IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BAKER DC, LLC, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, Defendant.	Case No. 1:15-cv-00571 Judge Amy Berman Jackson

DEFENDANT NATIONAL LABOR RELATIONS BOARD'S OPPOSITION TO PLAINTIFF BAKER'S MOTION FOR TEMPORARY RESTRAINING ORDER AS TO LIKELIHOOD OF SUCCESS AND THE MERGED BALANCE OF HARMS/PUBLIC INTEREST FACTORS

The National Labor Relations Board ("NLRB" or "the Board"), now files the remaining portion of its opposition to the motion for a temporary restraining order filed by Plaintiff, Baker DC, LLC ("Baker") in the above-referenced case. Baker moved this Court to enjoin an ongoing election proceeding in which the United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters ("the union") seeks to represent a portion of Baker's employees. Not only has Baker failed to demonstrate any irreparable harm caused by its participation in the election proceeding, as the Board made clear in the first part of its opposition (Dkt. No. 8), but Baker also has failed to demonstrate the additional factors required for entry of a temporary restraining order, as explained below. [1]

[1] The facts relevant to this opposition are explained in the Board's opposition as to irreparable harm, at 2-4 (Dkt. No. 8).

ARGUMENT

I. Baker Cannot Show a Likelihood of Success on the Merits of Its Complaint

A. This Court Lacks Jurisdiction Over Most of the Claims in the Complaint

Baker is unlikely to prevail on the merits of this case because this Court lacks subject-matter jurisdiction to hear most of its claims. As demonstrated below, this Court's subject-matter jurisdiction is limited to precisely the same issues that are ripe for review in the facial challenge to the election rule pending before this Court, *Chamber of Commerce v. NLRB* (Case No. 15-cv-0009-ABJ).[2] Those ripe challenges are (i) the Chamber's allegations that certain provisions of the Rule are "arbitrary and capricious" under the Administrative Procedure Act (APA), and (ii) its challenges to the few amendments whose meaning and effect are not dependent on the future exercise of administrative discretion. Those amendments include the requirements that employers subject to representation petitions post a Notice of Petition for Election (Am. 4) and provide initial and final disclosures of employee information (Ams. 7 and 20).

To the considerable extent that Baker seeks to have this Court review the discretionary decision making involved in the Board's application of the Rule to the facts of the ongoing representation proceeding (Board Case Number 05-CA-150123), the Court lacks jurisdiction to do so unless Baker can demonstrate that the Board is acting contrary to "clear and mandatory" statutory or constitutional requirements. *See Leedom v. Kyne*, 358 U.S. 184 (1958). Baker has failed to make that showing and the Court therefore lacks *Leedom* jurisdiction.

[2] To recap, the Rule contains some 25 amendments (Am.). *See* summary of rule changes at 79 Fed. Reg. 74309-10

1. Baker's Challenges to the Possible Exclusion of Evidence, Reduced Time For Submitting AVoter List, and Possible Abbreviation of Election Campaigns Are Not Ripe

Baker's Motion (Mem. at 2-3) summarizes the provisions of the Rule which it challenges here. Most of these challenges, however, are unripe, because they rely upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted). Baker's claim to the contrary (Mem. at 4-5) misapprehends the nature of the ripeness inquiry. An as-applied challenge to a discretionary rule is ripe when that rule *has actually been* "*implemented in particular circumstances*," not merely when a legal case has arisen in which the rule will probably be applied in the future. *Sprint Corp. v. FCC*, 331 F.3d 952, 956-57 (D.C. Cir. 2003). The policy considerations observed by the *Sprint* court—in particular, the difficulty courts have in grappling with how an agency *might* exercise its discretion in the future, when that discretion might well be exercised in a way that a plaintiff's concerns are never realized, *id.* at 958—remain fully applicable to this challenge.

First, Baker alleges that it may be denied "an appropriate hearing" because the hearing officer might exclude evidence. Mem. at 2. But it is unknown whether any evidence will be excluded, and if so, whether such exclusion will have any bearing on relevant issues. Indeed, inasmuch as the rule explicitly arms regional directors with the discretion to determine which, if any, voter eligibility issues should be heard, *infra* at 10-11, Baker cannot establish that the Regional Director's yet to be exercised discretion will necessarily exclude evidence or make the yet to be held hearing an inappropriate one. If the Board errs, a reviewing court must determine whether the error was harmless. *See Ozark Auto. Distributors, Inc. v. NLRB*, 779 F.3d 576, 582 (D.C. Cir. 2015) (finding hearing officer's revocation of employer subpoena in a post-election representation hearing to be prejudicial). Without concrete facts, such review is impossible.

Second, Baker suggests that the Board's deadline for submitting final voter list information, *i.e.* two days after entry of a decision and direction of election, is "impracticable." Mem. at 3. Again, this assumes facts that have not yet developed—*i.e.*, that the Regional Director will direct an election at all; that if such a direction of election issues, no extensions will be granted to the two-day period; and that Baker will actually be prejudiced in any way by the due date.

Finally, Baker claims that an "unlawfully abbreviated election campaign" may infringe its "free speech rights." Mem. at 3. Again, it is unknowable how long the election campaign will last, as no election has yet been directed, or whether Baker will be deprived of a meaningful opportunity to speak in the event an election is directed. Thus, like the prior two challenges, Baker's challenge to the length of the election campaign is unripe.

2. Even If Baker's Challenge Were Justiciable, It Cannot Show That the Board Has Acted Contrary to "Clear And Mandatory" Statutory or Constitutional Requirements as to Any of Its Claims

Baker seeks, by this Motion, to enjoin an ongoing NLRB representation case. In the process, it confronts a particularly formidable jurisdictional hurdle —*Leedom v. Kyne*. To exercise jurisdiction over interlocutory agency orders under that doctrine, a plaintiff must show that failure to review the agency's action will result in irreparable harm—the subject of our brief of April 20. It must also, however, show that the merits of its position are beyond any reasonable dispute. Baker cannot do so.

As we noted yesterday (Dkt. No. 8 at 8-9), the National Labor Relations Act ("the Act" or "NLRA") does not provide a mechanism for direct review of representation cases. It vests jurisdiction to review unfair labor practice case decisions directly in the Courts of Appeals, 29 U.S.C. § 160(e) and (f), and provides that the official record in a representation case shall be reviewed by the court when and if the Board's decision in such a case underlies a later unfair

labor practice order, 29 U.S.C. § 159(d). Congress's vesting of jurisdiction in the appellate courts ousts federal district courts of any subject-matter jurisdiction to review Board proceedings which they might otherwise have under the general federal-question and interstate-commerce jurisdiction statutes, 28 U.S.C. §§ 1331, 1337.[3]

In *Leedom v. Kyne*, 358 U.S. at 187, the Supreme Court created a narrow exception to the rule of no district court review of Board cases, holding that district courts may exercise jurisdiction under 28 U.S.C. § 1337 "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act," 358 U.S. at 188. But "in order to justify the exercise of [*Leedom*] jurisdiction, a plaintiff must show . . . that the agency has acted in excess of its delegated powers and contrary to a specific prohibition which is clear and mandatory." *Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006) (internal quotations omitted). Mere "possible infirmities" in the Board's actions will not suffice; for a district court to short-circuit the ordinary NLRB process, "the Board must have stepped [] plainly beyond the bounds of the Act, or acted [] clearly in defiance of it." *Local 130, IUERMW v. McCulloch*, 345 F.2d 90, 95 (D.C. Cir. 1965). Two decades later, in a case where an employer unsuccessfully relied on *Leedom* to establish district

[3] "The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts." *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989). And indeed, courts have repeatedly rebuffed efforts to use general federal-question jurisdiction to enjoin Board adjudications. *See, e.g., Fremont County Memorial Hospital*, 523 F.2d 845, 846 (10th Cir. 1975) (rejecting reliance upon 28 U.S.C. § 1337 to enjoin NLRB representation case); *Little River Band of Ottawa Indians v. NLRB*, 747 F. Supp. 2d 872, 889-90 (W.D. Mich. 2010) (rejecting reliance upon 28 U.S.C. §§ 1331 and 1362 to enjoin NLRB unfair labor practice case). Accordingly, Baker's citation of Section 1331 (Compl. at ¶6) as a basis for jurisdiction in this case is erroneous.

Baker's further citation (Mem. at 3) to the Administrative Procedure Act, 5 U.S.C. § 706, as providing independent grounds to review a representation case, is also unavailing because the APA is not a jurisdictional grant. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

court jurisdiction, the D.C. Circuit emphasized that "*any colorable support for the Board's ruling should be treated as a jurisdictional defect dictating dismissal*.'" *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1313 (D.C. Cir. 1984) (quotation omitted). In light of this extraordinary burden, it should come as little surprise that courts routinely reject claims that the Board has issued a decision so erroneous as to warrant *Leedom* jurisdiction.[4]

Most akin to the instant case, in *Groendyke Transport, Inc. v. Davis*, the Tenth Circuit *summarily* overturned a district court which relied upon *Leedom* to enjoin the Board from requiring production of a voter list. 406 F.2d 1158, 1165 (1969). At the time, the Board's voter-list requirement had been struck down by the First Circuit, *Wyman-Gordon Co. v. NLRB*, 397 F.2d 494 (1968), prior to the Supreme Court's reversal of that decision (394 U.S. 759 (1969)), though other circuits had upheld it. The Rule at issue here is, of course, still far too new to have been the subject of appellate opinions, but that fact warrants caution, not the precipitate and immoderate issuance of an injunction.

B. Baker's Claims Also Lack Merit

1. The Board is entitled to extraordinary deference in evaluating the Rule's permissible and explicitly articulated goals of improving the Board's representation procedures

Just last month, the Supreme Court reiterated "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (internal quotation marks omitted) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.* 435 U.S. 519,544 (1978)). In keeping with

[4] *Hartz Mountain*, 727 F.2d at 1313-15; *Goethe House NY v. NLRB*, 869 F.2d 75, 77-78 (2d Cir. 1989); *Bd. of Trustees of Mem'l Hosp. of Fremont County, Wyo. v. NLRB*, 523 F.2d 845, 848 (10th Cir. 1975); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917-18 (D.C. Cir. 1968); *Local 130*, 345 F.2d at 95-96; *Boire v. Miami Herald Pub. Co.*, 343 F.2d 17, 20 (5th Cir. 1965).

that deference, the Act's Section 9 grants the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The "broad" and "general" statutory requirements that "notice must be 'due' [and] the hearing 'appropriate'" reflect Congress's understanding that the Board has "great latitude concerning procedural details." *Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706 (1945).

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 16 (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).

Because Congress was concerned that elections be conducted expeditiously, unimpeded by delays that might interfere with employees' right to select a collective-bargaining representative, as stated above, Congress also deferred judicial review of representation case decisions unless and until the Board enters an unfair labor practice order based on those decisions. *See Boire v. Greyhound Corp*., 376 U.S. 473, 477-79 (1964) (recognizing Congress's concern that unless an election can promptly be held to determine the choice of representation, the union runs the risk of impairment of strength by attrition and delay while the case is dragging on).

The challenged Rule reflects decades of Board experience in administering Section 9 in a wide variety of circumstances and draws on the best practices of the Board's regional offices to

provide targeted solutions to a series of discrete problems, not just delay as Baker insists (Mem. at 13). Although many of the amendments have little to do with the timing of procedures, efficiency is nonetheless a manifestly valid goal for rulemaking; indeed government-wide rules instruct agencies to continuously improve their processes.[5]

As the Board explained, the Rule seeks to minimize unnecessary barriers to the fair and expeditious resolution of questions concerning representation, to eliminate unnecessary and duplicative litigation, to provide for a more informed electorate, to simplify representation case procedures and to render them more transparent and uniform across regions, to reduce the cost of such proceedings to the public and the agency, and to modernize the Board's processes, particularly by more effectively using new technology. 79 Fed. Reg. 74315, 74317, 74422-23, 74428. Among other things, the Board found that pre-election litigation has often been disordered, because it has been "hampered by surprise and frivolous disputes, and side-tracked by testimony about matters that need not be decided." *Id.* at 74308. The Board noted that some of its rules have become outdated as a result of changes in communications technology and practice. *Id*. The Board further noted that unnecessary delays had resulted from its own policy of automatically staying elections for 25 days in anticipation of requests for review of regional directors' actions that were filed in only a small fraction of cases and were rarely granted. *Id.* at

[5] *See, e.g., In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (suggesting rulemaking to improve FDA's efficiency in reviewing drug applications); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1340 (2013) (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of rulemaking . . . .") (emphasis removed); *see also* Government Performance and Results Modernization Act of 2010 (GPRMA), Pub. L. No. 111-352, 124 Stat. 3866 (codified as amended in scattered sections of 5 U.S.C. and 31 U.S.C.); OMB Circular A-11 Part 6, Section 200.10 (instructing agencies to "[i]nstill a performance and efficiency culture that inspires continuous improvement, . . . focus on better outcomes and lower-cost ways to operate, . . . [and] search for increasingly effective practices") *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s200.pdf.

74308, 74309-10. The Board also found the absence of the information now required by the Statement of Position form had hindered resolution of disputes over the contours of an appropriate unit and the eligibility of voters. *Id*. at 74366-67. And the Board explained that it saw many opportunities to streamline the election process at various stages. Baker's assertion that the Board is restricted to only dealing with issues in one stage of election proceedings (the time from the filing of a petition to an election) (Mem. at 13) makes no sense in light of the Agency's responsibility to find better, more efficient ways to carry out its statutory goals.

2. Even if ripe, Baker's "appropriate hearing" arguments are meritless

Baker urges the Court to hold that the Board erred in basing its construction of Section 9's hearing requirements on *Inland Empire Dist., Lumber Workers v. Millis*, 325 U.S. 697, 706 (1945), which issued prior to the Taft-Hartley Amendments of 1947. (Mem. at 9 n.4). As the Rule explains, however, the operative language of Section 9—that in its investigation of representation controversies, the Board "shall provide for an appropriate hearing upon due notice"—is the same in both the original Wagner Act and the amended statute. 79 Fed. Reg. 74386. In that circumstance, the Supreme Court's construction of that statutory language granting broad discretion to the Board remains controlling.[6]

Lacking textual support for its claim that Section 9 compels the Board to allow litigation of *all* individual eligibility or inclusion issues at the pre-election hearing, Baker urges this Court (with no explanation, Mem. at 2) to find such a requirement in the legislative history of the Taft-Hartley amendments, which, as shown, did not alter the relevant statutory text.

[6] *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 578 (1994) (finding that Congress did not change the meaning of statutory language previously construed by the Court when it included that same language in an amended statute, notwithstanding Congress disapproved of the result reached by the Court in the prior decision).

There is no merit to Baker's argument that the Rules deny it an appropriate hearing on voter eligibility because the regional director is given discretion not to receive evidence on some voter eligibility issues at the pre-election hearing and may instead authorize disputed voters to cast challenged ballots. By this means the status of these voters may be resolved after the election if the election results are close enough to make counting their ballots necessary. In objecting to this practical adaptation of the Board's longstanding and court-approved challenged ballot procedure, see *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."), Baker is left in the untenable position of arguing that parties have an absolute right to present evidence on individual eligibility and inclusion issues prior to the election even though a decision concerning such issues is reasonably deferred until after the election, and may never need to be decided at all.

In addition, if litigation of any eligibility issues is deferred against an employer's wishes, the administrative record will contain the employer's Statement of Position, its argument at the hearing, an offer of proof, and the regional director's denial. *See* Amended §§ 102.66-68, 79 Fed. Reg. at 74384 n.356, 74388, 74391, 74484-86. For that reason, the right to Board and court review of the regional director's exercise of discretion to defer litigation is preserved.

Baker's case is not advanced by citing Congress's rejection of so-called "quickie elections" when it passed the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") (Mem. at 9 and n.4). When House Education and Labor Committee Chairman Graham Barden declared that the LMRDA did not "reinstat[e] authority or procedure for a quicky election," he was referring to the Board's pre-Taft-Hartley Act procedure of holding elections without a hearing beforehand in some cases. 105 Cong. Rec. 18128 (1959) (statement

of Rep. Barden). Consistent with the Act, the Rule does not authorize elections without hearings, absent stipulation of the parties. Therefore, the Board will continue to conduct "appropriate" hearings under the Rule.[7]

3. Even if ripe, Baker's "time compression" arguments are meritless

Contrary to Baker's broad assertion that its free speech rights will be infringed during the "unlawfully constricted election campaign," (Mem. at 3), the Rule is premised on the Board's experienced judgment that employers will continue to have ample meaningful opportunities to express their views on unions even if the Rule generally results in more expeditious elections. First, the Board described the reality—recognized long ago by the Supreme Court—that union organizing campaigns rarely catch employers by surprise. *Id.* at 74320 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)). Consequently, many employers begin to engage in campaign speech well before a representation petition is filed. Second, "employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees" through materials such as handbooks and orientation videos. *Id.* at 74321. Third, "and most significantly," *id.* at 74320, the Board examined employers' ability to rapidly disseminate their campaign message after a petition is filed. *Id.* at 74322-23. For example, employers may repeatedly "compel [employee] attendance at meetings at which employees are often expressly urged to vote against representation." *Id.* at 74323. Thus, even "where employers wish to engage in an unusually high amount of communication, they can accomplish that in a short period of time because they control the quantum of work time which is

[7] There is no merit to Baker's claim (Mem. 8) that the rule "impermissibly vests hearing officers with decision-making authority regarding admission of evidence at the pre-election hearing." The Rule "makes clear in amended 102.66(c) that it is the regional director, not the hearing officer, who will determine the issues to be litigated and whether evidence described in an offer of proof will be admitted." 79 Fed. Reg. at 74398.

used in conveying their message." *Id.* at 74322. Because the Rule does not alter existing workplace dynamics, the Board concluded that employers will continue to have significant meaningful opportunities for election speech. Baker does not dispute the continued existence of these opportunities.

4. The Rule reasonably modernizes the procedures surrounding employer disclosure of employee information and furthers the goals of the Act

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 regional director 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.79 Fed. Reg. 74310 (Am. 20). Previously, employers were required to produce to the regional director within seven days of the direction of an election a list of names of eligible voters and their home addresses only. The regional director would then serve the list on the parties. *See Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (upholding *Excelsior* requirement).

The rationale for this requirement is that not only does the Act require that employees have the opportunity to cast their ballots for or against union representation free from interference, restraint, or coercion violative of 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 Underwear, Inc., 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.[8] The Supreme Court fully endorsed this rationale in *Wyman-Gordon Co*.: "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.

Baker objects to the Rule's updating the existing requirement that the names and home addresses of bargaining unit employees be disclosed prior to the election: now the voter list will include, if in the possession of the employer, non-work email addresses and phone numbers as well. Baker cites the risks, which the Board considered, of identity theft and data breaches (Mem. at 10). But the Rule explains that other federal employment laws already require small entities to maintain employee records, 79 Fed. Reg. at 74464, 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, *id.* at 74342. Contrary to Baker's claim (Mem. at 10-11), the Board reasonably determined that these risks are worth taking in election cases to better ensure that employees have the information they need to make a free choice in the election. In particular, the Board reasonably relied on the nearly 50-year absence of evidence of misuse of the rule requiring disclosure of names and addresses. 79 Fed. Reg. 74342. Baker further ignores the Board's reasoned judgment that unions seeking to win support in a secret ballot election have

[8] The Board additionally reasoned that disclosure of names and addresses will facilitate the public interest in the expeditious resolution of questions of representation by enabling parties on the ballot to avoid having to challenge voters based solely on lack of knowledge of the voter's identity. *Excelsior*, 156 NLRB at 1242-43.

a practical incentive to avoid conduct that would alienate potential voters. 79 Fed. Reg. at 74336, 74342. In any event, if misuse should occur in the future, as Baker speculates, the Board stands ready to fashion appropriate remedies, using its authority to rule on election objections or unfair labor practice charges and to discipline the parties before it. *Id.* at 74359.

Additionally, Baker argues that the Rule fails to accommodate other federal laws protecting privacy (Mem. at 10-11). The Board recognized and honored those obligations, but simply struck a different balance than the one urged by Baker.[9] As to other federal statutes that protect privacy, it remains undecided whether those laws apply to the required disclosures, and thus the Rule cautions nonemployer parties to comply with any applicable statutes. *Id.* at 74352. Thus, the balance struck by the Rule is reasonable.

Baker further criticizes the Board for "inexplicably" declining to put in place certain privacy protections, such as requiring unions to destroy personal contact information after a period of time (Mem. at 10). But the Board indeed explained that "petitioners are currently entitled to retain the list indefinitely under *Excelsior*, and, as shown, there are certainly legitimate reasons why petitioners might use the list after the election." *Id.* at 74360.[10] And the Board's exclusion of opt-out or unsubscribe provisions also does not render the Rule invalid (Mem. at 11), because it considered and reasonably rejected such proposals.[11] *Excelsior* highly

[9]Additionally, 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 Baker's fleeting reference to the Privacy Act (Mem. at 10-11), does not change the fact that it is not implicated. 79 Fed. Reg. 74346.

[10] Thus, petitioning parties are permitted to use the information to 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 may be held. 79 Fed. Reg. 74358.

[11] The Board also noted that such provisions would likely prove administratively burdensome, delay elections, and invite litigation. 79 Fed. Reg. 74347. As for an "unsubscribe" option in emails, the Board concluded that this union-administered approach would risk undermining

valued unsolicited communication from nonemployer parties during the campaign in order to ensure "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." *Id.* at 74346 (citing *Excelsior*, 156 NLRB at 1244). For this reason, the Board reasonably rejected such proposals as inconsistent with the goals of *Excelsior* and the Act.[12]

Finally, Baker objects (at 7) to the Rule's requirement that employers include with the statement of position form (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. *Id.* at 74309. Baker's claim that the Board failed to justify this new requirement overlooks the Board's explanation that disclosure of this information will facilitate the resolution of disputes over the contours of an appropriate unit and the eligibility of voters. *Id*. at 74366-67.

5. The Rule's New Posting Requirement Is Permissible Government Speech

Baker's claim that the requirement to post the notice of petition for election ("Petition Notice") is compelled employer speech cannot withstand strict scrutiny. (Mem. at 5-7). The Petition Notice is government speech and "not subject to scrutiny under the Free Speech Clause." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009); *id.* at 467 ("The Free

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employees' privacy interest in not having their sentiments regarding union representation revealed by their unsubscription. Thus, the Board 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." *Id.* at 74348.

[12] Baker complains (Mem. at 10) about providing personal information for 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.

Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005).[13]

The Petition Notice sent to Baker (Motion for TRO, Ex. 1 (Dkt. No. 3-2) at 11-12), bears clear indicia of government speech. It states at the top in large typeface that it is a notice from the "National Labor Relations Board." It includes copies of the Board's official seal no less than four times. And the very bottom of the notice states in all capital letters "THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE."

Since the Petition Notice is government speech, the proper approach in this case is to analyze whether employers' hosting of the Board's speech interferes with their own. *See Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 63-65 (2006) (*FAIR*). In *FAIR*, the Supreme Court held that the statutory requirement for law schools to host military recruiters on campus did not violate the law schools' First Amendment rights, even if the law schools disagreed with the military's message, because hosting the military did not "suggest[] that law schools agree with any speech by [military] recruiters" or "restrict[]" what law schools "may say about the military's policies." *Id.* at 65. Likewise, employers' posting of the Board's Petition Notice does not "affect[]" their speech, *see id.* at 63, because posting the notice does not restrict employers from disseminating their own message. Further, there is nothing in the Petition Notice suggesting that employers agree with any message the Board is purportedly conveying.

Despite Baker's protestations to the contrary (Mem. at 5 and n. 2), the Petition Notice is not pro-union propaganda. It contains a plain recitation of employee rights under the Act, an

[13] *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986), upon which Baker relies (Mem. at 6-7), actually supports the Board's position. In *Pacific Gas*, the Court struck down a requirement that a public utility distribute the speech of an adverse third-party. But all Justices agreed that the utility could be required to disseminate the government's own messages. *See* 475 U.S. at 15 n.12 (plurality opinion); *id.* at 23 n.2 (Marshall, J., concurring); *id.* at 39 (Stevens, J., dissenting); *id.* at 34 (Rehnquist, J., dissenting).

understandable list of objectionable conduct (by employers and unions) that may result in the setting aside of an election, and a simple explanation of the proceeding's next steps. The posting of a government notice informing individuals of their workplace rights does not violate the First Amendment. *See Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975).

II. The Balance of Harms and the Public Interest Weigh Against Granting a Temporary Restraining Order

The final two factors of the traditional preliminary injunction/temporary restraining order inquiry – harm to the opposing party (and other parties interested in the proceeding) and harm to the public interest – merge when the federal government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).[14] The Supreme Court has emphasized that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Here, a consideration of the overall public interest and the balance of equities overwhelmingly weighs against granting Baker's requested injunctive relief.

First, with respect to the public interest factor, as this Court has recognized, "it is in the public interest to deny injunctive relief when the relief is not likely deserved under law." *Qualls v. Rumsfeld*, 357 F.Supp.2d 274, 287 (D.D.C. 2005). Thus, Baker's claims of harm to the public interest are inextricably tied to its ability to demonstrate that the Rule is in fact unlawful. *See* Mem. at 14 (citing cases for proposition that it is not in the public interest to allow agencies to

[14] The Supreme Court has made clear that the NLRB is acting in the public interest when carrying out its congressionally-mandated duties to resolve questions of representation and to remedy unfair labor practices. *E.g., U.A.W. Local 283 v. Scofield*, 382 U.S. 205, 219-20 (1965); *Vaca v. Sipes*, 386 U.S. 71, 182-183 n.8 (1967) ("The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern….").

violate constitutional rights and statutory provisions). However, as explained immediately above, Baker has not demonstrated a likelihood of success on any of its claims. In such circumstances, where the moving party cannot demonstrate that it is likely to succeed on the merits, the public interest has been found to weigh against granting injunctive relief. *See Serono Labs. Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998) (finding that the public interest weighed against granting an injunction "because it is inextricably linked with the merits of the case" and the court found the plaintiff did not demonstrate a likelihood of success on the merits).

Baker attempts to minimize the harm to the NLRB and the public if its motion for a temporary restraining order is granted, stating that "processing the Union's petition against Baker in the same manner that has been in place and worked well for decades cannot be said to harm either the Board, the Union, or the public." (Mem. at 13). In support of this argument, Baker points out that the Board was meeting its internal time targets for conducting elections even before amending its representation case procedures. *Id.* In essence, this argument appears to be that the election process worked well enough under the old procedures, and therefore no one will be harmed if implementation of the Rule is enjoined and the Union's petition is processed under the old rules and guidelines.

Yet, as discussed above, the Board's rationale for promulgating the Rule was that its prior representation case procedures suffered from a variety of "discrete" deficiencies that were preventing the Agency from fulfilling its statutory mission to quickly and fairly resolve representation disputes. *See* 79 Fed. Reg. at 74315-18. Based on decades of experience under the prior framework for administering representation elections, the Board concluded that these problems could not be solved without amending the Board's practices and procedures. *Id.* at 74308. And, as noted, the amendments further seek to eliminate unnecessary and duplicative

litigation, provide for a more informed electorate and fair and accurate recording of votes, simplify representation case procedures and render them more transparent and uniform across regions, reduce the cost of such proceedings to the public and the agency, and modernize the Board's processes. *Id.* at 74315, 74317, 74422, 74428.The Rule thus serves the public interest by removing structural inefficiencies and other "unnecessary barriers to the fair and expeditious resolution of representation disputes" that were built into the prior procedures. *Id.* at 74315; *see also Boire v. Greyhound Corp*., 376 U.S. 473, 477-79 (1964). A temporary restraining order would prolong these deficiencies, which the Board reasonably concluded have prevented full achievement of the NLRA's promise of fair, accurate, and expeditious elections.

Such public interest in having the Rule implemented is not outweighed by the asserted injuries facing Baker if its petition for extraordinary injunctive relief were denied. As the Board explained in its previous irreparable harm brief (Dkt. No. 8), the harms claimed by Baker are speculative (regarding the length of the pre-election period, which is not yet set, and the potential misuse of employee contact information, which has not happened, nor might it ever happen). Moreover, as the Board also explained, Baker can avoid the alleged harms stemming from the required notice posting and employee disclosures by simply refusing to comply with these new requirements (Dkt. No. 8 at 9), or to bargain with the union should it be certified (*id.* at 8-9). Because Baker has failed to show that it will be harmed, let alone "irreparably harmed" in the absence of emergency injunctive relief, such relief is wholly inappropriate in this matter. *See Getty Images News Servs. Corp v. Dep't of Def.*, 193 F.Supp.2d 112, 124 (D.D.C. 2002) ('[T]he balance of harms clearly weighs against granting a preliminary injunction at this time … given the speculative nature of any actual harm to [plaintiff].").

And on the other side of the balance, enjoining the Board's lawfully promulgated representation case regulations poses significant injury to the Board's ability to further the statutory goals entrusted to it by Congress. *See Cornish v. Dudas*, 540 F.Supp.2d 61, 65 (D.D.C. 2008) ("[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce."). Therefore, and for all of the other above-stated reasons, the balance of equities in this case weighs in favor of denying Baker's requested temporary restraining order.

III. Even if All of Baker's Challenges Succeed, the Remainder of the Rule is Severable

Invalidation of any of the eleven provisions challenged by Baker would not require the Court to invalidate any other portion of the Rule.[15] Generally "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) ("*MD/DC/DE*").

Here, the Board sought to "provide targeted solutions to discrete, specifically identified problems" in each of the Rule's twenty-five amendments. 79 Fed. Reg. 74308. It explained the independent nature of each of the problems and specific measures taken to address those problems: "In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board . . . would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made." 79 Fed. Reg.

[15] Although Baker seeks to temporarily enjoin implementation of the entire Rule, at least as to its own representation proceeding (Mem. at 2, 15), it has not made any allegations with respect to Amendments 1-3, 6, 11-12, 16, 18-19, and 21-25, in its complaint or its memorandum in support of motion for a temporary restraining order.

74308 n.6. The Board specifically explained that certain provisions should remain in effect even if others are struck.[16]

Thus, because the Rule's various parts are justified by different rationales and perform various functions, it logically follows that one mechanism could be severed without impairing the others.[17] In these circumstances, this Court's finding any of the eleven challenged provisions invalid would not prevent the remainder of the Rule from functioning sensibly. *See MD/DC/DE*, 236 F.3d at 23-24. Accordingly, even if Baker is entitled to a temporary restraining order, this Court should permit the remaining fourteen provisions of the Rule to remain in effect.

CONCLUSION

For all of the foregoing reasons, as well as the reasons contained in the first portion of the Board's opposition, this Court should deny Baker's request for a temporary restraining order.

[16] 79 Fed. Reg. 74368 n.292; 74371 n.303; 74373 n.319; 74410 n.457; and 74414 n.469.

[17] *Compare Davis Cnty. Solid Waste Mgmt v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (where EPA standards operated "entirely independently of one another" the provision was found severable), with *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (no severability finding where agency not only did not contend rule was severable, but also the disputed provisions were expressly described as related, and some of the disputed provisions were required to define terms used in the others).

Respectfully submitted,

BARBARA A. O'NEILL
Assistant General Counsel for Contempt, Compliance, and Special Litigation

National Labor Relations Board
1099 14th Street, NW, Suite 10700
Washington, D.C. 20570

/s/ Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
Phone: (202) 273-2937
Fax: (202) 273-4244
E-mail: Nancy.Platt@nlrb.gov
D.C. Bar No. 425995

DAWN L. GOLDSTEIN
KEVIN P. FLANAGAN
Supervisory Attorneys

PAUL A. THOMAS
MARISSA A. WAGNER
IGOR VOLYNETS
Attorneys

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