

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

RIN 3142-AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the provisions of the National Labor Relations Act (the Act) which protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. While retaining the essentials of existing representation case procedures, these amendments modify them to permit parties additional time to comply with various pre-election requirements instituted in 2015, to clarify and reinstate some procedures that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues prior to an election, and to make several other changes the Board deems to be appropriate policy choices that better balance the interest in the expeditious processing of questions of representation with the efficient, fair, and accurate resolution of questions of representation.

DATES: This rule is effective April 16, 2020.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board administers the National Labor Relations Act which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and their employer are unable to agree whether employees should be represented for purposes of

collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board the authority to resolve the question of representation. The Supreme Court has recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226 (1940).

Representation case procedures are set forth in the statute, in Board regulations, and in Board caselaw.¹ The Board’s General Counsel has also prepared a non-binding Casehandling Manual describing representation case procedures in detail.²

The Act itself sets forth only the basic steps for resolving a question of representation. First, a petition is filed by an employee, a labor organization, or an employer. Second, the Board investigates a petition and, if it has reasonable cause to believe that a question of representation exists, provides an appropriate hearing upon due notice, unless the parties agree that an election should be conducted and agree concerning election details. Hearing officers may conduct such pre-election hearings, but they may not make any recommendations with respect to them. Third, if, based on the record of the hearing, the Board finds that a question of representation exists, an election by secret ballot is conducted in an appropriate unit. Fourth, the results of the election are certified. The Act permits the Board to delegate its authority to NLRB regional directors. The Act also provides that, upon request, the Board may review any action of the regional director, but such review does not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

Within this general framework, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at

¹ The Board’s binding rules of representation procedure are found primarily in 29 CFR part 102, subpart D. Additional rules created by adjudication are found throughout the corpus of Board decisional law. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 770, 777, 779 (1969).

² NLRB Casehandling Manual (Part Two) Representation Proceedings.

331. In promulgating and applying representation rules and regulations, the Board, the General Counsel³ and the agency’s regional directors have, in addition to seeking efficient and prompt resolution of representation cases, sought to guarantee fair and accurate voting, to achieve transparency and uniformity in the Board’s procedures, and to update them in light of technological advances. See, e.g., 79 FR 74308 (Dec. 15, 2014).

From time to time, the Board has revised its representation procedures to better effectuate these various purposes. In 2014, the Board promulgated a broad revision to those procedures, making 25 amendments in existing rules that, among other things, imposed a variety of new procedural requirements on the parties, limited the scope of pre-election hearings, and significantly contracted the timeline between the filing of a petition and the election. Certain of these amendments were controversial at the time and have remained subjects of frequent criticism since their implementation. For example, various of the Board’s stakeholders have expressed concern that the current default timeframe from the filing of a petition to the pre-election hearing is too short a time in which to meet the various new obligations triggered by the filing of a petition while also adequately preparing for the hearing; that the current procedures’ encouragement of deferral of disputes concerning unit scope and voter eligibility results in less fair and informed votes; and that parties may only submit post-hearing briefs when the regional director permits them to do so. Based on these concerns, as well as our independent review of the 2014 amendments, the final rule modifies those amendments in several respects—and makes further refinements that the Board believes will further clarify and improve representation case procedures—as discussed below.

II. List of Amendments

This list provides a concise statement of the ways in which this final rule changes or codifies current practice, and the general reasoning in support. It is not “an elaborate analysis of [the] rules or of the detailed considerations upon which they are based”; rather, it “is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.”⁴ As this list shows, the amendments constitute discrete

³ The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

⁴ S. Rep. No. 752, at 225 (1945).

modifications responding to particularized problems and concerns.⁵ All of these matters are discussed in greater detail below.

1. The pre-election hearing will generally be scheduled to open 14 business days from notice of the hearing, and regional directors will have discretion to postpone the opening of the hearing for good cause. Under the prior rules, pre-election hearings were generally scheduled to open 8 calendar days from the notice of hearing. The additional time will permit parties to more easily manage the obligations imposed on them by the filing of a petition and to better prepare for the hearing, thus promoting orderly litigation. The additional time is also necessary to accommodate changes to the Statement of Position requirement (summarized below); in conjunction with those changes, the additional time will also help facilitate election agreements and further promote orderly litigation.

2. The employer will now be required to post and distribute the Notice of Petition for Election within 5 business days after service of the notice of hearing. The prior rules required posting and distribution within 2 business days. The additional time will permit employers to balance this requirement with the other obligations imposed on them by the filing of a petition, and—in conjunction with the additional time between the notice and opening of the hearing—will guarantee that employees and parties have the benefit of the Notice of Petition for Election for a longer period of time prior to the opening of the hearing than is currently the case.

3. Non-petitioning parties are now required to file and serve the Statement of Position within 8 business days after service of the notice of hearing, and regional directors will have the discretion to permit additional time for filing and service for good cause. Non-petitioning parties were formerly required to file and serve the Statement of Position 1 day before the opening of

the pre-election hearing (typically 7 calendar days after service of the notice of hearing). The additional time will permit non-petitioning parties more time to balance this requirement with the other obligations imposed on them by the filing of a petition, and it will also permit them slightly more time to prepare the Statement of Position, which will in turn promote orderly litigation.

4. The petitioner will also be required to file and serve a Statement of Position on the other parties responding to the issues raised by any non-petitioning party in a Statement of Position. The responsive Statement of Position will be due at noon 3 business days before the hearing is scheduled to open (which is also 3 business days after the initial Statement(s) of Position must be received). Timely amendments to the responsive statement may be made on a showing of good cause. The prior rules required the petitioner to respond orally to the Statement(s) of Position at the start of the pre-election hearing. Requiring the response in writing prior to the hearing will facilitate election agreements or result in more orderly litigation by narrowing and focusing the issues to be litigated at the pre-election hearing.

5. Although acknowledging that the primary purpose of the pre-election hearing is to determine whether there is a question of representation, disputes concerning unit scope and voter eligibility—including issues of supervisory status—will now normally be litigated at the pre-election hearing and resolved by the regional director before an election is directed. The parties may, however, agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. The prior rules provided that disputes “concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.” The final rule represents a return to the Board’s procedures prior to the 2014 amendments, and it will promote fair and accurate voting as well as transparency by better defining the unit in question prior to the election. Further, by encouraging regional directors to resolve issues such as supervisory status prior to directing an election, the final rule will give better guidance to the employees and parties and will help avoid conduct that may give rise to objections or unfair labor practices. At the same time, expressly permitting the parties to agree to defer litigation on such issues continues to honor the Act’s fundamental interest in

encouraging agreement between parties where possible, which promotes promptness and efficiency. The choice is theirs, not mandated by the Board.

6. The right of parties to file a post-hearing brief with the regional director following pre-election hearings has been restored and extended to post-election hearings as well. Such briefs will be due within 5 business days of the close of the hearing, although hearing officers may grant an extension of up to 10 additional business days for good cause. Under the prior rules, such briefs were permitted only upon special permission of the regional director. Permitting such briefs as a matter of right after all hearings will enable parties more time to craft and narrow their arguments, which will in turn assist the regional director (and the hearing officer, in post-election proceedings) in focusing on the critical facts, issues, and arguments, thereby promoting orderly litigation and more efficient resolution of disputes. Extending the right to file post-hearing briefs to post-election proceedings also promotes uniformity.

7. The regional director’s discretion to issue a Notice of Election subsequent to issuing a direction of election is emphasized. The prior rules provided that regional directors “ordinarily will” specify election details in the direction of election. Reemphasizing the regional directors’ discretion in this area will eliminate confusion that may have led to unnecessary litigation and may facilitate faster issuance of decisions and directions of election in some cases, although the Board anticipates that regional directors will still “ordinarily” include the election details in the direction of election.

8. The regional director will continue to schedule the election for the earliest date practicable, but—absent waiver by the parties—normally will not schedule an election before the 20th business day after the date of the direction of election. As explained in item nine below, this period will permit the Board to rule upon certain types of requests for review prior to the election. The prior rules simply provided that the regional director “shall schedule the election for the earliest date practicable.” The final rule is largely consistent with Board procedures prior to the 2014 amendments, which provided that the regional director would normally schedule an election 25 to 30 days after the issuance of the direction of election. Permitting the Board to rule on disputes prior to the election will reduce the number of cases in which issues remain unresolved at the time of the election, thereby promoting orderly litigation,

⁵ In accordance with the discrete character of the matters addressed by each of the amendments listed, the Board hereby concludes that it would adopt each of these amendments individually, or in any combination, regardless of whether any of the other amendments were made, except as expressly noted in the more detailed discussion of the timelines set forth in § 102.63 below. For this reason, the amendments are severable. They are also independent of other representation case procedure amendments addressing election protection issues that have been proposed in a separate Notice of Proposed Rulemaking. See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 84 FR 39930 *et seq.* (proposed Aug. 12, 2019).

transparency, and fair and accurate voting.

9. Where a request for review of a direction of election is filed within 10 business days of that direction, if the Board has not ruled on the request, or has granted it, before the conclusion of the election, ballots whose validity might be affected by the Board's ruling on the request or decision on review will be segregated and all ballots will be impounded and remain unopened pending such ruling or decision. A party may still file a request for review of a direction of election more than 10 business days after the direction, but the pendency of such a request for review will not require impoundment of the ballots. This represents a partial return to the Board's procedures prior to the 2014 amendments, which removed the provision for automatic impoundment. By reinstating automatic impoundment in these narrow circumstances, the final rule 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. Consistent with the 2014 amendments, however, parties remain free to wait to file a request for review until after the election has been conducted and the ballots counted. By preserving this option, which encourages parties to wait to see whether the results of the election moot the issues for which they would otherwise seek review, the final rule also continues to promote efficiency.

10. Formatting and procedural requirements for all types of requests for reviews have been systematized. All requests for review and oppositions thereto are now subject to the same formatting requirements. Oppositions are now explicitly permitted in response to requests for review filed pursuant to § 102.71. And the practice of permitting replies to oppositions and briefs on review only upon special leave of the Board has been codified. All of these provisions are consistent with the Board's longstanding practice and promote transparency and uniformity.

11. A party may not request review of only part of a regional director's action in one request for review and subsequently request review of another part of that same action. The prior rule was not clear whether parties were permitted to proceed in such a fashion. Disallowing such a piecemeal approach promotes orderly litigation, administrative efficiency, and more expeditious resolution of disputes.

12. The employer now has 5 business days to furnish the required voter list following the issuance of the direction of election. Under the prior rule, the

employer had only 2 business days to provide the list. Permitting additional time for the voter list will increase the accuracy of such lists, promoting transparency and efficiency at the election and reducing the possibility of litigation over the list.

13. In selecting election observers, whenever possible a party will now select a current member of the voting unit; when no such individual is available, a party should select a current nonsupervisory employee. The prior rules simply provide that parties may be represented by observers. Providing guidance for the selection of observers promotes uniformity and transparency and will reduce litigation over parties' choices of observers and thus promote administrative efficiency.

14. The regional director will no longer certify the results of an election if a request for review is pending or before the time has passed during which a request for review could be filed. Under the prior rules, regional directors were required to certify election results despite the pendency or possibility of a request for review; indeed, in cases where a certification issued, requests for review could be filed up until 14 days after the issuance of the certification. As a result, a certified union would often demand bargaining and file unfair labor practice charges alleging an unlawful refusal to bargain even as the Board considered a request for review that, if granted, could render the certification a nullity. By eliminating the issuance of certifications until after a request for review has been ruled on, or until after the time for filing a request for review has passed, the final rule eliminates confusion among the parties and employees and promotes orderly litigation of both representation and consequent unfair labor practice cases. To promote transparency and uniformity, the final rule also provides a definition of "final disposition."

15. The final rule also makes a number of incidental changes in terminology, and updates internal cross-references, consistent with earlier changes that were effective on March 6, 2017. See 82 FR 11748. In addition, for the sake of uniformity and transparency within the representation case procedures, the Board has converted all time periods in subpart D to business days, and it has also updated § 102.2(a) to define how business days are calculated (including clarification that only *federal* holidays are implicated in time period calculations).

III. General Matters

Before explaining the specific provisions of the final rule, the Board

addresses several general issues: (a) The Board's rulemaking authority and the need to amend the regulations generally; (b) the decision to implement the final rule without notice and comment; (c) the length of the timeline for processing of contested cases that will result from the final rule; and (d) global changes made in the representation case procedures, including the recasting of all time periods in terms of business days.

A. The Board's Rulemaking Authority and the Desirability of the Final Rule

Congress delegated both general and specific rulemaking authority to the Board. Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board "shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act . . . such rules and regulations as may be necessary to carry out the provisions of this Act." In addition, Section 9(c), 29 U.S.C. 159(c)(1), specifically contemplates rules concerning representation case procedures, stating that elections will be held "in accordance with such regulations as may be prescribed by the Board."

The Supreme Court unanimously held in *American Hospital Association v. NLRB*, 499 U.S. 606, 609–610 (1991), that the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290 n.21 (1974); *AFL v. NLRB*, 308 U.S. 401, 409 (1940). "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

In *A.J. Tower*, 329 U.S. at 330, the Supreme Court noted that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees." The Act charges the Board to "promulgate rules and regulations in order that employees' votes may be

recorded accurately, efficiently and speedily.” Id. at 331. As the Eleventh Circuit stated:

We draw two lessons from *A.J. Tower*: (1) The Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower*, the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certaineed Corp. v. NLRB, 714 F.2d 1042, 1053 (11th Cir. 1983). As the Board stated in a prior rulemaking, the interests to be balanced in effectuating the purposes of the Act include timeliness, efficiency, fair and accurate voting, transparency, uniformity, and adapting to new technology. 79 FR 74315–74316.

Agencies have the authority to reconsider past decisions and rules and to retain, revise, replace, and rescind decisions and rules. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–515 (2009); *Motor Vehicle Manufacturers Ass’n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); *National Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038–1039, 1043 (D.C. Cir. 2012). As indicated above, the Act expressly contemplates that the Board will, from time to time, amend (or even rescind) its rules and regulations. 29 U.S.C. 156. In keeping with this congressional mandate, the Board has a “longstanding practice of incrementally evaluating and improving its processes” and, in keeping with that practice, has repeatedly amended its representation case procedures in a continuing effort to improve them. 79 FR 74310, 74314. “Past improvements do not and should not preclude the Board’s consideration and adoption of further improvements.” Id. at 74316–74317. Of course, revisions to existing rules should not and cannot be undertaken for arbitrary reasons; an agency must show that procedural changes constitute a rational means for achieving the changes’ stated objectives and must fairly account for any benefits that may be lost as a result of the change. See *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 351–352 (1st Cir. 2004) (citing *State Farm*, 463 U.S. 29, 43–44).

This final rule is therefore being undertaken pursuant to the Board’s clear regulatory authority to change its own representation case procedures and is firmly rooted in the Board’s longstanding practice of evaluating and improving its representation case

procedures. In particular, the final rule seeks to improve upon the most recent amendments to the representation case procedures, which were adopted on December 15, 2014, and became effective April 14, 2015. 79 FR 74308 *et seq.* Beginning with the responses to the 2011 Notice of Proposed Rulemaking, which ultimately led to the adoption of the 2014 amendments,⁶ and continuing to the present, certain provisions of the amendments have generated much controversy, spawning tens of thousands of comments (ranging from sharply critical to glowingly positive) and a series of dissenting opinions in both rulemaking and adjudicative proceedings.⁷ Among the most controversial aspects of the 2014 amendments were:

- The substantial reduction of time between the filing of a petition and the conduct of the pre-election hearing in contested cases owing to the mandate that hearings usually open 8 days after the issuance of a notice of hearing;
- the requirement that the non-petitioning party or parties file a detailed Statement of Position at noon on the business day before the opening of the pre-election hearing (on pain of waiving any arguments not raised in the Statement of Position);

⁶ The 2014 amendments were the result of a lengthy deliberative process that commenced with a Notice of Proposed Rulemaking issued on June 22, 2011. 76 FR 36812 *et seq.* Following the 2011 comment period, which included a public hearing and public deliberations by the Board regarding whether to draft and issue a final rule, a final rule was issued on December 22, 2011. 76 FR 80138 *et seq.* A Federal court later held that the Board had lacked a quorum in issuing the 2011 final rule. See *Chamber of Commerce of the U.S. v. NLRB*, 879 F.Supp.2d 18, 28–30 (D.D.C. 2012). A properly-constituted Board then issued a proposed rule on February 6, 2014, under the same docket number as the prior NPRM and containing the same proposals. 79 FR 7318 *et seq.* Following another comment period, on December 15, 2014, a final rule issued. 79 FR 74308 *et seq.* The 2014 amendments were upheld in the face of Constitutional and statutory challenges to its facial validity. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States of America v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 2015). We note that our revisions to some of those amendments do not rely in any way on the arguments rejected by the courts, particularly the due process and First Amendment arguments made by petitioners in those proceedings.

⁷ See 76 FR 36829–36833 (dissenting view of Member Brian E. Hayes); 79 FR 7337–7349 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III); 79 FR 74430–74460 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III); *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016) (then-Member Miscimarra, concurring in part and dissenting in part); *Yale University*, 365 NLRB No. 40 (2017) (then-Acting Chairman Miscimarra, dissenting); *European Imports, Inc.*, 365 NLRB No. 41 (2017) (then-Acting Chairman Miscimarra, dissenting); *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017) (Chairman Miscimarra, dissenting in part).

• the dramatic curtailment of the scope of pre-election hearings occasioned by the provision that disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated and resolved before an election;

- the elimination of the right of parties to file post-hearing briefs following pre-election hearings;
- the elimination of the 25 to 30 day period between a decision and direction of election and the conduct of the election, which previously permitted the Board to rule on requests for review of the decision and direction of election prior to the conduct of the election, along with the automatic impoundment of ballots that resulted when the Board had not yet ruled on, or had granted, a request for review before the conduct of the election;

- the reduction of the time for an employer to produce the required voter list from 7 days to 2 business days; and
- the implicit provision that, in virtually all cases, regional directors would issue a certification of results (including, where appropriate, a certification of representative) notwithstanding that a request for review was pending before, or could still be timely filed with, the Board.

As explained in more detail below, the Board has concluded that each of the foregoing provisions should be modified in order to strike a better balance among the competing interests the Board’s representation procedures are designed to serve.⁸

It should be stated here, at the outset, that the Board is *not* rescinding the 2014 amendments in their entirety. Indeed, for the most part the final rule leaves many of the 2014 amendments undisturbed, including some that were the subject of considerable debate prior to and after their enactment. Rather, the final rule very much follows in the footsteps of the 2014 amendments by making targeted revisions designed to address specific, identified concerns and problems. Further, although many of the concerns and problems the final rule addresses are inextricably linked to the 2014 amendments, many others are entirely unrelated to the 2014 amendments. In this regard, the final rule also clarifies imprecisions in the wording of the regulations that predate the 2014 amendments, resolves asymmetries between related provisions that prior rulemakings have apparently overlooked, and introduces several

⁸ We recognize that the procedural issues addressed here are not the only controversial aspects of the 2014 amendments and that it may be appropriate to address others separately in future proceedings, including the contents of the voter list.

entirely new innovations that the Board believes will facilitate more fairness,⁹ accuracy, orderly litigation, and efficiency in case processing.

In sum, this final rule is well within the Board's "wide degree of discretion[ary]"¹⁰ authority to set procedural rules for representation elections. The Board has determined that now is the proper time not only to address problems and concerns related to the 2014 amendments, but also to address other issues unrelated to the 2014 amendments. And each change set forth in this document is part of the Board's ongoing process of continually evaluating and improving its procedures to better effectuate the purposes of the Act.

B. The Decision To Implement the Final Rule Without Notice and Comment

The 2014 amendments resulted from a deliberative process that included two Notices of Proposed Rulemaking, that accepted comments on those proposals for a total of 141 days, and that conducted two public hearings over a total of 4 days.¹¹ This process yielded tens of thousands of comments and more than a thousand transcript pages of oral commentary. Much of the preamble to the 2014 amendments is devoted to summarizing and responding to these comments.

The Board has elected to take a different approach in this proceeding. First, the final rule is procedural as defined in 5 U.S.C. 553(b)(A), and is therefore exempt from notice and comment. Second, although foregoing notice and comment deviates from the process used in 2014, it is consistent with the Board's general approach in this area. As the explanation for the 2014 amendments itself observed, "the Board has amended its representation case procedures more than three dozen times without prior notice or request for public comment," and never before 2011 had the Board engaged in notice and comment rulemaking on representation case procedures. 79 FR 74310–74311. Third, despite having used notice-and-comment rulemaking, the explanation for the 2014 amendments was at pains to emphasize

that this process was not required by law. See 79 FR 74310–74313. Fourth, the fact that the final rule modifies certain of the 2014 amendments that were adopted after notice-and-comment rulemaking in no way requires notice-and-comment rulemaking now. The Board observed in 2014 that "[a]gencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience . . . nor adopt procedures suited to the precise question at stake," 79 FR 74313, and the Supreme Court has stated that if "an agency is not required to use notice-and-comment procedures to issue an initial . . . rule, it is also not required to use those procedures when it amends or repeals that . . . rule." *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, 1206 (2015). As such, the Board finds that notice and public procedure on this final rule are unnecessary.¹²

C. The Lengthened Timeline in Contested Cases

For contested cases, several provisions of the final rule will, both individually and taken together, result in a lengthening of the median time from the filing of a petition to the conduct of an election. As noted above, the Supreme Court has identified speed in recording employees' votes as one interest the Board's representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board's and Congress's emphasis on the need for expedition in representation cases.¹³ Promoting prompt elections by reducing unnecessary delay was also among the primary concerns underlying the 2014 amendments, and many of those amendments worked individually and in conjunction with one another to reduce the time between the filing of a petition and the conduct of an election. This is not to suggest, as have some critics of the 2014 amendments, that the 2014 amendments were solely

concerned with speed; to the contrary, the Board in 2014 clearly sought to serve and balance many different interests.¹⁴

It does appear, however, that speed in the electoral process was a very important consideration and has been the main tangible effect of the more controversial 2014 amendments. In this regard, the Board's statistics demonstrate that the median time between the filing of a petition and the election has been significantly reduced since the 2014 amendments became effective. This is true of both contested cases and those in which the parties reach an election agreement.¹⁵ In other respects, however, it appears that the 2014 amendments have not resulted in a significant departure from the pre-2014 status quo. In this regard, the overall rate at which parties reach election agreements remains more or less unchanged.¹⁶ So too the rate at which unions win elections.¹⁷ Based on this state of affairs, it is reasonable to consider whether these gains in speed have come at the expense of other

¹⁴ A cursory inspection of the supplementary information for the 2014 amendments demonstrates that speed was not the sole interest with which the Board was concerned in that proceeding. See, e.g., 79 FR at 74315–74316.

¹⁵ In FY14, the last full fiscal year under the former rules, the median number of days from a petition to an election was 37 days in cases where the parties reached an election agreement, 59 days in contested cases, and 38 days overall; in FY16, the first full fiscal year in which the 2014 amendments were in effect, the median number of days from a petition to an election was 23 days in cases with an election agreement, 36 days in contested cases, and 23 days overall. The FY14 figures are consistent with data going back to FY09; the FY16 figures are consistent with FY17 and FY18. See "Median Days from Petition to Election," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election>.

¹⁶ 91.3% of all elections were conducted pursuant to an election agreement in FY19. "Percentage of Elections Conducted Pursuant to Election Agreements in FY19," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election>. According to data the Board supplied to Senator Murray and Representatives Sablan, Scott, and Norcross by letter dated February 15, 2018, prior to the 2014 amendments taking effect the election agreement rate was 93% (7/6/12 to 8/13/13), 91% (4/14/13 to 4/13/14), and 92% (4/14/14 to 4/13/15). After the amendments took effect, the stipulation rate was 92% (4/14/15 to 4/13/16), 93% (4/14/16 to 4/13/17), and 92% (4/15/17 to 12/31/17).

¹⁷ See "Representation Petitions—RC," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>; "Decertification Petitions—RD," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/decertification-petitions-rd>; "Employer-Filed Petitions—RM," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/employer-filed-petitions-rm>. Analyzing the data posted on these sites, the overall union win rate in FY09 was 63.7%; the overall union win rate in FY18 was a remarkably similar 65.0%. In between, the win rate ranged from a low of 60.5% in FY13 to a high of 68.4% in FY16.

⁹ We emphasize that our references to "fairness" throughout this document are not to be confused with the legal concept of minimum "due process." Clearly, the Board's discretion to provide a balanced regulatory scheme for the conduct of representation elections is not limited to assuring only the minimal procedural access that the Constitution requires.

¹⁰ *A.J. Tower*, 329 U.S. at 330.

¹¹ Of course, the overall length of proceedings and volume of evidence adduced was the unintended consequence of the judicial invalidation of the 2011 Final Rule. See fn. 6 supra.

¹² 5 U.S.C. 553(b)(A). We note here that on December 14, 2017, the Board issued a Request for Information inviting information as to whether the 2014 amendments should be retained without change, retained with modifications, or rescinded. 82 FR 58783 *et seq.* We emphasize here that we are not treating the responses to the 2017 Request for Information as notice-and-comment rulemaking. As the Request for Information itself emphasized, the Board was merely seeking information; it was not engaged in rulemaking. None of the procedural changes that we make today are premised on the responses to the Request for Information; indeed, we would make each of these changes irrespective of the existence of the Request for Information.

¹³ See, e.g., *Northeastern University*, 261 NLRB 1001, 1002 (1982), *enforced*, 707 F.2d 15 (1st Cir. 1983); Senate Committee on the Judiciary, comparative print on revision of S. 7, 79th Cong., 1st Sess. 7 (1945) (discussing 5 U.S.C. 554(a)(6)).

relevant interests. Based on our review of our current representation case procedures, Congressional policy, and concerns that have been previously and repeatedly voiced about the current procedures, we conclude that they have.

Our reasoning for modifying the individual provisions that cumulatively result in more time between the filing of the petition and the conduct of the election in contested cases is set forth in our explanation for each individual change, but we emphasize here that we are not expanding this time period for its own sake. To the contrary, this is simply an incident of our conclusion that other fundamental interests and purposes of the Act can and should be served by modifying these provisions. As previously noted, beyond the interest in speed, the Board's interests include efficiency, fair and accurate voting, and transparency and uniformity, among others. The provisions instituted in this document that will expand the time between petition and election serve each of these interests.

For example, more time will promote fair and accurate voting. As noted earlier, the Eleventh Circuit has interpreted the accurate and efficient recording of employee votes to include "certainty and finality of election results." *Certainited Corp.*, supra at 1053. By permitting the parties—where they cannot otherwise agree on resolving or deferring such matters—to litigate issues of unit scope and employee eligibility at the pre-election hearing, by expecting the Regional Director to resolve these issues before proceeding to an election, and by providing time for the Board to entertain a timely-filed request for review of the regional director's resolution prior to the election, the final rule promotes fair and accurate voting by ensuring that the employees, at the time they cast their votes, know the contours of the unit in which they are voting. Further, by permitting litigation of these issues prior to the election, instead of deferring them until after the election, the final rule removes the pendency of such issues as a barrier to reaching certainty and finality of election results. Under the 2014 amendments, such issues could linger on after the election for weeks, months, or even years before being resolved. This state of affairs plainly did not promote certainty and finality.

Relaxing the timelines instituted by the 2014 amendments also promotes transparency and uniformity. Providing employees with more detailed knowledge of the contours of the voting unit, as well as resolving eligibility issues, self-evidently promotes transparency; leaving issues of unit

scope and employee eligibility unresolved until after an election (absent agreement of the parties to do so) clearly does a disservice to transparency. Relatedly, resolving issues such as supervisory status before the election ensures that the parties know who speaks for management and whose actions during the election campaign could give rise to allegations of objectionable conduct or unfair labor practice charges. Permitting non-petitioning parties slightly more time to submit their Statements of Position, requiring petitioning parties to file a responsive Statement of Position, and providing all parties slightly more time to prepare for the pre-election hearing also promotes a sense of overall fairness in representation proceedings, which also serves the purpose of transparency. And impounding ballots while a pre-election request for review remains pending also promotes transparency by avoiding the confusion that will likely follow the publicization of election results that may be nullified or modified by the Board's ruling on the pending request for review. In addition, the various provisions of the final rule work together to provide parties with a more definite, predictable timeline between the filing of the petition and the conduct of the election. In this regard, the final rule provides that the election will be scheduled sometime after the 20th business day from the direction of election, whereas the 2014 amendments stated only that the election would be scheduled "as soon as practicable." Likewise, the final rule promotes uniformity by guaranteeing the right to file post-hearing briefs, instead of permitting briefing only upon the discretion of the regional director (or the hearing officer in post-election proceedings).

Moreover, despite relaxing the election timeline, the final rule also serves the purpose of efficiency in a variety of ways.¹⁸ As with accuracy, the Eleventh Circuit has indicated that efficiency carries connotations of certainty and finality. *Certainited Corp.*, supra at 1053. On that note, it is worth emphasizing that the Board is charged with the expeditious resolution of questions of representation. The mere fact that elections are taking place

quickly does not necessarily mean that this speed is promoting finality or the most efficient resolution of the question of representation.¹⁹ Thus, by providing time between the direction and conduct of the election for the Board to resolve disputed election issues, should a party timely seek review during that time period, the final rule in fact promotes efficiency and expeditious final resolution of the question of representation, even if the election itself is not conducted as quickly as it may have been under the 2014 amendments. Likewise, although it is true that some pre-election issues need not be resolved in order to determine the existence of a question of representation, litigating those issues at the pre-election hearing (in the absence of the parties agreeing to defer them) will nevertheless contribute to a more efficient resolution of the question of representation by either resolving those issues prior to the election, leading to faster finality of the result, or at least permitting faster post-election resolution of those issues by creating a record before the election has been conducted.²⁰ And resolving issues

¹⁹For example, in *The Boeing Co.*, 368 NLRB No. 67 (2019), an election took place on May 31, 2018, but the Board ultimately granted review, reversed the Regional Director's finding that the petitioned-for unit was appropriate, and dismissed the petition on September 9, 2019. Similarly, in *Atlantic City Electric Co.*, Case No. 04-RC-221319, an election took place on June 25, 2018; the Board granted review on December 13, 2018, and affirmed the Regional Director's decision and direction of election on November 18, 2019. And in *Ohio College Preparatory School*, Case No. 08-RC-199371, an election was conducted on June 5, 2017; the Regional Director overruled objections that had been sent to hearing on March 6, 2018, and certified the Petitioner; the Board granted review, reversed the Regional Director, and remanded for a second election on July 30, 2018; and the second election (scheduled for August 23, 2018) was cancelled after the Petitioner withdrew its petition two days before the second election. In all three cases, then, despite their varied procedural conclusions, the questions of representation remained unresolved months after the election was conducted. And this phenomenon is not limited to cases in which the Board has granted review. Thus, in *Bio-Medical Applications of Alabama, Inc.*, Case No. 15-RC-201753, an election was conducted on August 2-3, 2017; timely objections were filed, but the Regional Director did not dismiss them until July 19, 2018, just short of a year after the election (the Board subsequently denied a request for review of the dismissal of objections on October 1, 2018).

²⁰Although it is true that in some cases the results of the election may obviate the need to address certain questions of unit scope or voter eligibility, it is impossible to know in advance whether this will be the case, and in many cases the election results are such that these issues, if deferred, will still need to be addressed after the election. In such situations, little efficiency has been gained by the quick conduct of the election, given that certainty and finality must wait until the conclusion of post-election litigation over issues that could have been decided before the election. See, e.g., *Detroit 90/90 and Axios, Inc.*, Case 07-RC-150097 (Regional Director deferred litigation of

¹⁸Efficiency and speed are two distinct interests. See *A.J. Tower*, supra at 331. They are, of course, closely related, and that close relationship is reflected in the Board's longstanding formulation of its duty to provide for "expeditious" resolution of questions of representation. "Expeditious" is defined as "[a]cting or done with speed and efficiency." *The American Heritage Dictionary of the English Language*, New College Ed. 462 (Houghton Mifflin 1979).

such as supervisory status before the election promises to minimize post-election litigation, given that the pre-election determination of supervisory status gives the parties an opportunity to guard against supervisory behavior that could give rise to objections or unfair labor practice charges.

In addition, there is another dimension of efficiency that the final rule promotes. As the Board has stated in the past, “the fundamental design of the Act is to encourage agreement between the parties as much as possible.” 79 FR 74393. Accordingly, when the Board encourages parties to enter into election agreements, it reflects the fundamental design of the Act and promotes efficiency by deferring to the parties’ resolution of potential differences. The Board believes that the final rule promotes election agreements through the introduction of the responsive Statement of Position requirement, which will result in greater clarification of the issues in dispute prior to hearing, and by the provision of 3 business days between the filing and service of the responsive Statement of Position and the opening of the hearing, which permits additional time for the parties to negotiate over whatever issues remain in dispute following the filing and service of the responsive Statement of Position. This may lengthen the period of time between the petition and the hearing (and, by extension, between the petition and the election), but the Board believes that any loss of speed will be more than offset by the facilitation of election agreements.²¹

Finally, although the final rule will often result in more time between the petition and the pre-election hearing and between the pre-election hearing and the election, the final rule retains provisions that will ensure the lengthened timelines apply in only a limited number of cases and that will minimize the potential for abuse. First, the time periods instituted by the final

rule apply only to contested cases, which have represented a small fraction of all representation proceedings before the Board in any given year.²² Parties entering into election agreements remain free to schedule the election as they see fit. Second, even where parties are unable to reach an election agreement, they may still, consistent with the Act’s bedrock interest in promoting agreement between parties, nevertheless agree to (1) a faster pre-election hearing; (2) waive the default period between the direction and conduct of election; and/or (3) defer any unit scope and eligibility issues until after the election.²³ Third, a party that disagrees with the regional director’s resolution of pre-election issues remains free to wait and see whether the results of the election render the issues moot, obviating the need to file any request for review. Fourth, the final rule retains the Statement of Position requirement, the provisions for precluding litigation of issues not properly raised therein, and the requirement that the hearing be continued from day-to-day. Additionally, pre-election hearings remain under the firm control of the regional director and the hearing officer, who will continue to have the authority to prevent introduction of irrelevant evidence and the litigation of improperly-raised issues. Parties accordingly will not be able to use the expanded timeline to engage in improper gamesmanship when negotiating election agreements, nor will they be able to engage in delaying tactics at the hearing. Given these provisions, we are confident that parties will frequently avail themselves of the opportunity to avoid potentially unnecessary litigation, and in any event they will be prevented from engaging in the types of delaying tactics the 2014 amendments sought to prevent.

²² See fn. 16, *supra*.

²³ We recognize that permitting parties to defer such issues until after the election comes at the expense of the benefits of litigation and resolution outlined above, but such tradeoffs are inherent in balancing competing interests. In our view, there is no inconsistency in this approach; rather, from an institutional perspective we find the deferral of such contested issues to be generally undesirable and we would not impose deferral on the parties as an agency rule. In those situations where agreement cannot be reached, and accordingly does not factor in to the balancing of interests, we think the benefits of pre-election litigation and resolution discussed above are sufficiently weighty to take precedence over the additional time that may be involved. However, if the parties to a particular election choose on their own to defer such issues, notwithstanding the potential drawbacks of doing so, we would not prohibit them from doing so. After all, this final rule seeks to encourage and promote agreement between parties (including with respect to deferring issues to post-election proceedings).

In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our considered judgment, a more than worthwhile tradeoff.

D. Global Changes

Consistent with the final rule effective March 6, 2017,²⁴ the representation case Rules have been revised to ensure that terms and capitalization of titles, such as “Regional Director,” are consistent throughout the Rules. Where feasible, headings have been added to facilitate finding particular rules. Outdated cross-references have also been updated and corrected.

In addition, all time periods have been explicitly set forth in terms of “business days,” and time periods previously phrased as calendar days have been converted to business days. Section 102.2(a) generally provides that time periods of less than 7 days should be calculated as business days, *i.e.*, calculations should omit weekends and holidays, whereas periods of 7 or more days include weekends and holidays (unless the last day falls on a weekend or holiday, in which case the time period in question ends on the next business day). Due to the fact that the representation case Rules have been drafted in such a way that many, even most, provisions are interlocking, the Board has concluded that all representation case time periods should be calculated in the same manner to reduce confusion and promote uniformity and transparency. For the most part, this has simply been a matter of converting due dates previously phrased in multiples of 7 (calendar) days to the same multiple of 5 business days. This conversion leaves the actual time afforded for complying with the relevant requirement undisturbed, except in those relatively rare circumstances where a federal holiday falls within time period being calculated. Any loss of speed or efficiency will accordingly be rare and will be more than offset by the uniformity, transparency, and clarity gained through the conversion to business days.

Relatedly, given that the prior rules did not expressly define “business day” (despite using occasionally using the phrase), the final rule updates § 102.2(a) to explicitly state that “business day” does not include Saturdays, Sunday, or holidays. Further, as the prior rules used various and undefined

eligibility issues and directed election conducted on May 6, 2015; deferred issues required post-election litigation and Regional Director did not resolve them until September 30, after which she directed a rerun election—based on objectionable conduct—for December 3, in response to which union withdrew petition. We accordingly think it is preferable to place the decision to defer litigation or resolution of pre-election issues in the hands of the parties, rather than to adopt a default position of deferring issues to post-election proceedings in the hope the results of the election will render the issues moot.

²¹ Although the rate at which parties enter election agreements is already high—see fn. 16, *supra*—we observe that there nevertheless is still room for growth in this regard. Given the Act’s fundamental interest in promoting agreement between the parties, such continued growth is worth pursuing through this final rule.

²⁴ 82 FR 11748 *et seq.*

formulations when accounting for holidays in time computations,²⁵ the final rule updates § 102.2(a) to specify that only federal holidays should be excluded from time computations. These modifications also promote uniformity and transparency.²⁶

IV. Explanation of Changes to Particular Sections

Part 102, Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

102.62 Election Agreements; Voter List; Notice of Election

In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239–40 (1966), the Board established a requirement that, 7 (calendar) days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an election eligibility list—containing the names and home addresses of all eligible voters²⁷—with the regional director, who in turn made the list available to all parties. Failure to comply with the requirement constituted grounds for setting aside the election whenever proper objections were filed. *Id.* at 1240.

The 2014 amendments codified the requirement that the employer furnish a voter list, but—in addition to a number of other modifications²⁸—provided

that, absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, the employer was required to file the voter list with the regional director, and serve it on the other parties, within 2 business days of the approval of the election agreement or direction of election. We conclude that the relevant interests will be better balanced by requiring filing and service of the list within 5 business days.

The 2014 amendments provided relatively little explanation for reducing the time for producing and serving the voter list—notwithstanding the accompanying expansion of the required information to be included on the list—aside from stating that “advances in recordkeeping and retrieval technology as well as advances in record transmission technology . . . warrant reducing the time period” and that faster production of the list facilitated expeditious resolution of questions of representation given that an election cannot be held before the voter list is provided. 79 FR 74353. In dismissing comments objecting to the reduction in time, the Board commented that employers now are far more likely to have access to computers, spreadsheets, and email than was the case in 1966, that prior experience indicates some employers were already capable of producing the list within 2 days, that employers are free to begin assembling the list before the election agreement is approved or the election is directed, that the median unit is relatively small, and that provision of the voter list simply entails updating the preliminary employee list that must be included with the employer’s Statement of Position pursuant to § 102.63. The Board also observed that for elections conducted pursuant to an election agreement, the parties are free to agree to more time, and that for directed elections the regional director can provide more time in light of extraordinary circumstances.

We take a different view. First, as discussed below with respect to

§ 102.67(b), for directed elections the election will now normally not be scheduled before the 20th business day after the date of the direction of election.²⁹ Accordingly, the reduction in the time for producing the voter list would no longer facilitates a corresponding reduction in time for scheduling a directed election. Under the final rule, the employer will now have 5 business days from the direction of election to file and serve the voter list, consistent with Board practice prior to the 2014 amendments. Further, the parties entitled to the list will—absent waiver—have additional time to make use of the list to communicate with employees prior to the election.³⁰ And for election agreement situations, providing for 5 business days to produce the list harmonizes these parallel provisions and promotes uniformity.

Second, independent of the institution of the 20-business-day period in directed elections, we conclude that, as a matter of policy, it is preferable to provide more time for employers to assemble and submit the list, and that the 2014 amendments accorded too little weight to concerns that favor permitting more time. Although there certainly have been technological changes since 1966 that may permit some employers to more quickly compile and transmit the voter list, this is by no means true of all employers. Further, the mere fact that employers may have access to computers, spreadsheets, and email does not mean that the required information is always computerized or kept in one location.³¹ If not, gathering the required information for disclosure could prove to be a substantial task, even if the employer has already gathered some of

²⁵ Thus, the time computation provisions in § 102.2(a) refer to both “a legal holiday” and unmodified “holidays”; certain time computation provisions of the representation case Rules refer to “federal holidays,” see § 102.63(a)(1), while others refer to unmodified “holidays,” see §§ 102.67(i)(1), (k), 102.69(f); and the time computation provisions Freedom of Information Act Requirements mostly refer to “legal public holidays,” see §§ 102.117(c)(2), 102.119(a)(2), (b)(1), (d), (f)(1)(iv), but also refer to “legal holidays,” see § 102.117(d)(1)(viii).

²⁶ As the main focus of the final rule is on the representation case procedures set forth in subpart D, the Board is not taking this opportunity to update references to holidays in other Subparts, particularly as the revisions to § 102.2(a) are adequate to bring clarity and uniformity to this issue.

²⁷ The Board subsequently clarified the *Excelsior* list requirements to include disclosure of employees’ full names and addresses. *North Macon Health Care Facility*, 315 NLRB 359 (1994).

²⁸ The 2014 amendments also modified the voter list requirement to require the employer: (1) To furnish additional information—including available personal email addresses, available home and personal cellular telephone numbers, work locations, shifts, and job classifications—for eligible voters; (2) to provide the same information for individuals permitted to vote subject to challenge (whether by party agreement or direction of the regional director); (3) to submit the list in an electronic format approved by the General Counsel (unless the employer certifies that it does not

possess the capacity to produce the list in the required form); (4) to serve the list on the other parties; and (5) to file and serve the list electronically when feasible. The 2014 amendments also state that the parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters. The final rule leaves these provisions unmodified, aside from simplifying the challenged voter information requirement so that it now simply refers to voters who will be permitted to vote subject to challenge, without specifying the manner in which that arrangement may be reached. For further discussion of individuals being permitted to vote subject to challenge, see the discussion of changes to § 102.64, *infra*.

²⁹ In most cases, the only exception is if the parties agree to waive the 20-business-day period, which is designed to permit the Board to rule on any pre-election request for review that may be filed.

³⁰ See *The Ridgewood Country Club*, 357 NLRB 2247 (2012); *Mod Interiors, Inc.*, 324 NLRB 164 (1997); CHM 11302.1.

³¹ For example, in *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 5–6 & n.19–20 (2017), the employer did not maintain its employees’ personal telephone numbers in a computer database, yet the Board concluded that this contact information was nevertheless “available” because there was evidence that when the employer’s supervisors and foremen needed to contact employees about work, they frequently contacted them on the employees’ personal cell phones. *Id.*, slip op. at 5–6 & n.19. The Board indicated that under such circumstances, the employer was obligated to ask the supervisors and foremen for the contact information stored on the supervisors’ or foremen’s phones. *Id.*, slip op. at 6 n.20. As this case illustrates, technological advances and their availability to a given employer do not necessarily mean that the required voter list information is readily at hand, even if it is “available.”

the required information for the employee list submitted in conjunction with its Statement of Position.³² Moreover, whatever their technological capabilities, assembling the voter list may prove challenging for large or decentralized employers,³³ and may, as some comments from the 2011 and 2014 rulemakings pointed out, pose special problems for particular types of cases, such as those involving the construction industry³⁴ or joint or multi-employer arrangements.³⁵ In addition, the fact that some employers were able to submit the *Excelsior* list within 2 days prior to the 2014 amendments is of questionable relevance, given that *Excelsior* required far less information to be disclosed than did the 2014 amendments, and in any event it simply does not follow that because some employers were able to submit a list of names and addresses within 2 days, all employers should be required to submit a significantly expanded list within that timeframe. Finally, expecting that employers will start assembling the list prior to the approval of an election agreement or the direction of election may well be reasonable in some cases, but citing this as a reason for reducing the time to produce the list in all cases does not promote orderly litigation. The voter list requirement is triggered by the approval of the election agreement or the direction of election; until the regional director takes one of these actions, the requirement has not been activated. Effectively requiring employers to begin

complying with requirements that have not yet been triggered—and in some cases may never be triggered—at the very least raises questions of fairness and transparency. It is anything but transparent to state that a procedural requirement attaches at a certain point yet defend a truncated timeline for meeting that requirement by opining that employers have ample time to comply with the requirement before it has even attached to begin with. At any rate, in cases in which the scope of the unit is in dispute, advance preparation will be difficult given that the precise contours of the unit will not be known until a direction of election issues,³⁶ and even in situations where the parties reach an election agreement, the contours of the unit may not be finalized until shortly before the agreement is signed and approved.

This is not to suggest that it is impossible or unreasonable for employers to produce the voter list within 2 business days; many employers have clearly been able to do so under the 2014 amendments. Unlike the 2014 amendments, however, we are unwilling to convert some employers' admirable speed into a requirement that must be applied to all employers absent "extraordinary circumstances" (for directed elections) or party agreement to the contrary. We think that the better practice is to set forth a timeline that is unlikely to present difficulties in the first instance and leave it to the parties to agree upon shorter timeframes, as they may deem appropriate.³⁷ In this regard, the final rule promotes efficiency by promoting voluntary

agreement between the parties in this area.

Finally, providing more time to produce the voter list will reduce the potential for inaccurate lists, as well as the litigation and additional party and Agency expenditures that may result therefrom. Most importantly, if providing the employer with 3 more business days to compile the list can avoid having just a few elections set aside based on noncompliant voter lists, this is a trade we are more than willing to make, given that rerun elections greatly delay the final resolution of a question of representation. The voter list, like its *Excelsior* forerunner, serves an important and crucial dual purpose, and the Board's practice of setting aside elections where the list is not provided or is unacceptably incomplete is designed to vindicate those purposes. But at the same time, this can result in the setting aside of elections where the parties entitled to the list did not suffer any prejudice,³⁸ or where the omissions warranting setting aside the election were not due to any bad faith on the part of the employer.³⁹ We are therefore of the view that the Board should, within reason, promulgate procedures that will reduce the possibility of inaccurate voter lists and thus avoid the litigation and rerun elections that may follow. This in turn will promote more expeditious resolution of questions of representation, at least in some cases. Providing the employer with 3 more business days is an easy way to minimize the possibility of inaccurate lists and is generally consistent with the prior 7-calendar-day requirement which—it must be said—the 2014 amendments did not demonstrate was itself causing undue delay in the scheduling or conduct of elections.

In sum, modifying the voter list requirement to provide that the list must be filed and served within 5 business days of the approval of an election agreement or the direction of election will promote efficiency, accuracy, transparency and uniformity, without any significant reduction in the timely resolution of questions of representation under the amendments set forth in this final rule. The parties will also remain free to agree to a shorter time for provision of the list.

³⁸ See, e.g., *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971).

³⁹ *Woodman's Food Markets, Inc.*, 332 NLRB 503, 504 n.9 (2000) ("a finding of bad faith is not a precondition for a finding that an employer has failed to comply substantially with the *Excelsior* rule").

³² This requirement is located at § 102.63(b)(1)(i)(C), (b)(2)(iii), and (b)(3)(i)(D) as amended by this final rule.

³³ See, e.g., *President and Fellows of Harvard College*, Case No. 01-RC-186442, in which the employer had to coordinate between 14 separate constituent schools in order to assemble voter list information for a unit that included over 3,500 eligible voters for the first election and over 5,000 eligible voters for the second election.

³⁴ The *Daniel/Steiny* formula provides that, in addition to those eligible to vote in Board-conducted elections under the standard criteria (i.e., the bargaining unit employees currently employed), unit employees in the construction industry are eligible to vote if they have been employed for at least 30 days within the 12 months preceding the eligibility date for the election and have not voluntarily quit or been discharged, or have had some employment in those 12 months, have not quit or been discharged, and have been employed for at least 45 days within the 24-month period immediately preceding the eligibility date. See *Steiny & Co. Inc.*, 308 NLRB 1323, 1326–27 (1992), and *Daniel Construction Co., Inc.*, 133 NLRB 264, 267 (1961), modified, 167 NLRB 1078, 1081 (1967). Even for small employers, applying the formula to identify eligible voters may itself prove time-consuming, irrespective of any additional time needed to gather the required voter list information.

³⁵ Such arrangements may involve gathering information from more than one employer. Particularly for elections involving multiemployer associations, this may require coordination among dozens of employers.

³⁶ We acknowledge that under the Statement of Position requirement (discussed below), a nonpetitioning party who contests the propriety of the petitioned-for unit is required to state the "classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit."; an employer is also required to provide information on such employees it contends should be included or excluded. § 102.63(b)(1)(i) and (iii); (b)(2)(i) and (iii); (b)(3)(i) and (iii). Thus, after all initial Statements of Position have been filed, an employer will be on notice of the possible unit configurations proposed by the parties. Even so, when a petitioned-for unit is not appropriate, the Board has the discretion to select an appropriate unit that is different from the alternative units proposed by the parties. See *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001). Accordingly, even though the parties may be aware of each other's positions and alternative proposals, the Board remains free to direct an election in some other unit.

³⁷ We fully agree with the 2014 amendments that the general rule should not be subject to categorical exemptions for particular industries. 79 FR 74354–74355. But unlike the 2014 amendments, our view is that the potential for greater compliance difficulties in certain types of cases counsels in favor of relaxing the general requirement, rather than placing the burden on a given employer to demonstrate that extraordinary circumstances warrant departing from the general requirement.

102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Notice of Petition for Election; Statement of Position; Withdrawal of Notice of Hearing

The final rule makes changes to 3 aspects of § 102.63: (1) For the scheduling of pre-election hearings, the regional director now will set the hearing date 14 business days from the date of service of the notice, and all requests for postponements may be granted upon a showing of good cause; (2) for Statements of Position, the non-petitioning party or parties' Statement(s) of Position will now be due 8 business days following the issuance and service of the notice of hearing, requests for postponement may now be granted upon a showing of good cause, and the petitioner will now be required to file a responsive Statement of Position no later than noon 3 business days before the hearing; and (3) for the required posting of the Notice of Petition for Election, the employer now has 5 business days to comply.⁴⁰

A. Scheduling of Pre-Election Hearing

The 2014 amendments revised § 102.63(a) to provide that, except in cases presenting "unusually complex" issues, regional directors "shall set the hearing for a date 8 days from the date of service of the notice." This period excludes federal holidays, and if the 8th day falls on a weekend or federal holiday, the hearing is set for the following business day. The amendments authorized regional directors to postpone the opening of the hearing for 2 business days upon request of a party showing "special circumstances" and to postpone it for more than 2 business days upon request of a party showing "extraordinary circumstances."

The final rule revises this timeline by providing that the pre-election hearing will now be set to commence 14 business days from the date of service of the notice of hearing.⁴¹ This timeline

is essentially dictated by the changes the final rule makes to the Statement of Position requirement, which are discussed in detail in the next section. In addition, for the reasons explained earlier, relaxing the time from the notice of hearing to the hearing itself promotes transparency and fairness by affording the parties more time to deal with necessary preliminary arrangements (such as retaining counsel,⁴² identifying and preparing witnesses, gathering information, and providing for any hearing-related travel) and to balance such preparation against their other procedural obligations (including preparation of the Statement of Position).⁴³ Further, the additional time before the hearing will give the parties more and better opportunity to reach election agreements, and at the very least will result in more efficient hearings. The relaxed pre-hearing timeline accordingly continues to promote efficiency. The 14-business-day timeline may even promote greater administrative efficiency by easing the logistical burdens the expedited 8-day timeline currently imposes on regional personnel⁴⁴ and by avoiding hearing-related costs when the parties are able to reach election agreements. And finally, the 14-business-day requirement brings the pre-election hearing schedule into closer alignment with the post-election hearing schedule, which provides for such hearings to open 15 business days from the preparation of the tally of ballots.⁴⁵ In sum, the

⁴² We observe that the 2014 amendments responded to concerns about necessity of retaining counsel by pointing out that labor consultants and other "advisers" frequently contact employers to offer their services shortly after a petition has been filed. This may be so, but our experience reflects that, in the vast majority of contested cases that involve appeals to the Board, employers have elected to retain licensed legal counsel who specialize in labor and employment law.

⁴³ The 14-business-day timeline should also alleviate concerns—expressed in the 2011 and 2014 rulemaking proceedings and in response to the 2017 Request for Information—that the 8-day timeline poses particular difficulty for smaller employers who are less experienced with the Act, larger employers who have other time-sensitive obligations, and those employers who may have been previously unaware of a petitioner's organizing campaign. 79 FR 74367.

⁴⁴ In this regard, we take administrative note that, at various times since the 2014 amendments took effect, regional personnel have voiced concerns over the 8-day timeline. For example, the submission of the NLRB Regional Director Committee in response to the 2017 Request for Information commented that some regional directors do not agree with setting of hearings for 8 days from the date of the petition.

⁴⁵ See § 102.69(c)(1)(ii). The prior rules provided for post-election hearings to open 21 calendar days from the preparation of the tally of ballots; for the reasons discussed earlier, the final rule has converted this period to 15 business days (which will, absent intervening federal holidays, translate

expanded timeline for pre-election hearings promotes multiple interests. Although it represents a departure from the accelerated schedule provided by the 2014 amendments, we think this departure is fully justified by the advantages the expanded timeline will secure.⁴⁶

The final rule also revises the standard for postponing the pre-election hearing: Instead of requiring parties to show "special" or "extraordinary" circumstances, limiting postponements based on "special" circumstances to 2 business days, and providing that postponements based on "extraordinary" circumstances may be "more than 2 business days," the final rule now simply permits postponement upon a showing of "good cause" and leaves the length of the postponement to the discretion of the regional director. The 2014 amendments offered little explanation for opting to require a showing of "special" and "extraordinary" circumstances to warrant postponement of the hearing, as opposed to some other standard. As for the 2-day limitation on postponements for "special circumstances," the 2014 amendments state only that this limitation of the regional directors' discretion was designed to ensure that "the exception will not swallow the rule." 79 FR 74371.

Prior to the 2014 amendments, the Board's Rules and Regulations did not articulate any standard for granting postponements. We readily agree that by

to the historical 21 calendar days). Contrary to our dissenting colleague's assertion, we are not suggesting that the Board could have scheduled post-election hearings to open 8 calendar days following the issuance of a tally of ballots; we are well aware that this would not have been possible given that parties have 5 business days (7 calendar days) to file objections following the issuance of the tally of ballots. We are merely observing that by virtue of this final rule, the time between a petition and pre-election hearing now closely corresponds to the time between the tally of ballots and the post-election hearing, as a result of which there is greater uniformity within the Board's representation case procedures.

⁴⁶ The timing of the hearing provided by the final rule is accordingly "an appropriate accommodation of the interests involved." *Goss v. Lopez*, 419 U.S. 565, 579 (1975). We recognize that the expanded timeline represents a significant departure from the 2014 amendments, as well as *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002), in which the Board held that 5 business days' notice of a pre-election hearing was sufficient. As already discussed, this departure is "rational and consistent with the Act" and therefore justified given other interests served by a longer period, particularly including the need to comply with newly-imposed pre-hearing procedural requirements that were not a concern under the *Croft Metals* timeline. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("a Board rule is entitled to deference even if it represents a departure from the Board's prior policy" if it is "rational and consistent with the Act").

⁴⁰ The time for scheduling the pre-election hearing and submitting the initial and responsive Statements of Position are all interconnected and therefore are not severable from each other. In addition, we would not adopt the relaxed timeline for posting the Notice of Petition absent the relaxed timelines for the pre-election hearing and the submission of the Statements of Position, but we would adopt the changes to the timeline for the hearing and the Statements of Position absent the change to the timeline for posting the Notice of Petition. Finally, the requirement that the petitioning party file a responsive Statement of Position prior to the hearing is severable, and we would adopt it in the absence of any or all of the timeline changes made to this Section.

⁴¹ The final rule retains the provision that the regional director may set a different hearing date "in cases presenting unusually complex issues."

articulating *some* standard for postponements, the 2014 amendments promoted transparency and uniformity. At the same time, we fail to understand why the 2014 amendments opted for the two-tier “special” and “extraordinary” standard, rather than incorporating preexisting guidelines that regional directors were to grant a postponement “only when good cause is shown.” See Casehandling Manual (Part Two) Representation Proceedings section 11143 (Sep. 2014). As the 2014 amendments acknowledged, several commenters urged retention of the Casehandling Manual’s guidance, and yet the 2014 amendments offered no explanation for opting for “special” and “extraordinary circumstances” standard over the existing “good cause” standard. 79 FR 74371–74372. It appears that the Board believed that a more restrictive standard would better serve the purpose of expeditious resolution of questions of representation, but we fail to see how this is self-evident. The 2014 Casehandling Manual specified that under the “good cause” standard, postponement requests were “not routinely granted,” see section 11143, and the 2014 amendments did not point to any evidence indicating that regional directors had been too liberal in granting postponements under this standard, or that it was otherwise causing unnecessary delay. Moreover, the 2014 amendments offered no guidance on what would constitute “special” or “extraordinary” circumstances.

Aside from the ill-explained rejection of the “good cause” standard for pre-election hearing postponements, the rationale for the 2014 amendments’ limitation of postponements to 2 days based on “special circumstances” is also elusive. Here too, the 2014 amendments did not reference any evidence, or even really suggest, that regional directors were granting unreasonably long postponements, or that parties were allowed to abuse the “good cause” postponement guideline. In any event, this restriction on regional directors’ pre-hearing discretion contrasts with the 2014 amendments’ expressed emphasis on encouraging regional directors’ post-hearing exercise of discretion,⁴⁷ as well as with the general axiom that regional directors, who are closer to the facts and realities on the ground, are in better position to judge what is or is not warranted based on the particulars

presented. And on a final note, this strict limitation is somewhat puzzling in light of the regional directors’ initial discretion to decide, based on the petition alone, that a case presents “unusually complex issues” that warrant setting the initial hearing date more than 8 days after the filing of the petition. If regional directors are free to schedule a hearing at whatever remote date they deem necessary in “unusually complex” cases, why should they be limited to granting only a 2-day postponement if “special circumstances” are established?

For these reasons, we have decided to reinstate and codify the previous “good cause” standard for granting postponements and to leave the length of each postponement within the sound discretion of the Regional Director. Once more, we are aware of no evidence suggesting that the “good cause” standard or the length of the postponements granted under it were in any way responsible for needless delay prior to the 2014 amendments. Although we acknowledge that limiting the length of postponements may have promoted some degree of national uniformity in terms of regional practices, we think that 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. Further, eliminating the ill-defined two-tiered standard in favor of a single, unitary standard for granting postponements will promote a more desirable kind of uniformity. Finally, to the extent that “good cause” is a lower threshold than “special” or “extraordinary” circumstances, we do not think that this standard will prompt regional directors to grant postponements at the drop of a hat, thereby detracting from the expeditious resolution of questions of representation; rather, just as the 2014 Casehandling Manual provided, even under the “good cause” standard postponements will not be routinely granted. We accordingly do not believe there is any risk that the exception will swallow the rule.⁴⁸

⁴⁸ Beyond the fact that postponements will not be routinely granted under the “good cause” standard, we observe that the expanded pre-hearing timeline will likely reduce requests for postponement to begin with and may mean that fewer parties requesting postponement are able to establish good cause in the first instance. In any event, should our predictions prove wrong and subsequent experience demonstrate that the “good cause” standard results in unacceptable delay, we will be willing to revisit it.

B. Statements of Position

The 2014 amendments introduced the requirement that the employer (in all types of election cases), the other named parties (in RM cases), and the incumbent union (in RD cases) file a Statement of Position. Although controversial, the Board has decided to retain the Statement of Position requirement in its entirety,⁴⁹ with two important modifications. First, in order to give parties more time to comply with the Statement of Position requirements, the non-petitioning party (or parties) will be required to file and serve the Statement of Position at noon 8 business days following service of the notice of hearing, as opposed to the current requirement that the Statement of Position be filed and served at noon the business day before the hearing is scheduled to commence. As with the aforementioned amendment relating to scheduling of a hearing, the regional director will also be permitted to postpone the due date for good cause and will have discretion to determine the length of any postponement. Second, in all election cases, the petitioner will now be required to file and serve a responsive Statement of Position by noon 3 business days before the hearing is scheduled to open; as with the initial Statement of Position, the regional director will also be permitted to postpone the due date for good cause.

As indicated above, these two modifications account for the 14-business-day timeline between the notice of hearing and the start of the pre-election hearing. Thus, the initial Statement of Position is due within 8 business days of the notice of hearing; the responsive Statement of Position is due 3 business days before the start of hearing; and by providing that the hearing will start 14 business days after the notice of hearing, the timeline will always provide 3 business days for the petitioner to prepare the responsive Statement of Position.

Although these modifications will result in a longer period of time between the filing of a petition and the start of the pre-election hearing than was the case under the 2014 amendments, the Board believes that these changes will enable parties to reach election agreements in even more cases than they currently do,⁵⁰ thus serving the purposes of efficiency and the voluntary resolution of disputes. Further, even in

⁴⁹ The required contents of the Statement of Position can be found in § 102.63(b).

⁵⁰ See fn. 16, *supra*, for statistics regarding the rate of election agreements before and after the 2014 amendments.

⁴⁷ Cf. 79 FR 74388 n.372 (“Keeping discretion in the hands of the regional directors is sensible in that it is the directors who are responsible for issuing decisions and directions of election following pre-election hearings”).

those cases where parties are unable to enter into election agreements, the introduction of the responsive Statement of Position will result in more efficient pre-election hearings. And the recasting of the timeframe for filing and serving these documents will promote transparency and uniformity with respect to the pre-hearing timeline.

1. Time for Filing and Service the Initial Statement of Position

The 2014 amendments provided that the initial Statement of Position was due at noon the business day before the opening of the hearing, which meant that in most cases the Statement of Position had to be filed and received within 7 calendar days of the notice of hearing.⁵¹ As with the scheduling of the pre-election hearing, the 2014 amendments provided that regional directors could, upon a showing of “special circumstances,” postpone the date for filing and service for up to 2 business days, and could postpone the date for more than 2 business days upon a showing of “extraordinary circumstances.” With limited exceptions, a party was precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position. § 102.66(d).

The Board has determined that the Statement of Position requirement has been a highly effective tool in promoting orderly litigation and efficiency. It has been particularly useful in narrowing the issues to be litigated at the pre-election hearing, and we believe that it has facilitated entry into election agreements in some cases. At the same time, the Statement of Position is also a complicated, multi-part requirement that must be completed at the same time the non-petitioning parties—especially employers—are concerned with retaining counsel and engaging in other hearing-related preparation. Further, the preclusive consequences of failing to file a Statement of Position, or of failing to raise an issue therein, are heavy. We have accordingly concluded that parties should be given slightly more time to file and serve the Statement of Position, and under the final rule it will now be

due at noon 8 business days following service of the notice of hearing.

This timeline continues to serve the purposes of transparency and uniformity, and perhaps even improves upon the 2014 amendments in this regard, as the due date is now set forth in terms of a set number of business days following the notice of hearing, rather than being linked to the scheduled opening of the hearing. The due date for the Statement of Position will accordingly always be predictable and readily ascertainable.

Further, the additional time will promote efficiency in several ways. Again, the Statement of Position must be prepared against the backdrop of other pre-election hearing preparations, which may involve a number of other time-consuming tasks, including retaining counsel, researching the facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, coordinating with regional personnel, and exploring the possibility of an election agreement. Providing non-petitioning parties with slightly more time to prepare the Statement of Position will allow them to better balance these obligations.⁵² Moreover, it is foreseeable that providing the non-petitioning parties with more time will improve the quality of their Statements of Position. For example, allowing more time to complete the Statement of Position should encourage parties to better focus their arguments, thereby avoiding the so-called “shotgun” approach some parties have taken to the Statement of Position (*i.e.*, raising every conceivable issue to avoid waiving any arguments). More focused Statements of Position should in turn lead to more focused and efficient hearings, which will result in more focused regional decisions (which, if any appeals are filed, will in turn promote more efficient Board review). And the additional time and potential for more focused Statements of Position—in conjunction with the introduction of the responsive Statement of Position discussed below—will promote entry into election agreements, promoting efficiency within that specific proceeding and conserving the Agency’s resources by obviating the need for a hearing.

Weighed against the foreseeable benefits of providing additional time for filing and serving the Statement of Position, the costs of doing so are modest. Generally speaking, extending the typical Statement of Position timeline from 7 calendar to 8 business days will typically result in initial Statements of Position being due 3–4 days later than under the 2014 amendments. This is still within the outer limits of the timeline contemplated by the 2014 amendments, which permitted regional directors to postpone the time for filing the Statement of Position for 2 or more business days upon a proper showing. This is also still a significantly shorter timeline than those proposed by commenters in the past.⁵³

In addition to extending the time for filing and serving the initial Statement of Position, the final rule modifies the standard for granting postponements. Rather than requiring a showing of “special” and/or “extraordinary” circumstances and limiting postponements based on “special” circumstances to 2 business days, postponements will now be subject to a showing of good cause, and the length of any postponement will be left to the sound discretion of the regional director. These changes are warranted for many of the same reasons discussed above with respect to postponements to the opening of the pre-election hearing. There is no reason to believe that regional directors have been too generous in finding good cause in other contexts, nor is there any reason to suspect that without limiting their discretion they will begin granting unreasonably lengthy postponements. The better course is, we think, to give regional directors wider discretion to consider the particular circumstances before them when evaluating requests for postponements, and we are also of the view that this approach better serves transparency and efficiency. Further, a uniform “good cause” standard is more understandable and desirable than the ill-defined two-tiered “special” and “extraordinary” circumstances standard, and in this particular context it aligns the standard for postponing the Statement of Position due date with the standard for permitting parties to amend the Statement of Position. See, *e.g.*, § 102.63(b)(1), (2), (b)(3)(i)(A). Finally, as is the case with requests to postpone the opening of the hearing, postponements will not be routinely granted under a good cause standard.

⁵¹ The 2014 amendments also provided that “in the event the hearing is set to open more than 8 days from service of the” Notice of Hearing, the regional director could set the due date for the Statement of Position earlier than noon on the business day before the hearing, but guaranteed that in all cases, parties would have 7 (calendar) days’ notice of the due date for completion of the Statement of Position. 79 FR 74361.

⁵² The additional time should also help alleviate the frequent complaints—stretching back to the comments to the 2011 NPRM and continuing through the responses to the 2017 Request for Information—that the Statement of Position requirements, by themselves or in combination with other obligations, are particularly onerous for certain types of employers or in certain types of cases.

⁵³ For example, the 2014 amendments noted comments proposing periods ranging from 14 to 30 days. 79 FR 74375.

2. Responsive Statement of Position

The Board has also determined that efficiency, transparency, and uniformity will be served by requiring the petitioner to file a responsive Statement of Position, which will be due at noon no later than 3 business days before the hearing. As indicated earlier, the 14-business-day timeline from the notice of hearing to the opening of the pre-election hearing guarantees that the petitioner will have 3 business days to prepare and file the responsive Statement of Position after receiving the initial Statement(s) of Position. As with the initial Statement of Position, the regional director may permit the responsive Statement of Position to be amended for good cause. And consistent with existing practice, the petitioner will, with limited exceptions, be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the responsive Statement of Position failed to place in dispute in response to another party's Statement of Position.

Under the prior rules, after the opening of the hearing "all other parties"—including the petitioner—were required to "respond on the record to each issue raised" in the Statement of Position. § 102.66(b). The regional director could permit such responses to be amended in a timely manner for good cause. § 102.66(b). And a party was precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the responsive Statement of Position failed to place in dispute in response to another party's Statement of Position. § 102.66(d). Accordingly, the responsive Statement of Position is not a new requirement, nor does the penalty of preclusion go beyond existing practice. Rather, the responsive Statement of Position simply takes an existing requirement and modifies it only to the extent that the response is now due, in writing, 3 business days before the opening of the hearing.⁵⁴

The responsive Statement of Position is not designed to be an onerous requirement. The primary purpose of the responsive Statement is simply to get the petitioner's response to the

initial Statement(s) of Position in writing prior to the hearing, thereby putting the parties and the regional director on notice that an issue remains in dispute in advance of the hearing. In addition, it will be an opportunity for the petitioner to clarify any positions taken that may not have been evident from the petition itself. We recognize that there may be times when a petitioner is unable to provide a detailed or meaningful response to issues raised by the initial Statement of Position due to a lack of evidence or knowledge, but in such circumstances it will be sufficient for the responsive Statement of Position to state as much, thus identifying the issue as still potentially in dispute. As is already the case with the initial Statement of Position, the responsive Statement need not be exactly detailed to avoid preclusion.⁵⁵ And again, as is already the case with oral responses at the hearing, regional directors have the discretion to permit the responsive Statement of Position to be amended upon a showing of good cause.

The responsive Statement of Position requirement serves the purpose of uniformity by requiring a written Statement of Position from all parties in advance of the hearing. As noted, RM petitioners are already required to file a responsive Statement of Position; this will now be required of petitioners in all election cases. Although it is true that petitioners were previously required to state positions on certain issues in the petition itself, if the initial Statement(s) of Position placed other issues in dispute, the petitioner was not obligated to state its position on those issues until after the hearing had opened. Given that issues beyond those contemplated in the petition can and will often be raised in the initial Statement of Position, we think that it is a matter of common sense to require the petitioner to state its position on newly-raised issues prior to the hearing.⁵⁶

⁵⁵ Cf. 79 FR 74369 n.298 (declining request to require employer raising supervisory status to identify in Statement of Position particular indicia of supervisory status on which argument is based).

⁵⁶ We do not agree with the dissent's characterization of the petition as equivalent to the Statement of Position, such that the responsive Statement of Position will amount to second written statement of position for petitioners. Aside from contact information for the petitioner, the employer, and the incumbent union (if any), the RC and RD petition forms merely prompt the petitioner to describe the unit involved (and to state whether a substantial number of employees in the unit wish/ no longer wish to be represented by the petitioner), to indicate whether a strike is currently in progress, to indicate whether there are other organizations or individuals claiming recognition or an interest in the unit, and to state the petitioner's position on election details (time, place, and type). The RC

On a related note, the responsive Statement of Position also serves the purpose of transparency by removing any impression that the Board is imposing an onerous pleading requirement on the non-petitioning parties without extending a similar requirement to the petitioner. To be clear, we are not suggesting that the 2014 amendments engaged in any prejudicial disparate treatment of the parties vis-à-vis the Statement of Position requirement; as already stated, the requirement that the petitioner respond to the Statement(s) of Position already existed, albeit in oral form after the hearing had opened. Nor, as the dissent suggests, are we altering our procedures to mollify prior criticism that the initial Statement of Position requirement is an unfair or arbitrarily one-sided requirement. The revision we make would seem incidentally to address that criticism, but that is not at all the point of requiring a written responsive Statement of Position in advance of the hearing.⁵⁷

petition form additionally asks whether the petitioner has made a request for recognition or is currently recognized as the representative but now desires certification, and the RD petition asks for the date the incumbent was certified and for the expiration date of the current or most recent contract (if any). See Form NLRB-502 (RC) and Form NLRB-502 (RD). By contrast, the Statement of Position, in addition to soliciting the nonpetitioning party's position on election details, also requires the party to state its position on the Board's jurisdiction, the propriety of the petitioned-for unit (and the basis for any contention it is not appropriate), whether there is a bar to conducting an election, and what eligibility period (as well as special eligibility formula, if any) should apply; the party is also obligated to list the names of individuals whose eligibility the nonpetitioning party intends to contest at the hearing (and the basis for contesting their eligibility), to describe any other issues the nonpetitioning party intends to raise at the pre-election hearing, and to prepare the initial employee list. See Form NLRB-505. The Statement of Position accordingly requires a great deal more information and detail from the nonpetitioning party than does the petition. It is true that the nonpetitioning party (typically the employer) generally possesses the facts needed to litigate any issue at the hearing, and that it accordingly makes sense for the Statement of Position form to seek more information than the petition form, but this does not detract from the fact that the Statement of Position form expressly prompts the nonpetitioning party to address issues beyond those addressed in the petition, and further assumes that the nonpetitioning party will often raise additional issues even beyond those the Statement of Position form affirmatively prompts that party to address. Thus, at the time it files the petition, the petitioner likely does not and often cannot know the full range of issues the nonpetitioning party intends to raise, let alone the positions that party intends to take on them. In short, requiring a responsive Statement of Position prior to the hearing is not redundant, but instead solicits the petitioner's response—in advance of the hearing—to issues and positions it has had no previous opportunity to address.

⁵⁷ We note here that that requiring a responsive Statement of Position is likely to be more productive than requiring that petitioners file a

⁵⁴ Further, the prior rules already required petitioners to file pre-hearing Statements of Position in RM cases, although the prior rules did not require the petitioner-employer's Statement of Position to respond to the issues raised by the Statement(s) of Position filed by the individual(s) or labor organization(s) named in the petition. See § 102.63(b)(2)(iii).

Most importantly, the responsive Statement of Position will promote greater efficiency. Virtually every reason that the 2014 amendments articulated for the original Statement of Position requirement could be reiterated here, but two considerations are, we think, sufficient to illustrate the advantages of requiring a responsive Statement. First, like the initial Statement, the responsive Statement will make hearings more efficient. As the 2014 amendments observed, “[i]t clearly . . . helps narrow the scope of the hearing if *all parties* state what they believe the open issues . . . are and what they seek to litigate *in the event of a hearing.*” 79 FR 74369 (emphasis added). By requiring the petitioner to respond to the issues the employer (and other non-petitioning parties) have placed in dispute before the hearing, all parties and the Board itself will have earlier notice of what issues will require litigation at the hearing, should one prove necessary. The earlier notice of the issues remaining in dispute will in turn facilitate better preparation for the hearing. For example, the responsive Statement will put parties on notice of the possible need for subpoenas, offer further guidance on what witnesses to call and what exhibits to prepare, and may suggest avenues for additional legal research. In addition, the responsive Statement will, in at least some instances, indicate that a non-petitioning party should prepare rebuttal witnesses, which may avoid the need for continuances that otherwise would have been necessary had the petitioner’s response come after the opening of the hearing. For that matter, the responsive statement may also enable non-petitioning parties to narrow the scope of their witnesses’ testimony and may eliminate the need for certain witnesses altogether. Thus, aside from permitting better preparation for hearings, the responsive statement could help parties save time and money. And at the very least, the responsive Statement will help non-petitioning parties evaluate the merits of the petitioner’s positions and better formulate their responses in advance of the pre-election hearing. These are, of course, some of the very reasons the 2014 amendments introduced the initial Statement of Position requirement. See 79 FR 74362–74364.

In addition, the responsive Statement of Position will also help Agency

personnel make hearings more efficient. Just like the initial Statement of Position, the responsive Statement saves government resources “by reducing unnecessary litigation and making litigation that does occur more efficient.” *Brunswick Bowling Products, LLC*, 364 NLRB No. 86, slip op. at 2 (2016). The Board has long sought “to narrow the issues and limit its investigation to areas in dispute.” *Bennett Industries*, 313 NLRB 1363, 1363 (1994). Historically, the Board has regarded the pre-election hearing as “part of the investigation in which the primary interest of the Board’s agent is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case.” *Solar International Shipping Agency, Inc.*, 327 NLRB 369, 370 n.2 (1998) (internal quotations omitted). The responsive Statement will permit the Board to narrow the issues and its investigation prior to the hearing, rather than at the start of the hearing. Even where the responsive statement may not narrow the number of issues, it will in most cases enable Board personnel to better understand the parties’ respective positions prior to the hearing, which will enable the hearing officer to better prepare for the hearing by, for example, reviewing relevant case law in advance and developing potential lines of questioning for the parties’ witnesses. In short, the responsive Statement of Position promises to assist hearing officers in anticipating what types of evidence and testimony will be necessary to ensure a more complete, useful record. And this, in turn, will assist the Regional Director in preparing a decision after the hearing.

Second, even more than promoting narrower, more orderly hearings, we are confident that the responsive Statement of Position will provide additional opportunity and incentive for parties to reach election agreements. Here too, the reasoning the 2014 amendments articulated for adopting the initial Statement of Position requirement applies directly to the new responsive Statement. As with narrowing the scope of the hearing, “[i]t clearly facilitates entry into election agreements . . . if *all parties* state what they believe the open issues (including eligibility issues) are and what they seek to litigate *in the event of a hearing.*” 79 FR 74369 (emphasis added). Likewise, if “[i]t plainly serves the goal of making it easier for parties to promptly enter into election agreements if the petitioner is advised of the nonpetitioner’s position on those matters prior to the hearing,” 79 FR 74370, the same can readily be

said of advising the nonpetitioner of the petitioner’s response prior to the hearing.⁵⁸

Election agreements are the most obvious and efficient means of expediting the resolution of questions concerning resolution because they avoid altogether the time that would be spent in litigation of pre-election issues. It is this interest in facilitating election agreements that has led us to adopt the requirement that the responsive Statement of Position be filed and received no later than noon 3 business days before the hearing. As with the initial Statement, if the responsive Statement “is to fulfill its intended purposes, then parties should be required to complete and serve it before the hearing.” 79 FR 74362. As the 2014 amendments observed:

one of the impediments to reaching an election agreement is that the parties sometimes talk past each other regarding the appropriate unit in which to conduct the election because, unbeknownst to them, they are using different terminology to describe the very same employees. In our experience, parties also sometimes use different terms to describe work locations and shifts.

79 FR 74366. Requiring that the responsive Statement of Position be filed and served 3 business days before the hearing will enable parties to identify circumstances where they are “talking past each other,” clarify the terminology at issue, and identify or even eliminate any related disputes. Providing more time between the due date for the responsive Statement of Position and the opening of the hearing will also give the parties more time to conclude an election agreement. In the days just before the hearing, however, negotiations for an agreement must be balanced with the parties’ other preparations in the event an agreement cannot be reached. These often include

⁵⁸ The dissent suggests that our prediction that the responsive Statement of Position will facilitate election agreements lacks supporting evidence. It comments that there is no showing that a significant number of election agreements are reached following the petitioner’s oral response to the initial Statement of Position at the hearing. Both criticisms miss the mark. Of course there is no empirical evidence that requiring the responsive Statement of Position before the hearing starts will facilitate election agreements, because to date no such response has been required prior to the start of the hearing. And although there may be no evidence that a significant number of election agreements are reached following the petitioner’s oral response *at the hearing*, this is beside the point. Our view is that by requiring a response *before the hearing*, parties will be afforded a greater and better opportunity to reach election agreements. Once a pre-election hearing has already commenced, parties have already lost one of the primary advantages of an election agreement, viz., avoiding the need to prepare for and appear at a hearing in the first place.

Statement of Position along with the petition, as some responses to the 2017 Request for Information proposed. Although in some instances a petitioner may be able to anticipate the issues nonpetitioning parties will raise in response to the petition, this will not always, or even often, be the case.

preparations for travel to the hearing location by the parties and their representatives and, in some cases, by regional personnel as well.

Under the prior rules, the employer's Statement of Position was due by noon the business day before the opening of the hearing. In many instances, this gave the parties less than one full day before the hearing to try to finalize an agreement; it hardly need be said that a half-day is not much time to receive and process the Statement of Position (which may itself complicate negotiations for an election agreement) and meaningfully negotiate for an election agreement while concurrently preparing for the hearing should no agreement be concluded. The Board is accordingly of the view that more time should be provided between the filing and service of the responsive statement and the hearing so that parties have more time to balance these tasks. We believe that requiring submission of the responsive statement by noon 3 business days in advance of the hearing date serves this purpose, as it ensures parties and Agency personnel will have at least two full business days (the two days after the responsive statement is received) to manage and adjust their hearing-related tasks in light of the responsive statement while still having time to explore the possibility of an election agreement. It also affords regional personnel and the hearing officer more time and opportunity to facilitate the execution of an election agreement while still preparing for the contingency of a hearing.

In conclusion, the responsive Statement of Position amendment here merely modifies the existing requirement that the petitioner respond to the initial Statement to require that response in writing prior to the hearing. This modification promotes uniformity and transparency, will facilitate more efficient hearings, and in many instances will enable parties to reach election agreements, avoiding the need for a hearing altogether.

C. Posting of Notice of Petition for Election

The 2014 amendments introduced the requirement that, within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places and must distribute it electronically if the employer customarily communicates with its employees electronically.

This requirement serves the laudatory purpose of giving employees prompt notice that a petition for election has been filed, and the information

contained on the Notice of Petition for Election provides useful information and guidance to employees and the parties. The Board has, however, determined that two refinements to this provision are warranted.

First, the final rule provides the employer with slightly more time to post the Notice of Petition for Election, requiring that it be posted within 5, rather than 2, business days after the service of the notice of hearing.

The Board believes that this change is warranted in view of the logistical difficulties many employers may face upon receipt of the notice of hearing. For some larger employers, especially large multi-location employers, it may take a significant amount of time to post the Notice of Petition for Election in "all places where notices to employees are customarily posted," and it may likewise take time to determine with which of the petitioned-for employees the employer customarily communicates. More generally, in view of the changes to the scheduling of the pre-election hearing occasioned by the amendments discussed above, it is far less urgent that the Notice of Petition for Election be posted within 2 business days. Under the prior rules, where the pre-election hearing was generally scheduled for 8 days after service of the notice of hearing, in most instances the employees and the parties were guaranteed only 6 calendar days' posting of the Notice of Petition for Election prior to commencement of the pre-election hearing.⁵⁹ On such a timeline, requiring posting within 2 business days was understandable in order to ensure some reasonable posting period. But under the final rule, where the pre-election hearing will normally be scheduled to start 14 business days after the notice of hearing, requiring that the Notice of Petition of Election be posted within 5 business days will guarantee that the employees and parties will have the benefit of the notice posting for at least 9 business days prior to the start of the hearing. That being the case, the Notice of Petition will clearly continue to serve its intended purpose of providing ample notice and useful guidance to employees and the parties under the final rule. Further, inasmuch as the failure to timely post the Notice of Petition may be grounds for setting aside the election, providing an extra few days for the employer to comply with this requirement will hopefully

minimize the occurrence of objectionable noncompliance.

Second, the final rule clarifies that in those situations where electronic distribution of the Notice of Petition for Election is warranted, the Notice only needs to be distributed electronically to the employees in the petitioned-for unit. This appears to have been the intent of the 2014 amendments, given that the explanation for the amendments states, in response to a comment questioning the reach of the electronic distribution requirement:

If the employer customarily communicates with all the employees in the petitioned-for unit through electronic means, then the employer must distribute the Notice of Petition for Election electronically to the entire unit. If the employer customarily communicates with only some of the employees in the petitioned-for unit through electronic means, then the employer need only distribute the Notice of Petition for Election electronically to those employees.

79 FR 74379. The limitation of electronic distribution to employees in the petitioned-for unit is not, however, clear from the face of the prior rules. By clarifying this point, the final rule provides parties with clearer guidance and reduces the possibility of wasteful litigation over the proper interpretation of this provision.

102.64 Conduct of Hearing

Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), states that whenever a petition has been filed in accordance with the Board's regulations, "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." The Act itself does not define the parameters of the pre-election hearing, aside from providing that (1) it may be conducted by a regional officer or employee "who shall not make any recommendations with respect thereto," and (2) if, upon the record of the pre-election hearing, the Board finds "that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." Id.

Prior to the 2014 amendments, the Board's approach to the scope of the pre-election hearing was governed by *Barre National, Inc.*, 316 NLRB 877 (1995). In that case, the regional director determined that, in the absence of any other disputed issues, the supervisory status of certain individuals would not be litigated at the pre-election hearing, and that instead those individuals would be permitted to vote subject to challenge. The Board reversed, holding that by precluding litigation of the

⁵⁹ The employees and parties are guaranteed only 4 calendar days' posting of the Notice of Petition for Election if the Notice of Hearing is served on a Thursday.

supervisory issue, the pre-election hearing had not met the requirements of the Act or the Board's then-current rules and regulations.⁶⁰ Thus, under *Barre National* and its progeny, the Board held that parties had the right to present evidence in support of their respective positions at the hearing. See *North Manchester Foundry, Inc.*, 328 NLRB 372, 372–373 (1999). This right did not extend to pre-election resolution of eligibility and inclusion issues, however, given that reviewing courts had held that there was no general requirement that the Board decide all voter eligibility issues prior to an election. *Barre National*, 316 NLRB at 878 n.9 (collecting cases).

The 2014 amendments altered this longstanding approach to the scope of the pre-election hearing. First, the 2014 amendments modified § 102.64(a) to state that the purpose of the pre-election hearing “is to determine if a question of representation exists” and to further specify the circumstances under which such a question exists.⁶¹ Second, the Board further modified § 102.64(a) to provide that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.” Third, the Board modified § 102.66(a) to limit the parties’ right to present testimony and evidence to contentions that “are relevant to the existence of a question of representation.” Relatedly, the Board modified § 102.67 to reflect that regional directors could defer questions of eligibility and inclusion by directing that the affected employees vote subject to challenge. In making these modifications, the 2014 amendments expressly overruled *Barre National* and *North Manchester Foundry*. 79 FR 74386.

The 2014 amendments explained these changes as follows. First and foremost, the Board emphasized that the only requirement for the scope of the pre-election hearing set forth in the Act is the determination of whether a

question of representation exists, and that whether particular individuals are in the unit and are eligible to vote is not relevant to whether a question of representation exists. 79 FR 74384–74386. Second, the Board explained that *Barre National* had relied on the text of the Board’s regulations, not the text of the Act, in holding that the parties had a right to present evidence in support of their positions, and the 2014 amendments eliminated that language. 79 FR 74385–74386. The Board also opined that *Barre National* was not “administratively rational” because although it required litigation of issues, it permitted deferral of the resolution of those issues until after the election, and in many instances the election results would moot those very issues; accordingly, *Barre National* permitted unnecessary litigation that was a barrier to more expeditious resolution of questions of representation. 79 FR 74385–74386. Third, the Board expressed concern that unless the pre-election hearing were limited to evidence bearing on the existence of a question of representation, “the possibility of using unnecessary litigation to gain strategic advantage exists in every case”; for example, a party could use the threat of litigating unnecessary issues at a hearing to extract favorable terms in an election agreement. 79 FR 74386–74387.⁶² Fourth, the Board emphasized that not requiring litigation of these types of issues conserved Agency and party resources rather than wasting them on issues that could ultimately prove unnecessary to litigate and resolve in the first place. 79 FR 74387, 74391. In this regard, the Board stated that “[e]very non-essential piece of evidence that is adduced adds time that the parties and the Board’s hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision.” 79 FR 74387.

The 2014 amendments accordingly permitted regional directors to defer litigation of eligibility and inclusion disputes in order to avoid wasteful litigation, to conduct elections more promptly, and to disincentivize delaying tactics. And more generally, the Board’s holding was that any interest in pre-election litigation of

these disputes was outweighed by the interest in prompt resolution of questions of representation. 79 FR 74391.

We agree with the 2014 amendments’ decision to set forth the purpose of the pre-election hearing. We are also satisfied that defining that purpose as “determin[ing] if a question of representation exists” is consistent with the text of § 9(c)(1). And we do not dispute that deferral of issues that do not bear on the existence of a question of representation is permissible under the Act.⁶³ But contrary to the 2014 amendments, we conclude that, as a policy matter, the Board should return to the practice of permitting parties to present evidence in support of their positions with respect to disputed, properly-raised issues. In our view, permitting litigation of issues of eligibility and inclusion at the pre-election hearing—and encouraging regional directors to resolve such issues before directing an election—will better serve the interests of certainty and finality, uniformity and transparency, fair and accurate voting, and efficiency. The final rule accordingly modifies § 102.64(a) to provide that the *primary* purpose of the pre-election hearing is to determine the existence of a question of representation, but to specify that—absent agreement of the parties to the contrary—disputes concerning unit scope, voter eligibility, and supervisory status will normally be litigated and resolved by the regional director before an election is directed.

Returning to the practice of permitting parties to present evidence in support of their properly raised, adverse positions will promote certainty and finality of election results in several ways. To begin, it bears emphasis here that, with respect to the scope of the pre-election hearing, the 2014 amendments focused almost exclusively on establishing the *existence* of a question of representation. Although we readily agree that the existence of such a question 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. As explained earlier, the mere fact that an election has been conducted promptly does not mean that the question of representation has been resolved. Indeed, where litigation of eligibility or inclusion issues has been deferred, and the election results do not

⁶⁰ Before the 2014 amendments, § 102.64 provided that “[i]t shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act,” and § 101.20(c) stated that “[t]he parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.” As noted below, the 2014 amendments removed this language from § 102.64; the 2014 amendments eliminated § 101.20.

⁶¹ “A question of representation exists if a proper petition has been filed concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.”

⁶² The Board commented that the temptation to use the threat of protracted litigation to gain a strategic advantage was heightened by the fact that, under the pre-2014 rules and regulations, parties had a right to take at least 7 days after the hearing to file post-hearing briefs, and elections directed after a hearing ordinarily could not be scheduled for sooner than 25 days after the direction of election.

⁶³ We note that court challenges asserting the contrary were rejected. *Associated Builders & Contractors of Texas*, 826 F.3d at 220–223; *Chamber of Commerce*, 118 F.Supp.3d at 196–200.

render these issues moot, the question of representation cannot be resolved until these issues are litigated and decided by the regional director (and, if a request for review follows, by the Board). Prior to 2014, these issues would have at least been litigated before the election, creating a record permitting them to be resolved more quickly post-election even if the decisional process was deferred until then. Under the 2014 amendments, however, it may be necessary to conduct extensive hearings on these very issues after the election has been conducted. Given that many such issues could be litigated *and decided* prior to the direction of election, actively promoting their deferral to post-election proceedings comes at the cost of swifter certainty and finality. In our view, where the parties have not agreed to defer these types of issues, the Board should strive to maximize the opportunity for an election vote to provide immediate finality, subject only to the filing of objections to conduct allegedly affecting the results. Creating a record on which issues of eligibility and inclusion can be decided and encouraging regional directors to resolve the issues to the greatest extent possible prior to the election serves this goal.

Litigating and resolving eligibility and inclusion issues prior to an election will, as a general matter, reduce the number of challenged voters. Whenever a challenged vote is cast, it cannot but detract from certainty, because neither the Board nor the parties nor the individual voter can be sure, at the time the challenged vote is cast, whether it will be counted. Whenever challenges prove determinative of the ultimate election outcome, their post-election litigation and/or resolution litigation postpones finality. And even where challenged votes are not determinative, a shadow of uncertainty remains over the bargaining unit placement of the challenged voters that could impact a rerun election or contract negotiations over the placement of the challenged voters in the bargaining unit. This is not to suggest that all challenges should always be resolved regardless of whether they are determinative, nor is to deny that unanticipated challenges can arise on the date of the election regardless of what issues have been litigated and resolved previously. It is only to observe that challenges inherently detract from the goal of finality and certainty in the election results, and that seeking to minimize them accordingly serves this goal.⁶⁴

⁶⁴ In addition, as discussed at greater length below with respect to the 20-business-day period

In particular, encouraging the resolution of supervisory issues prior to the direction of election advances these purposes. Failing to resolve properly-raised issues of supervisory status prior to an election can lead to post-election complications where the putative supervisors engage in conduct during the critical period that is objectionable when engaged in by a supervisor, but is unobjectionable when engaged in by nonparty employees.⁶⁵ As the dissent to the 2014 amendments observed, by not resolving supervisory issues before the election,

many employees will not know there is even a question about whether fellow voters—with whom they may have discussed many issues—will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election.

79 FR 74438 n.581 (dissenting views of Members Philip A. Miscimarra and Harry I. Johnson III). The 2014 amendments did not, in our view, satisfactorily account for these possible complications. In this regard, the 2014 amendments dismissed similar concerns by suggesting that undisputed supervisors will almost always be present during the election campaign and by arguing that uncertainty cannot be entirely eliminated. 79 FR 74389. But the fact that undisputed supervisors may be present during the campaign does not respond to the concern identified by the 2014 dissent, and the fact that pre-election resolution of all supervisory status disputes may not always be possible or cannot forestall objectionable conduct that occurs prior to resolution does not mean that the Board should not ordinarily attempt to resolve supervisory status issues prior to an election when the parties are unable to agree to other disposition of these issues. At a minimum, resolution of supervisory issues at some point prior to the election can provide the parties with better guidance for the remainder of the

between the direction and conduct of an election and the automatic impoundment of ballots when a request for review is pending, challenges carry a greater risk of compromising ballot secrecy. Thus, by litigating and resolving eligibility issues before the election, and thus removing the basis for at least some challenges, this change also serves the interest of ballot secrecy.

⁶⁵ For example, compare *Montgomery Ward & Co.*, 232 NLRB 848 (1977) (threats of job loss by supervisor objectionable) with *Duralam, Inc.*, 284 NLRB 1419, 1419 fn. 2 (1987) (“threats of job loss for not supporting the union, made by one rank-and-file employee to another, are not objectionable”).

election campaign and increases the possibility of forestalling objectionable conduct during that time.

The considerations identified above in support of this amendment in the final rule also promote transparency and uniformity. Having eligibility and inclusion issues litigated and generally resolved before a direction of election will assist the parties in knowing who is eligible to vote and who speaks for management. We think it goes without saying that these circumstances promote greater transparency in the Board’s procedures. Further, given that the 2014 amendments encouraged deferral and gave regional directors broad discretion to determine whether to defer and how many individual voter eligibility and inclusion issues could be deferred, or to litigate and resolve these types of issues prior to directing an election, 79 FR 74388,⁶⁶ setting the expectation in the final rule that, unless the parties agree to defer them, these types of disputes will be litigated, and normally will be decided, before the election is directed also promotes greater uniformity in regional practice.

The final rule promotes fair and accurate voting as well. When issues of eligibility and inclusion are deferred,

⁶⁶ The Board had originally proposed language under which deferral of issues affecting less than 20% of the unit would have been mandatory, but the final 2014 amendments stated that a case-by-case approach permitting regional directors to exercise their discretion was preferable. See id. Still, the amendments encouraged deferral to this substantial degree, or more, in order to avoid any delay in the conduct of an election. This was recognized in the General Counsel’s subsequent Guidance Memorandum, which stated “The Board noted that it strongly believed that regional directors’ discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election litigation of eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. GC Memo 15–06 at 12 fn. 18, <https://www.nlr.gov/news-publications/nlr-memoranda/general-counsel-memos> (citing 79 FR 74388 fn. 373). This guidance has been incorporated in the current advisory Casehandling Manual (Part Two) Representation Proceedings section 11084.3. This guidance contrasts with the prior version of the manual that provided, in relevant part, that “As a general rule, the regional director should decline to approve an election agreement where it is known that more than 10 percent of the voters will be challenged, but this guidance may be exceeded if the regional director deems it advisable to do so.” Notably, the General Counsel’s Guidance Memo for implementation of the subsequently revoked 2011 election rule amendments applied the 10 percent rule to directed elections as well. GC Memo 12–04 at 9, <https://www.nlr.gov/news-publications/nlr-memoranda/general-counsel-memos>. As discussed below, although we agree that regional directors should retain a certain degree of discretion to defer resolution of individual inclusion and exclusion issues under the final rule, they should be encouraged to resolve all of them, rather than defer, as much as possible, and should not as a general rule defer issues that affect more than 10% of the unit.

employees cast their votes without the benefit of knowing the precise contours of the unit in which they are voting, and specific inclusions and exclusions may be of great significance to them. The potential for confusion increases as the number of deferred individual employee eligibility issues increases. It seems obvious that it would be important for voters to know who they are voting to join in collective bargaining when they decide whether or not they want to be represented by a union for purposes of collective bargaining. Accordingly, rules encouraging the resolution of unit eligibility and inclusion issues prior to the election do not represent wasteful litigation, even if they may not be a cost-free proposition, because they still promote the exercise of employee free choice by maximizing the information available to voters regarding unit scope and voter eligibility. The 2014 amendments acknowledged that eligible voters do indeed have an interest “in knowing precisely who will be in the unit should they choose to be represented.” 79 FR 74384 (quoting 79 FR 7331); see 79 FR 74387. But the 2014 amendments also gave this interest short shrift, commenting that although employees may not know whether particular individuals or groups will be eligible or included, this was already the case under the pre-2014 rules and regulations because the resolution of a certain number of eligibility issues, even if litigated pre-election, would still be deferred in many instances until after the election. 79 FR 74389.⁶⁷ This is, however, precisely why the final rule amends § 102.64(a) to state that issues of “unit scope, voter eligibility and supervisory status will normally be litigated *and resolved*” before the election is directed (emphasis added).

We recognize that there may be instances in which the detriment of delay from requiring pre-election resolution of a particular eligibility issue or issues outweighs the substantial interest in having all eligibility issues

resolved prior to an election. For example, those instances may involve the eligibility of a few employees for whom the record evidence is not sufficient, even when the issue has been litigated, to permit a definitive finding.⁶⁸ The Board has also long held that disputes concerning the voting eligibility of economic strikers are properly resolved in post-election proceedings. See, e.g., *Milwaukee Independent Meat Packers Association*, 223 NLRB 922, 923 (1976) (citing *Pipe Machinery Co.*, 76 NLRB 247 (1948)). Accordingly, we are not imposing a requirement that, absent agreement of the parties to the contrary, all eligibility issues must be resolved prior to an election. Section 102.64(a) as modified by the final rule states only that that disputes concerning unit scope, voter eligibility, and supervisor status will “normally” be litigated and resolved by the regional director. However, we are making clear that, as a general rule, when regional directors consider the need to defer some properly-raised eligibility and inclusion issues, they should adhere to the general pre-2014 practice of limiting deferral of inclusion and exclusion issues to 10 percent of the proposed unit.⁶⁹ Doing so will, quite simply, help ensure that voters know the contours of the unit in which they are voting. And a more informed electorate plainly promotes fair and accurate voting.

The final rule also promotes fair and accurate voting by reducing the possibility that voters will be confused by use of the vote-subject-to-challenge procedure. When this procedure is used, the Notice of Election advising employees of the voting unit and the other election details states that the individuals in question “are neither included in, nor excluded from, the bargaining unit, inasmuch as” they have been permitted to vote subject to challenge, and that their eligibility or inclusion “will be resolved, if necessary, following the election.” § 102.67(b). Although the 2014 amendments optimistically described such language as providing the parties

and voters with “guidance,” 79 FR 74403, we are not persuaded that this is especially useful guidance for the typical voter in a Board-conducted election. When voters are effectively being told that the Board will decide an issue later if it has to, it is unclear to us what “guidance” this provides. Although it may be the case that employees can take the notice of their challenged status in stride, we think this information runs the risk of being a disincentive for some employees to vote, even if they might ultimately be found eligible to participate. Even the possibility that this could happen and that it could affect the election outcome warrants an amended procedural rule that seeks to provide more comprehensive guidance to employees in advance of an election as to who can and who cannot vote.⁷⁰

A few final observations concerning litigation of these issues are in order. First, we emphasize that the parties remain free to agree to defer litigation of these types of issues to post-election proceedings (should election results not render the issues moot), and the final rule expressly provides for this option.⁷¹ Second, we reiterate that although the practice of deferring litigation can result in conducting elections sooner,⁷² it is impossible to know in advance whether the eligibility and inclusion issues the parties have properly raised will be mooted by the election results, and little overall efficiency is gained when litigation of these issues proves necessary in post-election proceedings. Third, we are not requiring that regional directors resolve all disputes prior to the direction of election. As noted above, we are not at this time eliminating the discretion of the regional director to defer resolution of eligibility and

⁶⁷ The 2014 amendments also responded by pointing out that since 1947, voters in mixed professional/non-professional units do not know the precise composition of the unit when they vote, insofar as at the election, the professional employees must vote simultaneously on whether they wish to be included in a unit with non-professionals and whether they wish to be represented by the petitioning union. 79 FR 74389 (citing § 9(b)(1); *Sonotone Corp.*, 90 NLRB at 1241–42). This is true, but this procedure was developed in response to a specific statutory mandate. The fact that the Board has adopted this specific practice in this discrete area for statutory reasons is not, in our view, a persuasive reason not to seek to facilitate a better-informed electorate where this can be achieved through permitting litigation, and promoting resolution, of inclusion and eligibility issues prior to the direction of election.

⁶⁸ See, e.g., *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983) (finding no error in Board’s decision to allow certain individuals to vote under challenge where evidence was insufficient to determine whether they were statutory supervisors and noting “[s]uch a practice enables the Board to conduct an immediate election”).

⁶⁹ The same limitation should apply to the regional director’s consideration of election agreements to vote individuals subject to challenge. We leave to subsequent adjudication the question whether it may even be appropriate for a regional director to exceed the general 10 percent limitation on deferrals.

⁷⁰ The dissent indicates that our reasoning on this count is inconsistent with *UPS v. NLRB*, 921 F.3d 251 (D.C. Cir. 2019). Not so. The court in that case merely held that the Acting Regional Director’s decision to defer ruling on the unit placement of two disputed classifications and instead vote the affected employees under challenge did not “imperil the bargaining unit’s right to make an informed choice” given that the notice of election advised employees of the possibility of change to the bargaining unit’s definition. *Id.* at 257. The court said nothing at odds with our conclusion that, as a policy matter, it will better promote fair, accurate, and transparent voting by providing that eligibility and unit scope disputes will normally be litigated and resolved prior to the election.

⁷¹ As explained earlier, we do not view preserving this option as inconsistent with the benefits that attach to litigating and resolving issues prior to the election. See fn. 23, *supra*.

⁷² That said, we are confident that in the vast majority of instances, disputes of this kind that would be deferred under the 2014 amendments can be litigated and resolved without dramatically expanding the pre-election hearing and without drastically protracting the length of time it will take the regional director to decide such issues.

inclusion issues, although we are making clear that they should normally do so and that there are, in any event, limits to the number of individual eligibility and inclusion issues that may be deferred. Fourth, we are not, through this change, countenancing free-for-all hearings at which parties will be free to introduce irrelevant evidence without limitation. As already discussed, the final rule retains the Statement of Position requirement, as well as the preclusion provisions, and it further requires responsive statements from petitioners. Parties will accordingly be limited to presenting evidence pertaining to issues they have properly raised, and on which they have taken adverse positions. And although evidence regarding eligibility and inclusion issues may not necessarily be relevant to the existence of a question of representation, such evidence can and in many cases will prove relevant to the resolution of that question. As for truly irrelevant evidence, as explained below nothing in the final rule disturbs the right of the hearing officer and regional director to police the hearing against the burdening of the record.⁷³ With these protections in place, we are not persuaded by the 2014 amendments' concern that the ability to litigate these issues will result in parties "using unnecessary litigation to gain strategic advantage." 79 FR 74386.⁷⁴ Fifth, and finally, nothing in the final rule changes the fact that the regional director will direct an election upon finding that a question of representation exists. The final rule simply provides that the election thus directed will entail greater certainty about who is included in the unit and eligibility to vote in the election, thereby promoting a variety of the interests the Board's representation case procedures are required to balance and potentially limiting the litigation of post-election challenge and objections

⁷³ See, e.g., *Jersey Shore Nursing and Rehabilitation Center*, 325 NLRB 603, 603 (1998). See also 79 FR 74397 ("A tribunal need not permit litigation of a fact that will not as a matter of law, affect the result, or as to which the party that seeks to litigate the fact cannot identify evidence that would sustain its position.").

⁷⁴ We observe that despite the 2014 amendments' concern with the possibility of parties behaving in this way, the supplementary information to the amendments did not offer evidence establishing that such behavior was routine. See 79 FR 74445–74446 (dissenting views of Philip A. Miscimarra and Harry I. Johnson III). In addition, the Board's statistics reflect that parties continue to enter election agreements at the same rate that they did before the 2014 amendments took effect. See fn. 16, supra. If there was a widespread practice of parties using the threat of unnecessary litigation to gain strategic advantages in election agreements prior to the 2014 amendments, one would expect to see some meaningful change in this statistic following the 2014 amendments' elimination of this incentive.

issues that could delay finality in the election results.

102.66 Introduction of Evidence: Rights of Parties at Hearing; Preclusion; Subpoenas; Oral Argument and Briefs

The final rule makes three significant modifications to § 102.66.⁷⁵ First, the final rule modifies § 102.66(a) to specify that parties have the right to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions that are relevant not just to the existence of a question of representation, but also the other issues in the case that have been properly raised. Second, the final rule modifies § 102.66(c) to emphasize that, notwithstanding the offer of proof procedure, in no event shall a party be precluded from introducing relevant evidence "otherwise consistent with this subpart." Both of these changes simply reflect the modifications to § 102.64(a) explained immediately above. The rights of the parties at the pre-election hearing, and the discretion of the hearing officer to solicit (and the regional director to rule on) offers of proof, are both otherwise unmodified.

Third, the final rule modifies § 102.66(h) to provide that any party desiring to submit a brief to the regional director shall be entitled to do so within 5 business days after the close of the hearing, and that prior to the close of the hearing and for good cause the hearing officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Prior to the 2014 amendments, the Board's rules and regulations provided that, following the close of the pre-election hearing, any party that desired to submit a brief to the regional director had 7 (calendar) days to file it, although prior to the close of the hearing and for good cause the hearing officer could grant an extension of time of up to an additional 14 days. See § 102.67(a) (2013). The final rule here essentially reinstates that longstanding practice.

The 2014 amendments removed the right of the parties to file post-hearing briefs, providing that they would be permitted only upon "special permission of the Regional Director and within the time and addressing subjects permitted by the Regional Director." Absent such permission, parties were limited to presenting their positions via

⁷⁵ The final rule also modifies § 102.66(b) to reflect that, as now provided under § 102.63(b), at least two Statements of Position will have been filed prior to the start of the hearing and will need to be received in evidence at the start of the hearing. The final rule does not otherwise modify the requirements of this paragraph.

oral argument (if requested) at the close of the hearing. § 102.66(h). The principal supporting rationale for these amendments was that (1) briefs are not necessary in the majority of representation cases, as they often raise "recurring and uncomplicated legal and factual issues" that do not require briefs in order for the parties to fully and fairly present their positions, and (2) providing the right to file briefs could delay issuance of the decision and direction of election, and thus delay the conduct of the election itself. 79 FR 74401–74402. Although we do not take issue with the proposition that the Board is not required to permit post-hearing briefs after pre-election hearings, we have nevertheless decided to reinstate the parties' right to file them. In this regard, we disagree with the premises underlying the removal of this right, and we further conclude that permitting post-hearing briefs will better accommodate the interests of efficiency and uniformity.

To begin, we do not agree with the 2014 amendments' pronouncement that post-hearing briefs are generally unnecessary because representation cases are so prone to "recurring and uncomplicated legal and factual issues" as to make briefing unnecessary in a "majority" of cases. We note that *An Outline of Law and Procedure in Representation Cases*—the Office of the General Counsel's summary treatise for representation case law—takes more than 300 pages merely to summarize the range of possible pre-election representation issues. It is true that some of the issues covered in that document arise far more frequently than others, but the cases in which there is clearly controlling precedent that dictates only one possible outcome are far less common than suggested by the 2014 amendments. Further, even when governing legal principles are clear, many of the admittedly recurring issues that are litigated in pre-election hearings are anything but factually "uncomplicated." That was true even for issues directly involving whether a question concerning representation existed, such as those involving unit scope and contract bar, which still had to be litigated and resolved prior to an election under the 2014 amendments. As discussed above, under the final rule, properly-raised eligibility and inclusion issues will also once again be litigated at pre-election hearings. Many of these issues, such as those involving alleged supervisory or independent contractor status, frequently require detailed factual analyses in the context of multi-factor legal tests. In sum,

review of Board decisions on these and other representation issues suggests that factual and legal complexity is much more common in contested cases than the 2014 amendments supposed. And even in cases where no one issue is particularly complex, a multiplicity of issues may nevertheless result in a case that is complex overall.

We also do not accept the unsubstantiated premise that the right to file post-hearing briefs was a significant source of delay in pre-election proceedings prior to 2015. Outside of instances in which extensions were granted, the pre-2014 rules provided a mere 7 calendar days for filing post-hearing briefs. Thus, at best, the 2014 amendments saved 7 days between the close of the hearing and the issuance of a decision and direction of election. But even this figure is somewhat misleading. Following any pre-election hearing, the regional director typically requires at least a few days to draft and issue a decision and direction of election. And as the dissent to the 2014 amendments—quoting former Member Hayes’s dissent to the vacated December 2011 rule—pointed out:

[T]he majority points to no evidence that the 7 days . . . afforded parties to file briefs following pre-election hearings actually causes delay in the issuance of Regional directors’ decisions. . . . There is no reason why a Regional director or his decision writer cannot begin preparing a decision before the briefs arrive and, if the briefs raise no issues the Regional director has not considered, simply issue the decision immediately. In fact, the Agency’s internal training program expressly instructs decision writers to begin drafting pre-election Regional directors’ decisions before the briefs arrive.

79 FR 74449 (quoting 77 FR 25567).

In addition, it seems more plausible that the information provided in post-hearing briefs would generally save time in the processing of cases from the close of the hearing to the regional director’s decision, rather than causing delay. In this respect, the briefs serve the same purpose, but with greater specificity, as the *required* filing of pre-hearing statements by parties. Post-hearing briefs further clarify the issues presented and opposing views taken in pre-hearing statements, and they do so with the additional guidance of reference to specific caselaw and to specific pages in the record that support a party’s position.

Ultimately, then, there is no evidence—only the 2014 amendments’ ipse dixit—that post-hearing briefs are unnecessary and cause delay. That being the case, it is unclear whether permitting them only upon special

permission of the Regional Director secured any tangible benefit for the processing of election petitions, but even assuming that the 2014 amendments did in some cases accelerate the issuance of the Regional Director’s decision, we think that restoration of the right to file post-hearing briefs will yield benefits that easily outweigh any consequential addition of time for issuance of the subsequent decision.

We are strongly of the view that permitting post-hearing briefs in all cases will promote greater overall efficiency. The 2014 amendments generally permitted only oral argument, limiting parties to extemporaneous summaries of the evidence, relevant case law, and their arguments and positions on the issues without the benefit of the hearing transcript and post-hearing research of precedent. By contrast, permitting the routine filing of post-hearing briefs does allow the parties time to review the transcript, to engage in legal research, and to refine, moderate, or even abandon arguments or sub-arguments they otherwise might have only generally made, misstated, or even overlooked during oral argument. It seems obvious that the greater specificity in briefs, as opposed to oral argument, would benefit both the parties and the regional director in multiple ways by forging a better common understanding of the issues presented and the precedent and record evidence relevant to those issues. The regional director’s need for independent research of the law and record would be reduced, as would the risk of misunderstanding or overlooking arguments that a party believed to be essential to its case. Again, without totally discounting the contention in the 2014 amendments that permitting the routine filing of post-hearing briefs may add time to the pre-election period, we believe it is just as likely that in many instances routine briefing can have the opposite result of contracting the time needed for the regional director to draft a decision. In any event, the additional time involved will be modest. As indicated above, the final rule provides that parties have 5 business days to file their post-hearing brief, absent securing permission for an extension of up to 10 more business days at the close of the hearing. In most instances, this will equate to time provided for post-hearing briefs prior to the 2014 amendments. Given that pre-election hearings can be—and often are—fact-intensive affairs involving multiple and/or complex issues, 5 business days is hardly an

unreasonably long time to expect most parties to produce a brief.⁷⁶

Finally, we are not requiring that post-hearing briefs be filed in each and every contested case. As was the case before the 2014 amendments, the parties will be free to waive the period for filing post-hearing briefs, and we expect that hearing officers will resume the practice of encouraging parties to argue their positions orally in lieu of briefs in appropriate circumstances.⁷⁷ We are confident that parties will generally do so in cases that are truly routine and uncomplicated.⁷⁸

102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Appeals From Actions of the Regional Director; Statement in Opposition; Requests for Extraordinary Relief; Notice of Election; Voter List

The final rule makes several changes, most of them relatively limited, to § 102.67. First, the final rule modifies § 102.67(b) to emphasize that regional directors retain the right to issue the Notice of Election after issuing a decision and direction of election. Second, the final rule further modifies § 102.67(b) to provide that, absent a waiver by the parties, the regional director will normally not schedule an election before the 20th business day after the date of the direction of election. Third, the final rule modifies § 102.67(c) to provide for the impoundment of ballots if the Board has not ruled on a timely filed pre-election request for review by the date of the election. Fourth, the final rule codifies the existing practice of permitting reply briefs only upon special leave of the Board. Fifth, the final rule now specifies that a party may not file more than one request for review of a particular action or decision by the Regional Director. Sixth, the final rule aligns the procedure for requesting permission to depart from the formatting requirements for briefs,

⁷⁶ Although it is true, as the 2014 amendments pointed out, that many representation case hearings last less than a day, we nevertheless believe that even in simple cases the parties’ arguments to the regional director will benefit from having time to review the transcript, conduct additional research, and structure and refine their arguments. Contrary to the dissent’s imaginative reliance on comparative rates of Board reversals of Regional Directors’ decision before and after implementation of those amendments, we do not regard those statistics as conclusive, or even probative, of the value of post-hearing briefs to the decisional process.

⁷⁷ See former CHM section 11242 (2014).

⁷⁸ To the extent parties insist on filing briefs in truly routine and uncomplicated cases, we note that these are the very cases in which the regional director (or his or her decision-writer) will be in the best position to largely prepare the decision while awaiting the posthearing briefs.

and for requesting extensions of time, with the procedure used for these actions in other types of Board proceedings. Finally, the final rule clarifies that the Notice of Election only need be electronically distributed to eligible voters. Finally, the final rule modifies the time for submitting the Voter List in directed elections consistent with the modifications discussed above with respect to election agreements.⁷⁹

A. Timing of Election Details

The 2014 amendments modified § 102.67(b) to provide that if the regional director directs an election, the direction “ordinarily will specify the date(s), time(s), and location(s) of the election and the eligibility period.” Prior to the 2014 amendments, the Board’s rules did not state when regional directors would specify the election details,⁸⁰ but the practice was to resolve such details after the decision and direction of election through consultation and negotiation with the parties. See 79 FR 74404; CHM section 11280.3 (2014). The rationale in the 2014 amendments for adding language providing for simultaneous issuance of the direction of election and election details was that parties will have already stated their positions on the election details in the petition, in the Statement(s) of Position, and at the hearing. Accordingly, there was generally no need for the region to solicit their positions again, and the election would be conducted sooner. 79 FR 74404. The 2014 amendments stated that simultaneous issuance should “ordinarily” occur, given that there could still be situations where the regional director concluded it was appropriate to consult further with about election details. 79 FR 74404

⁷⁹ The final rule also modifies § 102.67(a) to reflect that the regional director will “determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining as provided in § 102.64(a), and to direct an election, dismiss the petition, or make other disposition of the matter” (emphasis added). This change is simply a matter of a cross-reference to reflect that issues of eligibility and inclusion will now be permitted at the hearing, and that the regional director will normally resolve those issues in the decision and direction of election. The reasons for these changes have already been discussed above. Similarly, the final rule simplifies § 102.67(b) and (l) to refer to the fact that voters may vote subject to challenge, without further explanation, as there is no need to set forth the method by which voters are permitted to vote subject to challenge. These changes also reflect the final rule’s encouraging of regional directors to resolve eligibility and inclusion disputes prior to directing an election, which has been explained above.

⁸⁰ Under the pre-2014 practice, the regional director’s decision and direction of election would contain the eligibility list requirements, however. CHM section 11273.1 (2014).

n.439. The 2014 amendments apparently envisioned that regional directors would only deviate from ordinary practice in the face of “unusual circumstances,” such as when an election was directed substantially after the close of the hearing, or where an election was directed in a unit very different from any the parties had proposed. 79 FR 74370 n.300.

The final rule modifies this language to state that the regional director “may” specify the election details in the direction of election, and to emphasize that the regional director “retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election.”⁸¹ This change represents a shift in emphasis, rather than substance. Given that the parties will have stated their positions on the election details both before and during the hearing, we fully agree with the 2014 amendments that the regional director should ordinarily be able to provide the election details in the direction of election, thus avoiding any delay in issuing the Notice of Election.

That said, we think that it will better promote transparency and efficiency to revise the wording of this provision to place more emphasis on the discretion regional directors have in this regard. By doing so, the final rule emphasizes what the 2014 amendments acknowledged, but did not overtly state in text of § 102.67(b): There may be situations where the regional director concludes it is appropriate to further consult with the parties concerning election details after issuing the direction of election. Replacing the word “ordinarily” with “may,” as well as the adding the final clause to the first sentence of § 102.67(b), makes the Regional Director’s discretion absolutely clear.

This change in wording will also promote efficiency by eliminating any concern that regional directors face an either/or situation where there remains some post-hearing issue about election details. The regional director can issue a direction of election and resolve the election detail issue later without having to justify the bifurcated action based on the existence of “unusual circumstances.” The discretion afforded regional directors to engage the parties in post-hearing discussion of those details will likely lead in some, if not most, cases to consensus and thereby avoid any subsequent request for review or post-election objection based on such

⁸¹ The final rule also modifies subsequent language in § 102.67(b) regarding transmission of the Notice of Election to reflect that it may be transmitted separately after the direction of election.

matters.⁸² It also communicates that a party seeking review of the regional director’s exercise of the discretion to issue a Notice of Election after a direction of election will do so in vain. Again, we expect that regional directors will in fact continue to ordinarily specify such details in the direction of election; the final rule accordingly should not result in any additional delay by virtue of this change.⁸³

B. Period Between Direction and Conduct of Election

Before the 2014 amendments eliminated it, § 101.21(d) of the Board’s Statements of Procedure provided that “unless a waiver is filed, the [Regional] Director will normally not schedule an election until a date between the 25th and 30th day after the date of the decision, to permit the Board to rule on any request for review which may be filed.” At the same time, a request for review of a decision and direction of election was required to be filed within 14 calendar days of that decision to be timely. See § 102.67(b) (2013).

As indicated, the 2014 amendments eliminated § 101.21(d) and revised § 102.67(b) to provide that a Regional Director “shall schedule the election for the earliest date practicable consistent with these Rules.”⁸⁴ In addition, the 2014 amendments modified the request for review procedures to permit a party to file a request for review of any regional director’s action “at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director,” and they more specifically stated that a party is not “precluded from filing a request for review of the direction of election within the time provided in this

⁸² To be clear, we are not suggesting that consensus on these matters is required, or that a regional director is obligated to try to achieve consensus on the election details. As always, in directed elections such details are left to the discretion of the regional director. See *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954). Nor do we suggest, via this change, that regional directors should be exercising their discretion in this area any more frequently than has been the case to date under the 2014 amendments. We merely modify the language of this provision to more clearly emphasize the discretion of regional directors to issue the Notice of Election separately from the Direction of Election.

⁸³ To the extent this provision does cause some additional delay in the issuance of the Notice of Election, we note that the mandatory period between the direction and conduct of election—as discussed immediately below—makes it highly unlikely that such circumstances would delay the scheduling of the election itself.

⁸⁴ The 2014 amendments described the insertion of the “earliest date practicable” language as a “codification” of guidance contained in the Casehandling Manual. 79 FR 74310. As discussed below, we think this characterization of the change is somewhat misleading.

paragraph because it did not file a request for review of the direction of election prior to the election.”

§ 102.67(c). Thus, the 2014 amendments eliminated any specified minimum timeline between the direction and conduct of election⁸⁵ while at the same time instituting procedures that permitted a party to wait to file a request for review of the direction of election until after the election (the results of which may have removed the need to request review of the direction of election).

The rationale for elimination of the 25- to 30-day period was that it “serve[d] little purpose.” 79 FR 74410. More specifically, the Board stated that (1) the period unnecessarily delayed the conduct of elections, thereby postponing the resolution of questions of representation; (2) the period was in tension with the instruction in section 3(b), 29 U.S.C. 153(b), that a grant of review “shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director”; (3) the period encouraged delay in elections conducted pursuant to election agreements because parties would use the threat of insisting on a hearing and the attendant 25- to 30-day period to extract concessions within the election agreement (including the scheduling of the election); (4) the period was designed to permit Board ruling on a request for review before an election, but because requests for review were filed in only a small percentage of cases, review was granted in an even smaller percentage, and stays of elections were virtually never granted, the period served little purpose;⁸⁶ and (5) even where a pre-election request for review was filed, the election “almost always” proceeded anyway, using the vote-and-impound procedure,⁸⁷ before

the Board ruled on the request for review. 79 FR 74410.

Upon reflection, we have decided that the better procedural policy is to reinstate a modified version of the 25- to 30-day period. Section 102.67(b) will continue to provide that the regional director “shall schedule the election for the earliest date practicable,” but restores this phrase to its original context by providing that “unless a waiver is filed, the regional director will normally not schedule an election before the 20th business day after the date of the direction of election.” We have replaced the 25- to 30-day period with the “20th business day” formulation in keeping with our general conversion of representation procedure time periods to business days, and also to provide more certainty and uniformity with respect to the minimum period of time between the direction and conduct of election. Further, consistent with prior practice, the final rule emphasizes that this period is designed “to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section.” However, the final rule also retains the flexibility introduced by the 2014 amendments, insofar as a party may wait until after an election has been conducted to decide whether to file a request for review of the direction of election. Also, consistent with the pre-2014 regulations, the parties remain free to agree to waive the 20-business-day period.

As an initial matter, we do not agree with the 2014 amendments’ characterization of the addition of the “earliest date practicable” language to § 102.67(b) as a codification of pre-2014 practice. The precursor to the 25- to 30-day period was already present in the rules and regulations promulgated in the immediate wake of the Board’s delegation of its representation case authority to the Regional Directors pursuant to section 3(b). 26 FR 3886 (May 4, 1961).⁸⁸ The language in the Casehandling Manual that the Board purported to codify in the 2014 amendments must, of course, be understood in conjunction with the Board’s extant procedures. As such—and indeed, as acknowledged in the 2014 amendments⁸⁹—the fact that the Casehandling Manual had long provided that “[a]n election should be held as early as is practical”⁹⁰

nevertheless assumed the existence of a period between the direction and conduct of an election during which a request for review could be filed, considered by the Board, and potentially ruled upon. By removing that period and providing for elections to be held on “the earliest date practicable,” the 2014 amendments accordingly did represent a “sea change” compared pre-2014 practice.⁹¹

In any event, the 25- to 30-day period was not, as the 2014 amendments stated, “unnecessary delay” that served “little purpose.” As the pre-2014 regulations explicitly stated, this period existed “to permit the Board to rule on any request for review which may be filed” in response to a direction of election. The 1961 institution of this period and the provisions in § 102.67 related to it was not some sort of accident or oversight; indeed, when certain aspects of § 102.67 were amended in 1977, the Board emphasized that they were “designed to facilitate consideration and disposition of requests for review of regional directors’ decisions, thereby *further contributing to the prompt resolution of representation issues.*” 42 FR 41117 (Aug. 15, 1977) (emphasis added). Although the 25- to 30-day period did indeed preclude scheduling the election at an earlier time after the direction of election, this was a calculated tradeoff, because—as the emphasized quote above demonstrates—the Board had concluded that the prompt resolution of representation issues prior to the election would facilitate other interests.

In many respects, this procedural amendment goes hand-in-hand with the amendment permitting litigation of eligibility and inclusion issues at the pre-election hearing and serves the same policy interests.⁹² For example, providing a period before the election during which parties can file and the Board can rule on requests for review permits issues to be definitively resolved prior to the election (or at least prior to the counting of the votes), thereby promoting finality and certainty. As previously stated, the mere fact that an election is conducted promptly does not mean that the question of representation has been resolved. When a request for review has been filed, there is no final resolution until the Board rules on the issues

⁸⁵ However, the scheduling of any of election under the 2014 amendments would still have to permit sufficient time for the required posting of the Notice of Election, which § 102.67(k) defines as “at least 3 full working days prior to 12:01 a.m. of the day of the election.” Further, nonemployer parties are entitled to have the Voter List for 10 days, although the parties entitled to the list may waive the 10-day period to proceed to an election more quickly. See *The Ridgewood Country Club*, 357 NLRB 2247 (2012); *Mod Interiors, Inc.*, 324 NLRB 164 (1997); CHM 11302.1.

⁸⁶ The Board further observed that by providing that a request for review of a direction of election could be filed after the election, it was likely even fewer pre-election requests for review would be filed, further reducing the number of cases the 25- to 30-day period would serve. 79 FR 74410.

⁸⁷ Prior to the 2014 amendments, § 102.67(b) provided that when a pending request for review had not been ruled upon or had been granted prior to the conduct of the election, “all ballots shall be impounded and remain unopened pending such decision.” The 2014 amendments also eliminated this procedure. See 79 FR 74409. As explained in

the next section, we are reinstating a modified version of this procedure at § 102.67(c).

⁸⁸ The period provided for in 1961 was a 20- to 30-day period, rather than a 25- to 30-day period.

⁸⁹ See 79 FR 74405 n.442.

⁹⁰ CHM section 11302.1 (2014).

⁹¹ 79 FR 74405 (“The Board likewise categorically rejects the notion that the proposed language, which the final rule adopts, constitutes a sea change from the Board’s practice which existed prior to the NPRM.”).

⁹² These amendments are, however, severable, and we would adopt each of them independently of the other.

raised by that request for review. Although there may be circumstances where the election results moot the issues raised by a pre-election request for review, there is no way to know beforehand whether this will be the case. Permitting time for the Board to rule on a pre-election request for review could just as well dispose of issues that would *not* be mooted by the election results and would have to be addressed later anyway. Here too, what we have said before applies: The Board should strive to maximize the opportunity for *the election* to provide finality. Permitting the Board a reasonable amount of time, prior to the election, to consider and rule on a request for review as to issues that might otherwise give rise to challenges or objections requiring post-election litigation clearly serves this goal, increasing the likelihood of final agency action—issuance of the appropriate election certification—soon after the tally of ballots.

Reinstating a minimum time period between the direction and conduct of election will also serve uniformity and transparency.⁹³ Under the 2014 amendments, an election would be scheduled “for the earliest date practicable,” an ill-defined term that provides very little guidance. An election could still be scheduled in 25 to 30 days, as under the prior rule, or in less than a week after the direction of election if the nonemployer parties waived the right to have the voter list for 10 days (the only other limitation being the requirement that the employer post the Notice of Election for 3 full working days). § 102.67(k). This is neither a uniform nor transparent standard for the public or agency personnel, and we believe a more consistent and predictable approach to the scheduling of a Board election is preferable by far. The 20-business-day period accordingly promotes uniformity and transparency by notifying parties that in all cases—unless they agree to the contrary—there will be a finite minimum period of time between the direction and conduct of election.

Further, under the 2014 amendments, there was no guidance at all as to when or even whether the Board would rule on a timely filed request for review prior to the election. Now, the 20-business

day minimum period from direction to election restores the opportunity for the Board to address and resolve issues that involve a question of representation as well as eligibility and inclusion issues.

If a party does file a pre-election request for review over issues of eligibility, inclusion, and/or unit scope, the 20-business-day period will also promote fair and accurate voting. As previously discussed, when the Board is able to rule on a request for review raising these types of issues prior to the election, it provides the voters with more precise information regarding the contours of the unit in which they are voting. Similarly, as discussed above with respect to § 102.64(a), the inclusions in and exclusions from a unit may be crucial campaign issues that may influence how employees intend to vote. Again, the 2014 amendments acknowledged that voters have an interest in “knowing precisely who will be in the unit should they choose to be represented.” 79 FR 74384. Giving parties a pre-election period during which to file a request for review that the Board has a realistic opportunity to resolve clearly promotes that interest.

We acknowledge here that the 20-business-day period will detract from how promptly elections were—or at least could be—conducted under the 2014 amendments. Such tradeoffs are unavoidable when balancing competing interests. We note that in most instances the 20-business-day period will add only about two weeks to the typical period between the direction and conduct of election. Under the 2014 amendments, the employer had 2 business days after the direction of election to supply the required Voter List, after which the nonemployer parties were entitled to 10 calendar days to use the list prior to the election. Thus, absent a waiver of the 10-day period, parties could expect an election to be conducted no sooner than two weeks after the direction. Under the final rule, the 20-business day period (absent intervening federal holidays) translates to about four weeks.⁹⁴ In our view, providing for an additional two weeks to facilitate the Board’s ruling on a request for review is a worthwhile tradeoff, given the potential gains to fair and accurate voting, finality and certainty, and uniformity and transparency such a ruling will occasion. Further, the 20-business-day period will also promote efficiency because—as discussed at length at

several points above—deciding issues prior to the election (in the absence of agreement by the parties to defer those issues to post-election resolution) will contribute to a more efficient resolution of the question of representation by clearing away issues that may otherwise linger on after the election.

We also reject the 2014 amendments’ other grounds for eliminating the 25- to 30-day period. First, such a period is not in tension with section 3(b) of the Act. Section 3(b) simply states that “such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.” The 20-business-day period is not a stay. It simply sets a uniform minimum period of time during which a pre-election request for review may be filed and ruled on by the Board prior to an election. As explained below, the election will go forward as scheduled even if the Board has not ruled on a pending request for review by the election date (unless the Board specifically orders a stay of the election). Second, as discussed already with respect to § 102.64(a), the 2014 amendments’ claim that parties used the threat of unnecessary litigation and the delay that came with it to gain leverage in negotiating election agreements was unsupported by objective evidence. The retention of the Statement of Position requirement and the authority of the regional director and hearing officer to require offers of proof should minimize the potential for abuse. Third, the fact that requests for review are filed in a small percentage of cases, and granted in only a fraction of those cases, does not explain why a pre-election period for requesting review should not be permitted in directed election cases, particularly when such a procedure may to lead to faster resolution of issues that *are* raised in a request for review and in doing so enhance the possibility of finality in election results without the need for post-election litigation. Fourth, although it may well be true that the Board frequently failed to rule on pre-election requests for review prior to the conduct of elections before the 2014 amendments, this says more about the historical shortcomings of the Board itself than it does about the desirability of a procedure providing the greater possibility of pre-election resolution.

In conclusion, while we find that reinstatement of a pre-election period for the resolution of issues that are timely raised by requests for review is desirable for the policy reasons we have stated, we emphasize that the 20-business-day period is likely to have a limited practical effect on the conduct of elections. The period applies only to

⁹³ The dissent faults us for discussing other interests served by the 20-business-day period despite the fact the regulatory text refers only to permitting the Board to rule on a request for review. The purpose of the 20-business-day period is indeed to permit the Board to rule on a request for review, should one be timely filed during that period. But that period also happens to serve others interests, and there is nothing irregular in discussing them here.

⁹⁴ Due to the fact that the final rule retains the “earliest date practicable” language, it is foreseeable that elections will be scheduled as soon as possible after the 20-business-day period has elapsed.

the historically small number of cases in which the parties cannot reach an election agreement, and even then the parties remain free to waive the 20-business-day period if they so desire.⁹⁵

In sum, the 25- to 30-day period eliminated by the 2014 amendments, and its purpose of giving the Board the opportunity to rule on pre-election requests for review, served a variety of important interests that outweighed the significance of the extra time required to accommodate that purpose and these interests. Accordingly, we are reinstituting a similar period, but will now instead provide that unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election.

C. Pre-Election Requests for Review and Impoundment of Ballots

Prior to the 2014 amendments, the Board's rules provided that a request for review of a decision and direction of election could be filed with the Board within 14 days after the service of the direction of election. The regional director would schedule and conduct the election, but § 102.67(b) (2013) provided that "if a pending request for review ha[d] not been ruled upon or ha[d] been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision."

The 2014 amendments eliminated this impoundment provision and amended

§ 102.67(c) to read that, if a request for review is filed:

such a review shall not, unless specifically ordered by the Board, operate as a stay of any action by the Regional Director. The request for review may be filed at any time following the action until 14 days after a final disposition of the proceeding by the Regional Director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

In justifying the removal of the impoundment provision, the 2014 amendments stated that doing so codified the approach purportedly set forth in section 3(b) of the Act, which states that stays will not take place "unless specifically ordered by the Board." 79 FR 74409. The amendments observed that nothing in the Act itself provides for impoundment, and accordingly argued that the removal of this mechanism "is consistent with the purpose of Section 3(b) to prevent delays in the Board's processing from impacting regional Section 9 proceedings." 79 FR 74409. In addition, the 2014 amendments stated that, although removing the impoundment procedure could result in unnecessary rerun elections, parties still remained free (under § 102.67(j)) to request impoundment in a particular case, ballots of those employees permitted to vote subject to challenge would still be segregated and impounded, and the possibility of reruns was minimized in any event because the Board rarely reverses the regional director. 79 FR 74409.

As indicated, the 2014 amendments did not eliminate automatic impoundment in all circumstances. The ballots of individuals permitted to vote subject to challenge—whether by the agreement of the parties or at the direction of the regional director—were still segregated and impounded. When such ballots proved determinative of the election outcome, the eligibility of the challenged voters would be resolved by the regional director, but even then the ballots could remain impounded. As provided in GC Memo 15–06, "Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015," following a regional director's decision ordering ballots to be opened and counted, the region "should not open and count until the time for filing a request for review has passed and no request was filed or the Board has ruled on the request for review" in order "[t]o help protect ballots secrecy." *Id.* at 33.

As discussed above, the final rule retains the option in the 2014 amendments for a party to wait to file a request for review of a decision and direction of election until after an election has been conducted. A significant inducement for exercising this option is that the results of the election may moot the arguments an aggrieved party would otherwise raise, thereby eliminating the need to file a request for review. See 79 FR 74408–74409. Even so, we have decided to reinstate the pre-2014 impoundment procedure in limited form. Accordingly, the final rule amends § 102.67(c) to provide that, if a pre-election request for review is filed within 10 days of the direction of election and remains unresolved when the election is conducted, "ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that decision issues, but the pendency of such a request for review shall not require impoundment of the ballots." ⁹⁶

As these modifications indicate, automatic impoundment will be strictly limited to situations in which the request for review is filed within 10 business days after the decision and direction of election. In this regard, the final rule also modifies § 102.67(i)(3) to provide that no extensions of time will be granted to circumvent the impoundment provisions in § 102.67(c). Thus, any party that files a request for review of a decision and direction of election more than 10 business days after the issuance of the decision will be precluded from securing automatic impoundment.⁹⁷

As discussed in the previous section, having a period between the direction and conduct of election during which the Board has the opportunity to rule on

⁹⁶ In keeping with these changes, the final rule also amends § 102.67(h) to state that "[t]he grant of a request for review shall not, outside of the provision for impoundment set forth in paragraph (c) of this section, stay the Regional Director's action unless otherwise ordered by the Board" (emphasis added).

⁹⁷ A party that files a request for review of a decision and direction of election more than 10 business days after the issuance of the decision will still be able to request impoundment pursuant to § 102.67(j). Relief pursuant to that provision, however, is only granted upon a clear showing that it is necessary under the particular circumstances of the case, and this standard is "not routinely met" and such requests are "very rarely granted." 79 FR 74409.

⁹⁵ We agree with the statement in the preamble to the 2014 amendments that implementing a 20-business-day period only in cases where a request for review is actually filed would be impractical (as the election details typically set forth in the direction of election would necessarily be contingent on whether a request was filed) and would invite gamesmanship in the form of parties filing frivolous requests for review solely to delay the election. See 79 FR 74410. For these reasons, as well as for the sake of uniformity and transparency, we think that the only way to guarantee the benefits of the 20-business-day period is to provide for it in all contested cases, absent waiver by the parties. We note that even absent waiver, we have—in keeping with the pre-2014 language—provided that the regional director will normally not schedule an election before the 20th business day after the date of the direction of election. Accordingly, we are not altering any procedures or precedent pursuant to which an election can be held on a faster timeline. For example, the Board historically permits regional directors to schedule elections earlier than would ordinarily be the case in order to preserve the voting eligibility of economic strikers. See, e.g., *Northshore Fabricators & Erectors, Inc.*, 230 NLRB 346 (1977); *Kingsport Press*, 146 NLRB 1111, 1112 fn. 4 (1964). Similarly, nothing in the final rule disturbs the Board's historic practice with respect to expedited elections conducted pursuant to section 8(b)(7). See also § 102.73 *et seq.*

any request for review of the decision and direction of election promotes finality and certainty, fair and accurate voting, transparency and uniformity, ballot secrecy, and even (in certain respects) efficiency. The advantages of the 20-business-day waiting period are largely undercut if the ballots are counted and the tally of ballots issues before the Board rules on the request for review. But even apart from that consideration, providing for impoundment where a request for review is filed within 10 business days of the decision and direction of election will also promote each of these interests.

First, providing for automatic impoundment in these limited circumstances promotes finality and certainty. In this regard, providing that all ballots will remain impounded pending the Board's ruling on a timely-filed request for review ensures that the issues raised in the request for review are resolved prior to the counting of votes. As a result, when the tally of ballots issues, it will not be subject to revision or invalidation based on the Board's ruling on a pending request for review. Although the tally of ballots may of course still be altered or nullified based on post-election litigation, at least the pre-election issues will have been cleared away. As we have stated before with respect to the litigation and resolution of eligibility and inclusion issues, as well as the 20-business-day period from direction to election, 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 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.

More specifically, impoundment serves the interest of finality and certainty in situations where the issues raised in a pre-election request for review result in challenges. Resolving such issues by ruling on the request for review before the ballots are counted may remove the basis for pending challenges, thereby permitting the challenges to be summarily overruled and for those ballots to be commingled and counted with the other ballots. By the same token, the Board's ruling on the request for review may agree with the basis for the challenges, allowing them to be summarily sustained. In either case, as we have explained elsewhere, challenges inherently detract from certainty and finality; resolving the basis for them before the count moves forward accordingly promotes these

interests.⁹⁸ More than that, ruling on the request for review prior to the count may also remove the basis for post-election objections, such as where the request for review raises issues of supervisory status. This may in turn facilitate the certification of the results of the election.

Providing for impoundment in these narrow circumstances also promotes transparency and uniformity. With respect to transparency, 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 subsequent ruling nullifies or alters the results. As for uniformity, this interest is advanced because (1) impoundment assures the parties that in all cases where a pre-election request for review is filed within 10 business days of the direction of election, the count will not happen until after that request has been ruled on (as opposed to the situation under the 2014 amendments, where the Board might never rule on the request); (2) impoundment avoids situations where sometimes some votes are not counted based on the guidance contained in GC Memo 15–06 concerning secrecy; and (3) on a related note, impoundment guarantees that, for the most part, all votes will be counted at the same time.

Restoring impoundment also promotes ballot secrecy. As noted above, even under the 2014 amendments the General Counsel recognized that in at least some situations impoundment remained necessary to protect ballot secrecy. This is naturally true of those situations where individual challenges might, if isolated from the count, compromise secrecy, or where all affected voters have voted the same way, but it is also true as a general matter. In many instances, a party will file a request for review of a decision and direction of election challenging the very propriety of the election, or of the unit. Although proceeding to a ballot count in these situations may not compromise ballot secrecy with respect to individuals, issuance of a tally of ballots nevertheless reveals the sentiments of the employees in the petitioned-for unit. Yet the Board's ruling on a request for review challenging the propriety of the election or the unit may nullify the

results of the election while still revealing the sentiments of the employees.

As with the institution of the 20-business-day period from direction to election, we acknowledge that providing for automatic impoundment in these limited circumstances may come at the cost of some promptness and efficiency, but we think the advantages outlined above outweigh the costs, particularly as the final rule also promotes efficiency in certain other respects. For instance, by limiting automatic impoundment to requests for review that are filed within 10 business days of the direction of election, the final rule requires an aggrieved party to promptly decide which request for review option they will exercise: File a pre-election request for review and receive impoundment, or wait until after the election to see if a request for review is even necessary in the first place. In addition, for the reasons already discussed above with respect to certainty and finality, the final rule promotes efficiency by resolving pre-election issues before the commencement of post-election proceedings. As a result, the need to litigate challenges or even objections may be eliminated, whereas counting the ballots may spur post-election litigation that ultimately proves unnecessary based on the Board's resolution of a pending request for review. Further, keeping ballots impounded pending resolution of a pre-election request for review avoids situations where ineligible ballots do get counted, only to be nullified, and will also avoid situations where the Board's ruling on the request for review requires a rerun election because challenged ballots were opened and commingled with the valid ballots.

For largely the same reasons that we disagree with the rationale in the 2014 amendments' reasoning for eliminating the 25- to 30-day pre-election waiting period, we also disagree with the 2014 amendments' criticisms of impoundment. Providing the 10-business-day period for filing a pre-election request for review, and for automatic impoundment when such a request is filed but not yet ruled on when the election is held, is not in actual tension with § 3(b), because impounding the ballots is not a "stay" of the regional director's action. The election will go forward as directed; impoundment only postpones the count to ensure the count comports with the Board's ruling on the pending request for review. We also place little weight on the fact that the Board rarely reverses findings in a regional director's decision and direction of election. That may be

⁹⁸ Even where such challenges may not have proven dispositive, resolving them before the count will clarify the contours of the bargaining unit, which will promote greater certainty and finality by removing any need for the parties to bargain over these employees or resort to unit clarification proceedings if the tally of ballots results in certifying a union.

an accurate description of the Board's experience in this area, but it is not a particularly compelling reason for seeking to avoid the complications that follow in the small number of cases where the Board *does* reverse a regional director's decision and direction of election. In addition, any delay that may be attributed to the impoundment procedure is based not on the impoundment procedure itself, but on the inability of the Board to rule on the request for review prior to the election. In our view, this should have been motivation for the Board to endeavor to rule on requests for review more swiftly, rather than a reason to eliminate the impoundment procedure.

We reiterate that, as with the 20-business-day period from direction to election, the automatic impoundment procedure will only apply in the small number of cases where parties are not able to conclude an election agreement, and even then will only apply in those cases where a party exercises the option to file a request for review within 10 business days of the issuance of the decision and direction of election. Accordingly, we think that while the reinstated impoundment provision is an important option in representation case procedure, it will only be activated in a very small number of cases.⁹⁹

D. Oppositions and Replies

The Board has long provided that, when a request for review has been filed, any party may file with the Board a statement in opposition thereto, although the Board need not await such an opposition to rule on the request for review. The right to file an opposition is currently located at § 102.67(f). From time to time, after an opposition has been filed, the party seeking review will attempt to file a reply to the opposition. The Board's general practice has been to

reject such replies on the basis that the Board's representation procedures do not provide for them; further, the Board's experience is that the reply briefs parties attempt to file in representation cases are generally unhelpful, as in most cases they simply reiterate points already made in the initial request for review. At times, however, the Board has accepted reply briefs, such as when a reply contains previously unavailable information that may be useful in assisting the Board's consideration of the request for review. We conclude that it will serve the interests of uniformity and transparency for the Board to codify its practice with respect to reply briefs. The final rule accordingly revises § 102.67(f) to provide that “[n]o reply to the opposition may be filed except upon special leave of the Board.”

The same limitation should apply when the Board grants a request for review. The parties are permitted to file briefs on review, and from time to time one of the parties may seek to file a reply brief. The Board typically rejects such replies, but has accepted them on occasion. We accordingly conclude that it will also serve the interests of uniformity and transparency to codify this practice. The final rule thus revises § 102.67(h) to provide that “[n]o reply briefs may be filed except upon special leave of the Board.” The alignment of § 102.67(f) and (h) also promotes overall uniformity in the Board's procedures for handling reply briefs in representation cases.

E. Prohibition of Piecemeal Requests for Review

As previously discussed, the 2014 amendments modified § 102.67(c) to provide that a party may file a request for review of a regional director's action

at any time following the action until 14 days after a final disposition of the proceeding by the regional director. No party shall be precluded from filing a request for review of the direction of election within the time provided in this paragraph because it did not file a request for review of the direction of election prior to the election.

Further, the 2014 amendments revised § 102.67(i)(1) to allow a party to “combine a request for review of the regional director's decision and direction of election with a request for review of the regional director's post-election decision, if the party has not previously filed a request for review of the pre-election decision.” The same paragraph also states that “[r]epetitive requests will not be considered.”

As already discussed, these modifications were designed to give parties flexibility in deciding when to

file a request for review, particularly requests for review of a decision and direction of election (which were formerly required to be filed within 14 days of the issuance of the decision and direction). At the same time, the 2014 amendments to § 102.67(i)(1) aimed to ensure there was still an orderly process for raising issues via a request for review. Thus, “repetitive requests” were not permitted under the 2014 amendments, nor could a party seek review of a decision and direction of election while also seeking review of a post-election decision if that party had already filed a request for review of the pre-election decision.

These modifications unintentionally left open an important question: Whether a party that has requested review of part of a regional director's action can subsequently file a request for review of a different part of that same action. In *Yale University*, Case 01–RC–183014, et al., the regional director issued a decision and direction of election on January 25, 2017, finding that (1) nine separate petitioned-for bargaining units were appropriate and (2) the petitioned-for graduate students in each of these units were “employees” within the meaning of the Act. The employer filed a request for review arguing the merits of the unit determination issue, and also registered its disagreement with the employee status issue, stating that it intended to request review of that issue, if necessary, following the regional director's final disposition of the case. The elections went forward,¹⁰⁰ and the petitioning union prevailed in six of the nine elections. Subsequently, the employer filed a letter with the Board requesting an extension of time to file a request for review addressing the employee status issue. The petitioner opposed this motion, contending that the Board should not permit such a piecemeal approach to seeking review of a single action by a regional director.

The petitioner in *Yale University* ultimately withdrew the relevant petitions before the Board had the opportunity to address the propriety of the employer's decision to sever its arguments concerning the direction of election into separate requests for review,¹⁰¹ but it is foreseeable that this

¹⁰⁰ The employer also requested expedited consideration of this issue, as well as a stay of the election. The Board denied the requests for expedited consideration and a stay of the election, see 365 NLRB No. 90 (2016), but did not pass on the merits of the request for review.

¹⁰¹ The Board accordingly informed the employer, by letter dated February 13, 2018, that its first request for review and its request for an extension

⁹⁹ With respect to the filing of pre-election requests for review, and the impoundment that follows such a timely filed request, the dissent charges that it is internally inconsistent for the Board to strive to maximize the opportunity for an election to provide finality (on the one hand) while also permitting parties to wait until after the election (and vote count) and then file a request for review that may still cover pre-election issues (on the other). This again misunderstands our project of balancing the various competing interests. We have outlined the many advantages to resolving pre-election issues prior to the ballot count, but just as we have recognized there are also many advantages to permitting parties to agree to defer eligibility and inclusion issues, we also recognize that there are advantages to permitting parties to wait to file requests for review until after the election has been conducted. Thus, despite the clear advantages to resolving pre-election issues prior to the ballot count, we also will not stand in the way of a party that decides to wait to see the results of the election before filing a request for review embracing pre-election issues.

circumstance will arise again.¹⁰² The final rule therefore modifies § 102.67(i)(1) to expressly prohibit such a piecemeal approach by stating: “A party may not, however, file more than one request for review of a particular action or decision by the Regional Director.” Taking this approach will better serve the interests of efficiency, fairness, finality, and certainty.

Although in some circumstances it may possibly promote efficiency to permit a party to raise different issues pertaining to a single action at different times, we are confident that in the vast majority of circumstances permitting such a piecemeal approach will be far less efficient than requiring a party to raise all issues it may have with a single action in a single request for review. In addition, requiring a party to confine its arguments concerning a single action to a single request for review permits the Board to efficiently allocate its resources to a case’s resolution by guaranteeing that the propriety of a single regional action cannot be raised to the Board on more than one occasion. It also promotes fairness to any parties in opposition—and provides guidance to all parties—by permitting them to focus on the issues that have been raised with respect to a regional director’s action without having to consider whether other issues may be subsequently raised.¹⁰³

F. Requests To Deviate From Formatting Requirements and for Extensions

For many years, § 102.67(i)(1) stated that if a party sought to exceed the 50-page limit to a request for review, the party was required to file a motion setting forth the reasons therefore filed “not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due.” By contrast, § 102.67(i)(3), which governed extensions of time to file requests for review, oppositions, or other briefs

permitted by § 102.67, simply stated that a request for an extension of time must be filed with the Board (or the regional director) and served on the other parties.

Section 102.2(c) also provides a procedure for filing a request for an extension of time that applies “[e]xcept as otherwise provided,” and requires a party to file an extension of time “no later than the date on which the document is due,” and further provides that a request for an extension of time “filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance.” Section 102.2(c) further states that a request for an extension must be in writing and served simultaneously on the other parties, encourages the party requesting the extension to seek agreement from other parties for the extension (and states that the request should indicate the others parties’ positions), and states that an opposition to a request for an extension should be filed as soon as possible following receipt of the request. In practice, the Board has applied § 102.2(c) by permissively granting requests for extensions of time filed more than 3 days in advance of the due date, but has been restrictive in granting requests filed within 3 days of the due date in keeping with the “grounded in circumstances not reasonably foreseeable in advance” standard.

It is unclear why § 102.67(i)(3) differs in its provisions for extensions of time, and we see no reason why the process for requesting extensions of time in representation cases should differ from that set forth in § 102.2(c). The final rule accordingly amends § 102.67(i)(3) to state that a request for an extension “shall be filed *pursuant to § 102.2(c)*” (emphasis added). This change promotes uniformity among the Board’s procedures, and also promotes transparency insofar as § 102.67(i)(3) (2013) did not provide any timeline or required showing for filing an extension. Cross-referencing § 102.2(c) will put parties on notice that the Board will be permissive in granting extensions of time unless they are filed within 3 days of the due date,¹⁰⁴ in which case it falls to the requesting party to make the requisite showing.

We are also of the view that the process set forth in § 102.2(c), which by its terms is applicable to extensions of time, can also be workably applied to any requests to exceed the request for

review page limit. The final rule therefore amends § 102.67(i)(1) to state that a request to exceed the page limit may be “filed *pursuant to the procedures set forth in § 102.2(c)*” (emphasis added). This change also promotes uniformity in the Board’s procedures, and further promotes transparency by signaling that requests to exceed the page limit will be permissively granted unless filed within 3 days of the due date.

G. Notice of Election

The 2014 amendments modified the already-existing notice posting requirement in Section 102.67(k) by adding the requirement that the employer also “distribute [the Notice of Election] electronically if the employer customarily communicates with employees in the unit electronically.” The final rule amends this provision to state that the Notice of Election need only be electronically distributed “to all eligible voters (including individuals permitted to vote subject to challenge) if the employer customarily communicates with employees in the unit electronically.” As with the Notice of Petition for Election, discussed above in relation to § 102.63, this appears to have been the intent of the 2014 amendments, given their statement that “if the employer customarily communicates with employees in the unit by emailing them messages, it will need to email *them* the Notice of Election.” 79 FR 74405–74406 (emphasis added). The final rule accordingly clarifies a minor imprecision in the wording of the 2014 amendments. This minor clarification provides parties with better guidance and reduces the possibility of wasteful litigation over the proper interpretation of this provision.

H. Voter List

The final rule makes the same change with respect to the timing of the list of eligible voters that the employer must file after a direction of election as described above in relation to § 102.62. In addition to the reasons stated there for giving the employer with 5 business days, as opposed to the former provision of 2 business days, to file and serve the list, the provision for the 20-business day period between the direction and conduct of election discussed above means that the extra time for providing the voter list will not, in directed elections, contribute to any delay in the scheduling or conduct of election.

of time to file the second request for review were moot and would not be ruled on by the Board.

¹⁰² Indeed, the employer in *Reed College*, Case No. 19–RC–213177, similarly filed two requests for review seeking review of different aspects of the Regional Director’s decision and direction of election, and the petitioner opposed the second on the grounds that the decision and direction had already been affirmed by the Board’s denial of the first request for review. As in *Yale University*, the petitioner in *Reed College* disclaimed interest and withdrew its petition before the Board ruled on the second request for review, and the Board accordingly advised the employer that the second request for review was moot and would not be ruled on by the Board.

¹⁰³ The Board’s experience in *Yale University* and *Reed College* indicates that, at a minimum, the employers’ decision to seek review of the decisions and directions of election in two separate filings caused significant confusion on the part of the petitioners.

¹⁰⁴ The exception, of course, being a request for an extension attempting to circumvent the impoundment provisions set forth in § 102.67(c), as discussed above.

102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Regional Director Decisions on Objections and Challenges

The final rule makes a series of changes to § 102.69. Several of these are consistent with changes that have already been discussed. In this regard, the final rule modifies § 102.69(f) and (g) to conform to the modifications made to § 102.67(i), which are discussed above. The final rule also subdivides § 102.69(a) into 8 subparagraphs so that the various procedures and requirements contained therein are easier to cite and locate. And consistent with the global changes discussed earlier, the final rule updates several cross-references and rephrases all time periods in terms of business days.

The final rule also makes three significant procedural modifications to § 102.69. First, the final rule modifies § 102.69(a) to provide additional instruction and guidance with respect to the selection of the parties' election observers. Second, the final rule modifies § 102.69(c)(1)(iii) to provide parties with the right to file post-hearing briefs with the hearing officer following post-election hearings. Third, the final rule modifies § 102.69(b) and (c) to eliminate the practice of regional directors issuing certifications while a request for review remains pending (or the time for filing one has not yet elapsed). In conjunction with this change, the final rule also adds § 102.69(h), which defines "final disposition" and thus provides clearer guidance as to the last point at which a party can file a request for review.

A. Election Observers

The practice of permitting the parties to be represented by observers at Board-conducted elections dates to the earliest days of the Act,¹⁰⁵ and since 1946 the Board's rules and regulations have provided that "[a]ny party may be represented by observers of [its] own selection, subject to such limitations as the Regional Director may prescribe." See 11 FR 177A-602, 612 (Sep. 11, 1946) (amending § 203.55); § 102.69(a).¹⁰⁶ But the Act itself does not make any provision for observers to be present at an election, and the Board has long made clear that there is no

such right, instead characterizing the practice as a "courtesy" or "privilege." *Jat Transportation Corp.*, 131 NLRB 122, 126 (1961); *Simplot Fertilizer Co.*, 107 NLRB 1211, 1221 (1954); *Union Switch & Signal Co.*, 76 NLRB 205, 211 (1948).¹⁰⁷ Indeed, one of the first Board cases to deal with observers held that it was not an abuse of discretion to refuse to permit a party from having a representative present at the balloting. See *Marlin-Rockwell Corp.*, 7 NLRB 836, 838 (1938).

In addition, although the Board's rules make open-ended provision for a party to select observers "of its own selection, subject to such limitations as the Regional Director may prescribe," the Board's decisional law has imposed a series of more specific limitations on the selection of observers. Thus, the Board has long held that employers may not use individuals "closely identified with management" as observers. See, e.g., *First Student, Inc.*, 355 NLRB 410, 410 (2010); *Sunward Materials*, 304 NLRB 780, 780 (1991); *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951). Unions are likewise barred from using supervisors as their observers. See *Family Service Agency*, 331 NLRB 850 (2000). And unions cannot use nonemployee union officials as observers in decertification elections. See *Butera Finer Foods, Inc.*, 334 NLRB 43 (2001).

Conversely, the Board has encouraged parties to use nonsupervisory employees as observers. For example, the Board has commented that "it is standard procedure to permit the parties to use employees, and unusual to permit outside observers." *Jat Transportation*, 131 NLRB at 126 (emphasis in original). Likewise, the Board has stated that "nonemployees may be used as observers only if 'reasonable under the circumstances.'" *Butera Finer Foods*, 334 NLRB at 43 (quoting *Kelley & Hueber*, 309 NLRB 578, 579 fn. 7 (1992)). Former editions of the Board's Casehandling Manual went further, stating that "[o]bservers *must* be nonsupervisory employees of the employer, unless a written agreement of the parties provides otherwise." CHM section 11310 (1989) (emphasis added). And even now, the current Casehandling Manual states that "[o]bservers *should* be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the

circumstances." CHM section 11310.2 (2017) (emphasis added).¹⁰⁸

In keeping with these principles, the Board historically found that the refusal to permit nonemployees to serve as observers was neither an abuse of discretion nor otherwise objectionable. See, e.g., *Jat Transportation*, 131 NLRB at 126; *Tri-Cities Broadcasting Co.*, 74 NLRB 1107, 1110 (1947). But the Board has also been unwilling to sustain objections based on the use of nonemployees as observers absent misconduct by such observers or prejudice to the other parties. See, e.g., *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993) (use of former employee not objectionable); *San Francisco Bakery Employers Ass'n*, 121 NLRB 1204, 1206 (1958) (use of nonemployee not objectionable).

In a similar vein, Casehandling Manual section 11310.2 currently provides that nonemployee union officials should not serve as observers,¹⁰⁹ but the Board has nevertheless excused that very practice. Thus, in *E-Z Davies Chevrolet*, 161 NLRB 1380, 1382-1383 (1966), *enfd.* 395 F.2d 191, 193 (9th Cir. 1968), the Board reasoned that because it was unobjectionable to use a nonemployee observer in *San Francisco Bakery Employers*, and because it is generally unobjectionable to use employee union officials as observers, it was also unobjectionable for a nonemployee union official to serve as an observer (absent any showing of misconduct by the observer or prejudice to the other party). Likewise, in *NLRB v. Black Bull Carting Inc.*, 29 F.3d 44 (2d Cir. 1994), the court, citing cases including the 9th

¹⁰⁸ The Board has generally been permissive regarding the meaning of "employee" in these circumstances. See, e.g., *Correctional Health Care Solutions*, 303 NLRB 835, 835 fn. 1 (1991) (individual whose employment status was "a matter of some dispute at the time of the election . . . was entitled to act as an observer"); *Kellwood Co.*, 299 NLRB 1026, 1029 (1990) ("[d]ischarged employees are entitled to be considered employees of the employer for the purpose of serving as observers at an election pending resolution of [unfair labor practice charges] against the employer"); *Thomas Electronics, Inc.*, 109 NLRB 1141 (1954) ("inasmuch as Lapinsky's eligibility to vote as a laid-off employee had not been determined at the time of the election, she was entitled to be considered an employee for the purpose of acting as an observer at the time of the election").

¹⁰⁹ The Board permits union officials who are also employees to serve as observers, however. See, e.g., *United States Gypsum Co.*, 81 NLRB 197 (1949) ("[a] fellow employee of the eligible voters does not possess the disciplinary power of a supervisor, or the ability to intimidate employees, merely because he holds office in the union that is seeking to be elected as the employees' bargaining representative"). See also *Soerens Motor Co.*, 106 NLRB 1388 (1953) ("[t]he Employer concedes that the presence of a union official as an observer at an election is proper, if such official is otherwise qualified").

¹⁰⁵ See, e.g., *Paragon Rubber Co.*, 7 NLRB 965 (1938) (sustaining objection based on use of "high supervisory official" as observer).

¹⁰⁶ The 2014 amendments left this provision undisturbed, aside from clarifying that it applies "[w]hen the election is conducted manually."

¹⁰⁷ See also *Southern S.S. Co. v. NLRB*, 120 F.2d 505, 507 (3d Cir. 1941) ("The [A]ct confers no right upon the employer to have its representatives present and it is obvious that their presence is not essential to a fair election."), *rev'd on other grounds*, 316 U.S. 31 (1942).

Circuit's enforcement of *E-Z Davies*, held that the Board had not abused its discretion in refusing to set aside an election based on the petitioner's use of a nonemployee union official.

Additional considerations may arise in cases involving an election agreement. Typically, in accord with the template Board agents use in such situations, election agreements contain a provision that "[e]ach party may station an equal number of authorized, nonsupervisory-employee observers" at the polling place(s). And yet the Board has, since 1993, consistently held that a union's use of nonemployee observers is *not* a material breach of the election agreement, while also holding that if—by preventing a union from using nonemployee observers—a union is left with fewer observers than the employer, such disparity is a material breach. See *Browning-Ferris Industries of California, Inc.*, 327 NLRB 704 (1999) (setting aside election where union had no observers at election because Board agent refused to permit union to use former employees as observers); *Longwood Security Services, Inc.*, 364 NLRB No. 50 (2016) (setting election aside where union had no observer because Board agent refused to permit union to use one of its officials as observer).¹¹⁰ The Board has rationalized this approach by explaining that the policy favoring the use of current employees as observers, and thus the language in the Board's election agreement template, is "aimed primarily at preventing intimidation that might take place should the employer choose to have supervisory employees present." *Embassy Suites*, 313 NLRB at 302 (quoting *New England Lumber*, 646 F.2d at 3 (emphasis in original)). By contrast, because observers "help to assure the parties and the employees that the election is being conducted fairly," an imbalance in the number of observers introduces "a significant risk that an imbalance in the number of observers, with the acquiescence of the Board agent, could create an impression of predominance on the part of [one party] and partiality on the part of the Board." *Browning-Ferris Industries*, 327 NLRB at 704 (1999) (quoting *Summa Corp. v. NLRB*, 625 F.2d 293, 295 (9th Cir. 1980)).¹¹¹

¹¹⁰ See also *New England Lumber Division of Diamond International Corp. v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981) (holding Board did not abuse discretion by permitting nonemployee union official to serve as observer notwithstanding typical stipulation language).

¹¹¹ The Board has accordingly held that, at least with respect to elections agreements, when a party proposes using an individual alleged to be ineligible, the proper procedure is not for the Board agent to prohibit the use of that individual as an observer, but instead to inform the parties that the

As the foregoing account illustrates, the current state of Board law concerning the selection of observers is riddled with inconsistencies. Thus, despite the fact that the use of observers is a courtesy and privilege, rather than a right, the Board has set elections aside based on the absence of observers. Even though the Board's own guidance documents and precedent set forth an explicit preference—sometimes even phrased in mandatory language—that parties use employees as observers, the Board has nevertheless permitted (and in some cases gone out of its way to allow) certain parties to use nonemployee observers. Contrary to guidance strongly disfavoring the use of nonemployee union officials, the Board has nevertheless countenanced the use of just such persons as observers, even in cases where the election was conducted pursuant to an election agreement explicitly stating that observers should be nonsupervisory employees.¹¹² In addition, intentionally or not, the Board decisions discussed above repeatedly permit a union's use of a nonemployee agent, contrary to the Board's stated preference against nonemployees generally and nonemployee agents in specific. And Board precedent in this area has not been entirely rigorous in distinguishing between directed elections and those conducted pursuant to election agreements.¹¹³

use of an ineligible observer may result in the election being set aside later, and then to proceed to conduct the election with the parties' chose observers. See *Longwood Security Services*, 364 NLRB No. 50, slip op. at 1; *Browning Ferris Industries*, 327 NLRB at 705.

¹¹² The Board has excused this tension by explaining that the "nonsupervisory-employee" language does not specify that the observer must be an employee of the employer. See, e.g., *Longwood Security Services*, 364 NLRB No. 50, slip op. at 1; *Browning Ferris Industries*, 327 NLRB at 704. At least one court has stated that whether this language "is sufficiently ambiguous . . . to warrant the Board's interpretation is uncertain" (even while accepting the Board's interpretation of the language as specifically aimed at preventing an employer from using supervisory employees as its supervisors). See *New England Lumber*, 646 F.2d at 3. For our part, we think it much more plausible that parties confronted with this "nonsupervisory employee" language will assume that it refers to employees of the employer.

¹¹³ For example, *Embassy Suites*, in which the election took place pursuant to a stipulated election agreement, see 313 NLRB at 302 fn. 1, makes no mention of the "material breach" precedent and relies primarily on *San Francisco Bakery Employer*, 121 NLRB at 1204, and *E-Z Davies*, 161 NLRB at 1381, which both involved directed elections. Similarly, *Longwood Security*, 364 NLRB No. 50, which does employ the "material breach" analysis, relies in part on the Ninth Circuit's decision enforcing *E-Z Davies*, as well as *Black Bull Carting*, 29 F.3d at 44, another directed election case. *Longwood* also freely cites cases involving the use of employee union officials to support its conclusion that the use of nonemployee union

In light of this undesirable state of affairs, and in order to better promote transparency, uniformity, and efficiency with respect to the selection of observers, the final rule amends the provision permitting election observers, now located at § 102.69(a)(5), to read:

When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

These modifications promote transparency by qualifying the statement that "any party may be represented by observers of its own selection" in order to codify the Board's historical preference that parties use nonsupervisory employees as their observers. Prior to the final rule, this preference could only be found in a handful of older Board decisions and the Casehandling Manual. Moreover, these modifications promote transparency because further qualifying the "observers of its own selection" phrase better reflects the fact that the use of observers is a privilege, not a right, and that as such a party does not have an unqualified right to use whatever observer it wishes. In addition, by explicitly setting forth this preference in the rules and regulations, we make clear that the preference is applicable to "any party," rather than only to employers, as certain decisions discussed above might otherwise suggest.

On that note, these revisions also promote uniformity. Aside from the fact that the final rule makes the Board's preference for nonsupervisory employee observers explicit, and expressly applies that preference to all parties, the final rule sets forth a clearer framework under which the parties will now select their observers. First, the parties will be expected to use current members of the voting unit "whenever possible"; second, in the event this is not possible, a party "should" select a current nonsupervisory employee. We

officials is permissible. See *Shoreline Enterprises of America*, 114 NLRB 716, 718–719 (1955). More than that, both the Board—see *Embassy Suites*, 313 NLRB at 303—and the courts—see *Black Bull Carting*, 29 F.3d at 46—have cited *Standby One Associates*, 274 NLRB 952 (1985), to support the use of nonemployee representatives as observers in Board elections, but that case involved the limited question of whether to extend comity to a certification issued by the New York State Labor Relations Board (the Board holding that the use of a nonemployee union official as an observer in the state proceeding was not a sufficient basis to refuse to extend comity).

acknowledge that the first step of this framework is a new innovation, but we think it is readily justified. Given the indisputably important role that observers play in Board elections—representing their principals, challenging voters, generally monitoring the election process, and assisting the Board agent in the conduct of the election¹¹⁴—it is highly desirable that the parties' observers be drawn from those persons most interested and invested in the outcome of the election: The members of the voting unit. Of course, due to unit size, employee schedules, and an employer's operational considerations there may be times when it is not possible for a party to select a voting unit employee as its observer. In such circumstances, a party will be able to fall back on the Board's historical preference and select some other current nonsupervisory employee of the employer to serve as an observer.¹¹⁵ Recognizing that there may be highly unusual situations where it is also impossible to select some other nonsupervisory employee, we have only phrased this second step in terms of "should." But to be clear, the intent of § 102.69(a)(5) is—absent agreement of the parties to the contrary—to limit observers to current nonsupervisory employees of the employer at issue.¹¹⁶

By limiting the selection of observers to nonsupervisory employees of the employer, the final rule also promotes efficiency by eliminating wasteful litigation. As our earlier discussion of observer cases makes abundantly clear, litigation over the identity of observers is a recurrent issue before the Board. It should strike the reader as peculiar that this has been the case even though the parties have no right to have observers present. Although we have no quarrel with the general policy of permitting observers, we also agree with the Third Circuit's long-ago observation that "it is obvious" that the presence of observers "is not essential to a fair election." *Southern S.S. Co.*, 120 F.2d at 506. That being the case, the Board's history of dedicating time, energy, and ink to sorting out disputes over the identity of particular observers is at the very least a questionable policy choice. In order to avoid this type of litigation, we expect that in directed elections Board agents will, going forward, simply apply § 102.69(a)(5) and disallow parties from

using nonemployee observers.¹¹⁷ We likewise expect that in directed elections, regional directors will summarily overrule objections contending that a party was wrongly prevented from using a person who is not a current employee of the employer as its observer (as well as objections contending that a party impermissibly used a nonsupervisory employee of the employer as its observer).¹¹⁸

As for cases involving elections conducted pursuant to election agreements, the final rule does not disturb the overall approach to alleged breaches (*i.e.*, determining whether the breach was material), but we have decided to adopt a new interpretation of the standard "nonsupervisory-employee" language. Consistent with the fact that the parties should reasonably understand any reference to "employer" in an election agreement to refer to the employer who is a party to the agreement, we will no longer construe "nonsupervisory-employee" to include employees who are employed by some other employer. Accordingly, whenever an election agreement provides that the parties "may station an equal number of authorized, nonsupervisory-employee observers" at the polling place(s), we will henceforth treat any use of an observer not employed by the signatory employer as a material breach of the election agreement. Further, because the use of a nonemployee observer constitutes a material breach of the election agreement, we will expect Board agents to disallow the use of such observers, rather than following the current procedure of permitting the use of such observers while advising the parties that this may result in the election being set aside. Moreover, if, as a result of noncompliance with the "nonsupervisory-employee" provision, a party ends up having fewer observers than the others, that party will be estopped from contending that the disparity constitutes a material breach of the agreement, insofar as the disparity will have resulted from the party's own material breach of the election agreement. See, *e.g.*, *Republic Electronics*, 266 NLRB 852, 853 (1983) ("a party to an election is ordinarily

estopped from profiting from its own misconduct").¹¹⁹

These changes represent only a limited departure from the Board's prior practice. The Board has long preferred that parties use nonsupervisory employees as observers; we are merely curtailing the use of nonemployee observers. We do not expect that the observer issue will arise all that often, given that (1) an employer should have little issue finding a nonsupervisory employee to act as its observer; (2) a union that is either an incumbent or has already produced a sufficient showing of interest should also have little issue finding a nonsupervisory employee to act as its observer; and (3) as always, the parties remain free to stipulate to other arrangements for observers, to the extent they are willing to do so. Finally, we conclude by emphasizing that we are not setting forth any new grounds on which parties can object to the selection of observers. To the contrary, the goal in modifying § 102.69(a)(5) is to reduce (or ideally even eliminate) litigation surrounding a party's choice of observer. The parties now have clear guidance in the rules and regulations that they should be choosing nonsupervisory employees, and we have made clear here that Board agents will be empowered to police the choice of observers prior to the conduct of the election. As a result, there should be fewer grounds on which to object in the first instance, and those objections that are filed should be easily disposed of.

B. Final Dispositions and Stays of Certifications

Prior to the 2014 amendments, regional directors issued certifications of results (including certifications of representative where appropriate) in limited circumstances, generally where no objections were filed to an election (or to a revised tally of ballots) and where challenges were not determinative. See § 102.69(b), (h) (2013); CHM section 11472 (2014). In most stipulated election cases where objections were filed or challenges were determinative, the Board would issue the certification; so too in directed election cases, unless the regional director chose to resolve challenges/objections via supplemental decision. See § 102.69(c)(3) (2013); CHM sections 11472.2, 11472.3 (2014).

As already described above, the 2014 amendments modified § 102.67(c) to provide that a request for review could

¹¹⁴ See Casehandling Manual section 11310.3.

¹¹⁵ We will continue to broadly define "employee" consistent with prior precedent. See n.108, *supra*. The dissent's contention that we are overruling precedent permitting the use of potential discriminates as observers is therefore meritless.

¹¹⁶ To the extent any previous Board decisions can be read to the contrary, we overrule them.

¹¹⁷ In those unusual situations where it is truly not possible for a party to use a nonsupervisory employee, a Board agent will determine whether the use of a proposed nonemployee observer is "reasonable under the circumstances," consistent with past precedent. *Kelley & Hueber*, 309 NLRB at 579 n.7. We emphasize, however, that it will be the extremely rare case in which this inquiry will be warranted.

¹¹⁸ As noted above, this expectation incorporates the Board's longstanding approach to broadly defining "employee" in this context.

¹¹⁹ To the extent that they are inconsistent with the principles set forth above, we overrule cases such as *Browning Ferris Industries*, 327 NLRB 704, and *Longwood Security*, 364 NLRB No. 50.

be filed “at any time following the action until 14 days after a final disposition of the proceeding by the regional director,” thereby removing the prior requirement that a request for review of a decision and direction of election be filed before the election, as well as the requirement that the Board rule on such request prior to the ballots being counted. The 2014 amendments also thoroughly overhauled the procedure for post-election appeals by providing, in § 102.69(c)(2), that appeals of post-election determinations by the regional director could only be made to the Board pursuant to the request for review procedure set forth in § 102.67(c). Further, the 2014 amendments provided that regional directors would issue post-election certifications, including certifications of representative, where appropriate, in most cases, irrespective of whether a request for review remained pending or could still be timely filed. See § 102.69(b); (c)(1)(i) and (iii), (c)(2). Additionally, although the 2014 amendments did not explicitly define “final disposition,” GC Memo 15–06 effectively defined the phrase to include the regional director’s issuance of a certification of representative. *Id.* at 27.¹²⁰

Taken together, these changes created a process under which regional directors were effectively required to issue certifications after the vast majority of elections, including where a request for review of a decision and direction of election was still pending before the Board and where a request for review could still be timely filed. Indeed, by defining the issuance of the certification as a “final action,” the 2014 amendments guaranteed that parties could wait to file requests for review until after certifications had already issued, and our experience reflects that parties have frequently done so.

The 2014 amendments accordingly instituted a shift from a procedural model in which regional directors infrequently issued certifications when an appeal to the Board was pending or still possible to a model where regional directors almost always issue certifications despite the pendency or possibility of an appeal. This represented a significant change in the Board’s practice and procedure, yet the 2014 amendments offered little explanation for it. At one point, the 2014 amendments state that they are “intended to carry out the Board’s statutory mandate to establish fair and

efficient procedures for,” *inter alia*, “certifying the results of secret-ballots elections,” and at another point stated that “a question cannot be answered until the election results are certified.” 79 FR 74326, 74411. Elsewhere, the 2014 amendments observed that the practice of issuing certifications notwithstanding the possibility a party may still file a request for review was permitted in limited situations under the prior rules. 79 FR 74414 (citing CHM section 11742.3 (2014)). Finally, the 2014 amendments also justified the practice by noting that certifications were always subject to challenge in technical 8(a)(5) proceedings in the courts. 79 FR 74414. Further, in a case decided after the 2014 amendments took effect, a Board majority defended the practice of regional directors issuing certifications by stating that “Sec. 3(b) of the National Labor Relations Act expressly authorizes, and [§] 102.69 of the final rule expressly requires, that regional directors issue certifications even though a party may file a request for review of that (or any other) regional director action.” *Republic Silver State Disposal, Inc., d/b/a Republic Services of Southern Nevada*, 365 NLRB No. 145, slip op. at 1 n.1 (2017).

From these remarks, it would seem the 2014 amendments viewed the regional directors’ issuance of certifications even when requests for review were pending or could still be filed with the Board as promoting efficiency, finality, and uniformity. As explained below, we take a different view. In fact, we think that the issuance of certifications prior to a final Board ruling on any request for review that has already been, or may yet be, filed has been a source of unnecessary confusion and needless litigation. To the extent that the regional directors’ issuance of certifications serves any relevant interests, those interests are substantially outweighed by other interests that will be served by instituting a uniform practice under which regional directors will not issue certification where a request for review is pending or may yet be filed. Accordingly, the final rule modifies relevant provisions of § 102.69 to provide that regional directors will only issue certifications after the time for filing a request for review has passed without any being filed. If any request for review is filed, the certification will issue only after the Board’s ruling on that request. These changes will better serve the interests of transparency, finality, efficiency, and uniformity.

First, the final rule advances transparency by eliminating confusion and complications occasioned by

certifications that issue prior to the Board’s ruling on a request for review. The issuance of a certification of representative triggers legal obligations on the parts of the employer and the certified representative.¹²¹ Both parties become obligated to bargain with each other in good faith;¹²² the union must meet its duty of fair representation;¹²³ and the employer must refrain from making unilateral changes to mandatory subjects of bargaining.¹²⁴ But if a certification of representative issues before the Board has ruled on any request for review, such ruling by the Board may require that the certification be modified or vacated. Likewise, the issuance of a certification of results may, depending on the circumstances, dissolve a previous bargaining obligation and/or require a union (or unions) to refrain from filing a petition to represent the unit for a period of time.¹²⁵ But here too, if the certification issues before the Board has ruled on any request for review, such ruling by the Board may reestablish the bargaining relationship and/or remove the bar to petitioning to represent the union; indeed, the Board’s ruling may even establish a new bargaining relationship.

The drawbacks of requiring regional directors to issue certifications that the Board may alter or vacate are accordingly clear: A certification of representative may create the appearance of rights and obligations on the part of unions and employees that may yet be nullified, and the issuance of a certification of results may create the appearance that a legal obligation does not exist that may yet be imposed. Thus, any case in which the Board grants review and reverses a regional director has the potential to, at minimum, cause confusion among employees and the parties. Further, the issuance of a certification despite the (potential) pendency of a request for review places an employer in the difficult position of either (1) refusing to bargain while awaiting the Board’s ruling on a request for review, or (2) devoting resources to bargaining while

¹²¹ Cf. *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84, slip op. at 2 (2017) (“Under well-established law, an employer is not relieved of its obligation to bargain with a certified representative of its employees pending Board consideration of a request for review” (citing *Benchmark Industries*, 262 NLRB 247, 248 (1982), *enfd. mem.* 724 F.2d 974 (5th Cir. 1984))).

¹²² See section 8(a)(5), (b)(3), (d).

¹²³ See section 8(b)(1)(A).

¹²⁴ See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

¹²⁵ See section 9(c)(3).

¹²⁰ The Board’s practice since the 2015 implementation of the 2014 amendments has reflected the same view of “final disposition.”

awaiting the Board's ruling.¹²⁶ In the former scenario, the employer risks committing unfair labor practices should the Board uphold the certification; in the latter scenario, the employer risks wasting resources should the Board invalidate the bargaining obligation. In all of these situations, the parties and employees are left to wonder whether the legal rights and obligations that supposedly attach to the certification actually exist.

The complications for employers outlined above will be compounded if an employer refuses to bargain while a request for review is pending, the certified union files unfair labor practice charges based on that refusal, and the regional director finds merit to, and processes, a technical 8(a)(5) refusal-to-bargain charge. The potential result is that both the unfair labor practice charge and the underlying representation case on which it is based end up pending before the Board at the same time. It plainly detracts from transparency for a region (or even the Board) to process unfair labor practice charges that are premised on a certification whose validity is still being challenged before the Board. We acknowledge that this situation is largely hypothetical; although the processing of refusal-to-bargain charges while the underlying certification is still being appealed to the Board is not entirely unheard of,¹²⁷ since the 2014 amendments took effect our experience has been that regions generally hold refusal-to-bargain charges in abeyance pending the Board's ruling on a request for review. But this practice also detracts from transparency, insofar as it gives the appearance that regions are delaying vindication of the rights that attach to already-issued certifications.¹²⁸

In short, where a certification issues notwithstanding the (potential) pendency of a request for review that may nullify the certification, the possibility for confusion is greatly amplified, and whatever course the region takes with respect to the filing of unfair labor practice charges premised

on the certification detracts from the legal effect of the certification. All of these problems are readily solved by simply requiring regional directors to refrain from issuing certifications until the Board has ruled on any request for review. Given that the Board employed that approach in most cases for over 50 years prior to the 2014 amendments, it is clearly a valid and viable approach.¹²⁹

For the same reasons just discussed, the final rule also better promotes certainty and finality. In addition, with respect to finality, to the extent that the 2014 amendments suggested that the faster issuance of certifications promoted finality, we disagree. In this regard, the 2014 amendments stated that "a question [of representation] cannot be answered until the election results are certified." 79 FR 74411. But the amendments also tacitly acknowledged that the issuance of a certification is not the final word on the matter by commenting that "a proceeding cannot necessarily be considered closed" until the time for filing a request for review has passed. 79 FR 74414. Regardless of technical niceties, a certification cannot be considered the "final" disposition of a question of representation until either the time for a request for review has passed, or the Board has ruled on any request for review that has been filed. To describe an action of a regional director, who is a Board delegate, as "final" when the Board itself may yet vacate or modify that very action robs the word of its ordinary meaning. By contrast, a certification that issues after the time for any request for review has passed, or after the Board has ruled on any pending request for review, will in fact be final for the Board's purposes.¹³⁰

All of the reasons discussed thus far also demonstrate that the final rule serves efficiency, particularly in the

form of providing for orderly litigation and resolution of disputes. Given that the Board's ruling on a request for review may nullify a previously-issued certification, waiting to issue any certification until after the Board's ruling is a far more orderly way of proceeding, and we can detect no harm in waiting to issue the certification until that point. As already discussed, regions are, as a practical matter, postponing the processing of unfair labor practice charges premised on certifications of representative until after the Board rules on a request for review, so any delay that might be caused by waiting to issue certifications already exists.

Further, the final rule promotes efficiency insofar as it will eliminate the perceived need or incentive for parties to file requests to stay certifications, or at least the legal effect thereof. Since the 2014 amendments became effective, the Board has processed a steady stream of such requests,¹³¹ but to date has declined to grant any. Given the regional practice, noted above, of holding refusal-to-bargain charges in abeyance pending the Board's ruling on a request for review, it is unclear whether, as a practical matter, any requested stay of certification has been or ever could be truly "necessary," but parties clearly are entitled to file such requests under the 2014 amendments, and have the incentive to do so given the legal rights and obligations that attach to the certification. Postponing the issuance of certifications until after the Board has ruled on any pending request for review removes both the need and incentive to file such requests. Accordingly, the final rule promotes efficiency by eliminating any basis to request stays of certifications, thereby avoiding needless litigation and better conserving the resources of the Board and the parties.

In conclusion, under the final rule regional directors will only issue certifications after the time for filing a request for review has passed without any such request being filed. If any

¹²⁶ See *Audio Visual Services*, supra, slip op. at 2 ("By relying on its filing of a request for review in refusing to bargain with the certified Union, the Respondent acted at its peril" (citing *Allstate Insurance Co.*, 234 NLRB 193, 193 (1978)).

¹²⁷ See *Audio Visual Services*, supra, slip op. at 2 and cases cited therein.

¹²⁸ The 2014 amendments' comment that most requests for review are ultimately rejected do not alleviate these concerns, which are only indirectly related to the rate at which the Board reverses Regional Directors' determinations. Rather, these concerns are based on the appearance of the Board's inaction with respect to the rights and obligations that attach to certifications.

¹²⁹ Although we do not question that the 2014 amendments' approach to issuing certifications was permissible under section 3(b), we do not agree that the 2014 amendments' approach is somehow more consistent with section 3(b). Although section 3(b) states that a request for review "shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director," it has nothing to say about the time at which a certification should issue vis-à-vis a request for review. Further, nothing in the legislative history of section 3(b) suggests that Congress intended for regional directors to issue certifications prior to the Board's ruling on a request for review.

¹³⁰ As noted above, the 2014 amendments apparently justified the premature issuance of certifications by pointing out that a certification still can be challenged before the courts. We acknowledge that a certification may not be given full effect until a circuit court enforces the Board's test-of-certification decision, but this is entirely beside the point in deciding, as a policy matter, when in the course of the Board's representation proceedings a certification should issue.

¹³¹ See *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 1 fn. 2 (2019); *Troutbrook Co. LLC d/b/a Brooklyn 181 Hospitality LLC*, 367 NLRB No. 56 (2019); *Premier Utility Services, LLC*, 363 NLRB No. 159, slip op. at 1 fn. 1 (2016); *St. Luke's Hospital*, Case No. 01-RC-230363 (Mar. 20, 2019); *Universal Television Productions*, Case No. 31-RC-226424 (Jan. 30, 2019); *Warner Bros. Television*, Case No. 31-RC-226460 (Jan. 23, 2019); *Centerpoint Energy Houston Electric, LLC*, Case No. 16-RC-229214 (Nov. 28, 2018); *Rhode Island LFG Genco, LLC*, Case No. 01-RC-208704 (Nov. 7, 2018); *Northwestern University*, Case No. 13-RC-177943 (Sep. 27, 2018); *Bronx Lobster Place, LLC*, Case No. 02-RC-191753 (Feb. 2, 2018); *Saint Mary's University*, Case No. 19-RC-173933 (Jun. 27, 2016); *Volkswagen Group of America, Inc.*, Case No. 10-RC-162530 (Apr. 13, 2016).

request for review is filed, the certification will issue only after the Board's ruling on that request.¹³² Given that a certification was previously a "final disposition" that would trigger the time for filing a request for review, the final rule has added § 102.69(h) to provide the parties with clearer guidance regarding what actions will now trigger the time for filing a request for review with the Board.

C. Posthearing Briefs Following Post-Election Hearings

In overhauling the Board's post-election procedures, the 2014 amendments provided that following the close of a post-election hearing, "[p]ost-hearing briefs shall be filed only upon special permission of the Hearing Officer and within the time and addressing the subjects permitted by the Hearing Officer." This was consistent with the Board's prior practice. See 79 FR 74402, 74417 n.475, 74426; CHM § 11430 (2014); Hearing Officer's Guide at 167.

It is not entirely clear why the Board has historically pursued this course; under the 2014 amendments, at least, it may be partly due to the fact that, unlike with pre-election hearings, there is an additional level of review following post-election hearings.¹³³ The Board's Casehandling Manual simply states that "[t]he filing of briefs is generally to be discouraged to the extent that they are unnecessary and interfere with the promptness with which post-election matters should be resolved." CHM section 11430. Even so, the Casehandling Manual provides that when such briefs are allowed, the hearing officer can set the time limit for filing them, but that it is assumed that "no more time than is necessary will be allowed, usually 7 days." *Id.*

The final rule amends § 102.69(c)(1)(iii) to provide for the filing of post-hearing briefs within 5 business days of the close of hearing as a matter of right and further provides that prior to the close of a hearing the hearing officer may, for good cause shown, grant an extension of time not to exceed and additional 10 business days. We have decided that the parties should be permitted to file post-hearing briefs in post-election proceedings for the

same reasons we have restored the right to file post-hearing briefs in pre-election proceedings. These reasons are fully discussed above with respect to § 102.66(h), and need not be repeated in detail here; suffice it to say, we think that hearing officers will benefit from post-hearing briefs for the same reasons regional directors will in pre-election proceedings, and the parties will also benefit from the opportunity to better formulate their post-election arguments.¹³⁴ Any delay will be minimal and consistent with prior practice, as the 5 business days to file briefs provided by the final rule accords with the 7 calendar days to file briefs set forth in CHM section 11430. To promote uniformity, we have made the same provision for extensions of time set forth in § 102.66(h), but we observe that the hearing officer will be under no obligation to grant an extension absent a showing of good cause, and is under no obligation to wait to begin drafting his or her report until briefs have been filed. Finally, as with post-hearing briefs in pre-election proceedings, the parties will be free to waive the period for filing post-hearing briefs, and hearing officers will be free to encourage the parties to opt for closing oral argument in lieu of filing briefs.¹³⁵

102.71 Dismissal of Petition; Refusal To Proceed With Petition; Requests for Review by the Board of Action of the Regional Director

Section 102.71 sets forth the requirements for filing a request for review of a regional director's administrative dismissal of a petition, as well as a regional director's determination that a petition should be dismissed or held in abeyance due to the pendency of concurrent unresolved unfair labor practice charges. Section 102.71(c) sets forth formatting requirements, which are limited to "[t]he request shall be printed or otherwise legibly duplicated," and provides—without further elaboration—that requests for an extension of time to file the request shall be filed with the Board. In keeping with the changes to §§ 102.67(i) and 102.69(f) and (g), the final rule modifies § 102.71(c) to require that any request for review comply with the formatting requirements of

§ 102.67(i)(1), and also states that a request for an extension of time shall be filed pursuant to § 102.2(c).

Section 102.71 does not explicitly provide for the filing of an opposition to a request for review filed pursuant to this section, but in practice the Board has accepted oppositions to requests for review filed pursuant to this section. To promote transparency and uniformity, the final rule codifies this practice in § 102.71(d), which, consistent with the changes to §§ 102.67(h), (i), and 102.69(f), (g), specifically provides that a party may file an opposition brief with the Board as a matter of right. The rule also specifies requirements for service and formatting, and requests for extensions of time to file, and requests for extensions of time to file. Finally, the rule also states that the Board may grant or deny a request for review without waiting for an opposition and that no reply to the opposition may be filed except upon special leave of the Board.

V. Response to Dissent

Our colleague dissents to the entirety of our rule revisions, although she specifically discusses only some of those that in her view contribute to unnecessary delay and its corollary, unnecessary litigation.¹³⁶ Where appropriate, we have addressed specific arguments in our justification of the particular contested revisions. We have also addressed her argument that the Board should engage in notice and comment rulemaking even though not required to do so under the Administrative Procedure Act exception for procedural rulemaking. Nothing more needs to be said in those respects. Here, we consider only the dissent's overarching contentions that this rulemaking cannot pass muster under the Administrative Procedure Act because the rule revisions made (1) are not supported by empirical evidence drawn from the agency statistics available to us, and (2) as measured by the standards set in the 2014 amendments, they will delay the conduct of an election.

¹³² Either the Board will do so when it rules on the request for review, or the regional director will do so following the Board's ruling on the request.

¹³³ Thus, the hearing officer conducting the post-election hearing issues an initial report; a party aggrieved by the hearing officer's report may file exceptions and an accompanying brief with the regional director, who issues a decision; and a party aggrieved by the regional director's decision may file a request for review with the Board. § 102.69(c)(1)(iii), (2).

¹³⁴ Further, given that briefs will ensure that hearing officers fully address the arguments raised therein, providing for post-hearing briefs in post-election proceedings should also help regional directors more swiftly deal with exceptions raised to hearing officers' reports.

¹³⁵ Obviously, the right to file a post-hearing brief will attach only where there has been a post-election hearing. Regional directors can, and frequently do, overrule objections without a hearing. See § 102.69(c)(1)(i).

¹³⁶ Not surprisingly, the dissent voices no complaint about our retention of numerous procedural changes made in the 2014 amendments, including the vitally important Statement of Position requirement, the reorganization of the process for post-election appeals, the Notice of Petition requirement, electronic filing of petition, simultaneous submission of showing of interest, option of waiting to file a request for review until after an election, electronic distribution of the notice of election, and simultaneous submission of offer of proof in support of objections. Of the revisions we do make today, she expresses no specific opposition to several of them that do not involve the alleged delay that she contests.

Our colleague does not claim, nor could she, that we are not operating within the range of our broad discretionary statutory authority to define the particulars of representation election procedures. Our revisions are clearly permissible under the Act. Instead, her dissent purportedly looks to the same procedural legal standard set by the APA for administrative agency action as we do, but her view of the proper application of that standard in this instance is far off the mark. It is certainly true that the APA requires the setting aside of agency action that is “arbitrary” or “capricious,” and that an agency must “examine the relevant data and articulate a satisfactory explanation for its action.” *State Farm*, supra, 463 U.S. at 43. However, the dissent fundamentally errs in its estimation of what are relevant data in this proceeding and what can be a satisfactory explanation for our action in revising or rescinding certain of the 2014 amendments in this proceeding.

First, the dissent is clearly mistaken to the extent that it implies our rationale for rescinding or modifying the 2014 amendments must be better than the rationale for implementing them. “The [Administrative Procedure Act] makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.” *Fox Television Stations*, supra, 556 U.S. at 515. Further, “the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.*

We have extensively explained the reasons why we believe the election rule provisions we announce today selectively improve on those made in the 2014 amendments. Further, the new policy we set here does not rest on factual findings that contradict factual findings made by the Board majority in the 2014 amendments. To the contrary, that majority made no significant factual findings relevant to the provisions in the amendments that we address in this

rulemaking. It specifically rejected the statistical argument that no rule revisions were needed because the Board was consistently meeting its extant statistical time targets. 79 FR at 74316. The reasons extensively set forth there were based on non-statistical policy choices, and our reasons for revising or rescinding some of the 2014 amendments are similarly based on non-statistical policy choices. That is a permissible approach to rational rulemaking under *State Farm* and *Fox*. See, e.g., *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999) (“When . . . an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, our role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive”), and *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (an agency “need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be ‘entitled to conduct . . . a general analysis based on informed conjecture.’”) quoting from *Melcher v. FCC*, 134 F.3d 1143, 1158 (D.C. Cir. 1998), and cited with approval in *Chamber of Commerce v. NLRB*, supra, 118 F.Supp. 3d at 183.

The Board majority in the 2014 amendments also did not claim that the pre-2014 representation procedures that they modified on policy grounds and that we selectively restore to the same or similar state here, were “arbitrary” or “capricious.” A different weighing of all relevant factors can lead to a different conclusion as to which is the better procedure for the conduct of representation elections. This brings us to the one factor that our dissenting colleague, in common with the 2014 rulemaking majority, stresses here far more than anything else: “delay.” Delay is a relative term, suggesting that an action takes longer than reasonably expected. It does not mean that any action is delayed that could possibly be taken sooner. If that were so, all governmental speed limits should be set aside as arbitrarily delaying drivers from going from Point A to Point B as fast as their vehicles can take them.

It is undisputed that the Act does not specify a maximum time for any stage of a representation proceeding, particularly the time between the filing of a petition and the conduct of an election. The Supreme Court has instructed that “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower*

Co., supra, 329 U.S. at 331. These goals are expressed in the conjunctive, not separately, and consistent with the Act the Supreme Court has deferred to the Board’s determination of how best to balance and achieve them. The 2014 rulemaking majority believed that elections could be conducted more speedily without detriment to the goals of doing so accurately and efficiently. Our colleague agrees with the timeline set there and consequently views our extension of that timeline to be unacceptable, arbitrarily-imposed delay. We obviously disagree.

We readily concede that the revisions to the pre-election timeline we make here may result in a return to pre-2015 median times, particularly in contested cases. Unlike the dissent, we do not regard that extension of time as unreasonably delaying the conduct of a fair election in which votes are recorded “accurately, efficiently, and speedily.” For reasons that have been extensively explained, we believe that the expedited processes implemented in 2014 at every step of the election process—from petition to hearing, from hearing to regional decision, from decision to election, and from election to final resolution of post-hearing issue—unnecessarily sacrificed prior elements of Board election procedure that better assured a final electoral result that is fundamentally fairer and still provides for the conduct of an election within a reasonable period of time from the filing of a petition. We believe that the representation election procedures we announce today are balanced measures necessary to redress those shortcomings.

VI. Dissenting View of Member McFerran

Member Lauren McFerran, dissenting.

A. Introduction

In 2014, the National Labor Relations Board comprehensively revised its regulations addressing the processing of petitions for representation elections under the National Labor Relations Act.¹³⁷ The 2014 rule was the product of a painstaking, three-and-a-half-year process, involving the consideration of tens of thousands of public comments generated over two separate comment periods totaling 141 days, including 4 days of hearings with live questioning by Board Members. The rule was designed to simplify and modernize the Board’s representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and

¹³⁷ *Representation-Case Procedures*, 79 FR 74308 (Dec. 15, 2014).

expeditious resolution of representation cases.

The implementation of the 2014 rule went smoothly. In the words of the Board's Regional Directors—the agency's own in-house experts charged with administering the representation case process on a day-to-day basis—“[w]hile parties initially voiced great concerns about the 2014 Election Rule, to all the parties' credit, after the initial learning curve, there have been very few difficulties in the adoption of the rules.”¹³⁸ In addition, all available evidence indicates that the 2014 rule has achieved its intended goals. As explained in greater detail below, Board procedures are more transparent, and more meaningful information is more widely available at earlier stages of our proceedings. Across regions, employees' statutory rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform. Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results. Voters are able to receive election information using modern means of communication rather than door-to-door visits.

And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure. The 2014 rule reduced the median time from petition to election by more than three weeks in cases involving a pre-election hearing, and by two weeks in cases involving an election agreement.¹³⁹ And the Agency's 100-day closure rate for representation cases is better than ever. In three of the four full fiscal years since the 2014 rule's implementation, the agency has achieved historic highs of closing 88.8%, 89.9% and 90.7% of its representation cases within 100 days of a petition's filing—besting any year's performance preceding the 2014 rule.¹⁴⁰

¹³⁸ See Regional Director Committee's Response (RDs' Response) to 2017 Request for Information concerning the 2014 Rule p.4.

¹³⁹ See <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (showing a median of 37 days to process an election agreement case from petition to election in pre-rule FYs 2013–2014, as compared to only 22 or 23 days in post-rule FYs 2016–2017, and 59 days for contested case in FYs 2013–2014, as compared to only 35 or 36 days in post-rule FYs 2016–2017).

¹⁴⁰ See Performance Accountability Reports, FYs 2013–2017, www.nlr.gov/reports-guidance/reports (indicating the following representation case 100-day closure rates: FY 2019–90.7%, FY 2018–88.8%, FY 2017–89.9%, FY 2016–87.6%, FY 2014–88.1%;

The 2014 rule has thus proved remarkably successful in doing exactly what it was intended to do, while promoting the goals of the National Labor Relations Act.

Certainly, the 2014 rule was the subject of employer criticism at the time of its enactment. While much of this criticism centered on misguided claims that the revisions were designed to put a thumb on the scale in favor of unions winning more representation elections,¹⁴¹ that has not proven to be the case in practice.¹⁴² The 2014 rule was also the subject of numerous legal challenges alleging that it went beyond the Board's statutory authority, or was inconsistent with the requirements of the Administrative Procedure Act (APA) or the Constitution. The courts rejected these claims, and the validity of the rule has uniformly been upheld.¹⁴³

But the success of the 2014 rule was apparently too good to last. On September 25, 2017—roughly two and a half years after the 2014 rule's effective date—the composition of the Board's majority shifted. Less than three months later, a new Board majority announced a Request for Information (RFI) seeking “to evaluate whether the [2014] Rule should be [1] [r]etained without change, [2] retained with modifications, or [3] rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule's adoption.”¹⁴⁴ The perfunctory request did not identify any

FY 2013–87.4%; FY 2012–84.5%; FY 2011–84.7%; FY 2010–86.3%; FY 2009–84.4%).

¹⁴¹ See, e.g., 79 FR 74326 fn.83.

¹⁴² See NLRB, *Annual Review of Revised R-Case Rules*, available at <https://www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules> (showing, in comparison between pre- and post-rule elections, no substantial change in party win-rates).

¹⁴³ See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 229 (5th Cir. 2015) (*ABC of Texas v. NLRB*) (noting that the Board “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions”), affg. No. 1–15–CV–026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (*Chamber v. NLRB*) (“[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the [2014] Final Rule, and it directly addressed the commenters' many concerns[.] [P]laintiffs have not shown that the Final Rule contravenes either the NLRA or the Constitution, or that the Final Rule is arbitrary and capricious or an abuse of Board discretion”). See also *UPS Ground Freight v. NLRB*, 921 F.3d 251 255–257 (D.C. Cir. 2019) (*UPS v. NLRB*) (rejecting a challenge to the application of various 2014 rule provisions including scheduling of the pre-election hearing, the timing of the employer's statement of position and the pre-election deferral of the voting eligibility of two employees in disputed classifications).

¹⁴⁴ *Representation-Case Procedures*, 82 FR 58783 (Dec. 14, 2017).

specific problems with the rule's implementation or negative effects that justified its revisiting. Nor did the then-majority (including two members of the current majority) make any effort to take even a preliminary look at the agency's own wealth of data and records about the rule's effect and operation before seeking to reopen its provisions. The RFI simply noted that the composition of the Board had changed,¹⁴⁵ observed that the rule had been in effect for more than two years,¹⁴⁶ and then conducted the functional equivalent of a straw poll on the rule's popularity.¹⁴⁷

The RFI was, in short, a fishing expedition—a transparent effort to manufacture an evidentiary basis for revisiting the rule. The effort, predictably, was unsuccessful. The public's responses provided no empirical basis for amending the 2014 rule, and likewise articulated no statutory arguments that were not previously rejected by the Board and the courts. Indeed, the current majority now expressly *disclaims* that it is relying on anything obtained through that process in generating or justifying its amendments to that rule. A reasonable observer might have thought that the 2014 rule was safe after the RFI, but that is not the case.

Fast forward two years, and the majority now issues a direct final rule substantially rewriting the 2014 rule *without any notice to, or comment from, the public about the specific changes being made*. The primary effect of these changes will be to dramatically increase the timetable for conducting

¹⁴⁵ This certainly is not a “good reason” for revisiting a past administrative action, particularly in the context of rulemaking. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). Even in the context of adjudication, the Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, e.g., *Brown & Root Power & Mfg.*, 2014 WL 4302554, *3 (Aug. 29, 2014); *Visiting Nurse Health System, Inc.*, 338 NLRB 1074 (2003); *Wagner Iron Works*, 108 NLRB 1236, 1239 (1954).

¹⁴⁶ As I mentioned in my dissent at the time, even the most ardent advocates of regulatory review would not support such a short regulatory lookback period. Indeed, Section 610 of the Regulatory Flexibility Act, for example, contemplates that agencies may take up to 10 years before they may adequately assess a rule's effectiveness. See 5 U.S.C. 610 (providing that agencies shall develop plan “for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule”).

¹⁴⁷ The majority also summarily cited congressional votes, hearings, and proposed (but never-passed) legislation as reasons to issue the RFI. As I pointed out at the time, though such congressional actions might raise concern over a rule's actual effectiveness in other circumstances, here—where criticism was leveled in the absence of any meaningful experience under the rule—they seem to signify little more than partisan opposition to the rule.

representation elections by imposing unnecessary delay at each stage of the representation case process. *Under the new rule, the minimum total number of days from the filing of an election petition to certification of a union in a case that is contested both pre- and post-election will rise from 23 days (under the 2014 rule) to 78 days.* The majority provides no reasoned explanation for proceeding in such utter disregard of public input, or for codifying such a substantial delay in conducting elections.

On the procedural front, even assuming notice and comment was not legally required, there is no question that the *better* choice would be to seek the input of workers, unions, employers, legal practitioners, Board regional staff, and other affected stakeholders about any specific proposed changes before rushing them to completion. We owe the public the opportunity to weigh in on something so central to our core mission as an agency.¹⁴⁸

¹⁴⁸ Although Federal agencies are not required to engage in notice and comment rulemaking before promulgating, amending, or repealing “rules of agency organization, procedure, or practice” (5 U.S.C. 553(b)(A)), nothing prevents an agency from voluntarily using notice and comment rulemaking. Indeed, the Administrative Conference of the United States has recommended that Federal agencies use that process even for rules that fall within the so-called “procedure or practice” exception “except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.” Administrative Conference of the United States (ACUS), Recommendation 92–1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* (June 18, 1992).

The majority offers no reasoned explanation for disregarding ACUS’s recommendation. The majority cannot convincingly claim that the costs of providing the public with notice of, and an opportunity to comment on, the specific amendments at issue today outweigh the benefits of having public input and information on those specific changes. The majority’s decision to disregard ACUS’ recommendation suggests that the majority believes that the responses to the 2017 RFI were not helpful in evaluating the 2014 rule provisions, and therefore engaging in notice and comment about these amendments would not be particularly helpful. But that would make no sense: The 2017 RFI did not provide the public with notice of any of the specific amendments the majority adopts today, and thus it is hardly surprising that the responses to the 2017 RFI did not provide illumination about these amendments.

Finally, it merits notice that the majority signals that they may be addressing in a future rulemaking the contents of the voter list provisions contained in very same 2014 rule that it amends today. It goes without saying that the majority would have to engage in notice and comment rulemaking to amend or repeal the substantive voter list provisions of the 2014 rule. Thus, the majority could have easily provided the public with notice of, and the opportunity to comment on, the majority’s desire to make the specific changes at issue today in the very same notice of proposed rulemaking—just as the 2014 Board engaged in

Unfortunately, the substance of the majority’s analysis is even more problematic. The current majority is in a unique and superior position as compared to the 2014 Board in evaluating whether to keep changes made in 2014, to revert to pre-2014 procedures, or to do something else entirely: The Board now has a rich source of data from which to determine whether any of the predicted problems with the 2014 rule actually materialized, and whether there is an objective basis to prefer one set of procedures to another. However, continuing the irresponsible pattern of the RFI, my colleagues appear to have conducted *no analysis* of the more than four years of available agency data and records about the actual, real-world impact of the 2014 rule. In justifying the changes enacted today, the majority does not cite even anecdotal evidence that significant problems with the operation or implementation of the 2014 rule have actually emerged. Instead, my colleagues base their criticism of the 2014 rule largely on their own unsupported suppositions, and those of previous dissenting Board members. Incredibly, the majority does not expressly invoke its own experience administering the 2014 rule to justify its amendments.

While the majority repeats (over and over again) that these changes are necessary to promote “fairness, accuracy, transparency, uniformity, efficiency, and finality,” repeating this mantra does not make it so. The majority cites no data whatsoever substantiating its conclusion that the 2014 rule has *impaired* those interests. Nor does it cite any evidence supporting its conclusions that the changes it makes today will *promote* these goals—despite the fact that my colleagues characterize several of these changes as a functional reversion to practice prior to 2014, which would presumably allow them to draw on a wealth of historical agency experience.

It is one thing for an agency to change its mind based on a reasoned analysis of available evidence—or even a reinterpretation of the data it previously relied upon,¹⁴⁹ but it is quite another for an agency to refuse to examine *any of the relevant information readily available within the agency itself* to test

notice and comment rulemaking before adopting each and every one of the 2014 rule provisions. It is difficult to discern why the majority would opt to do two separate rulemakings rather than use the time and resources available to do a single rulemaking on a longer timetable that would allow for notice and comment.

¹⁴⁹ See, e.g., *Nat. Assn. of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012).

the hypotheses underlying its new approach. This is particularly irrational in the context of a direct final rule that will not even provide members of the public with the opportunity to assist the agency in evaluating the wisdom of specific changes. The majority’s complete and indefensible failure to investigate the agency’s own data and experience on these issues renders the rule enacted today arbitrary and capricious.

This flawed analysis, unsurprisingly, produces an equally flawed result that undermines the fundamental goals of our statute. Section 9 of the National Labor Relations Act is animated by the principle that representation cases should be resolved quickly and fairly. As the Supreme Court has recognized, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.”¹⁵⁰

Recognizing the importance of timely elections to the fundamental goals of the Act, “every time Congress has amended laws governing representation cases, it has reaffirmed the importance of speed,” because “[t]his is essential both to the effectuation of [NLRA] rights of employees, and to the preservation of labor peace.”¹⁵¹ In keeping with this fundamental goal, since the NLRA was enacted, the Board has revised its representation case procedures multiple times, and the Board’s General Counsel has continually revised representation case time targets *downward* (not upward) to resolve questions concerning representation more fairly, expeditiously and efficiently.¹⁵²

With this rule, my colleagues claim the dubious distinction of becoming the first Board in the agency’s 84-year history to intentionally codify substantial delay in the representation case process, to the detriment of the mission of our Agency.¹⁵³ Because I

¹⁵⁰ *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946). Indeed, Congress deliberately exempted Section 9 proceedings from the APA’s provisions governing formal adjudications, see 5 U.S.C. 554(a)(6), because of “the simplicity of the issues, the great number of cases, and the exceptional need for expedition.” S. Comm. on the Judiciary, 79th Cong., Comparative Print on Revision of S. 7, at 7 (Comm. Print 1945). Because of this need for expedition, Congress also deferred judicial review of representation decisions unless and until the Board enters an unfair labor practice order based on those decisions. See *Boire v. Greyhound Corp.*, 376 U.S. 473, 477–79 (1964).

¹⁵¹ 79 FR 74316.

¹⁵² *Id.* at 74310, 74316–74317.

¹⁵³ The majority is wrong to claim that this rule will merely result in a return to pre-2015 timeframes for contested cases. The reality is that the processing of representation cases will be even

cannot support this arbitrary exercise, or the unjustified burden it will place on workers seeking to exercise their fundamental workplace rights, I dissent.

My dissenting views are laid out in two separate analyses—Section B explains in summary fashion why the majority’s rule violates the Administrative Procedure Act, while Section C includes a detailed discussion of the substance of the majority’s particular amendments and why these changes are not the product of reasoned decisionmaking.¹⁵⁴

B. The Majority’s Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act

It is hard to see how the majority’s rule could survive judicial review under the Administrative Procedure Act, given its glaring defects. The majority’s rule is arbitrary and capricious—a textbook example of how administrative agencies should *not* proceed. The rule makes radical changes to the Board’s 2014 rule without any factual basis. Simply put, there is no administrative record here supporting the rule. Indeed, the majority seems to have made a determined effort to *avoid* making factual findings related to the 2014 rule. It has (1) disclaimed any reliance on public submissions made in response to the Board’s 2017 Request for Information concerning the implementation of the 2014 rule; (2) inexplicably made no attempt to collect, examine, and evaluate the Board’s own records and data involving representation cases under the 2014 rule; and (3) dispensed with notice-and-comment rulemaking, which would have provided some basis to evaluate the 2014 rule. But that is not all.

The majority’s rule is arbitrary, too, in deliberately sacrificing the undeniable benefits of the 2014 rule—including dramatic reductions in unnecessary delay in the representation-case process—for purely speculative gains serving other policy goals that are (at best) secondary under the National Labor Relations Act. There can be no dispute that the 2014 rule reduced delay—the evidence proves it—and that this rule will, by design, *increase* delay by building it into the process at multiple points. There is no evidence at all, of course, that this increased delay will serve any legitimate statutory

slower than before the 2014 rule. For example, under the majority’s scheme, pre-election hearings will open no sooner than 20 days from the petition, yet in FYs 2011–2013, pre-election hearings were opening in a median of 13 days. See *infra* fn.182.

¹⁵⁴ The latter portion of the dissent incorporates passages, often verbatim, from the 2014 rule because the best evidence of the 2014 Board’s reasoning for adopting that rule is contained in its preamble.

purpose. This action is not reasoned decision-making leading to a permissible change in Board policy, but rather the reflexive rejection of the 2014 rule, predetermined when the current Board majority was formed.

This rule must be set aside under the APA as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁵⁵ As the Supreme Court has explained, under the “arbitrary and capricious” standard, an agency must: examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, supra, 463 U.S. at 43 (internal citations omitted).

The “arbitrary and capricious” standard simply cannot be satisfied here, given the complete lack of any factual basis for the majority’s rule. In addition, the majority’s decision to discard the demonstrated benefits of the 2014 rule—such as reducing unnecessary delay in representation cases, a prime statutory objective—in favor of alleged process improvements that are purely speculative also fails the “arbitrary and capricious” test.

1. The Majority Has Arbitrarily Failed To Examine the Board’s Actual Experience Under the 2014 Rule and Arbitrarily Failed To Rely on a Factual Basis for Its New Rule

In the Supreme Court’s words, the “APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy.’”¹⁵⁶ Here, the majority’s rule contradicts factual findings that underlay the Board’s prior policy (as reflected in the 2014 rule), but the majority’s rule does not rest upon any genuine factual findings at all.¹⁵⁷ The

majority has disclaimed any reliance on public submissions made in response to the Board’s 2017 Request for Information concerning the implementation of the 2014 rule, and it inexplicably has made no attempt to collect, examine, and evaluate the Board’s own records and data involving representation cases under the 2014 rule.¹⁵⁸

The Supreme Court has observed that in reviewing agency rules under the APA, the federal courts “insist that an agency ‘examine the relevant data and articulate a satisfactory explanation for its action.’”¹⁵⁹ The majority has arbitrarily chosen *not* to “examine the relevant data” (which is easily available to it) and so it cannot possibly “articulate a satisfactory explanation” for this rule, which is not “a new policy created on a blank slate,” but rather a departure from the 2014 rule that has been in effect for nearly 5 years.

That rule can only be rationally evaluated on the basis of the Board’s actual experience during that period, and the majority cannot simply refuse to examine that information.¹⁶⁰ The question here is not whether, *in 2014*, the Board permissibly could have made different choices in deciding whether and how to improve the representation-case process, but instead whether *today* the choices made by the Board in 2014 have been vindicated or refuted by experience. The majority, however, deliberately avoids addressing that question and thus “has failed to consider an important aspect of the

provisions that [are] address[ed] in this rulemaking.” But aside from the fact that the 2014 Board made multiple factual findings concerning pre-rule practice in the 2014 rule, it is beyond question that the implementation of the 2014 rule, over a period of more than four years, has created a new set of facts: The positive, real-world consequences of the 2014 rule that the Board sought to achieve (and effectively predicted). Those new facts are precisely what this rule contradicts, without justification.

¹⁵⁸ Even if the majority was free not to engage in notice-and-comment rulemaking, a *consequence* of that choice—given the majority’s failure to rely on RFI submissions or to address the Board’s own records and data—is that the Board has no factual basis for this rule. The majority, in other words, has assumed the risk of forgoing notice and comment, against the recommendation of the Administrative Conference. See ACUS Recommendation 92–1, *supra*.

¹⁵⁹ *Fox Television Stations*, supra, 556 U.S. at 513 (emphasis added), quoting *State Farm*, 463 U.S. at 43.

¹⁶⁰ See *Gas Appliance Mfrs. Assn. v. Department of Energy*, 998 F.2d 1041, 1047 (D.C. Cir. 1993) (“An important, easily testable hypothesis should not remain untested.”); *Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985) (agency “may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties.”)

¹⁵⁵ 5 U.S.C. 706. See, e.g., *Citizens to Preserve Overton Park, Inc. et al. v. Volpe*, 401 U.S. 402, 413–414 (1971).

¹⁵⁶ *Perez v. Mortgage Bankers Assn.*, 135 S.Ct. 1199, 1209 (2015), quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁵⁷ The majority argues that in 2014, the Board “made no significant factual findings relevant to the

problem.”¹⁶¹ As Supreme Court precedent makes clear, when “[t]here are no findings and no analysis . . . to justify the choice made” by an agency’s rule, the agency has acted arbitrarily and capriciously.¹⁶² That is the case here.

2. The Majority Has Arbitrarily Chosen To Significantly Increase Delay in the Board’s Representation Process for Unsupported and Unjustified Reasons

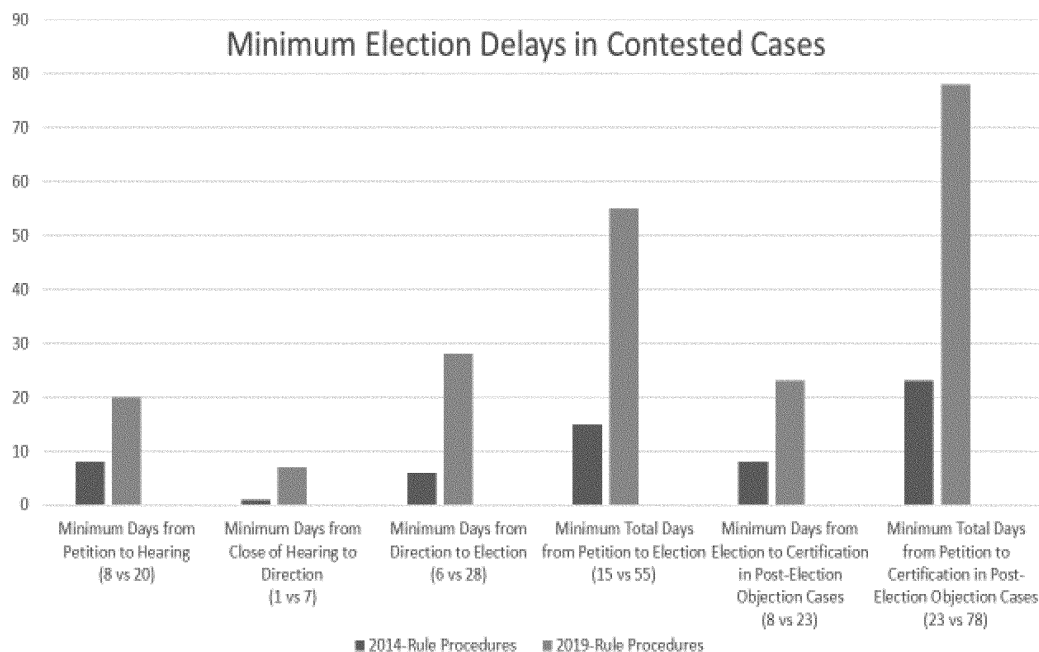
The lack of any factual basis for the majority’s rule is glaringly apparent—and unacceptable under the

Administrative Procedure Act. Equally arbitrary, in turn, is the majority’s deliberate decision to *increase* delay in the Board’s representation process, in the name of other considerations that are both unsupported and unjustified, given the Act’s overriding policy goals.

The majority’s amendments impose unnecessary delay at each stage of the representation case process: (1) Between the filing of the petition and the opening of the pre-election hearing; (2) between the opening of the pre-election hearing and the issuance of a decision and direction of election; (3) between the

decision and direction of election and the actual election; and (4) between the election and the certification of results. My analysis shows that the majority’s rule will cause elections to be held nearly two months from the filing of the petition in the simplest case. And it will add another three weeks to the time it takes for the results be certified.

The chart below compares the minimum amount of time it will take the Board to conduct an election and certify the results in a no-issue case under the rule the majority issues today, as compared to the 2014 rule.¹⁶³



Thus, the majority’s amendments will significantly delay certifications in the simplest directed election cases by close to two months.¹⁶⁴ The majority provides no reasoned explanation for codifying such a substantial delay into the Board’s election process.

The majority concedes, as it must, that one of 2014 rule’s legitimate purposes was to reduce delay in conducting elections, *and that it has succeeded in reducing delay in conducting both stipulated and directed elections*. But the majority then

observes, by way of explanation for this action, that:

In other respects, however, it appears that the 2014 amendments have not resulted in a significant departure from the pre-2014 status quo. In this regard, the overall rate at which parties reach election agreements remains more or less unchanged. So too the rate at which unions win elections. Based on this state of affairs, it is reasonable to consider whether these gains in speed have come at the expense of other relevant interests. Based on our review of our current representation case procedures, Congressional policy, and concerns that have been previously and repeatedly voiced about the current

procedures, we conclude that they have. [footnotes omitted]

* * * * *

[B]eyond the interest in speed, the Board’s interests include efficiency, fair and accurate voting, and transparency and uniformity, among others. The provisions instituted today that will expand the time between petition and election serve each of these interests.

* * * * *

In sum, the final rules will likely result in some lengthening of the pre-election period, but the sacrifice of some speed will advance fairness, accuracy, transparency, uniformity, efficiency, and finality. This is, in our

¹⁶¹ *State Farm*, supra, 463 U.S. at 43.

¹⁶² *State Farm*, supra, 463 U.S. at 48, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962).

¹⁶³ As discussed below, a party has the right under the Act to insist on a pre-election hearing even if there is no substantive dispute between the parties concerning the Board’s jurisdiction, the propriety of the petition, and the appropriateness of the petitioned-for unit. Accordingly, the chart assumes that the employer facing an RC petition

refuses to enter into a stipulated election agreement, and instead proceeds to a pre-election hearing that only requires the regional director to direct an election.

Regarding the timing of the election, the chart assumes that the petitioning union waives the 10-day period to use the voter list contact information. Regarding the timing of post-election certification, the chart assumes the regional director can overrule the losing party’s election objections the day after they are filed.

¹⁶⁴ Directing simple elections to be conducted in 55 days is nearly twice as long as the so-called “minimum period” that critics of the 2014 rule previously insisted (erroneously) was necessary “as a ‘safeguard against rushing employees into an election.’” See *ABC of Texas v. NLRB*, 826 F.3d at 226–227 (rejecting critics’ mistaken claim that Congress had recognized the necessity for a minimum 30-day waiting period between petition and election).

considered judgment, a more than worthwhile tradeoff.

The majority's explanation is demonstrably insufficient. It rests on a mischaracterization of the purposes of the 2014 rule, and it offers conclusions that are unsupported by any evidence. Most importantly, the majority's ostensible cost-benefit analysis—the “tradeoff” it embraces of increased delay for other supposed benefits—is arbitrary.

First, the majority's purported analysis of the results of the 2014 rule is fundamentally misleading. The majority is wrong to conclude that only one of the purposes of the 2014 rule (reduced delay) has been accomplished. Contrary to the majority, increasing the “rate at which unions win elections” was never a purpose of any of the 2014 rule amendments.¹⁶⁵ Accordingly, the fact that union win rates have not increased hardly provides a justification for re-evaluating, let alone amending, the 2014 rule.

Second, the majority fails to acknowledge other purposes of the 2014 rule, such as reducing unnecessary litigation and reducing the overall costs of litigation, objectives that the rule has successfully achieved.¹⁶⁶

Third, as will be discussed in more detail below, the majority's failure to examine the relevant data about how the

2014 rule has worked in practice, and to acknowledge pre- and post-2014 rule judicial precedent, allows the majority to wrongly assert that the rule's accomplishments have come at the expense of, and are outweighed by, the interests in finality, efficiency, fair and accurate voting, transparency, and uniformity. Remarkably, the majority cites no data to substantiate its conclusion that the 2014 rule has impaired those interests. Nor does it cite any case holdings that support its conclusions. This failure is damning, given that the rule went into effect in April 2015, more than four years ago.

In contrast, my analysis of the agency's own data indicates remarkable stability in every relevant statistical measure—proving, for example, that elections have been no less final, certain, fair, accurate, transparent, and uniform since the 2014 rule went into effect.¹⁶⁷ For example, the obvious gains in prompt case processing from eliminating the entitlement to litigate irrelevant individual eligibility issues at the pre-election hearing, and from eliminating the 25-day waiting period between the decision and direction of election and the election itself, have caused none of the majority's claimed unwelcome side effects. The number of Board reversals of regional director decisions and directions of elections has remained stable,¹⁶⁸ as has the number of cases involving post-election objections¹⁶⁹ and determinative challenges.¹⁷⁰ Similarly, the number of rerun elections has shown equal

stability.¹⁷¹ The majority is unable to point to a single case since the 2014 rule went into effect where the Board or the courts have set aside an election because employees were “confused” as a result of the Board's failing to decide pre-election a small number of individual eligibility or inclusion issues.¹⁷² Nor is the majority able to cite a single case in which the courts have set aside an election due to an issue attributable to the case's processing under the 2014 rule. Thus, the benefit of moving cases from petition to election much more promptly has not been accompanied by any countervailing costs. The more expeditious post-2014 rule elections have been just as final, just as certain, and just as fair and accurate as the pre-2014 rule elections in resolving questions of representation.¹⁷³

In short, there is no rational or empirical basis for the majority's claim that these changes will promote the purposes of the Act in any respect. Having inexplicably decided not to give weight to the public's responses to the 2017 RFI, to examine the Board's own data (which refutes the premises of this rule), or to engage in notice-and-comment rulemaking, the majority is left with no *good* reasons for departing from the 2014 rule. This failure dooms the rule under the Administrative Procedure Act.

¹⁶⁵ See, e.g., 79 FR 74326 fn.83.

¹⁶⁶ See 79 FR 74308–74310, 74383–74393, 74401–74404, 74407–74413, 74416–74417. For example, the 2014 rule has successfully reduced the number of decisions and directions of election appealed to the Board. See *infra* fn.233 (showing an approximate 23% decrease in pre-election requests for review from pre-rule FYs 2013–2014, to post-rule FYs 2016–2017).

Contrary to the majority's implicit suggestion, the statement of position requirement in the 2014 rule was not solely designed to increase the rate of election agreements, which was already above 90 percent. Rather, as the rule made clear, the requirement was designed to enable unions to make *informed* decisions about whether to enter into election agreements on alternative terms proposed by the employer by, for example, requiring the employer to provide the petitioning union with, among other things, the names and jobs titles of the employees that the employer wished to add to or subtract from the petitioned-for unit (in addition to narrowing the scope of the pre-election hearing in the event parties were unable to enter into an agreement). 79 FR 74318 fn.32, 74361, 74362, 74363, 74367; see also 74424 & fn.518. Accordingly, the fact that the 2014 rule has not dramatically increased the rate of stipulated election agreements hardly proves that the requirement is not serving one of its primary purposes of enabling unions to make more informed decisions about whether to enter into agreements. In any event, as former Member Pearce and I have previously pointed out (82 FR 58786–58787), the fact that the 2014 rule has not *reduced* the election agreement rate (as predicted by the dissenting Board members) actually supports retention of the rule, because it demonstrates that the rule's benefits have not come at the cost of increasing the number of pre-election hearings.

¹⁶⁷ Much of my statistical analysis below is based on data produced from searches in the Board's NxGen case processing database. For several reasons, this analysis will typically involve comparison of the last two full fiscal years of data before the 2014 rule's implementation with the first two fiscal years of data after the 2014 rule's implementation (*i.e.*, I will compare data from FYs 2013 and 2014 with data from FYs 2016 and 2017). First, the Board's NxGen case processing database does not include full fiscal year data for years more distant than 2013. Second, because the rule was implemented in the middle of FY 2015, it is difficult to untangle pre-rule data from post-rule data for that year. Third, I have not had time to carefully review data available in the software for FYs 2018 or 2019. In some contexts where the 2014 Board relied on relevant data from older fiscal years produced through searches in the agency's older CATS software, I have referenced that data as well.

¹⁶⁸ See *infra* fn.231 (showing consistency of 3 post-rule reversals based on extant law during FYs 2016–2017, with 4 pre-rule reversals based on extant law during FYs 2013–2014).

¹⁶⁹ See *infra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

¹⁷⁰ See *infra* fn.213 (showing 56 post-rule cases requiring a postelection regional director decision on determinative challenges in FYs 2016–2017 as compared to 53 such cases in FYs 2013–2014).

¹⁷¹ See *infra* fn.215 (showing 61 largely post-rule (non-duplicative) cases in which regional directors directed rerun elections during FYs 2016–2017 as compared to 59 such pre-rule (non-duplicative) cases in FYs 2013–2014).

Nor has there been any significant increase in parties filing unit clarification (UC) petitions after a union election victory, in order for the Board to determine unit placement issues that were not decided pre-election. See *infra* fn.216 (showing stability in the rate of UC petitions filed in relation to the number of union election wins in the prior fiscal year for post-rule FYs 2016 (8.2%) and 2017 (7.2%) as compared to pre-rule FYs 2013 (7.3%) and 2014 (8.7%)).

¹⁷² To the contrary, the District of Columbia Circuit has rejected the majority's premise that such a situation would cause confusion when, as the 2014 rule requires (29 CFR 102.67(b) (2015)), the notice of election alerts employees of the possibility of change to the unit definition. See *UPS v. NLRB*, supra, 921 F.3d at 257 (“the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications . . . were part of the bargaining unit” because it did not “imperil the bargaining unit's right to make an informed choice” given that the election notice “alert[ed] employees to the possibility of change” to the definition of the bargaining unit.”).

¹⁷³ Moreover, due to the 2014 rule's elimination of the automatic ballot impound procedure, elections since the rule went into effect have been *more* transparent and timing of the ballot count more uniform than were their pre-2014 counterparts, and more transparent and uniform than elections will be under the rule the majority announces today.

C. Discussion of Particular Amendments

The majority provides no reasoned justification for adopting amendments that undermine the Act's policies of fairly and expeditiously resolving representation cases. The majority's rule negatively impacts the representation process by:

- *Requiring unnecessary delays before workers can get an election.* These changes build a number of unnecessary delays into the pre-election process, including:

- Reverting to 1960s-era timeframes for employers to produce the voter list despite advances in widely-available technology that make it easier to collect and serve this information.

- Delaying pre-election hearings by two weeks—beyond any Board's processing time in more than two decades—while simultaneously making such hearings easier to postpone.

- Delaying the due date for the employer's statement of position and requiring that petitioners file an additional (and unnecessary) responsive statement of position, needlessly delaying the opening of pre-election hearings.

- Expanding the purpose of the pre-election hearing beyond that mandated by Congress, which also wastes resources and incentivizes employers to threaten irrelevant litigation to extract concessions regarding the election's timing and voting unit.

- Entitling parties to file post-hearing briefs in even the simplest cases, despite Congress's express decision to exempt Board representation cases from required post-hearing briefing due to "the simplicity of the issues, the great number of cases, and the exceptional need for expedition."

- Providing an unnecessary month-long waiting period between the direction of election and the election itself to allow time for the Board to rule on interlocutory appeals that might be filed, even though such appeals are rarely filed before the election, almost never result in reversals before the election, and in any event, could be mooted by the election results.

- *Making it more difficult to finalize the results of an election.* These changes also make it more difficult for workers to get finality in the results of their election. These delays include:

- Impounding ballots in cases where pre-election appeals remain undecided, which will require the Board to waste resources deciding matters that may be rendered moot by the election results.

- Stripping regional directors of the power to timely certify unions, despite Congressional authorization for regional directors to exercise such powers.

As discussed in more detail below, the majority fails to provide a reasoned explanation for these and other changes that build serious flaws into the election process.

1. The Majority Fails To Provide a Reasoned Basis for Amending Sections 102.62(d) and 102.67(l) to More Than Double the Time To Produce the Voter List

It is a bedrock principle of United States labor law that when a petition is filed with the Board seeking an election to enable employees to decide whether they wish to be represented by a union, the Board must strive to ensure that "employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also free from other elements that prevent or impede a free and reasoned choice." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966). By definition, one factor that "undoubtedly tend[s] to impede such a choice is a lack of information with respect to one of the choices available." *Id.* "In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Id.*

It is undeniable that as a practical matter an employer, through his possession of employee names and contact information as well as his ability to communicate with employees on plant premises, "is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation." *Id.* It is equally undeniable that, without a list of employee names and contact information, a union, "whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation." *Id.* at 1240–1241. Thus, dating back to its decision in *Excelsior Underwear, Inc.*, it has long been the Board's considered judgment that provision by employers of a list of eligible voters' names and home addresses promotes fair and free elections by "maximiz[ing] the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." *Id.* at 1241.

The *Excelsior* Board reasoned that the requirement of prompt disclosure of employee names and home addresses would also further the public interest in the speedy resolution of questions of representation. *Id.* at 1242–1243. As the

Board explained, in many cases at least some of the names on the employer's list of eligible voters—that are used by election observers to check off voters when they arrive at the polls—are unknown to the other parties. The parties may not know where the listed individuals work or what they do. Thus, for example, the union may be unable "to satisfy itself as to the eligibility of the 'unknowns,'" forcing it "either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote." *Id.* at 1243. As the Board further explained, "[t]he effect of putting the union to this choice . . . is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board." *Id.* Only through further factual investigation—for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves—can the union potentially discover the facts needed to assess eligibility and avoid the need for election-day challenges based solely on ignorance. To avoid unnecessary delay, the union must receive the recipient's response in time to be able to determine whether the employer correctly included those names on the list of eligible voters or whether it should challenge those individuals if they come to vote.

Accordingly, for both of these reasons, the Board had—since 1966—required employers to produce *Excelsior* lists of employee names and home addresses within seven days after approval of an election agreement or issuance of a decision and direction of election with the regional director having discretion to extend the time to produce the list upon a showing of extraordinary circumstances. *Id.* at 1239–1240 & fn.5. It has now been fifty years since the Supreme Court upheld the Board's *Excelsior* list requirement as "encouraging an informed employee electorate and [] allowing unions the right of access to employees that management already possesses." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

In 2014, based on a notice of a detailed proposal, and review of extensive commentary (predicated, in part, on the transformative technological changes since *Excelsior*), the Board decided to update and codify the *Excelsior* requirements as the "voter list" in its representation case regulations. See 79 FR 74335–74361 (Final Rule discussion of voter list); see also 79 FR 7322–7323, 7326–7328

(NPRM discussion of voter list). The Board explained at length why it concluded that requiring employers to disclose the available home and personal cell phone numbers of the unit employees (as well as available personal email addresses) would help advance the principal objectives of the original *Excelsior* requirement. 79 FR 74336–74341.

Specifically, the 2014 Board determined that requiring the employer to furnish the other parties with the available personal email addresses and home and personal cell phone numbers of eligible voters would facilitate an informed electorate, thus serving the first purpose of the *Excelsior* rule. 79 FR 74340. In addition, the Board concluded that the expanded voter contact information would help the union (or decertification petitioner) investigate the identity of any unknown employees on the employer's voter list in a more timely manner, thereby helping to decrease the chances that the union (or decertification petitioner) would have to challenge voters based solely on ignorance of their identities. *Id.*

Most relevant to this rule, the 2014 Board “conclude[d] that advances in recordkeeping and retrieval technology as well as advances in record transmission technology in the years since *Excelsior* was decided warrant[ed] reducing the time period for production, filing, and service of the list from 7 calendar days to 2 business days.” *Id.* at 74353. Shortening the time period would help the Board to expeditiously resolve questions of representation, because the election—which is designed to answer the question—cannot be held until the voter list is provided. As the 2014 Board explained, when the Board first established a 7-day time frame for producing the list, employers maintained their employees’ records in paper form (because virtually no employer had access to personal computers or spreadsheets). *Id.* Employers also had to allow time for the filing of the list via U.S. Mail (because instantaneous electronic filing and service methods such as email did not exist in 1966). *Id.* In contrast, the typical modern employer can use computers to retrieve the necessary electronically-stored information to compile the list and to file and serve it instantaneously. 79 FR 74353, 74428. The Board found particularly persuasive that even “under the technological constraints of the 1960s, [when *Excelsior* was decided] employers could and did produce voter lists, at least for deposit into the mails, in 4 calendar days or fewer.” *Id.* at 74353. “Thus, the advent of electronic filing and service via email alone

warrants a substantial reduction in the time provided, and in the Board’s view, technological advances fully justify the move to 2 business days for production of the final voter list.” *Id.*

Additional factors likewise persuaded the Board that the 2-business day time frame was appropriate for production of the list. *Id.* First, in many cases the employer will have provided a preliminary list of employees in the proposed or alternative units as part of its required Statement of Position¹⁷⁴ before the clock ever begins running on the 2 business day deadline for production of the voter list. That initial list will be due no sooner than 7 days after service of the notice of hearing, and so the employer will have the same amount of time to produce the preliminary list as it had under *Excelsior*. *Id.* Accordingly, to produce the voter list, “the employer need not start from scratch, but need only update that initial list of employee names, work locations, shifts, and job classifications, by adding employees’ contact information and making any necessary alterations to reflect employee turnover or changes to the unit.” *Id.*¹⁷⁵ Second, the description of representation case procedures which is served with the petition will explicitly advise employers of the voter list requirement—just as the opening letter did pre-2014—so that employers concerned about their ability to produce the list can begin working immediately; before an election agreement is approved or an election is directed and thus *before* the clock begins running on the 2-business day time period. *Id.* at 74353–74354.¹⁷⁶

¹⁷⁴ The majority retains this aspect of the statement of position requirement.

¹⁷⁵ Today, the majority has also lengthened the time to produce the statement of position from 5 business days to 8 business days. The majority never addresses why despite this additional time, employers need more time to subsequently produce the voter list. Nor does the majority acknowledge that for directed election cases, employers will have still more time to work on the voter list, as hearings are delayed for another 10 days after the initial list is filed.

¹⁷⁶ The Board noted that the Casehandling Manual in effect before the 2014 rule provided in Section 11009.2 that the initial letter to the employer following the filing of the petition should advise the employer: “In the event an election is agreed to or directed, the Agency requires that a list of the full names and addresses of all eligible voters be filed by the employer with the Regional Director, who will in turn make it available to all parties in the case. The list must be furnished to the Regional Director within 7 days of the direction of, or approval of an agreement to, an election, and the employer is being advised early of this requirement so that there will be ample time to prepare for the eventuality that such a list may become necessary.” 79 FR 74354 fn.224. Contrary to the majority, advising employers of the voter list requirement early in the process promotes transparency and orderly case processing, and the majority gives no indication that it plans to cease the practice of

Third, in the Board’s experience, the units for which lists must be produced are typically small—with half of all units containing 28 or fewer employees over the past decade—meaning that even for those small employers which lack computerized records of any kind, assembling the information should not be a particularly time-consuming task. *Id.* at 74354.¹⁷⁷ Finally, parties may enter into agreements providing more time for employers to produce the list subject to the director’s approval, and the regional directors may direct a due date for the voter list beyond two days in extraordinary circumstances. *Id.*

Today, the majority quite properly retains the requirement that employers disclose the available email addresses and available home and personal cell phone numbers of eligible voters to the nonemployer parties to the case once an election is agreed to by the parties or directed by the regional director. However, without engaging in notice and comment, the majority more than doubles the time to produce the voter list by amending the Board’s rules to provide that the list is due 5 business days from approval of an election agreement or issuance of a decision and direction of election. The majority justifies its elongation of the time to produce the voter list by claiming that: (a) In the minority of directed election cases changed in other respects by their rule, the added time will not delay the election; (b) the majority of stipulated election cases should then suffer a similar delay to make them “uniform” with the directed election cases; and (c) in any event, more time is better based

advising employers of the requirement in the description of representation case procedures that is served along with the petition. In any event, because of the required statement of position, the employer will already have compiled much of the information required by the voter list before the 2-business day period even begins to run.

The majority strains to suggest that because the Board may direct an election in a unit different from that proposed by either party, it may be difficult for an employer to produce the voter list notwithstanding that it will have already produced the initial lists of employees as part of its required Statement of Position. But it certainly is not the norm for the Board to direct an election in a unit that bears no relation to either the petitioned-for unit or the employer’s proposed alternative unit. And in the majority’s fanciful scenario in which the Board concludes that the appropriate unit is so substantially larger and different from either the petitioned-for unit or the employer’s alternative unit, so as to make it infeasible for the employer to produce the list within the normal time frame, that would obviously constitute extraordinary circumstances justifying additional time to produce the list.

¹⁷⁷ I note that this trend held steady in the years since the rule’s implementation. The median size of bargaining units ranged from 24 to 26 employees in FYs 2016–2017. See <https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections>.

on the possibility that some employers could have difficulty complying with the two-day timeframe to produce the list provided by the 2014 Board.

The majority claims that providing employers with more time to produce the information “better balances” the relevant interests in prompt elections, efficiency, accuracy, transparency and uniformity. But the majority has failed to show that the 2014 rule’s accomplishments have come at the expense of efficiency, accuracy, transparency and uniformity.

For starters, the 2014 rule timeline for production of the voter list was uniform and transparent; the default due date was two business days in both the stipulated election context and the directed election context. While the majority’s default five business day timeline is more than twice as long, it plainly is no more uniform or transparent than the 2014 rule. And while the 2014 rule provided for exceptions in both the stipulated and directed election contexts, the majority’s rule provides for exactly the same exceptions in both the stipulated and directed election contexts despite providing so much more initial time to produce the lists. See amended §§ 102.62(d) and 102.67(l).

The majority also argues that providing more time for employers to produce the list decreases the chances that employers will provide inaccurate lists. But the majority provides no evidence whatsoever that the reduction in time to produce the list has caused any statistically significant increase in the number of election objections cases concerning inaccurate voter lists. Indeed, the evidence that the total number of election objections cases has held steady despite the reduced time to produce the voter list would suggest precisely the opposite.¹⁷⁸ One might reasonably expect that a new Board majority, skeptical of the wisdom of the 2014 Board’s reducing the timeframe to produce the voter list, would examine available case records and agency statistics to see whether there have in fact been compliance problems warranting a change. Failing that, one might expect a skeptical 2019 majority to invite comment from stakeholders who had actually participated in Board proceedings involving the 2-day voter list production timeframe to hear specifics about their compliance experiences. But, here, one would be wrong. The majority demonstrates their

disinterest in reasoned decisionmaking by failing to examine evidence relevant to its proposal or to solicit comments.

Although the majority cites two cases in support of its claim that the information required to be disclosed may not be available in centralized computerized form and thus may not be readily available, the majority’s expanded time frame for producing the list would not have made any difference at all in those cases.¹⁷⁹

And the majority’s claim that its amendment will not delay elections is only true in the directed election context because, as the majority concedes, the majority has decided to amend § 102.67 to introduce a 20 business day (or 28 calendar day)

¹⁷⁹ *RHCG Safety Corp.*, 365 NLRB No. 88 (2017), certainly provides no support for the majority’s lengthening the time to produce the list. To the contrary, the case shows that the employer at issue, with a larger than average sized voting unit, both (a) had sufficient time to contact its supervisors for voter list information that was not stored on a computer database, and (b) would have produced a deficient voter list devoid of available employee cell phone numbers even under the majority’s 5 business day timeframe. As the Board explained, “although [] the individual assigned to compile the voter list testified that he spoke to supervisors to obtain information relating to employees who might be eligible under the [construction industry] *Steiny/Daniel* formula, he admitted that he did not ask any supervisors for the phone numbers of the unit employees they had.” *Id.* slip op. at 6. Moreover, the employer in that case “voluntarily entered into a stipulated election agreement providing for the normal 2-business day timeframe” to produce the list rather than “negotiat[ing] with the Petitioner for a longer period of time to produce the list or, failing that . . . refus[ing] to enter into an election agreement and go[ing] to a hearing to explain why it needed more time to produce the list.” *Id.* slip op. at 7. The fact that the employer in *RHCG* pursued neither option available under the 2014 rule would, if anything, tend to suggest that it thought it had sufficient time to comply with its voter list requirements, and certainly does not support the majority’s implication that a 5-business day timeframe would have materially changed the outcome of that case.

Next, the majority cites *President and Fellows of Harvard College*, 01–RC–186442, to support its position that a 5-business day timeframe for production of the voter list should be applied to all cases due to the possibility that “assembling the voter list may prove challenging for large or decentralized employers.” But, again, the majority’s 5-business day timeframe would seemingly have done nothing to change the outcome of that case. As recounted in the Regional Director’s Decision and Direction of Second Election, slip op. at 22 (July 7, 2017), the employer entered into a stipulated election agreement on October 21, 2016 under which it was able to produce the voter list used in the election on November 4 (10 business days later). Moreover, the employer had in fact begun preparing its list in mid-September, so any difficulties it had would clearly not have been meaningfully impacted by my colleagues’ adding 3 business days to the voter list’s presumptive due date. If anything, *President and Fellows of Harvard College* shows the current rule’s ability to adapt to extraordinary circumstances and hardly supports a general move to delay the production of voter lists in the main run of Board cases with bargaining units of twenty-some individuals, as opposed to the thousands at issue in the *Harvard* election.

waiting period between issuance of the decision and direction of election and the actual election. But for that waiting period, the majority’s decision to more than double the time to produce the voter list would delay directed elections (because the election cannot be conducted until the list is produced).¹⁸⁰ And, as shown below, the majority’s waiting period amendment is itself arbitrary and capricious and cannot shield its decision to more than double the time employers have to produce the voter list.

Echoing comments from the 2014 rule record, the majority contends that the rule’s time frame may pose special problems for particular employers or industries such as construction industry employers. The 2014 rule dealt with these contentions at length (79 FR 74354–74356), pointing out that, among other things, an employer can obtain more time to produce the list even without a union’s consent based upon a showing of extraordinary circumstances “which may be met by an employer’s particularized demonstration that it is unable to produce the list within the required time limit.” 79 FR 74354. Here again, the majority cites nothing showing that employers in those industries have been unable to comply with the rule’s provisions as a general matter or have been unable to obtain additional time where necessary.

Although the majority concedes that “many employers have clearly been able” to produce voter lists within two business days since the 2014 rule went into effect, the majority takes the position that “the potential for greater compliance difficulties in *certain* types of cases counsels in favor of relaxing the general requirement, rather than placing the burden on the employer” to justify why it needs more time than the default two business day time frame to produce the list. This is nonsensical; it amounts to a claim that the Act’s policy in favor of expeditiously resolving questions of representation should be undermined in the overwhelming majority of cases where delaying the election is not necessary merely because in some cases employers may justifiably need more time to produce the list, which additional time they can obtain under

¹⁸⁰ Moreover, the majority also imports its delay into the election agreement context (which accounts for more than 90% of Board elections) where it *will* undoubtedly delay the date on which elections could otherwise be held. See amended section 102.62 (increasing the time to produce the list in election agreement cases); see also *infra* fn.184 (showing pre and post-rule election agreement rates of 91.1% to 91.7%). Delaying more than 90% of elections merely to make them uniform with less than 10% of elections undermines the Act’s interest in expedition.

¹⁷⁸ See *infra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

the exceptions expressly provided for in the 2014 rule. Exceptions should not swallow the rule.

2. The Majority's Amendments to § 102.63 Create Unnecessary Delay Between the Petition and the Pre-Election Hearing

a. The Majority Amends § 102.63(a) To Delay the Opening of the Pre-Election Hearing by Two Weeks for No Good Reason

Unless parties enter into an election agreement, the Board may not conduct an election without first holding a pre-election hearing to determine whether a question of representation exists. See 29 U.S.C. 9(c)(1), (4). Accordingly, the timing of the pre-election hearing undeniably affects the timing of the election because the longer it takes to open the pre-election hearing, the longer it takes for the regional director to determine whether a question of representation exists and to conduct the election to answer the question. 79 FR 74371.

Prior to the 2014 rule, the Board's regulations did not specify when pre-election hearings would open. Instead, the regulations merely indicated that hearings would open at a time and place designated by the regional director. 29 CFR 102.63(a) (2011). Although pre-election hearings were routinely scheduled to open in 7 days to 10 days, practice was not uniform among regions, with some regional directors scheduling hearings for 10 to 12 days, even though a 1999 model opening letter indicated that hearings should open 7 days after service of the notice of hearing. 79 FR 74309, 74424 & fn. 517, 74373.

The 2014 rule scheduled pre-election hearings to open in 8 days from the date of service of the notice of hearing "[e]xcept in cases presenting unusually complex issues." 29 CFR 102.63(a) (2015). The Board reasoned that this amendment would bring all regions in line with best practices and help to expeditiously resolve questions of representation, while allowing sufficient time for the filing of the nonemployer party's statement of position before the hearing. 79 FR 74309, 74370–74371. The amendment would also render Board procedures more transparent and uniform across regions, thereby affording employees' statutory rights the same treatment across the country, convey to the employees that the Board, not the parties, is in charge of the process, reduce the Board's expenses and make the process more efficient by discouraging abusive party delays and

encouraging prompt settlement without litigation. 79 FR 74371–74373.

Today, however, the majority dramatically revises the hearing scheduling provisions of the 2014 rule and creates a significant delay between the filing of petitions and the opening of pre-election hearings. The majority substantially postpones the opening of pre-election hearings in all cases by some two weeks, with the majority delaying the opening of pre-election hearings from 8 calendar days to 14 business days (*i.e.*, 20 calendar days) from service of the notices of hearing.¹⁸¹ The majority's amendment will delay pre-election hearings beyond any Board's processing in more than two decades.¹⁸²

The majority fails to offer a reasoned explanation for changing the hearing scheduling provisions of the 2014 rule. The majority certainly cannot claim that the 8-day hearing scheduling provision contravenes the Act or the Constitution. Nor can the majority claim that the 8-day hearing scheduling provision contravened Board law. To the contrary, as the Board noted, the 8-day hearing scheduling provision was consistent with *Croft Metals, Inc.*, 337 NLRB 688 (2002), where the Board concluded that 5 business days' notice of pre-election hearings was sufficient. 79 FR 74309, 74370–74371, 74424. Nor can the majority cite any judicial authority for changing the hearing scheduling provisions. The courts have rejected every challenge to the hearing scheduling provisions of the 2014 rule.¹⁸³

Significantly, the majority offers no empirical basis for concluding that the 2014 rule hearing timeframe has caused the parade of horrors forecasted by rule's critics. Indeed, the majority fails to cite any available data to support its conclusion that it somehow promotes

efficiency to substantially delay all pre-election hearings. Thus, for example, the majority cannot show that the hearing scheduling provision reduced the rate of stipulated election agreements, prevented parties from adequately preparing for hearings, or from obtaining counsel, notwithstanding the "additional obligations imposed by the 2014 final rule" (*i.e.*, completing the statement position and posting the notice of petition for election). In fact, as the majority acknowledges, since the rule went into effect, the Board's election agreement rate has remained robust, with more than 90 percent of all elections having been held pursuant to stipulated election agreements.¹⁸⁴ Moreover, the median time for the parties to enter into election agreements approved by the regional directors has been 7 days from issuance of notices of hearings,¹⁸⁵ which constitutes powerful evidence that employers can in fact obtain advisors and have the conversations necessary to formulate positions on the issues that would be addressed at the pre-election hearing in the time frame set forth in the 2014 rule.¹⁸⁶

Instead, the majority contends that its amendment represents a better balance of the interests in the expeditious processing of representation cases, efficiency, fairness, transparency, and uniformity. The majority chiefly argues that the 8-day default timeline between petitions and pre-election hearings is

¹⁸⁴ Information reported in the Agency's NxGen case processing software shows post-rule election agreement rates of 91.7% in FYs 2016–2017, as compared with pre-rule election agreement rates of 91.1% in FYs 2013–2014.

¹⁸⁵ Information produced from searches in the Board's NxGen case processing software shows post-rule medians of 7 days from issuance of notice of hearing and regional director approval of election agreements for FYs 2016–2017.

¹⁸⁶ As the 2014 Board explained (79 FR 74375): Frankly, the Board finds it difficult to believe that an employer would commit to enter into a stipulated election agreement—and thereby waive its right to raise issues at a pre-election hearing—before satisfying itself that the Board did in fact have jurisdiction over it, that there were no bars to an election, and that the unit described in the agreement was appropriate. Indeed, as Jonathan Fritts testified on behalf of CDW, "it's hard to say that negotiating a stip[ulated election agreement] would necessarily take less time than preparing for the hearing[.] I think that everything that precedes the negotiation, at least in my experience, is something that you would do to identify the issues that may be subject to litigation. And so, if you're going to negotiate a stip I think you have to know what the issues are that you might go to hearing on, and then you have to decide if you can resolve them. The process of identifying those issues, what the evidence is, what the circumstances are, that's going to happen I think regardless of whether you go to a hearing or whether you go to a stip. It's only once you've done all that that you really begin the process of negotiating a stip."

¹⁸¹ Unless the notice of hearing is served on a Monday, no pre-election hearing will open sooner than 20 calendar days from service of the petition and notice of hearing.

¹⁸² See, *e.g.*, NLRB Annual Reports (Table 23) (FYs 1999–2009) (listing annual medians of only 13 to 15 calendar days to process cases from notice of a pre-election hearing to the close of the pre-election hearing); see also 79 FR 74353 and fn.222 (citing annual medians for FYs 2011–2013 of 10 calendar days to schedule pre-election hearings in the notices of pre-election hearings, and 13 calendar days to open pre-election hearings).

¹⁸³ See *UPS v. NLRB*, 921 F.3d at 256 ("an eight-day notice accords with both the Due Process Clause and [the employer's] statutory right to an 'appropriate' hearing"); *ABC of Texas v. NLRB*, 826 F.3d at 220, 222–223 ("the rule changes to the pre-election hearing did not exceed the bounds of the Board's statutory authority"), affirming *ABC of Texas v. NLRB*, 2015 WL 3609116 at *2, *5–*7; *Chamber v. NLRB*, 118 F.Supp.3d at 177, 205–206 (rejecting due process challenge to hearing scheduling provision).

too short and is burdensome and inconvenient for employers. And the majority argues that the additional time provided by its amendments will permit employers to “more easily manage” their obligations. According to the majority, providing more time “promotes a sense of overall fairness in representation proceedings, which also serves the purpose of transparency.”

But the majority greatly exaggerates the burden or inconvenience of the 8-day hearing scheduling provision. For starters, despite the majority’s claim that the 2014 rule caused a “substantial reduction of time between the filing of a petition and the conduct of the pre-election hearing,” the 2014 rule hearing scheduling provision, as shown, was *consistent* with Board caselaw and the best practices of the Board that existed before the rule.¹⁸⁷ Moreover, the majority simply ignores the fundamental facts that employers already know the necessary information to prepare for pre-election hearings before the notices of hearings even issue,¹⁸⁸ and that employers are

¹⁸⁷ Although the majority cites the need in some cases to obtain counsel, identify and prepare witnesses, gather information, and provide for any hearing-related travel as necessary, all this was equally true before the 2014 rule, when, as shown, *Croft Metals* was decided and when the best practice was already to schedule the opening of pre-election hearings in 7 days. Moreover, the statement of position requirement cannot be used to justify granting parties additional time to prepare for pre-election hearings. While employers were not required to file and serve a written statement of position prior to the rule, the information solicited by the form routinely was requested by regional personnel prior to the 2014 rule. 79 FR 74424, 74362–74370. And in any event, the form merely requires parties to do what they would have to do to prepare for pre-election hearings. Indeed, the requirement helps guide hearing preparation. 79 FR 74362–74370, 74424. Nor can the 2014 rule’s requirement that employers post the notices of petitions for election justify granting parties additional time to prepare for pre-election hearings. The regional director provides the employer with the notice to be posted along with posting instructions, and so compliance with the requirement is hardly time consuming. See 29 CFR 102.63(a)(1), 79 FR 74463.

¹⁸⁸ As the Board noted,

The factual subject matter that is the focus of the hearing typically is not all that complex to litigate, and is intimately familiar to the employer, permitting very rapid preparation. As discussed, the Board need not direct an election in the most appropriate unit; it need only select an appropriate unit. In determining whether a group of employees constitutes an appropriate unit, the Board analyzes whether the employees in that unit share a community of interest by examining the employees’ terms and conditions of employment, the employees’ job duties, skills, training, and work locations, the employees’ supervision, the extent of employee interchange and contact with one another, and the history of collective bargaining. The employer already knows all those things before the petition is even filed. Thus, the employer knows its employees’ terms and conditions of employment because it established its employees’ terms and conditions of employment. The employer knows its

frequently aware of union organizing campaigns even before the filing of the petitions.¹⁸⁹ The majority is unable to point to any demonstrable problems that have arisen since the 8-day default timeline became effective more than 4 years ago. In these circumstances and where, as here, the time provided by the 2014 rule exceeds that required by due process, the statutory interest in expeditiously resolving questions of representation clearly trumps the non-statutory interest in maximizing employer convenience.

The majority also claims that delaying the opening of the hearing from 8 calendar days to 14 business days (or 20 calendar days) will increase the rate of election agreements or will make hearings more efficient. But saying this does not make it so. The majority cites absolutely no evidence to support its proposition. And its explanation runs counter to the evidence before the agency. In fact, the rate of stipulated elections agreements was *not* meaningfully different prior to the 2014 rule when hearings were scheduled to open in more than 8 calendar days in some regions.¹⁹⁰ Nor was litigation at pre-election hearings more efficient then. Instead, all that the majority’s hearing scheduling amendment is likely to do is either simply push off the date when election agreements are entered into and approved (or delay the date that hearings actually open in the event the parties do not enter into election

employees’ job duties, work locations, and supervision, because it assigned those job duties, work locations, and supervisors to its employees. The employer knows its employees’ skills because it sets the skill requirements for its positions, and hires and evaluates its employees. Similarly, the employer is aware of the collective bargaining history of its employees, as well as the level of employee interchange and contact, and the training it provides for its employees. The employer likewise knows its connection to interstate commerce, and whether the petitioned-for employees are covered by a collective-bargaining agreement or participated in a valid election in the preceding 12-month period, thereby barring an election. Even if preparation within “a few hours” would not be feasible in some cases, within a few days an employer should reasonably be able “to gather his thoughts and his evidence and to make an informed decision about the best way to respond” regarding the community of interest and other issues. 79 FR 74372, 74378–74379 (footnotes omitted).

¹⁸⁹ See, e.g., 79 FR 74320–74321, 74372, 74378–74379. As the Board noted (79 FR 74320–74321), the Supreme Court’s decision in *NLRB v. Gissel Pacing Co.*, 395 U.S. 575, 620 (1969), Board precedent, the Board’s own experience in processing representation petitions and unfair labor practice cases, an academic study, and the 2014 rulemaking record confirm that employers are frequently aware of union organizing drives even before petitions are filed. See also *ABC of Texas v. NLRB*, 826 F.3d at 227 (noting the Supreme Court’s observation that union organizing drives rarely catch employers by surprise).

¹⁹⁰ See *supra* fn.184.

agreements). As any experienced practitioner knows, parties to a representation case frequently attempt to negotiate election agreements the day before the hearing opens as the immediate prospects of a hearing—and its attendant costs—serves to focus the parties’ attention on the matter at hand. 79 FR 74362.

The majority also speculates that the 14 business day (or 20 calendar day) timeline “may even promote greater administrative efficiency by easing the logistical burdens the expedited 8-day timeline currently imposes on regional personnel.” But that is all the majority offers in support of its specific amendment—sheer speculation. Although the majority takes “administrative note” that at various times since the 2014 rule took effect, regional personnel have voiced concerns over the 8-day timeline, the only “evidence” that the majority specifically cites for regional concern about the timeline is the response of the regional director committee to the RFI. But, as noted previously, the majority expressly states that “[n]one of the procedural changes that we make today are premised on the responses to the Request for Information.”

In any event, the regional directors’ response did not request that the pre-election hearing be scheduled to open in 14 business days (or 20 calendar days), let alone state that doing so would increase administrative efficiency, and it therefore provides no support for the majority’s hearing scheduling amendment. All the regional director committee said regarding the pre-election hearing date was as follows: “Some Regional Directors did not agree with this section of the rule which set hearings for eight days from the filing date of the petition. Other Regional Directors liked this section of the rule because it provides for consistency and is consistent with the hearing dates that were set by many Regions prior to the 2014 Election Rule.” RDs’ Response to 2017 RFI p.2. To the extent that the 2014 rule has required the agency to shift regional resources in order to accomplish the statutory goal of expeditiously resolving questions of representation, that is clearly appropriate.

The majority also argues that the hearing scheduling amendment promotes uniformity by bringing the pre-election hearing time frame “into closer alignment” with the time frame for post-election hearings, which the 2014 rule provided would open 21 calendar days from the tally of ballots. The majority’s implicit suggestion that Board could have scheduled *post-*

election hearings to open in 8 days from the tally of ballots—in line with the *pre*-election hearing schedule of 8 days from the petition—(but chose not to) reflects nothing less than a fundamental misunderstanding of the representation case process and the Board's rules and regulations. Even before the 2014 rule, parties had 7 days from the tally of ballots to file objections to the conduct of the election. See 29 CFR 102.69(a) (2011). Accordingly, the Board could not possibly have scheduled a post-election hearing within 8 days of the tally of ballots because party objections were not due until 7 days from the tally. And *Croft Metals* required that parties be given 5 business days' notice of a hearing. This meant that the earliest the Board could possibly schedule a post-election hearing would be 14 days from the tally. However, if the objections/offer of proof were not filed until the close of business on the 7th day following the tally, that would leave no time for the regional director to evaluate the objections/offer of proof to determine whether the objections warranted a hearing and still provide parties the notice the Board has long required they should be afforded. Accordingly, the Board determined that post-election hearings should commence 21 days from the service of the tally, which would give directors time to weed out frivolous objections and provide parties adequate notice. No such obstacles prevented the Board from scheduling pre-election hearings for 8 days from service of petitions and notices of hearing. To the contrary, as shown, the 2014 rule *pre*-election hearing scheduling provision was fully consistent with Board precedent and best practices. Making pre-election hearing scheduling more uniform with post-election hearing scheduling hardly serves any legitimate statutory purpose; rather, it simply imposes unnecessary delay in conducting pre-election hearings.

The majority also plainly fails to offer good reasons for mandating that pre-election hearings may not open sooner than 14 business days (or 20 calendar days). Recall that the majority affords employers far more time to prepare for the pre-election hearing than they were afforded prior to the 2014 rule. In 2013, regional directors scheduled pre-election hearings to open in 7 to 10 calendar days in 76% of cases. And in those few cases that actually went to a hearing, 25% of pre-election hearings opened in 7 to 10 calendar days and 71% of the cases that went to a hearing opened within 14 calendar days. 79 FR 74424 & fn.517. The majority offers no

reason whatsoever—let alone a good reason—why employers require more time to prepare for the pre-election hearing today than they needed in 2013.

Nor does the majority provide any explanation for why it selected that number of business days as opposed to any other number of days, apart from pointing to its statement-of-position amendments. For example, the majority offers no explanation for why it rejected the General Counsel's suggestion that the hearing open in 12 calendar days. See GC Response to 2017 RFI p.3. The majority has plainly failed to establish a rational connection between the facts before the agency and the choice made.

Finally, the majority is also simply wrong in contending that pre-election hearings must be postponed to 14 business days (or 20 calendar days) because of changes to the statement of position provisions, such as requiring written pre-hearing responsive statements of position from petitioning parties. Indeed, although the GC agrees that petitioners *should* be required to file such responsive statements of position, he argued that pre-election hearings should open in 12 calendar days, far quicker than the majority's 14 business day (or 20 calendar day) timeline. And the GC argued in favor of maintaining the 2014 rule's due date for employers' statements of position at 7 calendar days.¹⁹¹ The majority does not explain why it rejected the GC's view. In any event, as I explain below, the statement of position changes are unwarranted, arbitrary and capricious and cannot be used to justify the majority's hearing scheduling amendment. Indeed, because the majority concedes that its hearing scheduling amendment is not severable from its statement of position amendments, the hearing scheduling amendment must be invalidated as well.

b. The Majority Further Amends § 102.63(a) To Make Postponing the Pre-Election Hearing Easier, Exacerbating Their Default Two-Week Delay to the Pre-Election Hearing

To make matters worse, the majority also makes it significantly easier for parties to seek postponement of pre-election hearings, further delaying elections. The 2014 rule provided that the regional director could postpone pre-election hearings for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. 29 CFR 102.63(a)(1) (2015). Today, however, despite

automatically providing employers 2 extra weeks to prepare for pre-election hearings, the majority also substantially relaxes the standard for obtaining postponements of pre-election hearings by rewriting 29 CFR 102.63(a)(1) to provide that regional directors may postpone hearings for an unlimited amount of time upon request of a party merely showing "good cause."

Here, again, the majority offers no reasoned explanation for changing the 2014 rule standards governing postponements of pre-election hearings—no statutory or constitutional requirement of a good cause postponement standard, no judicial invalidation of the 2014 postponement standards, and no empirical basis for concluding that the 2014 standards were problematic. Significantly, the regional directors, the agency's nonpolitical career officials who were charged with administering the standards, have not requested any change in those standards in their response to the 2017 RFI about the rule. And the majority certainly provides no good reason for making it easier to obtain postponements now that it has automatically provided employers an extra 2 weeks to prepare for pre-election hearings. Thus, the majority nowhere explains why it should be easier for a party—who was given 20 calendar days to prepare for a hearing—to obtain a postponement than it was for a party who was given 8 calendar days to prepare for a pre-election hearing. If anything, common sense suggests that it should be harder to obtain postponements now that parties will have so much more preparation time.

The majority's arguments against what it calls the "two tier" postponement standard are based on erroneous readings of the pre-rule practice or the 2014 rule. Specifically, the majority's reliance on the casehandling manual in effect prior to the 2014 rule for the proposition that requests for postponements "were not routinely granted" is unavailing; the manual merely provided that the general policy "should be" that cases set for a hearing will be heard on the date set, and that a postponement request "will not be routinely granted." Contrary to the majority (and contrary to the aspirational language in the manual), the 2014 rule noted (79 FR 74424 fn.517), that extensions "were often granted." A stricter standard than good cause is also warranted because, the 8-day hearing timeframe does not apply to cases presenting unusually complex issues. See § 102.63(a)(1) (2015). In other words, requests to extend the opening of pre-election hearings beyond 8 days are unnecessary

¹⁹¹ See GC's Response to 2017 RFI at p.3.

in cases presenting unusually complex issues, because regional directors will schedule those hearings to open in more than 8 days. The majority asks why regional directors should be limited to granting only a 2-day postponement if special circumstances are established, when regional directors are free to extend the opening of the pre-election hearing beyond 2 days from the default 8-day timeframe in “unusually complex cases.” This question is beside the point, because the 2014 rule expressly provided that the regional director can extend the opening of the pre-election hearing “for more than 2 business days upon request of a party showing extraordinary circumstances.” 29 CFR 102.63(a)(1) (2015).

c. The Majority’s Amendment to § 102.63(b) Substantially Delays the Due Date for the Nonpetitioning Party’s Statement of Position for No Good Reason

Today, the majority quite properly retains the 2014 final rule amendment requiring nonpetitioning parties to complete a written Statement of Position soliciting the parties’ positions on issues such as the appropriateness of the petitioned-for unit, jurisdiction, the existence of any bar to the election; and the type, dates, times, and location of the election—issues that would have to be resolved in order to enter into an election agreement or addressed at the pre-election hearing. The majority also quite properly retains the preclusion provisions associated with failing to comply with the Statement of Position requirement.

However, the majority changes the Statement of Position scheduling provisions in ways that delay the opening of pre-election hearings and the conduct of elections. The 2014 rule provided that Statement of Position forms would be due no later than at noon on the business day before the hearing if the hearing were set to open 8 days from service of the notice. See 29 CFR 102.63(b)(1) (2015). And because the Statement of Position form largely requires parties to do what they would have to do to prepare for a pre-election hearing, the 2014 rule provided that parties would always have at least 7 calendar days (5 business days) notice. 79 FR 74362, 74363, 74364, 74371–74375.

But today the majority automatically gives the nonpetitioning parties an extra 3 business days to prepare the statement of position, by providing that it is due on the 8th business day (or 10th calendar day) following service of the notice of hearing. See amended § 102.63(b)(1) through (3). As the

majority concedes, delaying the due date for nonpetitioning parties’ statement of position beyond 7 days necessarily delays the opening of the pre-election hearing, which also inevitably delays the election.

However, just as was the case with its hearing scheduling amendments, the majority provides no reasoned explanation for changing the 2014 rule’s due date for completing the statement of position form. Thus, the majority certainly cannot claim that the statement of position scheduling provisions contained in the 2014 rule contravened the Act or the Constitution. Nor can the majority point to any judicial authority for changing the statement of position timeframes. Indeed, the courts have rejected every challenge to the time frames for completion of the statement of position.¹⁹² And the majority offers no empirical basis for concluding that the statement of position timeframes have caused the parade of horrors predicted by the rule’s critics. Thus, for example, the majority fails to cite any evidence showing that the 2014 rule statement-of-position time frames have regularly resulted in employers being precluded from raising or litigating issues. In addition, they concede that “the overall rate at which parties reach election agreements remains more or less unchanged” despite the 2014 rule’s time frames for completing the statement position.

Instead, the majority claims that its statement of position amendment represents a better balance of the interests in the expeditious processing of representation cases, efficiency, fairness, transparency, and uniformity. The majority argues that the 2014 rule timeframe for completion of the statement of position was too short and was burdensome and even onerous for employers, when considered “against the backdrop of other pre-election hearing preparation, which may involve a number of other time-consuming tasks, including retaining counsel, researching facts and relevant law, identifying and preparing potential witnesses, making travel arrangements, and coordinating with regional personnel and exploring the possibility of an election argument.” Accordingly, the majority argues that the additional time provided by its amendments will permit employers to “better balance” their obligations.

¹⁹² See, e.g., *Chamber v. NLRB*, 118 F.Supp. 3d at 205 & n.14 (rejecting plaintiff’s argument that “the burdensome requirement of the Statement of Position violates [its] due process rights by not providing it sufficient time to respond”).

But, as shown, the statement of position requires parties to do no more than what they have to do to prepare for a pre-election hearing; the form actually guides hearing preparation and facilitates entry into election agreements; and the 2014 rule’s 7 day time frame for completion of the statement of position complies with *Croft Metals* and best agency practices. In short the required statement of position does not delay hearing preparation (or vice versa) or impede negotiations for a stipulated election agreement (or vice versa). Indeed, the rule provided approximately one business day to negotiate an agreement after the filing and service of the statement of position before the hearing opens. 79 FR 74375 & fn.325. At bottom, the majority’s claim that employers need more time to complete the statement of position ignores that employers already have in their possession all the information necessary to complete the statement of position even prior to the filing of the petition,¹⁹³ and that employers typically are aware of union organizing drives prior to the filing of petition.¹⁹⁴ In these circumstances and where, as here, the time for filing the statement of position satisfies due process, the statutory interest in expeditiously resolving questions of representation trumps the non-statutory interest in maximizing employer convenience.¹⁹⁵

The majority provides no support for its claim that providing more time to complete the statement of position promotes efficiency. The majority suggests that allowing a few more days to complete the statement of position should discourage parties from taking a shotgun approach and raising every possible issue in it, which should lead to more focused hearings. But the majority provides no evidence that this frequently occurs under the current timeline, much less that providing more time will matter. Thus the list of litigable issues is ordinarily quite

¹⁹³ See *supra* fn.188.

¹⁹⁴ See *supra* fn.189.

¹⁹⁵ Although the majority invokes the interests of transparency and uniformity, it offers no evidence demonstrating that its amendment better serves those interests. Indeed, it merely states (emphasis added) its amendment “continues to serve the purposes of transparency and uniformity, and perhaps even improves upon the 2014 amendments in this regard, as the due date is now set forth in terms of a set number of business days following the notice of hearing, rather than being linked to the scheduled opening of the hearing.” Contrary to the majority’s implicit suggestions, parties faced with a petition under the rule did not wonder when their statement of position was due, because the notice of hearing served on them explicitly told them the date and time that the statement of position was due.

small—e.g., election bars, jurisdiction, and unit appropriateness. It is difficult to understand why an employer needs three additional business days on top of a week to ascertain whether an election involving its own employees has been held in the preceding 12 months, whether the petitioned-for employees are covered by contract (election bar issues), whether it is engaged in interstate commerce (jurisdiction), whether employees in the petitioned for unit share similar working conditions (unit appropriateness) or whether certain individuals employed by it are supervisors, because the employer already knows all these things before the petition is even filed. In any event, as the 2014 rule noted, the offer-of proof procedure—which the majority retains in its rule—provides tools for the region to “swiftly dispose of the unsupported contentions that a party may set forth in its Statement of Position simply to avoid triggering the preclusion provisions.” 79 FR 74375. Again, the majority provides no reasoned explanation for delaying the due date for the statement of position, which delays the election.

The majority also fails to offer any explanation for why it chose to set the due date at 8 business days as opposed to any other number of days. I note in this regard that although the GC advocated that the hearing date should be extended (to allow time for the implementation of his proposed requirement that petitioners file a prehearing responsive statement of position), the GC explicitly stated that he “would *not* modify the requirement that the [nonpetitioning party’s] SOP be filed at noon on the seventh day after filing of the petition.” GC Response to 2017 RFI p.3. (emphasis added). The majority certainly fails to offer a good reason for why employers need more time to prepare a statement of position today than *Croft Metals* entitles them to prepare for a pre-election hearing.¹⁹⁶

d. The Majority’s Further Amendment to § 102.63(b) Makes Postponing the Statement of Position Easier, Exacerbating Their Default Delay Caused by Granting Parties Approximately 50 Percent More Time to Complete It

To make matters even worse, the majority also substantially increases the likelihood of further delay in opening

pre-election hearings—and hence elections—by making it easier for nonpetitioning parties to obtain additional time to complete their statements of position. As noted, under the 2014 rule, if the hearing were set to open 8 days from the petition, then the nonpetitioning parties’ statement of position would be due at noon on the 7th day. The 2014 rule provided that the regional director could postpone the due date for filing statements of position up to 2 business days upon request of a party showing special circumstances, and for more than 2 business days upon request of a party showing extraordinary circumstances. 29 CFR 102.63(b)(1) through (3) (2015). But today the majority makes it substantially easier for parties to obtain potentially lengthy extensions of time to file their statements of position, by providing that the regional director may postpone the time for filing statements of position merely for “good cause.” See amended § 102.63(b)(1) through (3).

Here again the majority offers no reasoned reason for changing the standard—no statutory or constitutional requirement of a “good cause” standard; no judicial invalidation of the 2014 rule standards for postponement requests, and no empirical evidence that the rule standards for postponement requests caused problems. And here again neither the GC nor the regional directors requested a change in the standard.

The majority’s explanations for amending the two-tiered standard for granting postponements of the statement of position are identical to the explanations it offers for amending the two-tiered standard for granting request to postpone to pre-election hearing and are devoid of merit for the reasons previously discussed. And the majority certainly fails to offer good reasons for making it easier to obtain extensions of time now that nonpetitioning parties have approximately 50% more time to complete their statements of position.

e. The Majority’s Amendments to § 102.63(b)(1)(ii), (b)(2)(iii), and (b)(3)(ii) Further Delay the Opening of the Pre-Election Hearing by at Least a Week by Requiring Petitioning Parties To Complete a Responsive Statement of Position

A representation case is initiated by the filing of a petition. The 2014 rule required petitioners to indicate on their petitions their positions with respect to a variety of relevant matters, including the appropriate unit, identifying both inclusions and exclusions, the number of employees, the existence of any bars to an election, possible intervenors, and election details, including the date,

time, and place of the election.¹⁹⁷ As noted, nonpetitioning parties were then required to respond by filing their own statements of position a week later (normally at noon on the business day prior to the hearing).

The rule did not require the petitioner to respond in writing to the nonpetitioning party’s statement of position prior to the opening of the hearing. After all, the nonpetitioning party’s statement of position itself was a response to positions already taken in writing by the petitioner,¹⁹⁸ and was due at noon the day before the opening of the hearing. Instead, the rule provided that, in the event the parties were unable to enter into an election agreement, the petitioner “shall respond on the record to each issue raised in the Statement [of Position]” after the Statement of Position “is received in evidence [at the pre-election hearing] and prior to the introduction of further evidence[.]” 29 CFR 102.66(b) (2015).

Today, the majority amends this process by requiring the petitioning parties to file a written responsive statement of position no later than noon 3 business days before the hearing. In other words, the majority has decided to impose a requirement that petitioners file what amounts to a second written statement of position prior to the opening of the pre-election hearing. Imposition of this requirement delays the opening of the hearing (and hence elections) by a week, because the majority has built in a significant amount of time to allow for the filing of this new responsive prehearing statement of position by petitioners.

However, the majority fails to provide a reasoned explanation for amending the 2014 rule in this regard—no statutory or constitutional requirement that petitioners file a written, pre-hearing responsive statement of position, no judicial criticism of the rule

¹⁹⁷ 29 CFR 102.61 (2015); 79 FR 74328, 74424 (“This information will facilitate entry into election agreements by providing the nonpetitioning parties with the earliest possible notice of the petitioner’s position on these important matters.”).

¹⁹⁸ As the Board noted (79 FR 74424): Our colleagues are wrong in contending that the final rule’s statement-of-position provisions impose one-sided burdens on employers. The representation process in an RC case is initiated by a written petition for election, filed by employees or a labor organization on their behalf. The petition requires the filer to state a position on the appropriate unit, identifying inclusions and exclusions, and other relevant matters, including recognition and contract bar, election details, possible intervenors, the number of employees, the locations of the facilities involved, and the identities of the petition filer and the employer. All of this information is provided before the employer is required to respond in its Statement of Position. The statement-of-position form seeks essentially the same information from the employer’s point of view.

¹⁹⁶ Moreover, even prior to the 2014 rule, parties committed to enter into election agreements in 7 days or less, which constitutes powerful evidence that employers can in fact obtain advisors and have the conversations necessary to formulate positions on the issues covered by the Statement of Position form within the 5 business-day time frame set forth in the rule. 79 FR 74375.

amendment requiring petitioners to respond orally at the hearing to the nonpetitioner's statement of position, and no empirical evidence that the 2014 rule provision was causing problems.

Instead, the majority offers a number of unsupported contentions. First, the majority claims that requiring petitioners to file and serve a responsive statement of position prior to the hearing is more efficient than requiring petitioners to respond orally at the hearing to the nonpetitioner's statement of position, even though the majority's requirement will delay hearings and elections by a week. According to the majority, the requirement will increase the chances that parties enter into an election agreement. But saying this does not make it so. Indeed, even without the majority's new requirement, parties have entered into election agreements in over 90% of the cases.¹⁹⁹ The majority offers no evidence—or reason to expect—that requiring petitioners to file a responsive statement of position before the opening of the pre-election hearing will materially increase the election agreement rate. Indeed, the majority fails to show that a significant number of election agreements are reached after the petitioner responds orally on the record to the nonpetitioner's statement of position at the beginning of the pre-election hearing.

Alternatively, the majority insists that this amendment has the potential to streamline the pre-election hearing by clarifying what remains in dispute (*i.e.*, by informing the nonpetitioning party that the petitioner has changed its position from that which appeared on its petition in response to the nonpetitioner's statement of position). But if this is true, then the question arises why the majority does not also require the nonpetitioning parties to respond in writing (prior to the hearing) to the petitioner's (second) statement of position, and thereby inform the petitioner that the nonpetitioning party has changed its position in response to the petitioner's second statement of position. The answer is obvious. At some point, the hearing has to open, and the cost of delaying the hearing to allow multiple rounds of exchanging written statements of position is not worth the delay—particularly since it is the norm for the parties to disclose whether their positions have changed when they attempt to negotiate a stipulated election agreement the day before the scheduled opening of the hearing. In any event, as the 2014 Board explained,

because the employer already is in possession of all the facts necessary to litigate any issue at the pre-election hearing, no additional pre-hearing discovery (beyond the completed petition) is necessary from the petitioner. See 79 FR 74368; see also *supra* fn.188.

The majority also fails to provide a good reason for establishing the timeline associated with its new requirement that petitioners file a responsive statement of position: The petitioner's responsive statement of position is due 3 days after the nonpetitioner's statement of position is due and 3 days before the opening of the pre-election hearing. But given that petitioners have been able to respond orally to the nonpetitioner's statement of position less than 24 hours after service of the nonpetitioner's statement of position (as required by the 2014 rule), the majority provides no reason for tripling the amount of time for the petitioner to respond in writing. Indeed, the majority acknowledges that its responsive statement of position requirement “simply takes an existing requirement and modifies it to the extent that the response is now due, in writing, 3 business days before the hearing;” affirms that its new requirement that the petitioner file a pre-hearing responsive statement of position “is not designed to be an onerous requirement;” and states that it is simply designed to get the petitioner's response to the initial statement of position in writing prior to the hearing. So all the petitioner will have to note, for example, is that it disagrees with the employer's proposed alternative unit and maintains the positions it took on its petition—or that it agrees with the majority's position that for example, one classification that the employer seeks to add to the unit should be added. That should not take 3 business days.

Nor does the majority provide a good reason why the pre-election hearing should be delayed for another three business days following receipt of the petitioner's responsive statement of position, given that they fail to seek or produce any evidence that pre-election hearings have not been running smoothly notwithstanding that, under the 2014 rule, the pre-election hearing continues without adjournment after the petitioner responds orally on the record to the issues raised in the nonpetitioning party's statement of position. The employer certainly does not need an additional 3 business days to prepare for the hearing once it receives the petitioner's responsive statement of position, which it will receive 11 business days after service of

the notice of hearing. After all, as noted above, the employer already is in possession of the relevant evidence on all issues that can be contested at the pre-election hearing.

Although the majority claims that allowing an additional three business days could increase the chances of the parties arriving at a stipulated election agreement, thereby sparing the Agency the expense of having to conduct a pre-election hearing and issue a decision and direction of election, the 2014 rule already granted regional directors discretion to postpone the pre-election hearing if it appears likely that the parties will be able to enter into an election agreement. 79 FR 74375 fn.325, 74424. There simply is no good reason to build in an automatic delay in the process for those cases where there is no indication that the parties will be able to enter into an election agreement, given that such an automatic delay undermines the Act's policy of expeditiously resolving questions of representation. And, as shown, the majority offers no evidence—or reason to expect—that the election agreement rate will increase in any material way as a result of its amendment today. Instead, as noted, the most likely result is simply to push off the date that parties enter into election agreements.²⁰⁰

²⁰⁰ The majority's remaining contentions are nonsensical. Thus the majority's claim that its amendment promotes uniformity by requiring that all parties file a written statement of position in advance of the hearing ignores that, as the 2014 rule explained (79 FR 74425), “The nonpetitioning parties' prehearing, written Statement of Position is a response to the positions taken in writing 1 week earlier by the petitioner in its petition.” The majority's related claim—that its new requirement eliminates any impression that the Board is imposing one-sided pleading requirements on nonpetitioning parties—fails for the same reason; no statement of position is due from the nonpetitioning party until the petitioner has set forth its position on relevant matters in writing on its petition. In short, the 2014 rule's statement of position requirement was not “arbitrarily one-sided”, and the majority admits that any contrary impression was unwarranted. An agency should not alter its procedures to mollify unwarranted criticism. The majority's claim that the nonemployer party is required to furnish some additional information beyond that required of petitioners is partly true, but beside the point. As the Board explained (79 FR 74424–74425), “Where the statement-of-position form seeks different or additional information, it is generally because the employer has exclusive access to it. For example, the questions relating to jurisdiction concern the employer's dealings in interstate commerce. The names and job titles of an employer's own employees are typically known only by the employer, and payroll details, including the length of the payroll period and the most recent payroll period ending date, are those established by the employer.”

¹⁹⁹ See *supra* fn.184.

f. The Majority Fails To Justify Amending § 102.63(a)(2) to Nearly Triple Employers' Time To Post the Notice of Petition for Election

Prior to the 2014 rule, employers were requested, but not required, to post a notice about the representation petition that was filed and the potential for an election to follow. 79 FR 74309. The 2014 rule required employers to post the Notice of Petition for Election in conspicuous places and to electronically distribute the notice to employees if the employer customarily communicates with its employees electronically. (The regional director furnishes employers with the notice of petition for election that they must post and electronically distribute.) 29 CFR 102.63(a)(1), (2) (2015), 79 FR 74463.

The Notice of Petition for Election specifies that a petition has been filed, as well as the type of petition, the proposed unit, and the name of the petitioner; briefly describes the procedures that will follow, and lists employee rights and sets forth in understandable terms the central rules governing campaign conduct. 79 FR 74379. The notice also provides employees with the Board's website address, through which they can obtain further information about the processing of petitions. *Id.* The rule further requires that employers maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. *Id.*

The Board reasoned that the Notice of Petition for Election would provide useful information and guidance to employees and the parties. *Id.* The employees benefit from a uniform notice practice, which provides them, equally and at an earlier date, with meaningful information about the petition, the Board's election procedures and their rights, and employers benefit from more detailed Board guidance about compliance. 79 FR 74309, 74379.

The Board explained that while it believed that most employers should be able to post the notice on the same day that it is received, it would not judge an employer to have failed to comply with this provision so long as the notice was posted within 2 business days of receipt, and, accordingly, the 2014 rule stated that the employer shall post the Notice of Petition for Election within 2 business days after service of the notice of hearing. 79 FR 74379. The Board left it to future case by case adjudication whether some unforeseen set of factual circumstances might justify an employer taking a longer period of time to post the notice. Accordingly, § 102.63(a)(2) of the

2014 rule further provided that the employer's failure properly to post or distribute the notice "may be" grounds for setting aside the election when proper and timely objections are filed. Rendering failure to post the notice grounds for setting aside the election provides an incentive for its timely posting. *Id.*

Although the majority concedes that the requirement serves a laudatory purpose, the majority today nearly triples the time employers have to post and distribute the notice, by providing that employers shall post it within 5—rather than 2—business days. But the majority provides no reasoned explanation for changing the period of time to post and distribute the notice—no statutory or constitutional mandate for a longer timeframe, no judicial invalidation of the notice posting requirement's time frame, and no empirical basis for concluding that the time-frame has caused problems.

The majority merely states that it believes that this change is warranted in view of the logistical difficulties many employers "may face" in complying with the requirement. Specifically, the majority claims that for some larger multi-location employers, it "may" take a significant amount of time to post the notice in "all the places where notices to employees are customarily posted." But that is all the majority offers—sheer speculation, despite the fact that the rule has been in effect now for over 4 years. The majority certainly provides no empirical basis for concluding that two business days is insufficient time for an employer to post and electronically distribute the notice in the ordinary case. If the petitioned-for employees of a large employer work at more than one of the employer's facilities, it is likely that the employer has supervisors at each facility. And given the widespread availability and use of email, scanners, and facsimile machines, it should hardly prove difficult or time consuming for a "large multi-location employer" with a centralized human resources office to email, scan or fax the notices for posting to its on-site representatives at each of the facilities where its petitioned-for employees work and read the employer's posted notices. Significantly, the majority fails to cite any cases where parties complained that elections were improperly set aside due to an employer's failure to post the notice for election within 2 business days.

The majority also fails to provide good reason for granting employers 5 business days to post the notice. Recall that in 2002, the Board held that 5 business days constituted sufficient

time to prepare for a pre-election hearing. The majority nowhere explains why employers need the same amount of time to post and electronically distribute a notice—supplied to them with posting instructions by the regional director—as they need to prepare for a pre-election hearing.

The majority's contention—that it is "less urgent" that the notice be posted within two business days of service by the regional director given the majority's decision to delay the opening of the pre-election hearing to 14 business days—reflects a fundamental misunderstanding of the purpose of the notice and the realities of organizing campaigns. The purpose of the notice is not to inform employees of the pre-election hearing; indeed, as the majority concedes elsewhere, the vast majority of representation cases never have a pre-election hearing. Rather, as noted, the purpose of the notice is to timely inform employees about the petition and the process and to timely inform employees, supervisors and managers of employee rights and the central rules governing campaign conduct. 79 FR 74379. Given the purpose of the notice (and that campaigning does not commence only with the opening of the pre-election hearing), it makes little sense to link the time for posting the notice with the opening of the pre-election hearing.²⁰¹ In any event, this amendment must be invalidated because the majority concedes that this amendment is not severable from its hearing scheduling amendment, which, as shown, must be invalidated.

3. The Majority's Amendments to the Pre-Election Hearing in §§ 102.64 and 102.66 Will Encourage Unnecessary Litigation; Create Unnecessary Delay Between the Opening of the Pre-Election Hearing and Issuance of the Decision and Direction of Election; and Create a

²⁰¹ The majority's remaining arguments miss the mark for the same reasons. The earlier the notice is posted, the better, regardless of when the pre-election hearing opens, and the 2014 rule did not link the end of the posting period to the opening of the pre-election hearing, as the required posting period does not end with the opening of the pre-election hearing. Rather, the 2014 rule made clear that the employer must maintain the posting of the notice of the petition for election until it is replaced by the Notice of Election—which is not posted until after the regional director directs an election or approves the parties' election agreement—or until the petition is dismissed or withdrawn. See 29 CFR 102.63(a)(2) (2015). Moreover, the fact that the majority's rule substantially delays the opening of the pre-election hearing does not mean that regional directors will serve the notice of the hearing any later than they did under the 2014 rule. After all, it would hardly serve the majority's purpose of giving parties more time to prepare for the pre-election hearing if the regional director delayed serving the notice of hearing.

Perverse Incentive for Employers To Threaten To Litigate Irrelevant Matters

a. Background

As Section 9(c)(1) of the Act makes clear, the purpose of the pre-election hearing is to determine whether a question of representation exists.²⁰² *ABC of Texas v. NLRB*, 826 F.3d at 222; *Chamber v. NLRB*, 118 F.Supp.3d at 197. However, prior to the 2014 rule, the Board's rules and regulations neither expressly stated the purpose of the pre-election hearing nor empowered regional directors to limit the evidence that parties could introduce at the pre-election hearing to that which was relevant to the statutory purpose of the hearing. To make matters even worse, the Board had interpreted its pre-2014 statement of procedures and rules and regulations as entitling parties to litigate matters such as individual eligibility or inclusion issues (including supervisory status questions) that were not relevant to the statutory purpose of the pre-election hearing. This interpretation was particularly odd because, as the majority concedes, the Board and the courts had repeatedly held that parties were not entitled to a pre-election *determination* regarding such matters even if the parties had litigated them at the pre-election hearing.²⁰³

The 2014 rule modified the language which appeared in § 101.20(c) of its statement of procedures and amended §§ 102.64 and 102.66 of its Rules and Regulations to maximize procedural efficiency by ensuring that regional directors could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists.²⁰⁴ And because the question of whether a particular individual falls within an appropriate unit and is eligible to vote is not ordinarily relevant to whether a question of representation exists, the 2014 rule provided that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or

resolved before an election is conducted.”²⁰⁵

The Board reasoned that it served no purpose to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can determine if a question of representation exists, and that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence.²⁰⁶

The Board also reasoned that the amendment would eliminate an unnecessary barrier to the fair and expeditious resolution of questions of representation and reduce the costs of pre-election litigation.²⁰⁷ Every non-essential piece of evidence that is adduced at the pre-election hearing adds time that the parties and the Board's hearing officer must spend at the hearing, and simultaneously lengthens and complicates the transcript that the regional director must analyze in order to issue a decision, that is a prerequisite for the election. The Board reasoned that by reducing such irrelevant litigation at the pre-election hearing, hearings would be shorter (with attendant savings to the parties), and regional directors would correspondingly have to spend less time writing pre-election decisions, and be able to issue those decisions in less time than the then-current 20-day median. Thus, by eliminating such wholly unnecessary litigation, the 2014 amendments eliminate an unnecessary barrier to the expeditious resolution of questions of representation.

The Board also concluded based on the rulemaking record that without clear regulatory language giving the regional director authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case and skews the negotiation of pre-election agreements (79 FR 74386–74387) (footnotes omitted):

That specter, sometimes articulated as an express threat according to some comments, hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long

as the law, as embodied in the Board's regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself . . . [with] the effect of disenfranchising statutory employees. According to these commenters, instead of resolving bargaining unit issues on their merits, election agreements are driven by the threat of a hearing devoted to the litigation of unnecessary issues.

The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right under the current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) and the 25-day waiting period, both of which are triggered automatically when a case proceeds to hearing. Every experienced participant in the Board's representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the [pre-2014] rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 20 days to the process over the past decade. Accordingly, the bargaining units and election details agreed upon in the more than 90% of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation.

The Board also explained in the 2014 rule why it believed that the amendment would not merely shift litigation of individual eligibility or inclusion questions from before the election to after the election, but rather would eliminate unnecessary litigation. As the Board explained (79 FR 74391), the pre-2014 rule practice entitling parties to litigate individual eligibility or inclusion questions at the pre-election hearing often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees vote against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become

²⁰² Section 9(c)(1) of the Act provides: “Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”

²⁰³ 79 FR 74309, 74383–74386, 74425–74426 (and cases cited therein).

²⁰⁴ See 29 CFR 102.64(a)(2015) (“The purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists.”); see also 79 FR 74309, 74318, 74383, 74384–74387, 74391.

²⁰⁵ 29 CFR 102.64(a) (2015), 79 FR 74380.

²⁰⁶ 79 FR 74385–74386.

²⁰⁷ 79 FR 74309, 74318, 74385–74387, 74391.

moot (and therefore never have to be litigated or decided). *Id.* If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election. *Id.*²⁰⁸ (In that event too, the individual eligibility or inclusion issues never need to be litigated or decided by the Board.) And even if the parties cannot do so, the Board does not need to conduct another election to resolve the matter; rather, the unit placement of the small number of employees is resolved through a unit clarification (UC) procedure. *Id.*

The 2014 Board also explained why it rejected the argument, repeated by the majority today, that parties should be entitled to litigate at the pre-election hearing, and the Board should decide before the election, individual eligibility or supervisory status questions to enable employers to know who they can use to campaign against the union and to reduce the possibility of post-election objections based on conduct attributable to an individual whose eligibility/supervisory status was not resolved prior to the election. The Board noted that the Act clearly sets forth only one purpose of the pre-election hearing—to determine whether a question of representation exists—and thus it is not the purpose of the pre-election hearing to determine who is a supervisor and who the employer may use to campaign against the union. 79 FR 74389 & fn.382. The Board further explained that supervisory identification issues exist only at the margin, because in virtually every case where there is uncertainty concerning the supervisory status of one or more individuals, the employer nevertheless has in its employ managers and supervisors whose status is not in dispute and is undisputable. 79 FR 74389. The 2014 Board further pointed out that the policy arguments (embraced by the current majority) were based on a series of faulty premises: First even under the pre-2014 rules, employers had no right to a pre-election decision concerning individual eligibility or supervisory status questions. Second, even if parties are entitled to litigate supervisory status questions before the election, and even if regional directors are required to resolve them before the

election, a regional director cannot issue a decision on any eligibility or supervisory status question until well after the filing of the petition because a hearing must be held and the regional director must issue a decision. Thus, even where the regional director resolves the individual eligibility or supervisory status issue in the decision and direction of election, the employer will not have the benefit of the decision for a substantial part of any campaign, including a substantial part of the “critical period” between the filing of the petition and the election. Third, even if the regional director issues a decision concerning an individual eligibility or supervisory status question, the decision is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election.²⁰⁹ Fourth, even if a regional director's decision and final Board decision are issued prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be issued pre-election.²¹⁰ Thus, uncertainty regarding a disputed individual's supervisory status will continue to exist even if parties are entitled to litigate individual eligibility/supervisory status questions at the pre-election hearing and even if the Board is required to resolve them before the election. 79 FR 74389 (footnotes omitted).²¹¹

b. The Majority's Amendments to § 102.64 and 102.66 Create Unnecessary Barriers to the Fair and Expeditious Resolution of Questions of Representation for No Good Reasons

Today, however, the majority takes a giant step backwards. The majority expands the purpose of the pre-election hearing, by amending § 102.64 to state that “[t]he primary purpose” of the pre-election hearing is to determine whether a question of representation exists. Having thus expanded the statutory purpose of the pre-election

hearing beyond what Congress mandated, the majority then provides that “[d]isputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Region Director before an election is directed.” At the same time, the majority also expressly provides that parties can agree to defer eligibility questions (section 102.64(a)) and that regional directors need not always decide such matters even if they are litigated provided the directors adhere to the general pre 2014 practice of deferring “up to 10% of the proposed unit.” Thus, the majority characterizes its decision as a return to the pre-2014 final rule status quo.²¹²

The majority offers no reasoned explanation for why it changes the 2014 rule amendments to sections 102.64 and 102.66. The majority certainly cannot claim that the 2014 rule provisions were contrary to the Act (or the Constitution). As shown, the express statutory purpose of the pre-election hearing set forth in Section 9(c)(1) of the Act is to determine whether a question of representation exists. The 2014 amendments to §§ 102.64(a) and 102.66(a) were entirely consistent with Section 9(c) because “both permit[ted] parties to introduce evidence at the pre-election hearing that is relevant to whether a question of representation exists. Indeed, the [2014] amendment to § 102.66(a) expressly vest[ed] parties with a right to present evidence of the significant facts “that support the party's contentions and are relevant to the existence of a question of representation.” Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.” 79 FR 74385. It is thus not surprising that every court to have considered the matter has rejected the claim that the statute entitles parties to litigate at the pre-election hearing (and requires the Board to decide prior to the election), all individual eligibility or unit inclusion issues. See *UPS v. NLRB*, 921 F.3d at 257; *ABC of Texas v. NLRB*, 826 F.3d at 222–223, affirming *ABC of Texas v. NLRB*, 2015 WL 3609116 at * 7, *14–*16; *Chamber v. NLRB*, 118 F.Supp.3d at 195–203.

The majority does not claim that the amendments caused administrative problems or failed to accomplish their objectives. Indeed, the Board's regional directors have not requested these changes, despite the Board specifically

²⁰⁸ See *New York Law Publishing Co.*, 336 NLRB No. 93, slip op. at 1 (2001) (“The parties may agree through the course of collective bargaining on whether the classification should be included or excluded.”).

²⁰⁹ See, e.g., *Mercedes-Benz of Anaheim*, Case 21–RC–21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital*, Case 1–RC–22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.*, 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.*, 250 NLRB 58, 58 n.1 (1980) (same).

²¹⁰ See 29 U.S.C. 159(d) and 160(e); *Boire v. Greyhound Corp.*, 376 U.S. at 476–79.

²¹¹ In fact, the period of uncertainty will be even greater under the majority' rule than it was before 2014 in cases where regional directors decided supervisory status questions, because the majority delays the hearing date and hence the date of the pre-election decision.

²¹² Actually, the majority misrepresents the status quo that existed prior to the 2014 rule. As the rule explained, Board caselaw permitted more than 10% of the unit to be deferred in contested cases. 79 FR 74425; see also 79 FR 7331 & fn.54.

soliciting their opinions. In fact, the regional directors have reported that the amendments have “worked well in reducing the amount of unnecessary pre-election litigation.” RDs’ Response to 2017 RFI p.3.

Instead, according to the majority, its amendment represents a better balance of the interests in the expeditious processing of questions of representation with certainty, finality, and efficiency; fair, and accurate voting and transparency; and uniformity. The majority insists that its amendment promotes certainty, finality, and efficiency because conducting an election in which individuals vote subject to challenge may result in determinative challenges or the filing of post-election objections, which will require post-election litigation to definitely resolve the outcome of the election.

But in keeping with their pattern of pontification without producing anything in support, my colleagues fail to analyze or cite any evidence that the 2014 rule’s benefits of avoiding unnecessary litigation that also delays elections, have come at the expense of finality, certainty, and efficiency. Indeed, the majority’s explanation that avoiding pre-election litigation and resolution of individual eligibility or inclusion issues causes elections to be less final and certain runs counter to the evidence before the agency and is therefore arbitrary and capricious. See *State Farm*, 463 U.S. at 43 (rule is arbitrary and capricious if the agency has offered an explanation that runs counter to the evidence before it). Thus, my analysis of the relevant data reveals that the number of elections resulting in determinative challenges has remained remarkably stable since the 2014 rule amendments have gone into effect despite a significant increase in regional directors’ approving election agreements in which certain individuals would votes subject to challenge.²¹³ There has likewise been remarkable stability in the number of cases necessitating post-election decisions on objections by regional directors (which would tend to

show that deferring more individuals’ eligibility has not resulted in any significant increase in cases involving arguably objectionable conduct attributed to such individuals),²¹⁴ and stability in the number of rerun elections ordered by regional directors (which is likewise consistent with the lack of any significant increase in objectionable conduct resulting from increased deferral of eligibility litigation or resolution)²¹⁵ Just as telling is the stability in UC petitions (demonstrating that the increased pre-election deferral of individual eligibility decisions has not caused a spike in parties coming back before the Board to resolve individuals’ placement inside or outside the relevant bargaining units).²¹⁶ Thus, elections are just as “final” and “certain” under the 2014 rule amendments as they were under the pre-2014 status quo to which the majority wishes to return. In short, contrary to the predictions of the 2014 rule critics, the 2014 amendments have not shifted litigation from before the election to after the election. Rather, just as the 2014 rule predicted, the amendments have eliminated pre-election litigation that was unnecessary, as proven by the absence of a corresponding increase in post-election litigation. Thus, by expanding the preexisting practice of deferring individual eligibility decisions, the 2014 rule demonstrates a remarkable gain in agency efficiency. See 79 FR 74413; *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) (“The NLRB’s practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue”).

The majority similarly fails to cite any evidence in support of its naked assertion that avoiding pre-election

litigation and resolution of individual eligibility or inclusion issues impairs the interests in fair and accurate voting and transparency. The majority’s assertion also flies in the face of well-settled precedent. As the D.C. Circuit recently reaffirmed, so long as employees are advised before the election that the unit placement of the individual voting subject to challenge has not been determined—as the 2014 rule explicitly requires they be notified (29 CFR 102.67(b) (2015))—the interest in fair and accurate voting and transparency is satisfied. See *UPS v. NLRB*, 921 F.3d at 257 (“Nor does . . . th[e] . . . common practice [of] permit[ing] . . . employees in disputed job classifications . . . to vote under challenge . . . imperil the bargaining unit’s right to make an informed choice, so long as the notice of election—as happened here—‘alert[s] employees to the possibility of change’ to the definition of the bargaining unit.”). See also 79 FR 74386 & n.364, 74389–91 & n.386, 74413 (discussing cases and rejecting claims that settled practice of deferring resolution of such matters deprives employees’ of ability to make an informed choice in election, deprives employers of ability to campaign against union, or deters voting).²¹⁷

The majority’s additional claim that employees permitted to vote subject to challenge are less likely to vote suffers from the same flaw. The majority cites no evidence that the turnout of employees permitted to vote subject to challenge under the 2014 rule has been lower than the turnout of unit employees generally, much less that the reason any such individuals declined to vote was because their votes would be challenged. And the 2014 rule noted that there was no evidence that voter turnout was depressed prior to the 2014 rule when employees were likewise permitted to voted subject to challenge.²¹⁸

²¹⁷ The majority’s argument that the Board’s election notice is not sufficiently clear to avoid voter confusion runs afoul of the same well-settled precedent. In any event, the very same notice about which the majority complains will continue to be used in those cases where parties exercise their right under the majority’s rule to agree to avoid pre-election litigation of individual eligibility or inclusion questions (or where the regional director defers deciding such matters even though they are litigated). The very same notice will also continue to be used when the Board directs an individual to vote subject to challenge in ruling on a request for review prior to an election. The majority never bothers explaining why it has not sought to make the notice clearer if it believes the notice is insufficiently clear, instead of resorting to the ill-advised “solution” of opening the floodgates to irrelevant litigation.

²¹⁸ 79 FR 74390 (“The case law demonstrates that even in cases where only a single individual is

²¹³ See February 15, 2018 Letter from NLRB Chairman Kaplan and General Counsel Robb to Senator Murray and Representatives Scott, Sablan, and Norcross at p.5 (reporting that for a 2 year period immediately following the 2014 rule’s implementation there were 191 election agreements to vote individuals subject to challenge, while for an equivalent pre-rule period there were only 47 such cases; showing an approximate 75% increase). Nevertheless, information produced from searches in the Board’s NxGen case processing software shows that in FYs 2016–2017 there were only 56 post-rule cases requiring a postelection regional director decision on determinative challenges as compared to 53 such pre-rule cases in FYs 2013–2014.

²¹⁴ Information produced from searches in the Board’s NxGen case processing software shows that in FYs 2016–2017 there were 114 largely post-rule cases requiring a postelection regional director decision on objections as compared to 118 pre-rule cases in FYs 2013–2014.

²¹⁵ Information produced from searches in the Board’s NxGen case processing software shows that in FYs 2016–2017 there were 61 largely post-rule (non-duplicative) cases in which regional directors directed rerun elections as compared to 59 such pre-rule (non-duplicative) cases in FYs 2013–2014.

²¹⁶ Comparing information reported on the agency’s website concerning total RC elections won by unions with information reported in the agency’s annual Performance Accountability Reports concerning total UC Petitions filed in the following fiscal year (to take into account time for bargaining to resolve any deferred unit placement issues) shows that in FYs 2016–2017 post-rule UC Petitions filed constituted 8.2% and 7.2% of the total number of RC elections won by unions in the previous fiscal years, as compared to equivalent pre-rule UC Petition figures of 7.3% and 8.7% in FYs 2013–2014.

The majority's reasoning is also internally inconsistent. If avoiding pre-election litigation and resolution significantly impairs the interests in finality, certainty, efficiency, fair and accurate voting, transparency, and ballot secrecy, then it is difficult to understand several choices the majority has made. First, the majority permits the parties to agree not to litigate individual eligibility or inclusion issues at the pre-election hearing.²¹⁹ Second, the majority permits regional directors to avoid resolving such matters before the election even if they are litigated.²²⁰ Third, the majority's amendments permit the election to go forward if the Board has not yet ruled on a request for review of a regional director's resolution of an individual eligibility or inclusion issue.²²¹ Fourth, the majority's amendments continue to permit the Board itself to direct an individual to vote subject to challenge in ruling on a request for review of a regional director's decision and direction of election.²²²

permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, e.g., *NLRB v. Cal-Western Transport*, 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB v. Staiman Brothers*, 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).").

²¹⁹ See Amended 29 CFR 102.64(a) *Conduct of Hearing* ("the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election").

²²⁰ Thus, the majority specifically states, "we are not requiring that regional directors resolve all disputes prior to the direction of election. As noted above, we are not at this time eliminating the discretion of the regional director to defer resolution of eligibility and inclusion issues[.]"

²²¹ See Amended 29 CFR 102.67(c) ("if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded").

²²² The majority's claim—that its amendments promote uniformity and transparency by providing that eligibility or inclusion issues "normally will be litigated and decided before the election", and are therefore superior to the 2014 rule—is misplaced. Uniformity is not inherently desirable. Making a bad practice uniform hardly constitutes a good reason for amending the Board's rules. It makes no sense for the majority to provide that parties will "normally" litigate, and regional directors will "normally" decide, matters that are not relevant to the statutory purpose of the pre-election hearing and that carry significant costs to the fair and expeditious resolution of questions of representation. In any event, as just shown, the majority's claim of uniformity is belied by the myriad ways in which these matters may not be litigated or resolved before the election under the majority's own rule.

As for transparency, the 2014 rule did provide transparency and guidance to the regional directors

The majority also fails to consider important aspects of the problem of returning to the pre-2014 rule status quo and providing that parties will normally be entitled to litigate, and regional directors will normally be required to decide, individual eligibility or inclusion issues at the pre-election hearing: Namely that unless regional directors have authority to limit evidence to that which is relevant to determining whether a question of representation exists, (1) the parties and the Board will be forced to incur unnecessary expenses and delay resulting from having to respectively litigate and decide irrelevant matters; (2) elections that do not involve pre-election hearings will also be delayed; and (3) some parties will use the threat of protracted litigation to extract other concessions concerning the election details, including the definition of the unit itself, thereby disenfranchising employees. Thus, the majority utterly ignores the reality that, because bargaining takes place in the shadow of the law, the election dates employers are willing to agree to in the stipulated election agreement context are unquestionably influenced by how long it would take the Board to conduct an election if the case went to a pre-election hearing. In other words, the majority has plainly failed to consider

and the public regarding the appropriate exercise of discretion. For example, the 2014 rule explained that the Board must address whether there are any professional employees in an otherwise appropriate unit containing nonprofessionals. 79 FR 74384. The rule further explained that it expected regional directors to permit litigation of, and to resolve, individual eligibility or inclusion questions when they might significantly change the size or character of the unit. 79 FR 74390. On the other hand, the rule explained that where the issues would not affect the character of the unit, the Board strongly believed that regional directors' discretion would be exercised wisely if regional directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit. 79 FR 74388. See also 79 FR 74391.

With regard to the appropriateness of the 20% figure, the 2014 Board first explained that more than 70% of elections in FY 2013 were decided by a margin greater than 20% of all unit employees, suggesting that deferral of up to 20% of potential voters in those cases (and thus allowing up to 20% of the potential bargaining unit to vote via challenged ballots, segregated from their coworkers' ballots) would not compromise the Board's ability to immediately determine election results in the vast majority of cases. 79 FR 74387. But the Board further explained why there should actually be less than 15% of all elections with determinative challenges. *Id.* at 74387 fn.370. The 2014 Board was proven correct. In fact, the 56 post-rule determinative challenge cases in FYs 2016–2017 (described in *supra* fn.213) amount to less than 2% of the total RC, RD and RM elections conducted in those years. See also *ABC of Texas v. NLRB*, 826 F.3d at 228 (rejecting claim that hearing amendments will delay certifications by simply shifting litigation from before the election to after the election in light of election margins of victory).

that delaying elections in the directed election context—by providing that parties will normally litigate at the pre-election hearing, and regional directors will normally decide before the election, individual eligibility or inclusion questions—will also inevitably delay elections in the majority of cases that occur outside that context. The majority also ignores that parties use the threat of engaging in protracted litigation at the pre-election hearing to extract other concessions regarding election details, such as the unit itself which has the effect of disenfranchising employees. 79 FR 74318, 74386–74387.

The majority essentially contends that there are no such costs, but these denials are contrary to the record before the agency and belied by the majority's own assertions. Indeed, they fly in the face the district court holding in *ABC of Texas v. NLRB*, 2015 WL 3609116 at *16–*17 (relying upon the Board's notation that "the spectre of protracted pre-election litigation under the prior rule could be used to 'extract concessions' regarding the election," and finding that the Board adequately "explain[ed] how the final conclusions are factually and legally supported"). See also 79 FR 74318, 74386–74387. Moreover, the majority's insistence that its amendments will not significantly expand the pre-election hearing or delay the time it takes regional directors to issue decisions and directions of elections is impossible to square with the majority's earlier complaint that deferring such matters until after the election may make it necessary to "conduct *extensive hearings on these very issues*" after the election has been conducted, and the fact that the 2014 rule has significantly reduced the time it takes for regional directors to issue their decisions and directions of elections.²²³

²²³ See 2018 NLRB Letter (Summary Table) (reporting a 24-day median for regional directors to issue a decision and direction of election following the close of the pre-election hearing in the year immediately preceding the 2014 rule's effective date as compared to a 12-day median in the year immediately following the 2014 rule's effective date).

There is no merit to the majority's claim that permitting litigation of individual eligibility or inclusion issues will not significantly lengthen the hearing because the majority retains the statement of position and preclusion provisions of the 2014 rule. Thus, the statement of position and preclusion provisions can do nothing to prevent parties from litigating timely raised individual eligibility or inclusion issues now that the majority has expanded the scope of the pre-election hearing beyond that mandated by Congress and now that the majority has made what the courts have agreed was irrelevant to the purpose of the pre-election hearing "relevant." In short, as the majority's regulatory text provides, parties will "normally" be permitted to litigate such matters at the pre-election

Contrary to the majority, the fact that parties continue to enter into election agreements more than 90 percent of the time hardly disproves that prior to the rule parties used the threat of litigating irrelevant matters at the pre-election hearing to extract concessions regarding election details. Thus, what matters is the terms of those agreements. And the 2014 rule has clearly resulted in a meaningful change in those terms because, as the majority concedes, the median time for conducting elections in the stipulated election context has dropped significantly since the rule went into effect,²²⁴ and because, as shown, the number of election agreements providing for individuals to vote subject to challenge dramatically increased once employers were no longer entitled to litigate irrelevant eligibility issues at the pre-election hearing.²²⁵

4. The Majority's Amendment to § 102.66(h) Further Delays Elections By Entitling Parties To File Briefs Following the Close of Pre-Election Hearings

Prior to the 2014 rule, Board rules entitled parties to file briefs following the close of pre-election hearings. The 2014 rule amended § 102.66 to provide that although parties are entitled to present oral argument at the close of the pre-election hearing, parties may file post-hearing briefs only upon special permission of the regional director and within the time and addressing only the subjects permitted by the regional director. 29 CFR 102.66(h) (2015), 79 FR 74309.

The Board reasoned that given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs were not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. 79 FR 74309, 74401–74402, 74426. Indeed, the Board noted that section 11242 of the Casehandling Manual then in effect instructed hearing officers in pre-election proceedings to “encourage the parties to argue orally on the record

rather than to file briefs;” that the drafting guide demonstrated that briefs are often of so little help that the drafters are instructed to begin drafting decisions before the briefs arrive;²²⁶ and that the 1997 Report of Best Practices Committee—Representation Cases, prepared by a committee of primarily NLRB regional directors, deemed it a “best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases.” 79 FR 74427.²²⁷ The Board also found it self-evident that by exercising the right to file briefs or even by simply declining to expressly waive the right to file briefs until the running of the 7-day period, parties may delay the issuance of a decision and direction of election and the conduct of an election unnecessarily. 79 FR 74401, 74402, 74427 fn.529.²²⁸ And the Board found it significant that Congress had pointed to “the simplicity of the issues, the great number of cases, and the exceptional need for expedition in the representation case arena to justify its decision not to require the Board to permit post-hearing briefing after every pre-election hearing. 79 FR 74402, 74426.²²⁹ Accordingly, the Board

²²⁶ See 79 FR 74427, 74449 (“In fact, the Agency’s internal training program expressly instructs decision writers to begin drafting pre-election Regional directors’ decisions before the briefs arrive. See ‘NLRB Professional Development Program Module 5: Drafting Regional director Pre-Election Decisions, last updated May 23, 2004.’”).

²²⁷ See G.C. Memo. 98–1, “Report of Best Practices Committee—Representation Cases December 1997”, at 10, 28 (“It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.”).

²²⁸ The Board also observed that, as previously discussed, the temptation to use the threat of unnecessary litigation to gain strategic advantage is heightened by the right under the then current rules to take up to 7 days to file a post-hearing brief (with permissive extensions by hearing officers of up to 14 additional days) which is triggered automatically when a case proceeds to hearing, because every experienced participant in the Board’s representation proceedings who wishes to delay the election in order to gain strategic advantage knows that under the then current rules, once the hearing opens, at least 32 days (7 days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. 79 FR 74386–74387, 74401.

²²⁹ The 2014 rule stated in this regard (79 FR 74402):

The APA and its legislative history contain evidence of Congress’s intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides, in pertinent part, that in formal agency adjudication “parties are entitled to a reasonable opportunity to submit . . . proposed findings and conclusions . . . and supporting reasons for the . . . proposed findings or conclusions.” But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases

decided to grant regional directors discretion to permit the filing of post-hearing briefs only when they conclude it would be helpful. 79 FR 74427.

Today, however, the majority imposes additional delay between the close of the hearing and issuance of the decision and direction of election by granting parties an absolute right to file briefs following the close of the pre-election hearing. Here again the majority offers no good reason for changing the 2014 rule’s discretionary briefing procedure—no statutory or Constitutional mandate that parties be permitted to file briefs,

involving “the certification of worker representatives.” The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1252–1253 (9th Cir. 1979); *NLRB v. Champa Linen Service Co.*, 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board’s “determinations rest so largely upon an election or the availability of an election.” S. Rep. No. 752, at 202 (1945). The committee also pointed to “the simplicity of the issues, the great number of cases, and the exceptional need for expedition.” Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

Congress did not revisit this decision in 1947 when Section 9 of the NLRA was amended, and the APA continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board’s Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that “election case handling would be newly freighted and greatly retarded by . . . [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law.” Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, “After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent.” *Id.* at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, “It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.” S. Rep. No. 1234, 89 Cong., 2d Sess. 12–13 (1966).

This history demonstrates that Congress’s intent in the APA was to ensure that written briefing was not required in representation cases because of the interest in expedition. Congress has steadfastly maintained this view, and has expressly rejected any written briefing requirement in representation cases whenever the matter has arisen. The change is therefore consistent with the requirements of the law and the intent of Congress.

hearing, and regional directors will “normally” decide such matters before the election.

²²⁴ See <https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-days-petition-election> (showing a median of 37 days to process an election agreement case from petition to election in pre-rule FYs 2013–2014, as compared to only 22 or 23 days for post-rule FYs 2016–2017).

²²⁵ See 2018 NLRB Letter at p.5 (reporting that for a 2 year period immediately following the 2014 rule’s implementation there were 191 election agreements to vote individuals subject to challenge, while for an equivalent pre-rule period there were only 47 such cases; showing an approximate 75% percent increase).

no judicial invalidation of the 2014 rule's discretionary briefing provision, and no empirical evidence that the rule provision had caused problems.

The majority claims that entitling parties to file briefs with the regional director following the close of the pre-election hearing better accommodates the interests in the expeditious resolution of questions concerning representation, efficiency and uniformity. But the majority provides no evidence that the benefits of the 2014 rule's discretionary briefing procedure have come at the expense of uniformity or efficiency (or fairness or transparency). The 2014 rule *was* uniform (and transparent) with respect to briefing; thus the rule took the same standard that had long governed briefing to the hearing officer following the *post*-election hearing—no entitlement to briefing; briefing permitted only if deemed helpful by the decisionmaker—and made it equally applicable to briefing to the regional director following the close of the *pre*-election hearing. Compare 29 CFR 102.66 (h) with 102.69 (c)(1)(iii) (2015).

In claiming that its amendment promotes efficiency, the majority takes issue with the rule's conclusion that posthearing briefing is generally unnecessary because representation cases are prone to recurring and uncomplicated legal and factual issues. But the majority's conclusion is contrary to the Congressional determination not to require briefing in connection with representation case hearings because of the issues' "simplicity" and the need for expedition.

Although the majority agrees that the Board is not required to permit briefing to the regional director following the close of the pre-election hearing, it claims that the APA and the Act do not establish that Congress intended that the Board not permit briefing. But the 2014 rule does *not* prohibit briefing. To the contrary, the rule permitted directors to permit briefing when they concluded that such briefing would be helpful.²³⁰

²³⁰ For example, the majority points to independent contractor cases as the type of case that warrants briefing. But an analysis of the relevant data involving independent contractor cases indicates that since the 2014 rule was implemented, regional directors have been exercising their discretion to permit briefing in many independent contractor cases. See, e.g., Mar. 31, 2016 Decision and Order p. 1 in *Minnesota Timberwolves Basketball, LP*, 18–RC–169231; Mar. 31, 2017 Decision and Order p.3 fn.10, Tr. 674 in *Bimbo Foods Bakeries Distribution LLC*, 01–RC–193669; May 7, 2019 Decision and Direction of Election p.2 in *Rival Entertainment LLC*, 10–RC–238340; May 7, 2019 Decision and Direction of Election p.2 in *Center Stage Management LLC*, 10–RC–238326; Tr.321 in *Green Line Group, Inc.*, 01–RC–181492; Oct. 8, 2015 Decision and Direction of

In support of its claim that parties should be entitled to file briefs to the regional director following the close of the pre-election hearing in *all* cases, the majority argues that briefing reduces the risk that the regional director will overlook or misunderstand key arguments. But the majority cites no evidence that the quality of regional director decisions has suffered since the 2014 rule made briefing subject to special permission of the regional directors. And the circumstantial evidence is directly to the contrary. Thus, for example, there is no evidence of an increase in the number of Board grants of review or Board reversals of regional director pre-election decisions since the 2014 rule went into effect and eliminated the parties' entitlement to file post-hearing briefs with the regional director,²³¹ which is certainly what one would expect to see if there had been an uptick in regional directors reaching the

Election p.2 in *Uno Digital, Corp.*, 12–RC–159482; July 30, 2015 Decision and Direction of Election p.2 in *Pennsylvania Interscholastic Athletic Association Inc.*, 06–RC–152861; May 23, 2018 Decision and Direction of Election p.1 fn.2 in *City Communications Corp.*, 12–RC–218548; Sep. 18, 2018 Decision and Direction of Election p.2 in *Trustees of Columbia University*, 02–RC–225405. Significantly, however, in some independent contractor cases, parties have waived filing briefs in lieu of presenting oral argument, thereby evidencing that parties themselves recognize that post-hearing briefing to regional directors is *not* necessary in all cases involving independent contractors. See, e.g., *Porchlight Music Theatre Chicago*, 13–RC–242259 Pre-election Hearing Transcript pp.831, 854.

²³¹ According to a chart of requests for review of regional directors' decisions and directions of elections produced for my staff by the Board's Office of the Executive Secretary, in FYs 2016–2017 the Board only granted approximately 14% of such post-rule requests for review in which it decided the merits (11 out of 80), which constituted only 0.3% of all RC, RD and RM elections held in those fiscal years (11 out of 3,154 elections). This is consistent with the Board's granting approximately 14% of such pre-rule requests for review in which it decided the merits during FYs 2013–2014 (16 out of 111), which constituted only 0.5% of all elections held in those fiscal years (16 out of 3,157). These numbers are also consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2004–2013, the Board granted approximately 15% of all pre-election requests for review filed, which also constituted less than 1% of all elections held. See 79 FR 74410 fn.456.

Out of the 11 post-rule cases in which a FY 2016 or 2017 request for review was granted, only 3 regional director decisions were reversed based on applications of then-current law (and 4 regional director decisions were either dismissed, remanded or reversed based on application of new legal standards issued after the regional directors' decisions). These numbers are consistent with the 4 reversals of regional directors' pre-election decisions during FYs 2013–2014 based on applications of then-current law (and 2 remands based on application of new legal standards). These numbers are also consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2010–2013 there were only 14 cases in which regional director decisions were reversed. See 79 FR 74408 fn.454.

wrong results or making prejudicial procedural errors since the 2014 rule went into effect.²³² Indeed, there is not even any evidence of an increase in requests for review of regional director decisions and directions of elections since the 2014 rule went into effect and eliminated the parties' entitlement to file post-hearing briefs with the regional director, which one would expect if parties believed that the regional director had overlooked or misunderstood key points.²³³

The majority also claims that the regional director and his or her staff will benefit from briefs in all cases because party briefing will save the region from having to conduct independent research of the law and the record, which will shorten, rather than lengthen, the time it takes for regions to issue decisions and directions of elections. But because of the recurring nature and simplicity of the issues in representation cases, regions are generally familiar with the law. And, contrary to the majority's premise, the region must always examine the record and any cited cases for itself before the decision and direction of election issues because, as every tribunal knows, parties often misstate what the record shows and/or inaccurately characterize case holdings. In any event, the majority simultaneously acknowledges that at least in some cases the regional director and his or her staff can "largely prepare the decision while awaiting posthearing briefing." In these cases, therefore, briefing is not efficient and results in unnecessary costs. Moreover, in these cases at least, the majority's rule *will* unnecessarily delay the decision by requiring the regional director to delay his decision until the briefs are filed or the due date comes and with no briefs being filed. See 79 FR 74427.²³⁴

²³² Regional directors are bound to apply extant Board law. Accordingly, cases where the Board reverses a regional director by overturning existing precedent obviously cannot be cited as a basis for entitling parties to file posthearing briefs with the regional director. Indeed, the parties' ability to argue that precedent should be overturned was in no way impaired by the 2014 rule. Thus, as the Board noted, the rule permitted parties to file briefs with the Board in support of their requests for review in each case. 79 FR 74402.

²³³ To the contrary, the same chart from the Board's Office of the Executive Secretary, *supra* fn.231, shows 99 total requests for review concerning decisions and directions of election that were processed under the 2014 rule in FYs 2016–2017, which represents an approximate 23% decrease from the 129 such pre-rule requests for review filed in FYs 2013–2014.

²³⁴ I recognize that, in response to the Board's 2017 RFI, the regional directors requested that they be given discretion to permit the filing of briefs following the close of the pre-election hearing. However, the 2014 rule already grants regional directors such discretion (see 79 FR 74401 (the rule

The majority's additional suggestion—that briefing should be made a matter of right under this rule because regional directors will be resolving more issues now than they did under the 2014 rule—is mystifying. The majority insists that its amendments to the pre-election hearing simply constitute a return to the pre-2014 rule status quo regarding individual eligibility or inclusion issues. And that was precisely the status quo that the Board was reviewing when it concluded that briefing was not ordinarily necessary. My colleagues err to the extent they attempt to tie the 2014 Board's provision of discretion to regional directors to permit or deny pre-election briefing to the separate amendment concerning the pre-election litigation of individual eligibility issues. No such connection was made in the 2014 rule's discussion of pre-election briefing. See 79 FR 74401–74403. To the contrary, the 2014 Board expressly clarified that its amendments were severable and would have been adopted individually “regardless of whether any of the other amendments were made[.]” *Id.* at 74308 fn.6.

The majority also fails to consider an important aspect of the problem of returning to the pre-2014 rule status quo with respect to briefing following the close of the pre-election hearing. Specifically, they fail to acknowledge that entitling parties to file briefs in all cases not only delays elections in contested cases, but also delays elections in the stipulated election context. See *supra* fn.228.

5. The Majority's Amendments to Section 102.67 Also Create Unnecessary Delay Between Issuance of the Decision and Direction of Election and the Actual Election

a. Without Providing a Reasoned Explanation, the Majority Deletes § 102.67(b)'s Provision That Regional Directors Will Ordinarily Specify the Election Details in Their Decisions and Direction of Election

By definition, an election cannot be conducted until the details of the

“vest[s] the regional director with discretion to grant a request to file a post-hearing brief”), and regional directors have been exercising that discretion to permit briefing in cases where they judge it would be helpful. See *supra* fn.230 (listing independent contractor cases where post-2014 rule briefing has been allowed); see also 2018 NLRB Letter (Summary Table) (reporting both pre-rule and post-rule median and mean time periods between the filing of briefs following the close of pre-election hearings and the issuance of regional directors' decisions and directions of elections). In any event, the regional directors did not request the change made today, whereby the majority grants parties an absolute entitlement to file briefs, no matter how simple or routine the case.

election are set and the Notice of Election advises the employees of when, where, and how they may vote. Prior to the 2014 rule, election details were typically addressed after the direction of election issued, which required further consultation about matters that could easily have been resolved earlier. 79 FR 74310, 74404.

The 2014 rule required that petitioners state their positions regarding election details (including the type, date(s), time(s), and location(s) of the election) in their petitions and that the nonpetitioning parties state their positions on election details in their statements of position. 29 CFR 102.61, 102.63(b)(1)(i), (b)(2)(i), and (b)(3)(i) (2015). The rule also provided that before the close of the pre-election hearing, hearing officers would solicit party positions on election details and solicit the contact information of the employer's on-site representative to whom the notice of election should be transmitted if an election is directed. See 29 CFR 102.66(g)(1), (2) (2015).

Accordingly, the Board concluded that, because the parties will have already (twice) stated their positions on the election details, the regional director ordinarily will not need to solicit their positions on the election details yet again after issuing the direction of election, and therefore ordinarily will be able to specify the election details in the direction of election. 79 FR 74404. And, because the director ordinarily will be able to specify the election details in the direction of election, the director ordinarily will be able to issue the Notice of Election for the employer to post and distribute simultaneously with the direction, thereby enabling a more expeditious election. *Id.* Accordingly, § 102.67(b) of the 2014 rule provided that election directions “ordinarily” will specify the type, date(s), time(s) and location(s) of the election and the eligibility period and that the regional director will “ordinarily” transmit the Notice of Election “simultaneously with the direction of election.” 29 CFR 102.67(b) (2015). In sum, the 2014 Board concluded that by enabling the regional director to conduct the election without unnecessary delay, the amendments would help the Board to more expeditiously resolve questions concerning representation. 79 FR 74404. The Board also concluded that the change would obviate the need for a wasteful post-decision consultation process in favor of more efficient consultations during the hearing itself. Given that all parties would be present at the pre-election hearing, it was eminently reasonable to solicit party positions then, rather than have the

Board agent attempt to solicit input individually after the direction issues. *Id.* at 74405.

However, the rule left the director free to consult with the parties again after directing an election if necessary. *Id.* For example, if the regional director directs an election in a unit significantly different from the petitioner's proposed unit and the employer's alternative unit, the regional director should consult with the parties concerning the election details. *Id.*

Today, however, the majority amends § 102.67 to eliminate the provision that regional directors “ordinarily” will specify the election details in their direction of election, and instead rewords the language of that section to provide that the direction “may” specify the election details. Here again the majority provides no reasoned explanation for the amendment—no statutory inconsistency, no judicial invalidation of the 2014 rule provision at issue, and no empirical evidence that the rule provision has caused any administrative problems. Neither the GC nor the regional directors have requested the change made by the Board today, presumably reflecting their position that regional directors ordinarily need *not* consult for a *third* time with parties regarding election details, because the parties will have already stated their positions both before and during the pre-election hearing. Indeed, the majority does not, and cannot, cite a single submission (in response to the 2017 RFI) questioning this rule provision.

The majority's reasoning in support of this amendment is also internally inconsistent. On the one hand, the majority states (emphasis added) that the amendment “represents a shift in emphasis, rather than substance” and that it “fully agree[s]” that the regional director “*should ordinarily* be able to specify the election details in the direction, thus avoiding any delay in issuing the Notice of Election.” If the majority is sincere in this regard, then the majority's amendment is clearly less transparent than the 2014 rule because it substitutes the word “may” for the word “ordinarily.” And it is certainly unnecessary to change the 2014 rule to make it clear that regional directors do not have to specify the election details in their decision and direction of election because, as shown, the regulatory text of the rule did not require the regional directors to always specify the election details in the direction of the election. Moreover, the preamble clearly provided that directors retain discretion to consult with the parties yet again after issuing a direction

of election if the director concludes that it is appropriate to do so.

On the other hand, the majority appears to take the position that its amendment *will change* the status quo ante by claiming that it will promote efficiency to “place *more emphasis* on the discretion regional directors have in this regard” because “engag[ing] the parties in post-hearing discussion” of election details “will likely lead . . . to consensus.” (emphasis added). Accordingly, to the extent that my colleagues are signaling regional directors to avoid setting election details in their directions of election, such additional post-hearing consultations will delay elections and unnecessarily impose costs on the parties and the Board. The majority provides no reasoned explanation for placing more emphasis on regional director discretion. Consensus regarding electing details has never been required, and the majority provides no reason to think that consensus is more likely to be reached under its amendment than under the 2014 rule provisions. The majority’s claim—that its amendment decreases the chances that a party may seek review of a regional director’s decision to specify election details after a decision and direction of election issues, because its amendment makes clear that any such request for review will be “in vain”—is unfounded. The majority fails to point to a single such request for review filed since the 2014 rule went into effect. And that should not be surprising because, as shown, the regulatory text of the rule did not require the regional director to always specify the details in the decision: The phrase “ordinarily will” clearly indicates that there will be occasions when the director will not specify the election details in his decision, as the preamble explicitly provides. In any event, the majority’s argument ignores that even when a decision maker has discretion to act in a certain way, parties may still argue that the decision maker abused that discretion. Accordingly, the majority’s ill-advised and unnecessary amendment will not even accomplish its purported purpose.

b. The Majority’s Amendment to § 102.67(b) Creates an Unnecessary Month-Long Delay in Conducting Elections by Imposing a 20-Business Day (or 28 Calendar Day) Waiting Period Between Issuance of the Decision and Direction of Election and the Election

i. Background

Before the 2014 rule, parties were required to request Board review of a regional director’s decision and

direction of election prior to the election or be deemed to have forever waived any arguments that were or could have been made concerning rulings at the pre-election hearing or in the decision and direction of election. 79 FR 74309, 74407. And before the rule, the Board’s statement of procedures imposed a stay of 25 days following any direction of election to allow time for the Board to rule on any request for review that might be filed. See 79 FR 74309–74310; 29 CFR 101.21(d) (2011). The Board’s rules and regulations also provided for a second stay, whereby if a pending request for review had not been ruled upon or had been granted, the election would proceed but ballots whose validity might be affected by the final Board decision would be segregated, and all ballots would be impounded and remain unopened pending such decision. See 29 CFR 102.67(b) (2011). As a result of that provision, no ballots could be counted until the Board ruled on the request for review. See 79 FR 74309, 74409.

The 2014 rule made three changes to this procedure that are relevant today. First, the rule relaxed the due date for filing requests for review and eliminated the requirement that parties file requests for review of the decision and direction of election prior to the election. 79 FR 74309, 74408–74409. Thus, the rule provided that parties may request review of a regional director decision to direct an election either before or after the election. *Id.* at 74408. The Board reasoned that the former practice of requiring parties to seek such review of directions of election before the election—or be deemed to have waived their right to appeal the decision and direction of election—not only encouraged, but required unnecessary litigation. The Board noted that many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending elections are removed from consideration.²³⁵ *Id.* The Board concluded that the former rules thereby

²³⁵ For example, as the Board explained (79 FR 74408), if the regional director rejected an employer’s contention that a petitioned-for unit was inappropriate and directed an election in the unit sought by the union, rather than in the alternative unit proposed by the employer, the Board’s pre-2014 rules required the employer to request review of that decision prior to the election or be precluded from contesting the unit determination at any time thereafter. But if the union ends up losing an election, even though it was conducted in the union’s desired unit, the employer’s disagreement with the regional director’s resolution becomes moot (because the employer will not have to deal with the union at all), eliminating the need for litigation of the issues at any time.

imposed unnecessary costs on the parties by requiring them to file pre-election requests for review in order to preserve issues. *Id.* The Board further concluded that the amendment, which relieves parties of the burden of requesting pre-election review in order to preserve issues that may be mooted by the election results, would further the goal of reducing unnecessary litigation because rational parties ordinarily will wait to file their requests for review until after the election, to see whether the election results have mooted the basis for such an appeal. *Id.* The Board also concluded that the amendment would reduce the burdens on the other parties to the case and the agency, by avoiding the need for the other parties to file responsive briefs and for the Board to rule on issues which could well be rendered moot by the election results. *Id.*

The 2014 rule also eliminated the mandatory 25-day waiting period. *Id.* at 74309–74310. The Board reasoned that the 25-day waiting period was not only not provided for in the statute, but that the 25-day waiting period—which effectively stays the election in every contested case for 25 days—was in tension with Congress’ instruction in Section 3(b) of the Act that the grant of review of a regional director’s action “shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.” 29 U.S.C. 153(b). 79 FR 74410.

The Board further reasoned that elimination of the 25-day waiting period would eliminate an unnecessary barrier to the fair and expeditious resolution of questions concerning representation, because, by definition, the waiting period delays the election, which is designed to answer the question of representation. 79 FR 74410. Although the 25-day waiting period by its terms only applied to contested cases, the waiting period also had the effect of delaying elections in stipulated-election cases. Thus, the Board noted that bargaining takes place in the shadow of the law, and that, as the administrative record confirmed, some parties use the threat of insisting on a pre-election hearing—and the resulting 25 day waiting period—to extract concessions concerning election details, such as the date of the election and the unit itself. *Id.*

The Board further concluded that the 25-day waiting period also served little purpose under the pre-existing rules. *Id.* at 74310, 74410. The stated purpose of the 25-day period was merely “to permit the Board to rule on any request for review which may be filed.” 29 CFR 101.21(d) (2014), 79 FR 74410.

However, such requests were filed in a small percentage of cases, were granted in an even smaller percentage, and resulted in orders staying the conduct of elections in virtually no cases at all. 79 FR 74410. Thus, if the Board had not yet ruled on the request at the time of the election, as was not infrequently the case, the election was held and the ballots impounded until the Board could rule. *Id.* Even if the Board granted the request, the Board almost never stayed the election and the same vote-and-impound procedure was used. *Id.* Finally, the Board explained that there would be even less reason for the waiting period under the 2014 rule, which should (and did) reduce the number of requests for review filed before elections by permitting parties to file such requests after the election. *Id.*

The Board also eliminated the automatic ballot impoundment procedure so that the voting and counting of ballots would proceed notwithstanding a request for review, unless the Board specifically ordered otherwise pursuant to a party's motion for segregation and/or impoundment of the ballots. *Id.* at 74409. By requiring that all ballots be impounded until the Board ruled on the request for review, the pre-2014 rule provisions actually required the Board to decide matters that could be rendered moot by the election results. The Board reasoned that elimination of the automatic impound procedure, which appeared nowhere in the statute, was consistent with Section 3(b)'s purpose to prevent delays in the Board's processing from impacting regional Section 9 proceedings. *Id.* The Board noted that impoundment, standing alone, could not and did not prevent rerunning elections, and that the possibility of reruns was minimized further because the Board rarely reversed the regional director. *Id.*

ii. The Majority Provides No Good Reasons for Amending § 102.67(b) and (c) To Institute a Month-Long Waiting Period and Automatic Impound Procedure

Although the majority retains the 2014 rule amendment that eliminates the requirement that parties request review of a regional director's decision to direct an election before the election to avoid waiving the right to contest that decision, the majority nevertheless imposes a 20-business day (or 28-calendar day) waiting period before an election can be held following issuance of a decision and direction of election. The majority further provides for the impoundment of all ballots if a party

files a request for review within 10 business days of the decision.²³⁶

The majority provides no reasoned explanation for these amendments that, by definition, will delay elections and certifications—no statutory or constitutional requirement for either a 20-business day waiting period or for ballot impoundment, no judicial invalidation of the 2014 rule request-for-review amendments,²³⁷ and no empirical evidence of any administrative problems caused by the amendments. Instead, the majority asserts: (1) That its waiting period and impoundment procedure serve the same variety of purposes—including finality, certainty, fair and accurate voting, transparency, and uniformity—that the pre-2014 waiting period served; (2) that these purposes “outweigh[] the significance” of delaying the election and the tally of ballots; and (3) that contrary to the 2014 rule, there is no tension between its waiting period/ballot impoundment provisions and the Act. But these explanations ignore the text of the majority's own regulatory language, the stated purpose of the pre-2014 rule waiting period, and the relevant statutory language. The majority has also failed to analyze the relevant data, and failed to consider important aspects of the problems, rendering arbitrary and capricious its conclusion that the benefits of its amendments outweigh their costs.

The majority has plainly failed to engage in reasoned decisionmaking. First, the regulatory text of the majority's waiting period amendment does *not* state that the waiting period has a variety of purposes. Instead, it lists just one purpose—providing the Board with an opportunity to rule on a request for review.²³⁸ Accordingly, it is by no means clear why in analyzing the need for the amendment, anything other than providing the Board with an

opportunity to rule on a request for review should be considered.

Second, the majority is simply wrong in claiming that the pre-2014 Board recognized that a waiting period of 25 days served a variety of important purposes beyond providing the Board with an opportunity to rule on a request for review that might be filed, and that those were the actual purposes of the pre-2014 rule 25-day waiting period. Put simply, as the Board repeatedly noted in adopting the 2014 rule, the *only* stated purpose of the 25-day waiting period articulated in the Board's statement of procedures prior to the 2014 rule was to give the Board an opportunity to rule on any request for review that might be filed. 79 FR 74409, 74410.²³⁹

Third, the majority likewise errors in claiming that there is no tension between its 20-business day waiting period and the Act because the waiting period does not amount to a stay of the regional director's authority to direct and conduct an election. The Act requires the regional director (as a result of the Board's delegation to regional directors of its authority to conduct elections and certify the results thereof pursuant to Section 3(b) of the Act) to direct an election if he or she concludes, based on the pre-election hearing, that a question of representation exists. 29 U.S.C. 159(c)(1)(B), 29 U.S.C. 153(b). But the majority's amendment prevents the director from conducting the election for 20 business days. That plainly is in tension with Congress' express provision in Section 3(b) that although the Board may review any action of the regional director at the request of a party, such review “shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.” But for the majority's amendment today, regional directors could direct and conduct elections in far fewer than 20 business days from their directions of election, which is precisely what the regional directors have regularly done since the 2014 rule amendments went

²³⁶ The majority mistakenly claims that the 2014 rule's elimination of the 25-day waiting period was “controversial.” Yet, the rule noted that very few comments specifically objected to the proposed elimination of the 25-day waiting period, and that there was near consensus that this period serves little purpose. 79 FR 74410 & fn.458. Moreover, the Board received only 3 submissions critical of that amendment in response to its 2017 RFI.

²³⁷ See, e.g., *ABC of Texas v. NLRB*, 826 F.3d at 227 (noting that the Act does not mandate a specified waiting period prior to the election).

²³⁸ Thus, the majority amends Section 102.67(b) to state, “The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election, to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section.” (emphasis added).

²³⁹ Thus, 29 CFR 101.21(d) (2011) provided: 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. . . . 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. (emphasis added).

into effect.²⁴⁰ Indeed, the majority concedes elsewhere that its automatic impound procedure *does* amount to a stay of the regional director's power to count the ballots and certify the results.²⁴¹

There are additional serious flaws with the majority's reasoning.²⁴² As noted, the majority concludes that the benefits resulting from the 2014 rule's elimination of the 25-day waiting period and the automatic impound procedure have come at the expense of, and are outweighed by, the interests in finality, certainty, fair and accurate voting, transparency, and uniformity.²⁴³ But saying this does not make it so. Once again, the majority has failed to analyze the relevant data before asserting its conclusion. Indeed, the majority's explanation for instituting the waiting period and automatic impound procedure run counter to the evidence before the agency, and the rule is therefore arbitrary and capricious for this reason as well. See *State Farm*, 463 U.S. at 43. The relevant data reveals that the 2014 rule's elimination of the 25-day waiting period and automatic impound procedure have not caused elections to become less final or certain and have

not impaired the interests in fair and accurate voting and transparency.

As shown above, my analysis of the agency's own data indicates remarkable stability in every relevant statistical measure since the 2014 rule went into effect, proving that agency elections have been no less final, certain, fair, accurate, transparent or uniform. The obvious gains in expeditious case processing from the 2014 rule's elimination of the 25-day waiting period caused none of the majority's claimed unwelcome side effects. The number of Board reversals of regional director decisions and directions of elections has remained stable,²⁴⁴ as has the number of cases involving post-election objections²⁴⁵ or determinative challenges.²⁴⁶ Thus, the benefit of moving cases from petition to election much more expeditiously (without the 25-day waiting period) has not been accompanied by any countervailing costs; *i.e.*, there has been no trend of more cases being dragged out following the election due to the need to resolve objections or determinative challenges, or because a regional director's pre-election decision must be reversed. Similarly, the number of rerun elections has shown equal stability.²⁴⁷ And the majority is unable to point to a single case since the 2014 rule went into effect where the Board or the courts have set aside an election because employees were "confused" as a result of the Board's failing to decide pre-election—without the help of the 25-day stay—a small percentage of individual eligibility or inclusion issues.²⁴⁸ Thus,

the more expeditious post-2014 rule elections have been just as final and certain, just as fair and accurate, and just as uniform as were the pre-2014 rule elections in resolving questions of representation. (Moreover, due to the post-2014 rule's abstaining from automatically impounding ballots, those elections were *more* transparent than were their pre-2014 counterparts, and more transparent than the elections will be under the rule announced today.) In any event, absolute certainty and finality are not possible under the statutory scheme because even if the Board could review every regional director decision and direction of election the second it issued, the Board decision would still be subject to reversal in the court of appeals in a technical 8(a)(5) proceeding. See 79 FR 74334, 74389.

Moreover, the majority's rule is internally inconsistent. If, as the majority contends, "the Board should strive to maximize the opportunity for the election to provide finality" particularly with regard to individual eligibility or inclusion issues and if a final Board determination of pre-election issues is necessary to preserve fair and accurate voting and transparency, then it is difficult to understand why the majority permits parties to wait until *after* the election to file their requests for review. It is also difficult to understand why the majority provides that the election will go forward (with ballot impoundment) if the Board has not ruled on the request for review by the date of the election, and why the election will go forward (without ballot impoundment) in cases where the pre-election request for review is filed more than 10 business days from the date of the decision's issuance.²⁴⁹

employees of the possibility of change to the unit definition. See *UPS v. NLRB*, 921 F.3d at 257 ("the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications . . . were part of the bargaining unit" because it did not "imperil the bargaining unit's right to make an informed choice" given that the election notice "alert[ed] employees to the possibility of change" to the definition of the bargaining unit.").

²⁴⁹ Moreover, as discussed in connection with the majority's amendments to the pre-election hearing, if the election should provide finality regarding individual eligibility or inclusion issues, and if final Board resolution of pre-election issues is necessary to preserve fair and accurate voting and transparency, then it is also difficult to understand why the majority makes several additional decisions that run counter to its articulated goals. First, it permits the parties to agree not to litigate individual eligibility or inclusion issues at the pre-election hearing. Second, it permits regional directors to avoid resolving such matters before the election even if they are litigated. Third, it permits

²⁴⁰ Information produced from searches in the Board's NxGen case processing software shows post-rule medians of 11 to 12 calendar days from issuance of a decision and direction of election to the election itself in FYs 2016–2017.

²⁴¹ Thus, the majority acknowledges that it "amends § 102.67(h) to state that "[t]he grant of a request for review shall not, outside of the provision for impoundment set forth in paragraph (c) of this section, stay the Regional Director's action unless otherwise ordered by the Board" (emphasis added).

²⁴² There is likewise a serious flaw in the majority's legal citation to a 1977 *Federal Register* entry to draw a disingenuous connection between the "1961 institution of [the waiting] period" and the 1977 amendments to § 102.67 that the Board emphasized were "designed to facilitate consideration and disposition of requests for review of regional directors' decisions, thereby further contributing to the prompt resolution of representation issues." 42 FR 41117. As is patently clear from the 1977 Board's own words, its references to the "prompt resolution of representation cases" was aimed at its amendments of 102.67(d) permitting "the Board to examine the record in evaluating a request for review" and 102.67(g) permitting "the Board to rule upon the issues on review at the same time it grants the request. Such action will avoid the delay associated with the briefing time after a grant of review when the issues are clear and readily resolved." 42 FR 41117. The waiting period was not discussed, and the majority can find no support in the quoted language.

²⁴³ The majority insists that its amendments serve those interests by enabling the Board to definitely resolve individual eligibility or inclusion issues prior to the election. The majority asserts in this regard that these amendments to Section 102.67 work "hand-in-hand" with its amendments to the pre-election hearing providing for the parties to litigate, and for regional directors to decide, individual eligibility or inclusion issues at the pre-election hearing.

²⁴⁴ See *supra* fn.231 (showing consistency of 3 post-rule reversals based on extant law during FYs 2016–2017, with 4 pre-rule reversals based on extant law during FYs 2013–2014).

²⁴⁵ See *supra* fn.214 (showing 114 largely post-rule cases requiring a postelection regional director decision on objections in FYs 2016–2017 as compared to 118 such pre-rule cases in FYs 2013–2014).

²⁴⁶ See *supra* fn.213 (showing 56 post-rule cases requiring a postelection regional director decision on determinative challenges in FYs 2016–2017 as compared to 53 such pre-rule cases in FYs 2013–2014).

²⁴⁷ See *supra* fn.215 (showing 61 largely post-rule rerun election cases during FYs 2016–2017 as compared to 59 such pre-rule rerun election cases in FYs 2013–2014).

Nor has there been any significant increase in parties filing unit clarification (UC) petitions after a union election victory for the Board to determine unit placement issues that were not decided pre-election. See *supra* fn.216 (showing stability in the rate of UC petitions filed in relation to the number of union election wins in the prior fiscal year for post-rule FYs 2016 (8.2%) and 2017 (7.2%) as compared to pre-rule FYs 2013 (7.3%) and 2014 (8.7%)).

²⁴⁸ To the contrary, the D.C. Circuit has rejected the majority's premise that such a situation would cause confusion when, as the 2014 rule requires (29 CFR 102.67(b) (2015)), the notice of election alerts

The majority also errs in assessing the costs of its 20-business day waiting period and automatic impoundment procedure. To be sure, the majority concedes, as it must, that the 20-business day (28-calendar day) period will delay elections in the directed election context by approximately one month. But the majority attempts to minimize the delay by claiming that the waiting period will *only* delay directed elections, which constitute a small subset of the elections the Board conducts each year.

Once again, however, the majority has entirely ignored important aspects of the problem and has thereby acted arbitrarily and capriciously. See *State Farm*, 463 U.S. at 43. Thus, the majority utterly ignores the reality that, because bargaining takes place in the shadow of the law, the election dates employers are willing to agree to in the stipulated election agreement context are unquestionably influenced by how long it would take the Board to conduct an election if the case went to a pre-election hearing. By instituting a month-long pre-election waiting period in the directed election context, the majority not only delays elections in the less than ten percent of representation cases that are contested at pre-election hearings, but it also delays elections in the more than ninety percent of representation cases in which the parties stipulate to an election. In addition to ignoring that its amendments will delay all elections, the majority also ignores that the delay occasioned by the waiting period will be used to extract concession regarding election details and the unit, including disenfranchising certain individuals.²⁵⁰

the Board itself to direct an individual to vote subject to challenge in ruling on a request for review of a regional director's ruling on an individual eligibility question. These unexplained inconsistencies highlight the arbitrary nature of my colleagues' choices.

It is also impossible to square the majority's claim—that “the Board should strive to maximize the opportunity for *the election* to provide finality” with the position the majority has taken in the blocking charge rulemaking. Recall that in the blocking charge rulemaking, 84 FR 39930, 39938, 39948 (Aug. 12, 2019), the majority has taken the opposite position—namely that nothing is more important than having employees vote promptly, and therefore it should conduct elections before assessing whether employees can exercise free choice in the election in the face of blocking charges. And it has taken that position in the face of evidence showing that 67 percent of the elections that are conducted in the face of blocking charges are unlikely to count and thus will not be final. The majority nowhere explains the inconsistency.

²⁵⁰ The majority's contention that there is no objective evidence that parties use the threat of unnecessary litigation and delay that comes with it to extract concessions regarding election details—flies in the face of the district court's holding in *ABC of Texas v. NLRB*, 2015 WL 3609116 *16–*17

The automatic impound procedure also imposes costs on the Board by requiring it to decide issues that may be, and regularly are rendered moot by election results,²⁵¹ and imposes costs on the parties by inevitably delaying certifications (by delaying the tally of the ballots).

The majority complains that the regulatory text of the 2014 rule did not set forth a minimum time between the direction of election and the election, and argues that imposing a minimum time between the direction of the election and the election serves the interests in uniformity and transparency and therefore is preferable. But, contrary to the majority's suggestion, the critical period is not between the direction of election and the actual conduct of the election. Rather, the critical period is between the petition and the election. And in the lengthy history of the Act, neither Congress nor the Board has ever mandated a minimum timeline in which to conduct elections. See 79 FR 74422. The majority does not do so either. It provides no timeline to process cases from *petition* to election. (While the majority does impose a 20-business day waiting period between the pre-election *decision* and the conduct of the election, the majority allows parties to waive it.)

Given that the majority provides no petition-to-election timeline in the directed election context, and given that the majority makes it so much easier for parties to obtain extensions and postponements, the majority's suggestion that its rule is more transparent than the 2014 rule is utterly mystifying. The public and agency employees certainly have not been operating in the dark regarding the median times for conducting elections in both the directed election and stipulated election contexts under the 2014 rule, because the GC has been publishing those median times on an annual basis, just as prior GCs have done for decades, when there was also no minimum timeline provided in the Board's rules and regulations.

(Board noted the spectre of protracted pre-election litigation under the prior rule could be used to ‘extract concessions’ regarding the election The Board's [rule] . . . explain[ed] how the final conclusions are factually and legally supported.”). See 79 FR 74318, 74386–87; and further ignores its reliance on gamesmanship as justification for one if its amendments and the concession that good lawyers use procedures to their clients' advantage.

²⁵¹ According to my staff's review of a list of cases involving requests for review of decisions and directions of election, produced by the Board's Office of the Executive Secretary, 29% (11 out of 38 post-rule cases) of the requests for review that were filed before the election in FYs 2016–2017 were ultimately rendered moot by the results of the elections or withdrawal of the petitions.

In any event, whether uniformity is “preferable” depends on what is being made uniform. Although imposition of the 20-business day waiting period will indeed delay all elections, not just directed elections, the waiting period is not preferable because it will serve little purpose under the majority's rule just as it served little purpose prior to the 2014 rule. Put simply, delaying all elections so the Board can rule on a request for review serves no possible purpose in those cases where a request for review is not filed before the election. And those are the overwhelming majority of cases.²⁵²

The waiting period will serve very little purpose under the majority's rule even if one looks just at the directed election context. Thus, delaying all directed elections so the Board can rule on a request for review serves no possible purpose in those directed election cases where a request for review is not filed prior to the election. The majority of regional director decisions and directions of election are never the subject of a request for review.²⁵³ And even considering only the minority of instances when parties have filed requests for review of decisions and directions of election since the 2014 rule went into effect, an even smaller minority of them have

²⁵² Indeed, in FY 2013, only 4.2% of all RC, RD and RM elections (66 out of 1,557) involved requests for review of a regional director's decision and direction of election, while in FY 2014, only 3.9% of such elections (63 out of 1,600) involved such requests for review. Since the 2014 rule went into effect, the percentage of elections involving requests for review of regional directors' decisions and directions of election has been even lower. In FY 2016, only 3.5% of elections (56 out of 1,594) involved such requests for review, while in FY 2017, only 3.1% of elections (49 out of 1,560) involved such requests for review. See Office of Executive Secretary's Chart (listing requests for review of regional directors' decisions and directions of election for FYs 2013–2017); <https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections>. In other words, in the two full fiscal years both before and after the 2014 rule, more than 95% of elections involved no requests for review of decisions and directions of election whatsoever, and the majority offers no reason to believe that this trend will not continue.

²⁵³ Considering data from the same two full fiscal year periods both before and after the 2014 rule's implementation shows a steady increase (from approximately 52% to 62%) of directed election cases in which no request for review is filed. In other words, in FY 2013, only 47.4% of all RC, RD and RM directed elections (66 out of 139) involved such requests for review, and that percentage fell in each subsequent fiscal year. (FY 2014—44.3% (63 out of 142 pre-rule cases); FY 2016—42.4% (56 out of 132 largely post-rule cases); FY 2017—37.9% (49 out of 129 largely post-rule cases). See Office of Executive Secretary's Chart; <https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election> (past versions of this chart reported directed election percentages for past fiscal years as follows: FY 2017—8.3%; FY 2016—8.3%; FY 2014—8.9%; and FY 2013—8.9%).

been filed before the election.²⁵⁴ (Thus, as shown, most parties act rationally and wait until they see the election results so they know whether the results have mooted the basis of their appeal). There certainly is no reason to think that this will change after today because, under the majority's rule, the waiting period applies regardless of whether a party files a request for review before the election, and the majority retains the 2014 rule provision permitting parties to wait until after the election to request review of the regional director's pre-election decision. In short, the waiting period serves little purpose even if one looks just to its application in the directed election context because parties typically do not file requests for review before the election. Moreover, as the 2014 Board noted (79 FR 74410), the comparable pre-2014 rule waiting period served little purpose, because even in the small percentage of cases in which the Board granted review, the Board almost never stayed the election and the election proceeded as scheduled. In other words, despite the presence of the waiting period, the Board was typically unable to render a decision on the underlying merits until *after* the waiting period had elapsed and the election *had* been held.²⁵⁵ The majority plainly foresees this continuing to be the case because it provides that if the Board has not ruled on the request for review, the election *will* proceed as scheduled, and the majority continues to provide for the filing of briefs in cases where it grants review, which inevitably means that the election will occur before the Board has ruled on the request for review of the regional director's pre-election decision. Of course, even if the Board were somehow magically able to decide the underlying merits of every request for review within 20 business days, the waiting period would still not justify

delaying all elections because the Board only rarely reverses the regional director's pre-election decisions.²⁵⁶

The majority's argument—that the Board should definitively resolve individual eligibility or inclusion issues before any ballots are counted (even if the Board cannot definitively resolve the issues before the election) because it enables the Board to summarily resolve challenges after the election—serves only to confirm that despite imposing a month-long waiting period, the Board will still not be able to definitely resolve these issues before the *election* (because if the Board had resolved the issues prior to the election, those individuals would not have cast challenged ballots). And it makes little sense to expend the resources necessary for the Board to regularly decide those matters before the ballots are counted, because, as shown, the election results could moot the need to do so, and in any event, the Board is unlikely to reverse the regional director. The majority's claim—that its waiting period and ballot impoundment procedure promote “orderly litigation”—is stranger still. Those provisions are in aid of the pre-election request for review procedure that amounts to an interlocutory appeal, and interlocutory appeals have long been generally disfavored as wasteful, piecemeal litigation. See 79 FR 74407 and authority cited therein.

Although the majority offers a few additional arguments specifically in support of its automatic impound procedure, they suffer from similar shortcomings. For example, the majority offers the specious argument that all the ballots should be impounded pending the Board's rulings on requests for review because employees or parties may be confused if the Board nullifies the results of the election. Again, reversals are possible in any legal regime which permits appeals, and the possibility of reversal will continue to exist under the majority's rule. The majority fails to cite a single case demonstrating such employee confusion, much less one where employees were so confused by a Board reversal of a regional director decision that they were unable to cast an informed vote in a subsequent election.

Although the majority claims that its impoundment procedure serves a variety of other interests, that procedure cannot possibly serve any interest in most directed election cases. As the majority concedes, its ballot impoundment procedure applies only if a request for review is filed before the election and within 10 business days of the decision and direction of election. But again, only a minority of regional director decisions and direction of election are appealed at all. And in the minority of instances when those decisions have been appealed since the 2014 rule's implementation, an even smaller minority have been filed before the election. Even when ballot impoundment is triggered, it will not serve the claimed interests in a significant number of cases because, as previously discussed, the Board so rarely reverses the regional director. The majority's response to that bottom line—“We also place little weight on th[at] fact”—is no response at all.

The majority ignores how its amendments will work in practice in claiming that impoundment promotes uniformity (and voter secrecy) by ensuring that, “for the most part” all ballots are counted at the same time in directed elections. To repeat, most decisions and directions of election are never the subject of a request for review, and the automatic impoundment procedure is triggered under the majority's rule only if a request for review is filed prior to the election and within 10 business days of the decision and direction of election. This makes it quite likely that in the vast majority of directed election cases in which people vote subject to challenge, it will be only their ballots that are impounded, while all other ballots are opened and counted immediately at the close of the election. Thus, as shown, the majority's rule permits the parties to “agree [at the pre-election hearing] to permit disputed employees to vote subject to challenge,” (see amended § 102.64(a)), in which event only the ballots cast by those particular individuals will be impounded (in addition to any election day surprise challenges), while the remaining ballots are opened and counted immediately at the close of the election. As also shown, regional directors can direct individuals to vote subject to challenge even if their eligibility or inclusion was litigated at the hearing, in which event, only the ballots cast by those individuals will be impounded while the remaining ballots are opened and counted immediately at the close of the election. And just as was the case prior to the 2014 rule, in

²⁵⁴ As noted, the 2014 rule eliminated the requirement that parties file their requests for review of decisions and directions of elections before the elections, and granted parties the freedom to request review either before or after elections. The Office of Executive Secretary's Chart shows that only 39% (38 out of 99) of the requests for review concerning decisions and directions of election that were processed under the 2014 rule in FYs 2016–2017 were filed before the election, which constituted only 1.2% of all RC, RD and RM elections held (38 out of 3,154) during those fiscal years.

²⁵⁵ For example, the underlying NxGen case files concerning the 16 cases in which the Board granted review in FYs 2013–2014, shows that only once did the Board issue an order disposing of the merits before the election was held. See *Armstrong County Memorial Hospital d/b/a ACMH Hospital*, 06–RC–112648 (Dec. 9, 2013) (ordering that the intervenor union's name should be corrected on the ballots of the election scheduled for Dec. 12, 2013); see also Office of Executive Secretary's Chart.

²⁵⁶ See *supra* fn.231 (Showing in FYs 2016–2017 only 3 reversals of regional director decisions based on applications of then-current law (and 4 regional director decisions that were either dismissed, remanded or reversed based on application of new legal standards issued after the regional directors' decisions). These numbers are consistent with pre-rule statistics relied upon by the 2014 Board showing that from FYs 2010–2013 there were only 14 cases in which regional director decisions were reversed. See 79 FR 74408 fn.454.).

response to a request for review, the Board is free to direct that only particular individuals vote subject to challenge, in which event only their ballots are impounded while the remaining ballots are opened and counted. The majority's willingness to sanction these practices belies its claims of uniformity and undermines its claim that failure to definitively resolve individual eligibility or inclusion issues before the election impairs voter secrecy.

6. The Majority's Amendments to § 102.69 Also Create Unnecessary Delay Between the Election and the Certification of Election Results

a. The Majority Upsets the Pre-2014 Rule Status Quo by Amending § 102.69(c)(1)(iii) To Entitle Parties To File Briefs With the Hearing Officer Following the Close of the Post-Election Hearing

By definition, certification of the results of a Board conducted election or a certification of representative following an election cannot issue until determinative challenges or election objections are resolved. Determinative challenges and election objections are sometimes set for a hearing before a hearing officer, who then is charged with issuing a decision addressing those matters and making recommendations regarding proper disposition of them to the regional director. Prior to the 2014 rule, parties had no right to file briefs with the hearing officer following the close of the *post*-election hearing.²⁵⁷ The 2014 rule made *no* change in that regard. Thus, both before and after the 2014 rule, hearing officers had discretion to deny party requests to file post hearing briefs when he or she determined that briefing was unnecessary.

Today, however, the majority entitles parties to file post-hearing briefs with the hearing officer following the *post*-election hearing in all cases, no matter how simple. The majority's amendment can obviously delay final resolution of the question of representation because the hearing officer will not be able to issue a decision until briefs are filed or the time for filing briefs has expired. It also raises the cost of litigation by encouraging parties to file their own briefs on the assumption their counterparts will do so and by requiring the hearing officer to spend time and

resources digesting the briefs. The majority offers the same reasons for entitling parties to file briefs to hearing officers following the close of the *post*-election hearing that it offers in support of its amendment entitling parties to file briefs to the regional director following the close of the *pre*-election hearing, and its arguments fail for the same reasons. Moreover, the majority glosses over the fact that under the 2014 rule, parties had a right to file briefs with the regional director when they filed exceptions to the hearing officer's recommended disposition of *post*-election objections and determinative challenges.²⁵⁸ And, of course, under the 2014 rule, parties also had a right to file written briefs with the Board in support of any request for review of the regional director decision on objections and determinative challenges. 29 CFR 102.67(e), 102.69(c)(2) (2015). The majority offers no good reason for granting parties *three* opportunities to file briefs. And the majority makes matters even worse by making it substantially easier for parties to obtain extensions. Thus, the majority provides that extensions should be granted merely for good cause, whereas before today, the casehandling manual provided that extensions should *not* be granted "except under the most unusual circumstances." See Casehandling Manual Section 11430 (January 2017).

b. The majority's Amendments to § 102.69(b), (c)(1) and (2) Further Delay Resolution of Questions of Representation by Stripping Regional Directors of the Power to Timely Certify Unions

The majority today makes an additional change which will further delay resolution of questions of representation by stripping regional directors of the power to certify victorious unions as collective bargaining representatives. In section 3(b) of the Act, Congress authorized the Board to delegate the power to certify election results to regional directors subject to discretionary Board review.²⁵⁹

²⁵⁸ See 29 CFR 102.69(c)(1)(iii) (2015) ("Any party may, within 14 days from the date of issuance of [the hearing officer's] report, file with the regional director . . . exceptions to such report, with a supporting brief if desired. * * * [A] party opposing the exceptions may file an answering brief with the regional director.").

²⁵⁹ Section 3(b) provides in relevant part: The Board is also authorized to delegate to its regional directors its powers . . . to direct an election . . . and certify the results thereof, except that upon the filing of a request therefor with the Board . . . 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.

Consistent with the express language of the statute, the 2014 rule empowered regional directors to resolve all *post*-election matters and to issue certifications of results and representatives, subject to discretionary Board review. 29 CFR 102.69(b), (c); 79 FR 74310, 74331–74335, 74412–74414.²⁶⁰ The 2014 Board reasoned that the amendment would make the process of obtaining Board review of regional directors' dispositions of *post*-election disputes parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes and concluded that the amendment would enable it to more expeditiously resolve questions of representation. *Id.* at 74331–74332, 74412. The Board explained that it perceived no reason why *pre*- and *post*-election dispositions should be treated differently in this regard. *Id.* at 74332. The Board noted that just as regional directors have expertise regarding determining the appropriate unit in which to conduct elections, so too do regional directors have expertise regarding *post*-election matters. For example, the Board observed that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act; those prosecutorial decisions often involve supervisory status questions and determinations whether certain conduct is unlawful, both of which often parallel questions that arise in *post*-election representation proceedings; and the courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct.²⁶¹ The Board further observed that it affirms the vast majority of *post*-election decisions made at the regional level, and that many present no issue meriting full consideration by the Board. *Id.* The Board noted that in FY 2013, for example, parties appealed to the Board in only one third of the 98 total cases involving regional *post*-election decisions concerning objections or determinative challenges, and the Board reversed the regional decision to set aside or uphold election results in only 3 cases. *Id.* at fn.106. The Board

²⁶⁰ Even prior to the 2014 rule, regional directors could issue certifications in certain cases, notwithstanding the possibility of Board Review. This included cases where objections were resolved by a hearing officer and appealed to a regional director, as opposed to the Board. In these cases, the casehandling manual has long specifically instructed that the certification "should not be delayed until after the expiration of the time for filing a request for review." See, e.g., Casehandling Manual Section 11472.3(b)(1) (August 2007).

²⁶¹ See 79 FR 74332, 74334 & fn.125 (citing *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992)).

²⁵⁷ See 79 FR 74402 (quoting the 2003 Hearing Officer's Guide: "In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.").

also found support for the amendment in the Supreme Court's opinion in *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). In that case, the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent "technical 8(a)(5)" unfair labor practice proceeding, the employer asserted that "plenary review by the Board of the regional director's unit determination is necessary at some point," *i.e.*, before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140–41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word "may" in the clause describing the possibility of Board review, the Court held, "Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination." *Id.* at 142. Consistent with the purpose of the 2014 rule amendment authorizing the Board to delegate to regional directors the power to resolve post-election matters, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to "expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination." 79 FR 74333.

Today, however, the majority stands section 3(b) on its head and deprives regional directors of the power to issue certifications until the time for filing requests for review of both the regional director's pre-election decision and direction of election and the regional director's post-election decision disposing of election objections and/or determinative challenges has come and gone, or the Board has ruled on any requests for review that have been filed. This will plainly delay certifications of election results and certifications of representatives, even where no requests

for review are ultimately filed, while regional directors wait for the time for filing to run. Such uniform and unnecessary delay is especially egregious given that requests for review of regional director determinations are so rarely filed and so rarely result in a reversal of the regional director.²⁶² The majority offers no reasoned explanation for doing so—no statutory or constitutional prohibition against regional directors issuing certifications which are subject to requests for review, no judicial invalidation of the 2014 rule amendment, and no empirical evidence that the amendment caused the parade of horrors predicted by the critics, such as reducing the rate of stipulated election agreements and increasing the number of technical 8(a)(5) proceedings and court reversals of certification decisions.

The majority argues that whatever interests are served by permitting regional directors to issue certifications prior to the Board's rulings on requests for review of regional director decisions, they are substantially outweighed by the interests in transparency, finality, efficiency and uniformity. But the majority merely states that this is so without any empirical support.²⁶³

At bottom, the majority argues that it does not make sense to subject employers to liability for refusing to bargain with a union when it is possible that the Board might reverse the regional director's certification decision. But the possibility of an erroneous certification decision cannot be completely eliminated given the statutory scheme and will continue under the amendments that the majority

²⁶² See *supra* fn.s.252 and 231 (together showing that both before and after implementation of the 2014 rule, requests for review of regional directors' pre-election decisions were filed in less than 5% of elections conducted each fiscal year, they were granted in less than 1% of elections conducted each fiscal year, and regional directors' pre-election decisions have been reversed, on average, in fewer than 4 cases per fiscal year).

Agency data shows that appeals and reversals of regional director post-election decisions are just as rare. Thus, during FYs 2016–2017, only 2.2% of elections involved requests for review to the Board concerning regional directors' post-election decisions (69 cases as compared to 3,154 RC, RD and RM elections), and the Board only granted review in 8 cases to reverse any part of those decisions. (Data produced from searches in the Board's NxGen case processing software concerning regional director post-election decisions and from the Board's Office of the Executive Secretary concerning post-election requests for review).

²⁶³ For example, the majority here repeats its curious argument that employees or parties may be confused if the Board reverses a regional director's certification of results or representative. But the possibility of such reversals exists in any legal regime that provides for an appeal process, and the majority cites no evidence of any confusion that lingers.

makes today. Thus, even under the majority's amendments, employers still face the possibility of erroneous bargaining obligations because a reviewing court can always reverse a certification decision made by the Board itself in a technical 8(a)(5) proceeding. See 79 FR 74414. And Congress has already determined that it does make sense to permit the regional directors to do so notwithstanding that the regional director's certification decisions will be subject to Board review, because it speeds certifications.²⁶⁴ And it clearly does speed certifications by enabling the regional directors to, for example, issue a certification without having to wait to see whether a request for review will be filed.

The evidence before the agency confirms the soundness of the congressional judgment. Thus, the Agency's experience is that parties rarely request review of regional director *post*-election determinations, and that even when parties do request review of regional director *post*-election determinations, the Board only rarely reverses the regional director's *post*-election determinations. Thus, in the two fiscal years following the 2014 rule's implementation, parties requested review of regional director *post*-election determinations in only 2.2 percent of RC, RD and RM elections (69 requests for review as compared to 3,154 elections), and the Board reversed the regional director in only 8 cases.²⁶⁵ And, as noted previously, most *pre*-election decisions are not the subject of requests for review either, and the Board rarely reverse regional directors' *pre*-election decisions even when they are the subject of requests for review.

The 2014 rule amendment clearly promotes the practice and procedure of collective bargaining. While an employer acts at its peril in making unilateral changes between the time of the election and the issuance of a certification,²⁶⁶ the Board has long been of the view that an employer is under no obligation to bargain with a union that has won an initial certification election over the terms of a first contract

²⁶⁴ The majority is simply wrong in claiming that the 2014 rule's amendment—authorizing regional directors to issue certifications that are subject to review—was controversial. Thus, neither the GC nor the regional directors have requested the change made by the majority today, nor did a single response to the Board's 2017 RFI. Moreover, the majority concedes that that the 2014 amendment is permissible. See also *Chamber v. NLRB*, 118 F.Supp.3d at 216 (rejecting challenges to 2014 rule amendments requiring regional directors to issue certifications subject to discretionary Board review).

²⁶⁵ See *supra* fn.262.

²⁶⁶ See *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

until that union has been certified.²⁶⁷ Accordingly, under the majority's rule, an employer's refusal to commence negotiations for an initial contract with a victorious (but yet to be certified) union will not be unlawful where, for example, the employer has filed election objections, even if the employer has no plans to challenge the regional director's decision overruling those objections. Delaying certification thus delays the commencement of negotiations over the employees' terms and conditions of employment, and deprives employees of the benefits of that bargaining. Given that employers are presently under no obligation to bargain prior to the union being certified, given that most employers never appeal regional director determinations to the Board, and given that most employers agree to commence bargaining once certifications issue (as evidenced by the small number of technical refusal to bargain cases), it is clear that enabling regional directors to issue certifications of representatives (when, for example, they overrule election objections) is likely to result in most employers agreeing to bargain sooner than if certifications are withheld until the time for filing requests for review have come and gone.

I also note that Chairman Ring has expressed reservations about *Mike O'Connor Chevrolet* and signaled that the Board should consider overruling that case.²⁶⁸ In the event of such a legal change, employers would be free to make unilateral changes between the date the union wins the election and the date the certification issues, which would have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued.²⁶⁹ The Chairman's signal—that the Board may add *Mike O'Connor Chevrolet* to the long list of established precedent that the current majority has overruled—provides yet another reason to maintain the 2014 amendment that speeds

certifications by enabling regional directors to issue certifications, (notwithstanding that they are subject to Board review as provided by the Act).²⁷⁰

7. The Majority's Election Observer Amendment to § 102.69(a)(5) Is Also Poorly Justified

I also cannot agree to the majority's change to the Board's treatment of election observers. The 2014 rule did not make any changes regarding who a party could select as its election observers. Yet today, without engaging in notice and comment and outside the adjudicatory process and without any briefing, the majority admittedly overrules precedent and codifies language that changes the status quo ante by providing that observers should be current unit employees, and that when current unit employees are unavailable, observers should be current nonsupervisory employees of the employer of the unit employees at issue.

Although the majority contends that its language is to some extent consistent with prior casehandling manuals, those manuals, of course, were not binding on the Board, and prior Boards had explicitly declined to interpret them in the manner favored by the majority today, at least partly on policy grounds. Thus, before today, unions were permitted to select potential discriminatees as their observers and it was not per se objectionable for parties to select as observers individuals who were not employees of the employer.²⁷¹

By narrowing the pool of observers, the majority threatens a union's ability to obtain observers, which threatens both the objective integrity and the perceived legitimacy of Board

conducted elections.²⁷² Moreover, by narrowing the pool of potential observers, the majority increases the chances that the parties will have an unequal number of observers, which creates the impression among employees that the Board favors the party with the greater number of observers, which reasonably tends to interfere with the fairness and validity of the election.²⁷³ It is certainly possible that a union would be unable to obtain an observer from the unit for reasons other than those suggested by the majority today. At a minimum, the majority has not persuaded me that the Board's current case-by-case approach is so patently unreasonable that we should rush to codify a different approach without first hearing from interested parties. The majority's claim—that the current state of Board law is “riddled with inconsistencies”—certainly counsels in favor of a more deliberative approach.²⁷⁴

VII. Other Statutory Requirements

Paperwork Reduction Act

The amended regulations are exempt from the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501, *et seq.* See 44 U.S.C. 3518(c); 79 FR 74468–74469. Accordingly, the final rule does not contain information collection requirements necessitating the approval of the Office of Management and Budget under the PRA.

Final Rule

This rule is published as a final rule. As discussed in the preamble, the National Labor Relations Board considers this rule to be a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of “agency organization, procedure, or practice.”

²⁷² See *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 4 (2016) (“By their presence, observers help to assure the parties and the employees that the election is being conducted fairly.”) (citation omitted); *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 85–86 (1978) (election misconduct and errors in checking off and/or challenging voters that may not be noticed by the Board agent are often brought to his or her attention by an alert observer) remanded on other grounds 594 F.2d 218 (4th Cir. 1979).

²⁷³ *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 4; *Browning-Ferris Industries of California, Inc.*, 327 NLRB 704, 704 (1999).

²⁷⁴ However, I note that at least some of the alleged inconsistencies appear to stem from the majority's mistaken view that the use of union officials as observers has the same potential to interfere with employee free choice as does the employer's use of its supervisors (or other individuals closely identified with management) as observers. See, e.g., *Longwood Security Services, Inc.*, 364 NLRB No. 50, slip op. at 2–4.

²⁶⁷ See *G.H. Bass Caribbean, Inc.*, 306 NLRB 823, 825 (1992) (“an ostensible union victory in an initial certification election does not activate an employer's duty to bargain with a union. An 8(a)(5) violation resulting from an employer's postelection unilateral changes, once the union is certified, is actually an exception to the rule that election results are final on certification, an exception used solely to safeguard a union's future bargaining position.”) (citation omitted).

²⁶⁸ See *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. 16 fn.1 (2018).

²⁶⁹ See *Mike O'Connor Chevrolet*, 209 NLRB at 703 (“To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending.”).

²⁷⁰ The majority complains that there has been a steady stream of requests to stay regional director certifications under the 2014 rule, and that stripping regional directors of the power to timely certify unions will eliminate any basis to request stays of certifications, which will avoid needless litigation. That will certainly come as news to the attorneys who litigate on behalf of the Board in technical 8(a)(5) proceedings before the courts of appeals. Thus, employers sometimes file requests to stay certifications even after a court of appeals has agreed with the Board's underlying certification decision (pending their appeals to the Supreme Court).

²⁷¹ See, e.g., *Kellwood Company*, 299 NLRB 1026, 1029 (1990) (alleged discriminatees are entitled to serve as election observers) *enfd.* 948 F.2d 1297 (11th Cir. 1991); *NLRB v. Black Bull Carting Inc.*, 29 F.3d 44, 45–46 (2d Cir. 1994) (upholding Board's decision that union did not engage in objectionable conduct by using as its election observer a union official who was not employed by the employer of the unit employees at issue, because there was no showing that the union official engaged in improper conduct while acting in that capacity); *Embassy Suites Hotel, Inc.*, 313 NLRB 302, 302 (1993) (Board “will not find the use of a nonemployee as an observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer.”).

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

- 1. The authority citation for part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart A—Definitions

- 2. In § 102.1, add paragraph (i) to read as follows:

§ 102.1 Terms defined in Section 2 of the Act.

* * * * *

(i) *Business day.* The term *business day* means days that Agency offices are open normal business operating hours, which is Monday through Friday, excluding Federal holidays. A list of Federal holidays can be found at www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/.

Subpart B—Service and Filings

- 3. In § 102.2, revise paragraph (a) to read as follows:

§ 102.2 Time requirements for filings with the Agency.

(a) Time computation. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it does not fall on a business day, in which event the period runs until the next Agency business day. When the period of time prescribed or allowed is less than 7 days, only business days are included in the computation. Except as otherwise provided, in computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.

* * * * *

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

- 4. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to § 102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to § 102.5(c) need not file an original. Except as provided in § 102.72, such petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the Regional Director when the petition is filed. Along with the petition, the petitioner shall serve the Agency's description of the procedures in representation cases and the Agency's Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the

petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

- 5. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

- (1) The name of the employer.
- (2) The address of the establishments involved.
- (3) The general nature of the employer's business.
- (4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and

accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

(b) *RM petitions.* A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the Regional Director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(9) The type, date(s), time(s) and location(s) of the election sought.

(c) *RD petitions.* Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(11) The type, date(s), time(s) and location(s) of the election sought.

(d) *UC petitions.* A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) *AC petitions.* A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) *Provision of original signatures.*

Evidence filed pursuant to paragraph (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the Regional Director no later than 2 business days after the facsimile or electronic filing.

■ 6. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list; Notice of Election.

(a) *Consent-election agreements with final Regional Director determinations*

of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the Regional Director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary Board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the Regional Director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the Regional Director in

conducting elections pursuant to §§ 102.69 and 102.70.

(c) *Full consent election agreements with final Regional Director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the Regional Director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66, and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the Regional Director shall issue a decision. The rulings and determinations by the Regional Director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the Regional Director shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 5 business days after the approval of an election agreement pursuant to paragraph (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who

will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the agreement or direction respectively within 5 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) *Notice of Election.* Upon approval of the election agreement pursuant to paragraph (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the Regional Director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with § 102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

■ 7. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 14 business days from the date of service of the notice. The Regional Director may postpone the hearing upon request of a party showing good cause. A copy of the petition, a description of procedures in representation cases, a "Notice of Petition for Election," and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

(2) Within 5 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed

under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b) *Statements of Position*—(1) *Statement of Position in RC cases.* If a petition has been filed under § 102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) *Employer's Statement of Position.* (A) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(B) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(C) The Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of an employer's Statement of Position, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the employer's Statement of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(2) *Statement of Position in RM cases.* If a petition has been filed under § 102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if

it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* The employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received no later than noon 3 business days before the hearing. The Employer's Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; and respond to the issues raised in any Statement of Position timely filed and served pursuant to paragraph (b)(2)(i) of this section. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases—(i) Employer's and Representative's Statements of Position.*

(A) If a petition has been filed under § 102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be no later than noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(B) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(C) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(D) The employer's Statement of Position shall also include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the

time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of any Statement(s) of Position filed pursuant to paragraph (b)(3)(i) of this section, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the other Statement(s) of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein; or take other appropriate action. If a Notice of Hearing is served, it shall be accompanied by a copy of the petition. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion. All hearing and post-hearing procedure under this paragraph (c) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's

decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 8. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The primary purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed. However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a Hearing Officer and shall be open to the public unless otherwise ordered by the Hearing Officer. At any time, a Hearing Officer may be substituted for the Hearing Officer previously presiding. Subject to the provisions of § 102.66, it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. The Regional Director may, in the director's discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

■ 9. Revise § 102.65 to read as follows:

§ 102.65 Motions; intervention; appeals of Hearing Officer's rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may

be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. The Motion shall immediately be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the Regional Director, except that motions made during the hearing shall be filed with the Hearing Officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The Regional Director may rule upon all motions filed with him/her, causing a copy of the ruling to be served on the parties, or may refer the motion to the Hearing Officer, except that if the Regional Director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The Hearing Officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the Hearing Officer as hereinabove provided, except that the Hearing Officer shall rule on motions to intervene and to amend the petition only as directed by the Regional Director, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the Regional Director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The Regional Director, or the Hearing Officer, at the specific direction of the Regional Director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the Regional Director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the Hearing Officer shall not be appealed directly to the Regional Director, except by special permission of the Regional Director, but shall be considered by the Regional Director when the director reviews the entire record. Requests to the Regional Director for special permission to appeal

from a ruling of the Hearing Officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the Regional Director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the Regional Director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the Regional Director grants the request for special permission to appeal, the Regional Director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the Regional Director. As stated in § 102.67, the parties may request Board review of Regional Director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any Regional Director or Hearing Officer with respect to any matter which could have been but was not raised pursuant to any other section of these Rules except that the Regional Director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence

which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 10 business days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a Regional Director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 10. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation and the other issues in the case that have been properly raised. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of

fact may be introduced in evidence with respect to any issue.

(b) *Statements of Position.* Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The Regional Director may permit any Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall respond to each amended position. The Regional Director may also permit responses to be amended in a timely manner for good cause. The Hearing Officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the Regional Director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the Regional Director determines that record evidence is necessary.

(c) *Offers of proof.* The Regional Director shall direct the Hearing Officer concerning the issues to be litigated at the hearing. The Hearing Officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. But in no event shall a party be precluded from introducing relevant evidence otherwise consistent with this subpart.

(d) *Preclusion.* A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the

election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in § 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

(e) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the Hearing Officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the Hearing Officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the Regional

Director who may either rule upon it or refer it for ruling to the Hearing Officer except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the Hearing Officer. Notice of the filing of petitions to revoke shall be promptly given by the Regional Director or Hearing Officer, as the case may be, to the party at whose request the subpoena was issued. The Regional Director or the Hearing Officer, as the case may be, shall revoke the subpoena if, in his/her opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Regional Director or the Hearing Officer, as the case may be, shall make a simple statement of procedural or other grounds for his/her ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) *Election details.* Prior to the close of the hearing, the Hearing Officer will:

(1) Solicit the parties' positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Regional Director should transmit the Notice of Election in the event the Regional Director directs an election;

(3) Inform the parties that the Regional Director will issue a decision as soon as practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these Rules if the director directs an election and of the time for complying with such obligations.

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party desiring to

submit a brief to the Regional Director shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.

(i) *Hearing Officer analysis.* The Hearing Officer may submit an analysis of the record to the Regional Director but shall make no recommendations.

(j) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

■ 11. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) *Proceedings before Regional Director.* The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining as provided in § 102.64(a), and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the Regional Director upon the record shall set forth the director's findings, conclusions, and order or direction.

(b) *Directions of elections.* If the Regional Director directs an election, the direction may specify the type, date(s), time(s), and location(s) of the election and the eligibility period, but the Regional Director retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election. The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election, to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if

neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), whether transmitted simultaneously with the direction of election or separately thereafter. If the direction of election provides for individuals to vote subject to challenge, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) *Requests for Board review of Regional Director actions.* 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/her under Section 3(b) of the Act except as the Board's Rules provide otherwise. The request for review may be filed at any time following the action until 10 business days after a final disposition of the proceeding by the Regional Director. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director, except that if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that decision issues, but the pendency of such a request for review shall not require impoundment of the ballots.

(d) *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

- (i) The absence of; or
- (ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) *Contents of request.* A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(f) *Opposition to request.* Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

(g) *Finality; waiver; denial of request.* The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) *Grant of review; briefs.* The grant of a request for review shall not, outside of the provision for impoundment set forth in paragraph (c) of this section, stay the Regional Director's action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 10 business days after

issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the Regional Director and/or other briefs which shall be limited to the issues raised in the request for review. No reply briefs may be filed except upon special leave of the Board. Where review has been granted, the Board may provide for oral argument or further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(i) *Format, Service, and Extensions—*
(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in § 102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited. A party may combine a request for review of the Regional Director's decision and direction of election with a request for review of a Regional Director's post-election decision, if the party has not previously filed a request for review of the pre-election decision. A party may not, however, file more than one request for review of a particular action or decision by the Regional Director. Repetitive requests will not be considered.

(2) *Service.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A certificate of service shall be filed with the Board together with the document.

(3) *Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as

permitted by this section, shall be filed pursuant to § 102.2(c) with the Board or the Regional Director, as the case may be, except that no extension of time will be granted to circumvent the impoundment provisions set forth in paragraph (c) of this section. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(j) *Requests for extraordinary relief.*

(1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;
(ii) A stay of some or all of the proceedings, including the election; or
(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion.

(k) *Notice of Election.* The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically to all eligible voters (including individuals permitted to vote subject to challenge) if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. For the purposes of this subpart, the term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(l) *Voter list.* Absent extraordinary circumstances specified in the direction

of election, the employer shall, within 5 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the direction respectively within 5 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

■ 12. Revise § 102.68 to read as follows:

§ 102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, Notice of Hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the Regional Director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the Regional Director or to the Board, and the decision of the Regional

Director, if any. Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.

■ 13. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the Regional Director; hearings; Hearing Officer reports on objections and challenges; exceptions to Hearing Officer reports; Regional Director decisions on objections and challenges.

(a) *Election procedure; tally; objections.* (1) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.

(2) All elections shall be by secret ballot.

(3) Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit.

(4) A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit.

(5) When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

(6) Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded.

(7) Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

(8) Within 5 business days after the tally of ballots has been prepared, any party may file with the Regional

Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to § 102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.5(e) or (c). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a)(8) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, and if no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.

(c) *Regional director's resolution of objections and challenges—*(1) *Regional director's determination to hold a hearing—*(i) *Decisions resolving objections and challenges without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges. If no

request for review filed pursuant to § 102.67(c) is pending, and no request for review is timely filed pursuant to paragraph (c)(2) of this section, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing on objections and challenges.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election, and raise substantial and material factual issues, the Regional Director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a Notice of Hearing before a Hearing Officer at a place and time fixed therein. The Regional Director shall set the hearing for a date 15 business days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the Regional Director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an Administrative Law Judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the Administrative Law Judge shall, after issuing a decision, sever the representation case and transfer it to the Regional Director for further processing.

(iii) *Hearings; Hearing Officer reports; exceptions to Regional Director.* The hearing on objections and challenges shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The Hearing Officer may rule on offers of proof. Any party desiring to

submit a brief to the Hearing Officer shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Upon the close of such hearing, the Hearing Officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 10 business days from the date of issuance of such report, file with the Regional Director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. Extra copies of electronically-filed papers need not be filed. The Regional Director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case, save that the Regional Director shall not issue a certification of results and/or representative if a request for review previously filed subject to § 102.67(c) remains pending, or if a request for review is timely filed pursuant to paragraph (c)(2) of this section prior to the issuance of the certification of results and/or representative.

(2) *Regional Director decisions and Board review.* The decision of the Regional Director disposing of challenges and/or objections shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the Regional Director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67,

except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the Administrative Law Judge's decision, and a request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due. If no request for review is timely filed pursuant to this paragraph, and no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(d) *Record for objections and challenges.* (1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the Regional Director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the Regional Director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings, or orders of the Regional Director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a Regional Director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the Regional Director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) *Revised tally of ballots.* In any case under this section in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 5 business days after the revised tally of ballots has been made available, the Regional Director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

(f) *Format of filings with Regional Director.* All documents filed with the Regional Director under the provisions of this section shall be filed double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Regional Director by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in § 102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) *Extensions of time.* Requests for extensions of time to file exceptions,

requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed pursuant to § 102.2(c) with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(h) *Final disposition.* For the purposes of filing a request for review pursuant to § 102.67(c) or paragraph (c)(2) of this section, a case is considered to have reached final disposition when the Regional Director dismisses the petition or issues a post-election decision that will result in the issuance of a certification of results (including, where appropriate, a certification of representative) absent the filing of a request for review.

■ 14. Revise § 102.71 to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the Regional Director.

(a) If, after a petition has been filed and at any time prior to the close of hearing, it shall appear to the Regional Director that no further proceedings are warranted, the Regional Director may dismiss the petition by administrative action and shall so advise the petitioner in writing, setting forth a simple statement of the procedural or other grounds for the dismissal, with copies to the other parties to the proceeding. Any party may obtain a review of such action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A request for review from an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

- (i) The absence of; or
- (ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The request for review is accompanied by documentary evidence previously submitted to the Regional Director raising serious doubts as to the

Regional Director's factual findings, thus indicating that there are factual issues which can best be resolved upon the basis of the record developed at a hearing.

(4) The Regional Director's action is, on its face, arbitrary or capricious.

(5) The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

(b) Where the Regional Director dismisses a petition or directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the Regional Director, upon request, has so notified the parties in writing, any party may obtain a review of the Regional Director's action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A review of an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

- (i) The absence of; or
- (ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The Regional Director's action is, on its face, arbitrary or capricious.

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the Regional Director and copies served on all the other parties within 10 business days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall contain a complete statement setting forth facts and reasons upon which the request is based. The request shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. The request must comply with the formatting requirements set forth in § 102.67(i)(1). Requests for an extension of time within which to file the request for review shall be filed pursuant to § 102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests.

(d) Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The

opposition must comply with the formatting requirements set forth in § 102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to § 102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the

request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

Dated: December 10, 2019.

Roxanne L. Rothschild,

Executive Secretary.

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