Final Brief Oral Argument Not Yet Scheduled

Nos. 20-5223 & 20-5226

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Appellant/Cross-Appellee

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Appellee/Cross-Appellant

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

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

RESPONSE AND REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

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SUMMARY OF THE ARGUMENT

AFL-CIO fails to rebut the presumption that Section 10(f) of the NLRA encompasses rulemaking and adjudication. Although it argues that no one "sought relief" from the Board, no case holds that relief is not sought when an agency acts on its own motion. It also cites cases containing overbroad language suggesting Section 10(f) applies only to ULP adjudications. Those cases do not apply to rulemakings and lack sufficient rationale. Section 10(f) is ambiguous and should be construed in favor of direct review.

AFL-CIO's arguments that five challenged provisions of the 2019 Amendment are substantive, not procedural, rest on a long-rejected substantial impact analysis and fail to acknowledge that the NLRB changed none of the substantive elements required to obtain certification under Section 9 of the NLRA.

Its arguments that the Amendment is arbitrary and capricious do not overcome the deference afforded to agencies in rulemaking, much less the extraordinary leeway granted to the NLRB in crafting its representation case procedures. The NLRB weighed policy objectives similar to those considered by the 2014 NLRB, clearly identified

problems it saw, explained its reasoning, and reached different but rational conclusions, based upon evidence it viewed as relevant.

As to the ballot impoundment provision, the NLRB appropriately weighed the benefits of reducing confusion where a tally is announced that might conflict with the Board's final resolution, against the possibility of election results mooting the need to resolve certain issues. Further, NLRA Section 3(b)'s plain language permits this provision. And any existing ambiguity regarding its limitations of stays of actions taken by a regional director must give way to the NLRB's reasonable statutory interpretation.

ARGUMENT

I. This Court Has Original Jurisdiction Over This Matter Under Section 10(f) of the NLRA.

AFL-CIO's answering brief on the jurisdictional issue leaves the parties' positions surprisingly close, leaving unchallenged the NLRB's argument that if Section 10(f) is ambiguous, it must be read in favor of coverage of this case. This Court should thus reaffirm its longstanding position: Congress will not lightly be presumed to have created a confusing, bifurcated system of judicial review within a single statute.

A. AFL-CIO tacitly concedes that if NLRA Section 10(f) is ambiguous, this Court will read that section to cover this case.

As we previously explained (NLRB Br. 17–23),[1] under this Court's precedent, an ambiguous direct-review provision will be read in favor of covering a particular type of suit unless there is some "firm indication" that Congress intended to create a split-review scheme.[2] AFL-CIO agrees that this presumption exists under this Court's caselaw, contesting only whether the presumption has been rebutted here. (Br. 22.) It has not.

B. AFL-CIO fails to rebut the NLRB's position that this case falls within the language of NLRA Section 10(f).

AFL-CIO's argument that this case is excluded from Section 10(f) fails. To recapitulate, Section 10(f) grants circuit courts jurisdiction to review "a final order of the Board granting or denying in whole or in

[1] The NLRB's opening brief is cited as "NLRB Br." and AFL-CIO's opening brief as "Br."

[2] *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)).

part the relief sought." That the 2019 Amendment meets the first two criteria here is uncontested—it is "final,"[3] and it is an "order."[4]

AFL-CIO does dispute that the Board in this case granted any "relief sought" (Br. 21), but even there, its narrow argument is that no one outside the NLRB "sought" the relief the Board granted in its Amendment. As a preliminary matter, AFL-CIO asserts that the NLRB "abandoned" its position that relief was sought here. (Br. 21.) But the NLRB was not required to discuss this point in its opening brief.[5] The district court did not advance a rationale—much less make a finding—that relief was not "sought"; it merely observed that the NLRB's position was "odd."[6]

Turning to the merits of AFL-CIO's argument, Section 10(f) has no requirement that relief be sought from outside the agency—indeed, in a ULP case, which indisputably comes under Section 10(f) (Br. 12), relief

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[3] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

[4] *N.Y. Republican State Comm. v. SEC* (*NYRSC*), 799 F.3d 1126, 1130–34 (D.C. Cir. 2015).

[5] *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) ("An appellant generally may, in a reply brief, respond to arguments raised for the first time in the appellee's brief.") (cleaned up).

[6] D.A. 301.

is "sought" when the NLRB's own General Counsel issues a complaint. And as a matter of plain English, it is illogical to suggest that the relief the Board granted here *wasn't* "sought." A party with the power to take certain actions can "seek relief" by exercising those powers.

Relatedly, AFL-CIO's assertion that "relief sought" under Section 10(f) must refer to "the relief sought in the complaint provided for in subsection (b)" (Br. 15) lacks support. Neither Section 10(b) nor the following Section 10(c) reference "relief." Section 10(b) addresses only issuance of, and rules of procedure for, ULP complaints. And Section 10(c), when describing NLRA remedies, speaks of "an order requiring such person to cease and desist . . . and to take [] affirmative action[.]"[7]

AFL-CIO's counterargument thus reduces to the claim that because the Board in this case happened to issue the rulemaking notice on its own initiative, the requirements of Section 10(f) are not met. But the Board can make rules at the behest of a private party's petition for rulemaking.[8] At any time, AFL-CIO could petition the Board to reverse

[7] 29 U.S.C. § 160(c).

[8] *Notification of Employee Rights Under the National Labor Relations Act*, 76 Fed. Reg. 54,005, 54,007 n.7 (Aug. 30, 2011).

this rulemaking,[9] as it has with regard to other rulemakings.[10] If the Board refused, AFL-CIO would then have been denied relief and be entitled to circuit-court review; it could thus, by either filing or declining to file a rulemaking petition, control the locus of review. Subject-matter jurisdiction cannot hinge on such tactical calculations.[11]

When the Board completes a rulemaking proceeding by making regulations with prospective binding effect, that is "granting . . . relief sought" within the meaning of Section 10(f). All of the textual requirements of that section are met here.

C. Section 10(f)'s context is ambiguous as to whether it authorizes direct circuit-court review of Board rulemaking, and thus it must be so construed.

AFL-CIO's core argument is that Section 10(f)'s *context* unambiguously excludes any coverage of judicial review of NLRB

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[9] 29 C.F.R. § 102.124.

[10] AFL-CIO filed just such a petition regarding the Board's recent joint-employer rule, which remains pending. The NLRB filed that petition as an exhibit in another suit between the same parties. *AFL-CIO v. NLRB*, No. 1:20-cv-01909 (BAH) (D.D.C.) [ECF 16-1, filed Sept. 11, 2020].

[11] *See Lorion*, 470 U.S. at 741–42 (rejecting statutory construction that would have made the locus of judicial review dependent upon the "fortuitous circumstance" of whether an interested person happened to request a hearing).

rulemakings. It spends several pages (Br. 12–15) explicating Section 10(b)–(e) of the NLRA. Its observations are true, but irrelevant. Section 10(f) is grammatically distinct from the rest of Section 10 of the NLRA; regardless, the question here is not whether Section 10(f) must be read to cover rulemakings, but merely whether it plausibly could be.[12]

Section 10(f) materially differs from Section 10(e). Section 10(e) is not a self-contained provision, providing that "[t]he Board shall have power to petition any court of appeals . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of *such order* . . . ."[13] A phrase like "such order" is a grammatical shorthand whose meaning depends on the order being referenced, but here, has no definition within the section. Section 10(e), in other words, is grammatically incoherent without reference to the rest of Section 10 (which makes sense, because there's no such thing as seeking "enforcement" of an APA rule).

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[12] *Nat'l Auto. Dealers*, 670 F.3d at 270.

[13] 29 U.S.C. § 160(e) (emphasis added).

By contrast, Section 10(f) uses the phrase "such order" in a self-contained fashion: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order[.]"[14] And where two phrases have different referents, as with 10(e) and (f), they are not (as AFL-CIO incorrectly contends, Br. 15) the kind of parallel phrases that must be construed to have parallel meanings.[15]

AFL-CIO also relies on Section 10(f)'s venue clause, with its reference to "the circuit wherein the [ULP] in question was alleged to have been engaged in," to argue that 10(f) applies only to ULP cases. (Br. 15 & n.6.) But AFL-CIO's *ipse dixit* assertion that applying Section 10(f)'s venue language to rulemaking "strains credulity" epitomizes the observation that "plain meaning, like beauty, is sometimes in the eye of the beholder."[16] To the contrary, it strains credulity to give significant

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[14] 29 U.S.C. § 160(f).

[15] *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (same words in different sections of a statute may have different meanings "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different").

[16] *Lorion*, 470 U.S. at 737.

interpretive weight to a kind of venue that matters only in exceedingly rare cases.

Thus, in order for the location where a ULP occurred to supply a unique venue, that ULP must have been committed (i) *not* in Washington, D.C. and (ii) in a judicial circuit in which the aggrieved party *neither* "resides" *nor* "transacts business." (If either of those were true, the circuit would have venue under the other provisions of section 10(f).) While one can write law-school venue hypotheticals that fit this fact pattern—say, an interrogation of a long-distance trucker conducted while driving through a judicial circuit where the trucker never stops—in the overwhelmingly vast majority of ULP cases, the ULP-in-question venue option makes no difference.

Apart from its venue clause, Section 10(f) is indeed in the section of the NLRA dealing with ULPs. (Br. 13.) But this placement codified Congress's express intent to prohibit direct judicial review of representation cases. (NLRB Br. 30–35.) The absence of any relevant legislative history as to judicial review of rulemaking likely reflects the 1935 Congress's belief that pre-enforcement review would be unavailable; it does not reflect any intent to channel such review to

district courts, which otherwise were purposefully excluded from reviewing policy questions under the NLRA. (*Id.* at 32.) And Congress's grant of authority to the Board to "make, amend or rescind [rules or regulations] in the manner prescribed by [the APA]"[17] does no work, because the APA's judicial-review provisions yield to any agency-specific direct review statute.[18] So it begs the question to say, as AFL-CIO does (Br. 16), that Congress intended the APA to apply to NLRA rulemakings.

The balance of AFL-CIO's opposition (Br. 17–20) is devoted to a review of various cases that have stated in passing that Section 10(f) only applies to ULP cases. But only one of those cases even addressed rulemaking, and none offer persuasive dicta on that topic.

American Federation of Labor v. NLRB (*AFL*) is the logical starting point, but that case's statement that the NLRA "on its face thus indicates a purpose to limit the review afforded by § 10 to orders of

[17] 29 U.S.C. § 156.

[18] 5 U.S.C. § 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute[.]")

the Board prohibiting [ULPs]"[19] was distinguished in the NLRB's opening brief (pp. 35–38), and AFL-CIO largely fails to engage with the NLRB's arguments. It does resist the NLRB's characterization of *AFL's* statement as a dictum (Br. 18 n.7), but the definition of a dictum is judicial comment "unnecessary to the decision in the case and therefore not precedential."[20] The Court did not need to comment on the locus of judicial review of rulemaking in order to decide that individual representation certifications are not final orders of the Board.[21] Nothing about the court's rationale turned on that question. So *AFL* is a classic "drive-by jurisdictional ruling . . . (if [it] can even be called a ruling on the point rather than a dictum)."[22] Whether or not it technically constitutes a dictum, it has no precedential effect on the issue at hand.[23] Likewise, AFL-CIO's citation of post-*AFL* cases straightforwardly

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[19] 308 U.S. 401, 409 (1940).

[20] BLACK'S LAW DICTIONARY 569 (11th ed. 2019).

[21] *AFL*, 308 U.S. at 409.

[22] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

[23] *Id.*

applying its holding to prohibit judicial review of such certifications does not enhance its argument.[24]

AFL-CIO also cites three cases involving dismissals or prehearing settlements of ULP charges, or the conduct of investigations, by the NLRB's General Counsel.[25] But "the Board's General Counsel has unreviewable discretion to refuse to institute [a ULP] complaint."[26] What's more, such cases do not even arguably trigger Section 10(f), because the orders in question are not "orders of the Board" at all—they are orders of the NLRB's independent General Counsel.[27]

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[24] *Gen. Drivers, Chauffeurs & Helpers, Local 886, v. NLRB*, 179 F.2d 492, 494 (10th Cir. 1950); *Inland Container Corp. v. NLRB*, 137 F.2d 642, 643–44 (6th Cir. 1943).

[25] *Int'l Ladies' Garment Workers' Union, Local 415-475 v. NLRB* (*Garment Workers*), 501 F.2d 823, 827–28 (D.C. Cir. 1974), *abrogated on other grounds by NLRB v. UFCW, Local 23*, 484 U.S. 112, 127 (1987); *Laundry Workers Int'l Union, Local 221 v. NLRB*, 197 F.2d 701, 703–04 (5th Cir. 1952); *Lincourt v. NLRB*, 170 F.2d 306, 307 (1st Cir. 1948).

[26] *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *cf. UFCW*, 484 U.S. at 130–33 (citing 5 U.S.C. § 701(a)) (APA does not permit judicial review of pre-hearing decisions to settle or decline prosecution of ULP cases because such review is precluded by the NLRA).

[27] *UFCW,* 484 U.S. at 128–30.

Next, AFL-CIO cites *Manhattan Construction Co. v. NLRB*.[28] That case denied review of a Board order quashing a hearing in a "jurisdictional dispute" case under NLRA Section 10(k).[29] The *en banc* Ninth Circuit in *Foley-Wismer & Becker v. NLRB* held that such quashing orders *are* subject to direct judicial review.[30] The Fifth and Tenth Circuits disagree.[31] But as the majority and dissenting opinions in *Foley-Wismer* make clear, the circuit split is over whether such orders are "final agency action" and therefore reviewable in circuit courts, or not final and not reviewable at all. No judge has ever suggested that they are reviewable in district courts.

Finally, AFL-CIO notes that prior NLRA rulemaking challenges have been initiated in district courts. (Br. 20 n.8.) But with one exception, *New York Racing Association v. NLRB*,[32] the jurisdictional issue presented here was not discussed by the courts of appeals in those

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[28] 198 F.2d 320 (10th Cir. 1952).

[29] *Id.* at 321; 29 U.S.C. § 160(k).

[30] 682 F.2d 770, 775 (9th Cir. 1982), *supplemented*, 695 F.2d 424 (9th Cir. 1982).

[31] *Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1123 (5th Cir. 1974); *Manhattan Const. Co.*, 198 F.2d at 321.

[32] 708 F.2d 46 (2d Cir. 1983).

cases, and therefore not precedential.[33] As for that exception, *New York Racing* summarily held that district courts have jurisdiction to review procedures by which the Board determines to decline to regulate particular industries, but not the substance of those determinations.[34] But cases that "offer no rationale for their holdings" are unpersuasive.[35] And just two years later, the Supreme Court in *Lorion* instructed courts to reject interpretations of direct-review provisions that would create a "seemingly irrational bifurcated system" of review unless Congress clearly wanted that result.[36]

Relatedly, AFL-CIO's effort to use the NLRB's own overbroad statements in previous cases against it (Br. 19–20) fails. Those statements are as out-of-context as the quotes it proffers from *AFL* and *Garment Workers*, and for the same reason—none of those cases addressed rulemaking. In any case, "[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the

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[33] *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).

[34] 708 F.2d at 54.

[35] *Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 389 n.7 (4th Cir. 2010).

[36] 470 U.S. at 742 (cleaned up).

controversy."[37] The NLRB has never denied that its position in this case is new, but at least as to issues of jurisdiction, the law follows Justice Jackson's maxim: there is no reason to "be consciously wrong today because [one] was unconsciously wrong yesterday."[38]

In some ways, the parties are not far apart here. If Section 10(f) were its own Section of the NLRA and did not offer the location of a ULP as one of several sources of appellate venue, it would clearly apply to rulemakings. Those countervailing considerations are what *makes* Section 10(f) ambiguous. But nothing in Section 10(f) resolves this ambiguity or expresses any "firm indication" that Congress wished to channel judicial review of Board rulemakings to district courts.[39]

The interpretive choice before this Court is relatively simple. One can apply the rule of cases like *Investment Co.* and *NYRSC*, which address judicial review of rulemakings, or one can apply the dicta of cases like *AFL* and *Manhattan Construction*, which offer sweeping statements about the NLRA, but say nothing about rulemaking and

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[37] *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

[38] *Massachusetts v. United States,* 333 U.S. 611, 639–640 (1948) (dissenting).

[39] *Nat'l Auto. Dealers*, 670 F.3d at 270.

which lead to a result at odds with Congressional labor policy. (See NLRB Br. 33–34.) We trust this Court will choose wisely.

II. AFL-CIO Misapplies This Court's Analysis of the APA Procedural Exception By Ignoring This Court's Rejection of the Substantial Impact Test.

Although AFL-CIO purports to adopt the legal principles cited by the NLRB in its brief, its recitation and application of these principles is flawed. As we previously addressed at length (NLRB Br. 43–48), this Circuit has shifted its analysis from whether a rule has a substantial impact on parties to whether it encodes a substantive value judgment or forecloses fair consideration of the underlying issues.[40] AFL-CIO does not address this Court's turn away from the substantial impact test, and its analysis of the challenged portions of the Board's Amendment fatally suffers from this omission.

Mendoza v. Perez, this Court's most recent discussion regarding the procedural exception, illustrates the limited extent to which judges consider a rule's effect in applying this exception.[41] Specifically, these

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[40] *Compare, e.g., JEM Broad. Co. v. FCC,* 22 F.3d 320, 328 (D.C. Cir. 1994) *with Air Transp. Ass'n of Am. v. Dep't of Transp.,* 900 F.2d 369, 376 (D.C. Cir. 1990), *remanded,* 498 U.S. 1077 (1991), *vacated as moot,* 933 F.2d 1043 (D.C. Cir. 1991).

[41] 754 F.3d 1002 (D.C. Cir. 2014).

effects should be considered only in the context of the policies underlying the APA; that is, "to serve the need for public participation in agency decision-making and to ensure the agency has all pertinent information before it when making a decision."[42] But AFL-CIO's arguments are not limited to these narrow circumstances; rather, by focusing on the burden that these rules allegedly cause to parties, they attempt a return to the long-abandoned substantial impact test.

"An otherwise-procedural rule" however, "does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties."[43] A central fact ignored by AFL-CIO is that the challenged provisions do not change the substantive elements required to obtain a certification, the end goal of the NLRB's representation process. Nor is there any evidence to suggest that they materially affect the regulated public, in terms of Board election results or any other manner. As shown below, these facts are fatal to AFL-CIO's claims.

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[42] *Id.* at 1023.

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

A. Determining voter eligibility and unit scope in the pre-election hearing changes no substantive elements in a representation proceeding and is therefore procedural.

AFL-CIO suggests that this provision is in tension with the NLRA because it places an additional barrier to holding elections. (Br. 27–28.) But AFL-CIO's emphasis on Section 9's statutory trigger for an election, that is, the existence of a "question of representation," neglects another key part of Section 9, which tasks the Board with resolving that question.[44] The Amendment's requirement that eligibility and scope issues normally be heard prior to the election serves the latter interest, as the Board explained: "[a]lthough we readily agree that the existence of such a question [concerning representation] is the prerequisite to the direction of an election, this does not mean that the litigation of additional issues is an impediment to the ultimate *resolution* of the question of representation."[45] Determining voter eligibility and unit scope at this stage serves numerous interests, including ensuring that, in as many cases as possible, the election *resolves* the question

[44] D.A. 201–02; *see* 29 U.S.C. § 159(c)(1) (requiring Board to "direct an election by secret ballot and [ ] *certify the results thereof*") (emphasis added).

[45] D.A. 201.

concerning representation.[46] AFL-CIO focuses only on the existence of a question concerning representation, ignoring the Board's statutory requirement to resolve this question.

AFL-CIO next suggests that this change adds an additional substantive element to representation cases by requiring unit scope and eligibility issues to be decided prior to elections. (Br. 28.) The response to this argument echoes the one above. The election is merely the congressionally-chosen procedure for reaching Section 9's substantive goal: the resolution of questions concerning representation. The substantive right conveyed by Section 9 of the Act is not the right to an election for its own sake; it is the right to employee self-determination and the subsequent certification should a union prevail. Reordering when disputed issues are litigated and decided does not change whether they are necessary to the ultimate resolution of a representation case—especially in situations where a union wins the election.[47]

For example, assume that an employer and union dispute whether three mechanics should be included in a unit of twenty-five production

[46] D.A. 202.

[47] D.A. 204.

workers. The union wins the election by fifteen votes (twenty to five), so the mechanics' votes will not affect the outcome. Presumably, AFL-CIO would deem the mechanic's status superfluous to determining a question concerning representation. Nevertheless, in the event a certification issues, their status must still be resolved to determine if they are in the bargaining unit—either the parties will do so through bargaining, or the Board will do so through a unit-clarification petition.[48] Either way, final resolution of the bargaining unit depends on the status of the disputed mechanics. Contrary to AFL-CIO's assertions, the Board's 2019 Amendment changes *when* this issue is determined—not whether it is necessary to be determined.

The procedural nature of this change is confirmed by this Court's decision in *Neighborhood TV Co. v. FCC*.[49] There, the Court determined that a rule re-ordering the agency's consideration of applications was procedural, despite its effects on outside parties, as it "in no way limited or precluded [the party] from competing for translator licenses along

[48] D.A. 008, 016.

[49] 742 F.2d 629 (D.C. Cir. 1984).

with other qualified applicants."[50] Similarly, the Board is re-ordering when issues are determined, but not limiting or precluding parties from obtaining certification rights under Section 9 of the Act.

Further, AFL-CIO incorrectly asserts that this provision gives parties a "substantive right . . . to an advisory opinion on individual employees' status." (Br. 28–29.) First, as discussed above, there is nothing advisory about a decision that determines oft-necessary issues in Board representation cases. Second, the Amendment does not require that these issues be litigated in the pre-election hearing—only that they *normally* be litigated and determined pre-election.[51] Finally, even assuming this change could lead to "advisory" opinions in certain cases, that outcome would not transform otherwise procedural rules into substantive ones.[52]

Additionally, while AFL-CIO correctly notes that the Board justified the change in part by providing more information to parties as

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[50] *Id.* at 637–38.

[51] D.A. 203–04.

[52] *See JEM Broad.*, 22 F.3d at 326 (rules affecting "the manner in which the parties present themselves or their viewpoints to the agency" are procedural) (cleaned up).

to the status of unit members (Br. 29), AFL-CIO cites no support for the proposition that an agency rule becomes substantive merely because it benefits outside parties. (Br. 29–30 & n.11.) Rather, this Circuit has routinely found rules to fall under the procedural exception even where the agency justifies them in terms of benefits to outside parties.[53] AFL-CIO also ignores numerous other justifications provided by the Board, including limiting the number of challenged voters;[54] promoting uniformity in regional practices;[55] limiting litigation before the agency created by unresolved issues;[56] and preserving ballot secrecy.[57]

Finally, AFL-CIO's attempt to analogize this provision to the rule this Court struck in *Mendoza* fails. (Br. 30–31.) There, the agency

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[53] *E.g., Pub. Citizen v. Dep't of State,* 276 F.3d 634, 640–41, 44 (D.C. Cir. 2002) (finding "a prototypical procedural rule" where agency justified it, in part, by allowing it to more quickly provide information to outside parties); *Nat'l Whistleblower Ctr. v. NRC,* 208 F.3d 256, 263 (D.C. Cir. 2000) (noting agency's rule designed "to ensure fair processes for applicants and would-be intervenors alike"); *JEM Broad.,* 22 F.3d at 327 (justifying new rule based on "public interest in receiving new service as quickly as possible").

[54] D.A. 202.

[55] *Id.*

[56] *Id.*

[57] D.A. 202, n.64.

tightened foreign workers' visa standards, including new minimum wage requirements.[58] The panel found the rule substantive, and distinguished this Court's prior decision in *American Hospital Association v. Bowen*:[59]

> The [regulations] at issue here are nothing like the Peer Review Organizations Manual we examined in *American Hospital Ass'n*. The [regulations] do not merely instruct Department of Labor agents to give extra scrutiny to H-2A applications from herder operations. Rather, they *alter the standards* imposed on herding employers seeking H-2A certification. They are not procedural, but substantive rules.[60]

AFL-CIO points to no changed standards here—because none exist. As the agency did in *Bowen*, the Board is revising the process to make a substantive determination—not the standards applied in such a review.[61] The change, therefore, is procedural.

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[58] 754 F.3d at 1024.

[59] 834 F.2d 1037 (D.C. Cir. 1987).

[60] 754 F.3d at 1024.

[61] 834 F.2d at 1051 ("This is not a case in which HHS has urged its reviewing agents to utilize a different standard of review . . . Were HHS to have inserted a new standard of review . . . or to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment.").

B. The provision changing the scheduling of elections is a quintessential procedural change; AFL-CIO's claim of "substantive[ ] delay[ ]" is legally incognizable.

AFL-CIO claims that the twenty-day scheduling provision "substantively delays" unions' rights to a "prompt election," and therefore constitutes a substantive rule. (Br. 31.) But any extension to agency timelines would affect this right—including numerous changes that AFL-CIO chose not to challenge, such as extending the time between petition and pre-election hearing and providing parties more time to submit position statements.[62]

Further, AFL-CIO's claim that delay *ipso facto* creates a substantive rule runs contrary to numerous decisions of this Circuit. (Br. 31.) In *Kessler v. FCC,* this Court determined that a rule delaying consideration of new applications for radio licenses for at least fifteen months was procedural, noting that "[o]f course all procedural requirements may and occasionally do affect substantive rights, but this possibility does not make a procedural regulation a substantive one."[63]

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[62] D.A. 187.

[63] 326 F.2d 673, 681–82 (D.C. Cir. 1963). The agency had frozen consideration of new applications in May 1962 and had not begun accepting new applications as of the time of the court's decision in December 1963. *Id.* at 680–81.

Similarly, in *Neighborhood TV,* this Court reaffirmed that a decision to delay considering license applications was procedural, despite its obvious impact on television stations.[64]

AFL-CIO further asserts, erroneously, that the Amendment is substantive because it benefits parties by providing more time to communicate their views to voters. (Br. 32.) That the Board justified this provision (in part) in terms of benefits to outside parties, however, does not convert it to a substantive rule, as addressed above. AFL-CIO also ignores numerous additional justifications offered by the Board, including providing the Board more time to rule on requests for review and providing clearer guidance about when elections will occur.[65]

Finally, AFL-CIO's attempt (Br. 33) to distinguish this case from *Lamoille Valley Railroad Co. v. ICC* is unavailing.[66] AFL-CIO claims that this provision, in contrast to the internal filing deadlines in *Lamoille Valley*, is directed at outside parties. The extension of time between the direction of election and election, however, involves agency

[64] 742 F.2d at 637–38.

[65] D.A. 210.

[66] 711 F.2d 295, 328 (D.C. Cir. 1983).

procedures. The election is staffed by Board personnel, and the extension of time, as explained above, is intended to provide the Board time to rule on requests for review filed by parties—all of which are internal agency concerns.[67] And, this Court simply does not recognize AFL-CIO's claim of "substantive[] delay" (Br. 31), outside of the narrow test established in *Lamoille Valley*—i.e., where the delay is such that it forecloses fair consideration of the issues before the agency.[68] AFL-CIO does not attempt to confront this test, and the minimal delay created by this Amendment does not satisfy it.[69]

C. The Board's voter list extension of three days is a *de minimis* timeline change.

AFL-CIO's arguments addressing the Board's short extension of time to provide the voter list largely echo the same failed arguments discussed above. The Board agrees that the voter list plays an important part in the Board's election procedures. (*See* Br. 33–34.)

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[67] Further, as addressed at length in our opening briefing (NLRB Br. 51–54), whether a rule satisfies the procedural exception does not turn (at least primarily) on whether a rule has an internal, as opposed to external, focus.

[68] 711 F.2d at 328.

[69] *See* D.A. 190, n.17 (citing data showing prior changes to timelines did not change union win rates).

However, delaying even an important right by three days does not make a procedural change substantive under the APA. Similarly, that the Board justified the rule in terms of benefits to outside parties does not make the rule substantive.[70]

AFL-CIO further argues that the voter list's primary benefit is to the petitioner, since it provides (for the first time) employee contact information. (Br. 35–36.) Nonetheless, this list is also filed with the NLRB,[71] and provides key information necessary for the NLRB to carry out its statutory duties.[72] To take just one example, the voter list separates out any voters that the parties have agreed should vote subject to challenge, which aids the NLRB agent in quickly identifying these voters during the election.[73]

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[70] *See* cases cited above note 53.

[71] D.A. 252 (noting that in Amended Section 102.62(d) "the employer shall provide to the Regional Director and the parties . . . a list of the full names, work locations, shifts, job classification, and contact information . . . of all eligible voters.").

[72] NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL, PART TWO, REPRESENTATION PROCEEDINGS, VOTER LIST § 11312–13 (2020) (explaining how voter lists should be used by agency personnel during the election process).

[73] *Id.* at § 11312.1.

Finally, contrary to AFL-CIO's rhetoric, briefly delaying the voter list does nothing to endanger "the fair and free choice of bargaining representatives." (Br. 36.) AFL-CIO fails to present any compelling reason that changing a timeline—especially by three days—endangers the rights of unions or employees. And far longer delays have been found by this Court to be procedural.[74]

D. The Board's change to the timing of certifications has little practical effect and constitutes a procedural rule under the APA.

AFL-CIO claims that moving the date of certification deprives employees and unions of numerous rights that attach to certifications, primarily the right to bargain. (Br. 37–38.) But as explained in our prior briefing (NLRB Br. 63), these rights extend back to the *election* date, not certification.[75] So regardless when the certification issues, if an

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[74] *See* cases cited above, notes 63–64.

[75] *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974) (employer acts at its peril when it unilaterally changes working conditions post-election; if the union is later certified as representative, those changes will be ULPs), *enf. denied on other grounds,* 512 F.2d 684 (8th Cir. 1975); *Ozburn-Hessey Logistics,* 366 NLRB No. 177, slip op. at 2 n.8 (Aug. 27, 2018) (same, for union's right to request information); *id.* at 4 (same, for employees' rights to be represented at investigatory interviews), *aff'd in part, rev'd on other grounds,* 803 F. App'x 876 (6th Cir. 2020).

employer unilaterally changes terms and conditions of employment or refuses to accord the union other prerogatives of representative status after the election, it will be liable for violating the NLRA. Therefore, "the risk of acting contrary to the will of the majority" (Br. 37) remains the same—regardless of this provision.

AFL-CIO also incorrectly alleges that staying certification limits the union's right to engage in recognitional picketing (Br. 37, n.12); the filing and pendency of a valid representation petition privileges such picketing while the petition is being processed.[76] Further, this change's practical effect is muted because ULP complaints based on a failure to bargain were not administratively prosecuted while a request for review of a certification was pending under the 2014 Rule.[77]

AFL-CIO's arguments also assume that an employer challenging a certification would nonetheless bargain with the union while a request for review is pending. (Br. 37–38). But this assumption is illogical,

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[76] *Int'l Hod Carriers Bldg. & Common Laborers*, 135 NLRB 1153, 1157 (1962); *see also Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 71 v. NLRB,* 553 F.2d 1368, 1372 (D.C. Cir. 1977) (recognizing that valid petition would privilege union's recognitional picketing).

[77] D.A. 217.

because any effort spent bargaining will have been wasted if the employer's challenge succeeds. Moreover, it is self-defeating, as an employer is *required* to refuse to bargain in order to obtain circuit court review of a certification.[78] Again, the Board's certification provision imposes little practical difference on the parties' rights.

Further, this change does not, as AFL-CIO claims, "constitute a substantive decision in favor of one side of a policy debate over which party, the employer or union, should bear the risk that the election results will be overturned." (Br. 39). That risk remains, as always, on the employer while a request for review or a court challenge is pending.[79] The Board also explained that this change is motivated by a desire to reduce unnecessary confusion where a certification is issued by a Regional Director and thereafter reversed by the Board.[80]

Finally, this change can be easily distinguished from the precedent relied on by AFL-CIO—*Time Warner Cable, Inc. v. FCC* and *Electronic Privacy Information Center v. U.S. Department of Homeland*

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[78] *Boire v. Greyhound Corp.*, 376 U.S. 473, 476–77 (1964); *Physicians Nat'l House Staff Ass'n v. Fanning,* 642 F.2d 492, 495 (D.C. Cir. 1980).

[79] *See* cases cited *above* note 75.

[80] D.A. 216.

Security (EPIC). (Br. 39–40.) In *Time Warner,* the Court relied primarily on the fact that the rule at issue froze, for the first time, the terms of the parties' contractual relationship during pending litigation.[81] But here, the Board's Amendment does not create a new requirement to maintain the status quo—that requirement to refrain from making unilateral changes existed under the 2014 Rule and continues to exist in the same form under the Amendment. *EPIC* is similarly inapposite, as the rule there—requiring body scanners in airport security screenings—implicated substantial privacy interests. This Court further explained that "few if any regulatory procedures impose directly and significantly upon so many members of the public."[82] Here, no privacy concerns are implicated and the Board's election procedures (while vital) do not directly impact nearly as many members of the public.[83]

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[81] 729 F.3d 137, 168–69 (2d Cir. 2013).

[82] 653 F.3d 1, 6 (D.C. Cir. 2011).

[83] The NLRB's website indicates that approximately 76,000 employees voted in NLRB elections in FY 2019. NLRB, ELECTION REPORT FOR CASES CLOSED FOR FISCAL YEAR 2019, DATED FEB. 26, 2020, available at http://10.18.2.35/sites/default/files/attachments/pages/node-296/fy-2019-totals.pdf (last visited Jan. 15, 2021).

E. The selection of election observers is procedural, not substantive, because it only changes who represents a party's interests before the Agency.

In this Circuit, rules regulating who may present positions before an agency are procedural because they do not regulate the content of those positions.[84] AFL-CIO first attempts to evade this clear precedent by citing numerous Board decisions it claims are being overruled by these regulations (Br. 40–41). AFL-CIO, however, cites no precedent from this Court or any other to support the proposition that an otherwise procedural regulation becomes substantive because it overturns prior agency decisions. Nor could this logically be the case, as many undisputedly procedural changes—such as changing the standard for an extension of time from "extraordinary circumstances" to a lower "good cause" bar—also overturn administrative decisions.

Second, AFL-CIO contends this change is substantive because it is directed towards parties, not the agency's internal operations. (Br. 43.) The Board explained, however, that the change merely regulates who can represent parties during Board-conducted elections.[85] Moreover, the

[84] *E.g., James V. Hurson*, 229 F.3d at 281–82.

[85] D.A. 214.

Board directly benefits from this provision, as it decreases wasteful litigation and uncertainty in the Board's election processes.[86]

Finally, AFL-CIO mischaracterizes the Board's position here as stating that any agency change seeking to avoid litigation is *ipso facto* procedural (Br. 43). Rather, the Board is asserting that this provision is in line with other rules that this Court has found procedural,[87] and that the agency's justification for instituting this change is based on the internal, procedural concerns of avoiding litigation and ensuring uniformity in its procedures. Thus, while a change to a liability standard (Br. 43) would likely be substantive, the Board's observer change is procedural.

III. The 2019 Amendment Is Not Arbitrary and Capricious as a Whole.

This issue boils down to a disagreement between the Board and AFL-CIO about how to balance different, potentially conflicting policies in crafting representation procedures. But "[t]he scope of review under the 'arbitrary and capricious' standard is narrow," allowing neither a

[86] D.A. 214–15.

[87] *See James V. Hurson,* 229 F.3d at 281.

party nor a court to "substitute its judgment for that of the agency."[88] To satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action."[89] And where, as here, Congress "entrusted [the agency] with a wide degree of discretion" in carrying out statutory duties, even greater deference is warranted.[90] AFL-CIO's challenge fails to overcome the extraordinary deference due the Board in this context.

A. Courts apply a highly deferential standard to agency rulemaking and are particularly deferential to Board election procedures.

Under the APA, courts may only set aside a rule in a limited number of circumstances, including where a rule is "arbitrary, capricious, or manifestly contrary to the [law]."[91] The issue is not whether the agency made "the best regulatory decision possible, or even whether it [was] better than the alternatives."[92] Instead, an agency

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[88] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983).

[89] *Id.*

[90] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990).

[91] *Sebelius*, 568 at 157 .

[92] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177, 1189 (D.C. Cir. 2020) (cleaned up).

need only demonstrate that its rule "is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute,"[93] *i.e.*, an agency rule must be the "product of reasoned decisionmaking."[94]

Even where an agency changes course, it need not establish that "the reasons for the new policy are *better* than the reasons for the old one; it suffices . . . that there are good reasons for it, and that the agency *believes* it to be better."[95] Rather, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[96]

This high level of judicial deference carries heightened force here, where "[t]he control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."[97] In drafting the NLRA,

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[93] *State Farm*, 463 U.S. at 42.

[94] *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 495 (D.C. Cir. 2016); *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

[95] *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[96] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

[97] *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

Congress intentionally granted the Board "great latitude concerning procedural details" for representation cases.[98] Section 9 outlines only the basic requirements for representation case procedures, leaving details to "such regulations as may be prescribed by the Board."[99] Thus, "to insure the fair and free choice of bargaining representatives by employees . . . the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily."[100] Ultimately, Congress left it to the Board to make "such formal rules of procedure [it] may find necessary to adopt in the sound exercise of its discretion."[101] This is precisely what the Board has done here.

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[98] *Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706 (1945).

[99] 29 U.S.C. § 159(c)(1).

[100] *A.J. Tower*, 329 U.S. at 330–31.

[101] *Id.* at 333.

B. The Board's 2019 Amendment was the product of reasoned decision making and furthers rational policy goals.

1. *In revising the 2014 Rule, the Board considered similar policy goals and permissibly decided to strike a different balance between competing factors.*

The Board examined many of the same factors examined by the 2014 Board majority.[102] To ensure the "accurate[], efficient[] and speed[y]" resolution of questions of representation,[103] the Board assessed the 2014 Rule's operation in terms of "speed . . . fairness, accuracy, transparency, uniformity, efficiency and finality."[104] Weighing these relevant factors, the Board found that its representation procedures could, and should, be improved upon.[105] This accords with the NLRA's congressional mandate and the Board's "longstanding practice of incrementally evaluating and improving its processes."[106]

Specifically, the Board found that while the median time between the filing of a petition and holding an election had decreased, it was

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[102] D.A. 192 (citing "speed . . . fairness, accuracy, transparency, uniformity, efficiency, and finality," from 79 Fed. Reg. at 74,315).

[103] D.A. 186 (quoting *A.J. Tower*, 329 U.S. at 331).

[104] D.A. 192.

[105] D.A. 189.

[106] *Id.* (citing 29 U.S.C. § 156 and quoting 79 Fed. Reg. at 74,310, 74,314).

nevertheless "reasonable to consider whether these gains in speed have come at the expense of other relevant interests."[107] The Board decided that interests such as transparency, certainty, and finality would be better served by allowing more time for the electoral process to play out.[108]

For example, the Board found that deferring litigation of voter eligibility and unit scope allowed these issues to "linger on after the election for weeks, months, or even years before being resolved."[109] This created "a barrier to reaching certainty and finality of election results."[110] As one example, in *Detroit 90/90*, eligibility and unit scope issues were deferred until after the election.[111] The failure to address these issues earlier led to five months of extensive post-election

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[107] D.A. 223.

[108] *See, e.g.,* D.A. 191 ("more time will promote fair and accurate voting" (citing *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1053 (11th Cir. 1983)) & D.A. 219.

[109] D.A. 191 & n.19.

[110] D.A. 191.

[111] *Detroit 90/90 and Axios, Inc.,* Case 07-RC-150097, docket available at https://www.nlrb.gov/case/07-RC-150097 (last visited Jan. 14, 2021); *see also* 84 Fed. Reg. at 69,529 n.20 (collecting cases where deferring eligibility and unit scope issues led to delay and inefficiency).

litigation, concluding with the Regional Director directing a rerun election and the union then withdrawing its petition.[112]

The Board consequently decided that allowing these issues to be litigated and decided pre-election would better serve the interests of certainty and finality. While this provision permits parties to agree to defer issues of supervisory status and unit scope, not *requiring* deferral should result in fewer instances of post-election litigation.[113] And even where issues could not be definitively resolved pre-election, litigating these issues beforehand would build a complete record that would allow the Board to promptly resolve them post-election.[114] Thus, the Board decided that more rapid elections should give way to greater certainty and finality by resolving voter eligibility and unit scope issues earlier.

AFL-CIO argues that the Amendment is arbitrary and capricious because data shows the 2014 Rule significantly reduced the time between petition and case closing and thus improved finality. (Br. 47.) But as Judge Jackson aptly put it, "[i]n this regard, the AFL-CIO's

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[112] D.A. 191 n.20.

[113] D.A. 191–92.

[114] *Id.*

arbitrariness argument just serves to underscore its own disagreement with the NLRB's judgment regarding which *kind* of finality is more important: finality in terms of efficient election results that facilitate rapid certification, or finality in terms of definitiveness."[115] Judge Jackson correctly followed this Court's teaching that it does "not look at the [agency's] decision as would a scientist, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimal standards of rationality."[116] It is the Board's place in the first instance to balance relevant factors and make policy judgments, even if AFL-CIO may disagree with them.

The decision to lengthen the period between a Regional Director's direction of election and the election is another example of the Board striking a different balance between competing factors, just as past Boards have done. Between 1987 and 2014, an election was scheduled between twenty-five and thirty calendars days after the direction of

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[115] D.A. 333.

[116] *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 249 (D.C. Cir. 2013) (cleaned up); *see also Associated Builders & Contractors of Tex. v. NLRB*, 826 F.3d 215, 228–29 (5th Cir. 2016) (upholding Board's 2014 Rule and noting "it is not the role of the court to weigh the evidence pro and con.") (cleaned up).

election.[117] But under the 2014 Rule, a Regional Director scheduled an election for the "earliest date practicable consistent with these rules."[118] The current Board has now returned to a policy similar to that of the 1987 rule, that absent waiver by the parties, a Regional Director will schedule an election at the earliest practicable date, but usually not "before the 20th business day after the date of the direction of election."[119] Thus, different Boards have long disagreed about what timeline is best for holding elections. Relying on its expertise and experience, the current Board again adjusted the election timeline based on differing policy goals.

Here, the Board explained that providing a longer time period would allow it to consider and rule on requests for review, permitting "issues to be definitively resolved prior to the election (or at least prior to the counting of votes), thereby promoting finality and certainty."[120] The Board acknowledged that requests for review were not often filed

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[117] 29 C.F.R. § 101.21(d) (1987).

[118] 29 C.F.R. § 102.67(b) (2015).

[119] D.A. 207.

[120] *Id.*

and they infrequently reversed directions of election.[121] But it also observed that its duty is to ensure the final resolution of questions concerning representation, not merely the speediest. Accordingly, the Board balanced the interest in speedy elections with the interest in greater "finality and certainty" of election results, and ultimately decided a longer election timeline was preferable.[122]

Such decisions—how to properly balance different policy interests and what representation procedures best further those interests—are "matters which Congress entrusted to the Board alone."[123] Here, the Board exercised its broad discretion in balancing the relevant factors and supplied "a reasoned analysis" for the changes it made.[124] That satisfies the narrow standard of review under the APA.

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[121] D.A. 211.

[122] D.A. 207.

[123] *Waterman*, 309 U.S. at 226.

[124] *State Farm*, 463 U.S. at 42.

2. The Board properly engaged in this balancing by making non-statistical policy choices, examining the operation of the 2014 Rule, and considering what it determined to be relevant information.

In issuing the 2019 Amendment, the Board exercised its "wide degree of discretion" to examine the workings of the 2014 Rule.[125] In some instances, the Board based its revisions on "non-statistical policy choices."[126] For other revisions, the Board "looked at the existing relevant information" about the operation of the 2014 Rule and "identified the considerations it found persuasive."[127]

The Board's examination of non-numerical considerations is consistent with this Court's recognition that an agency "need not – indeed cannot – base its every action upon empirical data."[128] As Judge Jackson found, the Board permissibly relied on "policy judgments, and its value-driven choices did not primarily rely on either statistical data or particular facts about the operation of the prior regime."[129] Such

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[125] *A.J. Tower Co.*, 329 U.S. at 330.

[126] D.A. 219.

[127] D.A. 350 (cleaned up).

[128] *Am. Great Lakes Ports Ass'n v. Shultz*, 962 F.3d 510, 516 (D.C. Cir. 2020) (cleaned up).

[129] D.A. 350.

choices are appropriate where "facts alone do not provide the answer,"[130] and here, the Board clearly identified these instances and explained its reasoning.

For instance, in deciding to extend the time to produce voter lists by three additional days, the Board acknowledged that many employers had been able to meet the 2014 Rule's two-business-day time limit.[131] But as a matter of policy, the Board found it "preferable to provide more time for employers to assemble and submit the list."[132] Although parties could agree to extend the time limit under the 2014 Rule, "the better practice," the Board concluded, was to "set forth a timeline that is unlikely to present difficulties in the first instance."[133] Considering the consequences of inaccurate voter lists, the Board thought it preferable to "promulgate procedures that will reduce the possibility" of them

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[130] *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 466 (D.C. Cir. 2016) (cleaned up).

[131] D.A. 194.

[132] D.A. 193.

[133] D.A. 194.

occurring and "avoid the litigation and rerun elections that may follow."[134]

Regarding other provisions of the 2019 Amendment, the Board examined data concerning the operation of the 2014 Rule and saw opportunities to further the NLRA's key policy goals. For example, case processing statistics showed that while the 2014 Rule cut the median time between the filing of a petition and holding an election, the rate at which parties reached election agreements remained the same.[135] Observing that "the fundamental design of the [NLRA] is to encourage agreement between the parties," the Board reasonably concluded that improving the rate of election agreements was an appropriate goal to strive for through its Amendment.[136]

Thus, the Board (1) extended the scheduling of pre-election hearings to fourteen business days, (2) required petitioners to file and serve Responsive Statements of Position three business days before pre-election hearings instead of only presenting such positions orally at the

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[134] *Id.*

[135] D.A. 190 & n.15.

[136] D.A. 192 & n.21.

hearing, and (3) required that disputes concerning voter eligibility and unit scope normally be litigated before an election, while allowing parties to agree to defer litigation on such issues.[137] By requiring parties to present their arguments upfront and providing them more time to negotiate, the Board's changes encouraged "agreement between parties where possible, [promoting] promptness and efficiency."[138]

Nonetheless, AFL-CIO faults the Board for not relying on certain statistics cited by dissenting Member McFerran and Professor John-Paul Ferguson in making its policy judgments. (Br. 47.) First, the Board majority *did* consider this data referenced by Member McFerran, and explained why it disagreed that such data was relevant.[139] And regarding Professor Ferguson's study, Judge Jackson aptly observed that the Board was not "required to engage in the particular kinds of statistical analyses that the AFL-CIO would have preferred."[140]

AFL-CIO also complains that the Board did not examine data concerning extensions of time when it changed the standard for

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[137] D.A. 187.

[138] *Id.*

[139] D.A. 219.

[140] D.A. 349.

postponing pre-election hearings to the pre-2014 "good cause" standard, including greater Regional Director discretion. (Br. 50.) As the Board observed, the 2014 Rule failed to explain its new two-tier "special" and "extraordinary" standards, giving parties only vague, confusing guidance at best.[141] Thus, the Board wanted to ensure uniformity and transparency in the standards it applied to parties seeking postponements.[142] Additionally, "restoring to regional directors greater discretion to consider the particulars of the cases before them is the preferable course here and will ultimately better serve transparency and fairness."[143] As the Board was not acting out of concern that parties were not receiving needed postponements, data on this issue was irrelevant to the Board's policy goals.

AFL-CIO also asserts that the 2019 Amendment is arbitrary and capricious because the Board disregarded "information supplied pursuant to its [Request for Information]." (Br. 47.) But this assertion is unfounded. The Board did consider the evidence garnered by the 2017

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[141] D.A. 196.

[142] *Id.*

[143] *Id.*

Request for Information, even if it chose not to premise the Amendment's changes on that evidence.[144] Indeed, the entire set of comments received from the Request is included in the administrative record here.[145]

Agencies are permitted to gather information about whether to engage in rulemaking in a variety of ways and engage in rulemaking at their discretion.[146] The Board should not be penalized for choosing to gather information through the Request for Information, even if the Board ultimately decided not to engage in rulemaking at that time. Rather than showing a disregard for evidence, the Request for Information demonstrates that the Board "was fully aware of the interests at stake" and engaged in a reasoned decision-making process.[147]

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[144] D.A. 190 n.12.

[145] D.A. 005.

[146] JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 45, 216 (6th ed. 2018) (e.g., advanced notices of proposed rulemaking); *see also Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543–44 (1978) (an agency generally has discretion over its pre-notice of proposed rulemaking procedures).

[147] D.A. 348.

AFL-CIO nonetheless suggests the Amendment had no factual basis, citing two inapposite D.C. Circuit cases. (Br. 45, 48.) In *Sorenson Communications, Inc., v. FCC*, this Court struck down a series of rules concerning fraud because there was "no evidence of [existing] fraud" nor "anything in the record" showing that the rules would prevent it.[148] But here, the Board considered the relevant evidence, identified specific problems with the existing rules, and made changes to solve those problems. For example, in adopting a bright-line standard for choosing election observers, the Board sought to address the previous case-by-case approach that had produced a confusing body of caselaw "riddled with inconsistencies."[149] Put simply, the Board saw a problem and demonstrated how its Amendment would fix it.

AFL-CIO's citation to *NRDC* proves equally unhelpful. There, the Department of Energy used a predictive model in its regulation of energy-efficient appliances. And while this Court held that an agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those

[148] 755 F.3d 702, 707–08 (D.C. Cir. 2014).

[149] D.A. 214.

uncertainties," it nonetheless upheld the predictive model in the face of "'fragmentary' . . . conflicting" information "ultimately susceptible [to] different interpretations."[150] The Board here tried to balance sometimes conflicting goals against the backdrop of the Agency's past experience, which is similarly susceptible to different interpretations. And, like the Department of Energy, the Board committed itself to updating its position in the face of new information.[151] The Board's 2019 Amendment should likewise be upheld.

Finally, AFL-CIO implies that the Board acted in bad faith by relying on facts it knew to be false. (Br. 48.) That implication is improper. Agency decisions are "entitled to a presumption of regularity," and AFL-CIO has provided no evidence to rebut that presumption.[152] Moreover, the cases cited by AFL-CIO bear no resemblance to this case because in each case the agency promulgated a rule knowing it relied upon false information.[153] AFL-CIO may disagree

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[150] *NRDC v. Herrington*, 768 F.2d 1355, 1387, 1391 (D.C. Cir. 1985).

[151] *Id.* at 1390; D.A. 196, n.48.

[152] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

[153] *Envtl. Def. Fund v. EPA*, 922 F.3d 446 (D.C. Cir. 2019); *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003).

strongly with the Board's evidence, but has presented nothing to indicate the Board relied on anything it knew to be false.

3. The Board's 2019 Amendment reflects its continuing efforts to improve representation procedures.

Rulemaking allows federal agencies to continuously review and improve their processes, in turn "[m]aking [their] regulatory programs effective."[154] Here, the Board made "targeted revisions" to its representation case procedures, keeping some of the 2014 Rule's changes, returning other procedures to pre-2014 standards, and adding new provisions altogether.[155] The Amendment thus reflects the Board's "longstanding practice of evaluating and improving its representation case procedures."[156]

In several instances, the Board found that the Rule 2014's changes had greatly improved the Board's processes and retained those changes. Thus, the Board retained the 2014 Rule's Statement of

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[154] *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part); *see also* Government Performance and Results Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011) (codified as amended in scattered sections of 5 U.S.C. and 31 U.S.C.).

[155] D.A. 189.

[156] *Id.*

Position provisions, its reorganization of the post-election appeal process, and the requirements regarding Notices of Petitions.[157] In other instances, the Board changed procedures under the 2014 Rule by striking a different balance between competing factors as discussed above. Finally, the Board also added entirely new provisions to increase the efficiency, uniformity, and transparency of representation proceedings, such as calculating all deadlines by a uniform standard and requiring a Responsive Statement of Position from petitioning parties.[158]

The 2019 Amendment, like the 2014 Rule, was another step by the Board towards "evaluating and improving its processes."[159] The Board's reasoned approach at improving its processes, as embodied in the Amendment, is therefore neither arbitrary nor capricious.

[157] D.A. 218 n.136.

[158] D.A. 192–93, 198.

[159] D.A. 189 (citing 79 Fed. Reg. at 74,310, 74,314).

IV. The Board's Rationale for the Ballot Impoundment Change Satisfies the APA's Arbitrary and Capricious Standard; Further, This Change Is Consistent with Section 3(b)'s Plain Language and Alternatively, Is a Reasonable Interpretation of That Language.

A. The provision furthers the Board's reasonable policy objectives of finality, certainty, transparency, uniformity, and efficiency.

The ballot impoundment change provides that where a request for review is filed within ten days of a direction of election, ballots that may be affected by the Board's final determination will be segregated and all ballots impounded, pending the Board's decision.[160] This change marks a partial return to the Board's procedures before the 2014 Rule.[161]

The current Board found that reinstating automatic impoundment in these narrow circumstances will promote finality, certainty, transparency, uniformity, and efficiency.[162] Specifically, as Judge Jackson noted, the Board found "impoundment of the ballots will reduce the possibility of confusion where results are announced prior to the Board's ruling on a pending request for review, but then the Board's

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[160] Amended 29 C.F.R. § 102.67(c).

[161] *See* 29 C.F.R. § 102.67 (2015).

[162] D.A. 188.

subsequent ruling nullifies or alters the results."[163] This is not a hypothetical concern: for example, the Board noted that in *The Boeing Co.,*[164] it took more than a year after the election for the Board to grant review, reverse the Regional Director's finding that the petitioned-for unit was appropriate, and dismiss the petition. This situation—where the parties had an apparent bargaining relationship for over a year, only to have that position reversed by the Board—represents exactly the type of confusion that this change seeks to reduce.

Notably, under this provision, a party may still file a request for review more than ten business days after the direction of election, (including after the election itself),[165] but in that case, impounding all ballots will not be required.[166] The Board found this change promotes efficiency, because it encourages parties to await election results that might moot the issues for which they would otherwise seek review.[167] This could occur, for instance, where an employer seeks to exclude a

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[163] D.A. 354.

[164] 368 NLRB No. 67 (Sept. 9, 2019); D.A. 191, n.19.

[165] D.A. 209.

[166] Amended 29 C.F.R § 102.67(c).

[167] D.A. 188.

disputed classification from a unit, but the number of voters in that classification are insufficient to overturn the results of the election, given the union's margin of victory.[168]

AFL-CIO nonetheless alleges that this provision is arbitrary and capricious because it: (1) requires the Board to decide issues that may have been mooted by election results; and (2) deprives employers of information needed to determine whether they may lawfully make unilateral changes in wage, hours, and other working conditions. (Br. 51–53). Judge Jackson correctly found that neither of these claims is availing.

1. The Board reasonably found that the provision's benefits outweigh the possibility of deciding issues that may be mooted by election results.

The Board explicitly considered that the ballot impoundment provision may result in the need to decide issues that might have been mooted by election results.[169] Indeed, as Judge Jackson noted, quoting the Board, "although it is possible that the results of an election will render issues moot, there is no way to know in advance if this will be

[168] *See* hypothetical at pp. 19–20, above.
[169] D.A. 210.

the case, and where the issues are not mooted by the election results, the parties will have greater finality and certainty if these matters are resolved prior to the vote count."[170] Thus, while this change may result in some cases where election results might moot the challenges under review, the Board reasonably concluded that the provision nevertheless "promotes transparency by removing the possibility for confusion if a tally of ballots issues but is then affected by the Board's subsequent ruling on the pending request for review."[171] This is a considered policy decision that satisfies the APA threshold.

2. AFL-CIO's argument that the provision creates uncertainty for employers lacks merit because the practical effects of any increased uncertainty are minimal.

Contrary to AFL-CIO's claim (Br. 52), the ballot impoundment provision creates little increased uncertainty for employers. And whatever small increase exists has virtually no practical effect on an employer's rights and obligations following an election. This is because it has long been the case that an employer "acts at its peril" in making unilateral changes in terms and conditions of employment while an

[170] D.A. 354 (quoting 84 Fed. Reg. at 69,548).

[171] D.A. 188.

election remains unresolved.[172] Whether a unilateral change is lawful is always viewed retroactively to the election, regardless of any impoundment provision; therefore, in reality, the consequences of an employer's decision whether to maintain the status quo or make unilateral changes are unchanged by the provision.

Moreover, under this change, employers consciously choose to take any risk of increased uncertainty. Thus, an employer's choice to request review within ten days of a direction of election assumes the possibility that any unilateral changes in wages or other employment terms may later be found unlawful. A more risk-averse party could instead decide after the election to request review and have the benefit of a ballot tally.[173] As Judge Jackson aptly recognized, it is "the [Board's] prerogative to weigh the downsides of the [provision] . . . against the beneficial outcomes that the [Board] is seeking."[174]

And as she correctly concluded in dismissing both of AFL-CIO's arguments, "[a]ll that the APA's no-arbitrariness mandate requires, and

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[172] *See* cases cited n.75.

[173] *See* D.A. 202.

[174] D.A. 353–54.

thus all that this Court is permitted to compel, is the agency's transparent consideration of the relevant facts and factors when it weighs the costs of the new policy against the benefits that it believes the change will yield. And, here, the [Board] has clearly done so."[175]

B. The provision does not conflict with Section 3(b) of the NLRA.

Section 3(b) of the NLRA authorizes the Board to delegate certain powers to Regional Directors, and also creates a process to request that the Board review actions taken by Regional Directors:

> . . . upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, *but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director*.[176]

The unambiguous language of Section 3(b)'s "stay" provision permits the Board's ballot impoundment change. Alternatively, even if the statute is considered ambiguous, the Board's ballot impoundment change is a reasonable interpretation of Section 3(b).[177]

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[175] *Id.*

[176] 29 U.S.C. § 153(b) (emphasis added).

[177] *See* D.A. 355–57.

1. Section 3(b)'s plain language only prohibits stays of actions already taken by Regional Directors, while the impoundment provision only delays certain certifications that have yet to occur.

The contested provision is assessed using the familiar two-step procedure set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[178] First, the court must determine "whether Congress has directly spoken to the precise question at issue" by setting forth its "unambiguously expressed intent" in the statute.[179] Second, if the court concludes that the statute is either silent or ambiguous on that "precise question," it must determine whether the agency's interpretation is "based on a permissible construction of the statute."[180] If so, the court must defer to that interpretation.

Here, Congress has spoken directly to the question of the Board's power to stay representation proceedings prior to a certification: Section 3(b) states that a request for review shall not "operate as a stay of any action *taken* by the regional director."[181] Congress intended this section

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[178] 467 U.S. 837 (1984); *Merck & Co. v. U.S. Dept. of Health & Human Servs.*, 962 F.3d 531, 535–36 (D.C. Cir. 2020).

[179] *Chevron,* 467 U.S. at 842–43.

[180] *Id.* at 843.

[181] 29 U.S.C. § 153(b) (emphasis added).

to limit parties' ability to delay complying with Regional Directors' actions by requesting Board review. "When the regional director orders the parties to act, the parties must do so, regardless of the pendency of an appeal."[182] As Judge Jackson correctly summarized, "section 153(b)'s stay prohibition plainly speaks solely to actions that have been 'taken' by regional directors, and says nothing about whether actions that regional directors *have not yet taken* (but *will take*) can be stayed or postponed."[183]

This construction is supported by the contemporaneous understanding of the word "stay" when the statutory provision was enacted. Two authoritative legal dictionaries from that time indicate that "stay" can be used to mean either suspending a proceeding or stopping the effect of an order already issued.[184] Thus, the object of the

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[182] *NLRB v. Sav-On Drugs, Inc.*, 728 F.2d 1254, 1257 (9th Cir. 1984) (en banc).

[183] D.A. 356.

[184] *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (to interpret meaning of statutory text "we look to the ordinary meaning of the term . . . at the time Congress enacted the statute").

A stay of execution was defined as "[t]he stopping or arresting of execution on a judgment . . . for a limited period," BLACK'S LAW DICTIONARY 1583 (4th ed. 1951), or "the requirement that execution of a

stay must be identified to give it meaning, as the 1959 Congress can be presumed to have understood. Here, Section 3(b)'s text removes any potential ambiguities in the word "stay" by plainly identifying the object of the stay as "any action taken by the regional director."[185] The challenged provision requires in certain circumstances that ballots be impounded before the Regional Director issues a certification, that is, *before* an action has been "*taken*"; there is thus no "stay" of a Regional Director's "action taken" within Section 3(b).

The term "stay" in Section 3(b) should not be read to cover future actions, as AFL-CIO incorrectly asserts (Br. 58). Had Congress meant to include the multiple definitions of "stay," it could have instead worded Section 3(b) to state "any [proceeding or] action," and not used language that limits "stay" to actions a Regional Director has already taken.

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judgment or sentence shall not be carried out for a definite time," RADIN LAW DICTIONARY 329 (1st ed. 1955). A stay of proceedings meant "[t]he temporary suspension of the regular order of proceedings" BLACK'S at 1583, or "the suspension by court order of all proceedings in an action at law." RADIN at 329. *See* Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 423, 428 (2013) (describing these dictionaries as among "the most useful and authoritative for the English language generally and for law.").

[185] 29 U.S.C. § 153(b).

Thus, the Board's interpretation of Section 3(b) correctly reads "stay" in its statutory context, thereby giving effect to Congress's unambiguously expressed intent.[186]

AFL-CIO's response to the Board's plain language argument is that "taken" is a "participial adjective" not limited to past events. (Br. 58). "Participial adjectives" are the past or present participle of verbs that modify nouns or pronouns, like "the dining room" or "a proven need."[187] So the examples AFL-CIO provides ("vacation taken in summer 2021" or "appeal in a bankruptcy case *may be taken*") (Br. 58–59 n.9) might or might not be participial adjectives, but AFL-CIO has not demonstrated that such adjectives, without further context, include future action. Crucially, unlike AFL-CIO's examples, Section 3(b) contains no wording which encompasses future action. Read naturally, "taken" indicates a past occurrence,[188] and "action taken," as used in Section 3(b), refers to actions *already* taken, regardless of its part of speech.

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[186] *See Chevron,* 467 U.S. at 861.

[187] *See* BRYAN A. GARNER, THE CHICAGO GUIDE TO GRAMMAR, USAGE, AND PUNCTUATION 68 (2016).

[188] *See id.* at 80, 87.

Finally, AFL-CIO's construction strips any meaning from the word "taken." This Court has long held, however, that "[i]t is a fundamental principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute so that no part will be inoperative or superfluous, void, or insignificant."[189] Given the contemporaneous understanding of the divergent meanings of "stay," if Congress had intended to encompass stays of future action, it instead might have omitted the word "taken" altogether and instead prescribed a "stay of any action by the regional director."

This Court should reject AFL-CIO's attempt to distort Section 3(b)'s text by expansively stretching the meaning of some terms while selectively reading out provisions that resolve potential ambiguities.

2. Even if Section 3(b) were ambiguous, the impoundment provision is nonetheless consistent with the Board's reasonable interpretation of the NLRA.

Even if Section 3(b)'s stay provision were considered susceptible to multiple interpretations, the Board's interpretation of "stay" is "based on a permissible construction of the statute" to which this Court

[189] *Nat'l Ass'n of Recycling Indus., Inc. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981) (cleaned up).

should defer,[190] especially considering the extraordinary deference granted the Board in determining its representation procedures, *see* Section III.A, above.

Although Section 3(b) authorizes the Board "to delegate to its regional directors its powers under section 159" and to "review any action of a regional director delegated to him," it provides no specifics as to these delegation and review functions. The Board relied upon its Section 6 rulemaking authority to determine how best to "carry out" Section 3(b) (as well as its Section 9(c) rulemaking authority), by amending its prior procedures. This change does not postpone (or stay) any action taken; rather, it authorizes Regional Directors to take certain actions only *after* the Board's review is completed (or the period during which to request review has passed).[191]

AFL-CIO responds by arguing that the ballot impoundment provision conflicts with Congress's intent in enacting Section 3(b), citing *Magnesium Casting*.[192] That case explains that Section 3(b) was

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[190] *Chevron*, 467 U.S. at 843.

[191] D.A. 187–88, 216–17; D.A. 356.

[192] 401 U.S. 137 (1971).

"designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination . . . . This authority to delegate to the regional directors is designed . . . to speed the work of the Board."[193] But AFL-CIO ignores other key portions of *Magnesium Casting,* namely, that the limits of this delegation and even the choice whether to delegate in the first place, remain firmly within the Board's discretion: "by § 3(b) Congress did *allow* the Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director."[194] Indeed, Section 3(b) does not mandate that the Board delegate all, or even any, of its Section 9 powers to Regional Directors.

Here, the Board made the measured choice to continue to permit Regional Directors to make many decisions in the course of representation cases, but to no longer allow Regional Directors to certify results while a request for review is pending or could be filed. As Judge Jackson succinctly noted, "there is no indication in the legislative

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[193] *Id.* at 141.

[194] *Id.* at 142 (emphasis added); *see also Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171, 218 n.31 (D.D.C. 2015).

history or elsewhere that Congress intended to prohibit *all* stays of any action the Board delegates to its regional directors, retrospective and prospective; thus, it is not unreasonable for the NLRB to conclude that the postponement of future actions of a regional director is permissible."[195]

AFL-CIO additionally contends that references to impoundment as a "stay" in Amended Section 102.67 demonstrate that it violates Section 3(b) (Br. 56–57); this argument is without merit. Section 3(b) limits only stays of actions "taken by the regional director;" Section 102.67(c) concerns a broader series of actions, "election[s] or any other action taken or directed by the regional director." Therefore, there are stays within Section 102.67(c) that would not qualify as a prohibited stay under Section 3(b). So merely because the Board described impoundment as a stay defined in Section 102.67(c) does not answer whether it is a stay under Section 3(b). Rather, impoundment is most naturally considered a stay of an action *directed* to take place in the future by a regional director under 102.67(c), not a stay of an "action taken" under Section 3(b). And Section 102.67(h) adds nothing to AFL-

[195] D.A. 356–57.

CIO's argument; it is merely a general provision, related mainly to briefing, that refers back to the specific, detailed provisions of Section 102.67(c).

Separately, AFL-CIO argues that Section 3(b)'s requirement that all stays be "specifically ordered by the Board," (Br. 55–56) necessarily means the Board cannot implement such stays by regulation. A very similar argument was rejected by the Supreme Court in 1991: the American Hospital Association had charged that Section 9(b) of the NLRA[196] "requires the Board to make a separate bargaining unit determination 'in each case' and therefore prohibits the Board from using general rules to define bargaining units."[197] The Court rejected this argument, noting that neither Section 9(b) nor the legislative history expressly limited the Board's rulemaking or refers to the Board's Section 6 rulemaking powers.[198]

Just like Section 9(b), Section 3(b) makes no reference to the Board's Section 6 rulemaking authority.[199] And to the extent Section

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[196] 29 U.S.C. § 159(b).

[197] *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 608 (1991).

[198] *Id.* at 613–14.

[199] 29 U.S.C. § 156; *Am. Hosp. Ass'n*, 499 U.S. at 613.

3(b)'s "stay" provision can be viewed as a statutory limit on Board actions in specific cases, it cannot be reasonably interpreted to extend to the Board's power to make rules of general applicability.[200]

Accordingly, under either *Chevron* step, the ballot impoundment provision is consistent with, and based upon a reasonable interpretation of, Section 3(b) of the NLRA.

[200] *Am. Hosp. Ass'n*, 499 U.S. at 612.

CONCLUSION

Accordingly, *AFL-CIO I* should be reversed, and *AFL-CIO II* affirmed.

Respectfully submitted,

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Dated this 22nd day of March 2021, in Washington, D.C. and in Minneapolis, Minnesota

SUPPLEMENTAL STATUTORY ADDENDUM

TABLE OF CONTENTS (SUPPLEMENTAL ADDENDUM)

STATUTES

Administrative Procedure Act:

Judicial Review 5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

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

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Prevention of Unfair Labor Practices

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10(c) (29 U.S.C. § 160(c))

(c) Reduction of Testimony to Writing; Findings and Orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative

action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

10(e) (29 U.S.C. § 160(e))

Petition to Court for enforcement of Order; Proceedings; Review of Judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be

subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

10(k) (29 U.S.C. § 160(k))

(k) Hearings on Jurisdictional Strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

REGULATIONS

NATIONAL LABOR RELATIONS BOARD'S STATEMENTS OF PROCEDURES

29 C.F.R. § 101.21(d) (1987)

(d) The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary

arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed. As to administrative dismissals prior to the close of hearing, see § 101.18(c) of this subpart.

NATIONAL LABOR RELATIONS BOARD'S RULES AND REGULATIONS

Construction of Rules
29 C.F.R. § 102.124

Petitions for issuance, amendment, or repeal of rules.
Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original of such petition must be filed with the Board and must state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)

1. This final brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because this brief contains 12,714 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

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

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Dated March 22, 2021
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UNITED STATES COURT OF APPEALS
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	)	
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,	)	
	)	
Appellees/Cross-Appellants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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