IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LABORATORY CORPORATION OF AMERICA HOLDINGS, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	Civil Action No. 13-276 (RBW)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY TO TRANSER VENUE

The National Labor Relations Board ("Board") respectfully submits this Reply to LabCorp's Opposition to the Board's motion to dismiss or, in the alternative, to transfer venue (Doc. 19). Nothing in that Opposition supports the unwarranted intrusion that LabCorp seeks into the comprehensive, exclusive scheme that Congress mandated for handling the specialized and complex problems arising under Section 9 of the National Labor Relations Act ("NLRA"). LabCorp argues that this Court has jurisdiction to entertain its requests for declaratory and injunctive relief because in light of *New Process Steel*, 130 S.Ct. 2635 (2010) and *Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013) the Board, as currently constituted with one Senate-confirmed member and two intra-session recess appointees, is without the power to conduct, order, or certify, *any* elections. Pl. Opp. 5.

The Supreme Court's decisions in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S.Ct. 3138 (2010)*("Free*

Enterprise"), and *Elgin v. Treasury*, 132 S.Ct. 2126 (2012) are clear, however, that even in cases raising constitutional challenges to agency authority, if it is fairly discernible that Congress intended the statutory review scheme to provide the *exclusive* avenue for review, then parties are precluded from seeking immediate relief from the courts. The Supreme Court over 70 years ago, in *Myers v. Bethlehem Corp.* 303 U.S. 41 (1938), concluded that the Act's statutory review procedures in Section 10(f), 29 U.S.C. § 160(f), are the *exclusive* route for review of NLRB proceedings. Therefore, LabCorp's complaints must be channeled through the NLRA's congressionally-mandated review scheme before the company can obtain judicial review of its constitutional claims. LabCorp's assertions that it should not be required to follow the normal review procedures because it would entail "a series or orders, investigations, and adjudications before an entity whose proceedings are void *ab initio*," *see* Pl. Opp. 2, again ignores the fact that, pursuant to the long standing 1961 Delegation, NLRB Regional Directors have the authority to order, conduct and certify representation elections regardless of the Board's membership status.

ARGUMENT

THE NLRA ESTABLISHES AN EXCLUSIVE REVIEW SCHEME FOR NLRB PROCEEDINGS, AND LABCORP'S CONSTITUTIONAL CLAIMS REGARDING THE BOARD'S AUTHORITY ARE NOT EXCEPTED FROM THIS CONGRESSIONALLY-MANDATED SCHEME

1. The Supreme Court decisions in *Thunder Basin*, *Free Enterprise* and *Elgin* are in accord regarding the test to determine whether a statutory review scheme is intended to preclude initial judicial review. According to those decisions, the relevant considerations are: the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review. *Thunder Basin,* 510 U.S. at 207; *Free Enterprise,* 130 S.Ct. at 3150; *Elgin,* 132 S.Ct. at 2132. The Supreme Court has also noted three additional factors to consider in determining whether it might be appropriate in certain cases to unsettle this presumption and bypass initial administrative review: (1) if a finding of preclusion could

foreclose all meaningful review; (2) if the claims are outside the agency's expertise; and (3) if the suit is wholly collateral to a statute's review provisions. *Free Enterprise,* 130 S.Ct. at 3150, *citing Thunder Basin,* 510 U.S at 212-13. Of these additional factors, the first is perhaps most important – i.e. the opportunity for eventual meaningful review in the courts. *See Thunder Basin,* 510 U.S at 215, and n. 20.[1]

2. As explained in the Board's Memorandum in Support of its Motion to Dismiss ("NLRB Mem."), the NLRA's statutory scheme permits only *indirect* appellate review of the Board's representation decisions and requires exhaustion of available administrative remedies through 29 U.S.C. § 160. NLRB Mem. 6-8. Pursuant to *Myers,* it has long been settled that the NLRA is a "jurisdictional exhaustion" statute precluding district court review and substantively limiting appellate review only to final Board orders.[2] The exclusivity of the NLRA review scheme, as established in *Myers,* has been repeatedly followed by the courts. *See* NLRB Mem. 13-15. In fact, this exclusivity was implicitly recognized in *Thunder Basin,* since that decision relied on *Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.,* 379 U.S. 411 (1965), a case citing *Myers* as a situation where Congress had vested exclusive initial review in a particular administrative body. *Id.* at 420; *see also Patsy v. Florida Bd. of Regents,* 457 U.S. 496, 502, n. 4 (1982) ("Of course exhaustion is required where Congress provides that certain

[1] *See also, e.g., Nat'l Taxpayers Union v. U.S. Social Security Admin*., 376 F.3d 239, 243-44 (4th Cir. 2004)(explaining that so long as the constitutional claims could later be reviewed by the courts, plaintiff could be required to initially adjudicate its claims under the administrative review scheme established by Congress).

[2] In *Myers,* the Supreme Court explicitly considered the statutory language of the NLRA and its comprehensive enforcement mechanisms, *see* 303 U.S. at 48-49 and n.5, as well as its legislative history and provisions for judicial review, *id.* at 48-50, to conclude that the Act's statutory review procedures in Section 10(f), 29 U.S.C. § 160(f), are the *exclusive* route for review of NLRB proceedings. *Id.* at 50. The Court further explained that the review available at the conclusion of Agency unfair labor practice cases was adequate because "all questions of jurisdiction of the Board and the regularity of its proceedings and *all questions of constitutional right or statutory authority* are open to examination by the court." *Id.* at 49 (emphasis added).

administrative remedies shall be exclusive"), *citing Myers*, 303 U.S. at 58. Moreover, the D.C. Circuit acknowledged in *Noel Canning* that the NLRA is a "jurisdictional exhaustion" statute. 705 F.3d at 497. Contrary to LabCorp's suggestions, *Noel Canning* did not create an exception to the normal requirement that court of appeals review is available only after the Board has issued a final order, but rather exemplifies that principle. *Id.* at 493 (basing jurisdiction on 29 U.S.C. §§ 160(e) and (f), and noting petitioner sought review after the Board issued its order).[3]

3. The Supreme Court's decisions in *Thunder Basin* and *Elgin* buttress the conclusion that where, as in the NLRA, Congress has consciously designed an exclusive means of review of agency action, that choice should be honored even where the challenge is predicated on constitutional questions with respect to which the agency is not expert. 510 U.S. at 218; 132 S.Ct. at 2140. In *Thunder Basin*, a company, faced with the risk of citations and penalties for refusing to comply with a Mine Safety and Health Act regulation, sought a preliminary injunction from a federal district court on the grounds that having to submit to the Mine Act's enforcement and administrative-review scheme would violate its statutory and constitutional rights. In *Elgin*, plaintiffs alleged that the federal statutes authorizing their terminations were unconstitutional, and therefore district court review of their claims should not be precluded.

In both cases, after reviewing the statutes' language, purpose and legislative histories, as well as their "comprehensive" and "elaborate" review and enforcement structures, the Court concluded that Congress had demonstrated a "fairly discernible intent" to have plaintiffs proceed exclusively through the agencies' administrative review schemes. 510 U.S. at 218; 132 S.Ct. at

[3] LabCorp highlights the language in *Noel Canning* characterizing the recess appointments issue as "present[ing] a question of power or jurisdiction." Pl. Opp. at 5. However, this statement was made in the context of determining whether the Court had jurisdiction to entertain objections not initially raised before the Agency; therefore, this language provides no support for LabCorp's argument that its constitutional challenges to the Board's authority allow it to circumvent the normal 10(f) process for obtaining judicial review of final Board representation determinations.

2133-34, 2140. The Court also considered the three additional factors mentioned above at pp. 2-3, *supra*, to determine whether there might be a reason in those cases to allow plaintiffs to bypass the administrative review processes and obtain immediate judicial review of their constitutional challenges. In deciding that the review schemes in the Mine Act and CSRA were intended to provide the *exclusive* avenue to judicial review for plaintiffs' constitutional claims, the Court relied significantly on the first factor – i.e. whether the plaintiffs' claims could be meaningfully addressed by the courts of appeals in due course. 510 U.S. at 215; 132 S.Ct. at 2136-37.

Notably, the plaintiffs in those cases had also argued that the statutory review schemes did not provide them with meaningful review of their claims because the administrative agencies lacked authority to declare a federal statute unconstitutional. Assuming without deciding that the MSPB lacked such authority, the Court in *Elgin* nevertheless found that the CSRA provided an adequate forum for review of the constitutional claims because even if the agency could not decide them, the Federal Circuit could on appeal. 132 S.Ct. at 2136-37. The Court in *Thunder Basin* found likewise. *Id.* at 215, and n. 20 (noting that even if the administrative agency could not address the constitutional claims, those issues could be "meaningfully addressed in the Court of Appeals" on review and therefore this was not a case presenting "the serious constitutional question that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim")(internal quotations and citations omitted).

4. Here, there is a fully adequate avenue of review for LabCorp's claims pursuant to Section 10(f), 29 U.S.C. § 160(f). LabCorp seeks to escape the administrative review process by characterizing its constitutional claims as a challenge to the NLRB's "source of putative agency authority," thus necessitating immediate judicial review.[4] Pl. Opp. 4. LabCorp then attempts to

[4] LabCorp relies on *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984) as standing for the proposition that Appointments Challenges concern systemic, continuing violations that need not be exhausted with the

distinguish the precedents relied on by the Board at 13-15 of its Memorandum as cases involving "as-applied" constitutional challenges to the Agency's exercise of authority. Pl. Opp. 3-4.[5] But this point is irrelevant because it fails to come to grips with the determination in *Elgin* that jurisdictional exhaustion requirements apply to facial challenges as well. *See* 132 S.Ct. at 2136 n. 5.[6] Accordingly, because of the opportunity for meaningful review, the first factor does not weigh in favor of district court jurisdiction.

5. With respect to the second factor, whether the constitutional claim is outside the agency's expertise, LabCorp's Appointments Clause challenge is admittedly not the sort of issue that Congress intended to channel through the NLRB's normal review processes. Nevertheless, as explained in *Elgin*, in applying this factor the courts will look to see if other issues accompany the constitutional claim to which the agency can apply its expertise. 132 S.Ct. at 2140. Here,

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agency. In that case, the parties conceded that the appellants' constitutional claims could not have been brought in the administrative grievance procedures. *Id.* at 1491. Therefore, absent district court review, appellants would have received no meaningful review at all. It should be noted, however, that *Andrade* was decided before the Supreme Court held in *Elgin* that facial constitutional challenges could be exhausted through the CSRA's administrative review scheme.

[5] LabCorp cites *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996); *Gen. Elec. Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004); and *Live 365, Inc. v. Copyright Royalty Bd.*, 698 F.Supp.2d 25 (D.D.C. 2010) to support its argument that constitutional claims challenging the source of the Board's authority are not precluded from district court review. Pl. Opp. 4-5. But in each of those cases, the court determined that the plaintiff's constitutional challenge was not targeted to any specific administrative action. *Time Warner*, 93 F.3d at 965; *Gen. Elec.*, 360 F.3d at 191 ("GE's lawsuit does not challenge any particular action or order by the EPA"); *Live 365*, 698 F.Supp.2d at 32 (plaintiffs' request for injunctive relief derived from a facial constitutional challenge wholly independent of any action actually taken or expected to be taken in the future by the Copyright Royalty Board).

[6] *Elgin* indicated that challenges to actions "beyond the scope of the agency's statutory authority," may be treated differently. *Id.* But two factors here render that exception inapplicable. First, as discussed below, the loss of a Board quorum does not operate to revoke the 1961 delegation or justify enjoining the regional directors from carrying out Congress's intent as expressed in the 1959 amendments to ensure that elections and attendant hearings are held in a timely manner. Moreover, an injunction against the Board itself from deciding anything would serve no purpose, because if and when the Board makes a decision that aggrieves a party, fully adequate review is available under Section 10(f). Accelerating that review accomplishes nothing that could not be better accomplished by limiting review to actual decisions (as opposed to possible ones).

LabCorp seeks to enjoin the election ordered by the Board's Regional Director. As previously explained, however, Congress' intent was to prevent such pre-election review. NLRB Mem. 9-10. In part, Congress desired to prevent litigious interruptions of the ongoing representation process that "might cause the erosion of [union support] among bargaining unit employees, or furnish a recalcitrant employer with an opportunity for dilatory [tactics] to avoid bargaining with a certified union." *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984). But Congress also recognized that pre-election review was unnecessary because "an election is the mere determination of a fact, and in itself has no substantial effect upon the rights of either employers or employees." NLRB Mem. 9 (quoting S. Rep. No. 573, 1st Sess., p. 14, 2 Leg. Hist. of the NLRA, 1935, p. 2314) ("Leg. Hist."). Therefore, representation proceedings are inherently factual matters requiring the Agency's expertise to develop a full and complete record by holding hearings while witnesses are available and memories are fresh, and through taking secret ballots to determine employee choice. Because there is an ongoing representation matter to which the Agency can apply its expertise, LabCorp should be required to exhaust its constitutional claims initially through the administrative review scheme. Upon completion of that process, LabCorp can receive circuit court review if necessary.[7] *Elgin*, 132 S.Ct. at 2140. As *Elgin* recognized, channeling such claims initially through the administrative review scheme could possibly obviate the need for later judicial review of its constitutional claims, since the

[7] In a similar situation, during the time when the Board operated with only two confirmed members prior to the *New Process* decision, Grapetree Shores attempted to enjoin an ongoing representation case by filing a mandamus action in the Third Circuit (Case No. 08-3382). Later, Grapetree agreed to seek dismissal of its petition, predicated on its "ability to raise these issues through the normal appellate process." *See* Motion to Dismiss filed September 22, 2008. After three members of the Board issued final orders in the case, both parties petitioned the Third Circuit as provided by NLRA Section 10, and that Court ultimately enforced the Board's orders. *See NLRB v. Grapetree Shores, Inc.*, 451 Fed. Appx. 143, 145-46 (3d Cir. 2011).

underlying representation matter may be resolved on some other ground, 132 S.Ct. at 2140, such as employees voting against representation.[8]

6. With respect to the last of the three factors, LabCorp's claims are not wholly collateral to the NLRA's administrative review scheme because they are the very means by which LabCorp seeks to enjoin the election ordered by the Regional Director. In *Elgin*, the plaintiffs had argued that their claims alleging a federal statute constituted an unconstitutional bill-of-attainder and discriminated on the basis of sex had "nothing to do with the types of day-to-day personnel actions adjudicated with by the MSPB," and therefore should not preclude them from obtaining immediate district court review. *Id.* at 2139-40. The Court disagreed and found that plaintiffs' constitutional claims were "the vehicle by which they [sought] to reverse the removal decisions, and to receive compensation they would have earned but for the adverse employment action," and thus were the type of claims routinely handled by the MSPB. *Id.*

Here, LabCorp contends that this Court is not precluded from asserting jurisdiction because "this case has nothing to do with the details of an election order." Pl. Opp. 5. Rather, LabCorp asserts the issue is that "the Board cannot presently issue *any* election order without violating the Appointments Clause and the NLRA." *Id.* Although LabCorp seeks to characterize its constitutional claims as a broad-scale attack on the "lawfulness" of the Board's current composition, rather than as challenge to any particular Board action, *id.* at 2, this characterization is belied by LabCorp's Complaint.

[8] *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 772-73 (1947) (by requiring exhaustion of constitutional claims, "it is possible that nothing will be left of appellant's claim"); *Chicago Auto Trade Ass'n v. Madden*, 328 F.2d 766, 769 (7th Cir. 1964) ("An allegation of unconstitutional harm is insufficient where pursuit of administrative remedies might ultimately render judicial disposition of such issues unnecessary.")

LabCorp is requesting review of the Region's underlying representation determinations in NLRB Case No. 22-RC-096952, *see* Compl. ¶¶ 22-24, and that this Court find the Regional Director's February 26, 2013 Decision and Direction of Election invalid and unenforceable. Compl. ¶ 4. Specifically, LabCorp seeks a declaration "that the NLRB and the Regional Director are without statutory authority to enforce the February 26, 2013 order," and equitable relief prohibiting the NLRB "from enforcing its invalid February 26, 2013 order and from requiring, conducting or certifying an election on behalf of patient service technicians and patient center site coordinators employed by LabCorp in Northern New Jersey until such time as it has authority to do so." Compl. at p. 8, ¶¶ A-B. Undeniably, LabCorp is challenging specific actions that the NLRB has taken, or might take in the future, in connection with the ongoing representation proceeding involving its patient service technicians and patient center site coordinators in New Jersey. *See Live 365*, 698 F.Supp.2d at 34. Thus, LabCorp has failed to show its claims are wholly collateral to the NLRA's scheme of administrative review.[9]

Therefore, for all the reasons discussed at pp. 3-9, *supra*, it is fairly discernible that the NLRA review scheme was intended to preclude district court jurisdiction over LabCorp's constitutional claims, particularly since these claims can be meaningfully addressed on appeal by an appropriate circuit court, if the underlying representation matters are not ultimately resolved through the administrative process. *See Eastern Bridge, LLC v. Chao*, 320 F.3d at 90 ("The

[9] *See, e.g., Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996)(noting that facial challenges to a statute's constitutionality can be entertained by a district court, but only if these challenges are not raised in a suit attacking the validity of specific agency actions); *Live 365, Inc. v. Copyright Royalty Board*., 698 F.Supp.2d 25, 32 (D.D.C. 2010)(in concluding that the district court could assert jurisdiction over a constitutional challenge to the manner in which Copyright Royalty Board judges were appointed, the court expressly noted that plaintiff had not requested review of "any specific action the CR Board has taken or might take")*;Armstrong Coal Co. v. Dept. of Labor*, 2013 WL 653546 at * 5 (W.D. Ky Feb. 21, 2013)(relying on *Elgin* to find that plaintiffs' constitutional claims were the vehicle by which they sought to challenge the issuance of particular MSHA citations or orders, and therefore dismissing the complaint).

limitation imposed here is channeling of initial review through the administrative process, not exclusion of judicial supervision").

7. To avoid this conclusion, LabCorp relies on the Supreme Court's decision in *Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 130 S.Ct. 3138 (2010). In *Free Enterprise*, the Court held, *inter alia*, that a constitutional challenge to the existence of the Public Company Accounting Oversight Board ("PCAOB"), created by Congress under the 2002 Sarbanes-Oxley Act, need not be brought before the SEC and then appealed to the Court of Appeals as required by the statutory review scheme at issue. *Id.* at 3150-51. LabCorp argues that *Free Enterprise* controls this case because the organic statute at issue there is similar to the NLRA. Pl. Opp. 5. However, the *Free Enterprise* case is distinguishable for a number of reasons.

A. First, the Court found in *Free Enterprise* that the normal presumption of preclusion should not apply because the statutory scheme at issue did not provide petitioner with an opportunity for meaningful relief. *Id.* at 3151. In that case, the government had argued to the Court that the petitioner was required, under Section 78y of the Securities Exchange Act, 15 U.S.C. § 78y, to bring its facial constitutional challenge to the existence of the PCAOB before the SEC in the first instance. *Id.* at 3150. The Court found that Section 78y only provided for judicial review of final SEC orders or rules, however, and "not every [PCAOB] action was encapsulated in a final [SEC] order or rule." *Id.*. In addition, the petitioner in *Free Enterprise* was faced with the dilemma of either having to challenge a PCAOB rule "at random" or "incur a sanction" in order to invoke the administrative review process set forth in Section 78y. *Id.* Stating this was not a meaningful avenue of relief, the Court explained it would not require the petitioner to "bet the farm" by "taking violative action" (possibly subjecting the petitioner to "severe punishment") in order to obtain judicial review of its constitutional claim. *Id.*

Here, in contrast, LabCorp is already a party subject to ongoing Agency administrative procedures which it can exhaust to obtain meaningful review of its constitutional claims. NLRB Mem. 11-13. Specifically, LabCorp can secure appellate review of its challenges to the Board's authority by invoking such jurisdiction through a refusal to bargain/test of certification unfair labor practice proceeding. LabCorp will suffer no penalty by being required to exhaust its administrative remedies because it is entitled to have its complaints entertained by an appropriate circuit court before it can be forced to comply with any Board bargaining order. NLRB Mem. 13. While LabCorp contends that it could be subjected to significant liabilities if required to proceed through the NLRB's administrative review scheme, including both monetary losses and "tangible" disruptions to its operations and employee relations, it also concedes, at least with respect to the alleged monetary impacts, that such liabilities are entirely speculative and contingent on the Union winning the election and the Board issuing a final bargaining order. Pl. Opp. 12-15. ("An employer who refuses to bargain will not be required to bargain *until a final Board order is entered* to that effect . . . ")(emphasis added). LabCorp further acknowledges that these potential monetary losses are triggered by its own decision to make unilateral changes in terms and conditions of employment after having received notice that a secret ballot election has demonstrated that an employee majority has designated a union as their exclusive bargaining representative. *Id. See NLRB v. Westinghouse Broadcasting and Cable, Inc., (WBZ-TV)* 849 F.2d 15, 20, 21-22 (1st Cir.1988) (explaining the legal principles).

The Supreme Court has repeatedly explained that the NLRB's enforcement mechanisms of reinstatement and backpay are remedial, not punitive; they are solely intended to vindicate the public policy which the NLRB enforces and compensate employees for losses suffered on

account of unfair labor practices.[10] And the courts have readily approved of the Board's practice requiring employers who unilaterally change terms and conditions of employment to restore the status quo. *See, e.g., North Star Steel Co. v. NLRB*, 974 F.2d 68, 70-71 (8th Cir. 1992); *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 306–08 (7th Cir.1981). The fact that the Board may ultimately issue a bargaining order requiring LabCorp to modify its conduct or take remedial action does not excuse the company from exhausting the prescribed administrative review route because NLRA's "make whole" remedies cannot reasonably be characterized as coercive and certainly are not comparable to the penalties at issue in *Free Enterprise* and *Sackett v. EPA*, 132 S.Ct. 1367 (2012).[11] Therefore, the concern that the Court raised in *Free Enterprise* about the petitioner feeling coerced to comply with the disputed agency action, *see* 130 S.Ct. at 3151 (*citing Ex Parte Young*, 209 U.S. 123 (1908)), is not present here.[12]

B. *Free Enterprise* is also distinguishable because all activity of the PCAOB was suspect in light of the dual for-cause limitations on the removal of its members. Contrary to LabCorp's suggestions, a similar problem does not exist here because the Board's 1961 delegation of authority to conduct and certify representation elections to its regional directors remains in effect

[10] *See, e.g., Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 220 (1938); *NLRB v. Seven-Up Co.*, 344 U.S. 344, 346-47 (1953); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-99 (1941).

[11] Although LabCorp cites *Sackett* as a case involving a similar statutory review scheme, Pl. Opp. 14-15, there, Sackett risked being assessed fines of up to $75,000 per day for non-compliance with the EPA's order. 132 S.Ct. at 1370, 1372. Moreover, that order was a "final agency action" for which plaintiffs had no meaningful avenue for review. *Id.* at 1371-72.

[12] LabCorp's additional speculations about the "hostile divisions" and "divisive instability" that the election process will create, *see* Pl. Opp. at 12-13, would seemingly apply even if LabCorp agreed that the current Board is properly constituted. These fears appear to amount to nothing more than disagreeing with having to comply with the NLRA's representation process at all. But regardless of the validity of the current Board's membership, the NLRA is still in effect and LabCorp remains obliged to follow its mandates. Furthermore, as the Board previously explained, Congress was well aware of these potential "harms" and yet chose to have no direct review of Board representation case determinations. NLRB Mem. 24. Therefore, this argument does not justify departing from the normal administrative scheme.

regardless of the Board's quorum. Here, the February 26, 2013 Decision and Direction of Election of which LabCorp complains, *see* Pl. Opp. 7-8, is based on that 1961 delegation and thus continues to have the force of law. LabCorp concedes that the 1961 delegation has not lapsed. Pl. Opp. 8. But it contends that although "regional directors can still exercise whatever election powers the Board has," because "the Board currently does not have any election powers . . . there is currently no power for the regional directors to exercise." Pl. Opp. 8. LabCorp's argument rests on language in *Laurel Baye* that "delegated power to act . . . ceases when the Board's membership dips below the Board quorum." Pl. Opp. 9 (quoting 564 F.3d at 475).

In arguing that *Laurel Baye's* broad language controls the different issue presented here, LabCorp disregards the fundamental principle that "holdings, not language" are what constitutes binding law. *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001); *see also Hagans v. LaVine*, 415 U.S. 528, 534-35 n.5 (1974) (language in prior opinions not binding where the relevant issue had not been squarely raised as a contention in the cert. petitions or briefs). All that was before *Laurel Baye* for decision was the effect of the full Board's delegation of its powers to decide unfair labor practice cases to a three-member panel after that panel--and the Board itself--was reduced to only two members. The effect of prior Board delegations to regional directors, administrative law judges, the General Counsel or other officers of the Board, was not at issue in *Laurel Baye*.

Furthermore, in urging that the common law agency standard that *Laurel Baye* used to assess delegations of the Board's power to issue final orders in unfair labor practice cases decisions should also govern Board delegations of lesser powers to other agency officials, LabCorp would have this Court expand *Laurel Baye* in a questionable direction. As previously explained (NLRB Mem. 19-20), in addressing the same delegation question considered in *Laurel*

Baye, the Supreme Court in *New Process* pointedly did not rely on the private law agency theory invoked in *Laurel Baye.* Instead, it found that the delegation to a Board panel to decide cases with a two-member quorum no longer valid once that panel no longer had at least three members. *New Process,* 130 S.Ct. at 2640-42 (language and purpose of relevant statutory sections best given effect by requiring that the three-member "delegee group maintain a membership of three in order to exercise the delegated authority of the Board."). The Supreme Court emphasized that although it reached the same result as *Laurel Baye*, "we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended." 130 S. Ct at 2643 n.4. Specifically, with respect to the questions at issue here, the Court stated, "Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group *does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel*"). *Id.* (emphasis added).[13]

LabCorp's attempts to distinguish the three Court of Appeals cases cited by the Board arising in the context of Section 10(j) proceedings, *see* NLRB Mem. 20, because they involve delegations to the General Counsel and not the Regional Director likewise fail. *See* Pl. Opp. 9-10. Those cases examine the same issue present here - a prior delegation from the Board to a non-member entity - and hold that *New Process Steel* expressly disavowed the agency theory of *Laurel Baye.* The 10(j) case cited by LabCorp (Opp. 10), *Osthus v. Whitesell*, 639 F.3d 841, 844 (8th Cir. 2011), made a passing reference to the structure of the Act in its holding, but even that

[13] Thus, *New Process Steel's* explanation that "Section 3(b), as it currently exists, does not authorize the Board to create a tail that . . . would continue to wag after the dog died," refers only to the Board's quorum requirement to make decisions as the Board, *not* to the Board's delegation to non-member entities such as Regional Directors.

case expressly conditioned its holding on *New Process Steel's* rejection of *Laurel Baye*. 639 F.3d at 844 ("In light of the Act's framework *and the Supreme Court's view of Laurel Baye Healthcare*, this court joins the Fifth Circuit in concluding that the delegation survived the loss of a Board quorum") (emphasis added).[14] Thus, in the only cases to have construed the Board's non-member delegations, the Fifth, Eighth, and Ninth Circuits have agreed that such delegations continue in effect despite a loss of quorum by the Board.

Cases examining the continuing validity of governmental delegations and orders traditionally have taken this same approach. Specifically, once a power is delegated in the governmental agency context, the delegee acts in accordance with that delegation until that authority is revoked. For example, in *Champaign Cnty, Ill v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1206-1207 (7th Cir. 1979), the Administrator position was left vacant and unfilled by Presidential appointment, but the agency was found to have authority to act on an application for construction funds, because prior to leaving office, the Administrator had delegated such power to the Assistant Administrator. Consequently, that Assistant Administrator was acting "with authority to deny applications delegated to him by the Administrator while the Administrator was still in office."[15] And the rationale for this continuing effect is plain, because otherwise, "a change of administration or resignation from office by the official who acted

[14] Numerous district court decisions in other circuits have adopted this reasoning. *See, e.g., Paulsen v. Renaissance Equity Holdings, LLC*, 849 F.Supp.2d 335, 348-350 (E.D.N.Y. 2012); *Calatrello v. JAG Healthcare, Inc.*, 2012 WL 4919808, *3-4 (N.D. Ohio Oct. 16, 2012); *Fernbach v. 3815 9th Ave. Meat & Produce Corp.*, 2012 WL 992107, *1 (S.D.N.Y. March 21, 2012); *Gottschalk v. Piggly Wiggly Midwest*, LLC, 2012 WL 1805492, *1-2 (E.D. Wis. May 17, 2012).

[15] LabCorp's selective quotation from *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (Pl. Opp. 7-8) left out key language from the 1959 legislative history discussed in that case: "[i]n the handling of such cases, the regional directors *are required to follow the lawful rules, regulations, procedures, and precedents of the Board* and to act in all respects as the Board itself would act." (quoting 2 Leg. Hist. 1856)(emphasis added). When examined as a whole, it is clear that this history means only that Regional Directors deciding representation cases pursuant to delegated authority are obligated to follow Board policy, and does not speak to the effect of a loss of quorum on a non-member delegation.

within his authority when the designation was made would create a chaotic condition in the administration of the affairs of the [agency]." *United States v. Morton Salt Co.*, 216 F. Supp. 250, 255-56 (D.Minn. 1962), *aff'd*, 382 U.S. 44 (1965) (per curium). So too, if, as LabCorp contends, every single delegation issued by the Board in its 78-year history were to lose validity upon the loss of a Board quorum, even for a day, similar "chaotic condition[s]" in the Board's administration of its statutory duties would occur.

LabCorp has provided no satisfactory reason why the 1961 Delegation should not be treated in accordance with the usual rule that lawful governmental delegations continue in effect until revoked or altered. *See, e.g., NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1098 (9th Cir. 2009) (Board's 1955 delegation to the General Counsel of full authority to "petition for enforcement and resist petitions for review of Board Orders," 20 Fed. Reg. 2175 (1955), placed the power to initiate and maintain enforcement actions "permanently within the General Counsel's authority," and it "is not . . . conditioned on approval of the Board."); *see also Champaign Cnty, Ill.*, 611 F.2d at 1206-1207 and *Morton Salt Co.*, 216 F. Supp. at 255-56, *supra*. Regional Directors' continuing to exercise their delegated responsibilities is necessary to the achievement of Congress' purpose to ensure that election issues are promptly addressed and that secret ballot elections are conducted at a time when they can accurately record the contemporaneous view of the employees with respect to the choices presented in a union organizing campaign. See *Boire v. Greyhound*, 376 U.S. 473, 478 (1964) (discussing Congress' objective); *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (same).

The benefits of permitting the 1961 Delegation to operate despite a possible lack of a Board quorum are well illustrated in *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1367-68 (11th Cir. 2012), a case where a Regional Director exercised delegated authority during a time

when the Board was without a quorum. After the bargaining unit issue dispute was fully aired at a regional hearing, the Regional Director directed an election. Following the *New Process* decision, a panel of three confirmed Board members affirmed the Regional Director's bargaining unit determination and certification of the results of the election, *Mercedes-Benz of Orlando*, 355 NLRB No. 113 (2010), and this decision was in turn upheld by the Eleventh Circuit. 667 F.3d at 1372-73. The preliminary work accomplished by the Regional Director ensured that the representation hearing and election were held in a timely manner without the delay that Congress recognized serves to frustrate accurate determination of employee views about unionization.

8. There is also no merit to LabCorp's argument that it has met the requirements for establishing *Leedom* jurisdiction. As the Board has previously explained, *Leedom* is an extremely limited exception to the general rule of NLRA exclusivity. The D.C. Circuit, in particular, has repeatedly emphasized how difficult it is to establish jurisdiction under *Leedom*. In fact, the limits of *Leedom* jurisdiction have been described as "nearly insurmountable" by that Court. *U.S. Dept. of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir 1993); *see also Hartz Mountain*, 727 F.2d at 1311 (stating that only "in the rarest of circumstances" does *Leedom* support district court jurisdiction).[16]

[16] The D.C. Circuit decisions cited in LabCorp's Opposition at pp. 2 and 10, in fact, demonstrate just how difficult it is to establish district court jurisdiction over Board proceedings. *See McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916 (D.C. Cir. 1968)(reversing district court's grant of injunction because the Board's ordering of an election where there was no question of representation was not so "plainly beyond" or so "clearly in defiance" of the Act or Constitution as to justify district court review); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704, 706 (D.C. Cir. 1965)(finding no district court review was available for the Board's decision not to hear, in a Section 9 proceeding, relevant evidence of the employer's unlawful instigation of an election resulting in the union's decertification); *Local 130, IUERMW, v. McCulloch*, 345 F.2d 90 (D.C. Cir. 1965)(finding no basis for jurisdiction when Board ordered an election but there was no pending union claim to represent all of the employees in the newly consolidated operational division).

Under the *Leedom* exception, district courts may exercise jurisdiction *only if* the two conjunctive requirements are satisfied. First – and determinative here - the party invoking *Leedom* must show that in the absence of district court jurisdiction, "there would be no remedy [for the complaining party] to enforce the statutory commands which Congress had written." 358 U.S. at 190. Indeed, the courts have explained that the *Leedom* exception is largely premised on the unavailability of judicial review.[17] Here, LabCorp has ample means to obtain meaningful judicial review of its constitutional claims. NLRB Mem. 11-15. The Supreme Court's decisions in *Thunder Basin* and *Elgin* make clear that this opportunity for appellate review after a final Board decision is sufficient. *E.g., Thunder Basin*, 510 U.S. at 215; *Elgin*, 132 S.Ct. at 2132, 2136. Therefore, the Court need look no further than this first element of *Leedom's* two-part test.

But neither can LabCorp establish the second element of the *Leedom* test, which requires the party invoking the exception to show that the agency has acted "in excess of its delegated powers and contrary to a specific prohibition . . . which is clear and mandatory." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (internal quotations and citations omitted). The D.C. Circuit explained in *McCulloch*, a case cited by LabCorp (Pl. Opp. 2), that in order to establish district court jurisdiction over either a claimed statutory violation or constitutional violation the showing "must be *strong and clear*." 403 F.2d at 917 (emphasis added); *see also Squillacote*, 561 F.2d at 37-38 (noting that D.C. Circuit "treat[s] claims of violation of statutory and constitutional right alike as being subject to

[17] In fact, the D.C. Circuit has opined that *Leedom c*ame out the way it did only because the case arose in the context of a representation proceeding and the aggrieved party was a labor organization. As a labor organization, the plaintiff in that case did not have the option, available to employers, to seek indirect judicial review of the representation determination at issue. Had the aggrieved party in *Leedom* been an employer and thus able to seek indirect judicial review, the D.C. Circuit explained that the Supreme Court probably would have reached a contrary result. *Hartz Mountain*, 727 F.2d at 1312 and n. 2.

the test of *Leedom v. Kyne*")(citations omitted). Furthermore, "*any colorable support* for the Board's ruling should be treated as a jurisdictional defect dictating dismissal." *Hartz Mountain*, 727 F.2d at 1313 (quoting Robert A. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining 64-65 (Jesse H. Choper et al. eds., 1976)).

For the reasons discussed above at pp. 12-17, the NLRB's regional directors have authority to conduct and certify representation elections regardless of the Board's membership status. Therefore, there is colorable support for the Board's position that LabCorp has failed to make the requisite strong and clear showing of any action taken by the Board in violation of the Constitution or a clear statutory command. Furthermore, although *Noel Canning* is binding in this Circuit, LabCorp can hardly demonstrate a "strong and clear" constitutional violation for the further reason that there is an acknowledged circuit split regarding the constitutionality of intra-session recess appointments. *Noel Canning*, 705 F.3d at 505, 509.

ALTERNATIVELY, THE COURT SHOULD TRANSFER THIS CASE TO THE DISTRICT OF NEW JERSEY

Because all of the facts specific to the administrative case at the heart of this lawsuit occurred in New Jersey, and the impact of this Court's decision will be felt by employees residing in that state, this court should exercise its discretion under 28 U.S.C. § 1404(a) to transfer this case to the District of New Jersey.

9. LabCorp does not contest that the instant case could have been brought in New Jersey. And of the six private interest factors to be weighed in deciding the Board's motion to transfer (NLRB Mem. 35-36), only three are significantly disputed in this case: (1) Plaintiff's choice of

forum, (2) Defendant's choice of forum, and (3) where the claim arose.[18] These factors weigh in favor of transfer.

10. As previously argued, LabCorp's selection of Washington, D.C. is not entitled to traditional deference because Washington D.C. has no meaningful ties to the ongoing New Jersey representation dispute. *See* NLRB Mem. 37. "[T]he deference owed to plaintiffs' choice of forum is further diminished where transfer is sought to the forum where plaintiffs reside." *Lenz v. Eli Lilly and Co*., 464 F.Supp.2d 35, 38 (D.D.C. 2006) (internal citations omitted).

Here, the relevant ties to the controversy are overwhelmingly centered in New Jersey. As explained above, the impetus for LabCorp's district court action is its desire to have the Agency's particular representation case decisions overturned and enjoined (*see* Compl. at 8, Prayer for Relief at A and B). All of the underlying proceedings and decisions regarding that administrative case were in New Jersey. The election petition was filed in New Jersey. A pre-election hearing was held in New Jersey, at which time the parties stipulated to the Board's jurisdiction over LabCorp, and determined the scope of the potential bargaining unit as covering 276 employees scattered across 40 different sites in New Jersey. The Regional Director, located in New Jersey, issued a Decision and Direction of Election ordering an election in New Jersey which is contested in the instant proceedings. NLRB Mem. 2-4.[19] Clearly, those directly

[18] Both parties see the fourth and fifth factors as neutral: (4) convenience of the parties, and (5) convenience of the witnesses. Both parties see the sixth factor, ease of access to the sources of proof, as possibly neutral, but take divergent views on which way the factor tends if it is not neutral. But in any event, because the parties agree that this case should be decided as a matter of law, there should be no need to access sources of proof. *See Pacific Maritime Ass'n v. NLRB*, 2012 WL 5866231, *4 (D.D.C. Nov. 20, 2012) (*PMA*).

[19] The only event specific to this case that involves Washington D.C. happened eleven days *after* LabCorp filed the instant Complaint, when it sought review of the Regional Director's decision denying the motion to dismiss the election petition and requested Special Permission to appeal the direction of a mail ballot election. NLRB Mem. 2-4. Under the Board's rules, neither filing operates to stay the Regional Director's continued processing of the election case in New Jersey and Board review is wholly

impacted by this election dispute – the 276 employees and LabCorp patient service centers and medical offices – are all located in New Jersey. If this Court enjoins the pending union election, those employees will not have the opportunity to cast a ballot for or against union representation. Should they desire to be represented, they will not have the opportunity to bargain collectively with their employer over their terms and conditions of employment. *See, e.g., Lentz v. Eli Lilly and Co.*, 464 F.Supp.2d at 38 (finding transferee Maine's interests considerable where "the plaintiffs reside there, the injuries at issue occurred in Maine, and the doctors who prescribed DES to Mrs. Lentz's mother [in the products liability suit] practiced in Maine").[20]

Under the case law of this district, "[w]here "the only real connection [the] lawsuit has to the District of Columbia is that a federal agency headquartered here . . . is charged with generally regulating and overseeing the administrative process," such a tenuous connection is insufficient to find that a case should be heard in this District. *See DeLoach v. Phillip Morris Co.*, 132 F.

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discretionary. 29 U.S.C. Sec 153(b) ("[T]the Board may review any action of a regional director [in a representation case] . . . , but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director"); *see* 76 Fed. Reg. 80138, 80141, 80159-160, 80163, 80172 (discussing current procedures, and noting that "the Board almost never stays the election," and the issues raised, if not mooted by the results of the election, are resolved in post-election proceedings); *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 140-42 (1971) ("Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination").

[20] Because of the impact of this case on the New Jersey employees, *Otay Mesa Prop. L.P. v. U.S. Dep't of the Interior*, 584 F. Supp. 2d 122 (D.D.C. 2008), *see* Pl. Opp. 19, n. 5, is inapposite. There, the Court drew an explicit distinction to cases in which the transferee state had a substantial interest because of the impact on local citizens, whereas the *Otay Mesa* case affected only the plaintiff property holder and the government.

Similarly unavailing are LabCorp's attempts to distinguish this Court's recent decision to transfer venue in *PMA* by noting that the dispute "already was the subject of litigation in the transferee forum." Pl. Opp. 20. Also key to that decision was the finding that, "this case ultimately centers on a labor dispute in Portland, Oregon." Judge Howell explained that Portland is where the administrative hearing was held, the hearing officer's report was prepared, and "is precisely where the immediate effects of the Board's decision were felt and where issues related to the Board's decision continue to be litigated." *PMA*, 2012 WL 5866231, at *3. Here too, although some actions described in the complaint may, or will, have occurred in Washington, "the rest of the play was set elsewhere." *Id.*

Supp. 2d 22, 25 (D.D.C. 2000). Consistent with that principle, in *Valley Cmty. Preservation Comm'n v. Mineta*, 231 F. Supp. 2d 23, 47 (D.D.C. 2002) (Walton, J.), this Court transferred the case to New Mexico because the primary decision-makers and actors resided in New Mexico (*id*. at 45) and there had been no "decision-making involvement by high-ranking federal officers who are located in the District of Columbia." *Id*. at 47. And even "when a federal agency had had some role in formulating the policy that was applied by a local agency office, this does not alone support venue *when the claims are centered on the decision of a local agency office*." *Intrepid Potash-New Mexico, LLC v. United States Dep't of the Interior*, 669 F. Supp. 2d 88, 96 (D.D.C. 2009) (emphasis added).[21] Application of these principles strongly favors granting the Board's motion to transfer.

11. The public interest factors also weigh in favor of transfer, three of which are disputed: (1) the local interest in deciding local controversies at home, (2) the relative congestion of the courts of the transferor and potential transferee, and (3) the transferee court's familiarity with the governing law. (NLRB Mem. 36). These factors taken together weigh in favor of transfer.

12. "Considerations affecting whether a controversy is local in nature include where the challenged decision was made; whether the decision directly affected the citizens of the transferee state; the location of the controversy, and whether there was personal involvement by a District of Columbia official." *Intrepid Potash-New Mexico, LLC*, 669 F. Supp. 2d at 98-99

[21] By contrast, where the decisions relevant to the particular administrative action being challenged have been made in Washington, D.C., this District has normally rejected transfer. *See Nat'l Ass'n of Homebuilders v. EPA*, 675 F.Supp.2d 173, 177-80 (D.D.C. 2009) (keeping case in D.C. where no part of the decision-making process occurred in Arizona and no decision-maker resided in Arizona). Similarly, in *Ravulapali v. Napolitano*, 773 F. Supp. 2d 41, 55-56 (D.D.C. 2011), transfer was denied because the Texas administrative decision was made pursuant to guidance from D.C. headquarters pertaining to that case.

(internal quotations omitted). All of these considerations weigh unambiguously in favor of finding local interest in this case. As noted above, LabCorp is seeking relief from an order issued in New Jersey and directly affecting hundreds of New Jersey citizens. In contrast, in *Ravulapali v. Napolitano*, 773 F.Supp. 2d at 47, the decision to retain venue in Washington did not impact anyone in the state of Texas, as plaintiffs resided in Rockville, Maryland. Because LabCorp's pending requests for Board review are seeking a rarely granted discretionary intervention in an ongoing New Jersey proceeding, which has not been stayed, this case does involve the kind of personal involvement of headquarters officials that would justify keeping the case here. Rather, there is a predominant local interest in this case.[22]

13. LabCorp concedes that the median time from filing to disposition is three months longer in this Court than in the District of New Jersey. Pl. Opp. 22. Yet, LabCorp contends that delay would be inherent by transfer because the district court in New Jersey would have to familiarize itself with the facts, law, and issues of the case. The instant case was filed on March 1, 2013 and the NLRB filed its motion for transfer as part of its first substantive pleading with this Court. Thus, any delay from transferring this case is the kind inherent in all motions to transfer and should not be considered legally relevant to these proceedings. *See, e.g., Barham v. UBS Fin Srvs*, 496 F.Supp.2d 174, 180 (D.D.C. 2007) (finding a timely motion to transfer does not automatically lead to unnecessary delay).

[22] LabCorp cites *Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F.Supp.2d 1, 4 (D.D.C. 1999), *Detroit Int'l Bridge Co. v. Canada*, 787 F.Supp.2d 47, 53 (D.D.C. 2011), *Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5, 8 (D.D.C. 2007), and *Concerned Rosebud Area Citizens v. Babbitt*, 34 F. Supp. 2d 775, 776 (D.D.C. 1999) for the general proposition that cases involving whether a federal agency complied with federal law are of the type routinely and properly heard in the District of Columbia. *See* Pl. Opp. 21. However, as this Court has explained, the mere fact that a case implicates application of federal law does not automatically make it one of "national character" because, if that were true, then "any challenge involving a federal law implemented by a federal agency could not be transferred elsewhere." *Preservation Soc. of Charleston v. U.S. Army of Engineers*, 2012 WL 4458446, *4 (D.D.C. Sept. 27, 2012

14. LabCorp attempts to twist the third factor, by arguing that "the judges in the District of New Jersey have no greater familiarity with [a claim that *ultra vires* action violates federal law and the Constitution] than this Court does." Pl. Opp. 22. But this formulation would make it a contest between the two forums, requiring this Court to judge which forum is the *most* familiar with the governing law, whereas the factor has clearly been formulated as "the transferree's familiarity with the governing laws." *See, e.g., Mineta*, 231 F. Supp. 2d at 45. Thus, since LabCorp cannot claim that the District of New Jersey lacks familiarity with the types of claims at issue here, *see* NLRB Mem. 42, this factor weighs in favor of transfer.

15. Moreover, transfer is appropriate "in the interests of justice" because LabCorp forum shopped its New Jersey-centered labor dispute to Washington, D.C in order to take advantage of the D.C. Circuit's *Noel Canning* decision at a time when the Third Circuit (where the Board would file any application for enforcement) is, like several other circuits, presently considering arguments that it should disagree with *Noel Canning*. *NLRB v. New Vista Nursing & Rehabilitation*, Nos. 11-3440, 12-1027, 12-1936 (3d Cir. argued March 19, 2013). LabCorp's strategy is inconsistent with the principle that "venue provisions are designed with geographical convenience in mind, and not to guarantee that the plaintiff will be able to select the law that will govern the case. . . . [T]here is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray." *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (quotations omitted).

16. Moreover, if the Court accepts LabCorp's argument that venue is appropriate in Washington, D.C., despite the lack of any Board action specific to this proceeding, by merely

asserting a loss of quorum, every employer in Board representation proceedings nationwide could file a case in this Court. Such an outcome would not be in the interests of justice.

CONCLUSION

For these reasons, this Court lacks jurisdiction over LabCorp's Complaint and should dismiss the action with prejudice, or alternatively, transfer this case to the District of New Jersey.

Respectfully submitted,

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