IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT NATIONAL LABOR RELATIONS BOARD'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, OR, IN THE ALTERNATIVE, MOTION TO TRANSER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

The National Labor Relations Board ("the Board") files this memorandum (1) in support of its Motion to Dismiss Plaintiff's Complaint for Lack of Subject Matter Jurisdiction, or, in the Alternative, to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the District of New Jersey, and (2) in opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. Plaintiff, Laboratory Corporation of America Holdings ("LabCorp"), argues that neither the Board nor its Regional Director has authority to order representation elections or certify their results. LabCorp requests that the Court issue a temporary restraining order and preliminary injunction enjoining the Board from enforcing its February 26, 2013 Decision and Direction of Election and from "requiring, conducting, or certifying an election involving LabCorp's patient service technicians and patient center site

coordinators in Northern New Jersey . . . until such time as the Board is properly constituted." (Pl. Mem. of Law in Support of Its Mot. for Temporary Restraining Order and Prelim. Inj. (hereinafter, "Pl. Mem.") at 17, ECF No. 3).

As demonstrated below, this extraordinary relief should be denied because: (1) this Court lacks subject matter jurisdiction to interfere with or review Board representation proceedings; (2) the narrow exception to this strict jurisdictional limitation does not apply because Plaintiff has an adequate judicial remedy under Section 10 of the National Labor Relations Act, 29 U.S.C. § 160 ("NLRA" or "the Act") and has not shown the Board violated a clear statutory mandate; and (3) LabCorp has failed to demonstrate a likelihood of success on the merits or irreparable harm, and the balance of equities and public interest weigh against issuance of injunctive relief. Alternatively, the Board submits that the balance of factors considered under Section 1404(a)'s venue transfer provision support transferring venue to the U.S. District Court for the District of New Jersey.

BACKGROUND AND RELEVANT FACTS

On January 24, 2013, District 1199J, NUHHCE, AFSCME, AFL-CIO (the "Union") filed an election petition with the NLRB's Regional Director of Region 22 (the "Region"). (Starr Decl. Exh. 1).[1] Pursuant to Board procedures, a pre-election hearing was conducted on February 11, 2013, before two designated hearing officers. At the hearing, the parties stipulated to a bargaining unit of approximately 276 employees scattered across approximately forty different patient service centers and medical offices located in the northern New Jersey region. (Fox Decl. Exh. 1). The parties also stipulated to facts establishing Board jurisdiction over LabCorp (*i.e.,* commerce facts) and labor organization status of the Union. (Starr Decl. Exh. 3 at 2).

[1] The Starr Declaration is attached to Plaintiff's Motion (ECF No. 3) as attachment 2.

Prior to the opening of the hearing and again at the hearing, LabCorp moved to dismiss the Union's petition on the basis that pursuant to the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the Board lacked the statutory authority to conduct or certify an election.[2] The hearing officer denied the motion. At the close of the pre-election hearing, the only contested issue to be decided by the Regional Director was whether to order a manual ballot or mail ballot election. (Starr Decl. Exh. 3 at n.5). Both parties stated their positions on the record during the hearing – the Union sought a mail ballot election while LabCorp requested a manual ballot election. They were also given the option to address the issue further in post-hearing briefs. In its brief, LabCorp explained why the election should be conducted manually and also reiterated its *Noel Canning* arguments. (Starr Decl. Exh. 2). On February 26, 2013, the Regional Director issued a Decision and Direction of Election denying LabCorp's motion to dismiss the petition and ordering that an election take place. (Starr Decl. Exh. 3). LabCorp was also ordered to provide an "*Excelsior* list" to the Region on or before March 5, 2013, providing names and addresses of employees in the bargaining unit eligible to vote in the election.[3] *Id.* By letter dated February 28, 2013, the parties were subsequently informed that a mail ballot election would be conducted. (Fox Decl. Exh. 1). No date has yet been scheduled for the election.

On March 1, 2013, LabCorp filed a Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction with this Court. LabCorp seeks the extraordinary remedy of a

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[2] The D.C. Circuit in *Noel Canning* found invalid three recess appointments made by President Obama to the NLRB on January 4, 2012.

[3] The term "*Excelsior* list" is based on this requirement in election cases first articulated by the Board in *Excelsior Underwear Inc.*, 156 NLRB 1236, 1239-40 (1966), and approved by the Supreme Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-68 (1969).

temporary restraining order and preliminary injunction to prevent the Board from conducting or certifying an election involving LabCorp's Patient Service Technicians ("PSTs") and Site Coordinators in Northern New Jersey, as directed by the Regional Director of Region 22. Pursuant to a stipulation filed by the parties on March 4, 2013, the Board agreed not to take any action with respect to the ordered election, including scheduling an election date or releasing the *Excelsior* list to the Union, until this Court has heard oral argument on LabCorp's Motion. (ECF No. 5). On March 12, 2013, LabCorp filed a request for review of the Regional Director's decision denying its motion to dismiss the petition with the Board pursuant to Board Rules and Regulations, 29 C.F.R. § 102.67(b). (Fox Decl. Exh. 2). LabCorp also requested Special Permission to appeal the Regional Director's direction of a mail ballot election should the Board deny its request for review. *Id.*

SUMMARY OF ARGUMENT

This Court should dismiss the instant case and deny LabCorp's Motion for a temporary restraining order and preliminary injunction, or alternatively, transfer the case to the United States District Court for the District of New Jersey.

As to the Court's lack of subject matter jurisdiction, the first and – for the Agency – sole issue before this Court is whether LabCorp can effectively bypass the NLRA's congressionally-mandated review procedures by launching a preemptive attack on the Board's representation proceedings in district court. The Agency submits that the Supreme Court's decision in *Boire v. Greyhound*, 376 U.S. 473 (1964), as well as D.C. Circuit and out-of-circuit precedent, preclude this Court from exercising subject matter jurisdiction over the instant case. These courts recognize that Board determinations in representation proceedings under Section 9(c) of the Act, 29 U.S.C. §159(c), are not directly reviewable in the courts because they do not constitute

reviewable "final orders" of the Board pursuant to Section 10(f) of the Act, 29 U.S.C. §160(f). Instead, representation case determinations are generally only subject to *indirect* judicial review if and when an employer refuses to bargain with the certified union in an appropriate unit and the Board issues a final order finding that the employer's conduct constitutes an unfair labor practice. Furthermore, the statutory review procedures set forth in Section 10(f) grant exclusive review of Board unfair labor practice proceedings to the circuit courts – *not* the district courts – and strictly require parties to exhaust their administrative and legal remedies before the Board and the appropriate court of appeals. Here, LabCorp has failed to follow this "normal course" for obtaining judicial review of Board representation determinations and proceedings.

Nor can LabCorp establish that this case is suitable for application of the rare exception to the rule of no district court review authorized by *Leedom v. Kyne*, 358 U.S. 184 (1958), because LabCorp has another avenue for judicial review and it is well settled that exhaustion of administrative remedies is required even where there are constitutional objections to an agency's assertion of jurisdiction over a party. *E.g., Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938). LabCorp also cannot show that the Board violated a clear statutory mandate. This Court accordingly lacks subject matter jurisdiction to undertake direct review of the instant representation proceeding. Additionally, the motion for injunctive relief should be denied because participation in the NLRB's administrative proceedings will not cause LabCorp irreparable harm, LabCorp cannot show any likelihood of success on the merits of its Complaint, and the balance of equities and public interest favor denial of injunctive relief.

Alaternatively, the Board submits that this Court should transfer the case to the District of New Jersey because the events underlying Plaintiff's Complaint arose in New Jersey, and

Plaintiff and other future similarly-situated litigants should be discouraged from forum shopping in this Court.

ARGUMENT

I. DISTRICT COURTS LACK SUBJECT MATTER JURISDICTION TO REVIEW OR ENJOIN BOARD REPRESENTATION PROCEEDINGS

If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *Munn Bey v. Dep't of Corrections,* 839 F.Supp.2d 1, 6 (D.D.C. 2011). When a defendant argues a lack of subject-matter jurisdiction, the plaintiff has the burden of proving jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Shuler v. U.S.,* 531 F.3d 930, 932 (D.C. Cir. 2008). For the reasons set forth below, LabCorp cannot sustain that burden in this case because it is clear that Congress intended to withhold from district courts the power to review or otherwise interfere with Board representation election proceedings.[4] Accordingly, LabCorp's Complaint and motion for injunctive relief should be dismissed.

[4] The jurisdictional basis asserted by Plaintiff in its Complaint, 28 U.S.C. § 1337, does not authorize this action. General jurisdictional statutes like Section 1337 granting jurisdiction over cases arising under federal law affecting commerce do not apply when a specific regulatory statute precludes jurisdiction. *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts"); *see also Owners-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 589 (9th Cir. 1991) ("Specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts"); *Louisville & Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983)(rejecting reliance on Sections 1331, 1337, and 1361 because "when Congress designates a forum for judicial review of administrative action, that forum is exclusive"). Therefore, LabCorp's reliance on this general jurisdictional statute cannot surmount the Act's specific review procedures, which exclusively vest the power of judicial review over NLRB unfair labor practice and representation proceedings in a "specially designated forum" – that is, the courts of appeals.

Pursuant to Section 9 of the Act, 29 U.S.C. § 159, the Board has express authority to conduct representation proceedings and to issue orders concerning the conduct of elections. That authority is exclusively vested in the Board. *E.g., International Union of Elec., Radio & Mach. Workers, Local 806 v. NLRB,* 434 F.2d 473, 482 (D.C.Cir.1970); *Minn-Dak Farmers Co-op., Employees Org. v. Minn-Dak Farmers Co-op.*, 3 F.3d 1199, 1201 (8th Cir. 1993); *Bishop v. NLRB,* 502 F.2d 1024, 1027 (5th Cir. 1974).

While Section 9 of the Act provides only the barest outline for the conduct of representation election cases, it authorizes the Board to investigate election petitions filed by the parties and to determine whether there is reasonable cause to believe that the petition raises a "question of representation." 29 U.S.C. § 159(c)(1). If the Board finds that a question of representation exists in a unit appropriate for collective bargaining, Section 9 requires the Board to conduct a representation election by secret ballot and to certify its results. *See id.*

It is well settled that, except in rare circumstances, the agency's decisions during and at the conclusion of representation proceedings are not subject to district court review. *See Boire v. Greyhound Corp*., 376 U.S. 473, 476-77, 480 (1964); *A.F.L. v. NLRB*, 308 U.S. 401, 409 (1940); *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1310 (D.C. Cir. 1984); *New York Racing Assoc., Inc., v. NLRB*, 708 F.2d 46, 55 (2d Cir. 1983); *Chicago Truck Drivers v. NLRB*, 599 F.2d 816, 817 (7th Cir. 1979); *Charles Rossi Ford, Inc. v. Price*, 564 F.2d 372, 373 (9th Cir. 1977); *Bishop*, 502 F.2d at 1027. Nor are such decisions "final orders" subject to direct review in the federal courts of appeal pursuant to Section 10(f) of the Act. *Boire*, 376 U.S. at 476-77; *Adtranz ABB Daimler-Benz Transp. v. NLRB,* 253 F.3d 19, 24-25 (D.C. Cir. 2001); *Gold Coast Rest. v. NLRB,* 995 F.2d 257, 267 (D.C. Cir. 1993)(citing *A.F.L. v. NLRB,* 308 U.S. at 409).

Congress explicitly intended to preclude direct review of such representation determinations. That is, representation decisions are generally subject to indirect judicial review only if and when those determinations serve as the underlying predicate for a final order subsequently issued in a related unfair labor practice proceeding. *See* Sec. 9(d), 29 U.S.C. § 159 (d). That order is then directly reviewable in the appropriate appellate court pursuant to Sections 10(e) and (f) of the Act (29 U.S.C. §§ 160 (e) and (f)),[5] and the underlying representation proceedings are included in the record on review pursuant to Section 9(d) of the Act. As one court has explained:

> To obtain judicial review of a § 9 "representation" decision, an objecting [party], must take a roundabout, 'back door' route. It must transform the "representation" determination into an "unfair labor practice" determination. It can do so by 1) engaging in an activity (typically, refusing to bargain or picketing) that amounts to an unfair labor practice if . . . the Board's § 9 decision is proper; 2) making certain that the Board then finds that it has engaged in an unfair labor practice; and, then, 3) petitioning a court to set aside the "unfair labor practice" determination on the ground that the underlying "representation" determination is improper.

Union de la Construccion v. NLRB, 10 F.3d 14, 16 (1st Cir. 1993) (citations omitted); *see also South Carolina State Ports Authority v. NLRB*, 914 F.2d 49, 51 (4th Cir. 1990)(same). Thus, it is only the Board's final order in an unfair labor practice proceeding, and not any representation determination, which renders a dispute subject to review in the federal courts of appeals. *Boire*, 376 U.S. at 478-79 ("[T]he purpose of § 9(d) was to provide 'for review in the courts only after

[5] Section 10(f) of the NLRA, 29 U.S.C. § 160(f), describes the exclusive procedure that aggrieved persons must follow in order to obtain judicial review in unfair labor practice cases. Pursuant to that provision, any person "aggrieved by a final order of the Board" may obtain review of such order in an appropriate United States circuit court of appeals. *Id.* The term "final order," as used in Section 10(f), refers to a Board order that either finds that an unfair labor practice was committed and directs a remedy, or dismisses the unfair labor practice complaint. Accordingly, until such time as the Board has made a determination on the merits of an *unfair labor practice case*, there is no "final order" of the Board, and thus no basis for judicial review under Section 10(f).

the election has been held and the Board has ordered the employer to do something predicated upon the results of the election'")(quoting 79 Cong.Rec. 7658 (1935)); *see also A.F.L.,* 308 U.S. at 409. The D.C. Circuit has expressly recognized this statutory rule of limited review of Board representation proceedings. *Hartz Mountain*, 727 F.2d at 1310.

The legislative history of the NLRA could not be any clearer that Congress' intent was to provide for such indirect review of representation proceedings, and to thus prohibit pre-election judicial review, as LabCorp seeks here. *See A.F.L.,* 308 U.S. at 409-11. The Senate Report on the bill which ultimately became the NLRA explicitly states:

> Section 9(d) makes it absolutely clear that *there shall be no right to court review anterior to the holding of an election*. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing.

S.Rep. No. 573, 74th Cong., 1st Sess., p. 14, 2 Leg. Hist. of the NLRA, 1935, p. 2314 (emphasis added). The House Report is equally clear regarding the purpose of Section 9(d):

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision of court review of election orders prior to the holding of an election. *Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election*, and provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c).

H.Rep. No. 972 on S.1958, 74th Cong., 1st Sess., p. 20, 2 Leg. Hist. of the NLRA, 1935, p. 2977 (emphasis added). Further, the bills that were later introduced which would have allowed for direct judicial review of Board representation proceedings were not enacted.[6] *See Boire,* 376 U.S. at 478-79 n. 8.

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[6] *See* S. 1000, S. 1264, 76th Cong., 1st Sess. (1939). Further, although a 1947 proposed amendment to Section 10(f) permitting an "aggrieved person" to obtain direct post-election review of a Board certification in the courts of appeal passed the House, it was rejected in favor

While this indirect method of review only after final Board unfair labor practice orders may seem time-consuming and inconvenient, it is the precise mechanism that Congress created and is intended to provide speedy resolution of questions of employee choice and employer bargaining obligations.[7] Congress' determination in this regard is a "policy choice" which binds the courts. *Califano v. Sanders*, 430 U.S. 99, 108 (1977). District courts are therefore powerless, except in the most extraordinary circumstances, to enjoin Board representation proceedings.

II. THE EXTRAORDINARY AND NARROW EXCEPTION TO THE RULE OF NON-REVIEWABILITY OF BOARD REPRESENTATION PROCEEDINGS DOES NOT APPLY IN THIS CASE

LabCorp cites to a very narrow, and inapplicable, exception to the general rule of non-reviewability of Board representation determinations found in *Leedom v. Kyne*, 358 U.S. 184 (1958) (Pl. Mem. at 5 n.2). The *Leedom* exception has two requirements and both must be met to establish district court jurisdiction. First – and significant here – the party invoking *Leedom* must show that in the absence of district court jurisdiction, "there would be no remedy [for the complaining party] to enforce the statutory commands which Congress had written . . . ." *Id.* at 190; *see also Board of Governors of the Fed. Reserve Sys. v. MCorp Financial*, *Inc.*, 502 U.S. 32, 43 (1991) (there can be

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of the Senate version continuing the existing, unaltered Section 9 provisions for limited, indirect judicial review. *See* H.R. No. 3020, 80th Cong., 1st Sess., pp. 42-43, 1 Leg. Hist. LMRA, 1947, pp. 199-200, 334; *compare with* H.R. Rep. No. 510, 80th Cong., 1st Sess., pp. 56-57, 1 Leg. Hist. LMRA, 1947, pp. 560-561.

[7] *E.g., id.* at 477-78 ("That this indirect method of obtaining judicial review imposes significant delays upon attempts to challenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays"); *Gold Coast Rest.,*995 F.2d at 267 ("Congress adopted this policy because it wished to avoid delays involved in direct judicial review-delays which ultimately could frustrate employees' bargaining rights before the employees had an opportunity to exercise them"); *see also Hartz Mountain*, 727 F.2d at 1310-12 (1984); *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 503 (D.C. Cir. 1980)(dissent), *cert. denied*, 450 U.S. 917 (1981).

no "sacrifice or obliteration" of a right under *Leedom* where "a meaningful and adequate opportunity for judicial review" is available); *Hartz Mountain,* 727 F.2d at 1312 ("Only where the Board has clearly violated an express provision of the statute and the plaintiff has no means of obtaining review through a refusal to bargain, have the courts granted relief under [*Leedom*]"); *Grutka v. Barbour*, 549 F.2d 5, 10 (7th Cir. 1977) (finding no *Leedom* jurisdiction where employer "may refuse to bargain with the Union and test the validity of the Board's jurisdiction in this Court."). Second, the Board order must be "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act." *Leedom*, 358 U.S. at 188; *see also Hartz Mountain*, 727 F.2d at 1312 ("the lower courts have . . . exhibited great reluctance to find the [*Leedom* exception] applicable to any situation in which the Board has not acted patently and manifestly without legality").

Contrary to the assertions made in LabCorp's Motion for Temporary Restraining Order and Preliminary Injunction, *Leedom* does not apply in this case because Plaintiff can meet neither of these requirements.[8]

A. DISTRICT COURT JURISDICTION IS UNAVAILABLE UNDER *LEEDOM* BECAUSE PLAINTIFF HAS AN ADEQUATE ALTERNATIVE JUDICIAL REMEDY

In *Leedom,* the Board directed an election in a mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit," as expressly required by Section 9(b)(1) of the Act. Although the

[8] Plaintiff cites *Railroad Yardmasters v. Harris*, 1982 WL 2064 (D.D.C. Oct. 8, 1982), as a case where *Leedom* jurisdiction was asserted over a complaint that an agency, the National Mediation Board, acted without a valid quorum in conducting an election between two unions. *Yardmasters* was subsequently overruled by the D.C. Circuit on the basis that the agency in question was authorized to act pursuant to a validly issued delegation order. 721 F.2d 1338, 1344 (1983). The D.C. Circuit's opinion did not discuss the district court's invocation of *Leedom* to assert jurisdiction over the matter. In any event, the lower court's decision did not address *Leedom*'s requirement that a party seeking district court review must show the unavailability of alternative judicial remedies. For the reasons discussed below, *Yardmasters* is not applicable to the instant dispute because Section 10 of the Act provides LabCorp with an adequate opportunity to obtain judicial review of its Constitutional challenges.

Board did not contest that it had acted in excess of a statutory provision, it did argue that the district court lacked jurisdiction to entertain the suit. The Supreme Court determined that since Section 9(b)(1) is "clear and mandatory" as to the professional employees' right to a separate vote, 358 U.S. at 188, and because the employees had no other means to obtain judicial review to protect that right, *id.* at 190-91, the district court had jurisdiction to set aside the Board's exercise of a power that had been specifically withheld.

Subsequently, in *MCorp,* the Supreme Court confirmed that the absence of any alternative judicial review for the professional employees was critical to its decision in *Leedom.* The Supreme Court explained that *Leedom* does not authorize "judicial review of any agency action that is alleged to have exceeded the agency's statutory authority." *MCorp,* 502 U.S. at 43. Rather, "central" to *Leedom* "was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights." *Id.* The Supreme Court found the facts in *MCorp* to be entirely different and inappropriate for court review under *Leedom:*

> FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation. If and when the [Federal Reserve] finds that MCorp has violated that regulation, MCorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application.

MCorp., 502 U.S. at 43-44. Therefore, the Supreme Court held that, under the circumstances, it was unnecessary to consider the merits of MCorp's challenge to the regulation at issue. *Id.* at 44.

Similarly, *Leedom* does not apply in the instant case because LabCorp has adequate means to secure appellate court review of its challenges to the Agency's authority to conduct or certify the results of election proceedings. If LabCorp is eventually "aggrieved" by the results of the election directed by the Regional Director, it is not without redress. LabCorp could simply

refuse to bargain with the union. An employer's post-certification refusal to bargain will either force the union to file an unfair labor practice charge, or, in the absence of a charge, permit the employer to ignore the results of the election. *See Hartz Mountain,* 727 F.2d at 1312 n.2 ("Congress declared that the person aggrieved by a Board representation decision is obliged to precipitate an unfair labor practice proceeding as a means of securing review in the appellate courts"); *see also Goethe House v. NLRB,* 869 F.2d at 75, 80 (2d Cir. 1989).

If the Union did file an unfair labor practice charge, LabCorp would be able to argue the issues it prematurely raises here (i.e., the agency's lack of authority "to conduct or certify the results of a representation election") and any other defenses to the appropriate circuit court on review of any final Board decision, pursuant to Section 10(f) of the Act. Meanwhile, LabCorp would have no duty to bargain with the Union unless and until the Union prevails before the Board and the Board prevails in the circuit court on review. Accordingly, dismissal of Plaintiff's Complaint and motion for injunctive relief will not deny LabCorp meaningful judicial protection from the Board's allegedly unlawful conduct because "until the Board's order has been affirmed by the appropriate . . . Court of Appeals, no penalty accrues for disobeying it." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

LabCorp's contention that the election order was *ultra vires* and violated its constitutional rights (Pl. Mem. at 14), even if meritorious, would not confer jurisdiction on this Court. There is also no merit to Plaintiff's related argument that the company should be excused from following the normal method for challenging such election orders because the "Board is in no position to cure this harm." (Pl. Mem. at 15). The courts, including the Supreme Court, have repeatedly ruled that parties are obligated to exhaust NLRA administrative remedies, even where there are constitutional objections to the agency's assertion of jurisdiction over them. Indeed, in *Myers,*

the Supreme Court declined to create an exception to the general rule of non-reviewability of Board proceedings even though the complaining party had alleged constitutional violations by virtue of the Board's exercise of jurisdiction over it. 303 U.S. at 46. The Supreme Court found exhaustion of normal administrative remedies was nonetheless required, and therefore the requested injunction should be denied. *Id.* at 50. In reaching this decision, the Court concluded that the review procedures set forth in Section 10(f) provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* The *Myers* Court further emphasized the comprehensive nature of appellate court review available at the conclusion of Board unfair labor practice cases: "all questions of the jurisdiction of the Board and the regularity of its proceedings and all questions of *constitutional right or statutory authority* are open to examination by the court." *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)).

Another instructive case in this long line of authorities is *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977). There, the Catholic Church sought to have a district court enjoin simultaneous representation and unfair labor practice cases involving a parochial school on the ground that the agency lacked jurisdiction. Specifically, the Church argued that application of the NLRA to its church-operated parochial school would constitute a violation of First Amendments rights. However, like the Supreme Court in *Myers*, the Seventh Circuit rejected the Church's effort to establish district court subject-matter jurisdiction, concluding that "[t]he constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." *Id.* at 9.

Thus, it is clear that constitutionally-based claims of overreach by the Board do not alter the *Myers* exhaustion rule. *See also Zipp v. Geske,* 103.F.3d 1379 at 1383-84 (7th Cir. 1997); *J.P. Stevens Employees Educ. Committee v. NLRB,* 582 F.2d 326, 329 (4th Cir. 1978); *Bokat v. Tidewater Equipment Co.,* 363 F.2d 667, 672-73 (5th Cir. 1966); *cf. Thunder Basin Coal Co. v. Martin,* 969 F.2d 970, 975 (10th Cir. 1992)("permitting district court jurisdiction on the basis of claims of constitutional violations . . . would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended"). Indeed, there are many examples where, *after* exhaustion of the administrative process and issuance of a final Board order, the reviewing circuit courts have considered and resolved constitutional claims on Section 10(e) and (f) review, including, for example, the D.C. Circuit's decision in *Noel Canning* itself. *See also NLRB v. Catholic Bishop*, 440 U.S. 490, 494-95, 506 (1979); *Ampersand Pub. LLC v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012); *Viking Indus. Security, Inc. v. NLRB*, 225 F.3d 131, 136 (2d Cir. 2000); *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089, 1098 (9th Cir. 1999). The fact that the circuit courts can provide a remedy for any meritorious constitutional violations, as illustrated by cases cited above, is precisely the reason why this Court has no jurisdiction to hear LabCorp's present challenges regarding the Agency's authority to act in representation proceedings. *See Meyers*, 303 U.S. at 48-49.

In sum, Plaintiff has presented no persuasive argument to depart from the firmly established NLRA exhaustion rule.[9] Therefore, this Court lacks jurisdiction to entertain LabCorp's complaints or its request for injunctive relief.

[9] LabCorp's assertion that petitioners need not always exhaust their administrative remedies before obtaining Circuit review, and the cases it cites in support of this assertion (Pl. Mem. at 15) are misplaced in this context involving Section 10(f) of the NLRA, which is a jurisdictional bar

B. NOR CAN PLAINTIFF DEMONSTRATE THAT THE BOARD HAS CLEARLY VIOLATED A SPECIFIC STATUTORY MANDATE

LabCorp argues that the NLRB's processing of the representation case is beyond its statutory authority because the Board lacks a valid quorum (Pl. Mem. at 5 n.2, 8-9). However, LabCorp cannot show, as it must, that there has been a clear violation of a specific and mandatory provision of the NLRA. *Leedom*, 358 U.S. at 188; *see also Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988)(*Leedom* exception is very narrow and "intended to be of extremely limited scope); *Hartz Mountain*, 727 F.2d at 1311 (*Leedom* review may be had only when the agency acted "patently and manifestly" without legality, in violation of an "express provision" of the NLRA); *Local 130, IUERMW v. McCulloch*, 345 F.2d 90, 95 (D.C. Cir. 1965) ("For [*Leedom*] jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court"). As shown below, the Regional Director is empowered to conduct an election and certify its results pursuant to a longstanding delegation of authority that predates by fifty years the recent recess appointments, and which exists independently from the Board's current membership status.

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to judicial review. First, Plaintiff cites *Gibson v. Berryhill*, 411 U.S. 564 (1973), but that case concerned the *judicially* created administrative exhaustion rules that federal courts will apply when determining whether to enjoin state court or state administrative proceedings. Courts have discretion to excuse such judicially-created exhaustion requirements. Next, Plaintiff cites *Cohen v. U.S.*, 650 F.3d 717 (D.C. Cir. 2011), which concerned the Court's review of IRS procedures under the Administrative Procedures Act -- a non-jurisdictional exhaustion statute that does not require exhaustion of administrative remedies. *Id.* at 733. By contrast, the NLRA is a "jurisdictional exhaustion" statute substantively limiting this Court's power to review final Board orders. Thus, because as discussed above the NLRA mandates exhaustion, the Court "cannot excuse it." *See Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (explaining that jurisdictional exhaustion is "rooted not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts").

1. The Board's Delegation of Its Power Over Representation Proceedings

When the NLRA was enacted in 1935, the Board itself determined and certified for election the appropriate employee unit for collective bargaining purposes. *See The Ritz Carlton Hotel Co. v.* NLRB, 123 F.3d 760, 762 (3d Cir. 1997) (internal citations omitted). Congress amended Section 3(b) of the NLRA, 29 U.S.C. § 153(b), in 1959 in part because the Board developed a huge backlog including a large number of pending representation petitions. *Id.* (citing *Amalgamated Clothing Workers of Am. v. NLRB*, 365 F.2d 898, 903 n.10 (D.C. Cir. 1966)). As amended, Section 3(b) allows the Board to delegate to its Regional Directors its authority over representation cases. Specifically, Section 3(b) provides that "[t]he 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 . . . and certify the results thereof . . . ." The amendment was "'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) (quoting the explanation of Senator Goldwater, a member of the Conference Committee that added the new provision).

In accordance with Section 3(b), the Board delegated its decisional authority in representation cases to NLRB Regional Directors in 1961. *See* 26 Fed. Reg. 3889 (May 4, 1961) (the "1961 Delegation"). That delegation has never been withdrawn, and indeed, the Board subsequently codified rules and regulations regarding the Regional Director's authority pursuant to Section 3(b) and the 1961 Delegation. *See generally* 29 C.F.R. § 102.60–102.88.

Regional Directors thus "act[], in effect, as the Board" in representation proceedings under the 1961 Delegation, subject to discretionary Board review upon timely request. *Seven-Up Bottling Co*., 211 NLRB 521, 522 (1974), *enf'd* 506 F.2d 596 (1st Cir. 1974).

2. Survival of the Board's Delegation Even if the Board Loses a Quorum

Regardless of the Board's current composition, the 1961 Delegation ensures that the NLRB Regional Directors continue to be vested with the authority to conduct elections and certify their results. This is so because when a governmental entity such as the Board takes a permissible action -- whether issuance of a regulation, order, or delegation -- that action acquires the force of law in its own right. *Cf. Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2194-95 (2009) (noting that the "expiration of the *authorities* . . . is not the same as cancellation of the *effect* of the President's prior valid exercise of those authorities"). Nothing in Section 3(b) suggests that the legal effect of a valid Board delegation may be abrogated based on later changes in the Board's membership. In this respect, the Act is in harmony with the general principle that "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." *United States v. Wyder*, 674 F.2d 224, 227 (4th Cir.), *cert. denied*, 457 U.S. 1125 (1982); *accord Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan v. Nat'l Bank*, 696 F.2d 678, 682-83 (9th Cir. 1983). *Cf. Champaign Cnty., Ill. v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) ("a delegation of authority survives the resignation of the person who issued the delegation").

Relying on *Noel Canning's* holding that two of three current Board members were not validly appointed, Plaintiff argues that the Board now lacks a quorum and, invoking the Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and the D.C. Circuit's decision in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C.

Cir. 2009), Plaintiff contends that the legal consequence of a loss of a Board quorum is that the 1961 Board delegation to the regional directors has lapsed. (Pl. Mem. at 8-10). That claim lacks merit. The holdings of *New Process Steel* and *Laurel Baye* were limited to the authority of the Board members to adjudicate cases. The definitive holding of the Supreme Court on the issue common to both cases was that the Board's delegation of Board decisional authority to three-member Board panels lapses if the "delegee group" is reduced to two members or less. 130 S. Ct. at 2640-42. The validity of the 1961 Delegation or any other delegation to non-Board members was not before any of those courts. Indeed, the Supreme Court in *New Process Steel* was clear that such delegations were not impacted by its decision: "[o]ur conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group *does not cast doubt on the prior delegations of authority to nongroup members, such as regional directors* or the general counsel. The latter implicates a separate question that our decision does not address." 130 S. Ct. at 2643 n.4 (emphasis added).

Plaintiff relies heavily (Pl. Mem. at 8-9) on the *Laurel Baye* court's reasoning, which analogized to agency law, that "the delegee group's delegated power to act . . . ceases when the Board's *membership* dips below the Board quorum of three members." 564 F.3d at 475 (emphasis added). However, Plaintiff's brief fails to address that the Supreme Court's *New Process Steel* decision *expressly* disavowed *Laurel Baye's* agency theory. 130 S. Ct. at 2643 n.4 ("although we reach the same result, we do not adopt the District of Columbia Circuit's equation of a quorum requirement with a membership requirement that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,* 564 F.3d 469, 475 (2009) . . . ."). Rather, the Supreme Court held that the Board *delegee subgroup*, as opposed to the Board itself, must maintain a

membership of three. *Id*. at 2642. Moreover, the *New Process Steel* delegee requirement of three has no application to the 1961 Delegation since a Regional Director is not a subgroup of the Board itself. To the contrary, the 1961 Delegation has, since its promulgation, empowered a single individual, the Regional Director, to conduct elections without the necessity of three Board members joining the process and subject to wholly discretionary Board review which does not operate to stay any action taken by the regional director unless specifically ordered by the Board. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 138 n,1, 141-43 (1971). This important distinction explains the Supreme Court's limitation of its *New Process Steel* holding to exclude delegations to Regional Directors such as the one at issue here. *Id*. at 2643 n.4. *Cf. Frankl v. HTH Corp*., 650 F.3d 1334, 1354 (9th Cir. 2011) (ruling in NLRB case that *Laurel Baye's* underlying premise was rejected by *New Process Steel,* which "instructs that the Act's quorum requirement must be satisfied when the Board is acting directly through its members, but does not need to be satisfied for the Board's earlier exercises and assignments of its authority, made with a proper quorum, to remain valid and in effect); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010) ("In light of the Court's pronouncement in *New Process Steel*, we feel no compulsion to follow *Laurel Baye*. . . . [T]he operative fact here is that, at the time of its delegation to the General Counsel, the Board comprised the requisite number of members to constitute a quorum. The fact that Board membership subsequently dipped below a quorum does not retroactively invalidate the Board's prior delegation"); *Osthus v. Whitesell Corp*., 639 F.3d 841, 844 (8th Cir. 2011) ("In light of the Act's framework and the Supreme Court's view of *Laurel Baye Healthcare*, this court joins the Fifth Circuit in concluding that the delegation survived the loss of a Board quorum").

III. PLAINTIFF ALSO HAS NOT SATISFIED THE REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF

A plaintiff seeking preliminary injunction must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011)(citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). Because it is an "extraordinary remedy," a preliminary injunction "should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004), citing *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

The D.C. Circuit has applied a "sliding scale" approach in evaluating the preliminary injunction factors. *Sherley,* 644 F.3d at 392. While all four factors influence the analysis, the two criteria often cited as having greater importance are likelihood of success on the merits and irreparable injury. *See, e.g., Katz v. Georgetown Univ. et al*., 246 F.3d 685, 688 (D.C. Cir. 2001); *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

A. THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS

First, LabCorp can only be successful in this matter if this Court has subject matter jurisdiction to hear the matter and grant the requested relief.[10] As shown at length above,

[10] Plaintiff's reliance on *NLRB v. J.S. Carambola, LLP,* 457 F.App'x 145 (3d Cir. 2012), as evidence of success on the merits is misplaced. LabCorp cites that decision for the proposition that the Board cannot certify an election when it lacks a quorum of three members. (Pl. Mem. at 8). However, in *J.S. Carambola*, the respondent employer was appropriately arguing on Section 10(e) and (f) review that it did not fail to bargain with the union because the union was improperly certified by the two-member Board and did not repeat its request to bargain after the valid post-*New Process Steel* certification. In contrast, the issue here is whether LabCorp can circumvent that congressionally-mandated 10(e) and (f) review procedure and directly present its arguments about the Board's alleged lack of authority to a district court. *J.S. Carambola* does

however, this Court does not have jurisdiction. Board orders made in the course of representation election proceedings under Section 9(c) are not subject to direct judicial review. *Boire,* 376 U.S. at 476; *A.F.L.,* 308 U.S. at 409. LabCorp attempts to escape this outcome by claiming that this case falls within the extremely rare exception to the firmly established rule of no judicial review that was recognized in *Leedom*. However, *Leedom* cannot apply here because, as discussed earlier, if the Union were to win the election directed by the Regional Director, LabCorp could simply refuse to accept that result and obtain appellate review at the conclusion of any refusal to bargain / test of certification unfair labor practice proceeding. Therefore, Plaintiff has adequate means to secure appellate review of its challenges to the Board's authority. In addition, as also shown, LabCorp cannot establish that the Regional Director's or Board's processing of the election proceeding amounts to conduct in clear violation of a specific, mandatory provision of the Act or that such conduct was "plainly beyond the bounds of the Act." LabCorp, therefore, has no likelihood of success on the merits.

B. LABCORP HAS FAILED TO ESTABLISH THAT IT WOULD SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS DENIED

LabCorp's request for injunctive relief also fails because it has not shown a likelihood of immediate, irreparable harm. The D.C. Circuit has set a high standard for demonstrating irreparable injury: "proving irreparable injury is a considerable burden, requiring proof that the movant's injury is *certain, great and actual*—not theoretical—and *imminent,* creating a clear and present need for extraordinary equitable relief to prevent harm." *Power Mobility Coal. v. Leavitt,* 404 F.Supp.2d 190, 204 (D.D.C. 2005)(quoting *Wis. Gas Co.,* 758 F.2d at 674)(internal quotation marks omitted). In addition, the D.C. Circuit has explained:

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not support district court jurisdiction, but only further illustrates that Plaintiff will have an opportunity to obtain appellate review of its constitutional arguments.

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation *weighs heavily* against a claim of irreparable harm.

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006)(quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958))(internal quotation marks omitted)(emphasis added).

Here, Plaintiff cannot show that it will suffer irreparable harm if the injunction is denied because it could hardly be more settled that circuit court review of final Board orders affords "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers*, 303 U.S. at 48. As stated above, LabCorp will have ample opportunity for advancing its constitutional arguments before the Board and, if necessary, the Court of Appeals. If LabCorp's arguments are found to have merit, the Circuit Court will provide a remedy. This relatively modest procedure, though undesirable to LabCorp, cannot reasonably be characterized as causing "injury," let alone "irreparable injury," warranting enjoining the Agency from conducting and certifying representation proceedings. *See id.* at 48 n.5 (until the circuit court issues an order, an aggrieved person is definitively "not injured and cannot be heard to complain").

Stripped of its window dressing, Plaintiff's argument about the various operational harms it will suffer if this Court does not grant injunctive relief amounts to nothing more than a complaint about having to participate in the NLRB's administrative process before securing appellate court review under Section 10(f). Yet, submission to agency proceedings and the attendant expense do not constitute irreparable injury as a matter of law. *E.g., FTC v. Standard Oil* Co., 449 U.S. 232, 244 (1980)("We do not doubt that the burden of defending this

proceeding will be substantial. But the expense and annoyance of litigation is part of the social burden of living under government")(internal quotation marks and citations omitted); *Renegotiation Board v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974)("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"); *Randolph–Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C.Cir.1986)("The usual time and effort required to pursue an administrative remedy does not constitute irreparable injury"); *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972) ("Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings"); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002) (district court erred in finding subject matter jurisdiction existed on the basis that the employers would suffer harm by having to litigate the matter, as this was a basis "without foundation in the jurisprudence").

LabCorp gains no support from its complaints about the divisive nature of representation campaigns and the uncertainty surrounding the Board's authority to conduct and certify any election, which will affect the company's ability to recruit employees because it will be unable to inform prospective employees whether the positions they are seeking are unionized. (Pl. Mem. 11-13). These concerns, while not unfounded, are present in virtually every union organizing campaign, as illustrated by the cases cited by Plaintiff. *Id.* Thus, they are a type of "harm" that will often befall employers who are dissatisfied with the results of Board representation proceedings. Nevertheless, Congress chose to have no judicial review of Board representation case determinations unless and until they become the subject of an unfair labor practice order under Section 10. *Boire*, 376 U.S. at 477-79; *Hartz Mountain*, 727 F.2d at 1310-11; *IUEW, Local 806 v. NLRB*, 434 F.2d 473, 482 (D.C. Cir. 1970).

LabCorp also complains that if the Board election order were to stand, the company faces "imminent and substantial harm to its business." Specifically, Plaintiff contends that any attempt by the Board to certify the election in favor of the Union would prevent it for some indefinite "limbo period" from making changes to various employment policies and terms. (Pl. Mem. at 11, 12-13). To the extent LabCorp is suggesting that this constraint on management's "ability to manage its workforce" may have some impact on the company's finances, it is "well-settled that economic loss does not, in and of itself, constitute irreparable harm." *Wis. Gas Co.*, 758 F.2d at 674. Rather, it is only where a plaintiff establishes that the economic loss is so severe as to threaten the very survival of its business can economic harm qualify as irreparable. *Id.* That burden has not been met because no evidence has been presented indicating such a severe level of potential harm if LabCorp were required to maintain the current terms and conditions of employment until the company could secure appellate court review of its constitutional claims pursuant to Section 10(f).

Plaintiff's Motion also states in conclusory terms that the election order's required disclosure to the Union of an *Excelsior* list containing names and addresses of employees will inflict irreparable harm on the company (Pl. Mem. at 10-11). The *Excelsior* rule is not intended to test employer good faith or "level the playing field" between petitioners and employers, but to achieve important statutory goals by ensuring that all employees may be fully informed about the arguments pro and con concerning representation and can freely and fully exercise their Section 7 rights under the Act. *Mod Interiors, Inc.,* 324 NLRB 164, 164 (1997)(citing *North Macon Health Care Facility,* 315 NLRB 359, 360-61 (1994)). This well-settled Board practice of requiring *Excelsior* lists from employers has been approved by the Supreme Court and the D.C. Circuit. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *Federated Logistics and*

Operations v. NLRB, 400 F.3d 920, 929 (D.C. Cir. 2005)("[I]t is long established that requiring the employer to disclose employee names and contact details to the union furthers NLRA objectives 'by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses'")(quoting *Wyman-Gordon*, 394 at 767). The Board is aware of no case standing for the proposition that the mere disclosure of such list – which employers involved in NLRA representation proceedings have been required to provide since 1966 -- can constitute irreparable harm to an employer, and LabCorp cites none. Again, Plaintiff's position here seems to boil down to a complaint about having to follow normal administrative processes. However, as the Supreme Court made clear in *Myers*, irreparable injury does not flow from the requirement that LabCorp participate in NLRB proceedings prior to seeking judicial review, and the accepted *Excelsior* requirement is part of the Board's normal processing of representation proceedings.

Finally, LabCorp appears to be suggesting that any alleged constitutional violation is irreparable harm *per se*, and thus its bald allegation that the election order was *ultra vires* and in violation of its constitutional rights is sufficient to satisfy the "irreparable injury" element of the test for obtaining injunctive relief. (Pl. Mem. at 14). The Supreme Court and other courts have recognized that there is no per se rule that in alleging a constitutional injury a plaintiff automatically demonstrates irreparable harm. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983)("Lyons is not more entitled to an injunction than any other citizen of Los Angeles; a Federal Court many not entertain a claim by any and all citizens who no more than assert that certain practices [of defendant] are unconstitutional"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006)("in this court, as in several others, there is no *per se* rule that a violation of freedom of expression *automatically* constitutes

irreparable harm"); *see also Siegle v. LePore*, 234 F.3d 1163, 1177-78 (11th Cir. 2000); *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989).

In suggesting otherwise, LabCorp relies on the D.C. Circuit's decisions in *Mills v. Dist. of Columbia*, 571 F.3d 1304 (2009) and *Davis v. Dist. of Columbia*, 158 F.3d 1342 (1998). (Pl. Mem. at 14). However, those cases have no application to the facts of this case. *Davis* involved an inmate's suit against the District of Columbia alleging that the city had violated his right to privacy through its disclosure of his human immunodeficiency virus (HIV) status, and *Mills* arose in the context of a suspicionless police checkpoint implemented by the District of Columbia in an effort to promote the safety and security of persons living within a particular neighborhood in Washington, D.C. The Court in *Mills* stated that:

> It cannot be gainsaid that citizens have a right to drive upon the public streets of the District of Columbia or any other city absent a constitutionally sound reason for limiting their access. As our discussion of the likelihood of success has demonstrated, there is no constitutionally sound bar in the [ ] checkpoint program. It is apparent that appellant's constitutional rights are violated . . . .

Id. at 1312. In both of those cases, the D.C. Circuit found a clear showing of a constitutional infringement – i.e., in *Davis* the Court presumed a violation of the complainant's privacy rights, and in *Mills* the Court stated that it was *apparent* the checkpoint was in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. As explained in Section II.B above, no constitutional violation can be shown by LabCorp because the alleged unconstitutionality of the Board's recess appointments does not implicate the validity of the 1961 delegation of authority to regional directors. In any event, the harm alleged by LabCorp is qualitatively different than the harm involved in *Davis* and *Mills*, where the damage is inherent in the violation itself which cannot be repaired by final judgment. In contrast, the injury allegedly sustained by LabCorp (*i.e.*, governmental action taken against it by officials who

lacked constitutional authority to do so) can be remedied by subsequent litigation. *See A Helping Hand, LLC v. Baltimore County*, 355 F. Appx. 773, 776-77 (4th Cir. 2009)(unpublished)(finding that constitutional violation *per se* did not constitute irreparable harm where the harm at issue – damage to business interests – could be remedied at close of litigation).

Moreover, while it is true that a party who raises a timely constitutional challenge to governmental action is entitled to a decision on the merits of that issue and whatever relief may be appropriate if a violation did occur, it does not necessarily follow that the appropriate relief in all cases is immediate injunctive relief. Indeed, as discussed at length in this Motion, the Supreme Court explicitly determined in *Myers* that participation in NLRB administrative proceedings, before securing appellate court review pursuant to NLRA Section 10(f), does not constitute irreparable harm even where the plaintiff is complaining of irreparable damage to its constitutional rights. 303 U.S. at 49-50. In that case, the complaining employer contended that its attempt to evade the requirement of administrative exhaustion and secure injunctive relief was justified because a Board proceeding would violate its constitutional rights, and because the administrative hearing would result in costly litigation expenses. *Id.* at 47, 50. However, the Supreme Court firmly rejected this attempt to graft an irreparable harm exception onto the administrative exhaustion principle:

> Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of trial to establish the fact.

Id. at 51-52.

LabCorp, echoing the company in *Myers*, claims here that it cannot be required to follow the long-settled rule of no district court jurisdiction because exhaustion of administrative

remedies would cause LabCorp to suffer irreparable harm – namely that LabCorp "has been and will be harmed by being subjected to an *ultra vires* order issued in violation of the Constitution, and being forced to participate in an illegitimate proceeding." (Compl. ¶ 33). However, the harm asserted here is no greater than that asserted by the company in *Myers* or the Catholic Church under the Religion Clause of the First Amendment in *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977). *See also Steadman v. Governor, U.S. Soldiers' & Airmen's Home,* 918 F.2d 963, 967-68 (D.C. Cir. 1990)(where statutory scheme prevented district court review of agency decisions and required exhaustion of administrative remedies, court stated "it would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading [of a constitutional claim]").

At this point in the instant administrative proceedings, should the Union ultimately win the election, LabCorp must first present its arguments regarding the Agency's ability to conduct and certify representation elections to the Board itself, and then, if "aggrieved" by any final bargaining order issued by the Board, to a circuit court. At that time, the circuit court can consider the constitutional arguments Labcorp prematurely raises here. Any harm that LabCorp may suffer from having to await potential future court review is entirely speculative, insubstantial, and not irreparable since Board orders are not self-enforcing – that is, LabCorp cannot be forced to bargain with the Union until an appropriate circuit court reviews any bargaining order that may be issued by the Board. Under these circumstances, the abstract

"harm" complained of by LabCorp is insufficient to establish any legally cognizable harm that would warrant a grant of injunctive relief.[11]

C. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF DENYING PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

In addition to its failure to demonstrate likelihood of success or irreparable harm, LabCorp also cannot meet the other criteria necessary for a preliminary injunction – that the balance of equities tips in the movant's favor and that the injunction is in the public interest. *See Sherley*, 644 F.3d at 392. In this case, the balance of equities factor is intertwined with the public interest consideration. The NLRB was created and empowered by Congress to resolve questions of representation and to remedy unlawful labor practices which would otherwise interfere with interstate commerce. 29 U.S.C. §§ 151 & 160. The Supreme Court has made clear that the Congressional purpose behind the NLRA provisions which resolve representation questions and remedy unfair labor practice conduct is primarily public. *E.g., U.A.W. Local 283 v. Scofield*, 382 U.S. 205, 220 (1965); *Vaca v. Sipes*, 386 U.S. 171, 182-83 n.8 (1967) ("The public interest in effectuating the polices of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies").

Disruption of the Congressionally-mandated scheme for operation of the NLRB's representation proceedings would constitute an unprecedented interference with the Board's procedures and its exclusive jurisdiction over such proceedings. *See FTC v. Standard Oil*, 449

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[11] Plaintiff cites several cases for its proposition that courts routinely enjoin federal agencies from acting contrary to their governing statutes. (Pl. Mem. at 16). However, none of those cases excuse LabCorp's failure in the instant case to exhaust administrative remedies before seeking judicial review. *Doe v. Rumsfeld*, 341 F.Supp. 2d 1 (D.D.C. 2004), and *Planned Parenthood v. Heckler,* 712 F.2d 650 (D.C. Cir. 1983), involved actions against administrative regulations that constituted "final agency actions" under the Administrative Procedures Act. And, in *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), the statutory scheme at issue did not impose an exhaustion requirement. Therefore, unlike the instant case, the agency actions challenged in those cases were in a posture fit for judicial review.

U.S. at 242 (discussing the burdens of judicial interference with agency processes in the context of Federal Trade Commission Act). Such disruption would also necessarily harm the public's long-standing reliance on the prompt and orderly operation of the Board's representation machinery.[12]

Moreover, further processing of the instant representation proceeding and other representation and unfair labor practice cases by the Board itself in the wake of *Noel Canning* is the proper method of administering a national law in the absence of a Supreme Court decision invalidating Board action. The NLRA "is federal legislation, administered by a national agency, intended to solve a national problem on a national scale." *NLRB v. Natural Gas Utility District,* 402 U.S. 600, 603-04 (1971). The Board, which has responsibility to uniformly administer the NLRA, continues to argue in other circuits the correctness of its position in *Noel Canning*, that the President's January 4, 2012 recess appointments were valid. *See, e.g., Evenflow Transportation, Inc. v. NLRB*, 2d Cir., No. 12-3054; *NLRB v. New Vista Nursing*, 3d Cir., No.11-3440, 12-1027 and 12-1936 (argument scheduled for March 19, 2013); *NLRB v. Enterprise Leasing Co., SE*, 4th Cir., No. 12-1514 (argument scheduled for March 22, 2013); *Big Ridge, Inc. v. NLRB*, 7th Cir., No. 12-3120.

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[12] If LabCorp's argument that Regional Directors lack authority to conduct elections were to prevail in the courts, the NLRB would be stymied from acting on election petitions impacting approximately 1,500 workplaces and 100,000 employees each year exercising their federally-protected right to choose whether to form a labor union. *See* http://www.nlrb.gov/sites/default/files/documents/3430/total_elections_2012.pdf (last visited March 15, 2013). Such a view of the Board's delegation authority would thus improperly grind to a halt the NLRB's routine functions. This result would be particularly egregious given that *Noel Canning* will be pending on a petition for *certiorari* (*see* http://nlrb.gov/news-outreach/news-releases/nlrb-seek-supreme-court-review-noel-canning-v-nlrb (last visited March 15, 2013) (announcing the Board's intention to seek certiorari in *Noel Canning*)), and remains in conflict with other circuit decisions. *See Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004)(en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985)(en banc); *United States v. Allocco*, 305 F.2d 704, 707-15 (2d Cir. 1962).

The Supreme Court has made clear that prohibiting the government in all future cases from disagreeing with a court decision in a prior case "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 159-63 (1984) (setting forth the relevant policy considerations underlying the rule that collateral estoppel does not preclude the government from relitigating issues decided adversely to it in prior cases brought by different parties); *see also United States v. Estate of Donnelly*, 397 U.S. 286, 294-95 (1970) (the United States is generally "entitled to adhere to what it believes to be the correct interpretation of a statute except where bound to the contrary by a final judgment in a particular case"). The D.C. Circuit has reaffirmed and applied this principle in a variety of contexts.[13]

The Board's continuing to exercise authority in the wake of *Noel Canning* is also supported by the structure of the Act. Section 10(e) provides that the Board can petition for enforcement of a final order in any circuit where the alleged unlawful conduct occurred or where the person resides or transacts business, and Section 10(f) provides that any person aggrieved by

[13] *See, e.g., Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 810 (D.C. Cir. 2002) (holding that Social Security Commissioner is "not in fact bound" to apply Eleventh Circuit judgment interpreting premium reimbursements to entities not party to the Eleventh Circuit litigation); *Independent Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1260 n.3 (D.C. Cir. 1996) ("We do not . . . dispute . . . the proposition that agencies have the power of nonacquiescence in decisions of a single circuit."); *Johnson v. United States R.R. Retirement Board*, 969 F.2d 1082, 1092-93 (D.C. Cir. 1992) (explaining that nonacquiescence is appropriate where agency "honestly believes a circuit court has misinterpreted the law" and seeks to have the Supreme Court resolve a circuit conflict after "letting important legal issues 'percolate' throughout the judicial system"); *see also Atchison, Topeka and Santa Fe Railway Co v. Pena*, 44 F.3d 437, 446-47 (7th Cir. 1994) (en banc) ("We know from [*Mendoza*] that the executive branch need not follow a circuit's interpretation, even within that circuit's borders.") (Easterbrook, J., concurring).

a final Board order – and this may include the Union if it is aggrieved by any final bargaining order issued by the Board - can petition to review, not only in the District of Columbia, but in the circuit where the unfair labor practices were committed or where the person resides or transacts business. Discussing these provisions, the D.C. Circuit has explained that NLRB nonacquiescence is "not strictly 'intracircuit' at all," but "occurs because a broad venue statute" – Sections 10(e) and (f) – "often forces the agency to act *without knowing* which circuit court ultimately will review its actions." *Johnson v. United States R.R. Retirement Board*, 969 F.2d 1082, 1091 (D.C. Cir. 1992) (emphasis added). "It is thus apparent that we operate under a statute that simply does not contemplate that the law of a single circuit would exclusively apply in any given case." *Arvin Indus.*, 285 NLRB 753, 757 (1987).

Venue uncertainty means that, unlike a federal district court, the Board is always on notice that, adopting the views of one circuit is not a safe harbor since the Board must be prepared to defend its decision nationwide. This reality underscores the breadth of responsibility Congress placed on the Board to prevent unfair labor practices across the country despite a Circuit Court's different interpretation of the law.

LabCorp cites several District Court decisions for the proposition that courts will generally reject objections to the issuance of injunctive relief when the articulated harm to the government is delayed administrative proceedings. (Pl. Mem. at 15). However, those cases are distinguishable because they did not arise in the NLRA context where Congress has explicitly determined that delays in the representation process should be avoided because they "ultimately could frustrate employees' bargaining rights before the employees had an opportunity to exercise them." *Gold Coast Rest.,* 995 F.2d at 267 (citing *Boire*, 376 U.S. at 477-78); *see also Bishop,* 502 F.2d at 1027 ("The underlying purpose of the Act is to maintain industrial peace, and to

allow employers and unions to rush into federal district court at will to prevent or nullify certification elections would encourage dilatory tactics by dissatisfied parties and lead to industrial unrest")(internal citations omitted). Furthermore, two of the cases cited by LabCorp involved situations where the plaintiffs were seeking injunctive relief to prevent the government from selling unique and irreplaceable real property.[14] In those cases, there would have been no redress for the plaintiffs if their injunctions were denied and the property was sold – thus, irreparable injury was clearly established. Here, in contrast, LabCorp cannot show that it will suffer irreparable harm if the injunction is denied because, as explained above, the statutory Section 10(f) review scheme for final Board orders affords LabCorp with "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Myers*, 303 U.S. at 48. Because the Board faces a severe interference with its procedures and jurisdiction contrary to congressional purposes, while LabCorp faces only ordinary submission to the Board's representation process, requiring it merely to exhaust administrative remedies before obtaining appellate review, the balance of equities favors denial of injunctive relief.

Accordingly, this Court should find that the totality of the preliminary injunction factors weigh in favor of denying LabCorp's Motion for Temporary Restraining Order and Preliminary Injunction.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD TRANSFER THE CASE TO THE DISTRICT COURT OF NEW JERSEY PURSUANT TO 28 U.S.C. § 1404(A)

Alternatively, the Board requests that this Court, in its discretion, transfer venue of this action to the U.S. District Court for the District of New Jersey pursuant to 28 U.S.C. § 1404(a).

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[14] *See Nat'l Trust for Historic Preservation v. FDIC*, 1993 WL 328134 at *3 (D.D.C. May 7, 1993); *Monument Realty LLC v. Wash. Met. Area Transit. Auth.*, 540 F. Supp. 2d 66, 81 (D.D.C. 2008).

A. LEGAL STANDARDS TO TRANSFER VENUE PURSUANT SECTION 1404(A)

Section 1404(a) provides that: "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . ." 28 U.S.C. § 1404(a). In adjudicating a request to transfer under Section 1404(a), a court must make a "factually analytical, case-by-case determination of convenience and fairness." *SEC v. Savoy Indus*., 587 F.2d 1149, 1154 (D.C. Cir. 1978) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). *See also Moore's Federal Practice* - Civil §111.13[1][a] (3rd ed.) (a motion to transfer under Section 1404(a) "lies within the broad discretion of the district court" and "requires the court to make a 'flexible and individualized analysis,' and to 'weigh in the balance a number of case-specific factors' to determine whether the proposed transferee district would be a more convenient forum for the litigation") (citations omitted). Even where venue is proper, a district court has discretion to order a transfer. *See In re Scott*, 709 F.2d 717, 720 (D.C. Cir. 1983).

A district court should grant a motion to transfer where the movant has established the threshold requirement that the action could have been brought in the proposed transferee district and that the "balance of convenience of the parties and witnesses" and the "interests of justice" favor transfer. *See Lentz v. Eli Lilly and Co.*, 464 F. Supp.2d 35, 36 (D.D.C. 2006); *Thayer/Patricof Educ. Funding LLC v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002). In exercising its broad discretion, and as part of the balancing analysis, the court must weigh a number of "private and public-interest" factors. *Barham v. UBS Fin. Svcs.*, 496 F. Supp. 2d 174, 178 (D.D.C. 2007). The private interest factors include: (1) the plaintiff's choice of forum; (2) the defendant's preferred choice of forum; (3) where the claim arose; (4) convenience of the parties; (5) convenience of the witnesses, but only to the extent that witnesses may be

unavailable for trial in one of the fora; and (6) ease of access to sources of proof. The public interest factors include: (1) the transferee court's familiarity with the governing law; (2) the relative congestion of the courts of the transferor and potential transferee; and (3) the local interest in deciding local controversies at home. *Id*. *See also FTC v. Cephalon*, 551 F. Supp. 2d 21, 25 (D.D.C. 2008) (citations omitted).

In weighing whether the "interests of justice" favor transfer, courts consider whether the plaintiff has engaged in forum shopping. *See Turner & Newall, PLC v. Canadian Universal Ins. Co.,* 652 F. Supp. 1308, 1312 (D.D.C. 1987)(Section 1404(a) is designed to prevent forum shopping). This Court has recognized that because the transfer provisions were in part intended to prevent forum shopping, it is against the interest of justice "to encourage, or even allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents. . . ." *Schmid Labs., Inc. v. Hartford Accident and Indemnity Co.*, 654 F. Supp. 734, 737 (D.D.C. 1986).

B. THIS COURT, IN ITS DISCRETION, SHOULD TRANSFER THE CASE TO THE DISTRICT OF NEW JERSEY

The Court should find that all of the above factors weigh in favor of transfer to the District of New Jersey. There should be no dispute that the first requirement for a transfer is met here – that is, LabCorp's preliminary injunction action "might have been brought" in the District of New Jersey. Under Section 1391(b)(2), venue is appropriate in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). Venue would thus be appropriate in the District of New Jersey. Nearly all of the events giving rise to this action arose and will continue to take place in the District of New Jersey. *See Pacific Maritime Ass'n v. NLRB*, --F.Supp.2d --, 2012 WL 5866231 at *3 (Nov. 20, 2012)(transfer ordered

because action "might have been brought" in Oregon, where events underlying plaintiff's claim almost exclusively took place in Oregon). As the Board shows below, balancing the private and public interest factors and the interests of justice also make it clear that transfer is appropriate. *See SEC v. Ernst & Young*, 775 F. Supp. 411, 414 (D.D.C. 1991). Accordingly, the Court should find that the Board has satisfied its burden to show that the factors favor a transfer to the District of New Jersey.

1. Private Interest Factors Weigh In Favor of Transfer to the District of New Jersey

a. LabCorp's Choice of Forum Should Be Accorded Little Weight

While a plaintiff's choice of forum is ordinarily afforded deference by courts, it is afforded "substantially less deference" where that choice "has no meaningful ties to the controversy and no particular interest in the parties or subject matter." *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 128 (D.D.C. 2001); *Barham v. UBS Fin. Svcs.*, 496 F. Supp. at 178. Indeed, a defendant's burden in a motion to transfer "decreases when the plaintiff's choice of forum has no meaningful nexus to the controversy and the parties," *Greater Yellowstone*, 180 F. Supp. 2d at 128, or is not the plaintiff's home forum. *See Pacific Maritime Ass'n ,* 2012 WL 5866231 at *4.

In this case, because the facts underlying LabCorp's Complaint lack a substantial connection and any meaningful ties to this forum, LabCorp's choice of venue should not be afforded deference. LabCorp is a Delaware corporation, with a principal place of business in North Carolina. LabCorp's facilities which are the subject to the instant dispute, however, are all in New Jersey (*see* Comp. ¶ 18), and the conduct at issue (employees choosing whether to elect a union) and alleged impact to LabCorp's business, by its own declaration, are occurring in the eight counties in the Northern New Jersey area. (Starr Decl. ¶ 10). Of course, the proposed

bargaining unit of employees -- PSTs and patient center Site Coordinators -- work in the eight New Jersey counties (Starr Decl. Exh. 1). The union election petition was filed in the Board's Region 22 in Newark, New Jersey, and accordingly, the Board's administrative investigation of the election petition and pre-election hearing was conducted by Board agents in the Board's Newark Region, which is where the Regional Director issued the disputed Decision and Direction of Election ordering that an election take place.

Notwithstanding that all the events giving rise to the dispute occurred in New Jersey, LabCorp filed its Complaint in the District of Columbia, specifically relying on D.C. Circuit rulings in *Laurel Baye* and *Noel Canning* in support of its assertion that the Agency lacks authority to process representation cases without a lawful quorum. Indeed, LabCorp's D.C. forum choice and direct reliance on these rulings to obtain its desired relief demonstrates that LabCorp has chosen this Court for the purpose of forum shopping to the district where it believes it has advantageous precedent, given that there is *virtually no other connection* to the District of Columbia other than the fact that the Board's "principal office" is here. (Compl. ¶ 8). Considering this single connection, in comparison to the majority of ties to the District of New Jersey and the fact that the District of Columbia is not LabCorp's home forum, LabCorp's choice should be given little deference. *See Pacific Maritime Ass'n*, 2012 WL 5866231 at *4; *Schmid*, 654 F. Supp. at 737 ("While choice of an advantageous forum alone might not warrant a transfer, . . ., when [ ] forum shopping is considered with the other factors in this case, *i.e.,* the complete lack of nexus with the District of Columbia . . . , it is clear that [the] case should be transferred to that district.").

b. The Board's Preferred Choice of Forum, the District of New Jersey, Is the More Logical, Appropriate Forum and Transfer There Will Discourage An Onslaught of Forum Shoppers

As shown, the Board's choice of forum, the District of New Jersey, is the true locus of the dispute. If this case is not dismissed by this Court for lack of jurisdiction, the Board's preference to transfer this action to New Jersey is logical, given that the entire factfinding and administrative process underlying this dispute occurred in that district. Litigation in New Jersey is also practical, as it makes sense to entertain an action where the dispute is actually occurring. "Venue statutes serve the purpose of protecting a defendant from . . . having to defend an action . . . that is . . . remote [. . .] from where the acts underlying the controversy occurred.'" *Modaressi v. Vedadi*, 441 F. Supp.2d 51, 53 (D.D.C. 2006). Moreover, New Jersey is also the more appropriate forum to decide this case, considering that, as stated, LabCorp's choice of forum here strongly suggests a "forum shopping" motive in seeking to benefit from D.C. Circuit rulings on the validity of the recess appointments and authority of the Board to issue orders without a quorum.

Significantly, given the unsettled law or contrary precedents in other circuits on the recess issues, *see* n.12, *infra*, the Board is concerned that if LabCorp's Complaint is not dismissed or transferred, and thus remains in this Court for adjudication, other similarly-situated litigants around the country will choose this forum to seek to enjoin election proceedings pending before the Board, before the Supreme Court resolves the issues. Accordingly, the Board's choice of forum of New Jersey should be given greater weight.

c. The Claim Arose in the District of New Jersey and Relevant Events Will Continue to Occur There

Courts in this district have held that claims "arise" for purposes of Section 1404(a) where most of the significant events giving rise to the claims occurred. *See, e.g., Davis v. Am. Soc'y of Civil Eng'rs*, 290 F. Supp. 2d 116, 123 (D.D.C. 2003) (concluding that the case did not "arise" in D.C., where "only one of the many potential events giving rise to this action . . . occurred in the

District of Columbia"). When the material events that form the factual predicate of a plaintiff's claim did not occur in his chosen forum, transfer is favored. *Intrepid Potash–N.M., LLC v. U.S. Dep't of Interior,* 669 F.Supp.2d 88, 95 (D.D.C.2009).

Here, as shown above, nearly all events underlying LabCorp's claim arose in New Jersey. The dispute in this case arises out of the Union's filing of a petition in the Board's Newark, New Jersey Region seeking to become the exclusive collective bargaining agent of certain of LabCorp's employees working at multiple facilities in eight counties in Northern New Jersey (Complaint, para. 2). Moreover, the Newark, New Jersey Region is where Board agents investigated the petition and conducted a pre-election hearing, as well as where the Regional Director issued the disputed election decision. While the Board is headquartered in D.C., that is the only D.C. connection, and the Board members, to date, have taken no action with respect to the election case. Since all of the operative events took place in New Jersey, the third private interest factor weighs in favor of transfer.

d. Other Private Interest Factors Are Neutral or Tip in Favor of Transfer to the District of New Jersey.

The Board further submits that the next two considerations, convenience of the parties and convenience of the witnesses are not relevant here, and thus do not weigh in favor of either party. The parties can file pleadings electronically in either forum. With respect to the convenience of the witnesses, the relevant inquiry is "not whether witnesses are located outside the forum of the plaintiff's choice, but whether they would be unwilling to testify in that forum." *Cephalon*, 551 F. Supp. 2d at 28. The Board submits that this case involves only a legal issue and would not require the testimony of witnesses.

The final private interest factor—ease of access to the sources of proof is also neutral, or if anything, weighs in favor of transfer. The documentary evidence in this case is in electronic

form and available to anyone with authority to access it and an internet connection. Indeed, this Court has acknowledged the fact that the location of documents is "increasingly irrelevant in the age of electronic discovery." *Fanning v. Capco Contractors, Inc*., 711 F. Supp. 2d 65, 70 (D.D.C. 2010). However, should the need arise to refer to original documents or evidence regarding the dispute, the District of New Jersey would be more convenient because such material would be located the Region's office in New Jersey.

2. Public Interest Factors Weigh Strongly In Favor of District of New Jersey

The first public interest factor – the local interest in deciding local controversies at home – weighs heavily in favor of transfer. The District of New Jersey has a compelling interest in having local disputes "resolved in the locale where they arise." *Trout Unlimited v. Dep't of Agric*., 944 F. Supp. 13, 19 (D.D.C. 1996); *see also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) ("[t]here is a local interest in having localized controversies decided at home"). As the Board has established, all of the operative events have thus far occurred in the District of New Jersey. As the LabCorp centers involved in this dispute are scattered throughout eight counties in Northern New Jersey, the impact and immediate effects of any decision in this case will be felt in that region. The administrative representation case is being handled by agents in the Board's Newark Region, and the election, once scheduled, will take place by ballots mailed to that Region. The only tie to D.C. is that the Board members are headquartered here, and no action has yet been taken by them in this case. Based on these facts, this Court should find that transfer is supported by a local interest in having this matter resolved in the District of New Jersey.

The relative congestion of the transferee and transferor courts also favors transfer. In 2012, the median time from filing to disposition of actions in this District was 9.2 months, while in the District of New Jersey, the median time from filing to disposition was 6 months. *See*

http://www.uscourts.gov/uscourts/Statistics/FederalCourtManagementStatistics/2012/district-fcms-profiles-september-2012.pdf#page=15 (last visited March 15, 2013). In Board representation cases, any delay in holding an election which denies employees their ability to exercise their statutory right to choose a bargaining representative is detrimental, and is what the NLRA was designed to avoid. *See* Section I, at 9-10. Thus, to the extent this case may hold up the processing of the representation case, the fact that this case may be resolved more quickly in the District of New Jersey favors transfer. The final factor—the courts' familiarity with the governing laws—has little bearing here. This action involves LabCorp's claims of being subjected to *ultra vires* agency action that violates the NLRA and the Constitution (Compl. at 1), claims grounded in federal law. The District of New Jersey has already demonstrated that it is just as competent as this Court in addressing claims against the Board, pursuant to *Leedom v. Kyne*, arising out of the Board's processing of representation cases. *See, e.g., Harper v. NLRB*, 807 F.Supp.359, 362 (D.N.J. 1992)(court dismissed for lack of jurisdiction complaint challenging Board's certification of a bargaining unit of "casual employees," noting that *Leedom v. Kyne* exception could not be met).

3. The Court Should Transfer This Case "In the Interests of Justice"

The final factor of Section 1404(a), "the interests of justice," weighs in favor of transfer, in light of plaintiff's forum shopping in this Court. *See Onyeneho v. Allstate Ins. Co*., 466 F. Supp.2d 1, 5 (D.D.C. 2006) ("To the extent that plaintiffs are engaging in forum shopping, it weighs in favor of transfer to a more appropriate forum."); *Turner & Newall, PLC, Inc. v. Canadian Universal Ins. Co.,* 652 F. Supp. at 1312 (court considered "whether transfer is warranted in the interests of justice because [plaintiffs] engaged in forum shopping" "simply to benefit from this Circuit's ruling,"); *Schmid*, 654 F. Supp. at 736 (transferring case in the interests of justice, where court found that plaintiff's forum shopping, when considered with

other factors in favor of transfer such as a complete lack of nexus with the District of Columbia, was sufficient to deny plaintiff's chosen forum).

As noted, given the current state of the law on the Board's authority in the D.C. Circuit, and the fact that it is unsettled among other circuits, it is hard to detect any valid reason for LabCorp to file its Complaint in this Court other than to benefit from the D.C. Circuit's rulings. *Turner & Newall*, 652 F. Supp. at 1312; *Schmid*, 654 at 737. In *Turner & Newall*, this Court had before it defendants who claimed that plaintiffs had chosen D.C. "simply to take advantage of an unusually helpful precedent." 652 F. Supp. at 1309. The plaintiffs' response, in part, that forum shopping was "not inherently evil," was rejected by this Court:

> [T]he transfer provisions in the U.S. Code, . . ., were in part intended to prevent forum shopping. This Court cannot find that it is in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents*, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case*. (emphasis supplied).

Turner & Newall, 652 F. Supp. at 1312 (citing *Schmid*, 654 F. Supp. at 737). Similarly, the Court in *Schmid* concluded that transfer was appropriate, rejecting the plaintiff's argument that "the general presumption favoring the plaintiff's choice of forum is not negated simply because it filed in D.C. to take advantage of favorable precedent." 654 F.Supp. at 737. This Court should similarly not condone LabCorp's deliberate selection of this forum to obtain a perceived benefit of the application of *Noel Canning* and *Laurel Baye*. *See also Onyeneho v. Allstate Ins. Co*., 466 F. Supp.2d at 5 (transfer granted, where court was "indeed concerned about the possibility of forum shopping here" based on the argument that plaintiffs chose this forum "simply to avoid disadvantageous precedent in the Fourth Circuit").

In sum, after weighing all the private and public interest factors for and against transfer, the Court should conclude that the Board has established that any presumption in favor of this

forum is substantially outweighed by the greater interests of fairness and justice that would be served by transferring this case to the District of New Jersey.

CONCLUSION

For all of these reasons, this Court lacks subject matter jurisdiction and injunctive relief is unwarranted. Accordingly, the Court should deny the motion for temporary restraining order and preliminary injunction and should dismiss the action in its entirety with prejudice for lack of subject matter jurisdiction. In the alternative, the Court should transfer this case to the District of New Jersey.

Respectfully submitted,

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