IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION TO DISMISS COUNTS I AND III OF PLAINTIFFS' FIRST AMENDED COMPLAINT

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Statutes

National Labor Relations Act,
as amended (29 U.S.C. § 1511, et seq.):

Regulatory Materials:

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Other Authorities

The National Labor Relations Board was established by Congress (1) to conduct secret ballot elections in which employees may vote whether they wish to be represented by a labor organization and (2) to regulate the conduct of employers and unions that has a reasonable tendency to impair employee free choice. *See AFL v. NLRB*, 308 U.S. 401, 405 (1940); *NLRB v. Drivers Local 639*, 362 U.S. 274 (1960). Congress wanted to provide an administrative mechanism to peacefully and expeditiously resolve questions concerning representation. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Section 9 of the Act authorizes the Board to regulate representation elections. 29 U.S.C. 159(c). It sets forth procedures for determining whether a majority of employees wish to be represented. Since the beginning, (1 Fed. Reg. 207 (April 18, 1936)) the Board has promulgated regulations to carry out this provision. 29 U.S.C. §§ 156, 159(c). This case is about the Board's most recent regulations.

On December 22, 2011, the Board published a final rule amending its representation procedures. *Representation—Case Procedures*, 76 Fed. Reg. 80138 (effective April 30, 2012). Plaintiffs ("Chamber") here challenge the amendments on their face, contending that they violate the NLRA and the U.S. Constitution by "significantly speed[ing] up the existing union election process and limit[ing] employer participation." Am. Compl. ¶¶ 17 & Count 1. The Chamber also avers that the *rulemaking* process was unlawful. Am. Compl. Count 2 & 3. These contentions lack merit. As shown below, the Rule is consistent with the purpose and language of the NLRA, delegating responsibility for representation cases to regional directors as contemplated in Section 3(b), 29 U.S.C. § 153(b), in an effort to conduct more timely elections. Moreover, the Rule does not regulate speech or violate due process. Further, claims based upon speculation about how the Rule might be applied are not ripe. Finally, regarding the rulemaking procedure, notice and comment is not required for procedural rules like this, and the Board's rulemaking procedure

was in accord with applicable law. For these reasons, the complaint should be dismissed or summary judgment granted in favor of the Board.

BACKGROUND

Section 9 of the Act provides only a general outline of representation case procedure. The Board's representation rules provide the specifics of the process. The keystone is the secret-ballot election, but an investigation determines whether and how to hold the election and certify the result. This investigation is the subject of the amendments at issue here.

I. The fundamentals of representation cases: three types of disputes

Representation cases proceed in three stages: pre-election, election, and post-election. 76 Fed. Reg. at 80138. In each, a different type of dispute typically arises.

First is the pre-election stage, with the petition and the pre-election hearing. *Id.*; 76 Fed. Reg. at 36817 (proposed rule); *see generally* Garren, Fox & Truesdale, *How to Take a Case Before the NLRB*, Chapter 5 (7th ed. 2000).[1] The purpose of the investigation at this stage is to determine whether "a question of representation exists"—i.e., whether the election should be held. 29 U.S.C. § 159(c). The preliminary step is the petition, which must ask for an election among a specific group, or "unit," of employees. Garren, Fox & Truesdale at 123. In about 90% of cases the parties then enter a written agreement specifying the date and other details of the election, and describing the unit. 76 Fed. Reg. at 36818 n.40. But sometimes, no agreement is

[1] This brief background focuses on the most relevant features of Board procedure. For more detailed information, there are a number of treatises, most notably *How to Take a Case Before the NLRB*, that provide nonauthoritative summaries of Board procedure in an easily understood format. The Board's General Counsel also publishes nonbinding guidance manuals, such as "An Outline of Law and Procedure in Representation Cases" and the "Casehandling Manual Part 2: Representation Proceedings." http://www.nlrb.gov/publications/manuals. And in the proposed and final rules the Board provides narrative summaries of representation case procedure. 76 Fed. Reg. at 80138-80142 (final rule); 76 Fed. Reg. at 36817-18 (proposed rule). The final rule also describes in detail of how the procedure will work under the new rule. 76 Fed. Reg. at 80177-81. Of course, the authoritative source is the regulation. 29 C.F.R. Pt. 102.

possible—for example, where the parties disagree about whether the employees in the unit share a "community of interest" such that the unit is "appropriate." 76 Fed. Reg. at 80138; *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *see generally* Higgins, *Developing Labor Law*, Chapter 11 (5th ed. 2006).[2] In these cases, a pre-election hearing is held. If the regional director finds a question concerning representation, she will then direct an election, specifying the date and unit.

During the second stage (which stretches from shortly after the direction of election through the election itself) questions may arise about whether a particular employee or sub-category of employees is eligible to vote in the election. *See* Garren, Fox & Truesdale at 124 ("[P]articular care should be taken in describing the desired unit of employees; inaccurate or ambiguous language may invite argument . . . ."). These voters can cast ballots under challenge. *See id.* at 277-80. The unchallenged ballots are tallied shortly after the polls close. The challenges will be litigated only if there is no clear winner; otherwise, they are moot.[3] The regional director also has discretion to resolve some of these disputes pre-election in her direction of election, but this is not required.[4]

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[2] In addition to the appropriate unit, other issues may arise in determining whether to hold an election, such as whether the Board lacks jurisdiction or there is some other legal "bar." *See, e.g.*, 29 U.S.C. § 159(c)(3) (election bar); *Carpenters Local 1545 v. Vincent*, 286 F.2d 127 (2d Cir. 1960) (discussing the contract bar).

[3] Both former 102.69(b) and new 102.69(c) state that the challenges will not be litigated "if the challenged ballots are insufficient in number to affect the results of the election." If the union is certified, the parties may agree with each other about whether a challenged employee will be represented by the union. Agreement is common because the stakes are not as high post-election. 76 Fed. Reg. at 80172. But, if they cannot reach agreement, the parties may file a "unit clarification" petition so the Board can resolve the dispute. *See* Garren, Fox & Truesdale at 341.

[4] Many voter eligibility disputes do not arise until the second stage because the unit description in the petition, agreement and/or direction of election does not list the voters' names. Indeed it is not until seven days *after* the regional director has made her decision on pre-election

Third, after the election, one party may argue that the election was unfair, and so the results should not be certified. These "objections" are investigated by the regional director. *See id.* at 321-25.

II. Summary of the amendments

None of these fundamentals are altered by the eight amendments to the Board's procedures, each of which addresses certain discrete problems. *See* 76 Fed. Reg. at 80141. Cumulatively, these problems have caused unnecessary litigation and delay even in simple cases. For example, in the last five years the median election date in the subset of *litigated* cases was about 67 days from the petition, far longer than the overall median election date of 38 days. 76 Fed. Reg. at 80155; *see id.* at 80149. In general, the amendments grant regional directors greater discretionary authority, while simplifying and consolidating Board review. Specifically, the amendments revise the Board's procedures to give effect to the following eight propositions:

1. The purpose of the pre-election hearing is to determine whether there is a question concerning representation, and, if there is, to direct an election.

The amendments clarify that the sole statutory purpose of the pre-election hearing is to determine whether there is a question concerning representation. 76 Fed. Reg. 80164 (discussing 29 U.S.C. § 159(c)(1)). This does not appear to be in dispute. Am. Compl. ¶ 38 (hearing is "to determine if a question concerning representation exists").

2. The regional director has discretion to decide whether to entertain evidence about voter eligibility disputes at the pre-election hearing.

Under the former rules, the parties were entitled to introduce evidence about voter eligibility at the pre-election hearing, even though the regional director only needed to decide whether there was a question concerning representation, and *did not need to decide voter*

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issues that the employer is required to provide the Board and union with a list of all potentially eligible voters, and the parties can confer on eligibility. *See* Garren, Fox & Truesdale at 246-250.

eligibility before the election. 76 Fed. Reg. at 80139-80140. The amendments clarify that the regional director is no longer required to entertain evidence about all voter eligibility issues. The matter is now left to the regional director's sound discretion. If the regional director chooses not decide a certain voter eligibility issue before the election, then the hearing officer can exclude evidence on that issue. But if the regional director chooses to decide the issue, then the evidence will be taken. For example, if, at the hearing, a voter eligibility issue becomes intertwined with an appropriate unit issue, the regional director may choose to hear and decide the eligibility issue before the election. But, so long as the unit is appropriate as described, that is enough to know whether there is a "question concerning representation" and to direct the election.[5]

3. The regional director has discretion to decide whether to hear oral argument instead of written briefing at the conclusion of the hearing.

Under the former rules, parties usually filed briefs after the pre-election hearing, even in simple cases where it was patently unnecessary. The amendments permit the regional director to decide between accepting briefs or hearing oral argument. Therefore, in cases where written briefing would not be helpful pre-election, the regional director will not be required to wait for briefs before deciding the case. *Id.* at 80140, 80170-71.[6]

4. The parties are no longer required to file a request for interlocutory review in order to preserve their arguments, and such an interlocutory request will no longer automatically stay the tally of ballots after the election.

Under the former rules, after the regional director directed an election, the parties were

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[5] Consider a petition which calls for a unit of "production employees, excluding supervisors." See 76 Fed. Reg. at 80164. If there is—generally speaking—a community of interest among these employees, then the election may proceed even if it is not yet definitively established precisely who these employees will be. For example, the question of whether production foremen are supervisors is an eligibility question that need not be resolved before the election. The same is true for whether skilled quality control inspectors are "production employees." Eligibility can be resolved through election day voter challenges.

[6] The regional director can also permit limited briefing and can set the briefing schedule.

required to file an interlocutory request for discretionary Board review in order to preserve their rights. *Id.* at 80140. But the Board did not always rule on these requests before the election date, and in such cases, even though the election was still held as scheduled, the ballot count was automatically stayed (i.e., the ballots were "impounded"). *Id.* at 80172. Under the amendments, the parties will no longer have to request interlocutory review to preserve their rights, but may wait to request review until after the tally of ballots or, if there are objections or challenges that need to be decided, after the regional director's decision. In any event, the case will proceed as usual, and the ballot count will not be stayed absent a special order by the Board. *Id.* at 80162.

5. The regional director now has authority to choose an appropriate election date.

The former rules provided, as non-binding guidance, that the regional director should "normally" choose an election date at least 25 days (but no more than 30 days) after the direction of election. The express purpose of this waiting period was to give the parties a chance to pursue an interlocutory appeal. *Id*. at 80140, 80173. But in many cases no appeal was filed, and, even where filed, the Board sometimes took longer than 25-30 days to decide the case such that the election still had to be held without the benefit of pre-election Board review. In these cases, the prior guidance delayed the election for no reason.

The amendments give the regional director greater discretion to select an appropriate election date. Of course, wider discretion does not mean that, in every case, the regional director will necessarily choose an earlier election date under the amendments than she would otherwise have selected. The regional director will choose a date that will be both timely and fair in the particular circumstances of the case.

6. The Board will grant interlocutory "special permission" to appeal only in extraordinary circumstances.

Under the former rules, there was a procedure for obtaining interlocutory "special

permission to appeal" to the Board, but there was no standard articulated in the rules for granting such special permission. The amendments set the standard, stating that such permission will be granted only in "extraordinary circumstances where it appears that the issue will otherwise evade review." 76 Fed. Reg. at 80162.

7. Post-election procedures are simplified so that, in both directed elections and elections by agreement, the regional director will issue a decision and review by the Board will be discretionary.

The Board review procedure under the former rules was highly complex. Garren, Fox & Truesdale at 315-18 (providing a flow chart of Board review). For post-election decisions, unlike pre-election decisions, the regional director could choose whether to issue a "report" or a "supplemental decision." Garren, Fox & Truesdale at 315-332. If the regional director issued a "report," the parties could file "exceptions," which the Board was required to decide. But if the regional director issued a "supplemental decision," the parties could only file requests for review, which were within the Board's discretion to hear. In addition, the procedure was entirely different in those cases where the parties signed an agreement to resolve pre-election issues. For most such agreements, the former rules provided that only a "report" could be issued by the regional director, not a "supplemental decision," and the parties were entitled to file mandatory "exceptions" with the Board. The amendments simplify this procedure. For both directed and agreed-upon elections, the regional directors will issue a *decision* on all challenges and objections, with discretionary review by the Board. And, since review of pre-election decisions is discretionary, the amendments make discretionary Board review the norm for all elections.

8. The Board has reorganized and consolidated certain procedural provisions

Finally, the amendments consolidated a number of provisions to reduce redundancy and improve clarity. 76 Fed. Reg. at 80158. These changes are unchallenged.

ARGUMENT

Summary judgment is appropriate where there are no disputed material facts and the movant prevails on the law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This case presents facial challenges: "To prevail in such a facial challenge, respondents must establish that no set of circumstances exists under which the regulation would be valid. That is true as to both the constitutional challenges and the statutory challenge." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (emendation, quotations, and citations omitted); *see Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 939–942 (D.C. Cir. 1986).

I. The Board is entitled to extraordinary deference in crafting its own procedures.

This case is entirely about agency procedure, both representation case procedure and rulemaking procedure. The initial question is whether these procedures directly conflict with statutory text speaking to the "precise question at issue," or with the Constitution. *Chevron USA Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 5 U.S.C. § 706(2) (reviewing action "not in accordance with law," "contrary to constitutional right," or "without observance of procedure required by law"). Barring that, the deference owed to the Board is extraordinary. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31 (1946); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

"The control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940); *see A.J. Tower*, 329 U.S. at 330-331 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1178, 1181 (D.C. Cir. 2000) (the employer failed to meet its "heavy burden" under *A.J. Tower*, and the

NLRB appropriately "allowed [the employees] to vote for or against representation without significant delay"). The election procedure is unique in administrative law in that Congress gave remarkable exclusivity of control to the Board, even forbidding direct judicial review. *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Congress also specifically exempted representation cases from the APA's adjudication provisions, citing, among other things, "the exceptional need for expedition." Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.21 (1974); 5 U.S.C. §§ 554(3), (6) (excepting elections and "the certification of worker representatives" from the APA); *cf. Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990) (where the process is uniquely discretionary, deference above and beyond *Chevron* is required).

Indeed, deference is very high for *all* questions of agency procedure. The Supreme Court "has for more than [seven] decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments," *Vermont Yankee*, 435 U.S. at 524 (citations omitted), and "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).[7]

II. By delegating decisions to the regional director subject to discretionary Board review, the amendments give effect to Section 3(b) of the NLRA.

It is well established that timeliness is an important statutory goal for Board elections. As

[7] Deference on substantive questions is also high under the APA and *Chevron* step 2: the courts "must uphold an agency's action where [it] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks and citation omitted); 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, [or] an abuse of discretion"); *cf. Judulang v. Holder*, 132 S.Ct. 476, 483 n.7 (2011) (suggesting that APA "arbitrary and capricious" review and *Chevron* deference are essentially the same).

the Supreme Court held in *A.J. Tower*, the Board must "promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." 329 U.S. at 331. Again, Congress knew that the Board would need flexibility in crafting procedures, and noted "the exceptional need for expedition" in representation cases when exempting them from the APA's adjudication provisions. Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. § 554(a)(6)); *see also NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d. Cir. 1966) (Congress insulated representation cases from direct review because "[t]ime is a critical element in election cases"). This should be no surprise given the Act's concern with "industrial strife" and its purpose of "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151.[8] Lengthy representation procedures prolong the "excitements, strifes, and animosities which characterize the hustings," leading to a destabilized workforce, delayed bargaining, and considerable administrative burdens. *A.J. Tower*, 329 U.S. at 331 (quotation and citation omitted). Litigation delay also holds hostage the employees' right to a timely election. The election date should be chosen based on statutory policy—not the litigiousness of the parties. Needless litigation is wasteful, disrupts the process with interlocutory appeals, and bogs down the Board in review of simple cases.

The amendments seek to eliminate unnecessary litigation and increase the timeliness of elections by enlarging the discretion of regional directors to resolve election issues in the manner they deem appropriate, subject to discretionary review by the Board. Congress approved this

[8] *See, e.g.*, *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992) ("The Board's discretion in this area stems from its function to expedite labor elections and to eliminate meritless appeals designed to delay those elections."); *Liberty Coach Co. v. NLRB*, 418 F.2d 1191, 1196-97 (D.C. Cir. 1969) ("[T]he Board has the duty of . . . expediting resolution of questions preliminary to the establishment of the bargaining relationship." (notes, citations, and quotations omitted)).

approach in 1959 when it amended Section 3(b) to authorize the Board to delegate its powers in representation cases to regional directors subject to such review. This delegation is "*designed to expedite final disposition of cases* by the Board, by turning over part of its caseload to its regional directors for final determination." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (emphasis added) (quoting 105 Cong. Rec. 19770).

A. The amendments give effect to Section 3(b).

Section 3(b) provides in relevant part:

> 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 therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him . . . , but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. § 153(b). Here, in giving the region authority to exclude irrelevant evidence and briefing at the pre-election hearing, the Board enhances the region's responsibility "to determine the unit appropriate" and to "investigate and provide for hearings, and determine whether a question of representation exists." In giving the region greater authority to choose an election date, the Board enhances the region's responsibility "to direct an election." The amendments also effectuate 3(b)'s provision that review by the Board should be discretionary, that is, only where the parties "request" review, which the Board "may" grant. By eliminating mandatory interlocutory review and ballot impoundment (a form of "stay"), the amendments carry out 3(b)'s instruction that Board "review shall not . . . operate as a stay" unless "specifically ordered" by the Board. In sum, in delegating these cases to regional directors, the Board has given effect to the text and purpose of Section 3(b) as clearly countenanced by Congress.

B. The Supreme Court has approved the Board's reading of Section 3(b).

In *Magnesium Casting*, the Supreme Court held that it is appropriate for the regional director to control the proceeding with only discretionary Board review. 401 U.S. at 142. The employer in that case had filed a request for review of the regional director's decision regarding voter eligibility issues—supervisory status—which the Board denied because it did not raise substantial issues. *See* 175 NLRB 397, 397 (1969). In court, the employer argued that "plenary review by the Board of the regional director's unit determination is necessary at some point." 401 U.S. at 140-41. Rejecting the employer's contention, the Supreme Court emphasized that 3(b)'s "authority to delegate to the regional directors is designed . . . to speed the work of the Board," and that the Act "reflect[s] the considered judgment of Congress that the regional directors have an expertise concerning unit determinations." *Id.* at 141. The Court held that therefore it was appropriate for the Board to delegate decisions to the regions with only discretionary review: "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." *Id.* at 142. *Accord Beth Israel Hosp. v. NLRB,* 688 F.2d 697, 700-701 (10th Cir. 1982) (en banc).

III. The amendments are consistent with due process and Section 9.

Section 9 of the Act states that "the Board shall decide in each case . . . the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b).[9] It also states:

> [T]he Board shall investigate [representation] petition[s] 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*. . . . If the Board finds upon

[9] For the reasons explained above, 9(b)'s reference to "the Board" must be read to also include "the regional director," in light of 3(b)'s delegation of these powers. Under 3(b), the regional director clearly can issue decisions on the appropriate unit, with only discretionary Board review.

> the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. 159(c). There is no dispute that, under this language, the sole statutory purpose of the pre-election hearing is "to determine if a question of representation exists" in an appropriate unit. 76 Fed. Reg. 80164 (discussing 29 U.S.C. § 159(c)(1)); *accord* Am. Compl. ¶ 38. Section 9 does not "directly address the precise question" of what procedure to use. *Chevron*, 467 U.S. at 842. The phase "appropriate hearing with due notice" is very broad:

> Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be "due," the hearing "appropriate." These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an "investigation," essentially informal, not adversary. The investigation is not required to take any particular form or [be] confined to the hearing. . . . We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary.

Inland Empire Council v. Millis, 325 U.S. 697, 706-710 (1945).[10] *See also Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 552 (1985) (the essential principle of due process is "notice and [an] opportunity for *hearing appropriate to the nature of the case*" (emphasis added)).

[10] The 1947 amendment of Section 9 by the Taft-Hartley Act did not change what was required in "an appropriate hearing," except to specify that it should precede the election. As Judge Friendly stated, "[a]lthough under the [Taft-Hartley] 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 Life Ins. Co. v. Vincent*, 375 F.2d 139, 133-34 (2d Cir. 1967) (discussing the continuing vitality of *Inland Empire*); *see NLRB v. Gullet Gin Co.*, 340 U.S. 361, 365-66 (1951) (discussing the special care Congress took in reviewing Board caselaw in 1947). Absent "pertinent modification [of the statutory language,] Congress accepted the construction placed thereon by the Board and approved by the courts." *Gullet Gin*, 340 U.S. at 365-66; *see Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (selectively amending or incorporating only parts of a statute strengthens the presumption for those parts that are not changed); *Firstar Bank, NA v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001) ("If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old."). Congress did not change the language "an appropriate hearing upon due notice," despite 1947 and 1959 amendments to other language.

Here, each of the amendments is fully consistent with Section 9 and due process, providing an "appropriate hearing" pre-election that focuses on the relevant evidence, without unnecessary litigation or delay, and with discretionary Board review of regional decisions.[11]

A. An "appropriate hearing" need not include evidence about irrelevant eligibility questions.

One of the objectives of the amendments is to avoid burdening pre-election hearings with unnecessary litigation, particularly about voting eligibility issues that could reasonably be resolved after the election. The evidentiary amendment applies basic relevance principles. Neither due process nor the statute requires the region to hear evidence about irrelevant issues. Indeed, the amendment enables the region to exclude evidence that is irrelevant because it pertains to voting eligibility issues that need not be decided before the election.

The courts have long recognized that "deferring the question of voter eligibility until after the election is accepted NLRB practice." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994); 76 Fed. Reg. at 80165-66 (discussing cases). Subject to the requirement that the election is otherwise fair, there is no need to litigate or decide voter eligibility before the election.[12]

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[11] It should be noted that, unlike Section 9, the due process clause only applies where there has been a deprivation of life, liberty, or property. *See Utica Mutual*, 375 F.2d at 134 (questioning whether employer has any "'property right' in the designation of the unit of its employees with which it may be required to bargain"); *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396, 406-407 (9th Cir. 1954); *NLRB v. ARA Serv., Inc.*, 717 F.2d 57, 63-65, 67 (en banc) (3d Cir. 1983) ("Board investigation with no provision for a hearing on employer complaints would be perfectly consistent with due process for employers"); *but cf. NLRB v. Claxton Mfg Co., Inc.*, 613 F.2d 1364 (5th Cir. 1980) ("Due process requires the Board to grant a post-election hearing to a losing party who has supplied prima facie evidence raising substantial and material issues that would warrant setting the election aside."). The question whether there is a life, liberty, or property interest at stake in the pre-election hearing—or in the representation case as a whole—is a complex one, but it need not be addressed in this case because the procedures clearly comport with due process as discussed above.

[12] *See Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 54-56 (2d Cir. 1992) (fair election despite numerous challenged ballots); *cf. NLRB v. Parsons School of Design*, 793 F. 2d 503, 506-508 (2d Cir. 1986) (the unit described in the election notice should be similar to the unit

However, the Board had previously interpreted its old rules to *entitle* parties to present evidence about voter eligibility questions at the pre-election hearing. *Barre-National, Inc.*, 316 NLRB 877, 878 (1995). *Barre-National* acknowledged that the regional director need not decide the eligibility question, *id.* at 879 n. 9, but held that the text of former rules 102.66(a) and 101.20(c) gave the parties a right to introduce evidence on those questions anyway. By amending that text in this rulemaking, the Board eliminated the regulatory predicate for this decision.

Amended 102.66 authorizes the regional director to decide whether to accept evidence about voting eligibility issues raised at a pre-election hearing. Under Section 9 of the NLRA, the existence of a question of representation is the sole justification for conducting an election in an appropriate unit. *NLRB v. Financial Institution Employees (Seattle First)*, 475 U.S. 192, 198, 202-203 (1986). Where there is no need to resolve a particular eligibility issue to determine whether there is a question of representation, there is also no need to take evidence on that issue.[13] Instead, through the use of the Board's challenged ballot procedure, that eligibility issue may be reserved for post-election decision making. But if the regional director chooses to resolve the eligibility issue pre-election, the hearing officer will accept the evidence. 76 Fed. Reg. at 80168.

It does not violate the Act or due process to exclude evidence about irrelevant issues. Courts routinely refuse such evidence, *see* Federal Rules of Evidence 401(b) (evidence must be "of consequence in determining the action"); *LaJoie v. Thompson*, 217 F. 3d 663, 676 (9th Cir.

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certified); 76 Fed. Reg. at 80168-69 (explaining that *Parsons* only applies to cases where an inaccurate description of the unit was used in the notice of election).

[13] "Any party shall have the right to . . . [introduce] evidence so long as such . . . evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election." 29 C.F.R. § 102.66(a) (as amended); 76 Fed. Reg. at 80185.

2000) ("No defendant has a constitutional right to present irrelevant evidence."), as do agencies, even in an APA adjudication, 5 U.S.C. § 556(d) ("[T]he agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.").

Voter eligibility questions—including who is a supervisor—may be of great moment to the parties. But in election cases, where time is of the essence, that understandable interest, without more, does not give the parties a right to interject these difficult questions into a pre-election hearing whose sole purpose is to determine whether an election should be held as sought in the petition.[14] Indeed, where *all* decisions of the agency may eventually be subject to court review, the parties must always operate with a degree of uncertainty during the election. Consider the recurring question of who is a supervisor: supervisory status can be important during the campaign to the union, employer and employees because supervisors lack the rights of ordinary employees to support or oppose the union as they may choose. And yet, even under the former rules, throughout the election campaign—both before and after the filing of an election petition, any direction of election, and any post-election procedures—the parties had to exercise their best judgment about which employees possess supervisory authority. And even if the regional director undertakes to resolve all the disputed supervisory issues prior to the election, the Board or courts could reverse long after the election was over. Uncertainty about the voter eligibility is thus part of a more general uncertainty affecting an election campaign when there

[14] For example, questions of supervisory status are "heavily fact-dependent" and can be very difficult to litigate. *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007); *see NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11)

are genuine disputes about employee status. Uncertainty of this kind is inherent in the situation, regardless of these amendments. For these reasons, the objection that the amended rule deprives parties of a "right" to an authoritative determination of supervisory status prior to any election does not bear scrutiny. There has never been such right and, in the nature of things, cannot be.

B. Written briefing is not required for simple, straightforward cases.

The Supreme Court has permitted administrative agencies a great deal of flexibility to choose between oral argument and written briefing. *Compare Mathews v. Eldridge*, 424 U.S. 319, 345 (1976) (written submission without oral hearing); *with Goss v. Lopez*, 419 U.S. 565 (1974) (oral hearing without written submission); *see also Mathews*, 424 U.S. at 348-49 (giving "substantial weight" deference to the judgment of the agency in the due process constitutional analysis). Although adjudication under the APA requires briefing, 5 U.S.C. § 557(c), Congress specifically exempted Board representation cases from these provisions because of the "simplicity of the issues, the great number of cases, and the exceptional need for expedition." Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).

These very concerns motivate this amendment. 76 Fed. Reg. at 80170. Although some cases are sufficiently complex that briefing is helpful, in others the issues are quite simple and oral argument is sufficient. Neither due process nor the statute requires full briefing in such simple cases. Here, the Board authorized the region to choose whether to have full briefing, partial briefing, or oral argument, so that the region can ask for briefing only when it would be helpful in a given case. In addition, the parties retain the right to file briefs requesting Board review of the regional director's decision, so the parties will still have an adequate opportunity to present their arguments to the Board in writing.

C. It is reasonable for the Board to hear all the issues in a single review proceeding post-election. Interlocutory review is disfavored, and it is appropriate to limit it to issues that would otherwise evade review.

The final judgment rule is omnipresent in administrative and judicial procedure for good reason: as Justice Story stated, "causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses." *Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830). And as the Board similarly explained:

> The general rule in adjudication before both courts and agencies is that interlocutory appeals are not favored, and should be permitted only when the issues raised would evade review if not resolved before review of a final judgment.

76 Fed. Reg. at 80163, 80172. The old rules were inconsistent with this general practice, *requiring* interlocutory review to avoid waiver. The process was particularly wasteful because the issues raised pre-election could be mooted by the results of the vote itself, when one party or the other clearly prevails. Further, the exception for "special permission to appeal" is not in the Act and so not required at all. And it is perfectly reasonable to limit interlocutory review to issues that "would otherwise evade review." *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). The amendments merely apply a common-sense final judgment rule to election proceedings, consolidating review after the regional process has been completed.

D. The regional director is in the best position to decide a fair and timely election date.

The regional director determines the election date—this is not new. But the former rules had included—as a general, non-binding guideline—a recommendation that "normally" regional directors should hold the vote within a five-day window 25 to 30 days after the pre-election decision, thereby creating at least a 25 day wait between the direction of the election and the election itself. 76 Fed. Reg. at 80172. The former rules expressly stated that the purpose of this guideline was "to permit the Board to rule on any [interlocutory] request for review which may

be filed," after the region's direction of election. Former 29 C.F.R. § 101.21(d). But, even under the former rules, the window did not serve its stated purpose. It applied regardless of whether a request was filed. Furthermore, because a request for review does not operate as a stay unless specifically ordered by the Board, elections were usually conducted as scheduled after 25 days even if the Board had not ruled on a request to review. For these reasons, the amendments eliminate this recommended window so that the regional director's authority to choose an appropriate election date will not be limited.

This basic analysis was seldom criticized in the comments. In fact, there was "near consensus that this [25 day] period serves little purpose." 76 Fed. Reg. at 80173. Moreover, enlarging the regional director's discretion to set the election date makes sense because the regional director is most familiar with the case, the area, the industry, and the parties, and is in the best position to know what election date to choose. *Cf. Vermont Yankee*, 435 U.S. at 525. Should an unfair election date be chosen in a particular case, the Board and courts will be able to revisit that decision and re-run that election. But there is no due process or statutory problem with permitting the regional director to make this decision in the first instance.[15]

E. It makes sense for regional directors to decide objections and challenges, and certiorari review by the Board is a reasonable and efficient way to oversee the regions.

Under the former rules, the Board's post election procedures were complex, offering multiple options. The amended rule reflects the Board's judgment that there is no good reason to create a split procedure with formal distinctions between the review of regional director

[15] Significantly, proponents of retaining the 25 day guideline did so for a reason wholly unrelated to its stated purpose of permitting the Board to rule on requests for review prior to the election: they feared that regional directors would abuse their discretion and set elections too quickly if they were not given a specific waiting period. The Board considered and rejected this concern for a variety of reasons, discussed below in connection with the Chamber's argument that the First Amendment requires retaining the 25-day guideline.

"reports" and regional director "supplemental decisions" and with *greater* rights to Board review in agreed-upon rather than directed elections. *See* 76 Fed. Reg. at 80159-61, 73-74. The amendments make the procedures for post election review simpler and more uniform. In addition to consolidating Board review at the end of the case, the new rules make the regional director's pre- and post-election decisions subject only to a discretionary Board review. The amendments recognize that the regional director is usually the best person to make decisions in representation cases, since she has overseen the investigation of the case and is familiar with the circumstances:

> The Board affirms the vast majority of post-election decisions made at the regional level, and many present no issue meriting full consideration. . . . Other cases present only circumscribed, purely factual issues . . . . Still other cases simply involve the application of well-settled law to very specific facts. In short, for a variety of reasons, a substantial percentage of Board decision in post-election proceedings are unlikely to be of precedential value because no significant question of policy is at issue.

76 Fed. Reg. at 80159; *see also id* at 80161 n.106 ("[R]egional directors have expertise in determining what constitutes objectionable conduct."). In addition, it makes little sense to provide greater review in agreed-upon cases than litigated cases because the whole purpose of such agreements is to make the process *more* efficient. *NLRB v. Chelsea Clock Co.*, 411 F.2d 189, 191-92 (1st Cir. 1969) (agreements "afford considerable savings of time and expense. We take notice of the fact that the consent election is a valuable, and indeed necessary, device for the promotion of the purposes of the National Labor Relations Act. In light of the policy of the Act to prevent labor unrest by facilitating the expression of employee choice with respect to a bargaining representative, a procedure which fairly expedites that process is to be encouraged.").

The clear holding of *Magnesium Casting* is that these issues may be decided by the regional director and need not be decided by the Board. 401 U.S. at 142. And as the Supreme Court stated in a related context:

> One who is aggrieved by the ruling of the regional director or hearing officer can

> get the Board's ruling. The fact that special permission of the Board is required for the appeal is not important. Motion for leave to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented. We think that no more is required of it under the statutory system.

NLRB v. Duval Jewelry Co. of Miami, Inc., 357 U.S. 1, 7 (1958). In sum, the amendments reasonably address the problems presented. They give the parties all the process due, and are within the sound discretion of the agency to regulate its own procedures.

IV. The Board fully considered and appropriately rejected the argument that the amendments would unduly limit employer speech.

A. The amendments do not restrict speech and, even if they did, they would pass muster under the First Amendment.

A number of the amendments' opponents advanced the claim, urged by the Chamber here, that the amendments impair employer free speech rights under the First Amendment. *See* Am. Compl. ¶¶ 45-47. The Board reasonably rejected that claim. *See* 76 Fed. Reg. at 80151. As the Board stated, the amendments do not "in any way restrict[] the speech of any party." *Id.* The amendments merely streamline certain pre-election procedures in order to "advance the statutory objective of promptly resolving questions of representation." *Id.* at 80150-80151. All parties remain free to engage in as much or as little campaign speech as they desire. And the content of such speech is entirely unregulated by these amendments. It is not the purpose of the amendments to limit speech, but to limit needless delay. To the extent litigation delay incidentally provides extra opportunities for speech, the Board fully considered the effect of the amendments and validly found the rules consistent with the policies of the Act and Constitution.

1. The potential for shorter election campaigns does not violate the First Amendment.

The gravamen of Chamber's First Amendment objection to the amendments is not that they directly abridge speech but that they indirectly and unconstitutionally "curtail[] an

employer's right to communicate with its employees by substantially shortening the election period." Am. Compl. ¶ 47. This argument suffers from a number of flaws. As stated below, the Chamber's premise that the rule will "substantially shorten[] the election period" is entirely speculative. Under the rule, regional directors retain the discretion to set election dates on a case-by-case basis. As such, the Chamber inappropriately seeks from this Court a judgment grounded in hypothetical conjecture rather than fact.[16]

Furthermore, the Chamber's argument fails on its merits because it ignores the well-established principle that "the force of the First Amendment . . . var[ies] with *context,*" particularly in the sphere of labor relations. *US Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985, 991 (D.C. Cir. 1999) (emphasis in original); *see also UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (noting that free speech rights are "sharply constrained in the labor context"). The Chamber runs roughshod over this principle and instead impermissibly elevates employer speech interests above "the equal rights of the employees to associate freely." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). To the extent that the rule successfully accomplishes its objective of removing unnecessary obstacles to the "efficient, fair, uniform, and timely resolution of representation cases," 76 Fed. Reg. at 80138, a modest reduction in the time between a petition and an election *may* result in *some* cases. But as the Board observed, "[t]his does not rise to the level of an unconstitutional restriction on speech." *Id.* at 80151. To argue otherwise, as the Chamber does, is to ignore *Gissel*'s teaching that "the rights of employers to express their anti-union views must be balanced with the rights of employees to

[16] The Chamber fails to specify what minimum period of time it believes is necessary to avoid a First Amendment violation when scheduling a representation election. This comes as no surprise because such a bright-line rule finds no basis in law. Instead, the Chamber can only allege that any "substantial[] shortening [of] the election period"—whatever that means—would be unconstitutional. Am. Compl. ¶ 47.

collectively bargain." *US Airways*, 177 F.3d at 991 (applying *Gissel*). Indeed, the D.C. Circuit has instructed that "[n]ot only is a 'balancing' required, the NLRB calibrates the scales." *Id.* Therefore, the courts must defer to the Board's judgment about how to strike that balance in the context of scheduling the election date.

During this rulemaking the Board carefully considered several relevant factors, all of which support its conclusion that the amendments do not upset the appropriate balance between employee associational rights and employer speech. For example, the Board described how, based upon its extensive institutional experience with representation cases, employers are most often aware of internal organizing campaigns even before a petition is filed. *See* 76 Fed. Reg. at 80152-53 (also citing Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence* (2011)). Few employers are truly caught off-guard by an election petition, and they rarely need significant additional time to mount an effective anti-union campaign. Indeed, as the Supreme Court noted in 1969, a union will "[n]ormally[] . . . inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act." *Gissel*, 395 U.S. at 603. The Board also evaluated employers' undisputed opportunity to engage in pre-petition anti-union advocacy and found that employers can and do express anti-union views even in the absence of a campaign. *See id.* at 80153 & n.58 (noting that "some employers distribute employee handbooks or show orientation videos to all new employees that express the employer's view on unions"). Additionally, the Board weighed the fact that after a petition is filed, employers enjoy "unlimited access to employees during every workday and ha[ve] the ability to compel employees to attend [anti-union] meetings on working time at the employer's convenience." *Id.* at 80154 & n.64. These privileges, which unions do not share,

support the Board's finding that "as a general matter, employers are able to communicate their message quickly and effectively." *Id.* at 80154. Furthermore, as the Board noted, it has held in a number of cases that, for unions—who often do not know how to contact all the employees until the voter list is given to them—ten days with the list was adequate time to conduct a campaign. *Id.* at 80156 n.79. In light of these factors, the Board sensibly concluded that its amended representation procedures would continue to provide employers with adequate avenues to participate in organizing campaigns "even in those cases where employers are unaware of the organizing drive until the petition is filed." *Id.* at 80153.

Moreover, even assuming that application of the amendments in a specific case resulted in an appreciable shortening of the campaign window such that an employer could make a colorable claim that it was deprived of a full opportunity to express its views, the amendments would still be valid under the First Amendment. As the Supreme Court has acknowledged, "the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important government interest unrelated to the restriction of communication." *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (per curiam). The Board has long administered time, place, and manner restrictions in representation cases to protect the integrity of its processes and to ensure the unencumbered exercise of employee free choice. *See, e.g.*, *Milchem, Inc.*, 170 N.L.R.B. 362, 362-63 (1968) (prohibiting electioneering activity in the vicinity of the polls); *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429-30 (1953) (prohibiting "captive audience" meetings in the 24-hour period preceding an election). These amendments apply with equal force to all parties—union or employer—and in all kinds of elections, including those where a vote is being held to *dis*establish a bargaining relationship. And so this rule, like *Milchem* and *Peerless Plywood*, fully satisfies the standard for

valid "time, place, and manner" speech regulations in the representation election context.

2. Empowering regional directors with discretion to resolve supervisory disputes adequately addresses the Chamber's speculative concern regarding campaign speech.

The Chamber also complains that the rule violates the First Amendment "by authorizing the hearing officer to reject evidence and defer ruling on the supervisory status of certain employees." Am. Compl. ¶ 47. The Chamber claims that without prompt rulings on supervisory status, employers will be prevented from "communicat[ing] their views through their supervisory agents." *Id.* However, the Chamber overstates its case. "In the Board's experience, in virtually every case, even where there is uncertainty concerning the supervisory status of individual employees, the employer nevertheless has in its employ managers and supervisors whose status is not disputed and is undisputable." 76 Fed. Reg. at 80168. Moreover, as discussed above, pre-election certainty concerning supervisory status has never been guaranteed. "Prior to the amendments, regional directors were free to decide individual eligibility questions if they wished to do so or to defer such decisions until after the election and direct that disputed individuals vote subject to challenge. The same is true under the final rule." *Id.* In addition, if, in an extraordinary case, an employer finds itself without any undisputed supervisory or managerial employees through which to communicate its views, the Board and its regional directors may choose to exercise their discretion to resolve supervisory status disputes.

B. The amendments are in full accord with the text and purpose of Section 8(c).

The amendments are not in conflict with Section 8(c) of the Act, as the Chamber claims. *See* Am. Compl. ¶¶ 45-47. By its terms, Section 8(c) protects employers and unions from liability in *unfair labor practice* cases for expressing noncoercive "views, argument, or opinion." 29 U.S.C. § 158(c). It says nothing of what the Board may do in *representation* cases. Thus, speech that is unquestionably *protected* from unfair labor practice liability by 8(c) will

sometimes make an election unfair, so that it has to be rerun. *Dal-Tex Optical, Inc.*, 137 N.L.R.B. 1782, 1786-87 (1962); *see St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 146 (D.C. Cir. 1989). Accordingly, the Board correctly responded to opponents of the rule when it concluded that "Section 8(c) is not implicated" in this rulemaking "[b]ecause the final rule, which addresses representation case procedures, does not in any way permit the use of speech as evidence of an unfair labor practice." 76 Fed. Reg. at 80151. Simply put, the protection of 8(c) is not a talisman against any and all regulations that govern speech, especially in elections.

To the extent that Section 8(c) "merely implements the First Amendment," as the Supreme Court described in *Gissel*, 95 U.S. at 617; *cf.* Am. Compl. ¶ 45 (quoting this language from *Gissel*), the amendments must survive plaintiffs' challenge because, as shown, the rule has no First Amendment infirmity. And plaintiffs can fare no better by arguing that the rule trenches upon the general policy that the enactment of Section 8(c) exemplifies—that is, "to encourage free debate on issues dividing labor and management." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (preempting state statute that subjected employers who wished to speak about unionization to burdensome accounting requirements and the threat of civil monetary penalties for noncompliance) (internal quotation omitted). That policy, which "suffuses the NLRA as a whole," *id.* at 68, is not served by maintaining outdated procedures that only inject delay into the election process. By merely eliminating those sources of delay, the amendments do not conflict with the NLRA's policy to encourage parties to engage in noncoercive speech.[17]

Nor are the amendments inconsistent with *Brown*'s observation that the protected right of

[17] The Board does not expect that employers will engage in greater levels of pre-petition speech about unionization out of fear that the campaign period will be—in the Chamber's words—"substantially shorten[ed]." Am. Compl. § 45. However, to the extent that such speech does occur, it would be fully consistent with the policy that the enactment of Section 8(c) manifests. *See* 76 Fed. Reg. at 80153 n.57.

employees to refrain from engaging in union activities "implies an underlying right to receive information opposing unionization." *Id.* The Board similarly recognizes the strong link between noncoercive speech and the free exercise of the substantive rights that the NLRA protects. *See, e.g.*, *Harlan Fuel Co.*, 8 N.L.R.B. 25, 32 (1938) ("The rights guaranteed to employees by the Act include full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment"). But because the amendments leave ample opportunity for all parties to air their views, there is no danger that employee free choice will be unfairly swayed or that the rights identified by *Brown* and *Harlan Fuel* will be undermined.

For this reason, too, opponents of the amendments were wrong to accuse the Board of deliberately tipping the scales to favor unions. Even if the opponents' argument that the amendments impermissibly shorten the election window had merit, accusations of union favoritism cannot be reconciled with the reality that the amendments apply with equal force in both certification elections, where a union seeks to get voted in by employees, and decertification elections, where an incumbent union is threatened with being ousted. If potentially speedier elections put employers at a disadvantage in certification elections, the same must be true with respect to unions in decertification elections. This equality of treatment belies the specious charge of union favoritism.

V. Speculative claims about the way the region or the Board might exercise their discretion are not justiciable.

The plaintiff bears the burden of proving jurisdiction. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). In the ripeness context, this includes both constitutional and prudential inquiries. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n. 18 (1993); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 97 (1977). Ripeness depends upon "the fitness of the issues for judicial decision and the

hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

These amendments have not yet been applied and so, by necessity, this case involves facial challenges. But facial challenges to a *discretionary* rule are generally inappropriate unless the respondent can "establish that no set of circumstances exists under which the regulation would be valid. That is true as to both the constitutional challenges, and the statutory challenge." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (emendation, quotations, and citations omitted). Indeed, in most cases only an as-applied challenge would be ripe:

> [A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until . . . some concrete action applying the regulation to the claimant's situation.

Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003) (quotation omitted).

A. The discretionary amendments are not fit for facial challenge.

Facial review of discretionary amendments "threatens the kind of abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735-37 (1998) (quotation and citation omitted):

> [I]mmediate judicial review . . . could hinder agency efforts to refine its policies through revision of the Plan . . . [or] through application of the Plan in practice . . . [Immediate] review would [also] have to take place without benefit of the focus that a particular [application of the Plan] could provide. Thus, for example, the court below . . . had to focus upon whether the Plan as a whole was "improperly skewed," rather than focus upon whether the decision [about a particular application] was improper . . . . All this is to say that further factual development would significantly advance our ability to deal with the legal issues presented and would aid us in their resolution.

Id. (citations and quotation marks omitted); *see Cronin v. FAA*, 73 F.3d 1126, 1131-33 (D.C. Cir. 1996) (future review is more effective "[g]iven the variable nature of procedural due process").

Sprint Corp. v. FCC exemplifies application of the ripeness principles that the Chamber has failed to heed in mounting its premature challenge to the amendments. 331 F.3d 952, 955-58 (D.C. Cir. 2003). There, the FCC changed its rules so that certain types of area codes would no

longer be completely banned, but could be approved within FCC discretion on a case-by-case basis. The court acknowledged that "arbitrary and capricious" review generally involved purely legal questions, but concluded:

> [T]his court has held that where the agency retains substantial discretion to implement its decision, the decision is not ripe for judicial review until it has been implemented in particular circumstances. On the other hand, where the agency has replaced a prohibition or right with a discretionary process *and applied its new process*, the court has held that a challenge to the agency decision is ripe for judicial review: the agency has crystallized its position and to that extent it has been applied so that it has a direct and immediate impact.

Id. at 956-57 (citations omitted, emphasis added); *see also Fed. Ex. Corp. v. Mineta*, 373 F.3d 112, 118-120 (D.C. Cir. 2004); *Media Access Project v. FCC*, 883 F.2d 1063, 1070-72 (D.C. Cir. 1989); *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220-25 (D.C. Cir. 1984); *cf. Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB*, 561 F.3d 497, 501-02 (D.C. Cir. 2009) (a new Board rule announced in adjudication is still not necessarily ripe for review until the remedy is clear).

Here, too, the manner in which regional directors and the Board will exercise their discretion under these amendments is not yet clear. For example, the court at this stage is being asked to consider precisely how long elections will probably take under the amendments and to determine whether that would be sufficient time for a fair election campaign under the very general terms of the statute. The Chamber offers only unjustified speculation on these points. First, these amendments relate to the region's discretion, and none of them *require* faster elections in any particular case. Until applied in a particular case, conjecture that the region will abuse its discretion is entirely unfounded. Second, the amendments focus on the approximately 10% of cases that typically take the *longest*—i.e., fully litigated cases, which take a median of 67 days. If we are to engage in speculation, a more feasible guess is that the efficiencies of the amendments will bring this minority of cases closer in line with the typical case. So, eliminating briefs could save perhaps seven days, while eliminating the recommended 25 day wait could

save maybe one to two weeks (there must always be time to exchange voter lists and post notices before the election), for a total saving of about three weeks. This improvement, though important, cannot in this context raise any serious concern about campaigns that are "too short"—after all, the parties often *agree* to an election held about a month after the petition. Third, even if a colorable claim could be made in a particular case that the election date selected was not fair, that claim would necessarily depend upon the specific circumstances.

Suffice to say, the Chamber's claims are in need of the "focus" provided by application of the law to particular facts. *See Ohio Forestry*, 523 U.S. at 735-37.

B. There is no harm in waiting for an as-applied challenge.

Turning to hardship, speculative future harm is not an adequate basis for review when the plaintiff "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry*, 523 U.S. at 733-35. Here, employers suffer no cognizable hardship in waiting to see whether, in a particular case, their fears will be realized.

In the *Flores* case, the Court considered a facial challenge to a discretionary rule: the challenger argued that the immigration procedure was unlawful because it did not provide "automatic review by an immigration judge;" the challenger also argued that the procedure was unlawful because it did not provide a specific minimum time in which a hearing must be held. 507 U.S. at 308-09. The Court held that, because the plaintiff could not show that this procedure would always violate due process, the facial challenge failed. The Court noted that "we will not assume, on this facial challenge, that an excessive delay will invariably ensue" simply because the time was not specified. *Id.* at 309.

In *Action Alliance* as well, 789 F.2d at 941, the D.C. Circuit considered a discretionary rule and held, in language that applies with equal force here:

The appellants allege that changing this provision from mandatory to

> discretionary violated the statute. The discretionary cast of the challenged, recently-issued provision undermines the appropriateness of current review. A facial, purely legal challenge is both more difficult and less worthwhile when the prescription challenged is discretionary. To hold the provision invalid on its face, a court would have to conclude that the provision stands in conflict with the statute regardless of how the agency exercises its discretion. Before so ruling, a court would be obliged to perceive and consider the various ways in which the agency might use its discretion. In this case, for example, if the [Board] were to exercise [its] discretion under the challenged provision by [hearing evidence, setting election dates, granting review, etc., in just the way it would under the old rules], then the provision, as applied, would be functionally equivalent to the mandatory provision in the [old] rules. The only difference would be the formal existence of discretion to alter this policy; absent actual exercise of such discretion, appellants would experience no harm.

Id. Here too, in many cases these amendments will indisputably be applied in an appropriate manner, such as where the region exercises its discretion to proceed as the old rules required. Thus, the Chamber cannot show that there is "no set of circumstances" under which the Board's process is lawful.

Even in the "worst case" scenario, an unlawful abuse of discretion would be more than adequately remedied by an as-applied challenge in the courts. The remedy is to do the election all over again. In light of the strength of this as-applied remedy, no lasting harm "hangs over the [parties] like the sword over Damocles" in this case. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n. 13 (1991) (threatened veto); *see United States v. Quinones*, 313 F.3d 49, 57-60 (2d Cir. 2002) (possibility of death penalty). Litigation costs are not part of the calculus. *Ohio Forestry*, 523 U.S. at 735.

Even in the First Amendment context, the plaintiff must still establish some harm such as, at the very least, some "self-censorship" or chilling effect on speech: "[not] every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy." *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1110-1121 (D.C. Cir. 1969); *cf. New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499-1500 (10th Cir. 1995) ("The

primary reason[] for relaxing the ripeness analysis in this context is the chilling effect that potentially unconstitutional burdens on free speech may occasion. . . ."); *United States v. Salerno*, 481 U.S. 739, 745 (1987) (noting overbreadth doctrine). Vagueness and facial overbreadth doctrine are "strong medicine," designed to ensure that the occasional unconstitutional limitation of speech will not harm the speech rights of the public at large. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610-15 (1973). Thus, to present a justiciable First Amendment claim, the rule's impact on speech must be directly "regulatory, proscriptive, or compulsory in nature." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see U. Presbyterian Church in the USA v. Reagan*, 738 F.2d. 1375, 1378-81 (D.C. Cir. 1984) (then-Judge Scalia) (a "chilling effect . . . will not by itself support standing"). Here, however, as discussed at greater length above, the amendments do not punish, compel, regulate, restrain, or license speech in any way. And it is not as if the parties will be afraid to campaign because of the amendments. To the contrary, any fear of a short election—even an unfounded, unrealized fear—could only serve to *encourage* prompt and vigorous campaign speech.

For these reasons, to the extent the Chamber's complaint rests upon speculation about how the amendments will be applied, it should be dismissed because it is not fit for a facial challenge and there is no harm in waiting for an as-applied challenge, if necessary.

STATEMENT OF PROCESS

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking by a 3-1 vote, with Member Hayes dissenting. 76 Fed. Reg. at 36812. The Board provided 60 days for comments and 14 additional days for reply comments. The Board issued press releases to encourage broad participation. These efforts were a clear success, resulting in 65,958 written comments. The Board members also held two full days of hearings, where 66 individuals and organizations (including the Chamber and CDW) gave 438 transcript pages of oral testimony, and answered

questions asked by all the Board members. The views of the public were sharply divided, with tens of thousands of comments opposing the proposal and tens of thousands supporting it. Others agreed or disagreed only in part. The Board analyzed all the comments and testimony, and considered and deliberated on the issues for months. As the Board deliberated, then-Chairman Liebman's term expired, and the Board was reduced to three members. The Board also faced the imminent loss of Member Becker, and indefinite loss of a quorum.[18]

On November 18, 2011, the Board gave public notice—with invitations to press and public to observe in person and by simulcast on the internet—that it would have deliberations and a vote on how to proceed on November 30, 2011. At the meeting, the Board considered NLRB Resolution No. 2011-1 which would continue deliberations on the bulk of the proposals, but would resolve to "[p]repare a final rule to be published in the Federal Register containing [the eight specific changes, *supra*], 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*." Exh. 2 (emphasis added). After about an hour of discussion, the resolution passed by a vote of 2-1, with Member Hayes voting against it. Pursuant to the resolution, the final rule was drafted and circulated, as was a final order instructing the Board Solicitor to "immediately upon approval of a final rule by a majority of the Board, submit the final rule to the Federal Register for publication." Exh. 3. On December 15th, the final order also was approved by a vote of 2-1, with Member Hayes voting against it. Exh. 4. Pursuant to the resolution and the final order, the rule was published in the Federal Register on December 22, 2011, with any dissent to be published separately within a specific time period before the rule's effective date.

[18] 75 Fed. Reg. at 80140-45. When the Board last lost its quorum, it was years—816 days to be precise—until the Board was reconstituted. This time it turned out that only six days passed until three more Board members were appointed, but there was no way to anticipate this.

ARGUMENT

VI. The rulemaking procedure complied with all applicable law.

As discussed below, these are procedural amendments, and the Board could have promulgated them without notice, without opportunity to comment, without public hearings, without a public meeting to deliberate and vote to issue the amendments, without certification under the Regulatory Flexibility Act, without compliance with the Congressional Review Act, and without permitting publication of a dissent in the Federal Register. Nonetheless, the Board voluntarily undertook to provide these procedures here. Because these procedures were above and beyond the legal requirements, and in the public interest, to subject them to court scrutiny would affirmatively discourage agencies from engaging in anything more than the statutory minimum process. The Board also reasonably explained its choices here, and nothing more than that can be required.

A. Unless required by law or regulation, administrative procedure is left within the discretion of the agency.

The courts do not second guess agency procedure unless the procedure in question is expressly required by law or regulation. *See Vermont Yankee*, 435 U.S. at 524; *Nat'l Classification Committee v. United States*, 765 F.2d 1146, 1149-52 (D.C. Cir. 1985). The "formulation of procedures [i]s basically to be left within the discretion of the agencies." *Vermont Yankee*, 435 U.S. at 524. The Supreme Court discussed the wisdom of this principle:

> It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so . . . the APA is 'a formula upon which opposing and political forces have come to rest.' . . . Courts upset that balance when they override informed choice of procedures and impose obligation not required by the APA. By the same token, courts are charged with maintaining the balance: ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA . . . .

Chrysler Corp. v. Brown, 441 U.S. 281, 312-13 (1979) (citations omitted). Were agencies

required to operate under the "vague injunction" of procedures "perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable," and agencies would be practically forced to "adopt full adjudicatory procedures in every instance," and "all the inherent advantages of informal rulemaking would be totally lost." *Vermont Yankee*, 435 U.S. at 546-47 (rejecting "Monday morning quarterbacking").

Arbitrary and capricious review is not a loophole to this policy of extraordinary deference. To be sure, in some sense, arbitrary and capricious review "imposes a general 'procedural' requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision;" but, so long as the *substance* of the agency's rule is explained, the courts cannot prescribe "specific procedural requirements that have no basis in the APA." *LTV Corp.*, 496 U.S. at 653-55; *see NRDC v. NRC*, 216 F.3d 1180, 1189-91 (D.C. Cir. 2000); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994) (notice-and-comment rulemaking not required in agency's promulgation of "hard-look" rules intended to streamline license review process).

The Court has suggested that there might be a narrow exception for "a totally unjustified departure from well settled agency procedures of long standing." *Vermont Yankee*, 435 U.S. at 542. This exception, however, has been applied rarely, if at all. And, as in this case, where there are reasons to distinguish prior traditions there is no "totally unjustified" departure. *See Consol. Alum. Corp. v. TVA*, 462 F.Supp. 464, 476 (M.D. Tenn. 1978) (imminent loss of quorum justifies a departure from past practice).

B. These amendments are procedural, so Notice and Comment and Regulatory Flexibility Act procedures are not required by law. In any event, the Board complied.

Many of the Chamber's concerns are misplaced because this is a rule of agency procedure, and so exempt from notice and comment requirements as well as the RFA.

1. Notice and Comment rulemaking does not apply.

The APA requires notice and comment procedures in many rulemakings. 5 U.S.C. § 553. However, the statute specifically exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The amendments at issue here concern rules of procedure, and so fall within this exemption. Like the Board's former regulations implementing 3(b), here too the amendments to those regulations do not require notice and comment. *See* 29 Fed. Reg. 15918, 15919 (Nov. 28, 1964).

The distinction between substance and procedure is occasionally elusive or contextual. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Here, however, the traditional definition is perfectly workable: "procedural law *defines the steps* in having a right or duty [administratively] defined or enforced." Garner, A Dictionary of Modern Legal Usage 697 (2d. ed.) (emphasis added). As the D.C. Circuit has stressed, "the critical feature of a rule that satisfies the so-called 'procedural exception' is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *James V. Hurston Assoc., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (quotation and citation omitted). In addition, a "judgment about procedural efficiency . . . cannot convert a procedural rule into a substantive one." *Public Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002).

Here, the amendments all concern agency procedure and efficiency: the evidence presented, the manner of argument (briefing or oral), and the timing and procedure for Board review all concern "the manner in which the parties present themselves or their viewpoints to the agency." As such, notice and comment was not required. The fact that the agency chose to engage in notice and comment "does not carry the necessary implication that the agency felt it was required to do so." *United States v. Fla. E. Coast R.R. Co.*, 410 U.S. 224, 236 n.6 (1973).

2. The Board complied with notice and comment procedures because it thoroughly analyzed the comments.

In the alternative, the Board's analysis of the comments was full and fair:

> [T]he Board, through its Members personally or staff acting at the Members' direction, read every non-duplicative comment. The comments were coded so that all comments addressing specific issues could be electronically identified. All specific arguments raised in the comments were identified, grouped by subject matter, and analyzed. Through this process, the Board has read and carefully considered every relevant argument, datum, or suggestion in the comments.

76 Fed. Reg. at 80145.[19] Moreover, an examination of the rule demonstrates that the Board discussed, by name, the concerns of about 100 commenters, not to mention the tens of thousands of others addressed more generally. *See, e.g.*, *id.* at 80157 (discussing the "many" comments that "speak generally in favor of, or in opposition to, labor unions"). The Chamber's pure incredulity is not sufficient evidence to seriously dispute this point. *See* Am. Compl. ¶ 30.

3. The Board complied with notice and comment because, as a subset of the proposals, the final rule is a "logical outgrowth" of the proposals.

In these amendments, the Board adopted only some of the proposed changes, and chose to continue deliberating on others. Even if the Board's procedural rulemaking were subject to the APA's proposed rule requirements, all that is required of final rules is that they are "a logical outgrowth of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The Board' rule easily meets that requirement.

The Board's final rule is a logical outgrowth of its proposed rule for reasons similar to those the Supreme Court found adequate in *Coke*. There, the agency had made a number of proposals, one of which was to lift certain Fair Labor Standards Act exemptions. In its final rule,

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[19] Using electronic means, the Board identified all identical comments and read only one of each group of identical comments. More than 90 percent of the over 65,000 comments were duplicates, near duplicates, devoid of analysis, or irrelevant. In this connection, see ACUS 2011–1 ¶ 1(a)(1): "while 5 U.S.C. 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments." 76 Fed. Reg. 48789, 48780 (August 9, 2011).

however, the agency did not adopt that particular part of the proposal, leaving the individuals exempt. *Id.* at 174-75. The Supreme Court explained that the proposed rule was "simply a proposal," meaning that the agency was "*considering* the matter," and that its decision to withdraw this part of the proposal was "reasonably foreseeable" and thus a logical outgrowth. *Id.* at 175 (emphasis in original). Here the Board did precisely the same thing, proposing a number of changes and adopting only some of them.

4. The Regulatory Flexibility Act does not apply.

These amendments are exempt from the RFA. The RFA states that it only applies where "an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking." 5 U.S.C. § 603; *id.* § 604 (applies only "[w]hen an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking"). Here, as discussed above, since the rule is procedural the RFA does not apply.

In any event, this Court lacks jurisdiction because the complaint focuses solely on the proposed rule, and only *final* rules are subject to review. Judicial review under the RFA is explicitly limited to final agency actions. Section 611 of the RFA permits a small entity "aggrieved by *final* agency action" to obtain review of actions pursuant to certain listed provisions of the RFA. Proposed rules do not constitute final agency action. *Action on Smoking and Health v. Dep't of Labor*, 28 F.3d 162, 165 (D.C. Cir. 1994). In addition, Section 611 provides an exclusive list of provisions of the Act subject to judicial review, which pointedly omits the provision most specifically dealing with proposed rules, Section 603. 5 U.S.C. § 611(a)(1). For these reasons, RFA review is limited to final rules.[20]

[20] *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 89 (D.C. Cir. 2001) ("[T]he RFA expressly prohibits courts from considering claims of non-compliance with section 603."); *see Williams*

Here, the Chamber's RFA count must fail because it is directed exclusively at the *proposed rule* and makes no mention of the *final rule*'s RFA certification. Am. Compl. ¶¶ 60-76. In fact, the particular criticisms raised against the proposed rule's RFA certification appear to be entirely inapplicable to the final rule. Am. Compl. ¶ 70 (highlighting only *unadopted* proposals regarding the posting and distribution of notices, the Statement of Position, the Excelsior list, etc.); *see* 76 Fed. Reg. 80176 (noting that the Chamber's comments are "based primarily on elements of the proposed rule not adopted in the final rule"); 76 Fed. Reg. 36,834 (proposed rule). Therefore, this count must be dismissed.[21]

Alaska Petroleum, Inc. v. U.S., 57 Fed.Cl. 789, 802 (Fed. Cl. 2003) (plaintiffs were "precluded by the terms of the RFA" from contesting agency's alleged failure to conduct initial regulatory analysis because it was not final agency action under Section 611(a)); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 297 F.Supp.2d 74, 78 n.5 (D.D.C. 2003) (APA's "final agency action" requirement applies to RFA).

This reading is further supported by the general principle that only prejudicial error is reversible in administrative review; any alleged errors in the proposed rule's certification would be harmless, so long as the final rule's certification is proper. *See* 5 U.S.C. § 706 (in judicial review of agency action, "due account shall be taken of the rule of prejudicial error"); *Envir. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003) ("[E]ven if EPA had failed to properly comply with the procedural requirements of the RFA, its actual assessment of the rule's economic impacts renders any defective compliance harmless error.").

[21] In any event, the Board's RFA certification under 605(b) was appropriate. The Board explained in detail, in both the proposed and final rule, the very limited direct economic impact the amendments might have. 76 Fed. Reg. at 36833-34, 80175-77. The Chamber misunderstands the law governing certification. The law does not impose any onerous requirement for quantification or numerical analysis. Only a general descriptive statement of the factual basis for the certification is required, and the courts regularly approve certifications supported by far less information than was provided by the Board here. *Sw. Pa. Growth Alliance v. Browner*, 121 F.3d 106, 123 (3d Cir.1997) (upholding certification although agency did not specify the number of impacted small entities); *White Eagle Co-op Ass'n. v. Johanns*, 508 F.Supp. 2d 664, 677-78 (N.D. Ind. 2007) (upholding certification supported only by conclusion "that the regulation has no disparate impact on small entities"); *Cactus Corner LLC v. Dept. of Ag.*, 346 F.Supp.2d 1075, 1115-16 (E.D. Cal. 2004) (upholding certification although agency did not know the number of impacted small entities); *Sargent v. Block*, 576 F. Supp. 882, 893 (D.D.C. 1983) (upholding certification although agency did not include facts in its analysis and merely concluded that the regulation would not impose a major increase in cost). Moreover, rules can be certified even if

C. The Board's internal procedures in this rulemaking are not required by law or regulations, and, in any event, were not "totally unjustified."

1. The Board lawfully issued these amendments with two, rather than three, votes in favor of the rule.

The NLRA only requires decision by a majority of the quorum. *See FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 185 n.9 (1967) ("[The] NLRB ha[s] express authority to act through a majority of a quorum."). Nothing requires three "yes" votes to change policy. Nonetheless, in cases resolved through adjudication, the Board, as a matter of practice and discretion, has traditionally refrained from overruling Board decisions unless there are three affirmative votes to do so. *See Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 & n.1 (2010); *Local Joint Exec. Bd. Of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011) (the purpose of this internal guideline is to ensure that policy is not changed too precipitately). But this "policy" is not a hard and fast rule even in adjudications, and the Board has departed from it in the past. *See* 76 Fed. Reg. 80145 n.23 (citing *Mathews Readymix, Inc.*, 324 NLRB 1005, 1008 n.14 (1997); *Service Employees Local 87 (Cresleigh Mgmt.)*, 324 NLRB 774, 775 n.3 (1997)).

Even if it were well settled in adjudication, this guideline has never been applied to rulemaking. The Board has rarely engaged in rulemaking—certainly not often enough to "establish the type of longstanding and well established practice deviation from which might justify judicial intervention," *id.* at n.17—and has never stated that three "yes" votes are required for rulemaking. As the Board explained, the reasons for this tradition apply with little force to notice and comment rulemaking. 76 Fed. Reg. at 80145-46. The basic purpose of the tradition—to provide additional stability to Board caselaw—is closely related to the Board's history of

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they create a small reduction in gross revenue. *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (upholding agency certification of a rule that resulted in a 1-3% reduction in annual gross revenue for small entities); *Grocery Services, Inc. v. USDA Food and Nutrition Services*, No. H-06-2354, 2007 WL 2872876 *12 (S.D. Tex. 2007) (upholding certification for rule that may have a significant impact on 3-4% of the approximately 45,000 small vendors).

making policy exclusively by adjudication, instead of rulemaking. *Id.* (discussing *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011). The extended deliberation of notice and comment rulemaking is a sufficient guarantee of stability.[22]

2. The Board is not required to wait 90 days for a dissent before publishing the final rule.

Nothing in the Act or other law requires the Board to wait 90 days for a dissent. 76 Fed. Reg. 80146 & n.26; *see* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 431 n.102 (2010) (observing that "APA does not address the possibility of dissents in agency rulemakings"). Agencies can issue decisions without awaiting dissenting or other separate statements. *See, e.g., S. Cal. Edison Co.*, 124 FERC ¶ 61308, 2008 WL 4416776 at *8 (2008).[23] The courts also use this technique at times.[24]

Guidance documents are not binding. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F. 3d

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[22] Indeed, nothing in the Board's rulemaking "overrules" precedent. *Barre*, discussed above, was superseded by regulatory amendment—not overruled. 76 Fed. Reg. at 80165 (explaining that *Barre* "cannot be read to rest on a construction of the Act, but only on the Board's reading of [the regulations]."). This is much the same as when Congress amends a statute: Congress does not necessarily mean that the courts misinterpreted the statute, Congress merely changes the statute itself, rendering the old cases inapplicable to the new statute. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring) (prior interpretation of Title VII was correct, and legislative amendment creates a "new evidentiary rule"); *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (distinguishing between "supersede legislatively" and "overrule"). Similarly, changing Board rules does not *overrule cases* interpreting the old rules, it simply renders them irrelevant to cases brought under the new rules.

[23] *See* Marshall J. Breger & Gary J. Edles, "Established by Practice: the Theory and Operation of Independent Federal Agencies," 52 Admin. L. Rev. 1111, 1248-49 (2000) (noting that at least the Farm Credit Administration, the Federal Energy Regulatory Commission, the Federal Maritime Commission, and the Surface Transportation Board, all allow this practice).

[24] *See In re Kirk*, 376 F.2d 936, 946 (C.C.P.A. 1967) (Smith, J., dissenting) (protesting publication of majority opinion before dissenting opinions had been completed); *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (releasing the majority before the dissent, and stating that dissent would follow because there was "not now opportunity for a response adequate to the issues raised. . . . Accordingly, the detailed grounds for dissent will be filed in due course.").

1175, 1182 (D.C. Cir. 2000). Here, one such guidance document, an internal memorandum by the Executive Secretary, stated that in adjudications the Board usually waits 90 days for a dissent but may proceed more quickly for good cause. Exh.1; 76 Fed. Reg. at 80146. The policy is expressly limited to adjudications, as evident in the terms "full Board or Panel cases" in the policy. *Id.* It also permits departure from these "procedural instructions" on a "case-by-case basis" for "good cause." *Id.* Here, the imminent loss of a quorum was good cause to give Member Hayes 90 days to draft a dissent *after* publication of the rule, but *before* the effective date. In *Consolidated Aluminum*, for example, the TVA sped up its decision-making process because the resignation of one of its members threatened to deprive the agency of a quorum. 462 F.Supp. at 472. The court held that, even assuming that the TVA had deviated from a "well settled" tradition, the change was not "totally unjustified" because the impending loss of a quorum was good reason to move quickly to make a decision. *Id.* at 476. Similarly, the procedures used by the Board here were not required by law, and were far from "totally unjustified."

3. Member Hayes specifically voted against preparing the rule to be published and publishing the rule, the "final agency action" in this case.

The Board here voted *twice* to make these amendments: first it voted to proceed to draft, circulate, and publish a rule making these eight specific amendments, Exh. 2; and it voted again, after circulating the draft of the preamble and final rule, to publish. Exhs. 3, 4. This second vote, on an order to publish the final rule, was expressly designed to be "the final action of the Board in this matter." Exh. 3. Nothing more is required.

The Board's voting procedure here was consistent with the NLRA. The Act does not prescribe a specific procedure for final action on rulemaking, thus the form of the vote was the Board's choice to make. The order specified it was the "final action" of the Board. And the order

followed circulation of the draft preamble and final rule—so Member Hayes clearly voted against promulgating and publishing these amendments. The dissent does not need to cast yet another "vote" on the precise words used by the majority, any more than the majority would "vote" on the precise words used in the dissent. Thus, that the rule would be submitted for publication "[i]mmediately upon approval . . . by a majority of the Board" makes perfect sense: after all, in adjudications too, the vote determines what opinions must be drafted, but the majority opinion need only be approved by those who join that opinion. Exh. 3. Where, as here, the dissenting opinion is to be published separately, and where the dissenter has clearly voted against the rule, there is no need for the dissenter to take any particular action "voting against" the specific final text of the majority's opinion.

The Board's choice here is well within administrative norms. The FCC, for example, commonly votes to adopt new rules, and then finalizes and publishes the final rules in the ensuing months. Only the members who voted *in favor* of proceeding with the rule need approve the final text. [25] For these reasons, the procedures followed by the Board in this case are consistent with the Act and meet the minimal standard of *Vermont Yankee*.

[25] For example, in one proceeding the FCC announced that it had voted to adopt a new rule on July 8, 2004, see http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-249414A1.doc (last visited January 13, 2012), but the text of that rule was only issued November 22, 2004. *See* 69 Fed. Reg. 67823. That rule was later upheld by the D.C. Circuit. *Mobile Relay Associates v. FCC*, 457 F.3d 1 (2006). *See generally Joint Statement of Chairman Powell and Commissioner Abernathy on Northpoint*, 17 FCC Rcd at 9807 n.705 ("There is nothing procedurally inappropriate in making changes, substantive or non-substantive, after adoption to further elucidate the rationale for the Commission's decision. Such revisions are permissible when *all non-dissenting Commissioners concur* in the changes. Here, all of the Commissioners who supported the relevant sections agreed to the post-adoption edits." (emphasis added)); Statement of Chairman William E. Kennard, *1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, Biennial Review Report, 15 FCC Rcd 11058, 11126 n.6 (2000); Amendment of Subpart H, 2 FCC Rcd 3011 at para 76; (1987).

CONCLUSION

For all the foregoing reasons, the Board requests that the Court grant summary judgment to the Board on all counts, or, in the alternative, dismiss Count I as unripe, Count II on the merits, and Count III as beyond the Court's subject matter jurisdiction.

RESPECTFULLY SUBMITTED,

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