- Post-election Hearings: providing that the post-election hearing open 21 days, not 14 days, from the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date;
- Service: permitting the Board to serve papers on parties electronically;
- Streamlining the Rules and Regulations:
    - eliminating subpart C of Part 101; and
    - rejecting the proposal to eliminate subparts D & E of Part 101.

## VII. Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III

Members Philip A. Miscimarra and Harry I. Johnson III, dissenting.

We dissent from this Final Rule, and we have great regret that the Board has not chosen one of the available paths that would have permitted an assessment and resolution of these issues with unanimous support among all Board members and broad-based support among practitioners, scholars and advocates for employees, unions and employers. Much of the problem, but certainly not the main problem, involves the immense scope and highly technical nature of the Final Rule.

The Final Rule has become the Mount Everest of regulations: massive in scale and unforgiving in its effect. Very few people will have the endurance to read the Final Rule in its entirety. Recognizing that few will survive the climb, we offer the following selective observations at the outset:

- *Rule's Primary Purpose and Effect: Union Elections As Quickly As Possible*. The Final Rule adopts almost all of what was set forth in the February 2014 Proposed

Rule, which in turn was nearly identical to what the Board originally proposed in 2011.[535] There are minor changes, but the Rule's primary purpose and effect remain the same: initial union representation elections must occur as soon as possible. The Rule's defects also remain the same, uncured by the majority's lengthy discussion, which reflects an awareness of criticisms that are far too often summarily rejected.

- *Election Now, Hearing Later*. The Rule would impermissibly conduct expedited representation elections before any hearing addresses fundamental questions like who is eligible to vote, thereby resulting in an "election now, hearing later." This "election now, hearing later" approach was twice rejected by Congress, in amending the National Labor Relations Act (NLRA or Act) in 1947 and 1959, and is contrary to the statute's requirement – twice affirmed by Congress – mandating an "appropriate hearing" prior to any representation election.

- *Vote Now, Understand Later*. The Rule improperly shortens the time needed for employees to understand relevant issues, compelling them to "vote now, understand later." Regarding these issues, the Rule takes self-contradictory positions that are contrary to common sense, contrary to the Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of

---

[535] In these dissenting views, we refer to the current Final Rule as "Final Rule" or "Rule," to the February 2014 Proposed Rule as the "Proposed Rule" or "NPRM," to the nearly identical June 2011 proposed rule as the 2011 Proposed Rule, and to the more limited December 2011 final rule adopting elements of the 2011 Proposed Rule as the 2011 Final Rule. The 2011 Final Rule was invalidated by the United States District Court for the District of Columbia, *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 21, 25, 30 (D.D.C. 2012), appeal dismissed 2013 WL 6801164 (D.C. Cir. 2013), and was subsequently vacated by the Board.

which focus on guaranteeing *enough* time for making important decisions. The Rule operates in reverse, making the available time as short as possible.

- *Infringing on Protected Speech*. By requiring elections to occur as quickly as possible, the Rule curtails the right of employers, unions and employees to engage in protected speech. We believe this infringement on protected speech is impermissible, but even if it is within the Board's authority, it is ill-advised and poorly serves the Act's purposes and policies.

- *Lack of Need for the Rule*. The Rule leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary. Objective evidence demonstrates that the overwhelming majority of existing elections occur without *any* unreasonable delay (substantially more than 90 percent of elections occur within 56 days after petition-filing). Although a small number of elections involve more time, this is not a rational basis for rewriting the procedures governing all elections. The Final Rule does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays.

- *Due Process*. The Rule greatly accelerates all deadlines associated with representation elections; it selectively imposes on employers the duty to submit a comprehensive written position statement 7 days after notice of a petition-filing by a union; it permits post-submission "amendments" only in narrow circumstances; the new "pleading" requirements, while facially neutral, will in practice weigh far more heavily on employers than on unions attempting to organize nonunion employees; the Rule directs the exclusion of evidence regarding important election issues; and it directs hearing officers in most instances not to permit post-hearing briefs (which, currently,

adds a mere 7 days to the pre-election timetable); and it codifies and places increased reliance on private consultation and decisionmaking between hearing officers and regional directors, conducted off the record (and thus precluding review by the Board, especially regarding matters that are deferred or excluded from the hearing). In our view, these changes are fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues.

- *Improperly Diminishing the Board's Role*. The majority not only rewrites nearly all procedures governing elections, it eliminates any mandatory role for Board members in resolving post-election questions that arise from the Rule (relegating this to regional directors and to the courts, with only discretionary and post-election review by the Board). The Final Rule articulates no necessity for a "hands-off" policy of Board non-involvement in post-election cases, which we believe is irreconcilable with the statute's requirement that the Board "*in each case* * * * assure to employees the *fullest freedom* in exercising the rights guaranteed by this Act."[536]

- *Disclosures and Employee Privacy*. The Rule imposes new mandatory disclosure requirements obligating employers to disclose personal contact information of unit employees, including all personal email addresses and cell phone numbers in the employer's possession. However, the Final Rule's justification for these expanded disclosure requirements (the importance of personal email and cell phones to protected concerted activity in the workplace, given the "prevalence" at "work" of "cell phones,"

[536] Section 9(b) (emphasis added).

which have become "the preferred mode of communication for many young people") is irreconcilable with *Purple Communications*, 361 NLRB No. 126 (2014), where the Board majority insists that "social media, texting, and personal email accounts" are not even "germane" because they "simply do *not* serve to facilitate communication among members of a particular workforce" (emphasis added). Moreover, the Final Rule adopts the expanded disclosure requirements without any employee "opt-out" right regarding such information. The Rule even rejects privacy-enhancement measures as simple as requiring an "unsubscribe" link in election-related texts and emails, notwithstanding the current widespread use of such measures in other third-party communications.

- *The Consensus Path Not Taken*. Most disappointing is the Rule's failure to incorporate reforms that could have had unanimous Board member support, and substantial support among practitioners, scholars, and advocates for employees, unions and employers. We favor (i) making representation procedures more effective; (ii) having most representation elections occur at least within 30 to 35 days after petition-filing; (iii) changing the Board's internal procedures so virtually all elections – disputed or not – would occur within 60 days after petition-filing; and (iv) adopting stricter, more expansive remedies for unlawful election conduct.

As made clear in our dissent to the Proposed Rule,[537] we believe the Board should do everything within its power to ensure that representation elections give effect to

[537] This dissent incorporates passages, often verbatim, from our NPRM dissent, because the Final Rule to a substantial degree reflects the wholesale adoption of many provisions in the Proposed Rule, without regard to our earlier views. Many of our earlier views, therefore, apply with equal force to the Final Rule. We note that the majority likewise repeats many passages from the prior NPRMs and the vacated 2011 Final Rule. Where still appropriate, we also quote from the dissenting opinion of former Member Hayes to

employee free choice consistent with the Act. We are not irrevocably committed to the status quo, nor do we criticize our colleagues for their desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We share the same desire and remain committed to work as a full Board to further our responsibilities to everyone covered by the Act.

Although we might have agreed with certain changes in a different, more limited and focused rulemaking process, we unfortunately must dissent from the Final Rule including all its parts. Its unwholesome ingredients are too numerous and inseparable from the whole, in our view, for any slice to be fit for consumption.

**A. The Final Rule's Procedures Contradict Requirements in the Act and Are Otherwise Impermissibly Arbitrary.**

1. Background: What the Final Rule Would Change. It is difficult to summarize the changes reflected in the Final Rule because they are so numerous and implicate so many disparate aspects of the Board's longstanding election procedures. However, the principal thrust of the proposed changes is to greatly reduce the time between a representation petition's filing and the election in all cases. Indeed, the prime objective of the Final Rule is to conduct elections "sooner" than under current practices. How much sooner is not disclosed. There is no minimum time period for the pre-election campaign. Regional directors are to schedule the election "at the earliest date practicable."

Several features of the Final Rule manifest a relentless zeal for slashing time from every stage of current pre-election procedure in fulfillment of the requirement that an

---

the vacated rule. Again, the fact that we do so reflects the circumstance that although the Final Rule varies in certain respects from the NPRM first published in June 2011 and republished in February of this year, far too much remains the same.

election be scheduled "at the earliest date practicable,"[538] but the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues. The Final Rule would relegate these issues to a post-election hearing, or later.

Ironically, this "election now, hearing later" approach involves the deferral of questions about voter eligibility and unit inclusion. Yes, this means the election would take place first, and only later, if at all, would there be a hearing regarding issues as fundamental as (i) who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would not even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (i.e., representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

---

[538] Each of these amendments is designed to abbreviate the pre-election time period: (i) petitioners will now be required to provide the requisite showing of interest with the petition, rather than within 48 hours after filing the petition; (ii) any pre-election hearing must now generally be scheduled to open 8 days from the region's notice of petition; (iii) the right to file a post-hearing brief within 7 days of the close of hearing has been eliminated; (iv) regional directors must ordinarily schedule the election in a decision directing one, rather than leaving the date of the election and other details for further consultation with the parties; (v) the 25-day automatic waiting period after a regional director's decision and direction of election has been eliminated; and (vi) employers have only 2 days after the decision and direction, rather than the current 7 days, to produce the expanded list of employees and contact information.

These are indisputably important issues. Not only are they relevant to the election campaign, they can profoundly affect what type of bargaining relationship would exist after the election if the union prevails, and the inclusion or exclusion of certain groups may positively or negatively affect employee bargaining leverage. For employees, the "election now, hearing later" approach would create a new norm where essential issues do not even receive potential pre-election *consideration* by a regional director, much less by the Board. This is in addition to the Final Rule's shortening of the period between petition-filing and election, which creates a situation where employees will be forced to "vote now, understand later."

The Final Rule makes other equally dramatic changes in other election procedures. It incorporates in our Rules and significantly expands *Excelsior* list disclosure requirements with more severe time limitations and without adequate protection of legitimate privacy concerns, eliminates the overwhelmingly favored practice of permitting stipulation agreements providing for the automatic right of Board review of post-election issues, and incorporates into our Rules without meaningful change the current blocking charge policy, which impedes the expeditious resolution of questions concerning representation more than any of the processes substantially altered by the Final Rule.

2. The NLRA's Requirements. In contrast to the complicated array of changes in the Final Rule, the Act is straightforward: its fundamental purpose is to guarantee employee free choice when employees vote in elections regarding union representation. Sections 1 and 7 refer to "the exercise by workers of *full freedom* of association" encompassing the right of employees to have "representatives *of their own*

*choosing*."[539] Section 7 protects the right of employees to "*engage* in" protected activities and "to *refrain* from any or all of such activities."[540] Sections 8(a) and 8(b) prohibit actions by employers and unions that "restrain" or "coerce" employees in the exercise of protected rights.[541] Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers and unions, consistent with similar guarantees against state-action infringement of free speech afforded by the First Amendment.[542] Section 9(a)

---

[539] NLRA Sec. 1, 7, 29 U.S.C. 151, 157 (emphasis added).

[540] *Id*. Sec. 7, 29 U.S.C. 157 (emphasis added).

[541] 29 U.S.C. 158(a)(1), 158(b)(1)(A).

[542] Section 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Although Section 8(c) does not directly address representation elections, it has long been recognized by the Board and the courts as protecting speech generally, consistent with the First Amendment. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board."); see also *Chamber of Commerce v. Brown,* 554 U.S. 60, 67-68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.") (internal quotation omitted); *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present."); *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) ("[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)."). Section 7 of the Act has been interpreted as broadly protecting the right of employees to engage in speech regarding election issues. *Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974) ("The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations.'").

The First Amendment is clearly implicated in Board regulations that impermissibly curtail free speech guarantees since federal regulation constitutes quintessential state action for purposes of the United States Constitution. See *Chamber of*

provides for unions to represent employees in an appropriate unit to the extent they are "*designated* or *selected* * * * by the majority of the employees in [the] unit."[543] And Section 9(b) – specifically pertaining to elections – refers to the Board's obligation "in each case" to "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[544]

Significantly, *nowhere does the Act contain an express statement that elections should be held at the earliest date practicable*. Rather, when it comes to preserving the "fullest freedom" of employees to exercise their protected rights in an NLRB-conducted election, the Act makes other considerations more important than speed:

(a) *Neutrality*. Congress has mandated that the Board remain neutral while preserving employee choice, which is consistent with the Act's protection of employee rights to "engage in" concerted activities and to "refrain from any or all of such activities."[545]

---

*Commerce v. Brown*, *supra* at 68 (noting that the Court recognized "the First Amendment right of employers to engage in noncoercive speech about unionization" even before Section 8(c) was enacted).

[543] *Id*. Sec. 159(a) (emphasis added).

[544] *Id*. Sec. 159(b) (emphasis added).

[545] NLRA Sec. 7, 29 U.S.C. 157. The Board must be as neutral in its procedures as in its case adjudications. Concern that the Board's procedures detracted from the agency's neutrality was among the reasons Congress adopted the Taft-Hartley amendments in 1947. See S. Rep. 80-105, 80th Cong., at 3, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (hereinafter "LMRA Hist."), at 407 (Senate report stating that "as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee seeks to overcome, by insisting on certain procedural reforms"). The "procedural reforms" insisted upon by Congress in 1947, and reaffirmed in 1959, included a repudiation of precisely the type of arrangement incorporated into the Final Rule.

(b) *Knowledge of Representation, Bargaining and NLRA Rights*. In 2011, the Board stated that the great majority of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[546] It found that "*nonunion* employees are *especially* unlikely to be aware of their NLRA rights"[547] and acknowledged that "to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is *even more of a factor today*."[548] The Board has also found that many *employers* – and even some *union* officials – lack familiarity with important

---

[546] The Board based this finding on "several factors," including "the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights." 76 FR 54006, 54014-15 (2011). As a result, the Board has attempted to expand its outreach efforts, including distribution of a mobile app regarding the NLRB and the Act, which we fully support. See "National Labor Relations Board Launches Mobile App," Aug. 30, 2013 (http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app). 76 FR at 54014-15. In fact, we favor having Agency resources directed to a higher profile public relations campaign regarding the NLRB mobile app and other outreach efforts.

In 2011, the Board attempted to increase familiarity with the Act's requirements by adopting a rule requiring employers to post notices advising employees about the Act (*id.*), but this rule has been permanently suspended after appellate courts ruled that it exceeded the Board's authority. *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

[547] 76 FR at 54016 (emphasis added).

[548] *Id*. (emphasis added).

NLRA principles and many complex principles that govern union representation and collective bargaining.[549]

(c) *Free Speech*. Finally, employers and unions have protected rights to engage in protected speech prior to an election. As noted, the Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.'"[550]

3. The Legal Standards for Administrative Agency Action. Our colleagues state that their views will be given deference to a degree that must result in the Final Rule's approval.[551] We respectfully disagree. "Reviewing courts are not obliged to stand aside

---

[549] *Id*. at 54017 (emphasis added). In the words of a union official cited by the Board with approval in 2011: "Having been active in labor relations for 30 years I can assure you that *both employees and employers are confused about their respective rights under the NLRA*. Even *union officers* often do not understand their rights. *Members and non-members rarely understand their rights*. Often labor management disputes arise because one or *both sides are misinformed about their rights*." *Id*. at 54017 n.88 (emphasis added).

[550] *Chamber of Commerce v. Brown,* 554 U.S. 60, 67–68 (2008) (quoting *Letter Carriers v. Austin,* 418 U.S. 264, 272–73 (1974)). See also *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right * * * to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940) ("[I]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

[551] The court's ruling clearly indicated that it was deferring any consideration of the rule's other potential infirmities. *Chamber of Commerce of the United States v. NLRB*, supra, 879 F. Supp. 2d at 18, 21, 25, 30 ("Regardless of *whether* the final rule otherwise complies with the Constitution and the governing statute—let alone whether the amendments it contains are desirable from a policy perspective—the Board lacked the

and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[552]

The standard for review of agency rulemaking is principally governed by the Supreme Court's *Chevron* decision[553] and by the Administrative Procedures Act (APA).[554] In *Chevron*, the Court articulated a two-step analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[555]

---

authority to issue it, and, therefore, it cannot stand. * * * Because the final rule was promulgated without the requisite quorum, the Court must set it aside on that ground *and does not reach Plaintiffs' remaining arguments*. * * * The Court *does not reach—and expresses no opinion on—Plaintiffs' other procedural and substantive challenges to the rule*.") (emphasis added).

[552] *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

[553] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[554] 5 U.S.C. 551 *et seq.*

[555] *Chevron* at 842-43 (footnotes omitted). In determining whether an agency rule is invalid under step one of the *Chevron* test, the Court indicated that reviewing courts should use "traditional tools of statutory construction." *Id.* at 843 n.9. "For most judges, these tools include examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history." Section of Administrative Law and Regulatory Practice, American Bar Association, *A Blackletter Statement of Federal Administrative Law*, 54 ADMN. L. REV. 1, 44 (2002).

Step two of the *Chevron* test of an agency's statutory construction somewhat overlaps with the APA, which generally governs the quasi-legislative rulemaking function of administrative agencies and related judicial review. The APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[556] Under this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency * * * ." *Id.* Courts enforce this "hard look" principle with regularity when they set aside agency regulations that, though well within the agencies' scope of rulemaking authority, are not supported by the reasons that the agencies adduce.[557]

In our view, the Final Rule's primary purpose and consequence – shortening the time from the filing of a petition to the conduct of an election – is contrary to clear

---

[556] 5 U.S.C. 706 (2)(A).

[557] The Supreme Court has applied the *State Farm* articulation of the APA's "arbitrary and capricious" standard to judicial review of both Board adjudicatory and rulemaking proceedings. See *Allentown Mack Sales* and *Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (adjudicatory), and *American Hosp. Assn. v. NLRB,* 499 U.S.606, 618-20 (rulemaking).

Congressional intent, which renders it invalid under *Chevron* step one. Moreover, even if one were to find that Congress has not directly addressed issues in a manner contrary to the Final Rule's electoral revisions, we believe the Final Rule is "arbitrary or capricious," which means it does not warrant deference under the APA.[558] Our colleagues have demonstrated a remarkable indifference to the lack of relevant data in support of the Final Rule's extensive revisions. They have failed to address important aspects of the real problems of unacceptable delay in the Board's election process. And, in our view, they have not articulated a rational connection between the facts found and the choices they have made.

4. General Problems and Deficiencies in the Final Rule.

(a) *The Final Rule does not articulate a rational reason for substantially rewriting all representation election procedures.* We still do not understand the reason for embarking on the path our colleagues have taken. As described in our Proposed Rule dissent, the Board has a very successful track record of conducting timely elections. See 79 FR at 7320. Casehandling statistics since 2011 indicate no significant variation from

[558] As the D.C. Circuit has observed, inquiry at the second step of *Chevron*, i.e., whether an agency has made a permissible statutory interpretation, overlaps with the APA's "arbitrary and capricious standard." See *Shays v. FEC,* 414 F.3d 76, 96-97 (D.C. Cir. 2005), and cases cited there. However, the same court has explained that meaningful differences exist between the two standards. *Chevron II* looks to whether the agency has made a reasonable interpretation of an ambiguous provision of its governing statute. The APA "arbitrary and capricious" standard looks to whether the agency's exercise of rulemaking authority delegated to it in that statute by Congress is invalid because it is "arbitrary and capricious." See e.g., *Continental Airlines, Inc. v Department of Transportation*, 843 F.2d 1444, 1452 (D.C. Cir. 1988). Thus, most of the Final Rule's provisions will be reviewed and found wanting under the APA standard.

those described in the 2011 proposed election rule. See 76 FR at 36813-14. In 1960, the median time from petition to a direction of election was 82 days, with more time obviously elapsing before the elections occurred (*id.* at 36814 n.16). By 1975, only 20.1 percent of all elections occurred more than 60 days after the filing of a petition, and this percentage decreased to 16.5 percent by 1985 (*id.* at 36814 n.19). Since at least 2001, the Board has applied a well-known target to have elections conducted within a median of 42 days after the petition-filing.[559] Over the past decade, elections have actually occurred within a median of approximately 38 days after the filing of a petition, and in fiscal 2010, the average time from petition to an election was 31 days.[560] Another significant Board target is to hold 90% of all elections within 56 days of the filing of the petition. The Board has consistently done better than that standard.[561] In fact, in 2013, 94.3% of elections were held within that 56-day period.[562] Thus, it is fair to conclude that in 2013, by the Board's own measures, less than 6% of elections were unduly "delayed." Some

---

[559] NLRB's 2004 Performance and Accountability Report: Protecting Workplace Democracy, 15-17 and 67 (undated), *www.nlrb.gov/reports-guidance/reports/performance-and-accountability*. In the early 1990s, the Agency's articulated goal was to hold elections within a median of 50 days after the filing of the petition. See General Counsel's Memorandum, GC 93-16, "Major Accomplishments of the Office of the General Counsel for Fiscal Years (1990-1993)," 3 (Nov. 24, 1993), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

[560] General Counsel's Memorandum, GC-11-09, "Report on Midwinter ABA PP Committee," 19 (March 16, 2011), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

[561] NLRB Summaries of Operations, fiscal years 2007-2012, and Performance Accountability Reports, 2004-2013, *www.nlrb.gov/reports-guidance/reports*. See GC-11-09, *supra* note 25, at 18-19.

[562] NLRB Performance Accountability Report, fiscal year 2013, www.nlrb.gov/reports-guidance/reports.

elections take too long to resolve, but in recent years these cases have been few in number.

The Final Rule's focus on limiting the use of pre-election hearings by substantially narrowing their scope, limiting the evidence accepted, and eliminating the rights of parties to submit written legal arguments is predicated on the false assumption that providing parties with an opportunity to be heard and to develop a full factual record at the pre-election hearing is an impediment to efficient, prompt election case processing. This presumption is directly contrary to the foregoing facts showing that all but a very small percentage of Board cases are not unduly delayed.

The facts further show that the pre-election hearing itself accounts for very little of the overall time it takes to process representation cases. When hearings are required, regions hold pre-election hearings promptly, the hearing rarely lasts more than 1 day, and regional directors thereafter issue decisions with impressive celerity, perhaps facilitated by, but certainly not shown to be impeded by, the filing of post-hearing briefs. In FY 2013, regional directors issued 159 pre-election decisions in contested cases in a median of 32 days following the filing of the petition,[563] well below their target of 45 days. Similarly, in FY 2012, regional directors issued 169 pre-election decisions in contested representation cases after hearing in a median of 34 days, and in FY 2011 regional directors issued 203 pre-election decisions in a median time of 33 days.[564]

---

[563] Reported by NLRB Division of Operations Management, August 8, 2014.

[564] FY 2012 Summary of Operations, General Counsel's Memo 13-01 (January 11, 2013), at http://www.nlrb.gov/reports-guidance/general-counsel-memos.

These figures show that regional directors consistently issue decisions in contested cases with great efficiency. Contrary to the extended explanation offered by our colleagues – in the interest of justifying severe limits on the timing and scope of pre-election hearings, increased evidentiary and procedural burdens on employers, and extremely limited, discretionary Board review of regional directors' decisions – the facts show that pre-election hearings and regional directors' decisions are simply *not* a cause of significant administrative delay or other identifiable deficiencies.

We do not suggest the Board's work here is necessarily done. However, the available data do not provide a rational basis for the Final Rule's wholesale reformulation of election procedures.

The majority also continues to dismiss the utility of agency time targets and performance standards as measures of case processing efficiency, claiming that those standards evolve and only present a measure of what can be accomplished under the existing procedural regime. Yet, they do not even offer an alternative standard, under the Final Rule, regarding what *should* be accomplished *within what period of time*. Our colleagues find it sufficient to brand certain current practices as primary sources of delay. They are because the majority says they are, and the elimination or amendment of these practices will eradicate delay. The objective facts refute this ipse dixit justification.

Further, there are several important rational inconsistencies in the Final Rule's justification for expediting the conduct of elections: (i) a need ostensibly exists for elections to occur more quickly, yet other Board doctrines delay or defer elections for up

to several years;[565] (ii) the Final Rule makes elections occur more quickly – by eliminating time for reasonable preparation, by adopting new, accelerated pleading requirements applicable only to employers, by dispensing with post-hearing briefs, and by deferring until following the election evidence regarding issues as fundamental as who can vote, for example – but our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections; (iii) most importantly, the Act's purposes and objectives are vitally affected by the amount of time between petition-filing and any election (indeed, this is the near-exclusive justification offered for rewriting nearly all election procedures), but our colleagues affirmatively *disclaim* any need to indicate how much time should or will elapse under the Final Rule between petition-filing and election; and (iv) our colleagues adamantly refuse to acknowledge what has been universally understood by Congress when evaluating the NLRA and virtually every other context when parties make important decisions: some reasonable minimum time is necessary for protected speech and so parties can be familiar with relevant issues. In all of these respects, among others, we believe the reasoning underlying the Final Rule is insufficient to establish a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, *supra*, 371 U.S. at 168.

---

[565] For example, as we discuss later in this opinion, the current blocking charge policy, which the Final Rule incorporates without meaningful change, is an identified cause of substantial delay in representation cases. In addition, recent Board decisions also routinely impose delays of 6 months to a year in successorship situations, and as much as 4 years in initial card-based voluntary recognition situations, before a change in employee sentiment regarding union representation may be tested in an election. See *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011) (successorship), and *Lamons Gasket Co.*, 355 NLRB 763 (2010) (voluntary recognition).

(b) *The Final Rule improperly places speed over all other considerations.* We agree that it is desirable to eliminate systemic inefficiency and protracted delays in the election process. However, as discussed below, the Act's detailed provisions *require* Board proceedings and the consideration of evidence regarding important issues. Indeed, in addition to at least twice rejecting the "election now, hearing later" and "vote now, understand later" approaches reflected in the Final Rule, Congress enacted other amendments requiring the Board to abandon procedures – ostensibly justified by administrative efficiency – because Congress placed primary importance on having issues resolved without administrative shortcuts, so that Board members would do the "deciding" to ensure that *all* decisions would reflect "the considered opinions of the Board members."[566]

Our colleagues declare that "speed is not the sole or principal purpose" of the Final Rule, but that their amendments address "efficiency, fair and accurate voting,

---

[566] H.R. Rep. No. 80-245, at 25 (1947), reprinted in 1 LMRA Hist. 316; S. Rep. 80-105, 80th Cong., at 8-9, 1 LMRA Hist. 415. After the Wagner Act's adoption, the Board created a "Review Section" of attorneys to review transcripts and draft decisions, which a Senate report characterized as disposing of cases "in an institutional fashion." *Id*. Congress amended the Act to prohibit the Board even from employing attorneys for the purpose of reviewing transcripts, apart from each Board member's own legal assistants. *Id*. Thus, NLRA Section 4, 29 U.S.C. 154, added to the Act in 1947, states: "The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." Congress also amended Section 9(c)(1) by adding language prohibiting hearing officers from even formulating "recommendations." See note 622 *infra*, and accompanying text. In 1959, Congress permitted the Board to delegate responsibility to regional directors regarding representation-election issues, but the Act explicitly conditioned this delegation on each party's right to have the Board review "any action" by regional directors. *Id*. This delegation did not expand or modify the authority of hearing officers.

transparency, uniformity, and adapting to new technology." We do not dispute that these other factors can be legitimate considerations in rulemaking. However, speed is the obvious dominant justification for most of the Final Rule's changes, and the Final Rule accelerates virtually every deadline applicable even when doing so is not required by these other factors.[567] The majority states that "eliminating unnecessary delay is therefore unquestionably a valid reason to amend these regulations." One can hardly argue against eliminating unnecessary "delay" in the abstract. As noted below, we advocate aggressive measures by the Board to identify and eliminate those cases (involving less than ten percent of elections) where more than 60 days passes between petition-filing and the election. Yet, here again, there must be a "rational connection between the facts found and the choice made." *Burlington Truck Lines*, *supra*, 371 U.S. at 168. The majority invokes the language of "eliminating delay" as if cases involving undue delays are caused by widespread "dilatory tactics" (which is contrary to the available evidence).[568]

---

[567] For example, the Final Rule argues that "uniformity" favors having all pre-election hearings take place 8 days after petition-filing, but this aspect of the Final Rule contrasts with some Regions that currently allow up to 14 days before conducting the pre-election hearing. The Final Rule invokes "technology" to expand the disclosure requirements applicable to the voter eligibility (*Excelsior*) list – thereby requiring employers to disclose available personal employee email addresses and phone numbers, for example – while requiring the submission of the *Excelsior* list *2* business days after the regional director directs an election, which contrasts with the current *7* days.

[568] We disagree with our colleagues' interpretation of a statement by the Supreme Court in *Boire v. Greyhound Corp.*, 376 U.S. 473, 478 (1964), and a comment by Senator Taft during debates on the 1947 Taft-Hartley amendments adopted as part of the Labor Management Relations Act (LMRA). According to our colleagues, the Supreme Court noted that "*the policy in favor of speedy representation procedures* 'was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration.'" (Final Rule, *supra* (emphasis added), quoting *Boire*, 376 U.S. at 478). The Supreme Court in *Boire* addressed the limited question of whether a federal court injunction could be obtained, in order to block a Board-scheduled election, based on a challenge to an

Moreover, in our view, too many of the Final Rule's changes contradict "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 Act imposes statutory *requirements* on the Board, including an "appropriate" pre-election hearing (Section 9(c) of the Act), and the Board is charged with assuring employees the "fullest freedom" in their exercise of protected rights in Board-conducted elections (Section 9(b) of the Act). This plain statutory language, and its legislative history, preclude any suggestion that Congress intended for the Board to emphasize "speedy representation procedures" over election-related requirements that the statute expressly imposes on the Board.

Understandably, Board and court cases speak favorably about having "employees' votes * * * recorded accurately, efficiently and speedily." *Id.*; see also *AFL v. NLRB*, 308 U.S. 401, 409 (1940) (the Wagner Act was designed in part to avoid "long delays in the

---

election-related ruling by the NLRB (in *Boire*, the party seeking the court injunction claimed that the Board erroneously found that it was a joint employer). *Id.* at 476-77. Solely addressing whether Board-ordered elections could be enjoined by a pre-election federal court proceeding, the Supreme Court stated "Congressional determination *to restrict judicial review in such situations* was reaffirmed in 1947, at the time that the Taft-Hartley amendments were under consideration, when a conference committee rejected a House amendment which would have permitted any interested person to obtain review immediately after a certification because, as Senator Taft noted, '*such provision* would permit dilatory tactics in representation proceedings.'" *Id.* at 478-79 (emphasis added; footnotes omitted). Nothing in *Boire* states that Congress in 1947 reaffirmed a generalized "policy in favor of speedy representation procedures." Further, it is even more apparent that Senator Taft did not support a generalized "policy in favor of speedy representation procedures." To the contrary, as noted elsewhere in the text, the amendments sponsored by Senator Taft – which were adopted as part of the LMRA – reaffirmed and expanded the "appropriate hearing" requirement, contrary to the Board's pre-1947 practice and contrary to the changes adopted in the Final Rule. See text accompanying notes 572-581, *infra*.

procedure * * * for review of orders for elections"); *Northeastern Univ.*, 261 NLRB 1001, 1002 (1982) (referring to "expeditiously resolving questions concerning representation"); *Tropicana Prods., Inc.*, 122 NLRB 121, 123 (1958) ("[T]ime is of the essence if Board processes are to be effective."). Yet, nothing in these cases suggests speed or efficiency should be pursued at the expense of the Act's *express* principal purpose, which is to safeguard the "fullest freedom" of employees to vote in elections that determine whether or not they will be union-represented. NLRA Sec. 9(b), 29 U.S.C. 159(b). Indeed, the Court's statement in *A.J. Tower* that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" is entirely consistent with this statutory directive. 329 U.S. at 330.

Further, regarding the timing of elections, the Supreme Court precedent cited in the Final Rule deals with entirely different causes of delay than the processes that are amended or eliminated here. *A.J. Tower* was limited to endorsing the Board policy of not permitting post-election challenges to ballots, which would obviously and inevitably delay finality and accuracy in the ballot count. As indicated previously (see note 568, *supra*), the Supreme Court decision in *Boire v. Greyhound* involved an employer's attempt to enjoin election proceedings and gain immediate judicial review of a Board determination that it was an employer under the Act. The Court's rejection of pre-election court review had nothing whatsoever to do with delays attributable to the Board's handling of pre-election issues. To the contrary, as further discussed below, there is extensive legislative history demonstrating that Congress *opposed* "quickie elections,"

which was a central focus when Congress adopted the Taft-Hartley and Landrum-Griffin amendments in 1947 and 1959, respectively.

The Final Rule's emphasis on speed stands in marked contrast to all of the other contexts in which Congress, courts, and federal agencies have emphasized the need to guarantee *more* time, not less, when individuals are expected to exercise free choice about representation and other significant matters in a group setting. A substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line.[569] All of these have one thing in common: They require more time, not less. Against the backdrop of these examples, we have difficulty believing that federal labor law works in reverse. The thrust of the Final Rule—unintended or not—is that employees make better choices when they vote first, and understand later. Congress and other state and federal regulators have rejected such reasoning. Given that the Board's primary

---

[569] Examples include 60 days required when employees are affected by mass layoffs or plant closings that trigger notice requirements under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq*. (WARN); the 45 days required when a group of employees are offered benefits in exchange for signing a waiver of age discrimination claims, based on the Older Workers Benefit Protection Act (''OWBPA''), 104 Stat. 978 (1990), which added Section 7(f) to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(f); the recommended period of 60-90 days, with a minimum of 30 days, when plaintiffs decide whether to opt-out of a Rule 23 class action, see Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide,* 4 (2010), *http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf*; and the 4-6 week period between the nomination of candidates to be local union officials and subsequent elections. See Office of Labor-Management Standards, *Conducting Local Union Officer Elections: A Guide for Election Officials,* 4 (2010), *http://www.dol.gov/olms/regs/compliance/localelec/ localelec.pdf.* See generally our dissenting views in the 2014 NPRM, 79 FR 7344-7345 (Feb. 6, 2014) (dissenting views of Members Miscimarra and Johnson).

responsibility is to safeguard employee free choice, especially in elections, the Final Rule in this fundamental respect is deficient.

Finally, it is important to note that the Final Rule reflects a preoccupation with speed between petition-filing and the election, while improperly disregarding the increased delays it may cause in the Board's *overall* representation process: the period between petition-filing and the exhaustion of post-election proceedings and appeals. Postponing many employee eligibility and unit placement issues until the post-election period is likely to require *more* time from petition-filing to the final certification of election results, particularly since the Final Rule provides that parties will not even have a right to obtain any Board member decision regarding pre- and post-election determinations. This means the only guaranteed review of regional director decisions will occur if employers refuse to comply with post-election Board certification, which then provides the opportunity for court review. In this regard, limitations imposed on the creation of a full evidentiary record are likely to cause even more substantial delays because the majority directs the exclusion of evidence that is likely to be indispensable to any meaningful review by regional directors, the Board and the courts of appeals. The Final Rule's changes, which create a greatly accelerated pre-election timetable, impose inflexible new "pleading" requirements applicable primarily to the employer, largely eliminate post-hearing briefing, and truncate the record, are likely to produce an entirely new class of procedural and due process challenges – with many more remands from courts of appeals to the Board or from the Board to regional directors (in those relatively rare cases where the Board chooses to exercise its discretion to review a particular case). Only in the second stage of Board litigation will parties have the opportunity to present

and respond to evidence, arguments and briefing that could not fully and fairly be litigated earlier. This will result in greater delays between petition-filing and any bargaining between employers and unions, which is the most important end result of representation elections in which the union prevails.

(c) *The Final Rule's limits on pre-election litigation – creating an "election now, hearing later" and "vote now, understand later" election process – contravene clear Congressional intent.* The Final Rule defines the Board's statutory obligation to conduct an "appropriate" pre-election hearing as limited to the presentation of evidence necessary to determine whether a question concerning representation exists. This eliminates the parties' right to present evidence concerning properly contested individual eligibility and inclusion issues.[570] As previously stated, this restrictive definition, and the conferral of

---

[570] It is true that the Final Rule does not completely eliminate the pre-election hearing, nor does the Final Rule totally preclude the possibility that a particular hearing officer might permit the introduction of evidence regarding voter eligibility or supervisory status, for example. However, the Final Rule expressly states that it dramatically narrows the scope and duration of pre-election hearings, and it relegates all but the most basic issues to post-election proceedings. Therefore the Final Rule clearly will not result in pre-election hearings where voter eligibility and inclusion issues are regularly addressed. The Final Rule explicitly states otherwise. Further, the inclusion or exclusion of such evidence would be determined by hearing officers, who, under Sec. 9(c)(1), are not even permitted to make ''recommendations'' about relevant issues.

We also recognize that, under existing Board procedures, elections may take place while some questions remain unresolved, and some employees may cast votes that, if challenged, are ruled upon in post-election proceedings. In all such cases, however, the Act gives parties the right to *present evidence* regarding these issues at a pre-election hearing. And based upon such evidence, the Act requires that the regional director and the Board consider requests to stay the election until such issues are resolved. See text accompanying note 627, *infra*. In addition to dramatically shortening the time period between petition-filing and the election, the Final Rule would impermissibly curtail the right to present any evidence at the pre-election hearing regarding many fundamental issues, which in turn would prevent the regional director and the Board even from considering whether the resolution of such issues is important enough to warrant staying

authority on regional directors and hearing officers to limit the presentation of evidence on these issues, is a keystone device in the Final Rule's acceleration of the pre-election timeline.[571]

This leads inevitably to a conclusion – relevant when conducting an inquiry under *Chevron* step one – that the Final Rule's exclusion of eligibility and unit-inclusion issues from the "appropriate hearing" requirement of Section 9(c)(1) of the Act directly and substantially contravenes Congress's clearly expressed intent in enacting and reenacting that requirement.[572]

Section 9(c)(1) states that, whenever a representation petition is filed, the Board "shall investigate" and, if there is "reasonable cause" to believe there is a "question of representation," the Board "shall provide for an appropriate hearing upon due notice." Section 9(c)(1) further states that the hearing "may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto," and if the Board finds "based on the record of such hearing" that a question of representation exists, the Board "shall direct an election by secret ballot and shall certify the results thereof."

---

the election. *Id.*

[571] Other amendments in the Final Rule that impermissibly implement this definition by limiting the presentation of evidence in a pre-election hearing–-including the new preclusion standard, permitting offers of proof to substitute for testimonial evidence, and the discretionary 20 percent standard for the exclusion of evidence relating to eligibility and inclusion issues–-are discussed in a subsequent section of this opinion.

[572] See also former Member Hayes' discussion of this point in his dissent to the vacated December 2011 rule at 77 FR 25560.

Contrary to our colleagues' discussion of this issue, Congress has directly addressed the scope of the requisite "appropriate hearing," and has at least twice rejected the "election now, hearing later" and "vote now, understand later" approaches reflected in the Final Rule. In particular, Congress has clearly repudiated the notion that the Board may conduct so-called "quickie elections" *before* important issues such as eligibility and inclusion are the subject of an "appropriate hearing."

Based on the original Wagner Act (which did not require elections but provided for an "appropriate hearing" *if* an election was conducted), the Supreme Court decided in 1945 that the "appropriate hearing" requirement could be satisfied by a *post*-election hearing. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). For about 19 months thereafter, the Board conducted a number of prehearing elections and relegated important election-related issues to a post-election hearing. In 1947, Congress explicitly prohibited this practice by adding the aforementioned language in Sections 9(c)(1) and (4) of the Act requiring the Board to conduct an "appropriate hearing" *before* any election, and permitting "the waiving of hearings" *only* "by stipulation" of all parties.[573] Thus, when the Taft-Hartley amendments explicitly prohibited elections without an

---

[573] 29 U.S.C. 159(c)(1), (4); 61 Stat. 136 (1947), 29 U.S.C. 141 *et seq.*, reprinted in 1 LMRA Hist. 1 *et seq.* (1974); *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 429-30 (3d Cir. 1950); H.R. Rep. 86-741, at 24 (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act * * * a form of prehearing election was used by the NLRB."); S. Rep. 86-187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

"appropriate hearing" *before* the election, this not only repudiated a practice that had been adopted by the Board, it repudiated the Supreme Court's *Inland Empire* decision.[574]

In 1959, the resurrected concept of having expedited elections *followed* by the consideration of important issues in post-election hearings was part of President Eisenhower's original "20-point program" that prompted Congress to adopt the Landrum-Griffin Act. See S. Rep. 86-10, at 3 (1959), reprinted in 1 LMRDA Hist. 82 ("In order to speed up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made."). Not only was this "election first, hearing later" concept considered throughout the 1959 legislative debates, it was *adopted* in the Senate version of the Landrum-Griffin amendments.[575] Significantly, though authorizing the Board to conduct elections on an expedited basis while deferring important issues to a post-election hearing, the Senate-passed bill explicitly prohibited elections from occurring fewer than 30 days after the filing of a petition. Then-Senator John F. Kennedy – who chaired the Conference Committee and was a proponent of the pre-hearing election concept – repeatedly stated that at least 30 days were required between the

---

[574] In light of this and other clear expressions of Congress's intent on the precise question of the scope of the statutory term "appropriate hearing" *after* the Court's *Inland Empire* decision, we accord less weight to the Court's interpretation of that term in *Inland Empire* than do our colleagues.

[575] See S. 1555, 86th Cong. Section 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581.

petition's filing and the election to "safeguard *against rushing employees into an election where they are unfamiliar with the issues*."[576]

Ultimately, Congress still refused to adopt the Senate-passed arrangement because *elections would take place too quickly*. Congress instead reaffirmed the requirement that the Board conduct an "appropriate hearing" before any contested election, and it precluded the Board from deferring litigation of voter eligibility and other issues to post-election hearings. Representative Graham Barden, when describing the Senate-passed bill's abandonment, explained that pre-election "hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification."[577]

---

[576] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (emphasis added). To the same effect, Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints." 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86-741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections"). To repeat, Senator Kennedy was a principal proponent of pre-hearing elections. Contrary to our colleagues, we find that his remarks as to what would be required if pre-hearing elections were permitted are germane to the analysis of whether the changes they make to shorten the time from petition to election in all representation cases are rational or arbitrary.

[577] 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714. Cf. H.R. Rep. 86-741, at 76 (1959), reprinted in 1 LMRDA Hist. 834 (indicating that Representative Barden was Chairman of the House Committee on Education and Labor); H.R. Rep. 86-1147, at 42 (1959), reprinted in 1 LMRDA Hist. 946 (indicating that Representative Barden was the ranking House Conference Committee Manager). See also 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (opposing "pre-hearing or so-called quickie election" and affirming that the "right to a hearing is a sacred right"); H.R.

As is obvious from the legislative record, the core concepts underlying the current Rule ("election now, hearing later" and "vote now, understand later") were not simply matters of peripheral concern when Congress – in 1947 and again in 1959 – rejected the notion of having expedited elections without a hearing regarding fundamental election issues like voter eligibility and supervisory status. Thus, from 1947 until today, the Board's long-established practice has been to conduct a full evidentiary hearing on contested issues prior to conducting an election and to permit the introduction of evidence on unit eligibility and inclusion issues in those hearings *as a matter of statutory right.* This is consistent with Congressional intent in the Taft-Hartley amendments in 1947. It is also consistent with the ultimate knowing determination by Congress not to alter that practice when enacting the Landrum-Griffin amendments in 1959. As to the latter legislative event, the Supreme Court has stated that in reviewing the Board's interpretation of the Act, "a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation in 1959 is strongly supportive of our view that the longstanding interpretation is the one intended by Congress."[578] By this standard, it could not be clearer that the Final Rule's interpretation of "appropriate hearing" contravenes Congressional intent.[579]

---

Rep. 86-741, at 24-25 (1959), reprinted in 1 LMRDA Hist. 782-83 (mandatory period between petition-filing and election "guards against 'quickie' elections"); 105 Cong. Rec. A8522 (1959), reprinted in 2 LMRDA Hist. 1856 (referencing opposition to pre-hearing election proposal).

[578] *NLRB v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 274-75

Furthermore, not only is the Final Rule's interpretation of the scope of an "appropriate hearing" clearly contrary to Congress' expressed intent, it is especially objectionable from a policy standpoint to exclude from pre-election hearings evidence regarding *who is eligible to vote*.[580] To state the obvious, when people participate in an

---

(1974).

[579] Congress's failure to pass electoral initiatives in the Labor Law Reform Act of 1977-78 represented yet another rejection of the "vote now, understand later" approach. See Cong. Res. Serv., Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501-02 (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; failure of four cloture motions in Senate from June 13-22, 1978; closest votes 58-41 on June 14 and 58-39 on June 15).

[580] Regarding the Final Rule's provisions for Board-conducted elections without even permitting a pre-election hearing about who is eligible to vote, the Rule is on the wrong side of history and common sense. See NLRA Sec. 9(c)(1), (4) (requiring an "appropriate hearing upon due notice" before an election, unless there is a "waiver * * * for the purpose of a consent election"). Addressing the Taft-Hartley Act's rejection of the "election first, hearing later" concept, Senator Taft – cosponsor of the legislation – stated, "It is the *function of hearings in representation cases* to determine whether an election may properly be held at the time; and if so, to decide *questions of unit and eligibility to vote*." 93 Cong. Rec. 7002 (1947), reprinted in 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added). Addressing the Landrum-Griffin amendments adopted in 1959, Representative Graham Barden – Chairman of the House Committee on Education and Labor, and the ranking House conferee – stated that "[t]he right to a *formal hearing before an election can be directed* is preserved *without limitation or qualification.*" 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714 (emphasis added), describing H.R. Rep. 86-1147, at 1 (1959), reprinted in 1 LMRDA Hist. 934 (conference report). Chairman Barden stated: "The right to a hearing *is a sacred right*." 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (emphasis added). Consistent with these requirements, the Board itself has repeatedly held that Section 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and questions regarding supervisory status, among other things. See, e.g., *Barre-National, Inc*., 316 NLRB 877 (1995) (finding that hearing officer's refusal to permit evidence regarding supervisory status "did not meet the requirements of the Act" even though the hearing officer – like the Final Rule – would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status). Because, contrary to our colleagues' position, this requirement stems from the Act and not from our decisions, it cannot be evaded by overruling *Barre-National* and related cases. See also *Angelica*

election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them.[581] In this respect, the Final Rule's approach would be intolerable in every other voting context, whether it involved a national political election or high school class president. Thus, for

---

*Healthcare Services Group*, 315 NLRB 1320 (1995); *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999); *Avon Prods., Inc.*, 262 NLRB 46, 48-49 (1982).

[581] An array of problems and incongruities stem from the broad exclusion of eligibility and inclusion issues from pre-election hearings. Because the Final Rule directs the exclusion of evidence regarding such issues, there will be more situations where many employees cast votes in NLRB-conducted elections where, based on the post-election resolution of eligibility issues, the employees learn their votes were not even counted and, even if the union prevailed, the ineligible employees are excluded from any bargaining. Without a pre-election hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters – with whom they may have discussed many issues – will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions – though not directed by the employer – could later become grounds for overturning the election. Also, employees ultimately included in the bargaining unit will not know – at the time they voted – whether they will have the support of other employees who, after the election, end up being excluded from the bargaining unit. Congress clearly intended that parties would have the right to present evidence regarding such issues in the "appropriate hearing" required before any non-stipulated election.

As indicated previously (see note 570, *supra*), the point here is not that such issues require *resolution* before every election; the Final Rule adopts the broad-based position that *evidence as to these issues* should be excluded and in many instances will be excluded from the pre-election hearing. This is all the more perplexing given that Congress repeatedly reaffirmed the need for a pre-election hearing to permit evidence regarding such important issues and, in every case, potential pre-election Board review of "any action" by regional directors. NLRA Sec. 3(b), 29 U.S.C. 153(b). This deficiency in the Final Rule is not cured by the possibility that hearing officers may, as a discretionary matter, permit evidence regarding some voter eligibility issues in isolated cases. The Final Rule redefines the limited purpose of the pre-election hearing to a determination of whether a "question of representation" exists, thereby providing for the deferral of voter eligibility issues until after the election. One cannot reasonably presume that hearing officers and regional directors will exercise "discretion" to act at variance with what the Final Rule requires.

good reason, the "appropriate hearing" requirement has consistently been deemed to require that pre-election hearings encompass evidence regarding voter eligibility and inclusion issues. The Board's recent decisions have highlighted the importance of determining what employees may be excluded from petitioned-for bargaining units, which prompted a Board majority in *Specialty Healthcare* to change the legal standard governing such determinations.[582]

(d) *The Final Rule curtails protected speech during representation election campaigns.* Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. The Supreme Court has long recognized an employer's right to engage in free speech in the labor relations context. See *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477-79 (1941) (nothing in the Act prohibits employers from expressing their views about unions). The Court has also characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.'"[583] Employers and unions have protected rights to engage in protected speech prior to an election. This right only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation. Employees should

---

[582] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 83 (2011), *affd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[583] *Chamber of Commerce v. Brown*, 554 U.S. at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)).

have enough time to listen to both sides of the debate about unionization, to inform their colleagues of their views on the subject, and to consider their options before voting on an issue that could impact their working lives for years to come.

The Final Rule is intended to, and inevitably will, substantially shorten the time in all initial organizing representation elections from the filing of a petition, when support for unionization is often at its peak, to the day of the election.[584] The Final Rule will therefore necessarily curtail the ability of parties to exercise their rights to engage in protected speech during the critical pre-election campaign period. Particularly because the consequences of an election can be long-lasting – regardless of whether employees vote for or against union representation – the Final Rule limits the right of *all* parties to engage in protected speech at precisely the time when their free speech rights are most important. Thus, in most cases, parties and employees will have *less time* to share their respective views and engage in robust, lawful debate regarding the positive and negative aspects of union representation. This consequence alone is a matter of constitutional concern. That concern is magnified by the mandate that regional directors schedule an election "at the earliest date practicable," which creates an unacceptably heightened risk parties and employees will have *too little time* at least in some cases, as measured by any reasonable standard, to engage in protected debate.

---

[584] The majority argues that the Final Rule does not necessarily shorten the time between the petition and the election because it does not set any rigid timelines for the conduct of the election. If that were the case, then there is no point at all to the pre-election elements of the rule that abbreviate the timetable for conducting an election. Further, we have little doubt how regional directors—members of the career Senior Executive Service whose eligibility for annual performance awards depends in substantial part on how their regional office meets time targets—will construe the overriding imperative in the Final Rule that elections be scheduled "at the earliest date practicable."

The majority makes much of the statement, in our dissent to the Proposed Rule, that we did not know the precise point in time when shortening the election timetable would impermissibly deny employers, unions, and employees the right to engage in speech protected by the Act and the First Amendment. The Final Rule dispels any question about this: it *does* effectively and impermissibly curtail the protected speech rights guaranteed to employers, unions and employees under the Act and the First Amendment. The Final Rule substantially abbreviates the time from petition to election in *all* representation cases; as previously stated,[585] the Board has determined that most unrepresented employees – and many employers and union officials – lack familiarity with important NLRA principles and the many complex principles that govern union representation and collective bargaining; the Final Rule explicitly adopts the requirement that elections take place as quickly as "practicable"; the Rule squarely rejects any reasonable minimum time between petition-filing and election; and our colleagues explicitly disclaim responsibility even to identify an appropriate target time frame that should – or will – result from the Rule.

In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as "practicable" after a petition is filed).[586] Second, the

---

[585] See discussion in text and accompanying footnotes in Sec. A.2, *supra*.

[586] To the extent that the majority relates its First Amendment argument to its claim that "as soon as practicable" is the Board's historical standard, we counter that the Rule radically revises what the Board has historically viewed as practicable and, by doing so, greatly increases the risk of free speech infringement.

Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: to limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties – and the Board – regard pre-election campaigns as vitally important.

The substantial body of judicial precedent that governs campaigning in political elections is also relevant here.[587] Numerous courts have ruled that all but the most narrowly drawn durational limitations on political electioneering are impermissible government restrictions of free speech.[588] Further, the Supreme Court has declared: "It is simply not the function of government to select which issues are worth discussing or

---

[587] The majority rejects the analogy between Board elections and political elections. Their view cannot be reconciled with judicial precedent that has long recognized this analogy as apt. See *Wirtz v. Hotel, Motel & Club Emp. Union, Local 6*, 391 U.S. 492, 504 (1968) (when creating representation elections, "Congress' model of democratic elections was political elections in this country"); *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985) ("Congress intended representation elections to follow the model of elections for political office."). See also *NLRB v. A.J. Tower Co.*, *supra* at 332 (rationale for opposing post-election challenges in political elections also applies to representation elections). Therefore, the courts' regulation of conduct in political elections may be particularly instructive in the Board's regulation of representation elections and provide support for the assertion that individual free choice in representation elections requires more time and information, not less.

[588] See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D.N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-455 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election).

debating in the course of a political campaign."[589] Neither should it be the Board's function to curtail opportunities for the identification and discussion of issues in a representation election.

Our colleagues assert that the Final Rule is permissible because it does not completely eliminate the opportunity for employees, employers and unions to communicate about unionization. They argue, for example, that some nonunion employers learn about union organizing *before* representation petitions are filed.[590] However, our colleagues' reliance on possible union-related discussions *before* petition-filing is misdirected because, first, the Final Rule's deleterious impact on speech obviously occurs *after* petition-filing (by dramatically shortening the window between petition-filing and the election), and second, the filing of the petition initiates what the

---

[589] *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002) (citing *Brown v. Hartlage*, 456 U.S. 46, 60 (1982)).

[590] The Final Rule relies in large part on written comments and testimony submitted by Professor Kate Bronfenbrenner that purport to show that employers generally have knowledge of organizing campaigns before a petition is filed. However, the reliance on this research would be misplaced even if the research were objectively accurate. As the Final Rule emphasizes, "[m]ost elections involve a small number of employees," with a quarter of elections held in units with 10 or fewer employees, half of elections held in units smaller than 25, and three-quarters of all Board elections held in units of 60 or fewer employees. However, the Bronfenbrenner study is based on a specialized sample of cases involving only *large* bargaining units containing at least 50 employees. If for no other reason than that the study is based on a population of statistical outliers, this study cannot legitimately support the Final Rule's claim that "employers are very often aware of the organizing campaign before the petition is filed." See August 22, 2011 correspondence from Bronfenbrenner and Warren to the Board, enclosing *Empirical Case for Streamlining the NLRB Certification Process*. In addition, as has been noted elsewhere, there are far too many flaws in the current and past Bronfenbrenner studies to justify the Board's reliance on them for any purpose related to this rulemaking. See, e.g., *Chamber of Commerce, Responding to Union Rhetoric: The Reality of the American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity (*U.S. Chamber of Commerce White Paper 2009).

Board and the courts consider the "*critical period*" prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.[591] Indeed, our colleagues' argument reflects the hallmark characteristic associated with *every* infringement on free speech: the government simply determines the speech is not necessary. Rather than saving the Rule, this constitutes the most objectionable aspect of the Rule as it relates to protected speech.

It is not enough that employers and employees may communicate general observations regarding unions before the filing of an election petition, any more than it would be deemed permissible to limit political campaigning to generalized statements about a particular political party before actual candidates are selected. Again, the Board and the courts (for more than 50 years) have recognized that election petitions mark the commencement of a new "critical" phase in representation campaigns.[592] Only the filing of a petition means "the Board's processes have been invoked," resulting in an election that can be "anticipated pursuant to [the Board's] procedures."[593] Objectionable activity by employers or unions after petition-filing, *because* it occurs during this "critical

---

[591] The Board held in *Ideal Electric & Mfg. Co.,* 134 NLRB 1275, 1277-78 (1961), that "the date of filing of the petition * * * should be the cutoff time in considering alleged objectionable conduct," because that marks the time "when the Board's processses have been invoked" and an election "may be anticipated pursuant to present procedures." This period between petition-filing and the election – during which objectionable conduct is deemed sufficient to invalidate the election – is called the "critical period." *Goodyear Tire & Rubber Co*., 138 NLRB 453 (1962); *E.L.C. Electric, Inc.,* 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc*., 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc*., 397 F.3d 548, 553 (7th Cir. 2005).

[592] *Supra* note 591.

[593] See *Ideal Electric & Mfg. Co.*, 134 NLRB at 1278.

period," is deemed sufficient to invalidate the results of the election.[594] This belies the Final Rule's premise that eliminating post-petition opportunities for speech has no material adverse impact on elections and must be considered inconsequential.

Regarding the Final Rule's curtailment of opportunities for speech, the majority specifically disclaims being motivated by a desire to counter what they view as an employer's undue influence during representation campaigns. However, numerous union-side commenters rely on this justification in advocating the Rule's adoption. They contend that, under current representation procedures, employers have the upper hand in campaign communications. Further, as noted previously, our colleagues or commenters have observed that some employers may be well informed about union election procedures before a petition is filed; all employers have unlimited access to employees during the workday and can hold unlimited captive audience speeches in the workplace until 24 hours before the election; and they may still thereafter have the "last word" on election day in individual conversation with employees.

In our view, reliance on these factors is fundamentally flawed. First, it reflects a view that the Rule only adversely affects protected speech undertaken by employers. To the contrary, the Act and the First Amendment afford employees and unions, as well as employers, rights to engage in protected speech that the Rule impermissibly restricts or threatens.

Second, some of these factors (for example, the fact that employers have unique access to employees) are part and parcel of *every* employment relationship, and other

---

[594] *Supra* note 591.

factors (for example, limits on union access to the employer's property) arise from well-established prior decisions by the Board, the courts of appeals, and the Supreme Court, which impose different types of limitations on unions and employers, respectively.[595] But none of these factors and prior decisions authorizes the Board to disregard or adopt rules that impose undue restrictions on protected speech.

Third, although our colleagues disclaim the *intent* to redress an unfair balance of power between unions and employers by limiting employer speech, the Rule's provisions predictably and inescapably will have that *effect*. It is therefore contrary to the Supreme Court's holding that the Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965).

Finally, even if not intended, the Final Rule essentially embraces an "anti-distortion" theory – justifying speech restrictions to prevent an "unfair advantage" in campaigning based on "resources" that are too favorable to one side. This theory has been squarely rejected by the Supreme Court in the political election context,[596] and the

---

[595] See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (addressing limitations on union access rights to private property).

[596] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). See also 77 FR 25574 (Member Hayes, dissenting). In *Citizens United*, the Supreme Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and rejected the *Austin* "anti-distortion theory," pursuant to which limitations on speech were ostensibly justified as preventing "an unfair advantage in the political marketplace" based on "resources amassed in the economic marketplace." *Citizens United,* 130 S. Ct. at 904 (citations omitted). In *Citizens United*, the Court held that *Austin* "interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* at 907 (citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). And the Court concluded that "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others *is wholly foreign to the*

Final Rule has the same impermissible "anti-distortion" effect applied to the "uninhibited, robust and wide-open debate in labor disputes" that is fundamental to federal labor policy.[597] By reducing the time for employer speech, the Rule enhances the relative voice of a union and its advocates. This restriction of speech far exceeds the "narrow zone" deemed permissible by the *Brown* Court.[598]

Our colleagues have made a policy choice to abbreviate the "critical period" deemed most important by the Board to the exercise of employee free choice.[599] The unavoidable consequence of this choice is the limiting of opportunities for speech and debate during that period. It is apparent from the statements of numerous commenters supporting the Rule that in this respect the Final Rule will specifically disadvantage anti-union speech more than pro-union speech, and will correspondingly enhance a petitioning union's chances of electoral success. This does not concern the majority. In the context of union speech, however, the Board has taken great care to avoid interpreting and applying the Act in a manner that raises serious constitutional concerns regarding free speech infringement. See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010) (canon of constitutional avoidance requires Board to construe the

---

*First Amendment*.'" *Id.* at 904 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

[597] See *Chamber of Commerce v. Brown*, *supra* at 68. See 77 FR 25574 (Member Hayes, dissenting).

[598] "The NLRB has policed a narrow zone of speech to ensure free and fair elections under the aegis of § 9 of the NLRA, 29 U.S.C. 159. Whatever the NLRB's regulatory authority within special settings such as imminent elections, however, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech * * * ." *Chamber of Commerce v. Brown*, *supra* at 74.

[599] *Supra* note 591.

Act's provisions in order to avoid serious constitutional questions arising from an otherwise acceptable construction of the statute, if an alternative interpretation is possible and not contrary to the intent of Congress). The Board has the same interpretive obligation here. In our view, the Final Rule fails the test. It poses an unacceptable risk of infringing free speech rights guaranteed by Section 8(c) of the Act and the First Amendment.

(e) *Summary: the Final Rule's General Problems*. These general overarching problems with the Final Rule are reason enough to find that overall it contradicts the clear intent of Congress as to the Act's purpose, is "arbitrary and capricious" in failing to rationally relate to the Board's experience in administration of the Act and to facts adduced in rulemaking, and infringes or poses an impermissible risk of infringing free speech rights.[600] Inasmuch as these problems infect the Final Rule as a whole and all its parts, we do not approve of any aspect of the Rule, even if we fail to discuss some specific changes in these dissenting views. As we state at the outset, a fundamental problem with this rulemaking is its immense scope and highly technical nature. The majority has consciously adopted all of these changes simultaneously with the intention that they would function in conjunction with one another, which makes it unreasonable to suggest that any piece can be viewed in isolation. The manifold problems that we have identified throughout this dissent, in turn, mean the *entirety* of the new election process is

[600] Many commenters opposing the NPRM have contended that its provisions violate procedural due process rights. Necessarily, those Final Rule amendments that contravene Congressional guarantees of pre-election process or constitutional and Congressional guarantees of free speech rights are also invalid because they deprive affected persons of protected liberty interests without providing the mandatory due process.

beset with fatal infirmity. Our colleagues are therefore mistaken in suggesting that there exists a Board consensus on *any* specific provisions.

5. The Final Rule's Additional Specific Problems and Deficiencies.

Even putting aside the above deficiencies, significant other detailed -- and, in some respects, highly technical – provisions in the Final Rule are equally problematic, as fully discussed below.[601]

*(a) Accelerating Elections While Imposing New Inflexible "Pleading" Requirements – The Final Rule impermissibly shortens the time from petition to hearing while simultaneously imposing substantial new mandatory notice and pleading obligations.* Under current longstanding practice, an employer has no mandatory pre-hearing procedural obligations, although regions routinely request the voluntary submission of a written commerce questionnaire and oral communication of unit information to facilitate the negotiation of election agreements or to define issues to be

[601] We note that the Final Rule does not include a provision permitting petitioning parties to use electronic signatures in support of a showing of interest. Although certain federal statutes, including the Government Paperwork Elimination Act (GPEA), 44 U.S.C. 3504 (note), Pub. L. No. 105-277, Div. C, Title XVII, 112 Stat. 2681 (1998), and the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. 7001 *et seq*. "evidence Congress's intent that federal agencies, including the Board, accept and use electronic forms and signatures, *when practicable*," the General Counsel – as suggested by our colleagues – should perform an analysis similar to that outlined in the Office of Management and Budget's guidance for implementing the GPEA, OMB Procedures and Guidance; Implementation of the Government Paperwork Elimination Act, 65 FR 25508 (May 2, 2000), which describes a specific, detailed framework for agencies to follow "for deciding *whether* to use electronic signature technology for a particular application." *Id.* at 25514 (emphasis added). Absent the results of such an analysis, we cannot share our colleagues' confidence that a practicable way exists for the Board to accept electronic signatures to support a showing of interest while adequately safeguarding the important public interests involved. Inasmuch as the Final Rule itself contains no provision relating to electronic signatures, we do not further address the matter here.

contested at a hearing. In addition, if a hearing is necessary, regional directors possess and have exercised discretion in scheduling its starting date, generally scheduling hearings to begin from 7 to 12 days from notice of the petition, with postponements granted upon a showing of good cause.

Although the Final Rule delays the consideration of many fundamental eligibility and inclusion issues until after the election, it imposes significant new mandatory prehearing requirements. Specifically, the Final Rule now mandates that, in the absence of an election agreement, a non-petitioning party, usually the employer, must within 7 days of the Board's notice of petition file with the Region a written Statement of Position that must (1) include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, and if the employer contends that the proposed unit is inappropriate, a separate list of the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit; (2) address any matter it wishes to litigate before the election; (3) state preferences as to the details of conducting the election; and (4) indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Furthermore, a hearing must be scheduled to start the day after the statement's filing, 8 days from Board service of the notice of petition, absent undefined special or exceptional circumstances justifying extensions amounting to no more than 4 additional days.

As discussed hereafter, the new requirement to produce this written information prior to the hearing is unfairly placed only on non-petitioning parties, usually the

employer, and the preclusive effect given to the statements is too broad. As an initial matter, we question the rational basis for imposing a uniform shorter timeline from petition to hearing date while at the same time demanding much more information from the employer.[602] The majority claims in the Final Rule that it merely codifies a best practice here. (Actually, the claim is that 7 days would be the best practice, but they are willing to extend the time period to 8 days.)

Assuming that there is any basis other than the need for speed for declaring 8 days to be a best practice or to limit a party's opportunity adequately to prepare for a hearing, that rationale would seem to apply only to a timeline in which employers had no more than the primarily informal, voluntary, and verbal pre-hearing tasks to attend to under the Board's longstanding prehearing practice.[603] In sharp contrast, under the Final Rule, employers now must post and distribute an initial election notice, more often than not obtain counsel,[604] interview managers and others,[605] fill out a new mandatory Statement

---

[602] The requirement also applies to non-petitioning unions in RM and RD elections, but the range of potential contested issues in those elections is much narrower. In any event, the RC election petition is by far the petition filed most frequently. Thus, it is not accurate to state that in practice the burden imposed by the Final Rule's new Statement of Position requirements will fall equally on all non-petitioning parties.

[603] *Croft Metals, Inc.*, 337 NLRB 688 (2002), does not support the Final Rule's requirement that a hearing be held 8 days after the notice of petition. In *Croft*, the Board held that a party must receive at least 5 working days' notice of hearing. The hearing in *Croft* was, in fact, scheduled 10 days after the petition filing, but the employer did not receive the required notice until just 3 days before that hearing date. The Board was not required to consider and did not consider how soon a hearing should be scheduled after a petition is filed. Moreover, for reasons we state here, we believe *Croft*'s minimum notice of hearing requirement would have to be adjusted to provide a reasonable minimum time for an employer to meet the additional pre-hearing burden imposed by the Final Rule.

[604] As many comments to the Final Rule state, for small employers without experienced labor counsel in house or on retainer, these time periods make it difficult to find

of Position form within 7 days, prepare for a hearing on issues that it may still contest, and negotiate the possibility of a stipulated election agreement. This timing might work out in some instances, but it is predictable that employers in other circumstances--not falling within the Final Rule's ambiguous category of "special" or "exceptional"--will legitimately require more time. For example, concepts of appropriate unit or statutory supervisory status are not readily understood by laypersons and in any event may require significant factual investigation before the required position can be taken. In such situations, the majority is wrong to assert that employers "already know[] all those things." So even if an 8-day deadline would be a best practice for uniform application under current pre-hearing procedures, there is no basis for declaring it in advance to be a best practice under the amended procedures.

An even greater shortcoming of the Final Rule in this respect, however, is its failure to recognize that the practice of regional flexibility is the best practice, far preferable to a uniform restrictive standard in the timing of a hearing. There is no evidence in the considerable record before us that the Board's extremely competent regional personnel are manipulated and conned by employers into postponing hearings for unsound reasons. Regions currently have the flexibility to vary the starting time of a hearing on a case-by-case basis for good cause shown and often in pursuit of the desired

---

competent counsel. See, e.g., SHRM; Chamber II; AHA II; COLLE II.

[605] Preparation of the mandatory written Statement of Position obviously does not relieve an employer of the need to prepare witnesses to testify on issues that it seeks to contest at a hearing. Indeed, in light of the Final Rule's encouragement of offers of proof preliminary to or as a substitute for testimony, an employer may have to take the further substantial pre-hearing step of taking sworn witness affidavits for submission in support of potential offers relative to any unit eligibility and inclusion issues that it can anticipate.

outcome of concluding an election agreement before parties and witnesses are required to go through the expense and time of attending a hearing. Parties and witnesses will almost invariably have to do so under the Final Rule, unless such an agreement can be reached in 8 days. Inasmuch as the Final Rule relies so heavily in other respects on the expertise of regional personnel, it is inconsistent and arbitrary that the same confidence is not accorded to regions in the setting of hearing dates and the corollary adjustment of the date for submission of the Statement of Position.

(b) *Further Limitations on the Litigation of Pre-Election Issues – The Final Rule exacerbates inappropriate limitations on the scope of pre-election hearings by precluding the introduction of evidence on issues not initially raised in a Statement of Position, by permitting the exclusion of evidence pertaining to as much as 20 percent of a bargaining unit, and by encouraging the substitution of offers of proof for testimony*. As noted above, we believe the Final Rule contravenes the clear intent of Congress by eliminating the statutory requirement of an evidentiary hearing regarding contested voter eligibility and inclusion issues, among other things. These problems are compounded by the Final Rule's arbitrary limit on the introduction of testimony on those eligibility and inclusion issues as well as its imposition of formalistic barriers to the litigation even of those issues which the Final Rule recognizes as mandatory subjects for pre-election hearing.

- Statements of Position. The Rule requires all non-petitioning parties to arrange for preparation and submission of a comprehensive written Statement of Position no later than *7 days* after the notice of petition absent ill-defined "special circumstances." While this requirement applies to all representation-case proceedings, the problems it presents arise most frequently in the context of *initial* representation (RC) elections, where only

the employer (as the non-petitioning party) bears the burden to identify issues it wishes to contest in a written statement of position.[606]

Thus, the Final Rule states that, when "the petition is filed by a labor organization in an initial organizing context," the "employer's Statement of Position" must address all of the following items, among other things: (a) "whether the employer agrees that the Board has jurisdiction over it" (and "commerce information" must be provided); (b) "whether the employer agrees that the proposed unit is appropriate," and "if the employer does not so agree," what is "the basis for its contention that the proposed unit is inappropriate"; (c) "the classifications, locations, or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit"; (d) "any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention"; (e) "any election bar" (referring to complex Board doctrines that preclude the processing of representation petitions in various circumstances); (f) "the eligibility period" (referring to the time frame in which bargaining unit members may be employed in order to be eligible voters); (g) "the type, dates, times, and location of the election"; (h) "an alphabetized list of the full names, work locations, shifts, and job classifications of all individuals *in* the proposed unit"

---

[606] It is true that, under the Final Rule, the Statement of Position requirement will apply to unions in those cases when an employer files an RM election petition or when an individual employee files a petition seeking to decertify an incumbent union. The primary impact of the Final Rule, however, relates to initial representation elections where the union is the petitioning party, and in such cases, absent another union's intervention, the employer is the only party required to submit a comprehensive pre-election Statement of Position, and the employer is foreclosed from later raising any contentions or introducing evidence regarding mandatory pre-election issues not identified in the Statement of Position.

(emphasis added); (i) "an alphabetized list" of the "full names, work locations, shifts, and job classifications" for "all individuals that the employer contends must be *added to* the proposed unit to make it an appropriate unit" (if the employer contends the proposed unit is not appropriate) (emphasis added); (j) "those individuals, if any, whom it believes must be *excluded from* the proposed unit to make it an appropriate unit" (emphasis added); and "any other issues it intends to raise at hearing." Final Rule, Part VI B, *supra*.

It is worth pausing to appreciate just what the foregoing means in practice. Under the Final Rule, the employer Statement of Position *must address* all questions of statutory and discretionary jurisdiction, labor organization status,[607] contract bar and other election bars, appropriate unit, multi-facility and multi-employer unit scope, the statutory employee status of individuals constituting more than 20 percent of the petitioned-for unit, the use of eligibility standards other than the normal standard, whether the employer's business is about to close or whether it is expanding and does not yet have a substantial and representative employee complement, whether the employer is a seasonal operation, and whether there are any professional employees in the unit who must be accorded their statutory electoral option.[608] The Final Rule also requires an employer to include in the Statement of Position its position on eligibility and inclusion issues it wishes to contest at the pre-election stage, the newly required initial employees lists, and its preferences on election details. An employer's failure to timely file a statement will preclude it from litigating any issue that must be contested at the pre-election stage. Even

---

[607] This would include Section 9(b)(3) guard/nonguard labor organization issues.

[608] See *Sonotone Corp.*, 90 NLRB 1236 (1950).

if a statement properly raising some litigable issues is timely filed, an employer cannot raise any additional issue in the hearing unless permitted to do so by the regional director for good cause.

By contrast, the Final Rule requires only that a petitioner provide some minimal information in the initial election petition and make an oral response at the hearing to the issues properly raised in a written Statement of Position from non-petitioning parties. The petitioner would be precluded from introducing evidence by failing to make a response to an issue, but it need not respond in writing or in advance of the hearing. The Final Rule also permits a petitioner to sua sponte amend its petition during the hearing.

We recognize that the information required by the Final Rule has routinely been sought in conversations between regional personnel and parties after a petition has been filed, and that the exchange of information has the salutary purpose of encouraging election agreements in lieu of a hearing or to refine and limit the areas of dispute to be explored in a hearing. However, parties have not previously been *required* to raise issues prior to the beginning of a hearing, there has been no forfeiture of the right to litigate based on the failure to do so, and the extremely onerous pleading-type standard governing amendments – applied only to the employer, and permitting amendments only for good cause – is completely foreign to Board litigation. Indeed, in this regard, we believe the Rule's demanding standard is substantially more restrictive than the pleading requirements applied in formal adversarial unfair labor practice proceedings, in which the Board freely permits amendments to the complaint through the conclusion of the hearing. Further, an administrative law judge may even permit the litigation of issues – nowhere mentioned in the pleadings – if the issue is closely connected to complaint allegations,

and the Board will decide that issue if it agrees that it is closely connected and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

The mandatory written statement requirement, coupled with the preclusion of litigation on issues that are not raised in the statement (which must be filed just 7 days from the notice of a petition) are quantitatively and qualitatively different from the current longstanding practices. The Final Rule treats the employer Statement of Position like a formal pleading, binding on the employer as both admission and limitation and virtually precluding subsequent changes in position, and subject to restrictive standards regarding amendment. The Final Rule provides no rational basis for the imposition of such one-sided and onerous requirements with such severe consequences attendant on any failure to meet them.

Consider again the above litany of issues that must be raised in a timely written statement or the employer will be precluded from raising them. Many employers would have little knowledge of these issues and how they may apply to business operations. Employers will have little choice but to secure assistance from labor counsel or other consultants who, even with specialized expertise, may not be able to identify relevant issues without a reasonable period to review the employer's business operations. Putting aside the difficulty of preparing for a hearing, it is clearly unrealistic and unfair to impose an *inflexible* 7-day deadline for the start-to-finish preparation and submission of a comprehensive legal document, to which the Board will apply a rigorous "pleading" standard that will not permit later amendment, except in narrow circumstances, even as to concededly relevant issues that were fully and fairly litigated at the hearing. Meanwhile,

the employer must also busy itself preparing the required employee lists and a written statement of preferences on election details that may be difficult to define in advance of resolving any appropriate unit or unit scope issues.

What does the petitioning union have to do during this period? Other than filing the petition with minimum details and simultaneously serving the petition and accompanying documents on the employer,[609] the union has no mandatory pleading obligation, nor are any selective "amendment" standards applicable to the union. The union's views on potential issues and preferences on election details may be orally solicited, but it does not have to provide them. Even if the union does not orally state *at* the hearing a position responding to issues raised by the employer in its written statement, the Final Rule does not preclude it from introducing evidence in response to evidence presented by the employer as to those issues, and it permits the union to amend the petition during the hearing sua sponte, even as to an issue not raised by the the employer. In other words, while the existing voluntary and informal regional practices in obtaining pre-hearing information from the petitioning union remain essentially the same, those practices are transformed into binding legalistic requirements for the employer, with significant adverse consequences for any failure to comply by the time the hearing opens.

---

[609] One of the documents is the current Form 4812, a single page document that summarily notifies parties of certain election procedures. This document will have to be revised to reflect the Final Rule's amendments, and, as a matter of fundamental fairness, it must be expanded to include sufficient explanation of the issues that must be raised in a Statement of Position.

Under the Final Rule, there is no question about the preclusive effect of omitting from the Statement of Position anything that must still be addressed in a pre-election hearing.[610] Here, the Final Rule provides:

- A party generally may not raise any issue, present evidence relating to any issue, cross-examine any witness concerning any issue, and present argument concerning any issue that the party failed to raise in its timely Statement of Position or failed to place in dispute in response to another party's Statement of Position or response.

- If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations or other employee groupings that must be added to, or excluded from, the proposed unit to make it an appropriate unit, the party may not raise any issue or present evidence or argument about the appropriateness of the unit.

- [I]f the employer fails to timely furnish the lists of employees required to be included as part of the Statement of Position, the employer also may not contest the appropriateness of the proposed unit at any time and may not contest the eligibility or inclusion of any individuals at the pre-election hearing.

The Final Rule plainly intends to strictly apply these waiver provisions, to the detriment of any employer whose Statement of Position fails to describe specific issues and contentions with sufficient particularity. For this reason, the Final Rule provides little comfort – and no adequate degree of fairness – when it states that "the regional director

[610] As noted previously, the Act and its legislative history indicate that Congress clearly intended that the pre-election hearing would include evidence regarding voter eligibility and unit inclusion issues, which is the only means by which these issues can be afforded meaningful review by the regional director and, in the event of a pre-election request for review, by Board members. Because the Final Rule provides that evidence regarding such issues should be excluded until after the election, the Rule provides that there would not be a waiver of post-election review at least as to these issues based on the failure to include them in the pre-hearing Statement of Position. See Final Rule, part VI. D, *supra* (notwithstanding failure to submit Statement of Position, "no party is precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction" and "no party is precluded from challenging the eligibility of any voter during the election on the ground that the voter's eligibility or inclusion was not contested at the pre-election hearing").

has discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the director determines that record evidence is necessary." If anything, this amplifies that the Rule's most onerous requirements are only applied to employers, in contrast to the ability of regional directors and other parties to address whatever election issues they deem relevant. Although the Rule also gives regional directors the "discretion" to permit parties to "amend" the Statement of Position, the Rule permits such requests only if made "in a timely manner," such amendments will be granted only "for good cause," and if an amendment is permitted, then all "other parties" are then given the opportunity to "respond to each amended position." Here as well, the employer is the only party constrained by these onerous requirements, which, as noted above, are more restrictive than the liberal pleading requirements applicable to the Board's General Counsel in formal unfair labor practice proceedings. Such formal and restrictive pleading requirements are not only unprecedented in Board proceedings, they are especially unwarranted in representation cases, which have always been regarded as nonadversarial in nature.[611]

The Final Rule fails to provide any reasonable justification for its failure to require the same or similar written Statement of Position from the petitioning union in advance of the hearing. In the response to our dissent, the majority states that the position statement does not unfairly burden employers because petitioners are already required to

---

[611] See, e.g., *Solar International Shipping Agency, Inc.*, 327 NLRB 369, 370 n.2 (1998) ("[A] hearing in a representation proceeding 'is nonadversary in character [and] is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.' Sec. 101.20(c) of the Board's Statements of Procedure.").

state their position in the petition itself. But they draw a false equivalency. For example, the petition must only describe a unit, state that the unit is appropriate, provide some preferred election details, and identify perfunctory address and agent information. In contrast with what the employer is required to submit in the Statement of Position, a petitioning union is not required to state "the basis for its contention that the proposed unit" is appropriate; the union is not required to state any position regarding other matters likely to be in dispute – regardless of how foreseeable they may be – relating to included or excluded "classifications, locations, or other employee groupings," "individuals whose eligibility to vote" may reasonably be in question, or the "basis for each such contention"; nor is the union required to describe "any other issues it intends to raise at hearing." As to these and other matters, no preclusion attaches to the information the union provides or does not provide in advance of the pre-election hearing. Further, the petitioner is permitted to amend the petition during the hearing without any showing of good cause. Moreover, although the Final Rule provides that a petitioner may not litigate any issue that it failed to "place in dispute" in response to a Statement of Position, the burden of placing an issue in dispute for the petitioner is satisfied by an oral statement or description at the hearing, and not before. This is obviously far less onerous than the burden placed primarily on employers to contest issues in a formal written statement of position submitted prior to the hearing. This inequality of treatment is yet an additional fundamental deficiency that makes the Final Rule impermissibly arbitrary. Moreover, it is a denial of due process to selectively make such requirements applicable only to one party in the proceedings and not to other parties.

We believe the Statement of Position and its preclusive effects should at least be no more onerous than the standards applied by the Board to the amendment of unfair labor practice complaint allegations during a more formal adversarial hearing,[612] and to the amendment of the petition itself in the pre-election hearing, so that a party retains the right to address issues not specifically identified in the Statement of Position that are responsive to another party's contentions and presentation of evidence. The absence of such provisions strongly undermines any suggestion that the Final Rule treats parties and important election issues in an even-handed manner.

- Limiting "Voter Eligibility" and Unit Inclusion Evidence. The Final Rule provides for hearing officers to exclude evidence regarding eligibility and inclusion issues involving up to 20 percent of the employees in a petitioned-for unit, absent a direction to the contrary from the regional director, which would normally defer any evidence regarding such voter eligibility issues until following the election.

There is no judicial or Board precedent for this exclusionary practice. All cases cited by the majority voice general approval of the Board's discretion to defer *deciding* eligibility and inclusion issues for a certain percentage of the unit. It has never been the Board's practice to defer *the taking of evidence* regarding such issues, if validly introduced in a pre-election hearing, which then permits a determination (by regional directors and the Board) of whether they must be resolved prior to the election. The majority reasons that if an issue's resolution is potentially going to be deferred, it is "administratively irrational" and a waste of time and expense to permit a party to litigate

[612] See *Pergament United Sales*, *supra*, 296 NLRB at 334.

it. Further, they mistakenly declare that the 20 percent exclusionary rule is the applicable historical norm in Board practice and strikes an administratively appropriate balance between the public interest in prompt resolution of questions concerning representation (in other words, the majority's interest in holding an election "as soon as practicable") and employees' interests in knowing who would be in the unit should they choose representation.[613] As asserted proof of the reasonableness of this standard, our colleagues rely on the fact that "more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not have compromised the Board's ability to immediately determine election results in the vast majority of cases."

The majority has at least modified the NPRM proposal that the 20 percent exclusionary rule be mandatory. Regional directors will have the discretion to defer eligibility and inclusion issues for up to 20 percent of a unit, but they are not obligated to do so. We credit our colleagues for this modification, but any flexibility is clearly undermined by our colleagues' additional statement that they "strongly believe that regional directors' discretion would be exercised wisely if regional directors typically

---

[613] Notably, this articulation of a balancing test excludes any consideration of employer interests. That is consistent with the views expressed by some academicians and union advocates who maintain that -- contrary to statutory language, clear Congressional intent, and well-established precedent and practice -- employers should not have the status of a party in a representation election proceeding. See generally Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1992-93).

chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20% of the proposed unit." It seems likely, then, that there may be no practical difference between the NPRM's "hard" 20 percent rule and the Final Rule's nominally discretionary standard.

In our view, the majority's rationale for excluding and deferring evidence regarding voter eligibility until after the election – which would effectively ignore the interests of up to 20 percent of voters – is beset with irremediable problems.

First, it is unreasonable to conclude that hearing officers or regional directors should exclude evidence regarding who can vote or be part of a bargaining unit – affecting up to 20 percent of the unit – when nobody can determine prospectively how the exclusion may affect the future election. The Third Circuit long ago cogently observed that "the problem of substantiality, in our view, is one to be determined prospectively" because evidentiary rulings are not made from the "vantage point of hindsight."[614] At the pre-election hearing stage, a regional director will not, absent mystical powers of clairvoyance, have any idea what the final vote margin will be in an election and whether particular eligibility and inclusion issues would not have an effect on the outcome. Indeed, under the Final Rule, the regional director will now necessarily be making the exclusionary ruling on a purely speculative basis, without the benefit of any actual evidence by which to judge the importance of contested issues.

Second, the majority's 20 percent standard is hopelessly arbitrary. The majority maintains it is acceptable to disregard and exclude evidence from the pre-election hearing

---

[614] *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 431 (3d Cir. 1950).

regarding up to 20 percent of unit employees because – based on 2013 statistics – this would adversely affect *only* three of every 10 elections conducted. Even if one could accept the accuracy of this figure as a recurring annual norm,[615] it is not rational to conclude that adversely affecting 30 percent of elections is acceptable or reasonable, particularly since the Act requires the Board "in *each* case" to decide unit issues in order to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act."[616] The majority's analysis also likely understates the scale of potential risk because it fails to consider the very real possibility that statutory eligibility issues will frequently relate as well to election objections, particularly when the alleged supervisory status of an individual or group of individuals is at issue. Consequently, the mere fact that an election vote margin exceeds 20 percent is no guarantee that the eligibility or inclusion issue will not have to be litigated and decided at the post-election stage.

Third, the 20 percent rule has not been the Board's historical standard for deferring resolution of pre-hearing eligibility and inclusion issues to the post-election stage of proceedings. In a handful of cases, the Board has held that it did not need to set

---

[615] The 30 percent figure the majority cites is for all elections held in FY 2013. We do not know what the percentage was for the relevant subset of cases in which there were contested pre-election issues. Our colleagues further confound with their statistical analysis by contending that, because a party favoring the electoral result by any vote margin will not pursue litigation of nondeterminative challenges, this will eliminate "about half of the remaining litigation, even in those cases where the vote margin is narrow. Thus, at most, only 15% of deferred issues will ever have to be addressed." Valid bases for this statistical assumption elude us. We do not know what percentage of elections involve nondeterminative challenges filed by a party favoring the election result. We do know that petitioning unions annually prevail in far more than 50 percent of initial organizing elections, so there is no basis for assuming an equal 50-50 mooting of challenges based on election results.

[616] Section 9(b) (emphasis added).

aside an election based on post-election determinations resulting in as much as a 20 percent variation in unit size from that which was contemplated by the pre-election litigation and resolution of issues. However, several courts of appeals have invalidated elections based on these types of variations in unit size based on post-election Board rulings.[617]

The Board's actual historical standard has been not to defer *decision* on eligibility and inclusion issues if they potentially involve more than approximately 10 percent of a unit. Even this more limited deferral standard has not been applied as a general or per se rule. Moreover, although the Board has sometimes deferred making a *decision* on certain eligibility and inclusion issues that involve no more than 10 percent of a unit, such a practice has never been inflexibly applied, and – when the Board has deferred rendering a decision resolving such issues – *it has always been with the benefit of a pre-hearing evidentiary record* that includes evidence regarding these issues. Only with such an evidentiary record can regional directors and the Board determine whether and when these issues warrant resolution prior to the election and, if so, whether to stay the election until those issues have been resolved. See also notes 570 and 581, *supra*.

---

[617] These courts have reasoned that a difference of this magnitude impermissibly interferes with employee free choice because those who vote in the election do not have an accurate understanding of the bargaining relationship they must approve or reject. See *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpub., per curiam), *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986), *NLRB v. Lorimar Productions, Inc.,* 771 F.2d 1294 (9th Cir.1985), and *Hamilton Test Systems, New York, Inc. v. NLRB,* 743 F.2d 136 (2d Cir. 1984). As will be discussed later, we agree that the courts' reasoning presents a compelling rational argument against the 20 percent pre-election exclusionary rule as well, but the point we make here is that the cited Board precedent is inapposite to the issue of an historical practice.

Fourth, we believe our colleagues clearly exaggerate the "specter" that employers may use the potential delay associated with a pre-election hearing to force unions to enter into stipulated election agreements. Here, our colleagues rely on anecdotal claims by some commenters that employers *generally* contest pre-election issues as a matter of gamesmanship and for the sole purpose of delay, rather than out of any genuine concern that the unit status of an individual or group of individuals be resolved at this early stage. However, the majority ignores the fact that the Board itself encourages *all* parties to enter into stipulated election agreements, and the Board has received comments from all sides that favor the high number of stipulated elections that have resulted from the Board's current procedures.

It cannot be the prospect of delay from a pre-election hearing itself that so compels unions to accept unwanted terms in an election agreement. A hearing conducted under current full litigation practices most often lasts only 1 day, and very rarely exceeds 3 days. Further, with the Final Rule's elimination of both the 7-day period for filing post-hearing briefs and the automatic 25-day waiting period to permit pre-election requests for review, the prospect of that cumulative delay will no longer "loom" over the negotiation of a pre-hearing election agreement in all cases, if it ever did. In any event, the deterrent effect of a 20 percent exclusionary rule is illusory. Employers and their legal counsel (or unions and theirs) who wish to "extort" concessions in an election agreement and/or to delay the election date can continue to do so simply by contesting issues on questions concerning representation that must still be litigated at a pre-election hearing.

We can readily agree that employers should not raise the possibility of frivolous pre-election litigation to leverage their position in bargaining for an election agreement,

but the majority has failed utterly to show by objective evidence that this conduct routinely takes place.[618] Further, we have great confidence that regional personnel currently take an active role in post-petition negotiations and are fully capable of advising employers that frivolous issues will be swiftly dealt with as such. Election agreements are, after all, absolutely essential to the achievement of regional success in expeditiously processing petitions.

Fifth, the majority improperly disregards the fact that the early resolution of certain eligibility and inclusion issues is highly desirable and often extremely important. In this regard, our colleagues' view is contrary to common sense and it conflicts with longstanding Board and judicial precedent. The establishment of the *Excelsior* list requirement, which the Final Rule expands, is based on the fundamental proposition that the early identification of "bona fide disputes between employer and union over voting eligibility" may avoid resorting to "the formal and time-consuming challenge procedures."[619] Further, as stated by the Ninth Circuit, while the need to avoid unnecessary delay in the electoral process is undisputedly important, "it is at least of equal importance that employees be afforded the opportunity to cast informed votes on

---

[618] We note that the reply comment of former Region 7 Field Examiner Michael D. Pearson describes a "not uncommon" scenario of employer tactics that allegedly force a petitioning union to concede to "a significantly delayed election date in order to secure an election agreement." Pearson reply statement pp. 1-3. At several points in the Final Rule, our colleagues extrapolate from Mr. Pearson's multiple statements and testimony as to his regional experience, which ended in 2005, to generalize about representation casehandling practices nationwide. We do not believe this evidence is entitled to such weight. Among other things, it is difficult to reconcile with the facts concerning the Board's success rate in conducting elections in a median of 38 days.

[619] *Excelsior Underwear*, *supra*, 156 NLRB at 1243.

the unit certified."[620] It is plainly unreasonable to require employees to vote in an election, conducted on an extremely accelerated timetable, *before* the Board *even considers evidence* regarding (i) who is eligible to vote; (ii) whose votes will be counted, and whose will not; and (iii) what employees will be part of the unit – and thereby affected by the election – and what employees will not. In this regard, our colleagues also fail to appreciate that uncertainty as to these fundamental issues also adversely affects employees' informed choice in the election, and will unnecessarily create greater confusion and a potential need to set aside the election because parties will not know (i) what employees are non-unit supervisors who can act as agents of the employer and who cannot lawfully take certain actions for or against union representation; and (ii) what individuals are unit employees who, as eligible voters, can freely participate in campaigning without being subject to restrictions applicable to supervisors. Our colleagues' position on this point is no different from that of the Board majority that voted for the vacated December 2011 rule, as to which dissenting Member Hayes correctly observed:

> My colleagues may not think so, but *there are employees, employers, and unions who believe that there is value in the early resolution of individual issues* that do not bear on whether an election should be held at all. In particular, *employees quite reasonably would like to know if they are eligible to vote and will be part of a bargaining unit that the union seeks to represent*. Telling them they can cast a

---

[620] *NLRB v. Lorimar Productions*, *supra*, 771 F.2d at 1302. Our colleagues are simply wrong in contending that the court's view in this case, and in cases cited above at note 83, represent a minority view among the courts of appeals. The decisions cited by the majority decline to set aside elections based on the facts of a particular case, but none of them disavow the fundamental principle that information regarding unit scope and composition – i.e., understanding what other employees will be included or excluded – is fundamentally important when employees decide what vote to cast in a representation election.

> challenged ballot, with their eligibility possibly to be resolved later, is hardly an inducement to participate in the electoral process. Further, *individuals whose status as supervisors is disputed would reasonably like to have that issue resolved before an election*, as would their employer and the participating union. *It is unbecomingly blasé of my colleagues to state that, because resolution of this issue would in any event not undo the effect of antecedent actions taken in the election campaign, there is no problem with postponing such resolution until after the election, if then*.[621]

- Offers of Proof. The Final Rule gives hearing officers the discretion to require offers of proof on any issue, including those that must still be litigated under the majority's impermissibly restrictive interpretation of the scope of a pre-election hearing. The record fails to show that hearing officers have often required offers of proof under existing practices, and there is good reason for that.

We begin with the language of the Act. Section 9(c)(1) requires the Board to conduct an "appropriate hearing" before any election, and it is well established that one of the primary purposes of the hearing is to create a record – consisting of evidence (i.e., oral testimony under oath and documents admitted into the record) – which provides the basis for decisions by regional directors, the Board, and possibly courts of appeals. See *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999).

An "offer of proof" is not evidence.[622] Rather, when an advocate (usually an attorney) makes an "offer of proof," this is an informal short-form description of *potential* evidence. For example, an "offer of proof" can be requested by a judge or hearing officer who believes the potential evidence will be irrelevant or cumulative – i.e.,

---

[621] 77 FR at 25566.

[622] 75 Am. Jur. 2d Trial Section 353 (2014) ("A proffer is not evidence, ipso facto.") (citing *Crawley v. Ford*, 43 Va. App. 308, 316 (2004)); *United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir.1997) (same). See also cases cited in note 625, *infra*.

not logically related to a contested material issue or clearly duplicative of evidence already in the record – and if the "offer of proof" reveals that the potential evidence would be irrelevant or cumulative, the potential "evidence" is not permitted.[623] When evidence is ruled inadmissible, a party can also make an "offer of proof," which permits the evidentiary ruling to be reviewed on appeal.[624] In all cases, the "offer of proof" describes evidence that is *not* part of the "record," which means the described matters – since they have been *excluded* from the record – cannot be the basis for any decision or appeal on the merits.[625]

---

[623] The Federal Rules of Evidence (FRE) provide for the admission of all "relevant" evidence, FRE 402, and evidence is relevant whenever it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." However, relevant evidence can be excluded, based on an offer of proof, if it would be cumulative. *Cedar Hill Hardware and Construction Supply, Inc. v. Insurance Corp. of Hanover*, 563 F.3d 329, 353 (8th Cir. 2009) ("Cedar Hill's offer of proof, if anything, showed that the court needed to impose limits to curtail the presentation of cumulative evidence."); United States v. Stokes, 506 F.2d 771, 777 (5th Cir. 1975) (exclusion of testimony not prejudicial where the offer of proof showed the evidence would have been cumulative).

[624] FRE 103(a)(2) (a party may claim error based on the exclusion of evidence, in part, if the party "informs the court of its substance by an offer of proof, unless the substance was apparent from the context"). See also *Kline v. City of Kansas City, Fire Department*, 175 F.3d 660, 665 (8th Cir. 1999) ("An offer of proof serves dual purposes," including "to inform the trial court * * * of the substance of the excluded evidence" and "to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous.") (citation and internal quotation marks omitted); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406-07 (10th Cir. 1991) (offers of proof are designed "to allow the trial judge to make an informed evidentiary ruling" and "to create a clear record that an appellate court can review to 'determine whether there was reversible error in excluding the [testimony]'") (citation omitted).

[625] *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 416 (6th Cir. 2014) ("proffer" by party's attorney "is not evidence"); *United States v. Wade*, 120 Fed. Appx. 638, 640-41 (7th Cir. 2005) ("counsel's proffer was not evidence"); *Campania Mgmt. Co. v. Rooks, Pitts, & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) ("[I]t is universally known that statements of attorneys are not evidence."); *United States v. Reed*, 114 F.3d 1067 (10th

Under the Final Rule, offers of proof are made part of the record and treated as a *substitute* for record evidence.[626] While the Final Rule nominally gives hearing officers discretion to require offers of proof, it is patently clear that they are expected to do so

---

Cir. 1997) (reversing district court ruling that was based on party's "proffer of its evidence," where the "proffer was merely that, and in summary form as well," resulting in remand because court's decision "should be based only on the facts as they emerge at trial"); *Fulton v. L&N Consultants, Inc.*, 715 F.2d 1413, 1416-21 (10th Cir. 1982) (remand required to admit relevant evidence where party's offer of proof revealed that the evidence was improperly excluded). Cf. *Luce v. United States*, 469 U.S. 38 (1984), where the Supreme Court stated that appellate review is "handicapped" – even when an appeal involves evidentiary rulings – without a "factual context," which requires the court to know "the precise nature of the defendant's testimony, which is unknowable when * * * the defendant does not testify." *Id.* at 41 (footnote omitted). The Court differentiated between admitted evidence and a "a proffer of testimony" because "trial testimony could, for any number of reasons, differ from the proffer." *Id.* at 41 n.5.

[626] Respectfully, we must point out that our colleagues are simply wrong when they state, in response to our dissent, that the Final Rule does "not treat offers of proof as 'evidence' in decisions 'on the merits.'" The Final Rule explicitly makes offers of proof the sole basis for deciding whether many issues have *merit*, whether the facts warrant pre-election *litigation*, and whether the evidence if admitted might warrant pre-election *resolution*. See, e.g., Final Rule § 102.66(c) ("If the regional director determines that the evidence described in an offer of proof *is insufficient to sustain the proponent's position*, the evidence *shall not be received*.") (emphasis added); § 102.69(c)(1)(ii) (the regional director shall deny post-hearing objections without a hearing if "the evidence described in the accompanying offer of proof *would not constitute grounds for setting aside the election*") (emphasis added).

As President Lincoln is reputed to have said, "How many legs does a dog have if you call the tail a leg? Four. Calling a tail a leg doesn't make it a leg." Calling an offer of proof part of the "record" does not make it record evidence. And when an offer of proof is made the sole basis for deciding the merits (or deciding whether there will even be litigation), the offer of proof is being treated as a substitute for evidence. This infirmity is not cured by the possibility that, infrequently, a regional director or the Board might consider an offer of proof for the limited, proper purpose of determining whether evidence has wrongly been excluded, which can result in a remand and reopening of the record. Indeed, the fact that the Rule predictably will also cause an increase the number of remands and resulting delays, based on the improper exclusion of relevant evidence, is another reason the Final Rule should not be adopted.

more frequently, particularly on appropriate unit issues. This will preclude the existence of evidence needed to permit what the Act requires: decisions by regional directors, the Board, and possibly the courts, based on a record developed in an "appropriate hearing" held before the election.[627]

Consider the requirement of an offer of proof under the *Specialty Healthcare* standard.[628] Almost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate under that standard. Thus, a hearing officer will likely fulfill the Final Rule's stated expectation by requiring an offer of proof on the issue. Having nominally preserved the right to contest the appropriateness of a petitioned-for unit in the prehearing Statement of Position, an employer will really have done no more than to preserve the right to make an offer of proof attempting to show an overwhelming community of interest between petitioned-for classifications and excluded classifications. It is unclear what offer would suffice for a regional director to permit the introduction of oral evidence. It is clear that the requirement of an offer would make an already difficult burden almost impossible to meet. If not met, then not only would the employer be precluded from further contesting

---

[627] Section 9(c)(1). There is little question that the Final Rule contemplates hearing officers will substitute "offers of proof" for record evidence. How else is one to read the footnote comment that "we would expect hearing officers to typically require an offer of proof from an employer arguing against the appropriateness of a unit considered presumptively appropriate under Board caselaw. If the employer's proffered evidence would be insufficient to rebut the presumption, then it would be appropriate for the regional director to foreclose receipt of the evidence without regard to the proposed 20% rule."

[628] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

the issue, but employees in excluded classifications would generally not even be permitted to cast challenged ballots.

Section 9(c)(1) also provides that pre-election hearings "may be conducted by an officer or employee of the regional office, *who shall not make any recommendations*" and "[i]f the Board finds *upon the record of such hearing* that such a question of representation exists, it shall direct an election by secret ballot" (emphasis added). As the statutory language makes clear, the hearing officer may conduct the pre-election hearing, but the evidentiary record constitutes the sole basis for the ultimate decisions made by the regional director and the Board. Again, an offer of proof is an informal summary, provided by a party's attorney or representative, which is most often used to prevent the introduction of irrelevant evidence. In contrast, the statute's "appropriate hearing" requirement – combined with the Act's careful delineation of responsibilities between and among the hearing officer, the regional director, and the Board – requires that decisions be based on an appropriate "record" *consisting of evidence*.

The majority's analogy of the Rule's pre-election offer of proof process to the use of that process by courts, administrative law judges, magistrate judges, and hearing officers fails for one fundamental reason. In these other contexts, offers of proof are elicited by a presiding official who has the authority to make evidentiary rulings and decide substantive issues. By contrast, as previously stated, the hearing officer in a pre-election Board hearing has no authority to make recommendations, much less factual findings or legal conclusions. See Section 9(c)(1).

(c) *Off-the-Record Consultation and Decisionmaking Between Hearing Officers and Regional Directors*. In an attempt to avoid conflict with express statutory language

(id.), the Final Rule purports to vest regional directors, not hearing officers, with the exclusive authority to make substantive rulings and decisions. However, the Final Rule in this respect remains objectionable. Under the Act, although hearing officers may preside over the "appropriate hearing" (Section 9(c)(1)), Congress clearly intended that all decisions would be based on the hearing record. Here, the Final Rule departs from the statutory scheme by codifying and dramatically increasing reliance on private consultations between hearing officers and regional directors, in the absence of a record, with "real time" decisionmaking by regional directors while the hearing remains incomplete.

There are numerous deficiencies in this process, especially in relation to issue-determinative rulings and when combined with the Final Rule's other changes. First, the Rule relies on this process to resolve important election-related issues, including whether to exclude or defer evidence regarding voter eligibility and other matters. Second, decisions are made by an absentee regional director, who is *not* presiding over the hearing, and who is completely dependent on second-hand information conveyed by the hearing officer. Third, during these off-the-record consultations, the hearing officer has a near-impossible task, which is to refrain from making "recommendations" (based on the prohibition set forth in Section 9(c)(1)); to describe complex facts, some based on admitted evidence, and others based on offers of proof; and to summarize the parties' competing arguments outside of the parties' presence. This makes hearing officers the agency equivalent of a one-man band: he or she makes all of the arguments for everyone and describes all of the evidence (real and potential), with all decisions ostensibly being made by someone else (who has observed nothing and cannot lawfully even receive

recommendations from the hearing officer). And this entire process occurs without the parties' participation or presence, with no verbatim record being made of the consultation. Regional directors have no appropriate basis for making such decisions because they are absent from the hearing, and the Act's "appropriate hearing" requirement reflects Congress' intention to have disputed issues resolved based on the evidentiary record, not second-hand off-the-record descriptions provided outside of the parties' presence while the hearing remains incomplete. Conversely, hearing officers, though ostensibly without decisionmaking authority, have *exclusive* control over what is and is not conveyed to regional directors, and the absence of any record regarding these consultations precludes meaningful review by the parties or the Board.[629]

---

[629] In Member Miscimarra's view, the Final Rule's reliance on private off-the-record consultation and decisionmaking between hearing officers and regional directors—especially in conjunction with the Rule's other changes—is precluded under the Act. This does not involve any doubt about the integrity and competence of the Board's hard-working regional directors and hearing officers. Rather, in representation cases, Section 9(c)(1) permits regional hearing officers to preside over a representation hearing, but states they "*shall not make any recommendations* with respect thereto" (emphasis added). In unfair labor practice (ULP) cases, Section 10(c) provides for administrative law judges (originally called "trial examiners") to preside over the hearing, but Section 4(a) states "*no administrative law judge shall advise or consult with the Board* with respect to exceptions taken to his findings, rulings, or recommendations" (emphasis added). Member Miscimarra believes these restrictions, both part of the 1947 Taft-Hartley amendments, were designed to guarantee, first, that the Board would maintain a *bright-line separation* between decisionmakers, on the one hand, and the actions of hearing officers (in representation cases) and administrative law judges (in ULP cases) that are subject to review; and second, that hearing officers and judges would *absolutely refrain from attempting to influence*, by informal means, either the Board or regional directors (the latter inherited the Board's authority to decide representation cases pursuant to a delegation authorized by Sec. 3(b) of the Act). Both restrictions were explained in detail by Senator Taft – principal sponsor of the Taft-Hartley amendments in the Senate – when these amendments were adopted. See 93 Cong. Rec. 3953 (April 23, 1947), reprinted in 2 LMRA Hist. 1011 (statement of Sen. Taft) (stating, among other things, that the amendments preclude "private" or "secret meetings" between trial examiners and the Board, and provide that questions concerning representation are to be decided by the

(d) *No Post-Hearing Briefs – The Final Rule impermissibly eliminates the right to file post-hearing briefs*. Reflecting longstanding practice, § 102.67(a) of the current Rules gives parties the right to submit post-hearing written briefs within 7 days of the hearing's conclusion, and parties nearly always do so. The Final Rule takes this right away. Instead, "[t]he hearing will conclude with oral argument, and no written briefing will be permitted unless the regional director grants a motion to file such a brief." Although the majority does not define the range of discretion vested in the regional director to deny a motion, it clearly anticipates that briefing will *not* be necessary "[i]n the majority of representation cases."

Under the Final Rule, the stated justification for eliminating the right to file post-hearing briefs is twofold: (1) "given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and

---

Board "on the basis of the facts that are shown in the hearing" to avoid decisions "almost completely free from any review by the courts"). See also S. Rep. No. 80-105, at 25, reprinted in 1 LMRA Hist. 431 ("Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendation to the Board at the close of such hearing. By the amendment, such hearing officer's duties are confined to presiding at the hearing."). In Member Miscimarra's view, the Final Rule contemplates what the Act prohibits: the Rule improperly blurs the role of the hearing officer (whose duties, under the Act, should be "confined to presiding at the hearing") with the decisionmaking of the regional director (who, under the Act, should decide issues solely "on the basis of the facts that are shown in the hearing"). Id. Although due process requires that disputed matters be addressed in open hearings, the Final Rule essentially provides for a "private" or "secret meeting" (id.), with increased reliance on off-the-record consultation between hearing officers and regional directors, outside the parties' presence, in which the hearing officer, rather than the parties, makes all relevant arguments and presents all relevant facts; and the lack of any verbatim record effectively means this off-the-record decisionmaking is "almost completely free from any review" by the Board or "the courts." Id.

accurate decisions;" (2) "[b]y exercising [the] right [to file] or even by simply declining to expressly waive that right until after the running of the 7-day period, parties could potentially delay the issuance of a decision and direction of election and the conduct of an election unnecessarily."[630]

Current practice nearly always involves post-hearing briefs submitted by the parties, and these briefs – along with record evidence – are then the central focus when relevant issues are decided by regional directors, a practice which contradicts the Final Rule's suggestion that such briefs are unnecessary and unimportant. Even though there may be some cases – few in number – when parties may dispense with post-hearing briefing, this certainly does not justify a rule finding that briefs will presumptively not be permitted in "the majority of cases."[631]

The procedural context for this briefing issue is the same as for offers of proof. The regional director is the only person who, under the statute, is permitted to decide

---

[630] We note that the majority also relies on the inapposite fact that the APA exempts the Board's representation case proceedings from its requirements for formal adjudication, including any requirement of the right to file a brief. Of course, the APA does not proscribe the Board from permitting post-hearing briefs as a matter of right in its own rules for representation proceedings, which is what the Board has done for many years. Moreover, we cannot help but note the majority's reliance on the APA's exemption, which is founded on the premise that our pre-election hearings are nonadversarial investigative proceedings, in a Final Rule that imposes unprecedented formal adversarial pleading requirements.

[631] The majority suggests that parties retain the right to file one post-hearing brief in every case because, even if denied permission to file an immediate post-hearing brief, they can still file a brief in support of a request for review of the regional director's subsequent decision. The right to file a brief directly with the regional director prior to his de novo review of the evidence and issues is fundamentally different from the right to file a brief seeking to persuade that there are "compelling circumstances" for Board review of an adverse regional director's determination. In the latter instance, the horse has most often left the barn.

relevant election issues, subject to potential Board review. However, *neither the Board nor regional directors even preside over the hearing*. Rather, the only Board representative who conducts the actual hearing is a "hearing officer" and *hearing officers, under Section 9(c)(1) of the Act, are prohibited even from making any "recommendations" with respect to election-related issues* which, of course, must be resolved based on the record evidence combined with the parties' arguments and positions.

Here, the Final Rule operates in a world devoid of common sense. In comparison to current practice, eliminating post-hearing briefs will pare 7 days, at most, from the period between petition-filing and the election. Yet, on top of the Final Rule's other changes, eliminating post-hearing briefs will necessarily cause unfairness and confusion regarding (i) what arguments parties have made concerning what issues and based on what evidence; (ii) what arguments and issues can fairly be raised by the employer – and which ones have been waived – based on the pre-hearing Statement of Position. Moreover, the absence of post-hearing briefs will give parties an enormous incentive to file pre-election requests for Board review, including requests to stay the election, because this will provide the *only* opportunity for parties to file *any* briefs. In such circumstances, the Board will undoubtedly be confronted with an array of arguments that regional directors – without the benefit post-hearing briefs – *never considered*. Alternatively, the Board may conclude that many meritorious arguments have been waived by employers because the positions were not identified with sufficient particularity in the pre-hearing Statement of Position, or in the employer's end-of-hearing oral argument.

We have no lack of confidence in the ability of management- and union-side labor law practitioners to make effective closing arguments. However, with due respect for our colleagues, the Final Rule identifies nothing that justifies depriving those practitioners of a longstanding right to file briefs, adversely affecting their ability to frame parties' positions in light of the record evidence. Further, our decided cases over nearly 80 years demonstrate that some measure of factual and/or legal complexity is the norm, and not the exception, for issues contested in pre-election hearings. In this context, we have difficulty understanding why a regional director--even with the expertise, experience, and acumen of persons who typically occupy that office--would not benefit from the written definition of issues and supporting evidence in a brief in more than a few complex cases. The alternative of reviewing and deciding issues based on a cold transcript and ad hoc oral argument is far less likely to lead to the expeditious and reasoned resolution of those issues.

Take just one example of a recurring pre-election issue: a petitioner seeks to represent as an appropriate bargaining unit a group of workers whom the employer contends are independent contractors excluded from coverage. The employer bears the heavy burden of proving its contention. As recently described by the majority in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), resolution of the issue whether the workers are independent contractors or statutory employees requires an analysis of evidence relevant to a nonexhaustive list of 11 factors. In *FedEx*, which involved a petitioned-for unit of approximately 20 truck drivers, the majority opinion consumed over 4 two-columned pages (3,732 words) describing the facts of the case, and another 3-plus pages (2,736 words) analyzing the facts under its multifactor test. With the elimination of post-

hearing briefs, an employer's sole opportunity to persuade a regional director that it has met its burden under the *FedEx* test will be to accurately summarize all the relevant facts and their application to at least 11 factors of the legal test in semi-spontaneous oral argument at the conclusion of a hearing, usually without the benefit of a transcript; i.e., the employer must accomplish in oral argument what the FedEx majority needed 6,468 written words to accomplish.[632] We fail to see how this approach facilitates the fair and accurate resolution of a question concerning representation.

If the Board's experience under its longstanding practice of generally permitting written briefs contradicted this supposition, then there might be a factual basis for amending the current rule. The Final Rule cites no such evidence, however. It acknowledges that a procedure already exists under the current practice for hearing officers to encourage the *voluntary* use of oral argument in lieu of a written brief, and that the General Counsel's 1998 best practices memo endorsed this voluntary approach as appropriate "in some cases."[633]

The Final Rule's other rationale sounds a very familiar refrain, i.e., speculation that a party could use the right to file a brief as an instrument of delay. Has that been shown to have happened with any frequency over decades of experience under the current Rules? No it has not, at least not based on the considerable record before us, which on this point is factually no different than in 2012 when dissenting Member Hayes

---

[632] Assuming a person speaks 2.5 words per second, it would take approximately 45 minutes just to read aloud the relevant sections of the *FedEx* majority opinion.

[633] See Representation Casehandling Manual Sec.11242 and G.C. Memo. 98-1, "Report of Best Practices Committee – Representation Cases December 1997," at 10, 28.

cogently observed: "In practical terms, the majority points to no evidence that the 7 days currently afforded parties to file briefs following pre-election hearings actually causes delay in the issuance of Regional directors' decisions. In real terms, this is already an extraordinarily short period of time. Our colleagues have presented no evidence that parties routinely file briefs in those cases in which the issues are so simple that a Regional director could routinely issue a decision in less than 7 days, and certainly no evidence that briefs in general have no utility. There is no reason why a Regional director or his decision writer cannot begin preparing a decision before the briefs arrive and, if the briefs raise no issues the Regional director has not considered, simply issue the decision immediately. In fact, the Agency's internal training program expressly instructs decision writers to begin drafting pre-election Regional directors' decisions before the briefs arrive. See 'NLRB Professional Development Program Module 5: Drafting Regional director Pre-Election Decisions, last updated May 23, 2004, Participants Guide and Instructors Guide.'"[634]

In short, there is no valid justification for the briefing rule change. It is a solution in search of a problem. Properly managed under the existing regional practice, which represents the best practice, briefing should improve and expedite representation case decisions. Getting rid of briefs, on the other hand, is as likely to delay final resolution of representation issues as it is to facilitate it.

---

[634] See 77 FR 25567.

(e) *Eliminating Board Review – There is no rational reason to eliminate the right of Board member review regarding post-election issues.*[635] The Final Rule eliminates mandatory Board review of post-election disputes under a stipulated election agreement. It provides that post-election Board review – currently a guaranteed option – would become discretionary in all cases. Thus, the Final Rule contemplates that the Board may never review post-election reports of the hearing officer or decisions of the regional director. As set forth below, we find the elimination of mandatory Board review of post-election disputes to be arbitrary and capricious.

In recent years, about 90% or more of representation elections were promptly held pursuant to election agreements. Our statistics show that, under current regulations, parties are far more likely to enter into a stipulated election agreement than a consent election agreement, under which post-election issues are decided by the regional director.[636] Under the stipulated agreement, the parties negotiate resolution of all pre-election issues but preserve the automatic right to Board review of a regional director or hearing officer's resolution of post-election disputes. The Final Rule now eliminates that right, replacing mandatory review with a discretionary system of review that currently

---

[635] Much of the analysis in this section is drawn from former Member Hayes' dissent to the vacated December 2011 rule. See 77 FR 25566. In our view, the majority has yet to provide sufficient answers to the criticisms originally voiced there.

[636] According to the Office of Executive Secretary, in 2012, 1,401 elections were held pursuant to stipulation, while only 48 consent elections were held. In 2013, 1,411 elections were held pursuant to stipulation, while only 39 consent elections were held.

exists for the disposition of pre-election disputes in the absence of any election agreement.[637]

Without any empirical support, our colleagues assert that eliminating automatic Board review will not result in fewer pre-election agreements. It seems obvious to us that parties would resolve known pre-election issues for the guarantee that the Board will be the final arbiter of any unforeseen election conduct and eligibility issues that occur during the critical election period. It also seems natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties' willingness to compromise on pre-election issues. Thus, making Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation.

Our colleagues disagree. They contend that the parties will take what little we give them, preferring an agreement that permits discretionary Board review over one that provides for final disposition of post-election disputes at the regional level. They maintain that the parties will continue to look at the same factors previously considered when deciding whether to enter into any pre-election agreement. Yet, our colleagues could be wrong, and it was their duty to give more than passing thought to this potential adverse consequence for a process utilized in 1,401 elections, comprising 97 percent of all election agreements executed, in FY 2013. The guarantee of mandatory, as opposed to

---

[637] Even in the absence of an election agreement, the Final Rule also eliminates a regional director's choice of issuing a report and recommendations on post-election issues, to which there would be an automatic right to secure Board review by filing exceptions.

discretionary, Board review of post-election disputes *could* be the main reason some employers give up the right to litigate pre-election issues. Even if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction of purported delay due to the Final Rule's implementation. Our colleagues' willingness to make this change without considering the possible negative impact is attributable in significant part to their apparent agreement with comments that argue that employers use the election agreement procedure to extort unwarranted concessions from unions, who capitulate in order to prevent the delay due to litigation of pre-election disputes. This view stems from their belief that employers could not really have legitimate issues to raise in litigation. But we believe there are legitimate disputes, and thus, the process of negotiating an election agreement in which an employer foregoes its litigation rights in exchange for concessions on unit scope, unit placement, or election details seems to fairly mirror the give-and-take bargaining that takes place after a petitioning union wins an election and is certified.

In justifying the elimination of the automatic right of Board review of post-election challenge and objections issues, our colleagues also contend that "the final rule will enable the Board to devote its limited time to cases of particular significance." Regardless of how insignificant the issues may seem to be in most post-election cases, it is our duty to give those cases the same consideration as in "cases of particular significance." Moreover, we disagree with our colleagues that the Board does not have enough time to provide full consideration of post-election decisions. This is not 1959, when Congress adopted Section 3(b) to remedy the Board's undisputed inability to manage its pending caseload. At that time, there were 9,347 representation case filings,

8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases.[638]

In Fiscal Year 2013, 1,986 representation case petitions were filed in the regions, almost the same number as FY 2012, when 1,974 petitions were filed.[639] In other words, petition filings are down 80 percent from 1959. Moreover, the Board's pending caseload is near to historically low levels. Based on statistics prepared by the Board's Executive Secretary, as of October 1, 2014, there were 338 pending unfair labor practice cases and 48 pending representation cases.[640] Given the decline in case filings, this caseload is unlikely to increase. Thus, with *five times fewer* representation cases entering the system at the regional level, and a tiny fraction of all cases reaching the Board on exceptions, we clearly have the time to timely resolve all pending cases without abandoning stipulated election agreements for review of post-election decisions on a mandatory basis.

There is yet another problem with the new request for review standard for all post-election decisions. Under the existing rule, the Board engages in a *de novo* review of the entire record with respect to factual findings, other than credibility findings, of the decision maker below. Under the Final Rule's discretionary review standard, the Board will only grant review of regional factual findings where it is established that the finding

---

[638] Twenty-Fourth Annual Report of the National Labor Relations Board for Fiscal Year Ended June 30, 1959, Appendix A—Tables 1 and 3.

[639] Representation Petitions, National Labor Relations Board, available at http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

[640] The pending caseload statistics would be even less were it not for a temporary" bubble" created by the need to decide anew cases in which prior decisions have been invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

is clearly erroneous and prejudicial. Based on statistics for cases covered by the current request-for-review practice,[641] this standard will predictably rarely be met.

Our colleagues contend that mandatory Board review is unnecessary because under the current *de novo* review standard the Board affirms the majority of post-election decisions made at the regional level. While this may be true as to decisional outcome, there have been many Board decisions reversing the hearing officer's or regional director's findings in post-election cases.[642] Also, in numerous cases, even if the Board has affirmed the decision below, it has modified or clarified the supporting factual findings.[643] There also have been several cases where a Board member or members dissent to the findings below.[644] The new Rule provides significantly less opportunity for reversal, clarification, or dissent with respect to such findings and their application to the controlling legal principles.[645] This is counter to the Final Rule's assertion that it intends

---

[641] According the Board's internal casehandling statistics, the Board granted review, for *any* of four compelling circumstances defined in the Rules, on only 9 of 77 requests for review of regional directors' decisions and directions of election filed in FY2012, 7 of 57 filed in FY 2013, and 9 of 65 filed in FY 2014.

[642] See, e.g., *Labriola Baking Co.*, 361 NLRB No. 41(2014); *Sweetwater Paperboard and United*, 357 NLRB No. 142 (2011); *Go Ahead North America*, LLC, 357 NLRB No. 18 (2011); *Rivers Casino*, 356 NLRB No. 142. (2011); *Trustees of Columbia University*, 350 NLRB 574 (2007); *Madison Square Garden CT, LLC*, 350 NLRB 117 (2007); *In re Woods Quality Cabinetry Co*. 340 NLRB 1355 (2003); *Manhattan Crowne Plaza,* 341 NLRB 619 (2004).

[643] See, e.g., *Automatic Fire Systems*, 357 NLRB No. 190 (2012); *Enterprise Leasing Company-Southeast, LLC*, 357 NLRB No. 159 (2011).

[644] See, e.g., *Tekweld Solutions, Inc.*, 361 NLRB No. 18 (2014); *UniFirst Corp.*, 361 NLRB No. 1 (2014); *FJ Foodservice*, Case 21-RC-21310, 2011 WL 6936395 (December 30, 2011); *Mastec Direct TV*, 356 NLRB No. 110 (2011); *American Medical Response*, 356 NLRB No. 42 (2010).

[645] The majority cites *Mental Health Association, Inc*., 356 NLRB No. 151 (2011), as an

to improve transparency in decision making. The Board decisions addressed above may not ultimately be of precedential value, but because they involve a *de novo* review by the Board, they play an important role in assuring the public and reviewing courts that there is a uniform and consistent application of the law.

It has been the Board's long-held practice to develop and establish uniformity in representation case law. The Final Rule's discretionary review standard for all cases greatly increases the possibility that individual regions will reach different unreviewed results in factually identical or similar circumstances.[646] This presents an unacceptable risk of uncertainty and balkanization of substantive representation case law. It will likely lead to a system in which parties have to litigate issues in light of regional precedent, despite the well-settled Board principle that regional directors' decisions do not have precedential value.[647] There is a further risk that the ongoing development and understanding of labor law will be stunted inasmuch as the Board will be deciding few representation cases. It is particularly troubling that the Board will now be reviewing few appeals concerning election misconduct because the issues raised in these appeals go to the heart of employee free choice, and narrow factual distinctions have often determined

---

example of a case which did not require Board review because it involved the application of settled precedent. However, the Board modified the hearing officer's findings because it disagreed with part of the hearing officer's analysis and found it unnecessary to rely on another part. *Id.*, slip op. at 1 n.4.

[646] We note that our critique of this aspect of the Final Rule has nothing to do with the expertise and competence of regional directors and hearing officers, for whom we have great respect. However, like administrative law judges deciding unfair labor practice cases, expert and accomplished persons reviewing the same or similar sets of facts can reach different conclusions of law. It is the Board's role to reconcile those differences.

[647] E.g., *Rental Uniform Service, Inc.*, 330 NLRB 334, 336 n.10 (1999) (citing *S.H. Kress & Co.*, 212 NLRB 132 n.1 (1974)).

whether specific conduct has had an objectionable effect on that choice. These cases warrant *de novo* Board review. In sum, the Final Rule will significantly impair the important central oversight function of the Board in making representation case law.

The elimination of mandatory post-election Board review is also likely to cause an increase in "test of certification" cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board's certification.[648] Whether or not an employer would secure judicial reversal of a regional director's decision is irrelevant. An employer will now be forced to litigate in an unfair labor practice case, before the Board and in federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case.

The collective effect of the Final Rule amendments, notably including the elimination of stipulation agreements providing for the automatic right to Board review of post-election issues, is the creation of a system in which the Board is an absentee overseer of the representation case process. This is taking our delegation authority under Section 3(b) to the extreme. Absent the singular factual circumstance that motivated Congress to create this authority---i.e., that the Board in 1959 was overwhelmed by the task of deciding *all* contested representation case issues---or any other rational basis for taking this step, what we are left with is best described as agency "delegation running

---

[648] *Id.*

riot,"[649] an impermissibly overbroad and arbitrary abdication of the Board's central role in the process.

(f) *Due Process – Collectively, the Final Rule's revisions constitute an impermissible deprivation of what has traditionally been regarded as necessary procedural due process in representation case proceedings.* "The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues."[650] For decades, the due process accorded parties to representation proceedings has included adequate notice and time to prepare for a pre-election hearing, the opportunity to present oral testimony and cross-examine witnesses on all validly contested issues (including eligibility and inclusion issues), the opportunity to file a post-hearing brief, and the opportunity and incentive to enter into election agreements guaranteeing the automatic right to secure Board review of a regional director or hearing officer's findings on post-election objections and challenges. This is how the Board has traditionally complied with the Supreme Court's statement that "'[t]he fundamental requisite of due process of law is the opportunity to be heard'" at "'a meaningful time and in a meaningful manner.'"[651]

Now, in one fell swoop of agency policymaking, those procedural rights are gone. In their place, the Final Rule (i) creates new inflexible prehearing "pleading"

---

[649] The phrase is best known for its articulation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

[650] *Bennett Industries, Inc.,* 313 NLRB 1363 (1994).

[651] *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385,394 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

requirements –primarily and most severely affecting employers; (ii) greatly accelerates the timetable for scheduling the hearing; (iii) eliminates the right to contest eligibility and inclusion issues at a hearing; (iv) directs hearing officers to limit the introduction of evidence regarding both these issues as well as those that must still be litigated prior to an election; (v) eliminates post-hearing briefs except in unusual circumstances; and (vi) eliminates mandatory Board member review in all post-election cases.

The private interests affected by this extraordinary government action are substantial. They involve the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation, the paramount right of employee free choice, and the fundamental right of an employer to pursue its interests in maintaining autonomous control of a business operation in which it has a substantial capital investment (rather than sharing control in collective bargaining), and to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit.[652] Against this array of protected private interests, the Final Rule's primary asserted government interest is the need to conduct elections as soon as possible, with the notable exception of cases where a union's blocking charge allegedly justifies prolonged delay. In the foregoing sections, we have detailed the glaring lack of objective factual or policy grounds for the wholesale changes in representation case procedure founded on a perceived need for speed. Under that analysis, the Final Rule's revisions are shown to be collectively and individually invalid as arbitrary under the *State Farm* "hard look" test. Necessarily then, the asserted government interest in speed is inadequate to

[652] As we have noted elsewhere, the Final Rule also contravenes due process by impermissibly infringing free speech and privacy interests.

justify changes that deprive parties of previously enjoyed procedural rights and impose new procedural burdens that will inequitably affect employers more than other parties to an election. Accordingly, in our view, the Final Rule must be invalidated on procedural due process grounds as well.

(g) *Expanded Mandatory Disclosures – The Revised Excelsior list requirements impose unreasonable compliance burdens and fail to adequately address privacy concerns.* In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), the Board established the requirement that an employer must file with the regional director an election eligibility list—containing the names and home addresses of all eligible voters—within 7 days after approval of an election agreement or issuance of a decision and direction of election. The regional director, in turn, makes the list available to all other parties to the representation case. Failure to comply with this requirement constitutes grounds for setting aside the election whenever proper objections are filed.[653] *Id.* at 1240.

The Final Rule substantially modifies the current *Excelsior* list requirements. It requires the employer to furnish to the regional director *and* to other parties not only a list of the full names and home addresses of eligible voters, but also their available[654] personal e-mail addresses, home and personal cell telephone numbers, as well as their work locations, shifts, and job classifications. Employees who are to vote subject to

---

[653] The Supreme Court subsequently deferred to the Board's judgment, permitting the *Excelsior* list requirement to stand. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

[654] We take our colleagues at their word that "available" means an employer need only provide employee personal contact information already in the employer's possession and "do[es] not require the employer to ask the employee for it."

challenge—either by direction or the agreement of the parties—must be enumerated with the same required information in a separate section of the list. Further, the Final Rule dramatically shortens the time for production of the *Excelsior* list from the current 7 calendar days to 2 business days after an election agreement or direction of election, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The employer must provide the voter list alphabetized (overall or by department) in an electronic format generally approved by the Board's General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form, and must serve the voter list on the other parties electronically, when feasible, at the same time the employer files the list with the regional director. Failure to file or serve the list and related information within the specified time and in the proper format will be grounds for setting aside the election whenever proper and timely objections are filed. Finally, the parties are restricted from using the voter list "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters."

We do not quarrel with the idea that it would be convenient for organizing unions to have some of the additional information that must now be provided under the Final Rule. However, it has long been established that the *Excelsior* requirements are satisfied based on the disclosure of employee home addresses, *and nothing more*. For instance, both the Board and the Supreme Court in *Excelsior* and *Wyman-Gordon*, respectively, refrained even from requiring the disclosure of employee home telephone numbers. Thus, the majority, by finding rights to additional information beyond what *Excelsio*r required, cannot then use *Excelsior* as the "policy bootstrap" to justify the additional information.

Moreover, it is well established that the Act "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it." *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958). The question is whether the majority has established, based on the record in this proceeding or on our experience with the current *Excelsior* list, that it is necessary for unions to have this information in the absence of adequate protection of employees' legitimate privacy concerns and with the expedited compliance burden imposed on employers. We think that the majority has clearly failed to make such a showing, and we explain each of our concerns in turn.

- Absence of Rational Justification. The majority bears the burden of showing that the Final Rule's *Excelsior* rule revisions are rationally justified and consistent with the Act. In the Final Rule, our colleagues maintain that personal cell phone communications and texting are essential means by which employees engage in organizing and concerted activity, which is the reason our colleagues expand the *Excelsior* disclosure requirements to require employers to disseminate available personal telephone numbers and email addresses. For example, our colleagues call personal phones "a universal point of contact today" and cite the "prevalence of cell phones, which are typically carried with adults on their person whether at home, at work or around town," which "now allows callers' messages to reliably reach their recipients" with "shocking" reliability and speed, "enhanced through text messaging, * * * the preferred mode of communication for many young people." Yet our colleagues have taken precisely the opposite view in *Purple Communications*, 361 NLRB No. 126 (2014),

where the majority insists that "social media, texting, and personal email accounts" are not even "germane" because they "simply do *not* serve to facilitate communication among members of a particular workforce" (emphasis added). Both justifications cannot be correct. Given the Board majority's holding in *Purple Communications*, supra, the Final Rule's justification for requiring the disclosure of personal employee phone numbers and personal email addresses cannot be considered rational. [655]

---

[655] Our colleagues reason that no inconsistency exists between the Final Rule and *Purple Communications* – regarding the role played by social media in union organizing and related protected activities – because the Rule (which emphasizes the importance of smartphones and texting, for example) deals with communications involving "the union" and "other non-employer parties," whereas *Purple Communications* (which states these modes of communication are not even "germane") addresses "employee communications among themselves." We respectfully disagree with this distinction. Electronic communications and social media function in the same manner regardless of whether the user is an employee, a union organizer, or someone else. These communications also facilitate discourse to the same degree and with the same effectiveness, which means they cannot be "a universal point of contact" (quote from the Final Rule majority as justification for expanding mandatory *Excelsior* disclosures) at the same time these communications "simply do *not* serve to facilitate communication among members of a particular workforce" (quote from *Purple Communications* majority as justification for giving employees a statutory right to use employer email systems) (emphasis added). Although our colleagues justify the Final Rule's expanded *Excelsior* disclosures on the basis that "no practical way" may exist for unions or employees to obtain "email addresses, social media account information, or other information necessary to reach each other" (Final Rule, supra, quoting *Purple Communications*), this has already been disproven by the widespread use of social media, emails and texting, both in the workplace and in shaping world events. See *Purple Communications*, *supra* (Member Miscimarra, dissenting, at fn. 5).

Because the Final Rule's justification is irreconcilable with the Board majority's holding in *Purple Communications*, *supra* (as discussed in the text), and because we believe these revisions lack adequate privacy safeguards and our colleagues have unreasonably shortened the existing 7-day deadline for providing *Excelsior* list disclosures (which, among other things, would provide adequate time for the opt-out procedure described in the text below), it is unnecessary to address whether the revisions otherwise have sufficient support in the administrative record.

- Personal E-mail Addresses and Phone Numbers / Restriction on Use. In sum, the majority's message to employees in a Board representation election is that "the government wants your personal data –and we are going to compel it without your consent – and then we are giving it to someone else, too." To say the least, that is not a good message to give the citizenry in 2014.

The Final Rule fails to provide employees a reasonable opportunity to opt out from the disclosure of their personal contact information to other parties.[656] It also fails to provide that any petitioner-initiated electronic communications or phone calls would contain an "unsubscribe" feature that, if utilized, would prevent any further communications or calls from the petitioner and its agents. Finally, the Final Rule fails to provide, and cannot meaningfully provide, for specific appropriate restrictions and remedies regarding the use and misuse of voter list information. In declining to include these safeguards, the majority relies on the rationale set forth in *Excelsior* itself. There, the Board required the provision of employee names and home addresses to "all parties" (1) to "maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation" so employees may make a "free and reasoned [electoral] choice," and (2) to "further the public interest in the speedy resolution of questions of representation" by "eliminat[ing] the necessity for challenges based solely on lack of knowledge as to the voter's identity." *Excelsior*, 156 NLRB at 1240-43. According to the majority, advances in communications technology necessitate the

[656] Several comments support the inclusion of an opt-out procedure. See, e.g., Baker & McKenzie LLP; Council of Smaller Enterprises (COSE); Anchor Planning Group; SHRM II.

provision of employees' available personal contact information to serve and further these dual purposes. Thus, despite "employees' acknowledged privacy interests in the information that will be disclosed,"[657] our colleagues conclude that "the public interests in fair and free elections and in the prompt resolution of questions of representation outweigh employee privacy interests" and that it would be inconsistent with *Excelsior*'s concern for informed electoral choice "to begin allowing employees to opt in or opt out of [the] disclosures." We disagree.

Our colleagues posit that any invasion of employees' privacy is minimized because the required disclosures are limited in scope, recipients, permissible usage, and duration of use. Thus, they conclude that because the Final Rule does not "reveal employees' personal beliefs" or require the disclosure of what they apparently regard as more important private information, such as medical records or aptitude test results, it is a permissible invasion of privacy. In these times, when new reports of computer hacking, identity theft, and phishing scams surface daily, we are astonished that the majority fails to recognize that employees who may have provided their personal contact information to their employer would otherwise not want to share that information with anyone they do not know and trust. We seriously doubt that their privacy concerns will be assuaged by our colleagues' assurances that personal contact information will be disclosed to

---

[657] The majority cites *Electronic Frontier Foundation v. Office of the Director of National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010), for its characterization of lobbyists' privacy interests in their e-mail addresses as "minor." However, the majority fails to mention the court's conclusion that it could "easily envision possible privacy invasions resulting from public disclosure of the email addresses" and that such e-mail addresses should only be disclosed under Freedom of Information Act ("FOIA") Exemption 6 when "a particular email address is the *only* way to identify the [lobbyist] at issue from the disputed records." *Id.* (emphasis in original).

representation case parties but not to the public at large. We note, for instance, that in a decertification election the employer would have to provide to the employee-petitioner the available personal contact information of fellow employees.[658] There are any number of reasons totally unrelated to the election campaign why those employees might be uncomfortable with this arrangement.[659]

Once the contact information is provided to a party, it does not disappear after election day. With respect to the limitations on its further permissible use and duration, the majority assumes the efficacy of its vague restriction limiting the use of disclosed personal contact information to "the representation proceeding, Board proceedings arising from it, and related matters." Although we acknowledge our colleagues' attempt to list particular types of Board proceedings presumably covered by this language, we are nonetheless troubled by the vagueness and potential breadth of "related matters." Beyond that, the Final Rule fails to specify any remedy for violating the restriction, promising only an "appropriate remedy" to be determined in case-specific adjudication "if misconduct is proven and it is within the Board's statutory power to do so." Proving such

---

[658] Inasmuch as our colleagues assume that "a union seeking to persuade employees to select it as a bargaining representative would tend [not] to act coercively toward those employees," this assumption—regardless of its merits—ignores the possibility that employee-petitioners could act coercively.

[659] For instance, the decertification petitioner may have had conflicts with other unit employees inside or even outside of the workplace (e.g., domestic disputes/violence (HCP), stalking incidents, failed business dealings, etc.). Such other employees, fearing harassment, may therefore not want the petitioner to have their personal contact information. At least one commenter raised the concern that unqualified disclosure carries a general risk of employee harassment (IFA II). Another commenter expressed concern that the disclosure itself could cause intra-office conflicts (AAE).

misconduct may be difficult enough,[660] but the greater problem is that an effective remedy is probably not within the Board's statutory authority. The majority fails to guarantee – because it can't – to employees that the data won't be leaked or misused, whether intentionally or by error. In fact, in some cases, we know it will be leaked or misused, and the majority does not provide a serious sanction for doing so. Consequently, the Final Rule's restriction is meaningless. The opt-out and unsubscribe options we propose are therefore essential safeguards.

The majority counters with the argument that there is no evidence of voter lists being misused by non-employer parties in the nearly 50 years of the *Excelsior* requirement. Thus, they reason that our concerns and the need for safeguards are "entirely speculative." To the contrary, it is apparent that requiring the provision of a new type of information poses a new type of risk. The majority's rationale is tantamount to arguing the low incidence of accidents involving horses in the 19th century proved there would be a low incidence of accidents involving cars in the 20th century. Their attitude is blasé at best. As previously mentioned, the news is full of daily abuse stories relating to, e.g., disclosure of personal email addresses.[661]

---

[660] For example, the Indiana Chamber of Commerce observed that a party alleged to have misused a voter list may claim that it obtained the misused information independently from another source, and thus was not "using" the voter list at all, let alone for a restricted purpose (IN Chamber). Our colleagues miss the point in dismissing this concern as a "question of fact for the factfinder" in a particular case. The Indiana Chamber's valid concern is that an employer would find it extremely difficult, if not impossible, to prove misuse of a voter list to a fact finder.

[661] See, e.g., Shelly Banjo, *Home Depot Hackers Exposed 53 Million Email Addresses*, WALL STREET JOURNAL, Nov. 6, 2014, http://online.wsj.com/articles/home-depot-hackers-used-password-stolen-from-vendor-1415309282. As for the majority's suggestion that employees' personal contact information is unlikely to be misused, see

Our colleagues also assume that providing an opt-out procedure for employees would be inconsistent with the Board's reasoning in *Excelsior* that "the access of *all* employees to [election-related] communications can be insured only if all parties have the names and addresses of all the voters." *Excelsior*, *supra* at 1241 (emphasis in original). Of course, that basic assurance of communication access remains unchanged today. Employees' names and addresses are required to be disclosed without restriction, regardless of any privacy concerns that might apply. Further, those privacy concerns are fundamentally different from those attendant to email and phone contact information. A home is a readily identifiable, fixed physical point of geography that people in the public can typically visit, independent of the disclosure of address. An email address is a thing entirely created by the employee who thus has more of a privacy interest and it is typically not identifiable at all without the consent of the employee; and a personal phone number is also created, in part, by an employee, who gets to determine whether or not it is publicly listed and thus identifiable at all. Any limited and neutral opt-out provision for these additional means of access cannot be deemed to disrupt the balance struck in *Excelsior*.

Our colleagues' other objections to opt-out procedures are similarly misplaced. Thus, the majority speculates that an opt-out process would require too much "extra time" (a too-familiar refrain) for employees to decide whether to disclose their personal contact information and for employers to implement that decision, thereby exacerbating election delay. They further speculate that an employer-administered opt-out process

---

*Cedars-Sinai Medical Center*, 342 NLRB 596 (2004) (setting aside election based on telephonic threats of violence).

would engender new areas of costly litigation arising from "accusations of improper employer coercion" in influencing employees to opt out of disclosure. Finally, the majority suggests that because an opt-out process "could not be administered in a blind fashion," the resulting employer knowledge of who opted out would "require the invasion of employee privacy in the name of protecting employee privacy."

In our view, none of the majority's criticisms would preclude the administration of a workable opt-out procedure that we could support. The employer could be directed to post and provide notices and opt-out forms to all employees at the time initial and final election notices are distributed (recipients of the forms accompanying the initial election notice could be identified based on the preliminary voter list). Employees who wished to opt out could be directed to submit their completed forms to the Region prior to the existing 7-day *Excelsior* list deadline, which, in our view, should be retained without change. The Region could retain responsibility for distributing the *Excelsior* list, from which the Region, before serving the list on the petitioner and any intervenor, could easily redact personal contact information relating to those employees who opted out. The Region could administer the opt-out process in a simple, efficient manner that minimizes administrative burdens without delaying the election. And the employer would not know which employees, if any, had opted out. Federal and state courts commonly use nearly identical opt-out procedures, for example, to protect third parties' privacy interests in class action cases. In our view, no pejorative message would be associated with this type of procedure – administered by the neutral agency overseeing the election – and we believe the majority's argument otherwise is plainly without merit. Nor would such an opt-out procedure reveal either to the employer or union an employee's sentiments

regarding representation, since the opt-out information would be available only to the Region, and there is no necessary correlation between an employee's sentiments regarding union representation and his or her individual preference regarding dissemination of personal contact information.

The majority sees no need to permit employees to "unsubscribe" from petitioner-initiated electronic communications or phone calls. They observe that such an option "would do nothing to allay privacy concerns" occasioned by the employer's initial mandated disclosure of employees' available personal contact information. This observation would be accurate were the unsubscribe option to be the sole means for protecting privacy interests. In our view, however, any such option would at least have to work in tandem with a reasonable initial opt-out procedure. Thus, employees who decided not to opt out of the initial disclosure could later decide to stop receiving a petitioner's messages by personal e-mail or phone call. In any event, employees continue to have a privacy interest in their personal contact information even after the initial disclosure.

Our colleagues assure that an unsubscribe option is unnecessary because "some" unions voluntarily provide this option anyway. If this is the case, then we have before us proof that such a procedure is reasonable and can be workable. And if, as our colleagues claim, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act")[662] and Federal Trade Commission's Do-Not-Call Rule[663]

---

[662] 15 U.S.C. 7704.

[663] 16 CFR part 310.

"may already impose" a similar requirement for an unsubscribe option, we see no harm in making this requirement explicit and clear as applied to voter lists under Board law. Indeed, the Final Rule codifies the *Excelsior* rule's requirement that employers provide voters' names and home addresses even though this rule has stood for nearly 50 years without previously being codified.

- Timing. As stated above, the Final Rule dramatically shortens the time for production of the voter list from the current 7 calendar days to 2 business days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction of election. The 2-business-day maximum time limit, with the possibility of setting aside an election for failing to comply, is far too short a time period for a number of reasons. First, this timeframe is insufficient given the significant variation that exists among different potential bargaining units (e.g., large unit size,[664] multi-site units[665]). Second, certain industries and job classifications that have historically been recognized as involving substantial complexity (e.g., construction,[666] education,[667] entertainment, and contingent or regular part-time or on-call employees in, *inter alia*, the healthcare industry[668]) will routinely need more than 2 business days to finalize a voter list. Third, the majority's timeframe is unrealistic given the cumulative effect of the other

---

[664] See, e.g., Sheppard Mullin; AHCA; AHA.

[665] Such units may commonly occur within employers with decentralized operations. See, e.g., ACE; Con-Way.

[666] See, e.g., ABC II; AGC II.

[667] See ACE.

[668] See, e.g., AHA II.

accelerated time frames included in the Final Rule.[669] Fourth, the rush to comply with the 2-day time limit for production of the *Excelsior* list can reasonably be expected to produce more inaccuracies in the substantially greater information that must now be provided. Inasmuch as inaccuracies can be the basis for setting aside an election upon the timely filing of an objection,[670] the Final Rule will likely make more rerun elections necessary when a union fails to secure a majority vote in the first election.[671]

Our colleagues largely dismiss these concerns. Primarily, they assume that advances in recordkeeping, retrieval, and record transmission technology warrant the reduction in time for production to 2 business days for all employers in the interest of "expeditiously resolv[ing] questions of representation." We can readily concede that *some* employers may be able to comply with the new 2-day deadline for production of the expanded *Excelsior* list, but the record falls far short of establishing that all, or even most, employers will be able to do so, particularly those who lack modern technology or who operate in industries with complex eligibility formulae.

- Excelsior Disclosures – Summary. The majority relies on a bundle of assumptions to justify its rejection of the need for any privacy safeguards and its insistence that it is not onerous to require all employers to provide the expanded list in

---

[669] See, e.g., Bluegrass Institute; GAM; Sheppard Mullin; AHA.

[670] See, e.g., *Mod Interiors, Inc.*, 324 NLRB I64 (1997) (setting aside election where *Excelsior* list contained a significant number of inaccurate addresses).

[671] As previously noted with respect to the required posting of the initial election notice, our colleagues seem greatly concerned with expediting the electoral process in general, but the possibility of delay from this second-chance failsafe opportunity apparently escapes such concern.

just 2 days. None of those assumptions bears a rational relation to the factual record before us or to statistically proven probabilities.

What remains of the majority's rationale is quite familiar. With respect to privacy concerns, they say that "[w]ithout minimizing the legitimacy of the concerns underlying these comments, we conclude for the reasons that follow that the public interests in the fair and free choice of bargaining representatives *and in the expeditious resolution of questions of representation* outweigh the interests employees and employers have in keeping the information private." With respect to the 2-day deadline, they reason that "[s]hortening the time period from 7 calendar days to 2 business days will help the Board *to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided*." It is readily apparent that the irrational need for speed in the pre-election period is the primary motivation for rejecting any impediment to shortening that period, even the allotment of a just a few extra days to allay significant privacy concerns and to facilitate employers' accurate and timely compliance with the new *Excelsior* list requirements.

(h) *No Change in Blocking Charges and Resulting Delays – The failure to change the Board's blocking charge policy perpetuates lengthy delays, and making it part of the Rule will impede future changes.* As fully discussed in Section B below, the Final Rule fails to address the statistical "long tail" of representation cases that have actually been shown to account for a large portion of overall delay in representation case processing. Cases involving application of the current blocking charge policy are a major part of this

"long tail."[672] Also, as indicated in the NPRM, the blocking charge doctrine has not previously been codified in the Board's formal Rules. In the Final Rule, however, the blocking charge policy is being retained – with the most minimal modifications – and it is being embedded in the Final Rule itself. This is retrenchment, not progress.

As stated in Section 11730 of the Board's Casehandling Manual for Representation Proceedings, "[t]he Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted." However, the manual admonishes that "the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process."

The sense that the Board's blocking charge policy causes problems in case processing is hardly a new concept.[673] The Board has acknowledged the reality that its blocking charge policy can be improperly overutilized. See *Shaw's Supermarkets*, 350 NLRB 585, 589 (2007) (noting with respect to decertification petitions that "in many

---

[672] As noted by the majority, a study conducted by commenter and Professor Samuel Estreicher of data pertaining to blocking charges filed in 2008 determined that the filing of blocking charges in a case increased the time to an election, on average, by 100 days. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 ABA J. LAB. & EMP. L. 1, 9-10 (2009).

[673] See, e.g., Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* LABOR LAW JOURNAL, Vol. 39, No. 10 (October 1988). The author was for many years director of the Board's Office of Representation Appeals.

cases, blocking charges are filed and delay the election until the charges are resolved one way or another"). Indeed, multiple comments describe experiences where unions filed unfair labor practice charges to block an upcoming decertification election that such unions concluded they were likely to lose.[674] Our colleagues thus rightly acknowledge that "incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections." We would add that unions filing initial election (RC) petitions may likewise file meritless blocking charges to delay an election and buy additional time for campaigning and shoring up support where electoral defeat appears likely. Of course, many unfair labor practice charges that currently block an election may have merit, or at least warrant litigation, just as many unit eligibility and inclusion issues raised by employers may have merit or warrant litigation. We wish our colleagues paid as much attention to the potential for unacceptable election delay from the former as they do to the latter.

The Final Rule adopts from the NPRM and codifies certain evidentiary requirements applicable when a party requests than an unfair labor practice charge block the processing of an election petition. Specifically, the requesting party must "simultaneously file [with the Board], but not serve on any other party, a written offer of proof in support of the charge * * * * provid[ing] the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony." Further, the party must "promptly make available to the regional director the witnesses identified in its offer of proof." The Final Rule does not otherwise modify the extant

[674] See, e.g., NRTWLDF; Chamber II; COLLE; CDW II.

blocking charge policy. Our colleagues' stated purpose in adopting these requirements is "to protect against abuse of the blocking charge policy by those who would use the unfair labor practice procedures to unnecessarily delay the conduct of elections."

Although the Final Rule's modest reforms to the blocking charge policy are arguably improvements over the status quo in the pre-complaint investigatory stage,[675] they do not, standing alone, adequately address the frequent substantial delay in processing election petitions caused by blocking charges. In particular, we believe that the overbreadth of the current policy causes unacceptable delay in the conduct of elections even when the charge filing is not itself abusive of process.

As indicated in Section 11730.1 of the Representation Casehandling Manual, "[b]locking charges fall into two broad categories. The first, called Type I charges, encompasses charges that allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges that allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself."[676] In the Type I situation, unless the filing party requests that the election proceed, a petition is held in abeyance until the charge is dismissed or withdrawn, or if found meritorious, until final resolution of the ensuing unfair labor practice complaint litigation, which could take years. In the Type II situation, a merit determination will ordinarily result in the petition's dismissal.

---

[675] We say "arguably" because, as the majority notes, the General Counsel already accords "highest priority" to investigating blocking charges.

[676] Casehandling Manual Sec. 11730.1.

In our view, experience has shown the Board should refrain from holding petitions in abeyance for Type I blocking charges. Current policy represents an anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs outside the critical election period, would nevertheless be the basis for substantially delaying holding any election at all.[677] Further, we find it paradoxical that the filing party, almost invariably a union in the blocking charge context, may control the timing of an election by requesting that it proceed. Objectively, if the Board's stated intention in the blocking charge policy is "to protect the free choice of employees in the election process,"[678] it does not make sense for one party – in this case, the union that chooses to file a charge – to control whether or when employees exercise that choice by participating in the election.

Even with the new pre-complaint evidentiary requirements, we also oppose having the blocking charge policy codified in the Board's formal Rules. In this regard, we do not believe the Final Rule articulates a sufficient basis for incorporating the blocking charge doctrine, particularly since the Final Rule does not otherwise adopt any of the substantial potential changes referenced in the Proposed Rule, and codifying the policy is likely to impede or preclude further changes or improvements in this important area. At a minimum, we favor keeping the blocking charge policy out of our formal Rules during a 3-year trial period in which petitions will be routinely processed and elections conducted in Type I blocking charge cases, with the votes thereafter impounded, even in cases

---

[677] *Ideal Electric Mfg. Co.*, *supra* (to be found objectionable, alleged conduct must occur in critical period between petition and election dates).

[678] Casehandling Manual Sec. 11730.

where a regional director finds that there is probable cause to believe an unfair labor practice was committed that would require the processing of the petition to be held in abeyance under current policy. The Board would then have empirical evidence for evaluation of the need for permanent amendment of the policy, weighing any benefits in eliminating protracted delay in the conduct of elections against possible risk to the exercise of employee free choice.

Our colleagues decline to substantively modify the blocking charge policy principally because, as they claim, "holding a tainted election results in damage beyond that caused by the employer's unfair labor practices, which damage cannot be fully remedied simply by conducting a rerun election." Again, speaking only in reference to Type I cases—those *not* involving conduct that necessarily taints the petition process—it remains possible, even if the election takes place, for the union to file post-election objections and charges, causing the election to be set aside, followed by a rerun election. This remains the standard Board approach to election-related misconduct during the critical period. Given our colleagues' relentless focus on conducting elections as soon as possible – in literally every other context addressed in the Final Rule – it is irrational and self-defeating to retain the blocking charge doctrine, which prevents many elections from taking place *for years*.

In sum, the Final Rule's incorporation of the current blocking charge policy with minimal pre-complaint changes provides nothing of meaningful value and leaves completely unaffected the enormous delays caused by this policy. Codifying the policy, without meaningful change, makes even more difficult the future prospect of giving this policy the serious attention and substantial reforms that, in our view, are warranted.

**B. The Final Rule Still Fails to Target Election Cases that Involve Too Much Delay**.

The NLRA involves more than procedures in representation cases. The Act's *substance* consists of important election-related rights, obligations, and constraints, including the prohibition against restraint or coercion by employers or unions regarding any employee's exercise of protected rights.[679] In our NPRM dissent, we noted the absence of proposals directly addressing the commission of unfair labor practices during an election campaign. Still, the Final Rule makes no overt changes regarding the Board's treatment of unlawful election conduct by employers or unions. That is a matter for another day, say our colleagues. However, it is well known that many union advocates have argued for greatly expedited representation elections based on alleged employer misconduct that, it is claimed, adversely affects the outcome.[680] They maintain that the longer the pre-election period is, the greater is the potential for such misconduct to take place. Notwithstanding the majority's disclaimers, the absence of a rational justification for so many of the revisions discussed above that concentrate on the acceleration of the pre-election stage of representation case proceedings makes it difficult, if not impossible, to avoid the conclusion that the majority accepts the unions' argument and that the Final Rule's focus on the need for speed is compelled by this argument.

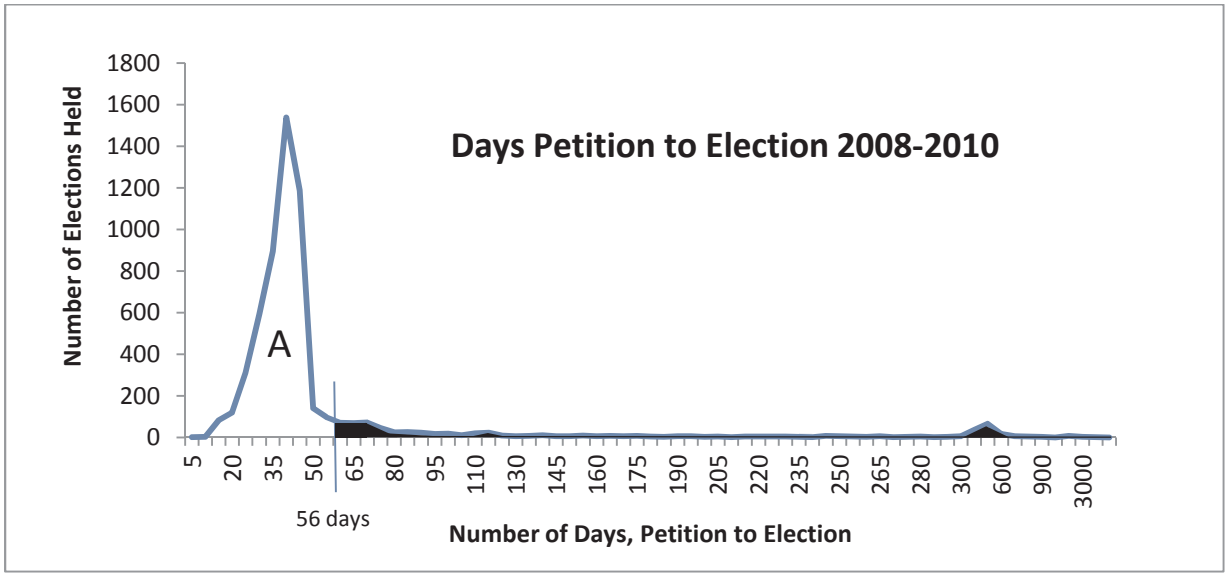
---

[679] See Sec. A.2., *supra*.

[680] These arguments were referenced in the preamble accompanying the now-vacated final election rule issued in December 2011. See 76 FR 80138 (2011) (prior final rule regarding representation case procedures with explanatory preamble). The preamble noted that many labor organizations cited research studies indicating that shorter election periods would result in "fewer unfair labor practices," although the preamble also acknowledged that various management-side organizations "question[ed] the validity of such studies." *Id*. at 80149 n.33.

Furthermore, to the extent that the Final Rule seeks to address unacceptable election delay, the objective evidence shows such delay occurs, at most, in only a very small percentage of Board-conducted elections. These relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.

The graph below, based on a breakdown of all NLRB initial elections conducted between 2008 and 2010, is republished from our Proposed Rule dissent and still illustrates this point. In more than 90 percent of those cases, elections occurred within 56 days after the filing of the petitions (these cases are reflected in the graph area appearing in white, marked "A"). As noted previously, this represents a dramatic improvement over the Board's track record since the early 1960s. Conversely, less than 10 percent of the cases identified in the graph involved elections that occurred more than 56 days after petition-filing (these delayed cases are reflected in the graph area shaded in black, which is barely visible, to the right of the 56-day line).




The case distribution in the graph shows there is no evidence of delay evenly apportioned across the universe of Board-conducted elections, i.e., delay affecting a large

group of cases to a significant degree. In fact, the graph is far from a standard bell curve; it does not show *any kind of significant distribution of cases greater than 56 days* between petition-filing and election.[681] We are not the first to note this wildly uneven statistical distribution in the context of an asserted "systemwide delay" problem. An earlier study addressing the same distribution findings accurately described the scattering of cases along the extended time continuum beyond 56 days as the "long tail" of election cases.[682] In other words, empirical data seem to disprove the existence of a systemwide delay problem, and instead demonstrate that delay is only an issue confined to a discrete minority of cases, possibly for issues unique to those cases.

The Final Rule contains many references to increased speed and efficiency, but fails here by making no differentiation between the overwhelming majority of elections that already take place quickly and the relatively small number that do not. Instead, the Final Rule rewrites the procedures that govern *all cases*, the overwhelming number of which *already* take place quickly.

Suppose, for instance, that the U.S. Fish and Wildlife Service had a mandate to stop the poaching of manatees, which reside almost exclusively in Florida.[683] It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most

---

[681] As noted previously, 56 days is the Board's own traditional target for conducting at least 90 percent of elections, a target that the Board has surpassed in recent years. See notes 560-562, *supra*, and accompanying text.

[682] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, *1999-2004*, 62 INDUS. & LAB. REL. REV. 3, 10 n.9 (Oct. 2008).

[683] Manatees, sometimes known as "sea cows," are large aquatic marine mammals considered to be relatives of the elephant. *See* http://en.wikipedia.org/wiki/Manatee; http://www.defenders.org/florida-manatee/basic-facts. The Florida manatee is Florida's state marine mammal. *Id*.

states do not even have bodies of water where manatees live. This is precisely the approach reflected in the Final Rule. It applies almost entirely to elections that do *not* involve significant delay, while failing to identify and target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

As we have repeatedly stated in this opinion, every federal agency has a legally mandated responsibility to take action that bears a rational relation to relevant facts and the matters being addressed.[684] In this respect, even putting aside the many ways in which the Final Rule is contrary to statutory mandates (see Part A above), it creates poor public policy and is not rationally related to the genuine problems of delay in case processing. At a minimum, there needs to be a better fit between rulemaking in this important area and any problems that ostensibly warrant Agency action.

In Section D below, we suggest rulemaking changes that would represent significant progress addressing the unacceptable delay in the "long tail" of representation cases. If our colleagues wish to immediately reduce the number of overage representation cases, they need look no further than the Board's own pending caseload. As of October 1, 2014, the beginning of Fiscal Year 2015, there were 33 pre-election representation cases pending before the Board *for over a year*, 4 of which have been pending *for over 3 years*. Nothing prevents the Board from adjusting its own internal procedures – combined with due diligence, effort, and commitment, rather than rulemaking – to resolve all of these cases, and to ensure that *every* future representation case is timely resolved. Indeed, the

---

[684] *State Farm, supra*, 463 U.S. at 43.

countless number of hours spent by Board personnel in rulemaking might much better have served the purpose of expeditiously processing representation cases by attending to this problem. In Part D below we identify measures that, in our view, would accomplish these objectives and otherwise improve representation procedures consistent with the Board's responsibilities under the Act.

**C. The Final Rule Still Does Not Reflect A Comprehensive *De Novo* Examination of Important Election Issues.**

We credit our colleagues for affording the opportunity to have renewed public comment on the republished NPRM. Further, we recognize that they have made some changes in the Final Rule that we support. For example, (1) the Final Rule abandons the proposal to eliminate pre-election requests for review and pre-election requests to stay the election, which the statute requires the Board to permit; (2) the Final Rule recognizes to some degree that the Act does not permit hearing officers even to make "recommendations" regarding election issues (although we believe these changes do not adequately cure the improper vesting of controlling authority in hearing officers);[685] (3) some restrictive provisions pertaining to the new Statement of Position and issue preclusion requirements have been modified;[686] (4) the 20 percent evidence-exclusion

[685] Section 9(c)(1). For example, the Final Rule ostensibly places authority in regional directors to exclude evidence (which conclusively precludes review by the regional directors and the Board regarding excluded matters), but it remains clear that hearing officers – not regional directors – preside over the hearing; and we believe the exclusion of evidence regarding issues like voter eligibility will improperly limit the scope of the hearing, contrary to Section 9(c)(1)'s "appropriate hearing" requirement. The Final Rule, therefore, will predictably cause litigation over hearing officer rulings that exceed what is permitted by Section 9(c)(1) and *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994).

[686] In the Final Rule, a non-petitioning party can now modify a Statement of Position "for good cause"; the inapposite use of the term "joinder" is eliminated, as is inapposite reliance on language drawn from the summary judgment standard in Federal Rule of

rule is no longer a mandatory standard; (5) the proposal to state in the Rule that parties have a maximum of 5 days to move to quash a subpoena has been abandoned;[687] and (6) the expanded *Excelsior* list disclosure requirements do not mandate employers to furnish the work email addresses and work phone numbers of eligible voters.[688]

However, the Final Rule clearly retains essential elements from the Proposed Rule that the Board issued in June 2011, which generated more than 65,000 sets of written public comments, with a further 66 individuals representing nearly as many different organizations making oral presentations to the Board. It is true that our colleagues incorporated by reference the entire administrative record of the 2011 rulemaking, including "numerous arguments both for and against the proposals,"[689] rather than requiring the public to resubmit the same comments. And the Proposed Rule stated "[a]ll of this material will be fully considered by the Board in deciding *whether* to issue any final rule" (emphasis added).[690] However, we believe the Board should have considered this voluminous material *before* determining the contours of the 2014 Proposed Rule.

---

Civil Procedure 56; contested issue requirements are revised to expressly exempt from preclusive effect a party's ability to challenge the eligibility of any voter during the election; and the mandate to require offers of proof on a potential issue prior to the introduction of testimony is eliminated.

[687] We nevertheless strongly disagree with the suggestion that limited caselaw supports a Board practice permitting a region to regire the filing of a motion to quash in less than 5 days. Such a requirement would be in direct conflict with the express language of Section 11(1) of the Act, which mandates a minimum of 5 days for a motion to quash.

[688] The significance of this revision is limited, due to our colleagues' determination that employers must ordinarily allow their employees access to work email systems to engage in organizational activities. See *Purple Communications, supra*.

[689] 79 FR at 7318.

[690] *Id*.

Having reviewed the earlier material and more recent additional comments and oral presentations, we believe the Board should have published an amended Proposed Rule for further comment. Even putting aside our disagreements with the Final Rule, the scope of the proposed changes combined with the voluminous, diverse comments received by the Board make it advisable, at the least, to do now what we believe our colleagues should have done when, in February 2014, they republished the 2011 NPRM.

The Board is an independent agency, first and foremost. We would serve the public better by "listening first, formulating later" instead of "formulating first, listening later." Once the NPRM issued anew, it necessarily reflected a conscious set of public policy choices or preferences. Just as the exchange of views during bargaining leads to improved outcomes and furthers industrial peace, so does engagement with the public in rulemaking. The Act itself disfavors the assumption that there is a "perfect initial offer" leaving nothing to discuss. See *General Electric*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970).

From the beginning of this particular era of a confirmed five-Member Board in August 2013, we already had before us an enormous record in this rulemaking proceeding. Further, there was an apparent commitment to proceed with rulemaking. Why, then, would it not have been preferable to review what was not definitively reviewed until later? In the 6 months before republication of the original NRPM in February 2014, there was ample opportunity to consider and include the revisions discussed above in a new, modified Proposed Rule. The modified NPRM would have represented an appreciable midpoint for further comment in this proceeding, a far preferable alternative to the first disclosure of revisions in the Final Rule without further

opportunity for public comment. The republication of the original NPRM could not help but convey the impression that the Board majority was set on an intractable course. The issuance of this Final Rule, presenting no opportunity for revisions of the NPRM's proposals, does not alter that impression.

The conduct of elections lies at the heart of the Board's statutory responsibilities, and the rulemaking path taken by the current Board to this point is far too suggestive of a fait accompli. Inasmuch as there will be no opportunity for public comment on the Final Rule, it falls to us to discuss its provisions in the foregoing sections of this opinion and, in the next section, to explain why it would be far better to take a different approach.

**D. The Path Not Taken.**

We support rulemaking if it is necessary to address relevant issues consistent with the Board's authority and the Act's requirements. We join our colleagues in their overall desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We fully agree that the Board should do everything within its power to conduct representation elections in a way that gives effect to employee free choice. And we agree that the Board should work aggressively in carrying out its statutory responsibilities to everyone covered by the Act.

Our opposition to the Final Rule stems from its variance from choices already made by Congress, in addition to provisions that predictably will cause unfairness and adverse consequences for many parties. The most important threshold question to answer – still not adequately explained in the Final Rule – is whether and why such expansive rulemaking is necessary at all. As the Supreme Court has stated, a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will

carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to."[691]

Regarding the substance of the Final Rule, we believe there would be broader support, substantially less opposition, and greatly enhanced prospects for judicial enforcement if the Final Rule took a more limited, better defined, and less potentially disruptive form that had unanimous support among Board members. We believe reasonable changes incorporating the following elements, had they been accepted by our colleagues, would also have broad-based support among scholars, practitioners, and advocates for employees, unions and employers.

1. Address the "Speed" Issue. For the reasons stated in our dissent to the Proposed Rule,[692] we believe it is important that the Board provide guidelines regarding reasonable minimum and maximum times between the filing of a representation petition and the holding of the election. The majority continues to reject this suggestion, focusing almost exclusively on their objection to the setting of a minimum time. In their view, such an action is not necessary to accord with Congressional intent or to assure against infringement of free speech rights. As we have discussed at length, we disagree with the majority on these critical points.

We believe it would be reasonable to have a *minimum* guideline time period between 30 and 35 days from petition-filing to election. This would be consistent with the indications that Congress intended that employees should have no fewer than 30 days

---

[691] *Atchison, T. & S. F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973).

[692] 79 FR 7340, 7344, 7347.

between petition-filing and an election to become familiar with relevant issues.[693] This standard would also permit other reasonable efforts to streamline election procedures, while retaining the 7-day period for having post-hearing briefs and a reasonable time for parties to file pre-election requests for Board review of regional director decisions and actions.

We also believe to the Board should establish a *maximum* guideline period of 60 days from petition to election, unless the Board or the regional director (subject to Board review) determines that unusual circumstances preclude holding the election within this 60-day timeframe. As previously discussed, 90 percent of Board elections are already held within 56 days or less after a petition is filed. With few exceptions, we believe a 60-day maximum represents a rational and attainable standard for all elections.

2. Address the Specific Issues Responsible for Delayed Elections. As noted above, there have been particular cases—few in number—where elections and related issues have taken too long to resolve. Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Final Rule should directly address the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay (depicted as the statistical long "tail" in the above graph).

Again, a prime candidate is the Board's "blocking charge" doctrine (which permits parties to indefinitely delay an election by filing certain unfair labor practice charges, addressed in our recommendation no. 3 below). More generally, there is no lack of data regarding factors that may have contributed to the relatively small number of

---

[693] See note 576, *supra*, and accompanying text.

cases involving too much time. This data should be carefully examined, with a view towards targeting the problem cases, rather than reformulating the procedures governing all elections.

3. Reform the Board's Internal Procedures So Election Issues Are Addressed More Quickly, and Eliminate Blocking Charge Deferrals for a Three-Year Trial Period. One of the biggest contributors to the delays associated with resolving election-related issues is the time that particular cases are pending before the Board, rather than in regional offices. The Final Rule does not foreclose changes in the Board's internal election case-handling procedures, but the Final Rule's expansive rewriting of the rules govering all elections – before the Board explores improvement in its own election case-handling – obviously undermines any argument that the Final Rule's changes are necessary.

The far better approach, in our view, would be for the Board to exhaust – or at least attempt – reasonable improvements in its own election casehandling practices, possibly combined with targeted changes, such as the 3-year trial period for "blocking charge" reform that we advocate. This change and similar targeted improvements could result in having nearly all elections occur between 30 and 60 days after petition-filing, while obviating the need to change other election procedures that are well known and have well served parties and the Board for many decades.

4. Aggressively Pursue Measures to Prevent and Remedy Unlawful Election Conduct. To the extent that unlawful employer or union conduct occurs during any election, this is already prohibited by the Act, and we continue to support aggressive Board enforcement and the formulation of effective remedies, including the pursuit of

civil and criminal contempt sanctions to the extent available under the Act and federal law. We continue to believe one of the greatest deficiencies in the Final Rule is its failure to address these substantive issues in any meaningful way. The Act deserves to be enforced by the Board, and to be respected by the parties, as much as any other federal or state legal requirements. See, e.g., *HTH Corp. d/b/a Pacific Beach Corp*., 361 NLRB No. 65 (2014) (addressing enhanced remedies and various Board member views regarding recurring unfair labor practices). Of course, the Board may not presume the existence of unlawful conduct, and much of the Board's statutory responsibility involves the adjudication of unfair labor practices if they are alleged. However, when violations of the Act occur, including instances where they affect elections, they should be dealt with promptly and aggressively by the Board, and we support further consideration of ways in which employer or union violations can be more effectively remedied.

5. Deal with the Need to Preserve and Enhance Privacy. Although the Proposed Rule solicited public input concerning the safeguarding of privacy interests regarding personal information, and the possibility of giving employees the opportunity to choose whether and how any personal information might be disclosed, the Final Rule dispenses with any meaningful effort to address these concerns.

6. Summary. Under the *State Farm* "arbitrary and capricious" standard, an agency engaged in policymaking has "a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives."[694] This is

---

[694] *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984).

particularly so where, as here, "the choice embraced suffers from noteworthy flaws."[695] To that end, we regret that our colleagues would not consider enacting a limited final rule and implement other procedural changes outside the rules.

## CONCLUSION

The Final Rule represents the culmination of a rulemaking process characterized by discontinuity, a near-complete change in the Board's composition, an unprecedented number of comments espousing widely divergent views, and the rewriting of virtually all procedures governing Board-conducted representation elections. The end result has been predictable only in its nearly complete conformity to what the Board originally proposed. In this regard, we believe the Final Rule is inconsistent with the Act and Congressional intent. It fails to provide adequate protection of employee rights of free choice and privacy and of all employees' and parties' rights of free speech and procedural due process. Although our colleagues go to great lengths to suggest the Final Rule's amendments do nothing more than reflect best practices and respond to changing times, we are not convinced. "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice."[696] Necessarily, the Board itself has a statutory obligation to "remain 'wholly neutral' as between the contending parties in representation elections."[697] Unfortunately, the inescapable impression created by the Final Rule's

---

[695] *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

[696] *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973).

[697] *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985).

overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.

The Board would better serve employees, unions and employers – and the public interest in general – by undertaking a more neutral, limited and even-handed approach, which would focus on specific problems in our representation procedures and formulate targeted solutions. Under our existing procedures, the Board has been extremely successful, with very few exceptions, in conducting elections and resolving all election issues without significant delay. We support reasonable efforts to make the Board's representation procedures as fair and effective as possible. However, we believe this is not accomplished by the Final Rule. Accordingly, for the reasons stated above, we respectfully dissent.

**VIII. Comments on Other Statutory Requirements**

**The Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601 *et seq*., requires agencies to prepare a regulatory flexibility analysis if the regulations will have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking").

The RFA only requires analysis of a rule, however, where notice and comment