No. 15-50497

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INCORPORATED; ASSOCIATED BUILDERS AND CONTRACTORS, INCORPORATED CENTRAL TEXAS CHAPTER; NATIONAL FEDERATION OF INDEPENDENT BUSINESS/TEXAS,

Plaintiffs - Appellants,

v.

NATIONAL LABOR RELATIONS BOARD

Defendant -Appellee,

On Appeal from the United States District Court
for the Western District of Texas, Austin Division 1:15-cv-00026-RP

BRIEF OF APPELLEE
NATIONAL LABOR RELATIONS BOARD

NANCY E. KESSLER PLATT
Deputy Assistant General Counsel

DAWN L. GOLDSTEIN
KEVIN P. FLANAGAN
Supervisory Attorneys

DAVID M. MORI
PAUL A. THOMAS
MARISSA A. WAGNER
Attorneys

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2936
(202) 273-2937
(202) 273-2938

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
BARBARA A. O'NEILL
Assistant General Counsel

National Labor Relations Board

STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board disagrees with Appellants Associated Builders and Contractors of Texas, Inc., *et al.* (collectively, ABC) that calendaring priority under Fifth Circuit Rule 47.7 is appropriate here. That rule provides for expedited appeals in criminal and habeas matters, cases involving temporary injunctive relief, and others where "good cause" is shown. This case, however, is a civil appeal from a District Court decision upholding an administrative regulation. It involves none of the enumerated case categories where priority is appropriate, and there is no "good cause" for expedition at this late juncture. ABC did not move the District Court for temporary injunctive relief; it did not move this Court for an injunction pending appeal; and it did not even request an expedited appeal. *See* 5th Cir. R. 27.5. Accordingly, ABC cannot be heard to complain now about the pendent effects of implementation of the Board's new representation rules.

The Board believes this case involves the application of largely settled legal principles to undisputed facts. However, in view of ABC's numerous contentions, the Board agrees that oral argument is likely to be of material assistance to the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases .... **Page**

Cases .... Page

Cases .... **Page**

Cases .... **Page**

Cases .... Page

Cases .... **Page**

Statutes .... **Page**

STATEMENT OF ISSUES

1. When an election petition is filed, Section 9 of the NLRA requires the Board to hold an "appropriate hearing" to determine whether a question of representation exists. Does Section 9 of the NLRA set forth an unambiguously expressed intent to mandate pre-election *litigation* of all voter-eligibility issues the parties wish to raise, even where the regional director plans to exercise longstanding discretion to defer *resolution* of those issues to the post-election period?

2. After taking into account privacy interests, the Board found that requiring employers to disclose certain employee information to nonemployer parties was a measure worth taking because it would reduce unnecessary litigation and substantially increase employee exposure to election communications. Was the Board's decision arbitrary and capricious?

3. The NLRA contains no minimum campaign period, and under the Rule regional directors have discretion to set election dates that take into account the parties' desires to campaign. Has ABC shown that the Rule on its face deprives employers of a meaningful opportunity to campaign?

STATEMENT OF THE CASE

In enacting the National Labor Relations Act (NLRA or Act), Congress assigned the National Labor Relations Board (NLRB, Board, or Agency) two principal responsibilities: preventing unfair labor practices, 29 U.S.C. § 160, and resolving questions concerning representation, *id.* § 159. This case is about a final rule that amends Board procedures for processing representation case petitions. It issued December 15, 2014, and took effect April 14, 2015. *Representation—Case Procedures* (ROA.512) (hereinafter the Rule or the amendments).

The NLRA grants employees the right "to bargain collectively through representatives of their own choosing . . . and to . . . refrain from . . . such activities." 29 U.S.C. § 157. Sometimes employees and their employer voluntarily agree that an appropriate unit of employees should be represented for purposes of collective bargaining (typically, by a labor union). But when they do not agree, Section 9 of the Act, *id.* § 159, gives the Board authority to conduct a secret ballot election and certify the results. The Board has delegated authority to its regional directors (RDs) to decide representation cases, subject to discretionary Board review. *See* 29 U.S.C. § 153(b); Regional Directors—Delegation of Authority, 26 Fed. Reg. 3911, 3911 (May 4, 1961).

Section 9 sets forth only the basic steps for resolving a question of representation. First, a petition is filed with the Agency by an employee, a labor organization, or an employer "in accordance with such regulations" as the Board may prescribe. *Id.* § 159(c)(1). Second, if there is reasonable cause, then unless the parties waive a hearing and agree to an election, an appropriate hearing is held on due notice to determine whether "a question of representation affecting commerce" exists. *Id.* § 159(c)(1), (4). *Id.* Third, if the RD directs an election and one is held, its results are certified. *Id.*

Because Congress was concerned that elections be conducted expeditiously, Congress deferred judicial review of representation case decisions. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964) (discussing Congress's concern that delay would result in a waning of employee support for collective bargaining). In addition, Congress expressly exempted Section 9 proceedings from the provisions of the Administrative Procedure Act (APA) governing adjudications. *See* 5 U.S.C. § 554(a)(6). Congress did so because "these determinations rest so largely upon an election or the availability of an election," S. Rep. No. 79-752, at 202 (1945), and because of "the simplicity of the issues, the great number of cases, and the exceptional need for expedition," S. Comm. on the Judiciary, 79th Cong., Comparative Print on Revision of S. 7, at 7 (Comm. Print 1945); (ROA.908).

In Section 6 of the NLRA, 29 U.S.C. § 156, Congress granted the Board "authority . . . to make, amend, and rescind[] . . . such rules and regulations as may be necessary to carry out the provisions of the Act." And as stated, Section 9(c), *id.* § 159(c), grants the Board authority to prescribe rules for processing representation petitions. Those procedures have been repeatedly amended over the years, usually without notice and comment. (ROA.514).

The Rule at issue makes some 25 changes to representation case procedures (ROA.512-ROA.514), and applies equally to initial organizing cases and to union decertification cases (ROA.583). Collectively, these changes provide targeted solutions to discrete, specifically identified problems, enabling the Board to better fulfill its duty to protect employees' rights by fairly, accurately, and expeditiously resolving questions of representation. As the Board noted, many of these changes are uncontroversial. (ROA.634). Indeed, on appeal, ABC challenges only 7 of the 25 amendments and does not make any claim that the entire rule should be set aside. (Opening Brief of Appellants ("Br.") 15-16, 51). The Board has explained the challenged provisions as follows:

Amendment 5

Amendment 5 provides that the pre-election hearing will ordinarily open eight days from the notice of hearing. (ROA.575). Prior to the Rule, there was no defined instruction for when RDs should set pre-election hearings, except that a hearing could not be set within five working days. *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002). Regional practice varied, with hearings set between seven and fourteen days from the notice of hearing. Amendment 5 standardizes Board procedure between regions, promoting uniformity, and transparency of practice.

Amendment 7

Amendment 7 for the first time requires that nonpetitioning parties (and also employers, where the employer is the petitioner) file a "Statement of Position" before the pre-election hearing, containing an initial list of the employees in the proposed bargaining units and the parties' positions on contested issues. The Board found that under its prior procedures, hearings had at times been "disordered" and "hampered by surprise and frivolous disputes." (ROA.512). This requirement will facilitate election agreements or, where such agreements cannot be reached, narrow the issues to be litigated. (ROA.566).

Amendments 9 and 10

In these amendments, the Board reconsidered and overruled *Barre-National, Inc.*, 316 NLRB 877 (1995), which had interpreted the Board's prior regulations to permit a party to a pre-election hearing to litigate any issue—even issues, such as the voting eligibility of individual alleged supervisors, that did not need to be and often were not decided before a decision and direction of election issued. The Board found that this procedure was "administratively irrational" and led to unnecessary costs, and therefore eliminated it. (ROA.590, ROA.601). Now RDs have discretion to utilize the challenged-ballot procedure to defer the litigation of eligibility and like issues which, if not mooted by the results, can appropriately be resolved after the election.

Amendment 15

Amendment 15 eliminates prior instructions to RDs that essentially created a stay of 25 to 30 days in cases in which an election was directed. The stated purpose of the stay was to permit the Board to rule on any requests for review of RDs' decisions which might have been filed. (ROA.614). In practice, the Board hardly ever reversed RDs during this lengthy time period. Even where a request was granted, the waiting period did nothing to prevent unnecessary elections as the vote was generally held as scheduled. (ROA.614). Since the self-imposed delay served little purpose, the Board eliminated it.

Amendment 17

Amendment 17 codifies decades-old instructions to RDs to set the election for the earliest practicable date (ROA.609). The Board rejected proposals to set either a minimum or a maximum number of days between the filing of a petition and an election. (ROA.527-528).

Amendment 20

Amendment 20 updates the Board’s longstanding requirement that employee names and addresses be provided to petitioners once an election has been agreed to or directed. Now, if the employer possesses the information, petitioners are to be provided as well with employees’ personal phone numbers and email addresses. (ROA.544). Amendment 20 enables all sides to use modern communications methods to provide employees with information about election issues. (ROA.543-544). In addition, the contact information enables petitioners to reach out to identify unknown voters, thus reducing the need for election-day challenges. (ROA.544). Amendment 20 also reduces the period of time for employers to produce the voter list from seven total days to two business days from the approval of an election agreement or direction of an election. (ROA.557). The RD retains discretion to extend this time period in extraordinary circumstances. Amendment 20 thus modernizes the Board's required employee information disclosures and eliminates unnecessary delay associated with those disclosures.

District Court Proceedings

ABC brought this action in District Court, seeking to have the challenged provisions of the Rule vacated as facially invalid and to enjoin their enforcement. (ROA.20). It moved for summary judgment, and the Board cross-moved for partial dismissal for lack of jurisdiction and for summary judgment.

The District Court denied ABC’s motion for summary judgment, functionally denied the Board’s cross-motion for partial dismissal,[1] and granted the Board’s cross-motion for summary judgment in its entirety. First, the Court determined that because ABC had brought a facial challenge, it was required to

[1] We concur with ABC (Br. 18 n.12) that the District Court was imprecise in suggesting that the Board’s motion for partial dismissal was granted. (ROA.1008-09).

show that there was "no set of circumstances" in which a provision of the Rule could lawfully be applied in order to prevail.[2] (ROA.987). Second, the court held that the Board did not violate the NLRA by authorizing RDs to defer voter-eligibility issues. (ROA.988-992). Third, the court rejected ABC's claim that the Board acted arbitrarily by requiring additional disclosures of information to petitioners. (ROA.992-998). The court next rejected ABC's assertion that the Rule either violated the NLRA or the APA because it could have the cumulative effect of shortening the time to an election. (ROA.998-1001). Finally, the court rejected ABC's claims that the Rule is generally arbitrary and capricious; it found that the Rule did not pursue impermissible goals, considered relevant aspects of the problems at hand, and was not contrary to the evidence before the Board. (ROA.1001-1007).

ABC timely noticed its appeal to this Court.[3]

---

[2] The court held, in disagreement with the Board, that ABC's challenge was ripe for judicial review, and that the "no set of circumstances" test relates to success on the merits rather than ripeness. (The Board does not challenge this conclusion on appeal.)

Given this holding, ABC's statement (Br. 18) that the court "view[ed ABC's] claims as both facial and as-applied challenges to the new Rule" is perplexing. To the contrary, it was precisely the facial nature of ABC's arguments that led the court to conclude that its arguments were ripe. (ROA.987-988).

[3] The District Court for the District of Columbia upheld the Rule in a parallel challenge brought by the United States Chamber of Commerce, Baker DC, LLC, and three individuals. *Chamber of Commerce v. NLRB*, No. 15-cv-00009, 2015

SUMMARY OF ARGUMENT

The Board enacted the Rule pursuant to a specific grant of rulemaking authority from Congress to regulate the filing and processing of representation petitions. Accordingly, the Board acted here at the very "zenith of its powers." *Am. Transfer & Storage Co. v. ICC*, 719 F.2d 1283, 1298 (5th Cir. 1983) (quotations omitted). To overturn a provision of the Rule on a facial challenge like this one, ABC must show that there is "no set of circumstances" in which it may lawfully be applied. *Reno v. Flores*, 507 U.S. 292, 301 (1993). As the District Court found, ABC's arguments cannot bear this weighty burden.

First, the Rule is in accord with the language and congressional intent underlying Section 9 of the Act. Since it was enacted in 1935, Section 9(c) has required the Board to hold an "appropriate hearing" in representation cases. Early in the Act's history, the Supreme Court determined that this phrase accomplished Congress's objective of "conferring broad discretion upon the Board as to the hearing which § 9(c) required." *Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 708 (1945). Although Congress has amended the Act several times in the past eight decades, including to specify that the hearing required by Section 9(c) must precede any election, Congress has never

WL 4572948 (D.D.C. July 29, 2015). No appeal was filed in that case, which raised substantially the same issues as the present one.

modified the phrase “appropriate hearing” so as to narrow the purposefully broad discretion originally conferred in 1935.

In the Rule, the Board reasonably exercised its broad discretion to provide that RDs may defer litigation of certain issues that the RD has determined need not be resolved at the pre-election hearing in order for the hearing to accomplish its statutory function. For example, RDs have long had the authority to defer *deciding* whether a particular employee is a supervisor (and therefore ineligible to vote in an election) by ordering that any such person vote a challenged ballot, which would remain sealed and uncounted until its validity is litigated and resolved in the post-election period, if necessary. However, RDs did not have the discretion under the Board’s prior rules to defer *litigation* over that question, even when the director had already determined to defer deciding the issue. The Rule eliminates this procedural oddity by granting RDs the discretion to allow or defer such litigation in each case.

Contrary to ABC’s contentions, nothing in the statutory text or the legislative history establishes that parties have an absolute right to litigate all eligibility and inclusion issues at the pre-election hearing. In making this argument, ABC relies heavily on an isolated remark made by Senator Taft following initial passage of the Taft-Hartley amendments of 1947 concerning the function of representation hearings. However, the statement seized upon by ABC is inconclusive at best. Nor can it bear the weight ABC ascribes to it in light of Congress' failure in 1947 to alter either Section 9(c)'s essential "appropriate hearing" language or the Board's established challenged-ballot procedure. Senator Taft's statement in 1947 about the meaning of "appropriate hearing" language enacted in 1935 simply is not relevant in discerning the intent of the 1935 Congress. *See Oscar Mayer & Co. v. Evans*, 411 U.S. 750, 758 (1979).

Second, ABC has failed to show that the Board violated the Act and capriciously ignored privacy interests in requiring employers to produce employee lists (Amendments 7 and 20) at different stages of the representation proceeding. The Board found that requiring production of an initial list of employees and their job data (but not contact information) before the pre-election hearing would reduce unnecessary litigation. In addition, building on longstanding precedent approved by the Supreme Court, *see Excelsior Underwear, Inc*., 156 NLRB 1236, 1239-40 (1966), *approved by NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969), the Board found compelling reasons to expand the preexisting voter list disclosure requirement to include additional contact information, if in the employer's possession. The Board expressly recognized that the provision of such information posed potential privacy risks. However, it explained why the benefits decisively outweighed the risks, set forth permissible uses of employee information, and described how it could remedy potential misuse.

And third, ABC errs in claiming that the challenged Rule amendments reflect an improper emphasis on speeding elections at all costs (Br. 43-50). As both district courts to have reviewed the Rule have concluded, ABC's suggestion that the Act somehow contains an unwritten requirement that elections not be held until 30 days after filing of an election petition defies canons of statutory interpretation. The Rule provides multiple reasons why employers will continue to have ample meaningful opportunities to convey their views on union representation to their employees.

In the end, ABC has no answer to the decisive fact that the Rule places discretion over the details of pre-election hearings and the length of election campaigns into the hands of the Board's RDs. Because courts may not presume in advance that discretion will be abused, ABC's facial challenge to these features of the Rule must fail.

The judgment of the District Court should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews the District Court's grant of summary judgment *de novo*, "applying the same standard as the district court." *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir. 2011). Because this case involves judicial review of an informal rulemaking, the APA sets forth the applicable standard.

Under the APA, a court may set aside a rule only where the rule is "arbitrary, capricious, or manifestly contrary to the statute." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826 (2013) (quotation omitted). Review of agency action is both narrow and "highly deferential to the administrative agency whose final decision is being reviewed." *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010).

An especially high level of deference is warranted here because, for decades, the Supreme Court has emphasized "that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (citations omitted). The Court has consistently rejected efforts to require agencies to follow judicially-imposed procedures above and beyond those explicitly specified by statute. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53 (D.C. Cir. 1990).

Where the Rule relies upon the Board's interpretation of the Act, that interpretation is assessed using the two-step procedure set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). First, the court must determine "whether Congress has directly spoken to the precise question at issue" by setting forth its "unambiguously expressed intent." *Id*. at 842-43. If this Court concludes that the Act is either silent or ambiguous on that "precise question," it must determine whether the Board's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If so, the court must defer to that interpretation.

ABC has also alleged that the Rule is arbitrary and capricious. "[U]nder this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Although an agency must provide its reasoning for adopting a rule, the court's review is limited to searching only for "a rational connection between the facts found and the choice made." *Id.* at 43 (quotation omitted). An agency rule will be set aside if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. (citations and quotations omitted).

This case raises an exclusively facial challenge to the Rule. At certain points on brief, ABC attempts—for the first time in these proceedings—to recast its challenge, filed months before the Rule had even gone into effect, as both facial and as-applied. (Br. 18, 35). But ABC's complaint alleges no circumstances constituting a violation of the APA in any Board case in which ABC or one of its members have participated, and it never sought leave of the District Court to amend its complaint to add such an allegation.[4] As this Court has recognized, a plaintiff cannot challenge a rule as applied until the agency has applied the rule against it in a final action. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997). And even if ABC had pointed to such a case, its claim would not be ripe; it would rest upon little more than speculation about the likely results of an unfinished administrative process. The federal courts lack subject-matter jurisdiction to intervene in unfinished Board representation cases. *Chamber of Commerce*, 2015 WL 4572948, at *9 (citing *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984)).

[4] ABC makes several references to a recent election involving Baker DC, LLC, which it describes as an "ABC-member company." (Br. 17-18; *see also id.* at 29, 42). This case was brought by ABC *of Texas*, of which Baker DC is presumably not a member. But regardless, ABC's references to Baker may not be considered by this Court, as none of that information is part of the administrative record in this case. *Chamber of Commerce*, 2015 WL 4572948, at *10 (citing, *inter alia*, *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam)).

Because it brings only a facial challenge, ABC "must establish that no set of circumstances exists under which the [Rule] would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993); *see also Sherley v. Sebelius*, 644 F.3d 388, 397 n.** (D.C. Cir. 2011) (recognizing that the no-set-of-circumstances test enunciated in *Flores* binds lower courts); *Center for Individual Freedom v. Carmouche,* 449 F.3d 655, 662 (5th Cir. 2006) (noting general applicability of "no set of circumstances" test to facial challenges).[5]

II. The NLRA's requirement that the Board hold an "appropriate hearing" on questions of representation does not clearly command the Board to permit pre-election litigation of every voter-eligibility issue that parties wish to raise.

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

> [T]he Board shall investigate [representation] petition[s] and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for *an appropriate hearing upon due notice*. . . . If the Board finds upon 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.

[5] ABC suggests (Br. 35) that this Court should apply a standard under which "the challenger need only show that a statute or regulation 'might operate unconstitutionally under some conceivable set of circumstances.'" *Carmouche*, 449 F.3d at 662 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). ABC overlooks that the point of the *Salerno* Court's statement was specifically to disavow such a test outside the unique context of First Amendment overbreadth challenges.

29 U.S.C. § 159(c)(1) (emphasis added). Accordingly, as the text of Section 9 indicates, the statutory purpose of the required pre-election hearing is "to determine if there is a question of representation" in an appropriate unit. (ROA.584; *see also* ROA.589 (discussing 29 U.S.C. § 159(c)(1))).

Because of the Amendments, the Board's regulations now track the text of Section 9(c) by specifying that "[t]he purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists." 29 C.F.R. § 102.64(a); (ROA.686).[6] The Rule explicitly grants parties the right to introduce evidence at the hearing which is "relevant to the existence of a question of representation." 29 C.F.R. § 102.66(a); (ROA.687).[7] The Rule also makes clear that unit appropriateness issues can be litigated at the pre-election hearing, and will be decided by the RD. 29 C.F.R. §§ 102.64(a), 102.67(a); (ROA.686, ROA.689;

[6] The Rule explains that a question of representation exists "if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative." 29 C.F.R. § 102.64(a); (ROA.686). Whether the petition is proper involves inquiry into issues like jurisdiction, labor organization status, or the possibility of legal barriers to the conduct of an election at that time. (*See* ROA.584 n.346, ROA.588-589).

[7] (*See* ROA.513) (Ams. 9, 10); (ROA.584-585) (discussing justification for explicitly construing the purpose of the hearing in accord with the statute); (ROA.587-591, ROA.595) (discussing justification for clarifying what evidence parties have a right to introduce at the pre-election hearing).

see also ROA.569, ROA.584 n.346). Therefore, Amendments 9 and 10 are fully consistent with the statute.[8]

A. The Amendments continue to provide parties with an "appropriate" pre-election hearing.

ABC objects to the Rule's changes to the pre-election hearing. It claims that Section 9 grants parties the right to present evidence on all issues potentially affecting the election at the pre-election hearing – including evidence pertaining to issues of voter eligibility, inclusion, and supervisory status. (Br. 4, 8, 25, 32). Since the Rule provides RDs considerable discretion to allow or defer the taking of evidence at the hearing concerning these issues, ABC's challenges to the pre-election hearing amendments must be rejected at the outset because they fail to satisfy ABC's facial challenge burden. As the District Court correctly held:

> [P]laintiffs are bringing a facial challenge to the New Rule. As a result, they are required to establish there is "no set of circumstances exists" under which the New Rule would be valid . . . Accordingly, even if the New Rule ordinarily limits the [ ] scope of the pre-election process, the deference granted a Regional Director to extend and expand those limits renders Plaintiffs' challenge unavailing.

(ROA.992).

---

[8] Contrary to ABC's preclusion argument (Br. 15, 24 n.14), Amendment 7 does not prevent any party from challenging the eligibility of any voter during the election, even if the eligibility issues were not raised in the required Statement of Position. (ROA.992) (citing 29 C.F.R. § 102.66(d)); (ROA.688, ROA.604, ROA.581). ABC simply misreads the Rule.

Furthermore, ABC's challenges to the pre-election hearing amendments lack merit. ABC does not, and cannot, point to any specific statutory language requiring the Board to permit litigation of all voter eligibility or inclusion issues at the pre-election hearing. (ROA.990, 992). In the absence of any such directive, the District Court thus properly concluded that the central question presented by ABC's argument is the meaning of the phrase "appropriate hearing upon due notice" and whether Congress intended that language to compel such pre-election litigation. (ROA.990-991).

As explained above, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vt. Yankee*, 435 U.S. at 544. An early example of this principle was *Inland Empire*, where the Supreme Court construed Section 9's "appropriate hearing" language as granting the Board wide discretion in devising the procedures to use to decide whether a question of representation exists. 325 U.S. at 706-10. As the Court explained there, the phrase "appropriate hearing upon due notice" is deliberately expansive:

> Obviously great latitude concerning procedure details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be "due," the hearing "appropriate." These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an "investigation," essentially informal, not adversary. . . . [N]or is any particular form of procedure necessary.

Id. at 706-10. The Court further stated that in choosing such terminology Congress intended to "confer[] broad discretion upon the Board as to the hearing which

[Section] 9(c) required before certification." *Id.* at 708. Accordingly, there is no "unambiguously expressed intent" to mandate pre-election litigation of all voter-eligibility issues the parties wish to raise. *Chevron*, 467 U.S. at 843. To the contrary, in interpreting the phrase "appropriate hearing," the Board is "at the zenith of its powers." *Am. Transfer*, 719 F.2d at 1298 (quotations omitted).[9]

Although following *Inland Empire* the Labor Management Relations Act of 1947 (often referred to as the Taft-Hartley Act) amended the NLRA to require that the Section 9(c) hearing precede the election unless waived, the relevant statutory language concerning the hearing requirement otherwise remained the same – that is, the requisite hearing must be "appropriate" and "upon due notice." There is simply no merit to ABC's assertion that Congress rewrote "*every* aspect of the hearing requirement" when it passed Taft-Hartley. (Br. 31). Rather, as the text makes plain, the amended language only changed the hearing's timing and made it mandatory where parties did not enter election agreements. As Judge Friendly explained, "Although under the [Taft-Hartley] amendment the hearing must invariably precede the election, neither the language of the statute nor the

[9] For this reason, ABC's reliance (Br. 25-26) on the lead opinion in *Texas v. U.S. Dept. of Interior* is misplaced. 497 F.3d 491, 501-05, 511-12 (5th Cir. 2007). The Supreme Court has repeatedly made clear that Congress intended to vest substantial authority in the Board as to the procedures necessary for the processing of representation cases. *Inland Empire*, 325 U.S. at 706-10; *see also Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-10 (1991); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-31 (1946); *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940).

committee reports indicated that any change in its nature was intended." *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 133-34 (2d Cir. 1967) (noting *Inland Empire*'s continued vitality).

ABC's counter-argument, for which it cites no legal authority (Br. 31-33), is that despite Congress's failure to change the relevant "appropriate hearing" language, the phrase should be given a different interpretation than set forth in *Inland Empire* because other parts of Section 9(c)(1) were amended in 1947. The District Court rightly rejected this argument, as it is contrary to well-established canons of statutory construction. (ROA.991).[10] Instead, as the District Court correctly found, in the absence of any change to the essential "appropriate hearing" language of Section 9, the Supreme Court's construction of the statutory text as granting broad discretion to the Board concerning procedural details remains controlling. (ROA.991; *see also* ROA.590 & n.362, ROA.629-630).

The Rule is fully consistent with Section 9 because under the Rule there will be an appropriate pre-election hearing upon due notice, unless the parties waive that right. 29 U.S.C. § 159(c)(1), (4); 29 C.F.R. § 102.63(a), (ROA.684). The

[10] *See also Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (selectively amending only parts of a statute strengthens the presumption for those parts that are not changed); *First Bank v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001) ("If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old.").

amendments simply clarify that parties only have the right to introduce evidence at the pre-election hearing that is relevant to the hearing's statutory purpose.[11] This change, which was reasonably aimed at eliminating unnecessary litigation, makes hearings more appropriate, not less so, and is well within the Board's wide discretion over representation cases.

ABC's position that parties are entitled to litigate all voter eligibility and inclusion issues pre-election is also in tension with the Board's longstanding, court-approved challenged-ballot procedure. *See A.J. Tower*, 329 U.S. at 330-35. That procedure, which ABC conspicuously fails to mention in its brief, allows the Board and its RDs to defer deciding discrete eligibility or inclusion questions until after an election has been held, instead allowing the voters in question to cast "challenged ballots" that are segregated, pending any need to resolve their status in order to certify an election's results. *E.g.*, *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) ("Deferring the question of voter eligibility until after an election is an accepted NLRB practice" which "saves agency resources for those cases in which eligibility actually becomes an issue."); *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 497 (5th Cir. 1992); (*see* ROA.590 & n.364, ROA.593-595 & n.386). And the Board has utilized the challenged-ballot

[11] (*See* ROA.602 & n.424) (explaining parties have no statutory or constitutional right to introduce irrelevant evidence); *see also* 5 U.S.C. § 556(d).

procedure for such purposes since the Act's early days. (ROA.590) (citing *Humble Oil & Ref. Co.,* 53 NLRB 116, 126 (1943) (deferring decision on whether classifications of sliding foremen, stillmen, and pumper supervisors should be included in production and maintenance unit)).[12] In short, by codifying RD discretion to defer deciding such matters until after the election, the Rule "involves no qualitative changes regarding the issues to be decided before the election." (ROA.630).[13]

Despite the fact that the Board is not required to decide all eligibility or inclusion questions before the election (which was true even prior to the Rule), the Board nevertheless interpreted its former rules and statement of procedures as entitling parties to present evidence regarding those matters at the pre-election

---

[12] *See also Ward Baking Co.*, 21 NLRB 483, 489 (1940) (allowing disputed individuals to vote subject to challenge and deferring decision regarding their eligibility/employee status pending results of the election); *Mid-State Frozen Egg Corp.*, 44 NLRB 661, 663-64 (1942) (same); *Phelps Dodge Corp*., 41 NLRB 140, 151 (1942) (same); *New York Merchandise Co.*, 50 NLRB 41, 49 (1943) (same).

[13] Accordingly, arguments in National Right to Work, *et al*.'s (collectively, NRTW) *amici curiae* brief (NRTW Br.) on pages 9-17 concerning what should be *decided* before an election are properly understood not as a challenge to the Rule, but instead as an attack on the longstanding practice of the Board. As ABC makes no such attack, NRTW's contention is not well taken. It is settled that this Court will not consider issues raised only in *amicus* briefs absent "exceptional circumstances." *E.g. Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1992); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2776 (2014). Neither of ABC's *amici* contend that there are any "exceptional circumstances" here.

hearing. (ROA.587-590) (discussing *Barre-National, Inc.*, 316 NLRB 877 (1995)). The Board reasonably determined that this practice made no sense. As the Rule explains:

> [I]t serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. It serves no purpose to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function . . . In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence.

(ROA.589-590, ROA.630). Pre-election litigation and resolution of such matters frustrates the goal of expedition, imposes unnecessary costs, and allows parties to use the threat of such litigation to extract concessions. (ROA.587-595).[14] Accordingly, the Board amended its regulations to afford RDs discretion to bar litigation of such matters at the pre-election hearing.

In making this change, the Board explicitly indicated that it was overruling *Barre* and its progeny. ABC attempts to characterize the *Barre* decision as unanimously holding that Section 9(c) requires the Agency to allow parties to contest all voter eligibility issues at the pre-election hearing. (Br. 9, 28). However,

---

[14] The cited text demonstrates that *amicus* Retail Litigation Center, Inc. (RLC) is incorrect in stating that the Board justified the amendments "by merely reciting that the prior rules might permit the same result." (*Amicus* Brief of RLC ("RLC Br.") 20); (*see also* ROA.1006).

as the Rule explains, the holding in *Barre* was not based on the statute, but on the Board's reading of its then-current rules and procedures. (ROA.589-590); *see also Barre*, 316 NLRB at 878.[15] In light of the Rule's amendments, that reliance is no longer relevant. In any event, even if *Barre* did look to Section 9(c), the Board reasonably explained in the Rule why it does not find that case persuasive (ROA.590): "There is no meaningful discussion of the statutory language, no analysis of the legislative history or the plain language of Section 9(c), and no explanation for why it would make sense to require litigation of issues that will not be decided . . . ."

Relying on "congressional reenactment," ABC suggests that the Board is not entitled to change its position regarding the scope of the pre-election hearing (Br. 33-34), but ABC does not explain its relevance here. In any event, congressional reenactment is only an interpretive aid and "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change." *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941). Rather, an administrative interpretation can be changed through an agency's exercise of rule-making powers. *Id.*; *see also, e.g.*, *McCoy v. United States*, 802 F.2d 762, 765-66

[15] ABC's reliance on *NLRB v. S.W. Evans & Son*, 181 F.2d 427 (3d Cir. 1950) is similarly misplaced. In that case, the Third Circuit's holding was also expressly based on its interpretation of then-current regulations – i.e., language from 1945 which is also long gone. *Id.* at 429-30; (*see also* ROA.589 n.360).

(4th Cir. 1986). Here, the Board fully explained in the Rule why foreclosing irrelevant litigation is both rational and consistent with the statute. (ROA.589-597). This decision is entitled to deference. *See, e.g.*, *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 787 (1990) (explaining that "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy" as long as it is "rational and consistent with the Act"). And the Board's clear statement that it was overruling *Barre* more than satisfies its obligation to "display awareness that it is changing position." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (emphasis removed).

Ultimately, the problem with ABC's statutory challenge is that neither the statute nor the case authority interpreting Section 9(c) provide any persuasive basis for concluding that Section 9 gives parties the absolute right to litigate all eligibility and inclusion disputes prior to the election. Both courts to have ruled on challenges to the merits of the Rule, correctly identified this fatal flaw. (ROA.992) ("Plaintiffs have not pointed to any binding authority which establishes the language of [Section 9] . . . requires the Board to permit employers to introduce evidence concerning voter eligibility in a pre-election hearing . . . ."); *Chamber of Commerce,* 2015 WL 4572948, at *17 ("[T]he statute does not call for a hearing on all issues affecting the election, or even all substantial issues affecting the election. It clearly specifies that the purpose of the section 9(c) hearing is to determine whether a question of representation exists. This is a yes or no question that is distinct from the question of which individuals will vote in the ensuing election . . . .”).

Unable to find any other support for its position that parties have an absolute right to litigate the voting eligibility of specific employees or groups of employees at the pre-election hearing, ABC turns to a remark made by a single legislator twelve years after the relevant statutory provision was enacted. (Br. 26-33). Specifically, ABC cites a statement made by Senator Taft, following a vote on the 1947 amendments to the NLRA, opining that the function of the pre-election hearing is “to decide questions of unit and eligibility to vote.” (Br. 26 n.17, citing “Supplementary Analysis of the Labor Bill as Passed,” 93 Cong. Rec. 6858, 6860 (June 12, 1947)).

First, there is no indication that Senator Taft’s remark sought to alter the Board’s established practice to allow disputed individuals to vote subject to challenge and to defer decision regarding their eligibility until after the election. *See A.J. Tower*, 329 U.S. at 330-35 (recognizing the Board’s challenged-ballot procedure), and cases noted *supra* pp. 22-23 & n.12. Additionally, “[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *accord Consumer*

Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980).[16] What is relevant is that Congress did not change the pre-existing "appropriate hearing" language in 1947 to take discretion away from the Board to defer deciding some eligibility issues until after the election. (ROA.590, ROA.629-630). Therefore, the Board justifiably concluded that Senator Taft's statement in 1947 about the meaning of a term from 1935 that his legislation did not change was not controlling, and the District Court properly agreed. (ROA.991).[17]

---

[16] The cases cited by ABC in support of its effort to add heft to Senator Taft's statement are inapposite, and announce a rule less expansive than ABC represents. For instance, in *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982), the Court noted that "the statements of one legislator made during debate may not be controlling," but indicated the statements made there by a sponsor were "the only authoritative indications of congressional intent regarding the scope of [the legislation]" because the legislation originated as a floor amendment and no committee report discussed it. Moreover, the statements "were made on the same day the [legislation] was passed." *See also FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (explaining sponsor's statement "[did] not stand alone" and that other statements in the legislative history supported the sponsor's position); *Mattox v. FTC*, 752 F.2d 116 (5th Cir. 1985) (same). Here, on the other hand, Senator Taft's inconclusive and general statement was not part of the committee report and is the only statement in the legislative history ABC points to in support of its construction.

[17] *See, e.g., O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (legislative observations made years after a statute's passage "are in no sense part of the legislative history. It is the intent of the Congress that enacted [the section] . . . that controls.") (internal citations omitted).

Nor do the other snippets of unenacted legislative history mentioned by ABC establish that parties have a right to litigate all eligibility or inclusion issues at the pre-election hearing. (Br. 5, 8). Specifically, ABC points to two failed legislative proposals from the 1947 and 1959 amendments to the Act that would have permitted the Board to proceed to an election without a hearing in certain circumstances. Failed legislative proposals, however, do not provide a sound basis for determining congressional intent. *United States v. Estate of Romani*, 523 U.S. 517, 533-34 (1998); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994). In any event, since the Rule requires a pre-election hearing absent stipulation, nothing about it is inconsistent with this legislative history. *See* 29 C.F.R. § 102.63(a); (ROA.684).

In sum, the Rule's grant of discretion to RDs to defer litigation of issues that are not relevant to the pre-election hearing's statutory purpose—and that may ultimately be mooted—comports with Section 9(c)(1), congressional intent, and *Inland Empire*'s pronouncement that the Board has been vested with "great latitude," 325 U.S. at 706, as to the hearing required.

B. A regional director's decision to defer discrete eligibility and inclusion questions until after the election does not conflict with the Board's obligation to make an appropriate unit determination.

Section 9(b) of the Act requires the Board to determine in each case whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Although ABC does not claim that the Board must resolve all eligibility and inclusion issues before the election, ABC intimates that Section 9(b) compels the Board to decide all disputes regarding "classification[s]" of employees before the election. (Br. 7-8, 29, 36; *see also* NRTW Br. 16-17 & n.5). However, ABC fails to point to anything in Section 9(b) requiring the Board to make a pre-election determination concerning the inclusion or exclusion of each and every prospective unit classification.

Nor does the Senate Report cited by ABC (Br. 7) signify that the Board is required to decide all classification disputes before an election. That report merely describes the Section 9(b) language as "similar" to language amending the Railway Labor Act regarding an agency designating "who may participate in the election." But ABC ignores that Congress chose not to use that language in the NLRA. At the end of the debate over what would become Section 9(b), Congress rejected the language "eligibility to participate" in favor of the different "unit appropriate" language now found in the statute. *Compare* 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 11 (1949) (language from Senate Bill 2926, Section 207, which was the earliest version of the Section 9(b) provision) *with* enacted language of 29 U.S.C. § 159(b).[18]

Put simply, an RD can reasonably determine the appropriate unit in which to conduct an election without deciding the placement of disputed classifications in certain circumstances.[19] For example, assume a union petitions for a unit of all carpenters employed by a construction company, excluding supervisors as defined in the Act, and that there are approximately 100 such carpenters. Assume also that the employer concedes that the carpenters share a community of interest and that the appropriate unit includes the carpenters and excludes supervisors as defined in the Act, but contends that 10 carpenter foremen should also be included in the

[18] NRTW also incorrectly asserts (NRTW Br. 17-18) that the final clause appended to the phrase in 9(b)—"or subdivision thereof"—signals congressional intent to require the Board to definitively determine all of the job classifications to be included in the appropriate unit before an election is held. Legislative history shows that the clause seized upon by NRTW was enacted to permit the Board "to order an election in a unit not as broad as 'employer unit,' . . .; for example, the 'production and maintenance employees' of a given plant." 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3260 (1949). Nor are the statutory provisions relating to professionals and guards evidence of such congressional intent. (NRTW Br. 18-19). Section 9(b)'s specific professional and guard provisos only serve to underscore the Board's broad discretion in representation cases generally.

[19] *See Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55-56 (2d Cir. 1992) (explaining that the "determination of a unit's composition need not be made before the election" and that an RD has "the prerogative of withholding a determination on the unit placement of [a classification] of employees until after the election"); (*see also* ROA.588) (discussing deferral of quality control employees in a production unit).

unit. The union disagrees on the basis that the carpenter foremen are statutory supervisors.

In such a case, the RD may reasonably decide to defer pre-election litigation and resolution of the group of carpenter foremen, who would comprise approximately 10 percent of the unit. Thus, it is not necessary for the RD to decide before the election whether the carpenter foremen are in or out of the unit to determine that the unit is appropriate. If the carpenter foremen are deemed to be employees, then they would properly be part of the unit of carpenters that the employer concedes is appropriate. On the other hand, if the foremen are deemed to be supervisors, then they would fall under the explicit exclusion for supervisors that the employer likewise concedes is appropriate. Accordingly, the RD can reasonably vote them subject to challenge, and advise employees via the Notice of Election that the carpenter foremen are neither included in, nor excluded from the unit, inasmuch as their placement has not been determined and that their eligibility or inclusion will be resolved, if necessary, following the election.

If the carpenter foremen's votes end up being determinative of the election results, then a post-election proceeding can be held to litigate and resolve their status. But the outcome of that proceeding would not call the RD's pre-election determination concerning the appropriate unit into question for the reasons discussed above.

Nor is NRTW accurate (NRTW Br. 4) when it asserts that "the Board will never decide[,]" even after the election, whether a challenged classification should be included in the unit if the votes of the disputed classification are not determinative of the election's outcome. As the Rule explains, if the union wins, the parties can negotiate unit inclusion issues through the collective bargaining process. (ROA.595). However, if the parties are unwilling or unable to resolve the status of disputed individuals or groups, then either party may have this issue resolved by the Board by filing a timely unit clarification petition. NRTW's argument ignores that this practice predates, and remains unchanged by, the Rule. (ROA.595, ROA.597 & n.398, ROA.617).[20]

C. ABC fails to show that the Rule's discretionary deferral of litigation of eligibility issues that may be mooted is arbitrary or capricious.

ABC also claims that the Rule's deferral of litigation policy is arbitrary and capricious because deferral of such matters may delay the conclusion of representation cases by increasing post-election litigation. (Br. 48). *Amicus* RLC presents two additional challenges that are not raised by ABC, and thus need not be considered by this Court: (1) deferral of supervisory status issues leads to

[20] Given the courts' longstanding approval of the parties' ability to enter into voluntary stipulations concerning the contours of the unit, *see, e.g.*, *Cappa v. Wiseman*, 659 F.2d 957, 960 (9th Cir. 1981), there is also no merit to NRTW's contention (NRTW Br. 22-24) that the Board abdicates its responsibility to make an appropriate unit determination by permitting employers and unions to resolve post-election inclusion issues through bargaining. (*See* ROA.597).

unacceptable uncertainty as to which individuals an employer may use to campaign and may lead to conduct that requires rerunning the election; and (2) if the contours of the bargaining unit are later modified, employees will have been deprived of their right to make an informed choice in the election. (RLC Br. 8-12, 15-16, 17-21). The Board reasonably found all of these objections unpersuasive.

First, ABC fails to substantiate (Br. 48; *see also* RLC Br. 11 & n.2) its speculative claim that deferring these issues will make the entire process slower. (ROA.1006). ABC cites no record evidence to support its theory, and we are aware of none. In fact, the record shows that the majority of elections are decided by margins of 20% or more, "suggesting that deferral of up to 20% of potential voters . . . would not have compromised the Board's ability to immediately determine election results in the vast majority of cases." (ROA.591; *see also* ROA.591 n.370; ROA.592; ROA.594 n.388). As the District Court observed, "deferral may render certain issues moot, and thus result in reduced [overall] litigation." (ROA.1006; *see also* ROA.617, ROA.612). Although there may be more challenged-ballot proceedings and unit clarification petitions under the Rule, ABC ignores other (unchallenged) amendments that should serve to shorten the time between the tally of the ballots and certification.[21] And there is no reason

[21] Amendments 22 and 23 require that evidence in support of post-election objections be filed within 7 days, and post-election hearings ordinarily open within

whatsoever for parties to file more petitions for review in the circuit courts of appeals than they did under the prior rules. Ultimately, the Board determined that it would be more efficient to accept a slight increase in post-election litigation than to continue to allow litigation of *all* voter-eligibility issues pre-election. This considered judgment is not subject to second-guessing.

Next, the Board reasonably determined that RLC's claim that employers will have difficulty campaigning, due to uncertainty about who their supervisors are, did not warrant revision of the Rule. The Board explained that the same uncertainty "exists under the current rules and cannot be fully eliminated" because: (a) parties were not guaranteed a pre-election decision as to supervisory status; (b) even if an RD resolved a supervisory status question prior to the election, the parties would not have the benefit of that decision for much of the campaign; and (c) any such decision was still subject to post-election reversal by the Board or a reviewing court. (ROA.593). Furthermore, as this Circuit has recognized, supervisory determinations in election cases are not entitled to preclusive effect in subsequent unfair labor practice cases. *See Heights Funeral Home, Inc. v. NLRB*, 385 F.2d 879, 881-82 (5th Cir. 1967). Therefore, no matter when the eligibility

---

21 days, of the tally of ballots. (ROA.514). And Amendment 13 permits the Board to deny review of all post-election decisions which raise no compelling grounds for such review-- an area the Board deemed "the most significant source of administrative delay in the finality of election results." (ROA.617).

issue is heard, the parties act at their own peril whenever they insist on involving disputed individuals in their campaigns. *See NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1255-58 (9th Cir. 1984) (en banc). This uncertainty is an unavoidable consequence of the statutory scheme, and not a deficiency of the Rule.

Nor will the amendments deprive employees of their right to an informed choice. (RLC Br. 8-11, 17-18; *see also* NRTW Br. 4, 11-12). As under the former rules, the RD must determine the unit's scope and appropriateness prior to the election. And, just as before, employers will be required to post the Notice of Election describing the unit, enabling employees to "assess the extent to which their interests may align from, or diverge from, other unit employees." (ROA.593).

There is also no merit to RLC's claim (RLC Br. 11; *see also* NRTW Br. 21-22) that unbeknownst to employees, the unit's contours may change after the election. First, the Board "expect[s] regional directors to permit litigation of, and to resolve, [individual eligibility or inclusion] questions when they might significantly change the size or character of the unit." (ROA.594). The Board carefully analyzed its statistics and the comments on this point (ROA.593-594) and concluded that "20 percent may often serve as a sensible benchmark." (ROA.629 n.523). Second, the Rule avoids employees being misled about the unit by providing in amended Section 102.67(b) that where the director does defer deciding such questions, the Notice of Election will inform employees prior to the election that the individuals in question "are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge," (ROA.594), and "that their unit placement 'will be resolved, if necessary, following the election.'" (ROA.594) (quoting 29 C.F.R. § 102.67(b)). Accordingly, employees "will cast their ballots understanding that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined." (ROA.594).

Finally, ABC's catch-all claims that the Board (*i*) arbitrarily and capriciously concluded that parties are not entitled to litigate voter eligibility issues at the pre-election hearing, and (*ii*) prioritized speed of the election over its duty to determine the appropriate unit (Br. 47-49; RLC Br. 19-20), simply rehash its NLRA statutory arguments discussed above. *See supra* pp. 16-33. Suffice it to say that, as the District Court concluded (ROA.989-992, ROA.1002-1004), the Rule still requires an appropriate unit determination before the direction of election, and the Board did not act arbitrarily in giving its RDs discretion to defer litigation of those voting eligibility issues that, if not mooted, can reasonably be decided after the election through the challenged-ballot procedure. There is also nothing unreasonable about the Board's considering the need to expeditiously conduct an election as one factor in formulating its rules.

III. The Board's decision to require employers to disclose employee information is consistent with the APA, furthers the goals of the Act while respecting employee privacy interests, and will not unduly burden employers.

The Rule requires two separate disclosures of employee information. These disclosures occur at different times and for different purposes. First, employers are now required to include with Statements of Position (filed the day before the pre-election hearing) a list of names, shifts, work locations, and job classifications of the employees in the petitioned-for unit, as well as any other employees the employer seeks to add to the unit (the "initial list"). (ROA.513; 29 C.F.R. § 102.63(b)).

Second, the Rule provides that within two business days of the direction of an election, employers must electronically transmit to the other parties (e.g., a petitioning union) and the RD a list of eligible voters, their home addresses, work locations, shifts, job classifications and, if available to the employer, their personal e-mail addresses and home and cellular telephone numbers. (ROA.514; 29 C.F.R. 102.67(*l*)). Previously, employers were required to produce to the RD within seven days of the direction of an election a list of names of eligible voters and their home addresses only. The RD would then serve the list on the parties. *See Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), *approved by NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). Contrary to ABC's claims (Br. 36-43), the Rule's disclosure provisions are consistent with the Act and strike a reasonable balance between obtaining sufficient information to satisfy the rationales for requiring this information and protecting employee privacy.[22]

A. The Board carefully explained that the initial list requirement is a reasonable way to ensure that all parties and the Board possess the information necessary to resolve representation disputes more efficiently.

We begin with the list of employees contained in the Statement of Position. Its rationale is simple: it grants access to useful information about the employees' work to non-employer parties and regions sooner in the election process with the goal of resolving disputes without litigation. (ROA.513).[23] Prior to the Rule, regional offices were urged to request that employers submit a list of employees' names and job classifications to the region and permit the region to share that information with the other parties before the pre-election hearing. (ROA.571) However, the regions had no legal authority to require that information prior to the hearing.

The Board found, and ABC does not dispute (*see* Br. 36-37), that requiring the initial list would aid in "expeditiously resolv[ing] questions of representation

[22] ABC's unsupported assertion that the required information disclosures impinge upon employees' Section 7 "right to refrain" from union activities (Br. 36) is without merit. In this context, that right is "exercise[d] by voting for or against union representation." *Excelsior*, 156 NLRB at 1244.

[23] This list is only required after the petitioner produces a showing of interest and the RD finds "reasonable cause to believe that a question of representation . . . exists." 29 U.S.C. § 159(c); (*see* ROA.625, ROA.674 (explaining the showing of interest requirement)).

by facilitating entry into election agreements, narrowing the scope of the pre-election hearing in the event that parties are unable to enter into an election agreement, and reducing the need for election-day challenges based solely on lack of knowledge of the voters' identities." (ROA.570). The Board also found that one impediment to reaching election agreements is parties "talk[ing] past each other" regarding the appropriate unit, because they may use differing terminology to discuss the same employees. (ROA.570). Moreover, petitioning unions are often left "in the dark" as to actual dimensions of an employer's proposed alternative unit. Thus, in crafting the disclosure requirement for the initial list, the Board drew on its experience, which "demonstrated that clear communication about the specific employees involved generally facilitates election agreements or results in more orderly litigation." (ROA.513); (ROA.566-568 (discussing the utility of the Statement of Position)).[24]

B. The Board fully explained why the expanded voter list requirements better advance the public interests in free and fair elections and prompt resolution of questions of representation.

The Act requires not only that employees have the opportunity to cast their ballots for or against union representation free from interference, restraint, or

[24] ABC vaguely claims, without citation to authority (Br. 38 n.24), that these disclosure requirements may compel the disclosure of "trade secrets." Assuming arguendo that this claim is valid, any employer in such a situation could simply apply for a protective order. *See, e.g.*, *Local 917, Teamsters (Peerless Importers, Inc.),* 345 NLRB 1010, 1011 n.7 (2005).

coercion that violates the Act, but also that they cast ballots free from other elements that prevent or impede a free and reasoned choice, including a lack of information:

> Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.

Excelsior, 156 NLRB at 1240 (footnote omitted). The Board in *Excelsior* held, therefore, that access of all voters to campaign communications of nonemployer parties through the disclosure of voters' names and addresses was necessary to "maximize the likelihood that all voters will be exposed to the arguments for, as well as against, union representation." *Id.* at 1240-41.[25] The Supreme Court fully endorsed this rationale in *Wyman-Gordon*: "The disclosure requirement furthers this objective [to ensure the fair and free choice of bargaining representatives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses." 394 U.S. at 767. This long-standing practice is not challenged by ABC.

---

[25] *Excelsior* additionally reasoned that this disclosure would facilitate the public interest in the expeditious resolution of representation cases by reducing the likelihood of challenges based on lack of knowledge of the voter's identity. 156 NLRB at 1242-43.

The Rule's expanded voter list provisions reflect the Board's conclusion that supplying nonemployer parties with additional contact information that facilitates the use of modern modes of communication in campaigns "better advances" *Excelsior*'s primary purpose of exposing employees to different viewpoints. (ROA.541, ROA.544 n.151). In 1966, cellular telephones and e-mail – crucial tools of communication in today's world – did not exist. (ROA.541, ROA.545). Although landline-based telephones were in use, no commercially viable home answering machine was yet on the market, rendering telephone numbers of limited utility. (ROA.542). In more recent years, however, the development of voicemail, cell phones, and smart phones has allowed people to be reached wherever they may be (especially those without landlines). (ROA.542-543). Indeed, cell phones are "a pervasive and insistent part of daily life." *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). Under the Rule, nonemployer parties can now take advantage of technological advances by calling employees and communicating a message about a union campaign, rather than trying to schedule a face-to-face meeting at their homes, or more intrusively, showing up unannounced. (ROA.542-543). "[T]he use of telephones to convey information orally and via texting is an integral part of the communications evolution that has taken place in our country since *Excelsior* was decided." (ROA.542).

Similarly, by requiring personal email addresses, the Rule recognizes the communications revolution that has transformed our country. In 2010, 80 times more emails were being sent every day than letters through the mail. (ROA.541). And the transmission of email is virtually immediate, permitting nonemployer parties to timely communicate with eligible voters, making it more likely that employees can make an informed choice in the election. (ROA.542). Thus, the Rule carries out the Board's "responsibility to adapt the Act to changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

1. The Board comprehensively explained that the expanded voter list disclosure provisions strike a reasonable balance between privacy and furthering the goals of the Act.

The Rule seeks to safeguard employee privacy by restricting dissemination and use of the information only for a "representation proceeding, Board proceedings arising from it, and related matters." (ROA.548). Notably, the list will not be made publicly available, nor will it be required in every representation case. Rather, the list is required only upon satisfaction of the "showing of interest" requirement, and after the employer admits that a "question of representation" exists by entering into an election agreement or an RD directs an election after a hearing. Moreover, the Rule lists precisely when this information may be used: to campaign for support, investigate eligibility, prepare for post-election hearings and unit clarification or unfair labor practice proceedings arising from the election, as well as for any rerun election that may be held. (ROA.562). At the same time, the Board explicitly cautioned that the information may not be sold to telemarketers, used in a political campaign, or used to "harass, coerce, or rob employees." (ROA.562).

The Rule further seeks to deter and remedy any misuse of voter contact information. The Board noted that in *Excelsior*, 156 NLRB at 1244, it had reserved the right to provide remedies if voter contact information was misused. And "the rulemaking record shows not a single instance of voter list misuse dating back to the 1960s." (ROA.632). Based on that record, the Board chose to take the same approach as in *Excelsior*, noting that it will provide an "appropriate remedy" for any such misuse, leaving the question of precise remedies "to case-by-case adjudication." (ROA.563-564). Such remedies could include, in appropriate circumstances, setting aside elections results, seeking injunctive relief in district court, or finding that the misuse constitutes an unfair labor practice, in violation of Section 8(b)(1)(A) of the Act. (ROA.563). The Board further noted that Section 102.177 of its Rules and Regulations (29 C.F.R. § 102.177), provides for the discipline of attorneys and other representatives for misconduct "at any stage of any [Board] proceeding." (ROA.563 n.259).[26] Accordingly, the Rule's case-by-

[26] There is no support for NRTW's assertion (NRTW Br. 28) that the Board's decision not to require "advanced security protocols" (ROA.563) equates to not

case approach in remedying voter list misuse is reasonable, given the nearly 50-year absence of evidence of such misuse. (ROA.631-632).[27]

ABC argues that the Rule is inconsistent with the "public policies underlying" other federal laws protecting privacy. (Br. 10-11, 40). ABC does not claim that the Rule violates any of these laws, nor could it.[28] The Rule cautions nonemployer parties to comply with any applicable statutes, including those governing unsolicited communications. (ROA.556). Far from ignoring these public

requiring unions to safeguard confidential information. In any event, this point was not raised by ABC. *See supra* note 13.

[27] ABC challenges this finding (Br. 11, 41), but none of its cited instances involves misuse of an *Excelsior* list. *Brown & Sharpe Manufacturing Co*., 299 NLRB 586 (1990), *Kohler Co*., 128 NLRB 1062 (1960), and *International Association of Machinists (General Electric Co.)*, 189 NLRB 50 (1971), all involve threats and harassment of employees at their homes during a strike against an already-unionized employer. *Goffstown Truck Center*, *Inc.*, 356 NLRB No. 33 (2010), involved a union campaign misrepresentation during a home visit, while *Pulte Homes*, *Inc. v. Laborers' International Union of North America*, 648 F.3d 295 (6th Cir. 2011), concerned a union's misuse of an *employer's* email and phone systems. And even assuming ABC's description of an unreported state court case to be correct (Br. 12), the union in that case could have obtained the decertification petitioner's address information from the petition's face.

[28] In fact, the Board has long protected *Excelsior* information from third-party disclosure under the FOIA. *Reed v. NLRB*, 927 F.2d 1249, 1251-52 (D.C. Cir. 1991). And ABC's fleeting references to the Privacy Act of 1974 (Br. 10 n.8, 39), does not change the fact that it is not implicated. (ROA.550).

policies, the Board recognized and honored them, but simply struck a different balance than the one urged by ABC.[29]

To the extent ABC cites the risk of identity theft and data breaches (Br. 43), the Rule notes that other federal employment laws already require small entities to maintain employee records, (ROA.668), and that the continuing expansion in the use of new electronic media demonstrates that the risks associated with cell phones and email are part of our daily life (ROA.546). Thus, the balance struck by the Rule is reasonable.[30]

Contrary to ABC's assertions (Br. 36-37), the Board weighed the benefits of expanding the disclosure of voter contact information against the risk of violating employees' privacy interests. As it explained:

---

[29] There is no evidence that *Excelsior* caused employees to withhold personal contact information from their employers, and there is no reason to expect such behavior as a result of the Rule. (Br. 38; *see also* ROA.547 n.169 (amendments do not require employers to ask for personal information)). As to ABC's argument that the Rule requires employers to breach promises of confidentiality, the Board noted that such potential already exists under *Excelsior*, and that pledges of confidentiality may provide for exceptions upon which employers may rely, such as when disclosure is legally required. (ROA.553) (citing *Howard Univ.*, 290 NLRB 1006, 1007 (1988)).

[30] ABC (Br. 42) and NRTW (NRTW Br. 26-28) complain about having to provide information regarding employees who ultimately may not be in the unit, given the Rule's deferral of eligibility issues. Even under the former rules, however, employers were required to provide names and addresses of individuals who may vote subject to a later eligibility determination. (ROA.554). Under both rules, employees whose votes may turn out to be decisive are enabled to receive information that may aid their making an informed choice.

> [E]ven assuming that the privacy, identity theft, and other risks may be greater than the Board has estimated—and, in particular, that adding personal email addresses and home and personal cell phone numbers to home addresses may, in combination, result in increased risks, especially as technology changes—nevertheless the Board's conclusion remains the same. These risks are worth taking and as a practical matter, must be taken, if communication about organizational issues is going to take place using tools of communication that are prevalent today.

(ROA.546). The Board's conclusions strike a prudent balance between privacy and continued furtherance of the Act's goals; any claim of the Board's arbitrariness or disregard of privacy concerns should be rejected.[31]

2. The disclosure requirements for the voter list do not unduly burden employers.

ABC also challenges the feasibility of the time period within which employers must produce the voter list. (Br. 37). But the Board carefully analyzed the practicability of the two-business-day timeframe for providing voter contact information following a direction of election, and found that general technological

[31] NRTW's argument that the exclusion of an opt-out provision in the Rule renders the voter list provisions arbitrary (NRTW Br. 25), is not adopted by ABC. *See supra* note 13. And for good reason, because *Excelsior* placed a high premium on the value of unsolicited communication from nonemployer parties during the election to ensure that "employees are able to hear all parties' views concerning an organizing campaign—even views to which they may not be predisposed at the campaign's inception." (ROA.550) (citing *Excelsior*, 156 NLRB at 1244). The Board also noted that such provisions would likely prove administratively burdensome, delay the conduct of elections, and invite new areas of litigation. (ROA.551). Thus, it concluded, "the existing self help remedy available to anyone who objects to unwanted communications—ignoring calls or letters and deleting emails—seems for the time being to be a more cost-effective option." (ROA.552).

advances in recordkeeping and the replacement of mail service with electronic service of documents warrant reducing the prior 7-day period. (ROA.557).

In making this determination, the Board relied on several additional factors. First, employers will in fact have much more than two business days to create the voter list. Employers will be placed on notice of the voter list requirement as soon as they receive the petition, which is served along with a description of representation-case procedures. (ROA.557-558). They can-- and should be expected to-- immediately begin compiling the voter list using information already within their possession. As the district court below noted, other federal employment laws, such as the Fair Labor Standards Act and the Immigration Reform Control Act, already require businesses to maintain employee records. (ROA.993 n.4). Some of this information will need to be compiled for the Statement of Position anyway (ROA.557). Moreover, over the last decade, "half of all units contain[ed] 28 or fewer employees." (ROA.558). Given all of this, the Board appropriately found that "even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task" in the typical case. (ROA.558)[32]

---

[32] ABC unjustifiably represents (Br. 37) that the Board "arbitrarily dismissed" claims that the voter list due date would prove unworkable for construction industry employers, who may need to use a voting eligibility formula requiring analysis of two years of payroll records. The Board engaged in a lengthy

Most important of all, however, the RD may direct the voter list's submission after two business days in "extraordinary circumstances." (ROA.558). Because courts cannot presume that RDs will exercise their authority arbitrarily, this discretion "effectively precludes a finding that the Board acted arbitrarily or capriciously in the context of a facial challenge." *Chamber of Commerce*, 2015 WL 4572948, at *27 (citing *Am. Hosp. Ass'n*, 499 U.S. at 619).

IV. The Rule eliminates unjustified delays and codifies preexisting best practices while preserving employers' meaningful opportunities to campaign.

As explained in the Board's Statement of the Case, amendments 15 and 20 of the Rule eliminate unnecessary delays (the 25-day stay following issuance of a direction of election and the 7-day period for employers to turn over voter names and addresses) built into the pre-Rule structure of representation cases. Amendments 5 and 17 codify regional best practices concerning the timing of pre-election hearings and election dates. The Rule explains that "the amendments honor free speech rights; they do not in any manner alter existing regulation of

---

examination of that precise issue. (ROA.558). Some petitions are for units already covered by collective-bargaining agreements, resulting in employers' ready access to the necessary information. Not all construction industry employers have significant numbers of employees covered by the formula. And although construction employers may have many job sites, modern technology renders transmission of the necessary information practicable. (ROA.558). Finally, the parties may agree not to use that eligibility formula. ABC has not carried its burden to demonstrate why the Board's detailed explanation fails to meet the requirements of *State Farm*.

parties' campaign conduct." (ROA.521). ABC does not contest this. Rather, ABC and *amicus* RLC allege that these provisions of the Rule will be *so effective* at eliminating delays that employers will be left with inadequate time to engage in antiunion campaigns. Both the Board and the District Court properly rejected such arguments.

A. The Board expressly found that all parties in representation cases would retain meaningful opportunities to convey their positions to voters under the Rule.

In determining when to set elections, the Board must take into account the "exceptional need for expedition," *see supra* p. 3, while ensuring that all parties have the "opportunity to win the[] attention" of voters. (ROA.523). The Board accordingly analyzed whether the Rule would unduly limit parties' ability to communicate their views, and concluded that the Rule afforded "ample meaningful opportunities" for electoral speech. (ROA.521, ROA.523-527).

First, as recognized by the Supreme Court in *NLRB v. Gissel Packing Co.*, union organizing campaigns rarely catch employers by surprise and so employers can begin communicating their views about that union before the petition is even filed. (ROA.524, quoting 395 U.S. 575, 603 (1969)). Second, "employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees" through materials like handbooks and orientation videos. (ROA.525-526). Third, "and most significantly" (ROA.524), the Board examined employers' ability to rapidly disseminate their campaign message post-petition. (ROA.526-527). For example, employers may repeatedly "compel [employee] attendance at meetings at which employees are often expressly urged to vote against representation." (ROA.527). Thus, because employers control the quantum of work time used to convey their message to employees, they are in a position to deliver a high volume of information to employees in a short time. (ROA.526-527). ABC fails to challenge any of these findings, much less the evidence supporting them.[33] It has thus failed to establish that the Board was unreasonable in concluding that employers will continue to have significant meaningful opportunities for election speech.[34]

B. Nothing in the Act requires elections to be held only after 30 days have elapsed from the filing of the petition.

ABC opens its attack upon these conclusions by suggesting (Br. 43-45) that the Rule somehow violates the Act itself, by permitting (but not requiring)

[33] The Board also relied on additional factors which ABC again fails to challenge. As previously noted, *see supra* p. 48, most elections take place in small bargaining units. (ROA.526). And modern communications technology has made information transmission more effective and efficient. (ROA.527).

[34] ABC (Br. 17 n.11) claims that the election process in "a number of instances" has been completed in 10 days or less. This anecdote, which lacks any specificity, relies on information outside the administrative record. *See supra* note 4. Moreover, ABC has not pointed to a single *directed* election that was completed in 10 days or less. Most elections are conducted by agreement of the parties, who may find it mutually convenient to have a quick resolution of their representational dispute.

elections to be held fewer than 30 days from the election petition's filing. But as both courts to have addressed this issue found, the Act contains no language even arguably setting a 30-day minimum campaign period. (ROA.999); *see also Chamber of Commerce*, 2015 WL 4572948, at *26. ABC's entire support for its claim is comprised of legislative history quotations concerning an *unenacted* provision of the Labor Management Reporting and Disclosure Act of 1959, which would have permitted elections to be set without a hearing, but not less than 30 days after petition filing. As the District Court noted (ROA.999, citing *Rainbow Gun Club, Inc. v. Denbury Onshore, LLC*, 760 F.3d 405, 410 (5th Cir. 2014)), ABC cites no ambiguous language in the Act's *enacted* text for these quotations to explicate. What ABC asks "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was [allegedly] omitted . . . may be included within its scope. To supply omissions transcends the judicial function." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926).[35]

---

[35] In any event, unenacted legislative proposals evidence nothing. *See supra* p. 29. This case is, in fact, a prime example of *why* reliance on such arguments is so dangerous—the actual text of the 1959 Act shows that Congress wanted faster, not slower, resolution of representation cases. Section 3(b) of the NLRA, 29 U.S.C. § 153(b), was amended, among other reasons, "to expedite final disposition of cases by the Board, by turning over part of its caseload to its [RDs] for final determination." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (quoting 105 Cong. Rec. 19770 (1959) (ROA.926)).

Revealingly, the Act *does* establish time frames in unfair labor practice cases. 29 U.S.C. § 160(b), (c) (minimum five days from service of the notice of hearing to opening of the hearing; twenty days to file exceptions to the Board from decision of an administrative law judge). And when Congress includes language in one part of a statute and omits it from another, such omissions are presumptively intentional. *Russello v. United States*, 464 U.S. 16, 23 (1983).

Thus, the equivocal evidence proffered by ABC of a handful of legislators' views falls far short of carrying its *Vermont Yankee* burden, which requires *explicit* statutory language before courts limit an agency's discretion to structure its procedures. *See supra* pp. 13-14.

C. The Rule's provisions do not arbitrarily compress the period for election campaigns.

ABC's remaining arguments assert that the Rule provisions curtailing delay are arbitrary. But it fails to carry its heavy burden under *State Farm* to show that the Board considered inappropriate factors, ignored or rejected relevant evidence, failed to consider key aspects, or provided implausible rationales. ABC's contention that the Rule as a whole might *increase* overall time to certification has already been refuted above. *See supra* pp. 34-35.

ABC next claims that the Rule embodies "the false notion that scheduling elections as quickly as possible should be the Board's primary objective." (Br. 47). This claim ignores the other substantial goals served by the Rule—efficiency, transparency and uniformity of procedure, fairer and more accurate voting, and adaptation of the Act to modern technology. Indeed, only two of the seven Rule provisions challenged by ABC (Amendments 15 and 20) even have as their primary objective the elimination of delay.[36] Amendment 15 eliminates the 25-day stay in directed election cases, which under the old rules tended to suffer significant delays as compared to cases where elections were held by agreement.[37] Amendment 20, as explained above, *see supra* pp. 47-48, relied on advances in recordkeeping and electronic communication, among other factors, to shorten the period for supplying the voter list. The Board properly adopted these provisions to eliminate *unjustified* delays.

Next, ABC asserts (Br. 48) that the Board "refused to consider" delays to representation cases caused by blocking unfair labor practice charges. But the Board dealt directly with this problem in Amendment 21, by modifying and limiting its prior policy. (ROA.1004-1006).

---

[36] Notably, neither provision those amendments modify was instituted in order to provide time to campaign. (*See* ROA.614 ("However, the stated purpose of the 25-day period is not to give parties an opportunity to campaign.")); *Excelsior*, 156 NLRB at 1239-40 (making no mention of accommodating campaign speech in setting 7-day deadline for production of voter list).

[37] The time between filing a petition and the election was almost twice as long in such cases. (ROA.521) (in most years, median for all election cases is 38 days, but median for fully litigated cases is closer to 70 days).

ABC also claims that because there was "no demonstrated need" for the Rule's changes, as shown by the Agency's meeting of time targets, the Board's explanations "make no sense." (Br. 49-50). ABC overlooks the fact that the General Counsel's time targets (which the Board had no role in setting) have always been measured by what could be achieved "in spite of" structural barriers imposed by the former rules, not by any consideration of what would be optimal in a perfect world. (ROA.520-521). It wrongly assumes that whenever the Agency is performing satisfactorily, any effort to improve agency procedures is arbitrary. That kind of "good enough for government work" theory has rightfully been rejected. *See, e.g.*, *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) (declining to vacate procedural rules "on the basis that the agency should have left well enough alone"). Efficiency and adoption of best government practices are valid goals for any rulemaking.[38]

Moreover, one cannot—and the Board did not—simply assume that meeting time targets meant that the prior rules were unproblematic. The Board credited record testimony, consistent with its own experience, that many stipulated elections held *within* its time targets occurred only because some parties extracted

[38] To justify its budget and comply with congressional mandates, the Board is instructed to foster a "culture that inspires continuous improvement, . . . [and] search for increasingly effective practices." OMB Circular A-11 Part 6, Section 200.10, *available at* http://go.usa.gov/3ajJw; *see also* Government Performance and Results Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866.

concessions through the express or implied threat of delaying litigation. (ROA.591). Quite properly, the Board viewed elimination of these perverse incentives as a substantial benefit of the Rule.

After analyzing various proposals to impose one-size-fits-all minimum or maximum election timeframes, the Board rejected all such proposals and delegated primary responsibility for setting fair election dates to its RDs. (ROA.527-528). RDs are explicitly instructed to take into account case-by-case variables such as the "size, geography and complexity" of the election (ROA.527), as well as "the desires of the parties, which may include their opportunity for meaningful speech about the election," (ROA.522). As noted above, *see supra* p. 49, this discretion "effectively precludes a finding that the Board acted arbitrarily or capriciously in the context of a facial challenge." *Chamber of Commerce*, 2015 WL 4572948, at *27.

CONCLUSION

The Board requests that the judgment of the District Court be affirmed.

Respectfully submitted,

s/Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2937

KEVIN P. FLANAGAN
DAWN L. GOLDSTEIN
Supervisory Attorneys

DAVID H. MORI
PAUL A. THOMAS
MARISSA A. WAGNER
Attorneys

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
BARBARA A. O'NEILL
Assistant General Counsel

National Labor Relations Board
October 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2937

Dated at Washington, DC
this 14th day of October, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,993 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2937

Dated at Washington, DC
this 14th day of October, 2015