Proof Brief Oral Argument Not Yet Scheduled

Nos. 20-5223 & 20-5226

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Appellant/Cross-Appellee

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Appellee/Cross-Appellant

ON CROSS-APPEALS FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS v. NATONAL LABOR RELATIONS BOARD, No. 20-cv-00675 (KBJ)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board, *et al.* ("the Board or NLRB"), hereby submits this Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

The parties to the district court case on review, and instant cross-appeals in this Court, are the National Labor Relations Board ("NLRB") and American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO").

B. Rulings Under Review

The NLRB is appealing Judge Jackson's ruling in *AFL-CIO v. NLRB*, No. 20-cv-0675, 2020 WL 3041384 (D.D.C. June 7, 2020); and AFL-CIO is appealing Judge Jackson's ruling in *AFL-CIO v. NLRB*, No. 20-cv-0675, 2020 WL 3605656 (D.D.C. July 1, 2020), along with that portion of Judge Jackson's June 7, 2020 ruling holding that the challenged parts of the NLRB's 2019 Amendment were severable.

C. Related Case

There is currently a civil action pending in the United States District Court for the District of Columbia before Judge Beryl Howell,

in which the NLRB moved the court to transfer the case to this Court because the District Court lacks subject matter jurisdiction to hear the matter. *AFL-CIO v. NLRB*, No. 20-cv-01909 (D.D.C. filed July 15, 2020). On October 23, 2020, Judge Howell issued a Minute Order staying that case, pending resolution of the instant cross-appeals.

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GLOSSARY

2014 Rule—the National Labor Relations Board's 2014 election procedure rule changes, identified at 79 Fed. Reg. 74,308 (Dec. 15, 2014)

2019 Amendment—the National Labor Relations Board's 2019 election procedure rule changes, identified at 84 Fed. Reg. 69,524 (Dec. 18, 2019)

AFL-CIO–American Federation of Labor-Congress of Industrial Organizations

APA–Administrative Procedure Act

Board–the presidentially-appointed, decision-making body of the agency

DDE–Decision and direction of election

FCC—Federal Communications Commission

FAA—Federal Aviation Administration

FOIA—Freedom of Information Act

NLRA–National Labor Relations Act

NLRB–National Labor Relations Board as an agency

NRC—Nuclear Regulatory Commission

ULP—Unfair labor practice

USDA—United States Department of Agriculture

JURISDICTION

Appellee/Cross-Appellant American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") asserts that the district court had jurisdiction of this case under 28 U.S.C. § 1331 and 5 U.S.C. § 702. Appellant/Cross-Appellee National Labor Relations Board (the "NLRB" or the "Board") takes the position that 29 U.S.C. § 160(f) vests exclusive original jurisdiction of petitions to review NLRB rulemakings in the Circuit Courts of Appeals.

On June 7, and July 1, 2020,[1] the district court denied the NLRB's motion to transfer the case for want of subject-matter jurisdiction and granted in part and denied in part AFL-CIO's and the Board's motions for summary judgment. The Board's timely appeal, filed on July 16, and AFL-CIO's timely cross-appeal, filed on July 23, were docketed and consolidated. These appeals arise from final orders of the lower court which disposed of all parties' claims. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

[1] All dates hereafter refer to 2020, unless otherwise noted.

STATEMENT OF THE ISSUES

1. Section 10(f) of the National Labor Relations Act ("NLRA") grants Circuit Courts of Appeals exclusive jurisdiction over petitions to review final orders of the Board and sets forth the permissible venues for such petitions. The district court nevertheless denied the Board's motion to transfer this case to this Court and decided the merits of the case. Should the district court have found that the Circuit Courts of Appeal have jurisdiction over such challenges?

2. The district court held that five challenged provisions of the Board's election procedure rulemaking did not qualify as rules of "agency organization, procedure, or practice," exempt from the requirement to give prior notice and an opportunity for public comment under Section 553(b) of the Administrative Procedure Act (APA). Did the district court err in its interpretation of the APA's procedural exception?

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

Congress granted the Board broad jurisdiction over two central areas in labor relations: the resolution of questions of union representation, and the prevention of unfair labor practices.[2] In 2019, the Board amended its procedures for handling representation cases as a final rule without issuing a notice of proposed rulemaking. [3]

Challenges to the Board's rulemaking authority should be initially heard before Circuit Courts of Appeal, not district courts, because the NLRA's capacious direct-review provision is ambiguous as to whether it includes rulemaking. And the five provisions challenged as being substantive do not require notice and comment: these are limited to issues of election procedures, do not change the substantive standards for resolving issues of union representation, and cannot otherwise be understood to encode any substantive value judgments.

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[2] 29 U.S.C. §§ 159–160.

[3] *Representation-Case Procedures* [hereafter 2019 Amendment or Amendment]. 84 Fed. Reg. 69,524, at 69,528 (Dec. 18, 2019) (citing to *Representation-Case Procedures* [hereafter 2014 Rule], 79 Fed. Reg. 74308, at 74,311 (Dec. 15, 2014)).

I. Relevant History and Facts

A. Statutory Provisions and Election Processes

Section 7 of the NLRA grants employees the right "to bargain collectively through representatives of their own choosing . . . and to . . . refrain from . . . such activit[y]."[4] Section 9 of the NLRA, in turn, effectuates these rights by giving the Board authority to conduct secret ballot elections to determine whether employees wish to be represented by a union.[5]

Section 9, however, sets forth only the basic steps for resolving questions of representation. Congress recognized that the Board would need to implement rules in order to carry out its broad statutory mandate and explicitly granted the Board rulemaking authority in Section 6 of the NLRA.[6] In addition, Section 9(c) grants the Board specific authority to prescribe rules for processing representation petitions.[7] In exercising this authority, the Board has amended its

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[4] 29 U.S.C. § 157.

[5] 29 U.S.C. § 159.

[6] 29 U.S.C. § 156 (Board has "authority [. . .] to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of the [NLRA].").

[7] 29 U.S.C. § 159(c).

representation case procedures more than three dozen times without notice and comment.[8]

Representation cases proceed in four stages: petition, pre-election/hearing (or election agreement), election, and certification/post-election.[9] First, a petition is filed with the Board by an employee, a labor organization, or an employer "in accordance with such regulations" as the Board may prescribe.[10] The petition asks for an election among a specific group, or "unit," of employees,[11] and the parties then must submit Statements of Position regarding any disputed issues.[12]

Second, at the pre-election/hearing stage, representation cases can take one of two paths. In the vast majority of cases, parties reach election agreements, which resolve potentially disputed terms, such as the date of the election and who is in the bargaining unit, prior to an

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[8] 84 Fed. Reg. at 69,528 (citing 79 Fed. Reg. at 74,311).

[9] 84 Fed. Reg. at 69,524.

[10] 29 U.S.C. § 159(c)(1); 84 Fed. Reg. at 69,524.

[11] BRENT GARREN, ET AL., HOW TO TAKE A CASE BEFORE THE NLRB 5-3 (9th ed. 2016) [hereafter HOW TO TAKE A CASE].

[12] 29 C.F.R. § 102.63(b)(1) (2019).

election.[13] If the parties cannot resolve their disputes, a hearing is held to determine whether a question concerning representation exists.[14] After this hearing, the Regional Director will then issue either a decision dismissing the petition, or a decision and direction of election ("DDE") specifying the election date and a description of the voting unit.[15] Either party may file with the Board a request for review of either decision.[16] Shortly after an election agreement is signed or a DDE issues, an employer is required to provide the union with a voter list, including personal contact information for all potentially eligible voters.

Third, at the election stage, eligible employees may vote for or against union representation in a secret ballot election. The parties, as well as the Board agent, may challenge voters during the election. After the election, the parties and Board agent attempt to resolve the challenges. Thereafter, unresolved challenged ballots will be set aside

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[13] *See* 84 Fed. Reg. at 69,528, n.16 (in fiscal year 2019, 91.3% of elections were by agreement).

[14] 29 U.S.C. § 159(c)(1), (4).

[15] *See* HOW TO TAKE A CASE at 5-38.

[16] 29 C.F.R. § 102.67 (2019).

and, in most circumstances, the remaining ballots will be tallied. The validity of challenged ballots is litigated only if they are outcome-determinative.[17]

Fourth, in the post-election/certification stage, either party may file objections to the opposing party's conduct. These "objections" are investigated by the Regional Director, who may direct an administrative hearing.[18] The initial election process is complete when the Board, or its Regional Director by delegation, issues a certification of representative or results. A valid certification cannot issue until the Board or its Regional Director has determined that the results of the election are accurate, not subject to valid objections, and do not hinge upon disputed ballots.[19]

B. The Board's 2019 Amendment Process

The Board's 2019 rulemaking is best understood in the context of its 2014 change to its election procedures. The 2014 Rule made twenty-

[17] 29 C.F.R. § 102.69(b) (2019) (challenges will not be litigated "if the challenged ballots are insufficient in number to affect the results of the election . . . .").

[18] 29 C.F.R. § 102.69(c)(1)(i) (2019).

[19] *See generally* 29 C.F.R. § 102.69 (2019).

five amendments to the then-existing rules, including imposing new procedural requirements on the parties, limiting the scope of pre-election hearings, and shortening certain timelines, such as the period between DDEs and elections.[20] That rule was upheld in full in two separate challenges.[21]

The Board undertook a considered process in promulgating the 2019 Amendment. The Board sought to address certain problems it identified with the 2014 Rule through its independent review, as well as those brought to its attention by stakeholders in the almost five years since the 2014 Rule's changes were implemented.[22]

The 2019 Amendment made fifteen changes to existing procedures,[23] which the Board determined would further the interests of efficiency, uniformity, transparency, finality, and the reduction of

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[20] 79 Fed. Reg. at 74,309–10.

[21] *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015); *Associated Builders & Contractors of Tex., Inc. v. NLRB*, 15-cv-26, 2015 WL 3609116 (W.D. Tex. June 1, 2015), *aff'd*, 826 F.3d 215 (5th Cir. 2016).

[22] 84 Fed. Reg. at 69,524. In 2017, the Board gathered information about how the 2014 Rule had been working by issuing a Request for Information. Representation-Case Procedures, 82 Fed. Reg. at 58,783 (Dec. 14, 2017); *see* 84 Fed. Reg. at 69,528.

[23] These changes are summarized at 84 Fed. Reg. at 69,524–26.

litigation.[24] The Board's 2019 Amendment was intended to modify its representation case procedures to, among other things, permit parties additional time to comply with pre-election requirements, and to resolve certain unit scope and voter eligibility issues prior to an election.[25] These provisions apply equally to initial organizing cases (when a union files a petition seeking to represent nonunion employees) and to decertification cases (when employees file a petition seeking to rid themselves of an unwanted incumbent union).

C. The Five Provisions of the Board's 2019 Amendment Challenged as Being Substantive

The lower court set aside five challenged provisions:

1. **Scope of issues litigated at pre-election hearings:** Amended Section 102.64(a) states that questions of individual eligibility and unit-inclusion are to be litigated at the pre-election hearing and would require Regional Directors to decide such questions prior to an election.

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[24] *Id.* at 69,526.

[25] The Board's 2019 Amendment largely represented a return to the practices in place prior to the changes made by the 2014 Rule. *Id.* at 69,527–28. The procedures in place prior to the 2014 Rule had been adopted without notice and comment. *Id.* at 69,528 (citing 79 Fed. Reg. at 74,310–11).

Under the portion of the 2014 Rule currently in effect, Section 102.64(a) reads, "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted."[26]

2. **Scheduling of election following DDE:** Amended Section 102.67(b) would require Regional Directors to schedule an election not earlier than twenty business days following the DDE. Under the 2014 Rule, Section 102.67(b) reads, "The [Regional Director] shall schedule the election for the earliest date practicable consistent with these rules."[27]

3. **Timing of voter list:** Amended Section 102.67(l) would require the voter list to be provided to the petitioner within five business days of the DDE, an extension of three business days from the 2014 Rule.[28]

4. **Timeline for issuance of certifications:** Amended Section 102.69 would provide that Regional Directors issue election certifications only after a request for review has been decided by the Board or after the

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[26] 29 C.F.R. § 102.64(a) (2019).

[27] 29 C.F.R. § 102.67(b) (2019).

[28] 29 C.F.R. § 102.67(l) (2019).

time for filing a request for review has passed. The 2014 Rule currently in effect requires Regional Directors to certify election results, despite the pendency or possibility of a request for review.[29]

5. **Election observer eligibility:** Amended Section 102.69(a)(5) would provide that whenever possible, a party will select as its election observer a current member of the voting unit, or, if a voting unit member cannot be found, a current nonsupervisory employee. The current regulation states that "any party may be represented by observers of its own selection," and case law qualifies this right.[30]

II. Procedural History

On March 6, the AFL-CIO filed suit in the District Court for the District of Columbia alleging that the 2019 Amendment was unlawful under the APA,[31] and the NLRA.[32] AFL-CIO's complaint consisted of four counts: five provisions of the 2019 Amendment were substantive, rather than procedural, and therefore subject to notice-and-comment

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[29] 29 C.F.R. § 102.69(b)(2) (2019).

[30] 29 C.F.R. § 102.69(a)(5) (2019); *see* 84 Fed. Reg. at 69,551 & nn. 106–19.

[31] 5 U.S.C. §§ 551–559, 701–706.

[32] 29 U.S.C. §§ 151–169.

rulemaking (Count One); the Amendment was arbitrary and capricious as a whole (Count Two); six provisions, including the five challenged as substantive, were individually arbitrary and capricious (Count Three);[33] and certain portions of the 2019 Amendment improperly conflicted with Section 3(b) of the NLRB (Count Four).[34] The Board first filed a motion to transfer for want of subject-matter jurisdiction, alleging the case should be before the D.C. Circuit. The parties then filed cross-motions for summary judgment.

The district court issued its initial order on May 30,[35] and an opinion explaining this order on June 7.[36] The court found that it had jurisdiction, awarded summary judgment in favor of AFL-CIO on Count One, found that the Amendment's remaining portions were severable, and declined to rule on Counts Two through Four. After AFL-CIO filed

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[33] AFL-CIO challenged the Board's proposed impoundment provision (Amended Section 102.67(c)) as being arbitrary and capricious but did not allege that this provision fell outside the procedural exception. This provision provides for automatic impoundment of ballots when a request for review is filed within 10 business days of a DDE.

[34] 29 U.S.C. § 153(b).

[35] *AFL-CIO v. NLRB,* 20-cv-0675, Order Dated May 30, 2020 (D.D.C. May 30, 2020) [ECF Doc. # 34].

[36] *AFL-CIO v. NLRB (AFL-CIO I),* 20-cv-0675, 2020 WL 3041384 (D.D.C. June 7, 2020).

a motion for reconsideration, the district court issued its supplemental opinion on July 1, addressing the remaining counts.[37] In its second opinion, the court ruled in favor of the Board, finding that the Board's rulemaking was not arbitrary and capricious either as a whole or with respect to the surviving impoundment provision, and that the impoundment provision did not conflict with the NLRA.

The Board filed a notice of appeal of the district court's June 7 opinion, and AFL-CIO filed a cross-appeal, contesting the lower court's July 1 opinion, and its June 7 severability finding.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's denial of the Board's motion to transfer and hold that Circuit Courts of Appeals have jurisdiction over challenges to the Board's 2019 election rulemaking. Where a statute, like Section 10(f) of the NLRA, gives direct review jurisdiction of agency action to the courts of appeals, that statute covers *all* agency action, absent compelling evidence of contrary congressional intent. Here, Section 10(f) requires only a "final order of the Board

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[37] *AFL-CIO v. NLRB (AFL-CIO II)*, 20-cv-0675, 2020 WL 3605656 (D.D.C. July 1, 2020).

granting or denying the relief sought" to create circuit-court jurisdiction. The district court nevertheless found that it had jurisdiction by drawing inferences from Section 10(f)'s venue provision and its placement in Section 10 of the NLRA, which primarily deals with unfair labor practice cases. But when read in light of the NLRA as a whole, as it must be, Section 10(f) shows no clear congressional intent to bifurcate judicial review of final Board orders based upon whether the action in question is a rule or a case decision. This case should accordingly be converted into a petition for direct review.

Turning from jurisdiction to substance, each of the challenged provisions fall within the procedural exception of the APA's notice and comment requirement. In determining the scope of this exception, this Court primarily considers whether the changes serve as a vehicle for imposing a substantive value judgment as it relates to agency policy or foreclose fair consideration of issues coming before the agency. The lower court largely ignored these standards in considering the challenged provisions: rather, it subjected them to a long-rejected version of the "substantial impact" test, adopted a virtually irrebuttable presumption in favor of notice and comment unmoored from the APA

and caselaw, and improperly limited the procedural exception to rules focused solely on internal agency conduct. Applying the standards actually utilized by this Court, the five challenged provisions fall within this exception. As such, AFL-CIO's petition for review should be denied, or (if this case is not converted to a direct-review petition) the decision of the district court should be reversed.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's grant of summary judgment, determinations on subject matter jurisdiction, and agency action under the APA.[38]

ARGUMENT

I. This Court has original, not appellate, jurisdiction over this matter based on the text of the NLRA, congressional intent, and binding precedent in this Circuit.

A. A live controversy exists as to whether this Court's jurisdiction over the 2019 Amendment is original or appellate.

Before this Court can decide whether this action should have been brought as a petition for review, it must satisfy itself that the issue is

[38] *Cigar Ass'n of America v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020); *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 385 (D.C. Cir. 2018).

not moot, i.e. whether "one or both of the parties plainly lack a continuing interest."[39]

This issue is not moot, even though a finding in the Board's favor would permit this Court to exercise original jurisdiction,[40] because finding it moot would render the issue capable of repetition yet evading review. That exception applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again."[41] The first prong is true by definition here—if an appeal to a circuit court could moot any question of whether that court properly had direct-review jurisdiction, any district court decision to usurp that circuit court's jurisdiction over agency action would evade appellate scrutiny.

Moreover, a second case between the same parties and raising the same issue is already pending in the district court, and Chief Judge Beryl A. Howell has now stayed that proceeding, pending the outcome

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[39] *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 192 (2000).

[40] *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75 (1803).

[41] *Weinstein v. Bradford*, 423 U. S. 147, 149 (1975) (per curiam).

of the instant appeal as to where the locus of subject-matter jurisdiction lies.[42] Any future suit over NLRB rulemakings will confront the same jurisdictional confusion. And as we explain more fully below, the NLRB has a powerful institutional interest in ensuring that the forums preferred by Congress for the review of labor issues—the courts of appeals, not the district courts—exercise original jurisdiction over judicial review of its actions. This question needs to be settled, one way or the other.

B. This Court holds that, absent a firm indication to the contrary from Congress, ambiguities in direct-review statutes are resolved in favor of circuit court review.

In this Circuit, "the normal default rule is that persons seeking review of agency action go first to the district court rather than to a court of appeals."[43] But direct review by the relevant circuit court is proper when "a direct-review statute specifically gives the court of appeals subject matter jurisdiction to directly review agency action."[44]

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[42] *AFL-CIO v. NLRB*, No. 20-cv-1909, Minute Order dated Oct. 23, 2020 (D.D.C.).

[43] *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (quoting *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012)).

[44] *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007).

Importantly, as this Court held in *National Automobile Dealers Association v. FTC*, where the application of a direct-review statute to a particular agency action is ambiguous, direct review in the circuit courts is appropriate absent a "firm indication" that Congress intended otherwise.[45] The First Circuit put it even more pointedly in *Citizens Awareness Network, Inc. v. United States*, instructing that "jurisdictional statutes should be construed so that agency actions will always be subject to initial review in the same court, regardless of the procedural package in which they are wrapped."[46] As we show below, the situation discussed in those cases is the situation here—the NLRA contains an ambiguous direct-review provision that neither clearly covers, nor clearly excludes, direct review of rulemakings, and there is no extrinsic evidence that Congress opposed such direct review.

Settled law establishes that the term "order" within a judicial review provision encompasses rulemaking.[47] "A court of appeals [may]

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[45] 670 F.3d 268, 270 (D.C. Cir. 2012) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)).

[46] 391 F.3d 338, 347 (1st Cir. 2004).

[47] *Investment Co. Inst. v. Bd. of Gov. of the Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977).

exercise statutory jurisdiction in a pre-enforcement review of rules where the statutory language refers only to orders."[48] Circuit courts have thus exercised direct review of agency rules promulgated under multiple other statutes that contained direct appellate review authority similar to the NLRA.[49]

Three seminal cases—*Investment Company*, *Lorion* and *NYRSC II*—illustrate the evolution of precedent on these issues. In *Investment Company*, this Court found that it had direct review jurisdiction over certain Federal Reserve regulations. The Court found that any

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[48] *See* 33 CHARLES A. WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE § 8299 (3d. ed. 2006) (internal quotation omitted), and cases cited there.

[49] *N.Y. Republican State Comm. v. Sec. & Exch. Comm'n (NYRSC I)*, 70 F. Supp. 3d 362, 370–71 (D.D.C. 2014), *aff'd*, 799 F.3d 1126, 1129–30 (D.C. Cir. 2015) (*NYRSC II*) (Investment Advisers Act of 1940); *see also Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep't of Energy*, 764 F.2d 896, 903 & n.37 (D.C. Cir. 1985) (Waste Act of 1982); *City of Rochester v. Bond*, 603 F.2d 927, 932–35 (D.C. Cir. 1979) (Federal Aviation Act and Communications Act of 1934); *Citizens Awareness Network, Inc.*, 391 F.3d at 347 (Atomic Energy Act); *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1526–28 (10th Cir. 1993) (Federal Aviation Act); *Nw. Airlines, Inc .v. Goldschmidt*, 645 F.2d 1309, 1314 (8th Cir. 1981) (following *Investment Company*); *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 312–14 (7th Cir. 1980) (relying extensively on *Investment Company* to review regulation promulgated under the Federal Aviation Act).

distinction between "orders" and rulemaking with regard to jurisdiction lacked significance given Supreme Court precedent finding that an FCC rulemaking was properly brought in circuit court under a similar direct-review provision.[50] This Court also identified several key policy considerations militating in favor of direct review: the lack of any need (absent extraordinary circumstances) for factfinding in the district court, "unnecessary delay and expense," and "undesirable bifurcation of the reviewing function between the district courts and the courts of appeals."[51] It accordingly found that "the purposes underlying [the direct-review provision] will best be served if 'order' is interpreted to mean any agency action capable of review on the basis of the administrative record."[52]

Lorion expanded upon *Investment Company* by establishing, in the context of adjudication, a clear presumption against reading a direct-review provision to create a scheme of bifurcated judicial review. The applicable direct-review provision provided for circuit court review

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[50] 551 F.2d at 1276 (citing *United States v. Storer*, 351 U.S. 192 (1956)).
[51] *See id.*, and scholarship cited.
[52] *Id.* at 1278.

of orders in a "proceeding for the granting, suspending, revoking, or amending of any license" by the NRC.[53] An individual filed a petition for review of a refusal to institute such a proceeding. A panel of this Court reasoned that since the NRC had not actually initiated such a proceeding and the petitioner had no right to have such a proceeding initiated, the matter fell outside of its jurisdiction.[54]

The Supreme Court reversed, finding that although the statute could be read to foreclose appellate jurisdiction in cases decided without a hearing, it could also be read to create such jurisdiction independent of a hearing.[55] In resolving this ambiguity in favor of appellate review, the high Court emphasized that the broad phrasing in the statute best reflected Congress's judgment to place such disputes in the courts of appeals.[56] Wholeheartedly endorsing this Court's reasoning in *Investment Company* as to why direct-review statutes should be broadly construed, the Supreme Court noted the absence of any role for the court's factfinding function—since, if the administrative record is

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[53] 470 U.S. at 733.

[54] *Id.*

[55] *Id.* at 736.

[56] *Id.* at 740.

inadequate, the appropriate course is to remand the case, not redecide it on the basis of proceedings in district court.[57] This constellation of considerations led the Court to pronounce that "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."[58]

NYRSC II, this Court's most recent extensive analysis of this issue, combined the policy considerations favoring circuit court review of rulemaking discussed in *Investment Company* with the *Lorion* presumption. The Investment Advisers Act of 1940 provided for judicial review of any "order" issued by the SEC pursuant to that Act; *NYRSC II* held that the *Investment Company* presumption attached to that provision and dictated judicial review of a rulemaking in the court of appeals, noting that "[t]he [*Lorion*] Court has tacitly approved of the practical course we charted in *Investment Company*."[59]

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[57] *Id.* at 744.

[58] *Id.* at 745.

[59] 799 F.3d at 1133.

Thus, in this Circuit, it is "blackletter administrative law" that "absent contrary congressional intent, a statutory provision creating a right of direct judicial review in the court of appeals of an administrative 'order' authorizes such review of any agency action that is otherwise susceptible of review on the basis of the administrative record alone."[60]

C. The NLRA's judicial-review provision is ambiguous as to whether it covers final orders relating to rulemaking.

Since its enactment in 1935, the NLRA has given the courts of appeals exclusive jurisdiction to review final Board orders. Section 10(f) of the NLRA reads, in relevant part: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia[.]"[61]

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[60] *Id.*; *see also Nat'l Fed. of the Blind v. Dep't of Trans.*, 827 F.3d 51, 55 (D.C. Cir. 2016).

[61] 29 U.S.C. § 160(f).

The NLRA does not specify whether this direct review authority extends to agency rulemakings. Section 6 of the NLRA, which outlines the Board's rulemaking power, provides no guidance as to the locus for jurisdiction of judicial review.[62] For the most part, however, the requirements of Section 10(f) are straightforwardly met here. The order at issue here is a "final order of the Board"; it represents the culmination of the Board's decision-making process, and legal consequences flow from it.[63] And although AFL-CIO contested below whether the 2019 Amendment granted or denied any "relief" sought,[64]

[62] 29 U.S.C. § 156 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of [the NLRA]").

[63] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). AFL-CIO does not contest the finality of the Board's order, and with good reason—if the Board's order were not final, AFL-CIO would have no cause of action to vacate it under either Section 10(f) *or* the APA. *See* 5 U.S.C. § 704 (similarly limiting the APA's cause of action to "final agency action for which there is no other adequate remedy in a court").

[64] *AFL-CIO v. NLRB,* 20-cv-675, Plaintiff AFL-CIO's Response in Opposition to Motion to Transfer to the D.C. Circuit, at *4, dated Apr. 8, 2020 [ECF Doc. # 20].

that term has a surpassingly broad sweep in administrative law.[65] The 2019 Amendment—which created numerous exceptions and flexibilities with respect to rules and deadlines that the present Board deemed unnecessarily rote or harsh[66]—constituted "relief" which falls well within that broad definition.

The remaining question is whether the 2019 Amendment can be characterized as an "order." But the NLRA does not otherwise define or address the term "order" as used in Section 10(f), nor does its legislative history speak to the matter.[67] And there is no dispute that this case can

[65] "Relief" under the APA, as under common usage both prior to and since the NLRA's passage, includes "the whole or a part of an agency—(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person[.]" 5 U.S.C. § 551(11). *Accord Relief*, NEW WEBSTERIAN 1912 DICTIONARY ILLUSTRATED 690 (1912) (*inter alia*, "release from some post of duty" or "redress"); *Relief*, OXFORD ENGLISH DICTIONARY (3RD ED. 2009) (*inter alia*, "formal release, esp. in law, from some hardship, burden, or grievance" or "legal remedy or redress").

[66] *Representation-Case Procedures*, 84 Fed. Reg. at 69,527–28.

[67] *See*, *e.g.*, S. REP. NO. 74-573 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2305 (1949); H.R. REP. NO. 74-972 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 2956, 2960 (1949) (same).

be, and in the district court was, reviewed solely by reference to the administrative record.[68] Under *Investment Company*, therefore, the ambiguous term "order" in Section 10(f) of the NLRA should be construed to require direct review of NLRB rulemakings in a circuit court.

D. The NLRA's statutory context, legislative history, and interpreting caselaw do not eliminate Section 10(f)'s ambiguity.

The district court nevertheless denied the Board's motion to transfer this case for want of jurisdiction.[69] Judge Jackson did not disagree with the binding *Investment Company* line of case precedent cited above. Instead, as explained below, she found it inapposite because, in her view, Section 10(f) unambiguously limits its applicability to cases "that pertain[] to unfair labor practices as opposed to any other topic that the agency might have acted to address."[70]

First, the district court stated that Section 10(f) specifically and narrowly limited direct review to unfair labor practice ("ULP") cases. The venue provision of Section 10(f) makes reference to the "unfair

[68] *NYRSC II*, 799 F.3d at 1131.

[69] AFL-CIO v. NLRB (*AFL-CIO I*), No. 20-cv-0675, 2020 WL 3041384 (D.D.C. June 7, 2020).

[70] *Id.* at *11.

labor practice in question," and the decision below found that this provision strongly suggests Section 10(f) can only be triggered when "some kind of unfair labor practice is at issue."[71] Second, the court found that Section 10(f)'s placement within a provision of the NLRA entitled "Prevention of Unfair Labor Practices" indicates that the Section relates solely to ULP cases.[72] And third, the court relied upon inapplicable dicta from the Supreme Court's decision in *American Federation of Labor v. NLRB (AFL)*, 308 U.S. 401, 409 (1940).[73] As we will show below, the district court's decision is fundamentally inconsistent with the NLRA's structure.

1. Section 10(f) of the NLRA references unfair labor practices only as a possible basis for venue, not as a jurisdictional prerequisite.

In finding that Section 10(f) applies only to unfair labor practice cases,[74] the district court improperly conflated subject-matter jurisdiction with venue. The jurisdictional trigger phrase used by the NLRA is "a final order of the Board granting or denying in whole or in

[71] *Id.* at *9.

[72] *Id.* at *10–11.

[73] *Id.* at *9–10.

[74] *Id.* at *9–10.

part the relief sought[.]" And the class of persons who "may obtain a review of such order" is any "person aggrieved" by such an order.[75] There simply is no other requirement to invoke federal court jurisdiction. "Judicial decisions have made clear that all intermediate federal courts have jurisdiction to review and enforce orders of the NLRB and that 29 U.S.C. §§ 160(e), (f), in designating particular forums for given cases, are concerned only with venue." *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 998 n.12 (D.C. Cir. 1972).

As *Wilder Mfg.* notes, Section 10(f) *then* sets forth the locale—the venue—where review may be had. It offers venue where the aggrieved person resides or transacts business or in D.C., but also in "the circuit wherein the unfair labor practice in question was alleged to have been engaged in."[76] But, crucially, "venue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience[.]"[77]

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[75] 29 U.S.C. § 160(f).

[76] *Id.*; *see AFL-CIO I*, at *9 (deeming this "a textual reference that strongly suggests that the provision is only triggered when some kind of unfair labor practice is at issue").

[77] *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

Moreover, even where there *is* no "unfair labor practice in question," Section 10(f) remains perfectly operative. In such a case, that part of Section 10(f)'s venue provision has no relevance. But in any case challenging a final Board action, parties necessarily have access to at least one, and usually numerous, other forums for review.

Thus, the decision below equating Section 10(f)'s venue provision with its jurisdictional provision makes little sense in either practice or theory. That Congress supplied petitioners seeking review of unfair labor practice cases with an additional convenient forum reflects its desire to give some choice of venue at the circuit court level to petitioners. But it says nothing about Congress's views on the proper distribution of judicial review between district and circuit courts. At most, then, the inapplicability of the "unfair labor practice in question" venue option *creates* an ambiguity in what would otherwise be a very plain, general grant of jurisdiction to circuit courts to review all "final orders of the Board granting or denying in whole or in part the relief sought."[78] It does not *resolve* that ambiguity in favor of district-court review.

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[78] 29 U.S.C. § 160(f).

2. The structure and history of the NLRA as a whole do not provide any "firm indication" that Congress intended NLRB rulemakings to be reviewed in district court; if anything, they indicate the opposite.

The second point made by the district court is structural—Section 10(f) is within a section dealing with the adjudication of unfair labor practices and entitled "Prevention of unfair labor practices."[79] Quite so, but the Supreme Court in *AFL* explained why Congress structured the NLRA the way it did, with representation cases discussed in Section 9 and unfair labor practices discussed in Section 10:

> It is to be noted that § 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by § 10(c).[80]

The purpose of the division, then, was to make clear that Section 10's review provisions did not extend to certifications issued under Section 9.[81] Congress's overtly stated objective was to end the then-prevailing regime whereby any time the pre-NLRA National Labor

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[79] *AFL-CIO I*, at *10 & n.7.

[80] *AFL*, 308 U.S. 401, 406 (1940).

[81] *Id.*

Relations Board or its predecessors ordered a representation election, those elections would be tied up for years in labyrinthine judicial proceedings in district court—all while employee sentiment in favor of unionization dissipated into frustration at the incompetency of the law.[82] Accordingly, Congress placed its discussion of representation cases in Section 9 of the NLRA, and provided for only limited review of the Board's determinations in such cases in the circumstances described by Section 9(d).[83] "The conclusion is unavoidable," the Supreme Court held, "that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d)."[84]

This history is all well known, but it tells us nothing about judicial review of rulemaking, a third, distinct statutory function of the Board that wasn't before the high Court in *AFL*. There is nothing in the

[82] *See id.* at 409–11.

[83] 29 U.S.C. § 159(d) (making the record of a representation certification part of the record on appeal of any unfair labor practice case premised upon that certification).

[84] *AFL*, 308 U.S. at 411.

statute's legislative or drafting history that could provide any indication—much less the requisite "firm indication"—that Congress wanted NLRA rulemakings reviewed by district courts.[85] The district court openly acknowledged that the legislative history on this issue is "scant" [86]—although "nonexistent" would be more accurate.

This Court has already recognized the reason for that absence of legislative history. As it cogently explained in *NYRSC II*, addressing a similarly vague judicial-review provision in the Investment Advisors Act of 1940:

> The *Investment Company* presumption reflects a pragmatic interpretation sensitive to developments in administrative law that could not have been foreseen by the Congress that enacted the Investment Advisers Act. When Congress enacted the Act in 1940, the courts generally declined to engage in pre-enforcement review of agency rules because such challenges were thought unripe. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1337–38 (2014). Drafters of review provisions thus were not typically considering those challenges.[87]

The NLRA is no different than the Investment Advisors Act in this respect.

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[85] *National Automobile Dealers Ass'n,* 670 F.3d at 270.

[86] *AFL-CIO I,* at *10.

[87] *NYRSC II*, 799 F.3d at 1134.

In the absence of any direct indication of congressional intent as to the proper locus of judicial review of NLRA rulemaking, that question should be answered by taking the context of the whole NLRA into account. "[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions."[88]

What duties, then, are assigned by the NLRA to district courts? They can enforce Board orders if all available circuit courts are unavailable;[89] they can issue pendent injunctions when irreparable harm will ensue if the case goes through the normal administrative process;[90] and they can enforce administrative subpoenas.[91] By contrast, circuit courts are given plenary power, in proceedings to enforce or review a final Board order, to "make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in

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[88] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citations omitted).
[89] 29 U.S.C. § 160(e).
[90] 29 U.S.C. §§ 160(j), (l).
[91] 29 U.S.C. § 161(2).

part the order of the Board."[92] District courts act only on ancillary matters requiring swift action; circuit courts directly shape the very decrees which give the NLRA its force.[93]

What's more, as noted, the 1935 Congress repeatedly expressed opposition to the then-prevalent practice of district courts interjecting themselves into labor-policy questions by enjoining elections before employees could even express their sentiments on unionization.[94] At an even more general level, the passage of the Railway Labor Act, Norris-LaGuardia Act, and NLRA between 1926 and 1935 represented a break from the prior era of "government by injunction," in which federal district judges effectively controlled federal labor policy within their districts.[95] It defies explanation that the same Congress would have returned to those same district judges the power to issue sweeping injunctions against the Board's efforts to set labor policy through enacting regulations.

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[92] 29 U.S.C. § 160(e).

[93] *NLRB v. Warren Co.*, 350 U.S. 107, 112–13 (1955).

[94] *See, e.g.*, S. REP. NO. 74-573, at 5, *reprinted at* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2300, 2305.

[95] *See generally* William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1180–85, 1227–35 (1989).

To sum up, Congress made no "deliberate choice of conflicting policies" when it came to subject-matter jurisdiction of NLRA rulemaking suits.[96] It did, however, make a very deliberate choice to cut district courts out of the business of shaping national labor policy. It's not just that there is no "firm indication"[97] that Congress would have wanted district courts to review Board rulemakings, if it had considered the issue; all indications are that it would have specified the opposite.

3. The Supreme Court's dicta in *AFL v. NLRB* does not express any firm indication regarding judicial review of NLRB rulemakings.

The district court makes a third point—that the Supreme Court in *AFL* said that the NLRA "on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms."[98]

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[96] *AFL*, 308 U.S. at 411.

[97] *See National Automobile Dealers Ass'n,* 670 F.3d at 270.

[98] 308 U.S. at 409; *see also AFL-CIO I*, at *10.

First and foremost, that language is dicta at the end of a paragraph comparing ULP cases to representation cases.[99] The holding of *AFL* is clear—orders directing elections and certifications in representation cases are not "final orders of the Board."[100] Because such orders are not final, they fail to satisfy Section 10(f)'s jurisdictional hook; there is no action that any court, district or circuit, may take under the NLRA in response to Board orders concerning a representation petition.[101] The Court's dicta in *AFL* should therefore be read in the context of what it actually decided—that Section 10(f) does not apply to, or permit judicial review of, Board orders in representation cases. Nowhere does the Court discuss Section 10(f)'s alleged inapplicability to Board rulemaking; quite the contrary, its decision makes clear that it found representation cases excluded from Section

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[99] *AFL*, 308 U.S. at 409 ("Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings.")

[100] *Id.* at 407–08.

[101] *Cf. Boire v. Greyhound Corp.*, 376 U.S. 473 (1965) (district courts generally have no jurisdiction to review Board representation-case orders).

10(f)'s language only by looking at those cases in the context of the entire NLRA:

> We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain *whether* the "order" for which the review in court is provided, is contrasted with forms of administrative action differently described as a *purposeful* means of excluding them from the review provisions.[102]

So while rulemaking is indeed "differently described" than unfair labor practice adjudication, that is just the beginning of *AFL*'s inquiry, not the end of it. As explained earlier, Congress did not "purposeful[ly]" exclude rulemaking from circuit-court review.[103] The question of rulemaking was not before the 1940 Court and was not decided there.[104]

Second, there is a serious flaw in the district court's analysis on this point. Section 10(f) has long, and correctly, been held not merely to vest jurisdiction in circuit courts but also to preclude district court

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[102] *AFL*, 308 U.S. at 408 (emphasis added).

[103] *AFL-CIO I*, at *10 (describing the legislative history as "scant").

[104] If anything, the Supreme Court's dicta seems to reflect the same misconception that Professor Bagley identifies and attributes to the 1935 Congress—the presumption that pre-enforcement review of rulemakings would rarely, if ever, occur. *See* 127 HARV. L. REV. at 1337–38.

jurisdiction over matters excluded from Section 10(f)'s coverage.[105] But if rulemakings are excluded from Section 10(f), as the decision below suggests, then the logic of that precedent would similarly preclude rulemaking challenges in district courts, as well. Such a result would be in considerable tension with the equally well-established proposition that pre-enforcement challenges to rules are generally permissible.[106]

The district court fails to explain or even confront the inconsistency created by finding itself to have jurisdiction to review rules about representation cases but not representation cases themselves. Surely Section 10(f) either precludes judicial review as to all matters outside its scope, or it doesn't.

The better course is simply to construe the ambiguous language of that section to cover rulemakings, so as not to needlessly create a paradoxical outcome. *AFL*'s dicta does not apply here.

[105] *Greyhound*, 376 U.S. at 481; *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 (1938).

[106] *See Abbott Labs. v. Gardner*, 387 U.S. 136, 152–56 (1967) (explaining that rules are usually ripe for review upon issuance).

E. Conclusion: The courts of appeals have original jurisdiction over petitions to review NLRA rulemakings.

To conclude, the district court's opinion fails to overcome the powerful presumption in favor of circuit court review set forth in this Court's precedents. The NLRA's jurisdictional trigger is satisfied here, notwithstanding its venue provisions; the NLRA's broader structure makes it implausible that Congress affirmatively intended to give district courts a key role in interpreting national labor policy; and some superficially-problematic language in the Supreme Court's *AFL* decision turns out to be dicta addressing only individual representation certifications, not rulemakings.

Under this Court's controlling caselaw, an ambiguous direct-review statute, plus the absence of any clear indication that Congress meant for it *not* to apply, equals original jurisdiction in the court of appeals. This case should be converted to a petition for review of the 2019 Amendment and, for the reasons set forth in Section II below, denied.

II. None of the five provisions of the Board's 2019 Amendment challenged as substantive encodes a substantive value judgment or forecloses fair consideration of issues before the Agency.

The APA contains a key distinction between substantive rules—which require notice and comment before implementation—and rules of "agency organization, procedure, or practice"—which do not.[107] This procedural exception has been characterized as narrow, as it limits public participation in agency decision-making.[108] But it is not a nullity. This Court has recognized that Congress included this exception to serve key agency interests, such as "effectiveness, efficiency, expedition and reduction in expense."[109] Consequently, the exception should not be read so narrowly as to virtually eliminate it from the statute.[110]

Several oft-cited principles guide this Circuit's determination whether a rule falls within the APA's procedural exception. First, a rule that falls within this exception must not "encode[] a substantive value

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[107] 5 U.S.C. § 553(b)(3)(A).

[108] *E.g., Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.* (*EPIC*), 653 F.3d 1, 6 (D.C. Cir. 2011) (quoting *United States v. Picciotto,* 875 F.2d 345, 347 (D.C. Cir. 1989)).

[109] *JEM Broadcasting Co. v. FCC,* 22 F.3d 320, 327 (D.C. Cir. 1994).

[110] *Id.* at 326; *Kaspar Wire Works, Inc. v. Sec. of Labor,* 268 F.3d 1123, 1132 (D.C. Cir. 2001).

judgment or put[] a stamp of approval or disapproval on a given type of behavior."[111] Second, rules that govern agency procedures generally fall within the scope of this exception, unless they "creat[e] extreme procedural hurdles that foreclose fair consideration of the underlying controversy."[112] Third, procedural rules generally "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency."[113]

Accordingly, agencies need not engage in notice and comment for rules that "d[o] not alter the substantive criteria" used to evaluate problems but instead "simply change the procedures it would follow in applying those substantive standards."[114] And while this Court has at times in the past focused on whether a procedural rule has a

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[111] *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987).

[112] *Lamoille Valley R.R. Co. v. ICC,* 711 F.2d 295, 328 (D.C. Cir. 1983); *Nat'l Whistleblower Ctr. v. Nuclear Regulatory Comm'n,* 208 F.3d 256, 262 (D.C. Cir. 2000).

[113] *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

[114] *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000).

"substantial impact" on the rights of regulated parties, more recent decisions have forcefully rejected this analysis.[115]

A. The district court misapplied this Court's precedent by improperly narrowing the scope of the APA's procedural exception.

The lower court's analysis of the APA's procedural exception contains three fundamental mistakes. First, Judge Jackson's decision improperly focuses on the potential impact that the five challenged rules have on substantive rights—adopting a position that has been repeatedly rejected by this Circuit. Second, Judge Jackson relies on an invalid presumption that "in nearly every instance" a final rule should be subject to notice and comment—thereby reading the procedural exception virtually out of the APA. Third, her opinion wrongly centers on whether a rule "primarily concern[s] the agency's internal operations"—an analysis that runs contrary to the statutory language of the exception, has not been relied on in this Circuit, and if true, would suggest that numerous prior cases decided by this Court were

[115] *Kaspar Wire Works, Inc.,* 268 F.3d at 1132 (holding that "this circuit has expressly rejected ["substantial impact"] standard"); *Cent. Tex. Tel. Coop., Inc. v. FCC,* 402 F.3d 205, 214 (D.C. Cir. 2005) (same); *see also Bowen*, 834 F.2d at 1047 (internal citations omitted).

wrongly decided. These errors infect the court's analysis of the specific provisions challenged by the AFL-CIO and warrant reversal.

1. The lower court erred by holding that "rules that potentially affect the substantive rights of regulated parties" trigger notice and comment obligations.

The extent to which rules can impact substantive rights and still fall within the procedural exception was once the subject of an evolving debate in this Circuit. But this debate is now settled—not only can rules have a "substantial impact" on the rights of parties and still fall within the exception, the Court *no longer* focuses on whether a rule has such an impact. The district court's view—that rules that "potentially affect the substantive rights of regulated parties" fall outside the procedural exception[116]—is mistaken on two fronts. First, it improperly focuses on the impact of the rules. And second, even assuming that the impact of a rule *was* relevant, the district court's standard takes a narrower view of the procedural exception than has ever been adopted in this Circuit.

This Court's substantial change in analysis from *Air Transport Ass'n of America v. Department of Transportation,* 900 F.2d 369 (D.C.

[116] *AFL-CIO I,* 20-cv-0675, 2020 WL 3041384, at *1 (D.D.C. June 7, 2020).

Cir. 1990), *remanded,* 498 U.S. 1077 (1991), *vacated as moot,* 933 F.2d 1043 (D.C. Cir. 1991), to *JEM Broadcasting Co. v. FCC,* 22 F.3d 320 (D.C. Cir. 1994), plainly illustrates the lower court's error. In *Air Transport,* this Court considered a rule expanding the penalties that could be assessed in the FAA's administrative hearings and otherwise changed the applicable procedural rules in these hearings. The panel in that matter found that these changes were substantive, not procedural, as they "substantially affect[ed] . . . defendant's right to an administrative adjudication."[117] Because the rule at issue "substantially affect[ed]" the substantive right of a party, the panel held that it fell outside the exception.

But this Court quickly reversed course in *JEM Broadcasting*. There, the Court was confronted with a change to the procedure for amending applications for radio licenses, which had the effect of denying a license to JEM. Despite this change's "harsh effects" on JEM, the Court nonetheless found the rule change procedural, holding that the mere fact that a procedural rule has "impacts on outcomes" and

[117] 900 F.2d at 376.

"affect[s] substance" does not take it outside the procedural exception.[118] The Court concluded: "The critical fact here, however, is that the [rule change] did not change the *substantive standards* by which the FCC evaluates license applications . . . . This fact is fatal to JEM's claim."[119]

In so holding, this Court explicitly disavowed its earlier reasoning in *Air Transport*, holding that merely changing the procedure at an administrative hearing, without more, did not encode a substantive value judgment and therefore was within the procedural exception.[120] Since *JEM,* this Court has recognized its "express[] reject[ion]" of the substantial impact test.[121]

The lower court's decision simply misses the mark. Specifically, it held that "rules that *potentially* affect the substantive rights of

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[118] 22 F.3d at 326 (internal quotations and citations omitted).

[119] *Id.* at 327.

[120] *Id.* at 328.

[121] *Kaspar Wire Works, Inc. v. Sec. of Labor,* 268 F.3d 1123, 1132 (D.C. Cir. 2001); *see, e.g., EPIC,* 653 F.3d at 6 (D.C. Cir. 2011) ("a rule with a 'substantial impact' upon the persons subject to it is not necessarily a substantive rule" under APA); *Pub. Citizen v. Dep't of State,* 276 F.3d 634, 640 (D.C. Cir. 2002) (applying *JEM* standard to rule change governing FOIA requests); *Cent. Tex. Tele. Co-Op,* 402 F.3d at 214; *Hurson,* 229 F.3d at 280–81 (applying *JEM* standard to rule change eliminating face-to-face meetings).

regulated parties" (emphasis added) fall outside the procedural exception and warrant notice and comment.[122] Judge Jackson should have appropriately evaluated the 2019 Amendment's potential impact on parties only to the extent that it "encode[s] a substantive value judgment"[123] or "creat[es] extreme procedural hurdles that foreclose fair consideration of the underlying controversy."[124] Instead, her analysis applies an improperly strict standard that is contrary to this Court's precedent. For example, in *Hurson,* this Court found a rule to be procedural, not substantive, even though it *precluded* face-to-face meetings with the agency by brokers whose livelihoods largely depended on such meetings—because the change merely addressed who presented positions to an agency.[125] In *JEM Broadcasting,* the agency did not simply *delay* consideration of an application; its change led to the application being denied outright—yet was still found to be

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[122] *AFL-CIO I,* at *1.

[123] *Bowen,* 834 F.2d at 1047.

[124] *Lamoille Valley R.R. Co.,* 711 F.2d at 328.

[125] 229 F.3d at 281; *see also American Inst. of Certified Pub. Accountants v. IRS,* 746 Fed App'x 1, 10–11 (D.C. Cir. 2018) (change in who could present filings to IRS procedural, not substantive, despite impact on certified accountants).

procedural.[126] Thus, the lower court's reasoning here that any rules "potentially affect[ing] substantive rights" fall outside the procedural exception cannot be reconciled with the binding decisions of this Circuit.

Nor do either of the recent decisions cited by the lower court—*EPIC,* 653 F.3d 1, and *Mendoza v. Perez,* 754 F.3d 1002 (D.C. Cir. 2014)[127]—support this exceedingly narrow view of the exception. Indeed, the court in *EPIC* recognized that even "a rule with *'substantial impact'* upon the persons subject to it is not necessarily a substantive rule."[128] And while the court in *EPIC* found the rule at issue to be substantive, not procedural, its reasoning was based primarily on the loss of privacy "impose[d] directly and significantly on so many members of the public"—no similarly substantive concern is implicated here.[129] *Mendoza* also offers no support for the lower court's reasoning, as it relied on the fact that substantive *standards* were changed: the

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[126] 22 F.3d at 327 (recognizing that change in review procedure could have "harsh effects," including denial of radio licenses); *see also Ranger v. FCC,* 294 F.2d 240, 243–44 (D.C. Cir. 1961).

[127] *AFL-CIO I,* at *18.

[128] 653 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640–41 (D.C. Cir. 2002)) (emphasis added).

[129] *Id.*

rules "do not merely describe *how* the Department will evaluate . . . applications, but they set the bar for *what* employers must do to obtain approval."[130] As the challenged provisions here change no substantive *standards* applied in Board election proceedings, *Mendoza* provides no support for the lower court's holding.

Put simply, the district court's focus on the potential impact of the 2019 Amendment as the touchstone of its procedural analysis is fundamentally flawed. It is inconsistent with this Court's precedent, as discussed above, and with congressional intent. As noted in the legislative history of a prior version of the APA, "some procedural rules may have a greater impact on the rights of individuals than substantive rules."[131]

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[130] 754 F.3d at 1024 (emphasis added).

[131] Memorandum on Administrative Procedure Bills by Dean G. Acheson, Senate Judiciary Committee Hearings on S. 674, S. 675, and S. 918, 77th Cong., 1st Sess., April 2 to July 2, 1941, ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY VOL. 2 (1946), 828.

2. The lower court committed further error by presuming notice and comment is required "in nearly every instance in which a final rule is adopted."

The district court erred in holding that "[t]he law presumes that an agency will engage in notice-and-comment rulemaking in nearly every instance in which a final rule is adopted"[132] and stating "that an agency rule is essentially *presumed* to be substantive for the purpose of the notice-and-comment requirement."[133] But the district court cites no authority for these assertions, and no such authority exists. Indeed, the applicable authority and evidence is to the contrary. By creating a nearly irrebuttable presumption of substantiveness and thereafter applying it to the Board's 2019 Amendment, the lower court flouted this Court's precedent and the routine practices of federal agencies.

Thus, although the Board bears the burden of proof with regard to the promulgation of its rules,[134] this burden does not equate to the virtually unassailable presumption applied by the lower court. Indeed, this Court has repeatedly indicated that the procedural exception

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[132] *AFL-CIO I,* at *1.

[133] *AFL-CIO I,* at *13.

[134] *Action on Smoking & Health v. Civil Aeronautics Bd*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983).

should be applied on a case-by-case basis. For example, in *Batterton v. Marshall,* 648 F. 2d at 707–08, the panel conducted an exhaustive review of prior APA cases in determining the scope of the procedural exception, yet not once cited to a presumption. Other cases indicate a similarly careful analysis.[135] Although this inquiry is admittedly fact specific, there is no legally applicable presumption, let alone one that applies in "nearly every instance," and the district court erred by applying one here.

Further, there is no empirical support for a nearly irrebuttable presumption in the practice of agencies or in the treatment of administrative rules before the courts. A recent scholarly study of over 26,000 rules found that agencies utilized the notice-and-comment process in roughly 50 percent of rules.[136] And that same study found that of those rules that were challenged, courts upheld the agency's

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[135] *Neighborhood TV Co. v. FCC,* 742 F.2d 629, 637 (D.C. Cir. 1984) ("[S]ince every change in rules will have some effect on those regulated . . . we must look at its effect on those interests ultimately at stake in the agency proceeding."); *EPIC,* 653 F.3d at 5 (noting that distinction between "substantive and procedural rules is 'one of degree'").

[136] Connor Raso, *Agency Avoidance of Rulemaking Procedures,* 67 ADMIN L. REV. 65, 91 & n.125 (2015).

action in about sixty-seven percent of cases.[137] Accordingly, the lower court's adoption of such a strong presumption is without basis in fact, as well as law.

The Supreme Court has repeatedly cautioned that courts cannot impose procedures greater than those required under the APA.[138] By its adoption of an unfounded presumption, the district court imposed a burden beyond the APA's requirements and engaged in prohibited "Monday morning quarterbacking" of the Board's actions.[139]

3. Contrary to the analysis of the lower court, the procedural exception is not limited to rules which "primarily concern the agency's internal operations."

Finally, the lower court's opinion is fatally undermined by its myopic focus on whether the Board's rules have an external, as opposed to internal, effect. Judge Jackson opened her discussion by citing to various precedents which suggest that externally directed rules cannot fall within the procedural exception.[140] But while the fact that a rule

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[137] *Id.* at 90 & n.110–12.

[138] *Perez v. Mortgage Bankers Ass'n,* 575 U.S. 92, 100 (2015); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 547–48 (1978).

[139] *Cf. Vermont Yankee Nuclear Power Corp.,* 435 U.S. at 547.

[140] *AFL-CIO I,* at *14–15.

regulates internal agency affairs can serve as a relevant factor in determining whether it falls within the procedural exception, it is not the touchstone upon which this Court's analysis rests.

Starting with the statutory language, the district court's heavy emphasis on whether a rule is internally focused cannot be correct. The procedural exception under the APA exempts rules of "agency organization, procedure, or practice" from notice and comment requirements. Courts have instructed that, to the extent possible, each word within a statute should be given independent meaning.[141] Yet the lower court's crabbed interpretation of the exception fails to give effect to the terms "practice" and "procedure" as understood at the time of the APA's enactment. Specifically, these terms direct *external conduct of parties*. Black's Law Dictionary (3rd ed. 1933) defines practice as "the form, manner, or order of instituting and conducting a suit or other judicial proceeding, through its successive stages to its end, in accordance with the rules and principles laid down by law or by the

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[141] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.6 EACH WORD GIVEN EFFECT (7TH ED. 2019) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") (quoting *U.S. v. Menasche,* 348 U.S. 528 (1955)).

regulations and precedents of the courts."[142] And procedure is defined as "the machinery for carrying on the suit, including pleading, process, evidence, and practice."[143] These terms are not limited to *internal* actions taken by judicial bodies or agencies; they are clearly terms that primarily apply to the conduct of *external* parties before the decision-making body. Although the term organization perhaps suggests the focus on internal operations applied by the district court, the court's focus does not give meaning to *all* the terms in the exception and is therefore incorrect.

Moreover, this Court has found that numerous *external* rules fall within the scope of the exception. For example, in *Bowen,* this Court upheld rules increasing the frequency of inspections by peer review organizations, in spite of their clearly external focus, as the rule did not "encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior."[144] In *Neighborhood TV v. FCC,* this Court found that the FCC's decision to freeze and reorder the

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[142] BLACK'S LAW DICTIONARY 1393 (3d ed. 1933).

[143] *Id.* at 1430.

[144] 834 F.2d at 1037.

processing of television license applications was procedural, as it did not impose new substantive standards.[145] And in *National Whistleblower Center v. Nuclear Regulatory Comm'n,* the Court again found the agency's decision to limit the circumstances in which parties would be allowed to file materials past agency deadlines was procedural, not substantive.[146] Though all of these changes directed the conduct of external parties—as opposed to solely or even primarily internal processes—this Court nonetheless found them to be within the scope of the procedural exception.

B. <u>Each of the challenged 2019 Election Amendments addresses Board election procedures; none encodes substantive value judgments or forecloses fair consideration of the underlying controversies in Board elections, and none materially alters substantive rights of parties.</u>

As demonstrated above, the lower court erred in its assessment of the five challenged provisions of the Board's 2019 Amendment. And when analyzed under the appropriate standard, these challenged

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[145] 742 F.2d at 638–39.

[146] 208 F.3d 256, 262–63 (D.C. Cir. 2000); *see also Hurson,* 229 F.3d at 281–82 (eliminating external parties' ability to have face-to-face meetings); *JEM Broadcasting,* 22 F.3d at 327 (removing external parties' opportunities to correct errors in applications).

provisions are virtually indistinguishable from other rules that this Court has found procedural. Under the precedent in this Circuit, the five provisions of the Board's 2019 Amendment challenged as being substantive should be similarly upheld.

1. Changing the timing of the issues to be litigated from pre-election representation case hearings to post-election is plainly procedural, not substantive.

Amended Section 102.64(a) would require that issues of unit scope, voter eligibility, and supervisory status are normally litigated at the pre-election hearing and decided by the Regional Director prior to an election. This amendment to the 2014 Rule, which allows these issues to be deferred, is, in fact, a return to the Board's historical practice.[147] Importantly, for purposes of this inquiry, this change does not affect the *elements* required to be adjudicated in a representation proceeding—the Board would continue to apply the same unit scope, voter eligibility, and supervisory status standards. All that it would change is *when* those issues are presented to, and decided by, the Board.

[147] 84 Fed. Reg. at 69,538–39.

This is a quintessential procedural change. This Circuit has disavowed reasoning suggesting that changing the ways in which administrative hearings are run falls outside the procedural exception.[148] And as this Court has held, "a judgment about procedural efficiency . . . cannot convert a procedural rule into a substantive one."[149] The justification for this change, as the Board explained, stems from these same considerations of procedural efficiency and finality.[150]

Mendoza illustrates why the Board's change is procedural. In that case, the Court found that an agency's enforcement plan regarding H-2A visas triggered notice and comment, *because it changed substantive standards*. Distinguishing its prior decision in *Bowen*, the Court explained:

> The [enforcement plans] at issue here are nothing like the [enforcement plans] we examined in *American Hospital Ass'n*. The [plans] do not merely instruct Department of Labor agents to give extra scrutiny to H-2A applications

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[148] *JEM Broadcasting Co.,* 22 F.3d at 328 (rejecting reasoning of *Air Transport Ass'n,* 900 F.2d at 376); *see also Rivers v. Dep't of Interior,* Case No. C05-2086P, 2006 WL 2841929, at *7 (W.D. Wa. Oct. 3, 2006) (rule changes allowing for consolidated hearings fell within procedural exception as it "promote[d] procedural efficiency").

[149] *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 641 (D.C. Cir. 2002) (quoting *Hurson,* 299 F.3d at 282).

[150] 84 Fed. Reg. at 69,539.

> from herder operations. Rather, they *alter the standards* imposed on herding employers seeking H-2A certification. They are not procedural, but substantive rules.[151]

The opposite result necessarily follows here. Because the Board's rules would not change the substantive standards for obtaining union representation, they are procedural.

That these procedural changes may cause some delay in the Board's election process is insufficient to remove it from the procedural exception. This Court has held that rules with *much* greater impact than this change can still fall within the procedural exception—including, for example, denials of radio licenses that endanger entire businesses.[152] The net effect of the Board's change would pale in comparison, as it would merely shift when certain issues are litigated in the small number of contested election cases that the Board hears per year.[153] Nor would the rule operate to (as the district court asserted) "hinder the employees' prospects of mobilizing a sufficient number of

[151] 754 F.3d at 1024.

[152] *E.g., JEM Broadcasting,* 22 F.3d at 327–28; *Ranger v. FCC*, 294 F.3d 240, 243–44 (D.C. Cir. 1961).

[153] 84 Fed. Reg. at 69,528 n.16 (noting that over ninety percent of elections were conducted via election agreement).

peers to unionize the workplace"[154]—the lower court provided no support for this assertion, and indeed, it is contradicted by the underlying data.[155] Further, the Board explained that it designed the rule to provide more reliable determinations to parties and to limit future litigation.[156] As such, the rule falls within the procedural exception.

2. Increasing the time period between pre-election hearings and elections is a procedural change, as it does not affect the substantive rights of parties.

Amended Section 102.67(b) would specify that an election will be scheduled by the Regional Director no sooner than twenty business days following a DDE's issuance.[157] The Board's change to its election timeline is procedural, not substantive.

This Court has routinely found that changes to agency timelines are procedural, not substantive. For example, in *Lamoille Valley R.R. Co. v. ICC,* 711 F.2d 295 (D.C. Cir. 1983), the court characterized a thirty-day decrease in the time to file responsive applications as

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[154] *AFL-CIO I,* at *16.

[155] 84 Fed. Reg. at 69,528 n.17.

[156] *Id.* at 69,539.

[157] *Id.* at 69,545.

"definitely at the procedural end of a spectrum running from 'procedural' to 'substantive.'"[158] The court went on to note that "[w]hen a rule prescribes a timetable for asserting substantive rights, we think the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one's case on the merits."[159]

There is no reasonable argument that the extension of time between the DDE's issuance and the election forecloses a union's effective opportunity to present its case. The Board noted, correctly, that this extension largely returns to the historical practice that was in effect for decades prior to the 2014 election amendments, which had facilitated the resolution of thousands of representation cases.[160] Nor can this brief extension of time be understood as a preference for or against unionization—it applies equally to all parties, does not deny any rights or change any standards, and covers both certification and decertification elections.[161]

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[158] 711 F.2d at 328.

[159] *Id.* ; *see also Nat'l Whistleblower Ctr.,* 208 F.3d at 262.

[160] 84 Fed. Reg. at 69,545.

[161] *Pub. Citizen,* 276 F.3d at 641 ("Because the Department's . . . policy applies to all . . . requests, making no distinction between requests on

Finally, the district court is wrong to assert that the rule encodes a value judgment because it "do[es] not bear meaningfully on the agency's internal processes"[162]—to the contrary, the rule *does* affect the internal workings of the agency by, among other effects, giving the Board more time to rule on requests for review prior to elections.[163] Nor is there any evidence, as the lower court claimed, that the rule will "have a significant impact on the employees' ability to mount a successful campaign for unionization."[164] The data shows that, under the 2014 Rule, shortening the period of time between DDEs and elections has had *no* effect on union win rates.[165]

3. The 2019 Amendment's brief extension of time for employers to produce voter lists is not substantive.

Amended Section 102.67(l) would extend the timeline for employers to provide the voter list to unions from two business days to five business days. And as with the change to the time period between

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the basis of subject matter, it clearly encodes no 'substantive value judgment.'").

[162] *AFL-CIO I,* at *15.

[163] 84 Fed. Reg. at 69,546.

[164] *AFL-CIO I,* at *15.

[165] 84 Fed. Reg. at 69,528 n.17.

DDEs and elections, this change is a mere extension of a timeline. Indeed, the provision of the voter list is most analogous to changing the timeline for filings with an agency, which this Court has held are "procedural, not substantive."[166]

The extension to provide the voter list similarly does not encode a substantive value judgment or foreclose fair consideration of the underlying issues. The Board justified this extension of time by pointing out that it avoided unnecessary litigation—not to provide any substantive benefit to employers or unions.[167] Further, extending the period of time for the employer to provide the list doesn't decrease the amount of time that the petitioner is guaranteed to have the list prior to the election because of the extension of time between the DDE and election. As in other cases involving changes to agency timelines, this change is procedural.

[166] *Nat'l Whistleblower Ctr.,* 208 F.3d at 262.

[167] 84 Fed. Reg. at 69,532.

4. Altering the time in which Regional Directors can certify election results is procedural, not substantive.

Amended Section Amended 29 C.F.R. § 102.69(b) and (c) addresses the timing of certifications. Specifically, these provisions would operate to delay issuance of certifications by Regional Directors until after a request for review is ruled on or the time for filing a request for review has passed.[168] As with the change to the election date and the voter lists, this change addresses timelines, not substance. None of the elements required to obtain a certification are changed—only the time at which a certification occurs.[169]

Nor do these changes encode any substantive value judgment. They are instead, as the Board explained, motivated by a desire to eliminate the confusion that occurs when a certification is issued by a Regional Director and is later rescinded by the Board.[170] In other words, the Board is concerned with conveying accurate information to the

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[168] *Id.* at 69,554.

[169] *Lamoille Valley R.R. Co.,* 711 F.2d at 328; *Nat'l Whistleblower Ctr.,* 208 F.3d at 262.

[170] 84 Fed. Reg. at 69,554–55.

public and its stakeholders and to prevent needless litigation—clearly legitimate interests.[171]

The Board further recognized that this rule change would delay certain "legal obligations on the part of the employer and the certified representative," particularly the duty to bargain in good faith while a request for review is pending.[172] As a practical matter, however, the delay in certification has no more than a de minimis impact on unions; the Board's regional offices generally have not issued unfair labor practice complaints asserting that employers were not bargaining pursuant to certifications that are subject to pending requests for review.[173] Further, other duties, such as an employer's obligation to refrain from making unilateral changes and provide information, extend back to the date of the election, not certification.[174]

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[171] *Id.*

[172] *Id.* at 69,554.

[173] *Id.* at 69,555.

[174] *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974) (employer acts at its peril when it makes unilateral changes to working conditions following an election; if the union is later certified, those changes will be unfair labor practices), *enf. denied on other grounds*, 512 F.2d 684 (8th Cir. 1975); *Ozburn-Hessey Logistics*, 366 NLRB No. 177, slip op. at 2 n.8 (Aug. 27, 2018) (same, for union's entitlement to information about

In light of the foregoing, the lower court's assertion that this rule change "forestalls the benefits that employees are seeking when they campaign for unionization" is unsupportable.[175] There is not a shred of evidence that changing the timeline for certifications would lead to any changes in substantive outcomes.[176] And the lower court is simply wrong to assert that this rule affects a union's right to picket for recognition,[177] as the 30-day limitation on picketing contained in Section 8(b)(7) of the NLRA is eliminated by the *filing* of a petition.[178] In short, the Board's reasoned decision to re-order its proceedings will not, in fact, result in any alteration of substantive rights. As such, it is procedural.

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working conditions); *id.* at 4 (same, for employees' rights to be represented by union at investigatory interviews), *aff'd in part, rev'd on other grounds,* 803 F. App'x 876 (6th Cir. 2020).

[175] *AFL-CIO I,* at *16.

[176] 84 Fed. Reg. at 69,528 nn. 15, 17.

[177] *AFL-CIO I,* at *16.

[178] *Int'l Hod Carriers Bldg. & Common Laborers*, 135 NLRB 1153, 1157 (1962).

5. The Board's change to its election observer criteria is an issue of procedure, not substance, given the observer's role in Board elections.

Amended Section 102.69(a)(5) would require that parties, whenever possible, select an election observer from the current bargaining unit; when no such employee is available, a party should select a current nonsupervisory employee.[179] Observers ensure that regular procedures are followed during elections and may challenge potentially ineligible voters.[180]

Although the NLRA does not require observers, the Board has long provided parties with the option of being represented during the election.[181] Prior to this rule change, the Board developed criteria on a case-by-case basis, which had led to complicated, arguably contradictory standards.[182] In order to promote administrative efficiency, the Board streamlined these standards, thus providing clear guidance to parties about who may serve as observers.[183]

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[179] 84 Fed. Reg. at 69,552.

[180] *Id.* at 69,553.

[181] *Id.* at 69,551.

[182] *Id.* at 69,552–53.

[183] *Id.* at 69,553.

Further, the district court's assertion that the rule falls outside the exception because it "make[s] not one whit of difference with respect to the agency's internal operations"[184] is false. To the contrary, the Board made the change in election observer criteria to avoid litigation and unnecessary rerun elections, both of which self-evidently affect the efficiency of agency operations.[185] And, as the Board explained, the observer position itself involves "representing the [parties'] principals, challenging voters, generally monitoring the election process, and assisting the Board agent in the conduct of the election"—all of which entail presenting positions to the Board personnel during representation elections.[186]

As with changes to agency timelines, changes to *who* can present positions to agencies are procedural, not substantive. For example, in *Hurson*,[187] this Court considered a USDA rule change that prohibited face-to-face meetings with representatives of food manufacturers. This rule went even further than the Board's rule change, because it

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[184] *AFL-CIO I,* at *16.

[185] 84 Fed. Reg. at 69,553.

[186] *Id.*

[187] 229 F.3d at 281.

eliminated the face-to-face option and endangered the livelihood of several businesses. Nonetheless, the Court found that change procedural, as it "did not alter the substantive criteria . . . ; it simply changed the procedures it would follow in applying those substantive standards."[188] Put simply, changes to "the manner in which the parties present themselves" are procedural, not substantive.[189] As that is all the Board did with the observer rule change, this provision also falls within the procedural exception.

C. Conclusion: The Board's rulemaking satisfies the procedural exception to the APA.

As demonstrated above, the Board's 2019 Amendment concerns matters of procedure, not substance. It alters the order of agency proceedings, affects timelines, and changes who is allowed to present positions to the NLRB. These are the sorts of changes that this Court

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[188] *Id.* ; *see also American Inst. of Certified Pub. Accountants v. IRS,* 746 F. App'x 1, 10–11 (D.C. Cir. 2018) (rule expanding eligible tax preparers before IRS fell within exemption to notice and comment requirement).

[189] *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Batterton,* 648 F.2d at 707).

has routinely found fall within the procedural exception; the same result necessarily follows here.

CONCLUSION

This Court has original, not appellate, jurisdiction over this matter. And the five challenged provisions of the Board's 2019 Amendment fall within the procedural exception. Accordingly, the lower court's decision on these matters should be reversed: the case should be converted to a petition for direct review and the five challenged provisions upheld.

Respectfully submitted,

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Dated this 3rd day of November, 2020, in Washington, D.C. and in Minneapolis, Minnesota

STATUTORY ADDENDUM

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STATUTES

Selected Provisions of the Administrative Procedure Act 5 U.S.C. § 551–59

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Rule Making-5 U.S.C. § 553.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

> **(1)** a military or foreign affairs function of the United States; or
> **(2)** a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

> **(1)** a statement of the time, place, and nature of public rule making proceedings;
> **(2)** reference to the legal authority under which the rule is proposed; and
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.

>> Except when notice or hearing is required by statute, this subsection does not apply—
>>> **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>>> **(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

> **(1)** a substantive rule which grants or recognizes an exemption or relieves a restriction;
> **(2)** interpretative rules and statements of policy; or
> **(3)** as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Selected Provisions of the National Labor Relations Act 29 U.S.C. §§ 151-169 ("NLRA")

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National Labor Relations Board

Sec. 3 [§ 153] (b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot

under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

***

Sec. 6. [29 U.S.C. § 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

***

Representatives and Elections

Sec. 9 [29 U.S.C. § 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the

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

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title]

is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections] (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve- month period, a valid election shall have been held.

Prevention of Unfair Labor Practices

***

10(f) (29 U.S.C. § 160(f)) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United

States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

REGULATIONS

NLRB Rules and Regulations – 29 C.F.R. Part 102 (Rules and Regulations)

***

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

Regulations challenged and set aside as substantive, *and* challenged as arbitrary and capricious as a whole and specifically in part <u>[rules shaded in gray (left-hand column) are currently in effect]</u>:

2014 Rule (79 Fed. Reg. 74,308)	2019 Amendment (84 Fed. Reg. 69,524)
§ 102.64(a): Disputes concerning individual's eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.	§ 102.64(a): Disputes concerning unit scope, voter eligibility, and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed.
§ 102.67(b): The Regional Director shall schedule the election for the earliest date practicable consistent with these Rules.	*§ 102.67(b): The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election, to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section.

* Rules marked with an "asterisk" were also challenged by AFL-CIO in the lower court as being inconsistent with Section 3(b) of the NLRA.

§ 102.69(b): If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to §102.70, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.	*§ 102.69(b): If no objections are filed within the time set forth in paragraph (a)(8) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to §102.70, and if no request for review filed pursuant to §102.67(c) is pending, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.
§ 102.69(c)(1)(i): If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges, and a certification of the results of the	*§ 102.69(c)(1)(i): If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges. If no request for review filed pursuant to §102.67(c) is pending, and no

election, including certification of representative where appropriate.	request for review is timely filed pursuant to paragraph (c)(2) of this section, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.
§ 102.69(c)(1)(iii): . . . If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.	*§ 102.69(c)(1)(iii): . . . If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case, save that the Regional Director shall not issue a certification of results and/or representative if a request for review previously filed subject to §102.67(c) remains pending, or if a request for review is timely filed pursuant to paragraph (c)(2) of this section prior to the issuance of the certification of results and/or representative.
§ 102.69(c)(2): . . . [A] request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due.	*§ 102.69(c)(2): . . .[A] request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due. If no request for review is timely filed pursuant to this paragraph, and no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall issue a certification of the results of the

	election, including certification of representative where appropriate.
(No corresponding provision)	*§ 102.69(h): For the purposes of filing a request for review pursuant to §102.67(c) or paragraph (c)(2) of this section, a case is considered to have reached final disposition when the Regional Director dismisses the petition or issues a post-election decision that will result in the issuance of a certification of results (including, where appropriate, a certification of representative) absent the filing of a request for review.
§ 102.69(a): . . . When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe…	§ 102.69(a)(5): When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

Regulations challenged and set aside as substantive *and* challenged only as arbitrary and capricious as a whole <u>[rules shaded in gray (left hand column) are currently in effect]</u>:

§ 102.67(l): Absent extraordinary circumstances specified in the direction of election, the employer	§ 102.67(l): Absent extraordinary circumstances specified in the direction of election, the employer

shall, within 2 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers) of all eligible voters.	shall, within 5 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular “cell” telephone numbers) of all eligible voters.

Regulations challenged as arbitrary and capricious as a whole and specifically in part *but not* challenged as substantive [rules shaded in gray (right hand column) are currently in effect]:

2014 Rule	2019 Amendment
§ 102.67(c): Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act except as the Board’s Rules provide otherwise, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director. No party shall be precluded from filing a request for review of the direction	*§ 102.67(c): Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act except as the Board's Rules provide otherwise. The request for review may be filed at any time following the action until 10 business days after a final disposition of the proceeding by the Regional Director. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director, except that if a request for review of a

of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.	decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that decision issues, but the pendency of such a request for review shall not require impoundment of the ballots.

Relevant remaining regulations challenged as arbitrary and capricious as a whole <u>[rules shaded in gray (right hand column) are currently in effect]</u>:

2014 Rule	2019 Amendment
§ 102.63(a): . . . Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 8 days from the date of service of the notice excluding intervening federal holidays, but if the 8th day is a weekend or federal holiday, the Regional Director shall set the hearing for the following business day. The	§ 102.63(a): . . . Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 14 business days from the date of service of the notice. The Regional Director may postpone the hearing upon request of a party showing good cause.

Regional Director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the opening of the hearing for more than 2 business days upon request of a party showing extraordinary circumstances.	
§ 102.63(a)(2): Within 2 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically.	§ 102.63(a)(2): Within 5 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically.
§ 102.63(b)(1): If a petition has been filed under §102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon on the business day before the opening of the hearing if the hearing is set to open 8 days from service of the	§ 102.63(b)(1): If a petition has been filed under §102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may

notice. The Regional Director may set the date and time for filing and serving the Statement of Position earlier than at noon on the business day before the hearing in the event the hearing is set to open more than 8 days from service of the notice. The Regional Director may postpone the time for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances. The Regional Director may postpone the time for filing and serving the Statement of Position for more than 2 business days upon request of a party showing extraordinary circumstances. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.	postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.
(no corresponding regulation in 2014 Rule. See 84 Fed. Reg. at 69,525 (#4)).	§ 102.63(b)(1)(ii): Following timely filing and service of an employer's Statement of Position, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the employer's Statement of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement

	of Position in a timely manner for good cause.
§ 102.66(h): Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Posthearing briefs shall be filed only upon special permission of the Regional Director and within the time and addressing subjects permitted by the Regional Director. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.	§ 102.66(h): Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party desiring to submit a brief to the Regional Director shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.
§ 102.67(b): If the Regional Director directs an election, the direction ordinarily will specify the type, date(s), time(s), and location(s) of the election and the eligibility period.	§ 102.67(b): If the Regional Director directs an election, the direction may specify the type, date(s), time(s), and location(s) of the election and the eligibility period, but the Regional Director retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election.

(no corresponding provision specifically allowing for reply briefs. See 84 Fed. Reg. at 69,526 (#10).)	§ 102.71(d): Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.[1]

[1] The Board also made the following changes, which have not been specifically disputed: amending various regulations in Subpart D to codify that *all* replies to oppositions could only be filed on special leave of the Board (84 Fed. Reg. at 69,526 (#10)); clarifying that parties are not allowed to file multiple, piecemeal requests for review (*Id.* (#11)); and updating terminology, cross-references, and converting all time periods to business days (*Id.* (#15)).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Appellants/Cross-Appellees,	)	
	)	
v.	)	Nos. 20-5223 &
	)	20-5226
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,	)	
	)	
Appellees/Cross-Appellants.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)

1. This proof brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because this brief contains 12,987 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This proof brief complies with the typeface requirements of Fed. R. App. P. 28.1(e)(2)(B)(i) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 16 in Century, Font 14.

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Dated November 3, 2020
in Minneapolis, MN 55401

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Appellants/Cross-Appellees, v. AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, Appellees/Cross-Appellants.	Nos. 20-5223 & 20-5226

CERTIFICATE OF SERVICE

I hereby certify that on this November 3, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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