Statement of Peter C. Schaumber
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before the

Committee on Education and the Workforce
United States House of Representatives

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"Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice"

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, my name is Peter Schaumber. I am a former chairman and Board member of the National Labor Relations Board (NLRB). I was nominated by President George W. Bush and confirmed by the United States Senate for two terms on the Board beginning in December 2002 and ending in August 2010.

I began my legal career in government service as an Assistant United States Attorney for the District of Columbia and Associate Director of a Law Department Division of the Office of the Comptroller of the Currency. I subsequently entered private law practice in Washington, DC, where I was director of my firm's litigation department. Before my appointment to the NLRB, I served as a neutral and a labor arbitrator on a number of industry panels and through national arbitration rosters.

I have been an adjunct professor at the National Law Center of George Washington University and in Georgetown University's MBA Program. I also taught arbitration practice to union advocates at the George Meany Center for Labor Studies in Silver Spring, Maryland.

For 28 months, the Board's current chairman, Wilma Liebman, and I were a two-member board. We were widely commended by both the union and management labor law bars for our ability to work together collegially despite our ideological differences and to reach agreement on 90% of the

cases brought to us for decision.[1] Although I have strongly criticized recent Board actions, and I will do so here today, I respect Chairman Liebman's intellect, her passion for labor law, and her commitment to public service, and I value my experience working with her for nearly eight years.

In my testimony today, I will describe the growing politicization of the Board, how it manifests itself in the decisions and actions of the current Board majority, most recently in its proposed rule to shorten the time from a petition to an election. The latter proposal would drastically change many decades of Board election law and procedure although there is no demonstrated need to do so and would interfere with the fundamental rights of employers and employees under the Act.

I. Background to the Board's Newly Proposed "Quickie Election" Rule

One would normally commend an agency for undertaking a thorough review of its election law and procedures and recommending revisions to streamline the process. Such a commendation is out of place here. The Board's proposed rule was developed by the majority in "star chamber" fashion. This is now followed by an expedited comment period and a hearing in Washington, D.C. twenty-eight days later during the middle of the summer that will deprive the public and those who will be most affected by the rule—particularly the tens of thousands of small business owners and their employees across the nation who undoubtedly remain unaware of the proposal's existence—of the time necessary to study the proposal and consider attending the hearing or commenting on the proposed rule.

Some of the proposal's less consequential changes are sensible enough and worthy of adoption. But the majority has made no effort to demonstrate the necessity for so substantially shortening the period of time for a Board election. And the reasons it asserts for the drastic changes in Board law and procedures it proposes are unpersuasive.

The proposed rule accomplishes its result principally in two ways:

- by moving Board resolution of virtually all pre-election issues from before the election to after—even though those issues can affect an election's outcome

[1] The Supreme Court ultimately found that a board of two persons did not constitute a quorum under the Act. *New Process Steel L.P. v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635 (2010).

- by limiting the opportunity for full evidentiary hearing and Board review of contested issues

When put in context with other recent Board actions, it does not require a fertile imagination to conclude that the purpose for this radical manipulation of the Board's election process is to tilt the process in favor of organized labor and, as described by dissenting Board Member Brian Hayes: "[T]o effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[2]

The proposed rule demonstrates once again that the current Board majority feels unconstrained by the limits of the law and its role under the Act to be completely neutral on the question of unionization. This is not a sudden phenomenon: it has developed over the last 30 years as a result of several factors—such as the decline of unionization in the private sector, changes in the process for selecting Board members, and the impact of the political response chosen by organized labor to address its decline.

A. Unionization in the Private Sector Continues To Decline

Organized labor has made important contributions to the workplace and to our country. However, union density in the private sector has declined from 35% in the 1950s to less than 7% today, mirroring a decline in most western democracies.[3] Nevertheless, American unions continue to represent roughly the same number represented in the 1950s—approximately 16 million workers.[4]

I maintain, as some others have argued, that the decline of unionization in the private sector is the result of several social, political, and economic factors, including:

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[2] *See* p. 45 of the Board's Notice of Proposed Rulemaking (hereafter called "Notice of Proposed Rulemaking") that issued in the Federal Register on June 22, 2011. I fully agree with the dissenting opinion of Board Member Brian Hayes and respectfully refer members of the committee to it.

[3] *See* Jelle Visser, "Union Membership Statistics in 24 Countries," Monthly Labor Review (Jan. 2006). The period for Board elections in the 1950s was more than twice what it is today.

[4] Bureau of Labor Statistics, Economic News Release, "Union Members Summary" (January 21, 2011).

- the plethora of workplace legislation, both state and federal, that has improved working conditions—which in no small part was fought for by unions—but contribute to the view that unions are no longer necessary
- the decline in our country's manufacturing base, which provided a fertile ground for unionization
- the high-visibility failure of some unionized industries
- the desire of many contemporary workers, particularly more skilled workers, to have a cooperative relationship with their employer, which is inconsistent with the predominant union model that presupposes an antagonistic struggle between employees and management[5]

B. Changes in the Selection of Board Members and the Impact of the Political Response Chosen by Organized Labor to Address Its Decline

Congress carefully considered the qualifications it wanted for members of the NLRB and explicitly rejected calls for a Board composed of partisan representatives of management and labor. Instead, Congress determined that the Board would function best if composed of "impartial government employees." Now, most Board members are drawn from union and management labor law backgrounds. Most came from private law practice, but a few who worked for labor organizations were nominated after serving what has been referred to as a "period of detoxification" in government service.

The nomination of Craig Becker by President Obama broke with this tradition. Member Becker, who was recess-appointed to the Board after his nomination was filibustered in the Senate, is the first person to be nominated for a full Board term to come directly from a union. In fact, Mr. Becker comes from two of the nation's largest international unions, the AFL-CIO and the Service Employees International Union.[6] The move toward

[5] Some have argued that the decline of unionization in the private sector is the result of unions not selling themselves adequately to workers, and their failure to commit sufficient resources to organizing activities. Studies show that the percentage of union funds devoted to organizing shrank from 40% in the 1930s to 4% in the 1990s. See Peter Francia, The Future of Organized Labor in American Politics (Columbia University Press, 2006); Bruce Nissen, Which Direction for Organized Labor (Wayne State University Press, 1999).

[6] I mean no disrespect to Board Member Becker with whom I worked collegially for many months but his situation is different from that of Michael Bartlett who came to the Board from the U.S. Chamber of Commerce. Mr. Bartlett was nominated specifically to serve as a short-term

choosing appointees who previously represented one side or the other has coincided with—and arguably helped cause—the delay in filling vacancies on the Board and the packaging of Board nominees. This delay is contrary to the statutory scheme that contemplated the nomination and confirmation of one new Board member each year.

Some have cited these changes in the selection of members as causing the instability in Board law when control of the Board moves from one political party to the other. Although these changes have made oscillations in board law possible, they are not, in my view, its cause. Apart from the decline of unionization in the private sector, which is the stage upon which this has been played out, the dramatic changes in Board law and procedure we are witnessing today stems from:

- the decision of organized labor to use the political process to arrest that decline
- the concomitant publically expressed expectation of organized labor that Democrats on the Board are there to serve its interests[7]

These factors have worked to undermine Board neutrality and bring us to where we are today.

C. The Board's Proper Role Under the Act

The Wagner Act was not the last word on these issues: Congress has amended the Act three times. As the law has changed, the role of the Board has also evolved. The most significant amendment was the *Taft-Hartley Act of 1947*, which moved the Wagner Act into the mainstream of American political thought. It expanded the Wagner Act's notions of collective action with the broader notions of workplace democracy and neutrality. For example, the Taft-Hartley Act gave workers the right to refrain from union and other concerted activity and protected an employer's First Amendment right to non-coercively express its opposition to unionization.

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recess appointee pending the nomination and confirmation of five new board members to serve full terms.

[7] "We are very close to the 60 votes we need. It [sic] we aren't able to pass the Employee Free Choice Act, we will work with President Obama and Vice President Biden and their appointees to the National Labor Relations Board to change the rules governing forming a union through administrative action. . . ." (Stewart Acuff, "Restoring the Right to Form Unions and Bargain Collectively," The Huffington Post, February 3, 2010).

The amended Act and the court decisions interpreting it reflect an evolving view of the role of the Board. Originally, the role was to maintain a singular focus on promoting collective bargaining; today, the Board's role is to balance and accommodate competing, conflicting interests. Archibald Cox, the pre-eminent labor law scholar, observed that the Taft-Hartley Act "represent[ed] a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining."[8] To the extent that Professor Cox viewed the Taft-Hartley Act as requiring the Board to maintain complete equipoise on questions of union representation, he was, in my view, absolutely correct. As the Supreme Court said in *NLRB v. Savair Manufacturing*, 414 U.S. 270, 278 (1973): "The Act is wholly neutral when it comes to the basic choice [of union representation]."

Thus, as result of these amendments to the original Act, the Board's role of promoting collective bargaining begins after employees have made a free and informed choice for unionization as the means to improve their terms and conditions of employment.

D. The Current Board's Consistent Demonstration of Partiality on the Question of Unionization

In my view, the current Board consistently demonstrates that it is not neutral on the question of unionization. Rather, its majority members appear to remain mired in a period when the Wagner Act reigned supreme, when unions had rights but no obligations, when employers did not have the right to non-coercively express their opposition to unionization, and when employees had no express right to refrain.

The majority's animating concern is the loss of union density in the private sector. It takes refuge in the language from the Act's preamble "to encourage the practice and procedure of collective bargaining" to issue decisions and take actions that trump specific provisions of the Act, including the Taft-Hartley Act and the individual rights set out therein. The following are recent examples:

- **Limiting employer speech.** The new Board majority moved quickly to limit an employer's ability to engage in non-coercive speech

[8] Archibald Cox, "Some Aspect of the Labor Management Relations Act of 1947," 61 Harv. L. Rev. 1, 24 (1947).

opposing unionization.[9] At issue was a New York state neutrality statute that prohibits a state contractor who receives state funds from using any portion of those funds to support or oppose unionization. The majority assumed without deciding that the state statute was pre-empted by the Act, as indeed it was. Nevertheless, against uncontroverted evidence that the statute impacted the extent of the employer's anti-union campaign, the majority declared that the employer's campaign was sufficient despite the state statutory restrictions. The majority's decision contravened settled precedent and Section 8 (c) of the Act (29 U.S.C. Section 158 (c)) by effectively deferring to a preempted state statute that imposed impermissible restrictions on employers' rights to express—as well as employees' Section 7 (29 U.S.C. Section 157) rights to receive—non-coercive information opposing unionization.

- **Stripping employees of the right to a secret ballot**. In response to the increasing use by unions of an employer's voluntary recognition based on a card check (often after a corporate campaign) and recognizing that the secret ballot election is the most reliable indicator of employee free choice, in September 2007, the Board made an incremental change in Board law.[10] The Board modified its bar to election petitions following a voluntary recognition to give employees or a rival union a 45-day window within which to challenge the recognized union's majority status with a secret ballot election provided the petition is supported by an adequate showing of interest (supported by 30% of employees).

  Within a few months of forming a majority, the current Board granted requests for review that sought to reverse this Board law and issued an unprecedented request for briefing. The Board found that the petitioners raised "compelling circumstances" warranting review despite the fact that the only reasons offered by the petitioners were the same reasons that were asserted and found insufficient by the prior

[9] *Independence Residences*, 355 NLRB No. 153 (2010) (Members Schaumber and Hayes dissenting therein).
[10] In *Dana Corp*, 351 NLRB 434 (2007)(Members Liebman and Walsh dissenting therein), 50% of employees in one case and 35% in the other filed petitions for an election within weeks of being notified of their employers' voluntary recognition of a union by card check.

Board.[11] It is widely anticipated that a decision stripping employees of this right to a secret ballot will issue before Chairman Liebman's term ends on August 27.[12]

- **Expanding the ability of unions to engage in coercive secondary activity inconsistent with the plain language of the Act.** The Board overturned decades of Board law defining unlawful secondary picketing, even though this precedent was consistently affirmed by the U.S. Supreme Court and the Federal circuit courts.[13] In addition, the Act requires no proof of actual or potential loss. It proscribes conduct that "threatens, coerces, or restrains" for a secondary object. The majority, however, ruled that absent traditional picketing—carrying signs on pickets and moving in a circular ambulatory fashion—the Board will find a violation only if the union engages in conduct that "directly caused or could reasonably be expected to directly cause, disruption of the secondary's operation."

- **Authorizing premature law suits against two states for constitutional amendments that guarantee the secret ballot election**. The same Board that gave partial effect to a New York state neutrality statute in *Independence Residences*, see fn 7, authorized premature lawsuits against Arizona and South Dakota for state constitutional amendments that appear to do no more than the Act: guarantee the secret ballot election. The Act recognizes the secret ballot election as the preferred method for determining employee free choice and guarantees it. An employer need not recognize a union based on a card check. It may insist on a secret ballot election. Similarly, under current law, employees can challenge their employer's recognition of a union based on card check.[14]

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[11] According to statistics provided by the Board's Office of the General Counsel, as of April, 2011, roughly 25% of elections held in response to employee decertification petitions resulted in the union's claim of majority status being defeated.

[12] *Rite-Aid Store 6473 - Lamons Gasket Co.*, 355 NLRB No. 157 (2010) (Members Schaumber and Hayes dissenting therein).

13 *Carpenters local 1506 (Eliason & Kurth of Arizona, Inc), 355 NLRB No. 159 (2010).* (Members Schaumber and Hayes dissenting therein).

[14] Then-Board Member Liebman filed a dissent to the Board's filing of an amicus brief in pending federal litigation that argued that a California statute was pre-empted by the Act because it required employer neutrality during a union organizing campaign. *Chamber of Commerce v. Lockyer et a*l, 225 F. Supp. 2d 1199 (D.C.Cal 2002). The decision of the District Court finding the state statute pre-empted was affirmed by the Supreme Court. *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008).

- **Re-defining an "appropriate bargaining unit."** The Board has invited amicus briefs on whether it should change decades of Board law as to what is an appropriate bargaining unit. The request was made in a case that never raised the issue.[15] Under longstanding Board law, a unit can be all the employees of the employer or something less, but the Board is considering adopting as presumptively appropriate a unit of two or more persons doing the same job in the same location. Such a change would make it easier for a union to gain access to a non-union employer: it is easier to organize 2 to 5 employees than it is 20 to 30. However, it is inconsistent with the right of workers to have a bargaining unit with sufficient collective strength to effectively negotiate with their employer; moreover, it threatens a proliferation of units and the balkanization of the workplace that will be detrimental to workers and dramatically increase a business's labor relations costs.

And now, we have the majority's proposed rule to dramatically shorten the time for Board elections as its most recent demonstration of partiality on the question of unionization. It is a startling display of the current Board's activism on an outcome long favored by organized labor. Consider this: the proposal was put forth on the majority's own initiative citing unreasonable delay but without defining what constitutes "delay" and without analyzing the very small number of representation cases in which such delay has occurred and the causes for it. Dissenting Board Member Brian Hayes observed:

> "[T]he majority makes no effort whatsoever to identify the specific causes of delay in those cases that were unreasonably delayed. Without knowing which cases they were, I cannot myself state with certainty what caused the delay in each instance, but I can say based on my experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics."[16]

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[15] *Specialty Healthcare and Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010) (Member Hayes dissenting therein).

[16] Notice of Proposed Rulemaking, Dissent at pp. 45-46.

A brief overview of the Board's current election practices and procedures and the agency's timeliness in processing election cases demonstrates that there was little need for the sweeping changes the majority proposes. And the isolated manner in which the proposed rule was crafted further detracts from its legitimacy.

E. Current Board Election Practice and Procedure

Two principal time periods are involved in the Board's representation (election) case process:

- **Pre-election:** the time from the filing of a petition to the election. Pre-election procedural and legal issues are resolved either by agreement or by a decision of the Regional Director and then the Board.
- **Overall:** the time from filing the petition to the completion of the representation case. Challenges and objections to the election are considered by the Region and then the Board.

During the pre-election period, current Board practice encourages the informal resolution of pre-election issues—including the time and place for holding the election, the form of the balloting, whether the unit sought is appropriate, unit placement, voter eligibility, and exclusion. After the petition is filed, a hearing is promptly scheduled; in 86% to 92% of all cases, elections proceed by agreement of the parties without the need for a hearing.

Under current Board procedures, pre-election issues that are not resolved by agreement of the parties are heard by a designated hearing officer agent and then decided by a Regional Director, who issues a decision after the hearing. The Board's "best practices" contemplate that hearings will commence between the 10th and 14th day.[17] The hearing may take place on several consecutive days on any of the pre-election issues, such as jurisdiction, representation showing, a question concerning representation (e.g. contract bar), unit composition and unit scope. The Regional Director either dismisses the election petition or proceeds with a Decision and Direction of Election directing an election for approximately three to four

[17] "Representation Cases Best Practices Report," Gen. Couns. Mem. 98-1, at 2 (Jan. 26, 1998).

weeks later.[18] Either party may file a request for review with the Board. In the vast majority of cases, the Board will hear and decide the request for review before the election takes place. In those few instances when the Board does not act, the election is generally held and the votes are impounded.

The pre-election hearing is not adversarial. Its purpose is to enable the hearing officer, who is an agent of the Board, to identify the issues with the assistance of the parties and develop a full record so they may be decided by the Regional Director consistent with Board law.

> "The hearing officer is an agent of the Board who has an affirmative obligation to develop a full and complete record and may, if necessary to achieve this purpose, call and question witnesses, cross-examine, and require the introduction of all relevant documents. See *Mariah, Inc.*, 322 NLRB 586 n. 1 (1996). Once on notice of a substantial issue, the hearing officer is obliged to conduct inquiry. *Pontiac Osteopathic Hospital*, 327 NLRB 1172 (1999). The hearing officer is, of course, required to be impartial rulings and in conduct." An Outline of Law and Procedure in Representation Cases, Section 3-820 Hearing Officer's Responsibilities.[19]

The agency conducts the vast majority of its elections in a remarkably timely fashion. The median time for conducting initial Board elections in Fiscal Year 2010 was 38 days; for all elections, it was 31 days; and 95% of all elections are held within 2 months. Based on my experience, in a very small number of cases, elections have been substantially delayed as the result of a union filing unfair labor practice charges that block the election or for circumstances beyond the control of the parties, such as delays by the Board in issuing a decision.

[18] When the Regional Director directs an election after a hearing, the election normally should not be scheduled prior to the 25th nor later than the 30th day after issuance of the decision to allow for the filing of requests for review with the Board. NLRB Casehandling Manual, Section 11190-11209.

[19] *See also* National Labor Relation Board's Rules and Regulations, Section 102.66.

II. Looking at the Proposed Rule and How It Was Crafted

The Board proposes to reduce the time for Board elections from the current period of roughly 6 to 8 weeks to as little as 10 to 14 days.[20] It achieves this result by substantially limiting the opportunity for a full evidentiary hearing or Board review of contested issues, by deferring resolution of most pre-election issues—some of which can impact an election's outcome—to after the election and then limiting the Board's standard of review. The process the Board proposes tilts heavily against employers' rights to engage in legitimate free speech, it threatens to deprive large numbers of employers of due process and the right to petition the government for redress of grievances.[21] It will deprive the Regional Director, the Board, and reviewing courts of an adequate record upon which to base their decisions. And at the end of the day, it is far from certain that these proposed changes will reduce the time required to process representation cases, which should be a primary goal of any electoral reform. For these reasons, in my view, the proposed rule's principal revisions are ill-conceived and misguided.

A. **The Proposed Rule Was Crafted in Isolation without Input from Key Agency Personnel or Public Discussion of its Need**

It is clear from the majority and dissenting opinions that the Board majority crafted its proposed rule in isolation. The majority appears to have assiduously avoided triggering the public meeting requirement of the Government in the Sunshine Act, 5 U.S.C. 552 b. A Board agenda with Republican Board Member, Brian Hayes, apparently was never held.[22] Under the Government in the Sunshine Act, such a meeting would have required notice and been open to the public. The majority members may have avoided deliberating among themselves because that too would have required notice and an open meeting. Presumably, the majority conducted deliberations through their staffs and in meetings of only two majority members at a time, excluding the minority member.

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[20] The 10 to 14 days' time is derived as follows: Consistent with current practice and the proposed rule, a pre-election hearing will be scheduled for seven days following the date the petition is filed. Absent an election agreement, after a one day hearing, the employer is given two days to provide the union with an Excelsior List of employees. A Final Notice of Election must be posted for at least two work days prior to the election. Although the union must have the Excelsior List for at least ten days before the election, the union can waive that requirement.

[21] Notice of Proposed Rulemaking, Dissent at p. 49.

[22] Notice of Proposed Rulemaking, Dissent at p. 43-44.

The Board also excluded key agency personnel and outside labor law practitioners whose views are routinely solicited by the Board when considering changes in its rules of procedure. The majority side-stepped the Board's Rules Revision Committee, a group of agency officials responsible for recommending and considering proposed changes in existing and proposed new rules. And the Board did not bring its proposal to the attention of the Practice and Procedures Committee of the American Bar Association, composed of experienced union-side and management-side labor lawyers, which for many years has been consulted on proposed changes in the Board's rules of practice and procedure. [23]

The Board did not seek input from those who will be most affected by the proposed rule before issuing the proposed rule, which is contrary to President Obama's Executive Order 13563. Although the Executive Order does not apply to independent agencies, the NLRB and other agencies have been "encouraged to give consideration to all of its provisions, consistent with their legal authority."[24]

All this has now been followed with a notice and comment period that meets the bare minimum requirements of the Administrative Procedure Act. 5 U.S.C. Section 553 The public has been given 60 days to comment; 14 days have been given for replies. A 2-day public hearing is scheduled for July 18 and 19, just 27 days after notice of the proposed rule was published in the Federal Register. On June 27, the agency announced that registration for the meeting must be filed four days later—by 4 p.m. on July 1. If an interested person wanted to make an oral presentation, a brief outline of the presentation must be submitted with the registration.

The manner in which the Board majority proceeded and its expedited period for public comment gives little time for consideration and comment by those most affected by the proposed rule. The dissenting member understandably took strong issue with his colleagues:

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[23] *Id*.

[24] *See* May 23, 2011, letter from Board Executive Secretary submitting the Board's Preliminary Plan to Review Significant Regulations to the OMB Office of Information and Regulatory Affairs in response to Section 6 of Executive Order 13563, available at http://www.slideshare,net/whitehouse/nation-labor-relations-board-reform-board.

> "It is utterly beside the point, and should be of little comfort to the majority, that its actions may be in technical compliance with the requirements of the Administrative Procedure Act and other regulations bearing on the rule-making process. President Obama's Memorandum on Transparency and Open Government, issued on January 21, 2009, makes clear that independent agencies have an obligation to do much more than provide minimum due process in order to ensure that our regulatory actions implement the principles of transparency, participation, and collaboration. As explained in the subsequent directive from the Director of the Office of Management and Budget, these principles form the cornerstone of an open government.
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> Sadly, my colleagues reduce that cornerstone to rubble by proceeding with a rulemaking process that is opaque, exclusionary, and adversarial. The sense of fait accompli is inescapable."[25]

B. The Proposed Rule Will Deprive Employees and Employers of Fundamental Rights that Permit an Informed Choice in a Board Election.

The proposed rule, if implemented, will deprive employers of a meaningful opportunity to express their views on unionization, which is protected under Section 8 (c) of the Act, and the employee's right under Section 7 of the Act to hear his or her employer's views and to make an informed choice. It will impermissibly limit the free and robust debate on the issue of unionization that Congress sought to ensure. As relied upon by Member Hayes in his dissent, the Supreme Court said in *Chamber of Commerce v. Brown,* supra, 554 U.S. at 67-68:

> "From one vantage, § 8(c) 'merely implements the First Amendment,' *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 80-105, pt. 2, pp. 23-24 (1947). But its enactment also manifested a 'congressional intent to encourage free debate on issues dividing labor and management.' *Linn v. Plant Guard Workers,* 383 U.S. 53, 62, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such 'free

[25] Notice of Proposed Rulemaking, Dissent at p. 44.

> debate' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word...has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272-73, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974).[26]

The union will covertly collect employee signatures on authorization cards[27] for its petition without the employer's knowledge. The predominant story that workers will hear before the election will be the union story; unlike the employer, the union can promise employees increased wages and benefits with few restraints under the law. The employee may not be told that changes in the terms and conditions of employment are the product of collective bargaining; that wages and benefits may be the same, less or more. Nor is the employee likely to hear that to be a member of the union the employee will have to support the union's political and social agenda or that the union may seek to further its own business during bargaining and ask for a neutrality card check agreement. The employee may not have been exposed to the experiences the union has had with other employers and its impact on their profitability and competitive position in the marketplace.

After achieving the requisite number of signatures, the union will select the date and time for filing the petition, catching the employer and unsolicited employees by surprise. The employer will have to prepare for an adversarial proceeding, described below, only days away and for an election as little as three or four days later. The employer will have little opportunity to become informed about the union and the issues involved, respond to union claims, and communicate with its employees on the issue of

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[26] Canadian law provides for elections in five to ten days. It is often relied upon by proponents of "quickie elections" in the United States. Canadian law, however, does not implicate the Canadian Constitution as the NLRA implicates the U. S. Constitution. And it can prove problematical to import one element of another country's labor relations law without considering all of its constituent parts.

[27] An authorization card is a form signed by an employee that typically designates a union as the employee's bargaining agent. If signed by at least 30% of employees, the union can use the authorization cards to file a petition for an election. If signed by over 50% of the employees, the union may use the cards to demand recognition by the employer. The employer does not have to recognize the union: it may, at its option, file for a secret ballot election or wait for the union to do so.

unionization. Other employees who were unaware of the union solicitations will find themselves in a similar situation.[28] They will not have enough time to clarify the facts, openly debate the issues, hear from their employer, and effectively express their concerns.

C. The Proposed Rule Replaces a Non-Adversarial Hearing Focused on Developing a Full Record for a Limited Adversarial Hearing with Formal Pleading Requirements.

As mentioned above, under current Board procedures, in the relatively small number of representation cases that require a hearing, the hearing is non-adversarial. Its purpose is for the Board agent to identify the issues with the assistance of the parties and impartially develop a full record to enable the Regional Director to issue a decision on the issues consistent with Board law.[29] The Board agent has the authority to subpoena witnesses and request documents. Prior to the hearing, the only document to be produced is a questionnaire to be completed by the employer confirming that it meets the Board's statutory jurisdictional requirements.

The proposed rule changes all of this. It requires that the employer file a detailed Statement of Position identifying the issues it wants to raise. Those issues can include:

- whether the employer is a religious organization exempt from the Act's coverage
- whether the petitioner is a labor organization
- the appropriateness of the petitioned-for unit
- exclusions from the petitioned-for unit
- the existence of a bar to the election

If the employer contends the unit is inappropriate, it is required to state the basis for its contention and to "identify the most similar unit it

[28] The proposed rules apply to all petitions for an election, including decertification petitions and petitions filed by rival unions. Since the vast majority of election petitions are filed by a union seeking to organize a unit of an employer's employees, however, and those petitions are the focus for my comments, I refer only to them.

[29] Sec. 101.20 (c) of the Board's Statement of Procedures provides in pertinent part: "The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case."

concedes is appropriate."[30] If the employer contests the eligibility of any voters, it must identify the voters and the basis of the voters' proposed exclusion, such as that they are supervisors.[31]

These issues can be varied and complex, as the Board majority readily concedes,[32] requiring inquiry and consultation, hopefully leading to a resolution in the pre-election process. But the proposed rule gives little time for that process to play out, mandating a hearing seven days from service of the petition and the Statement of Position Form "absent special circumstances."[33]

If the employer fails to raise an issue in its Statement of Position, it forfeits its right to do so.

> "No party would be permitted to offer evidence or cross-examine witnesses concerning an issue it did not raise in its Statement of Position or did not join in response to another party's Statement of Position."[34]

As to the hearing, the Board adopts for its model Rule 56 of the Federal Rules of Civil Procedure and proposes that "[t]he duty of the hearing officers [under the proposed rule] is to create an evidentiary record *concerning only genuine issues of material facts*."[35] Those are issues raised by the employer in its Statement of Position, contested by the union and on which the employer has made a sufficient offer of proof. As mentioned, under current Board procedures, the Board hearing officer is charged with impartially developing the record on the issues presented by the petition. Under the proposed rule, that burden is shifted to the employer, as the non-petitioning party, requiring that it make an offer of proof and thereafter introduce evidence on the issues it has identified.

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[30] Notice of Proposed Rulemaking at p. 25.
[31] *Id.*
[32] Notice of Proposed Rulemaking at p. 15.
[33] The Regional Director may require its completion at some time before the hearing. Notice of Proposed Rulemaking at p. 25.
[34] Notice of Proposed Rulemaking at p. 28. However, the hearing officer has the discretion to permit a party to amend the Statement of Position for good cause, such as newly discovered evidence, and during the election a party can challenge the eligibility or inclusion of a voter even if not raised in the Statement of Position.
[35] Notice of Proposed Rulemaking at p. 27.

According to the Board majority:

> "The proposed amendments would not prevent any party from presenting evidence concerning any relevant issues if there is a genuine dispute as to any material fact. In other words, the proposed amendments would accord parties full due process of law consistent with that accorded in federal courts."

The Board majority's statement cannot be taken seriously. The Board majority suggests cutting in half, if not further, the time for a hearing and now shifting to the employer the obligation to identify the issues and present evidence supporting its position in an adversarial hearing.[36] Although larger companies with in-house legal staffs may be able to respond and protect their rights in that short time frame, many of the Board's representation cases involve the employees of smaller business owners who do not have legal counsel with traditional labor law expertise or labor consultants readily available to them. Many may not have heard of the National Labor Relations Board despite the wide controversy over the agency's recent Boeing complaint.[37] Few will be familiar with the Board's arcane legal concepts such as "appropriate unit," "contract bar," or "statutory supervisor." They are not likely to have the wherewithal to contact knowledgeable labor counsel; even if they do, seven days is insufficient time to locate, engage, and prepare counsel for an effective representation.[38]

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[36] This can inure to the detriment not only of the employer but the employees and the union as well. No longer will there be an obligation on the part of the hearing officer to make sure that the record is fully developed for the Regional Director and ultimately the Board to decide the issues involved consistent with Board law. Thus, for example, the employer may claim that a lead person is ineligible to vote because he or she is a supervisor, but a fully developed record would show otherwise.

[37] The Boeing complaint alleges that the Boeing Company's opening of a new second production line in South Carolina for its highly successful 787 Dreamliner aircraft was retaliatory and seeks a Board order requiring Boeing to produce all of its 787 aircraft at its unionized facilities in Washington state. The Acting General Counsel relies on statements made by some senior Boeing executives that one of the reasons it opened a second production line in South Carolina was to avoid the economic consequences of future strikes. Although the work in South Carolina is new work, not unit work, and Boeing's collective bargaining agreement permitted Boeing to choose the location for the production of its aircraft, the Acting General Counsel nevertheless claims Boeing could not do it for "retaliatory" reasons. The complaint is unprecedented and inconsistent with controlling law.

[38] In the absence of legal counsel, small business owners may engage in unintentional, innocent, unfair labor practices. Few people would suspect that it is a violation of law to ask a long-term employee with whom you have a relationship whether he or she supports the union and the

What will happen is exactly what Member Hayes predicted in his dissent: "The proposed rules, if implemented, will unconscionably and impermissibly deprive these small business owners of legal representation and due process." [39] If the Board's proposed rule is implemented, this scenario will play out in countless workplaces across the nation, and it will undermine public trust in the fairness of Board elections. The majority's effort to draw support for its expedited hearing procedures on the summary judgment procedures of Rule 56 of the Federal Rules of Civil Procedure is decidedly unimpressive. Parties to a civil lawsuit under the Federal Rules are given an opportunity to develop their case and engage in discovery. Complaints are often amended afterwards as issues reveal themselves. Motions for summary judgment are generally filed after discovery is complete. If the non-moving party has not had an opportunity for discovery, the court will generally withhold ruling on the motion until its discovery is complete and it has had an opportunity to file an opposition or a cross motion. The situation encumbering an employer seven days after a union has filed a petition is hardly analogous.

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reasons why. The union could use such innocent unfair labor practices to extract concessions from the employer concerned the union may file charges with the Board.

[39] Notice of Proposed Rulemaking, Dissent at p. 48.

The difficulty for employers timely securing knowledgeable counsel will be compounded if the Department of Labor's proposed new interpretation of the "advice" exemption of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 433, takes effect. See "Labor Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption" that issued in the Federal Register on June 21, 2011. Historically, legal advice given to an employer by its attorney during a union organizing campaign has been treated as exempt from the LMRDA. Under the Department's proposed re-interpretation many of these legal services will be considered "persuader activities." "Under the proposed interpretation, when such a person prepares or provides a persuasive script, letter, videotape or other material or communication . . . for use by an employer in communicating with employees, the advice exemption does not apply and the duty to report is triggered." FR at p. 36. The regulations would apply to drafting or reviewing written materials and speeches for legal sufficiency so as to avoid unfair labor practices, as well as conducting supervisory training and seminars regarding union organizing, collective bargaining and converted activity, such as strikes. The current reporting requirement as a result of performing persuader activities already requires reporting not only by and for that particular client, but for all labor relations services for all clients whether or not those services involve persuader activities. Since this information is considered subject to the attorney-client privilege, it is anticipated that many attorneys will simply stop providing such advice. In sum, the new, incredibly broad interpretation of reportable persuader activities would eviscerate the current "advice exemption" and would further chill employer free speech, thus preventing employees from receiving needed information to make a fully informed decision regarding union representation.

D. The Proposed Rule Will Unfairly Constrain Employers from Exercising their Legal Right to Board Review

Under extant Board law, an employer's obligation to bargain with the union attaches from the election date. As a result, an employer acts at its peril if after an election and without bargaining with the union it changes any terms or conditions of employment ("unilateral changes"). If the Board ultimately certifies the union, the employer, at the union's request, will be required to return those changed terms and conditions to the original status quo ante.

Returning to the status quo ante can be costly and can undermine the employer's competitiveness. Making changes in terms and conditions of employment is part of an employer's normal business operations—for example, making changes to retain employees who could be lured away by a competitor's offer of higher wages or better benefits, making changes to control rising health care costs, or making changes to respond to market conditions that may require work reassignments and so forth.

The resolution of some pre-election issues will determine whether an employer has a collective bargaining obligation at all. Thus the proposed rule's shift from before to after the election of the resolution of most pre-election issues unfairly burdens an employer. In short, the employer might have to choose either to exercise its right to Board review while it continues to conduct normal business operations or to forego its right to Board review or its right to conduct normal business operations.

E. The Proposed Rule Is Likely to Result in More Elections Being Overturned.

The proposed rule, if implemented, is likely to result in an increase in the number of elections being overturned after the results have been announced, threatening to disrupt the workplace and waste the Board's and parties' time and money.

Postponing resolution of some issues—such as whether there is a bar to the election or whether the unit is appropriate—will increase the likelihood of an election being set aside after Board review.

Up until the time I left the Board in August of 2010, the Board followed a guideline generally putting an upper limit of 10% on the number of employees who could vote under challenge.[40] The reason for the rule was to lessen the likelihood that the challenged ballots would be election-determinative. And it is largely discretionary with the Regional Director whether he or she deferred some eligibility issues until after the election. The proposed rule changes all of this with a bright-line numerical rule requiring that questions concerning the eligibility of voters constituting up to 20% of the electorate must be resolved post-election. This requirement will increase the incidence of outcome-determinative challenged ballots being held for resolution after the election and which, if sustained, will require that the results of the election be set aside.[41]

Furthermore, several courts of appeal have held that if a sufficient number of challenges are sustained so that the modified bargaining unit is fundamentally different from the bargaining unit that was proposed, employees will have been denied their right to make an informed choice, requiring a new election:

> "Where employees are led to believe that they are voting on a particular bargaining unit and the bargaining unit is subsequently

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[40] In its Notice of Proposed Rulemaking, the Board majority cites *Northeast Iowa Telephone*, 341 NLRB 670, 671 (2004), for the proposition that "[t]he Board has permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters." Notice of Proposed Rulemaking at p. 53. The majority's description of *Northeast Iowa Telephone* is far off the mark. That case was unique and does not represent the norm as the Board majority (then Member Liebman and former Member Dennis Walsh) took great pains to explain. The case involved a unit of eight workers, including two managers who the employer claimed were statutory supervisors. The Regional Director permitted the managers to vote under challenge finding the "record inclusive." The employer sought review asking that the hearing be re-opened because the Regional Director scheduled the hearing when one of the two managers was recuperating from surgery and unable to testify. Over the dissent of former Chairman Robert Battista, the Board majority voted to deny review. They faulted the employer for not filing a special appeal to the Board to reschedule the hearing and held that in light of that failure and "given the case's present posture" – which would have required setting the election aside, reopening the record and ordering a new election – "resolution of the supervisory issue through the challenge procedure is the best use of the Board's limited resources." The majority concluded that it recognized "allowing 25 percent of the electorate to vote subject to challenge is not optimal." 341 NLRB at p. 671.

[41] The Board majority interprets the Act's pre-election hearing requirement; see Section 9 (c) (1), as limited to "questions of representation." Such an interpretation fights with decades of Board law that until the majority's Notice considered an "appropriate hearing" under the Act one that required consideration of all election issues and a record developed by an impartial agent of the Board.

> modified post-election, such that the bargaining units, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election." *NLRB v. Beverly Health and Rehabilitation Service, Inc.*, No. 96-2195, 1997 WL 457524 at 4 (4th Cir. 1997)(citations omitted).

F. The Proposed Rule Inappropriately Narrows the Standard of Board Review of Important Election Issues.

Currently, pre-election issues that are heard by a designated hearing officer and decided by a Regional Director may be reviewed by the Board on a request for review filed by either the union or the employer. The Board's review is a summary one based on a review of the requesting party's papers which is required to include a summary of all evidence and rulings bearing on the issues.[42] While an opposition may be filed, the Board may rule on the request without awaiting an opposition.[43] The Board will grant review only for "compelling reasons.[44]"

After the election, objections either to the conduct of the election or to conduct affecting the results of the election as well as challenges to outcome- determinative individual voters are heard and decided at the regional level. Either party may file exceptions to the region's decision with the Board which will consider the exceptions on a de novo review of the record. If the exceptions are found to have merit, the Board may overturn the election results and order a new election.

The proposed rule changes the Board's post-election scope of review from an automatic de novo review upon the filing of exceptions to a discretionary review based on "compelling reasons." This is a significant and unwise revision to long-standing Board practice and procedure.

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[42] "Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. * * * [S]aid request must contain a summary of all evidence or rulings bearing on the issue together with page citations form the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director." See Notice of Proposed Rulemaking at p. 73.

[43] *Id*

[44] *See* Notice of Proposed Rulemaking at p. 72, National Labor Relations Board, Rules and Regulations, Section 102.67 (c).

According to the majority, it "anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service."[45] The only reason offered by the majority for such a significant change is Board law is the assertion, that it "would eliminate the most significant source of administrative delay in the finality of election results."[46] The majority's assertion is unaccompanied by any evidence supporting it.

The Board does not explain the significance of its comment that it anticipates a higher number of final decisions on election disputes will be made by "members of the career civil service." The concern of some with such a proposed change will not be easily assuaged given the fact that the highly controversial Boeing complaint was recently-filed by a long-time member of the Board's career civil service.

The two principal functions of the National Labor Relations Board are to enforce the unfair labor practice provisions of Section 8 of the Act and to hold elections pursuant to Section 9 of the Act to determine whether a majority of workers in an appropriate unit wish to be represented by a labor organization. Board's elections have long been considered its "crown jewel." Section 3 (b) of the Act permits the Board to delegate its authority to conduct elections to regional directors but subject to subsequent Board review.

For decades pre-election issues heard and decided at the regional level were subject to the Board's discretionary standard of review and its summary process. The post-election issues that directly impact on the results of the election and involve the integrity of the election process itself—consideration of outcome-determinative challenges to individual voters, as well as objections to the conduct of the election and to conduct affecting the results of the election—were subject to de novo review by the Board upon the filing of exceptions by either party. The discretionary highly deferential standard of review and its summary process that being proposed by the majority for all contested election issues is inappropriate. The post-election issues currently heard automatically on exceptions go to the heart of employees' right under Section 7 of the Act to make a free and uncoerced

[45] Notice of Proposed Rulemaking at p.37.
[46] Notice of Proposed Rulemaking at p.37, n. 56.

choice for or against unionization. Final agency decisions should not be entrusted to "career civil servants" but to presidential appointees who have been entrusted with the agency's quasi-judicial functions.

A regional director's pre-election consideration of an eligibility issue is less significant than when that same issue is presents itself post-election. Regional directors defer consideration of eligibility issues to post-election challenges because they raise difficult factual or legal issues, the consideration of which may delay the election. When they are subsequently considered post-election, their complexity remains but they have added significance, only outcome-determinative challenges are considered.

Objections over the conduct of an election are generally investigated by a region that did not conduct the election. This avoids a conflict with the region alleged to have been responsible for the misconduct investigating itself. Nevertheless, the party that filed the objection may be concerned that one "career civil servant" may not want to offend another. Automatic de novo review by the Board alleviates that fear and preserves public confidence in the integrity of the election process.

Conduct affecting the results of an election—pre-election misconduct by either the union, the employer or others, that can reasonably be expected to have affected the election outcome—deprive employees of *the* fundamental employee rights the Act granted, "the right to self-organization, to form, join, or assist a labor organization . . . and . . . the right to refrain from any and all such activity," *see* 29 U.S.C. Section 157, and intended the Board to protect. If the party filing an exception from a Regional Director's decision reasonably believes that the Regional Director erred, the Board should not look for "compelling reasons" requiring its review, it should automatically review such objections de novo.

Finally, the review of contested issues that was traditionally considered post-election, on a discretionary request for review standard with its summary procedures, is less-apt to be dissented to. Such dissents are critical for a reviewing court less familiar with the intricacies of Board law.

III. CONCLUSION

The above are my views on what I believe to be an increasing politicization of the Board that began a few decades ago and the reasons I

attribute to it. Oscillating Board law and the public perception that the Board members serve a constituency undermines the Board's credibility and its effectiveness as an instrument of good government. At a time of enormous economic anxiety, many of the Board's recent actions and decisions reverse long-standing Board law and procedures and destabilize, or threaten to destabilize, labor-management relations. They can, and I believe will, impact on the willingness of entrepreneurs and other businesses to "make here what they sell here."

The Board's proposed rule to shorten the time for a Board election proposes drastic changes in election law, practice and procedures that have been in place and guided the parties for many decades. It will take time for the thought, discussion and debate necessary to fully consider all the elements of the proposed rule and flesh out their implications. My comments are preliminary in that they reflect my opposition to the principal provisions of the proposal. There are a variety of other provisions, however, which I have not had an opportunity to fully consider that raise concern, such as, the elimination of a Regional Director's ability to transfer cases to the board, the required disclosure of employees' personal e-mail addresses and the requirement that pre-election hearings "continue day to day until completed absent extraordinary circumstances." [47]

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the committee may have.

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[47] Notice of Proposed Rulemaking at p. 27.