IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 11-cv-02262 Judge James E. Boasberg

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION TO DISMISS COUNTS I AND III OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Howard M. Radzely (D.C. Bar #437957)
Charles I. Cohen (D.C. Bar #284893)
Jonathan C. Fritts (D.C. Bar #464011)
Michael W. Steinberg (D.C. Bar #964502)
David M. Kerr (D.C. Bar #475707)
David R. Broderdorf (D.C. Bar #984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5996

Philip A. Miscimarra (Pro Hac Vice)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, 5th Floor
Chicago, Illinois 60601
(312) 324-1000

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and COALITION FOR A DEMOCRATIC WORKPLACE

Robin S. Conrad (D.C. Bar #342774)
Shane B. Kawka (D.C. Bar #456402)
Rachel Brand (D.C. Bar #469106)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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Plaintiffs Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace (the "CDW"), by and through undersigned counsel, respectfully submit this memorandum in opposition to the Motion for Summary Judgment and Alternative Motion to Dismiss Counts I and III filed by Defendant National Labor Relations Board (the "Board" or "NLRB") and in further support of Plaintiffs' motion for summary judgment.

INTRODUCTION

There is much the parties agree on in this case. There is no dispute, for example, 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). And Congress expressly

authorized the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. There is likewise no dispute that "[t]he control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940).

The Board's authority and discretion, however, are not boundless. "Congress has left questions of law which arise before the Board . . . ultimately to the traditional review of the judiciary." *Id.* at 208; *see also, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 n.5 (1951) ("We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past."); *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 22 (1st Cir. 1999) ("Because the NLRA is silent as to the standard for reviewing nonfactual matters, the standard of review for such matters is provided by section 10(e) [5 U.S.C. § 706] of the Administrative Procedure Act. Errors of law are reviewed by the court de novo."). The Board does not have *carte blanche* to issue rules that directly contradict the National Labor Relations Act (the "NLRA" or the "Act") and overturn the delicate balancing of interests Congress has adopted in the Act. Defendant's position – that it can establish virtually any election procedure it wants without judicial review except in individual cases – is breathtakingly broad and plainly wrong. Moreover, two members of the Board lack authority to dispense with the statutorily mandated quorum requirement for taking action.

To be clear, Plaintiffs do not ask this Court to speculate about how the Final Rule will be applied in individual cases. And the outcome of this case does not depend on how discretion might be exercised in a particular matter. Instead, the issues here are much more

straightforward: namely, whether the Defendant had a quorum, as mandated by the NLRA, in adopting the Final Rule whether the Final Rule's election procedures are consistent with the NLRA, and whether the Final rule was adopted in a manner consistent with the Administrative Procedure Act ("APA").

This case, therefore, is an appropriate challenge to the Board's rulemaking under the APA. As we show below, the election procedures promulgated at 76 Fed. Reg. 80,138 (December 22, 2011) (the "Final Rule"), were approved without the statutorily required quorum, are inconsistent with the NLRA, and were promulgated in an arbitrary and capricious manner.[1]

SUMMARY OF ARGUMENT

In their initial brief, Plaintiffs demonstrated that the statutorily required quorum did not participate in the final agency action of approving the Final Rule; that the Final Rule is inconsistent with the NLRA and the delicate balance Congress formulated over the past 77 years; and that certain actions taken in issuing the Final Rule were arbitrary and capricious. The arguments made by Defendant in its memorandum do not refute these points. Accordingly, for the reasons set forth below and in Plaintiffs' opening brief, the Defendant's motion for summary judgment (or alternative motion to dismiss) should be denied and the motion for summary judgment filed by the Chamber and CDW should be granted.

First, Defendant has presented no evidence that the required quorum of three members participated in approving the Final Rule. A vote to publish a final rule "upon approval" of the rule by a majority of the Board is not and cannot be the final agency action under review in the present case. This case challenges specific provisions of the election rules that were "approved"

[1] To expedite this case and clarify the issues, Plaintiffs are focusing on these three arguments, which were discussed in detail in Plaintiffs' memorandum in support of their motion for summary judgment and are further articulated in this opposition brief.

with only two members of the Board participating. Approval of the Final Rule is an agency action that requires participation by a quorum of at least three members of the Board. It is undisputed that three members did not vote for or against the Final Rule. Accordingly, the Final Rule was issued without the statutorily required quorum and must be vacated.

Second, this Court should reject Defendant's attempt to insulate from judicial review the merits of the Final Rule. There is no merit in Defendant's contention that the Final Rule should receive "extraordinary deference" with a "no set of circumstances" standard of review. As the Supreme Court, the D.C. Circuit and courts within the district have held, challenges such as the one here are properly considered under the familiar *Chevron* framework. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Third, Defendant has failed to show that the Final Rule is consistent with Sections 3 and 9 of the NLRA. Section 3 allows the Board to delegate specific authority to Regional Directors subject to Board review of any action of a Regional Director. Section 9 provides for an appropriate pre-election hearing. The Final Rules inappropriately delegate authority to the *hearing officers*, not Regional Directors, to substantially limit the scope of pre-election hearings, preclude Board review, and force employees to participate in "quickie" elections. The text, structure, purpose, and legislative history of the Act, however, demonstrates that Congress intended: (1) that pre-election hearings would include taking evidence on *all* election-related issues; (2) that parties would have the right to seek pre-election Board review and a stay; (3) that hearing officers cannot be delegated decision-making authority; and (4) that the Act does not permit employees to be rushed into an election and deprived the fullest freedom in exercising their rights. In all of these respects, the Final Rule is inconsistent with the NLRA and the delicate balance Congress has made in the Act between efficiency and the need for a fair and just

process.

Finally, Defendant has failed to refute Plaintiffs' allegations that specific actions in issuing the Final Rule were arbitrary and capricious. The Final Rule substantially alters the election procedures. By breaking with prior practice and by misstating the effect of the Final Rule, which contrary to the Defendant's arguments did in fact overturn prior precedent, the actions by the two members that approved the Final Rule were arbitrary and capricious. Moreover, in this rulemaking any potential dissenter was explicitly precluded from participating in a way that could serve to inform or persuade the majority. This contradicted the Board's policy of accommodating dissenting opinions as an important part of the deliberative process and was arbitrary and capricious.

I. THE VOTE TO APPROVE THE FINAL RULE DID HAVE PARTICIPATION OF AT LEAST THREE MEMBERS, THE STATUTORILY REQUIRED QUORUM

Plaintiffs' memorandum in support of their motion for summary judgment demonstrated that the vote to approve the Final Rule was conducted without the congressionally-mandated quorum. (Pls. Memo. at 8-18.) There is and can be no dispute that the Board quorum requirement under the NLRA requires at least three members of the Board to participate in order for it to exercise its legal authority, except under limited circumstances not present here.[2] 29 U.S.C. § 153(b); *New Process Steel, L.P. v. NLRB,* 130 S. Ct. 2635 (2010). Nor is or can there be any dispute that only two members participated in the vote adopting the Final Rule. Indeed, this is conceded in the preamble of the rule: "Member Hayes has *effectively indicated his opposition to the final rule* by voting against publication of the NRPM and voting against

[2] As pointed out in Plaintiffs' opening brief, the Board not only has previously recognized that only a proper delegation to three or more members allows two members to act on behalf of the Board, it makes full use of this provision when the Board only has three members and one is precluded from participating. (Pls. Memo. at 11.) The Defendant has not argued, and there is no evidence, that the authority to act on behalf of the Board was delegated to the then-three members of the Board.

proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011." 76 Fed. Reg. at 80,146 (emphasis added). Defendant likewise does not contend in its memorandum that Hayes participated in the vote on the Final Rule itself.

Indeed, in yet another odd post-agency action revelation, on February 23, 2012, less than a week before this opposition brief was due and nearly a month after summary judgment briefs were filed, the Board's lawyers sent an affidavit signed by Member Hayes, which they stated would be attached to Defendant's opposition. Although this affidavit is not part of the administrative record, and although Defendant has not moved to supplement the administrative record, the affidavit confirms that Member Hayes did not vote on whether to approve the Final Rule: "On December 16, further modifications of draft Final Rule were circulated. . . . The draft, consisting of 207 pages with revisions noted, was approved . . . by Chairman Pearce and Member Becker. As approved, the rule was forwarded that day by the Solicitor for publication in the Federal Register. . . . I was not asked by email or phone to record a final vote." (February 23, 2012 Hayes Affidavit, at ¶ 10.[3])

Given the Defendant's recent circulation of the affidavit from Member Hayes, it appears that Defendant will continue to argue that adopting the Final Rule satisfied the statutory three-member quorum requirement because, even though only two members participated in the vote on the Final Rule, three members participated in two procedural votes: (1) the November 29, 2011 resolution, which provided, among other things, to proceed to drafting a final rule and that "no final rule shall be published until it has been circulated among the members of the Board and approved by a majority of the Board" (Def. Memo. at Exh. 2) and (2) a December 15, 2011

[3] Member Hayes' affidavit also noted that he voted against the December 15 "procedural Order" that was included with the NLRB Executive Secretary's January 30, 2012 affidavit as an Exhibit to the Defendant's Motion for Summary Judgment. (February 23, 2012 Hayes Affidavit, at ¶ 7.)

order, which similarly provided, among other things, that a final rule would be submitted to the Federal Register for Publication "[i]mmediately upon approval of a final rule by a majority of the Board" (Def. Memo. at Exh. 3). According to the Defendant, the November 29, 2011 Resolution and December 15, 2011 Order are the be-all and end-all of issuing the Final Rule. (Def. Memo. at 42-43.) A quorum, therefore, according to Defendant, need not participate in the vote "approving the final rule." *Id.* This position is inconsistent with the statute, *New Process Steel*, and flawed on multiple levels.

First, Defendant's argument that the December 15, 2011 Procedural Order is the final agency action and "nothing more is required" is simply incorrect. If Plaintiffs had brought this suit based solely on the December 15, 2011 Order, this Court would have properly dismissed the case as unripe:

> Different verbal formulations have been used to determine whether agency action is "final" within § 704's meaning. Is the agency's action "sufficiently direct and immediate" and does it have a "direct effect ... on day-to-day business"? *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967). Has the agency "completed its decisionmaking process" and is "the result of that process [one that] will directly affect the parties"? *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). . . . On the other hand, courts have defined a nonfinal agency order as one, for instance, that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939).

DRG Funding Corp. v. Secretary of Housing and Urban Development, 76 F.3d 1212, 1214 (D.C. Cir. 1996); *see also, e.g., Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986) ("The appropriateness of an issue for judicial review depends on such factors as: whether the agency action is final; whether the issue presented for decision is one of law which requires no additional factual development; and whether further administrative

actions needed to clarify the agency's position.").[4] Voting to proceed to drafting a final rule and voting to approve the final rule as drafted are plainly two distinct actions. Approval of the Final Rule – the agency action being challenged in this lawsuit – plainly requires the statutorily mandated quorum of three members to participate.

Indeed, without the text of the Final Rule there would have been nothing of substance for this Court to review. The December 15, 2011 Procedural Order was not final, and "further administrative action" — approving the Final Rule — was needed for the Board to adopt the Final Rule. Plaintiffs are clearly challenging the Final Rule itself, not the decision to proceed to draft (or publish) a not-yet-approved final rule.[5]

The fallacy of the Defendant's logic is perhaps best illustrated by an example. Under the Defendant's argument, if one member had been tragically killed in an accident after voting on the December 15, 2011 Order, but before the vote on the Final Rule, the two remaining members could have nonetheless voted to approve the Final Rule. This is clearly inconsistent with Section 3(b) of the NLRA's quorum requirement and the Supreme Court's decision in *New Process Steel*: "Congress *changed* that requirement to a three-member quorum for the Board. As we

[4] The statement on the December 15, 2011 Procedural Order that it shall constitute the final action of the Board does not and cannot excuse the failure to have a quorum for the final agency action challenged here. The D.C. Circuit has cautioned courts to be skeptical of agency attempts to characterize an action as non-final. *See American Petro. Inst. v. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."). The same must be true of attempts to characterize an action as final.

[5] Indeed, the December 15, 2011 Procedural Order effectively does nothing more than the November 29, 2011 Resolution. Both provide that the Final Rule will be published when approved by a majority of the Board. The December 15, 2011 Order, therefore, adds nothing to this analysis other than a second vote that the Defendant relies on for quantity, not quality: "The Board here voted twice to make these amendments . . . . Nothing more is required." (Def. Memo. at 42-43.) In addition, even if the December 15, 2011 Procedural Order were relevant, the January 30, 2012 signature on the order and accompanying affidavit (Def. Memo. at Exhs. 3 & 4) are not part of the administrative record because they were not before the Board when the Final Rule was issued. *See, e.g.*, *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("Ordinarily review is to be based on the full administrative record that was before the Secretary at the time he made his decision." (internal quotation marks omitted)).

noted above, if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two." 130 S. Ct. at 2644; *see generally* Pls. Memo. at 8-15.

Second, there is no basis for Defendant to argue that the quorum requirement somehow does not apply to the action of approving the actual final rule. The NLRA provides that "three members of the Board shall, *at all times,* constitute a quorum of the Board." 29 U.S.C. § 153(b) (emphasis added). The Defendant cites no authority for its remarkable proposition that approval of the final rule is not subject to this quorum requirement. As the *New Process Steel* Court explained in clear terms: "the Board quorum requirement . . . requires three participating members ***'at all times'*** for the Board to act." 130 S. Ct. at 2640 (emphasis added).

Third, Defendant's reliance on FCC rulemaking procedure is wholly misplaced. (Def. Memo. at 43 & n.25.) The Defendant asserts that the FCC "votes to adopt new rules, and then finalizes and publishes the final rules in the ensuing months. Only members who voted in *favor* of proceeding with the rule need approve the final text." (Def. Memo. at 43.) In the example cited by the Defendant, however, when the FCC voted to adopt the new rule on July 8, 2004, it voted on the text of the final rule. *See Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order* at ¶ 340 & Appendix C (FCC 04-168), *available at* http://www.800ta.org/content/fccguidance/FCC_04-168_08.06.04.pdf (last visited February 24, 2012) ("It is ordered that . . . the rule changes specified in Appendix C are adopted."). To be clear, the July 8, 2004 Order was not a procedural order to "draft" or "publish" the final rule once approved by less than a required quorum of the FCC. Rather, the text of the final rule was part of the order (Appendix C) adopted by the Commission. In addition, the vote was unanimous and thus clearly a quorum participated. *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/

DOC-249414A1.doc (last visited February 24, 2012).

Defendant is partially correct in that small changes were made to the rule between the time it was adopted by the full FCC and its publication. Specifically, in the intervening months there were three errata issued to correct "errors or omissions." 19 F.C.C.R. 14,969 et al., 2004 WL 1780979 (2004). These changes, to correct typographical and other non-substantive changes were not made by the Commission, but rather by the Chief, Wireless Telecommunications Bureau, under very restricted delegated authority: "The Chief, Wireless Telecommunications Bureau shall not have [rulemaking] authority . . . except such orders involving ministerial conforming amendments to rule parts, or orders conforming any of the applicable rules to formally adopted international conventions or agreements where novel questions of fact, law, or policy are not involved." 47 C.F.R. § 0.331(d). This example, therefore, does not establish, as Defendant asserts, that only those who vote in favor of drafting a final rule need vote to approve (or change) the text of the rule.[6] (Def. Memo. at 43.) To the contrary, it demonstrates that quorum requirement must be met in *adopting* and *approving* the final rule, and that even for eratta there must be appropriately delegated authority.

Here, the Defendant's creative efforts to try to end-run the quorum requirement must be rejected. As the *New Process Steel* Court aptly held: "In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import." 130 S. Ct. at 2644. Only two Board members participated in the vote to approve (or not) the Final Rule. The vote, therefore, was conducted

[6] The Defendant also cites an apparent statement from FCC chairman that "[t]here is nothing procedurally inappropriate in making changes, substantive or non-substantive, after adoption to further elucidate the rationale for the Commission's decision." (Def. Memo. at 43 n.25.) This statement, however, does not appear in the document cited and thus it is impossible to discern the context. In any event, there is no indication that less than a quorum participated in making the referenced post-adoption edits. Moreover, the fact that the edits are post-adoption distinguishes that situation from this case in which the rule itself was not adopted with a quorum participating.

without the congressionally-mandated three-member quorum. Because two members lacked the legal authority to issue the Final Rule, it must be set aside as "plainly contrary to law." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

II. THE SUBSTANCE OF THE FINAL RULE IS NOT INSULATED FROM JUDICIAL REVIEW

Perhaps in recognition of the fatal flaws in the Final Rule, the Defendant repeatedly contends that the substance of the final rule is essentially insulated from all judicial review at this time and can only be challenged in individual "as-applied" challenges. (Def. Memo. at 8-9; 28-29; 34-35.)[7] As explained below, this argument is plainly incorrect: Plaintiffs bring a straightforward challenge under the APA and the NLRA contending that the Final Rule exceeds the bounds of authority granted to the Board in the NLRA and that the Final rule is arbitrary and capricious under well-settled APA principles.

As an initial matter, the contention that there is "no harm in waiting for an as-applied challenge" (Def. Memo. at 30) is disingenuous at best. As explained in Plaintiffs' opening brief, the Final Rule effectively eliminates pre-election Board review. (Pls. Memo. at 31-34.) This is conceded in the Final Rule: "[Two Members of] the Board ha[ve] decided to amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election." 76 Fed. Reg. at 80,141. An as applied challenge, therefore, could not be made before an election. More importantly, as correctly noted in the Defendant's opening memorandum, direct judicial review of representation determinations is not available under the NLRA. (Def. Memo. at 9 (citing *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940)).) Under the NLRA, the only way to seek judicial review of specific election-related

[7] Defendant rightly does not contend that this Court lacks authority to decide whether the Final Rule was adopted with the legally required quorum. *See supra* pp. 5-10.

issues in a particular election is indirectly – after an election has been held and the results certified – by refusing to bargain with the union to induce the Board to prosecute an unfair labor practice complaint. *See, e.g.*, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 709 (2001).

In any event and more importantly, there is no basis in law to require such a circuitous path for a straightforward APA challenge to the Final Rule. Contrary to Defendant's contentions, this case does not ask this Court to speculate about how rules will be applied in individual cases (Def. Memo. at 29), there are no "abstract disagreements" (Def. Memo. at 28), and the outcome of this case does not depend on how discretion might be exercised in a particular case (Def. Memo. at 29). The claims in this case are thus not like the claims in *Sprint Corp. v. FCC*, 331 F.3d 952 (D.C. Cir. 2003), which concerned "how the Commission might improperly exercise its discretion in the future." *Id.* at 957. Instead, the claims in this case concern, for example, whether discretionary authority has been inappropriately delegated to the hearing officers and whether the right to seek pre-election Board review and a stay has been inappropriately eliminated. In other words, the issues in this case are whether the Final Rule as adopted is inconsistent with the NLRA and whether it was adopted in an arbitrary and capricious manner.[8]

Defendant advances two arguments in its effort to get this Court to avoid reaching the substance of the Final Rule. Both lack any merit.

[8] Defendant's suggestion that Plaintiffs' claims are not fit or ripe for review (Def. Memo. at 28-32) is therefore also misplaced. Plaintiffs are not challenging a discretionary process. The issues raised in this case do not require the Court to consider how the Board might exercise its discretion in individual situations. Instead the issues are, for example, whether the Board can foreclose the right to seek pre-election review or whether there is a statutory right to present evidence on voter eligibility in a pre-election hearing. These are straightforward *Chevron* questions that are clearly fit and ripe for review. *See, e.g. Nat'l Assoc. of Home Builders v. U.S. Army Corp of Engineers*, 417 F.3d 1272, 1281-82 (D.C. Cir. 2005) ("The appellants' APA challenge is 'purely legal': They allege that the Corps exceeded its statutory authority in drafting the NWPs . . . . We have also often observed that a purely legal claim in the context of a facial challenge, such as the appellant' claim, is presumptively reviewable." (citation omitted)).

First, Defendants contend that a "no set of circumstances" standard, rather than the more familiar and routinely applied *Chevron* rubric, governs Plaintiffs' substantive challenge to the final rule. (Def. Memo. at 8, 31.) For its argument, Defendant relies on *Reno v. Flores*, 507 U.S. 292, 301 (1993), which seemed to apply the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987), to the challenge of a regulation. The case law from both the Supreme Court and the D.C. Circuit, however, demonstrates that the *Salerno* and *Reno* "no set of circumstances" standard does not replace the familiar *Chevron* framework for facial challenges to agency regulations.

The argument that Defendant makes, to be clear, is that the *Salerno* and *Reno* standard applies to "facial challenges to a *discretionary* rule." (Def. Memo. at 28.) As explained above, Plaintiffs are not challenging the Board's application of discretion. Plaintiffs are challenging the Final Rule because it is inconsistent with the NLRA and was issued in a manner inconsistent with the APA. While there is some confusion about the application of *Salerno* and *Reno* by the D.C. Circuit, it is clear that it does not apply in a "facial" challenge of underlying legality of a rule:

> [W]e hold that the *Salerno* standard does not apply here. The Supreme Court has never adopted a "no set of circumstances" test to assess the validity of a regulation challenged as facially incompatible with governing statutory law. Indeed, the Court in at least one case, *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885, 107 L.Ed.2d 967 (1990), upheld a facial challenge under normal Chevron standards, despite the existence of clearly valid applications of the regulation.

Nat'l Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1407 (D.C. Cir. 1998). The D.C. Circuit also explained:

> Our own cases confirm that the normal *Chevron* test is not transformed into an even more lenient "no valid applications" test just because the attack is facial. We have on several occasions

> invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications. *See, e.g., Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 418–20 (D.C. Cir. 1994) (holding that agency exceeded statutory authority in enacting regulation concerning Medicare payment recovery, because rule plainly covered some situations in which recovery was barred by statute).[9]

Id. at 1407-08.

At least one decision in the D.C. Circuit has questioned whether *National Mining* was valid, but declined to answer the question. *See Amfac Resorts Int'l v. Dep't of Interior*, 282 F.3d 818, 827 (D.C. Cir. 2002) ("Whether despite *Reno v. Flores*, *National Mining* therefore must stand as circuit law unless and until the full court overrules it is a question unnecessary for us to answer."), *rev'd on other grounds, sub nom Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 537 U.S. 1018 (2002).[10]

Other decisions, however, have rejected application of the *Salerno* and *Reno* standard in general. *See, e.g., Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno*

[9] By contrast, "when the challenger's success turns on the assumption that the agency will exercise its discretion unlawfully," a facial challenge will be rejected "as unripe or meritless." *Nat'l Mining*, 145 F.3d at 1408. Here, as in *National Mining*, Plaintiffs "rely on no such assumption." *Id.*

[10] To add to the confusion, some decisions have applied the no set of circumstances approach without much explanation or analysis. *See Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2011) ("To prevail in their challenge to the Guidelines on their face the plaintiffs must establish that no set of circumstances exists under which the [Guidelines] would be valid." (internal quotation marks omitted)); *Air Transp. Assoc. v. Dep't of Transp*., 613 F.3d 206, 213 (D.C. Cir. 2010) (same). As the dissent in *Sherley* points out, these decisions do not address or resolve the confusion on this issue. 644 F.3d at 404 n.7 (Henderson, J. dissenting) ("Whether *Salerno's* no set of circumstances approach [applied by the majority] is properly applied in the absence of a constitutional challenge is not altogether settled in our Circuit."). In any event, to the extent the no circumstances standard applies, as explained above, it applies only where there is discretion at issue. It does not insulate review of rules that conflict with the statute, but nonetheless might have an application that is consistent with the statute. Nothing in the case law supports the argument that an agency can adopt an *ultra vires* regulation, but escape direct APA review by positing one or more applications that might be consistent with the statute. Indeed, the cases hold exactly the opposite. *See, e.g., Zebley*, 493 U.S. at 536 n.18 ("We fail to see . . .why a facial challenge is not a proper response to the systematic disparity between the statutory standard and the Secretary's approach."). Here as discussed in Section III, *supra* pp.18-32, the Final Rule plainly conflicts with the NLRA and as discussed in Section IV, *supra* pp. 32-38, the two members did not comply with the APA when they issued the Final Rule.

formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."); *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself.").

Courts in this District have likewise repeatedly rejected application of *Salerno/Reno* to statutory challenges like the instant case. For example, observing that "neither the Supreme Court nor the D.C. Circuit has consistently utilized the *Salerno* standard to review statutory challenges to administrative rules," D.C. District Courts have in prior cases declined to supplant *Chevron* with the stricter *Salerno* standard. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 39-40 (D.D.C. 2003); *see also American Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 188 (D.D.C. 2008) ("[E]valuating facial challenges to regulations on statutory grounds under *Chevron* . . . seems especially sound when, as here, plaintiffs challenge a regulation that embodies an agency's interpretation of statutory language.").

In any event, the *Salerno/Reno* formulation, even if applicable, is of no help to Defendant. The cases that seemingly apply that standard do so on the basis that the possibility that the regulation (or other agency promulgation) may be applied in a manner inconsistent with the statute does not provide a basis for a facial challenge. *See, e.g.*, *Bldg & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002). As the D.C. Circuit explained in the *Amfac* decision:

> *National Mining* dealt only with the no-set-of-circumstances formulation of *Salerno*. It did not mention [*Immigration and Naturalization Service v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) ("NCIR")] the opinion cited in *Reno v. Flores* for the proposition that *Salerno* applied to statutory challenges. Justice Stevens, writing for the Court in *NCIR*, held: "That the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without

> statutory authority." 502 U.S. at 188, 112 S.Ct. at 555. *NCIR*, without citing *Salerno*, echoed in a non-constitutional setting the sentence in *Salerno* following the no-set-of-circumstances test- "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," 481 U.S. at 745, 107 S.Ct. at 2100. See *Janklow v. Planned Parenthood*, 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) (memorandum of Stevens, J., on denial of certiorari).

282 F.3d at 827. As this description makes clear, courts that have applied the no-set-of-circumstances test to uphold agency action have done so where the argument was that the regulation could have been applied an impermissible way, not, as in this case, where the challenge was whether the regulation itself exceeded the statutory authority. *See generally*, *NCIR*, 502 U.S. at 188 ("That the regulation may be invalid as applied in some cases, however, does not mean that the regulation is facially invalid because it is without statutory authority.").

This approach is inherently logical, "[w]here the regulation flatly contradicts the statute, the contradiction affects every possible application, which is why facial invalidation is appropriate." Stuart Buck, *Salerno vs. Chevron: What to do About Statutory Challenges*, 55 Admin. L. Rev. 427, 464 (2003), *cited in Sherley*, 644 F.3d at 404 n.6. After all, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously express intent of Congress." *Chevron*, 467 U.S. at 842-43. Similarly, when considering an APA challenge "the courts do not even ask whether *any* application is consistent with the statute. Rather, the question of validity is decided by the agency's compliance with required procedures—and failure to comply can facially invalidate a regulation even if all application would otherwise be consistent with the statue." Buck, *Salerno vs. Chevron*, 55 Admin. L. Rev. at 463-64. In such cases the challenge is not aimed at the rule itself, but rather the procedure in which it was issued. The same regulation could be legally valid or invalid depending on whether the agency adhered to the APA. The question in this case is

whether the regulation promulgated by two Board members exceeds the statute and whether the two Board members complied with the APA, not whether a possibly valid regulation could be applied in an impermissible manner. In the present case, the *Chevron* standard clearly applies.

Second, Defendant argues that the Board, or in this case two members attempting to act on behalf of the Board, are entitled to "extraordinary deference" to craft representation election procedures. (Def. Memo. at 8.) However, while the Board indisputably serves an important function in the administration of the NLRA, Congress has not, as Defendant suggests, given the Board unfettered discretion to interpret and apply the NLRA in any way it sees fit. *See, e.g.*, *Waterman Steamship Corp.*, 309 U.S. at 208 ("Congress has left questions of law which arise before the Board . . . ultimately to the traditional review of the judiciary."). As the D.C. Circuit has held, "A Board's decision will also be set aside when it has no reasonable basis in law, fails to apply the proper legal standards, or departs from established precedent without reasoned justification." *Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007); *Northeast Beverage Corp. v. NLRB*, 554 F.3d 133, 138 (D.C. Cir. 2009) ("The Board attempts to find a 'labor dispute' in the facts of this case but its effort is unconvincing and does not amount to a reasonable reading either of § 2(9) or of [*NLRB v. Washington Aluminum*, [370 U.S. 9 (1962)]."); *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2005) ("Board orders will not survive review when the Board's decision has no reasonable basis in law or when the Board has failed to apply the proper legal standard."); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("We are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle.") (citation omitted).

The Final Rule, which substantially alters election procedures and is inconsistent with the NLRA, is subject to judicial review by this Court under the traditional APA framework in

Chevron and its progeny. And, as noted below and in Plaintiffs' opening memorandum, the Defendant plainly runs afoul of the APA and the NLRA.

III. THE FINAL RULE IS INCONSISTENT WITH NLRA

As set forth in detail in Plaintiffs' opening brief, over the past 77 years Congress has delicately balanced the need for efficiency in representation elections against the need for a fair and just process. (Pls. Memo. at 19-27, 32-33, 35-37.) While Congress considered ways to make the process more efficient, it also safeguarded against "quickie" elections. The Final Rule emphasizes, and in some instances distorts, Congress's efforts to make the process more efficient while ignoring specific provisions of the NLRA intended to safeguard the process.

For instance, in its brief, Defendant emphasizes that in 1947 Congress "did not change what was required in 'an appropriate hearing,' except to specify that it should precede the election." (Def. Memo. at 13 n.10.) The Board, however, ignores the evidence that Congress in 1947 intended the pre-election hearing as a forum to present evidence about *all* substantial issues regarding a representation election, including voter eligibility and supervisory status, even if some of these issues are not ultimately resolved until after the election. (Pls. Memo. at 21-27.) In addition, as discussed in detail below, the Defendant's persistent misstatement of the pre-election hearing issue, contending that it is about *resolving issues* at the pre-election hearing instead of *presenting evidence*, undermines its analysis throughout its Memorandum.

The Defendant also emphasizes that in 1959, Congress "authorize[d] the Board to delegate its powers in representation cases to regional directors subject to [Board] review." (Def. Memo. at 10-11.) The Board, however, ignores that Congress: (1) intended this provision as an *alternative* to scaling back pre-election hearings (Pls. Memo. at 25); (2) required the opportunity for parties to seek pre-election Board review of "any action" by Regional Directors (and the

opportunity to seek a stay of the election pending such review) (Pls. Memo. at 33); and (3) never permitted the Board to delegate any decision-making authority to hearing officers (Pls. Memo. at 31).

Defendant also misstates the effect of the Final Rule. In its brief, for example, Defendant states that "[a]mended 102.66 authorizes the *regional director* to decide whether to accept evidence about voting eligibility issues raised at the pre-election hearing." (Def. Memo. at 15 (emphasis added).) According to the preamble of the Final Rule, however, amended section 102.66 "ensure[s] that *hearing officers* presiding over pre-election hearings have the authority to limit the presentation of evidence." 76 Fed. Reg. at 80,141 (emphasis added); *see also id.* ("[T]he Board has determined . . . to vest the *hearing officers* with authority to limit the presentation of evidence.") (emphasis added). There is no indication that Congress intended the Board to delegate such authority to the hearing officers. In fact, Congress expressly prohibited them from having decision-making (or even decision-recommending) authority under the Act. "Such [appropriate] hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto." 29 U.S.C. § 159(c)(1); *see also* Pls. Memo. at 20.

When the full text, structure, purpose and history of the Act are considered, it is clear that the Final Rule is inconsistent with Sections 3 and 9 because it authorizes hearing officers to categorically exclude evidence on issues of voter eligibility, eliminates the statutory right to seek pre-election Board review (and a stay of the election), and violates employees' right to the fullest freedom in their exercise of their statutory right to choose whether to be represented by a union. Defendants cannot ignore statutory provisions intended to safeguard elections to "advance the statutory objection of promptly resolving questions of representation," 76 Fed. Reg. at 80,151.

See, e.g., *Hammontree v. NLRB*, 894 F.2d 438, 441 (D.C. Cir. 1990) ("We find that in deferring Hammontree's ULP claims [to accommodate a competing objective], the Board gave inadequate consideration to Congress' expressed intent in Section 10(a).")

A. The Board's Improperly Narrow View of "Appropriate Hearing" is Inconsistent with the Act.

1. The Supreme Court described scope of an "appropriate hearing" in *Inland Empire.*

As set forth in Plaintiffs' opening brief, the Supreme Court in *Inland Empire Council v. Millis*, 325 U.S. 697 (1945), concluded that the statutory purpose of an "appropriate hearing" under Section 9(c) is to provide for a hearing in which interested parties shall have a "full and adequate opportunity" to present evidence on all issues pertaining to the election. *Id.* at 708; Pls. Memo. at 22. The Supreme Court concluded in *Inland Empire* that a defective pre-election hearing was cured when "the Board gave full and adequate opportunity for hearing, *including the presentation of evidence*," after the election. 325 U.S. at 709. At that time, nothing in the Act "purport[ed] to require a hearing before an election." *Id*. at 707.

Following *Inland Empire*, Congress in 1947 amended Section 9(c) of the Act to make pre-election hearings mandatory. (Pls. Memo. at 23.) As Defendant correctly points out in its brief, Congress did not alter the statutory language or indicate it was changing what was required in the hearing; rather, Congress merely required the hearing be *before* the election. (Def. Memo. at 13 n.10.) What Defendant ignores, however, is that the *Inland Empire* Court found that the Board had held an "appropriate hearing" because the post-election hearing permitted evidence on "all matters," including the eligibility of employees whose votes would not have affected the outcome of the election. 325 U.S. at 707. (*See also, e.g.*, Pls. Memo. at 22 & n.12 (citing the underlying Board decision).) Applying the Defendant's logic, therefore, Congress accepted the Supreme Court's finding in *Inland Empire* that an "appropriate hearing" must provide a "full and

adequate" opportunity to present evidence on all issues pertaining to the election. (Def. Memo. at 13 n.10 ("Absent pertinent modification [of the statutory language,] Congress accepted the construction placed thereon by the Board and approved by the Courts." (citation omitted)).) Congress merely required that the "full and adequate" opportunity to present evidence take place *before* the election. *See Utica Mut. Ins. Co. v. Vincent*, 375 F.2d 129, 133-134 (3d Cir. 1967) ("Although under the amendment the hearing must invariably precede the election, neither the language of the statute nor the committee reports indicated that any change in its nature was intended.").

2. The 1947 legislative history demonstrates that Congress intended an "appropriate hearing" to include all issues related to the election.

Any doubts – and there can be none – that an "appropriate hearing" necessarily includes all issues relevant to the election, including eligibility of individual or groups of employees are fully resolved by the legislative history of the 1947 Amendment. That history clearly demonstrates that Congress intended that the pre-election "appropriate hearing" would provide the same "full and adequate" opportunity to present evidence as the Supreme Court described in *Inland Empire*. (Pls. Memo. at 24.) Senator Taft, the principal sponsor of the 1947 amendments, specifically stated that"[i]t is the function of hearings in representation cases to determine whether an election may be properly held at the time; and if so, to decide questions of unit *and eligibility to vote*." 93 Cong. Rec. 7002 (1947) (emphasis added); Pls. Memo. at 24 (discussing additional legislative history). Congress clearly intended for the pre-election hearing to provide an opportunity to present evidence on *all* issues reasonably related to the election.

3. In 1959, Congress reiterated the need for a "full and adequate" pre-election hearing.

When Congress amended the Act in 1959, it once again made clear that the pre-election hearing must provide a "full and adequate" opportunity to present evidence on *all* substantial issues related to the election. With these amendments, Congress adopted the language in Section 3(b) authorizing the Board to delegate its authority to Regional Directors, subject to the right to seek pre-election Board review of any action by the Regional Director and to seek a stay of the election. (Pls. Memo. at 25-26.) In order for the Board to decide whether to review a decision of a Regional Director and stay the election, the Board needs the evidentiary record from a "full and adequate" hearing. (Pls. Memo. at 28, 31.)

4. Defendant's and the Final Rule's interpretation of "appropriate hearing" would render impermissible the delegation to Regional Directors, which has been in effect the last 50 years.

The Final Rule's approach also leads to a fundamental conflict within the text of the NLRA, specifically between Section 9(c)(1) and Section 3(b), where Congress authorized the Board to delegate to the Regional Directors the important functions related to representation elections. If the Final Rule is upheld, Regional Directors would no longer have the statutory authority to render decisions on issues of voter eligibility or inclusion within the appropriate unit because, according to the logic of the Final Rule, the Board's ability to delegate its powers to Regional Directors is limited in Section 3(b) to the function of making an "appropriate unit" determination.

Section 3(b) specifically provides that "[t]he Board is also authorized to delegate to its regional directors its powers under section 159 of this title to *determine the unit appropriate for the purpose of collective bargaining*, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under

subsection (c) or (e) of section 159 of this title and certify the results thereof . . . ." 29 U.S.C. 153(b) (emphasis added). There is no distinction in Section 3(b) between "appropriate unit" and "voter eligibility" issues. Prior to the 1961 delegation to the Regional Directors, the Board itself decided *all* issues related to unit appropriateness and voter eligibility, based on the evidence taken at the pre-election hearing. *See, e.g., Musgrave Mfg. Co.,* 124 NLRB 258 (1959).

But the amendment to Section 102.64(a) redefines the sole purpose of the Section 9(c)(1) pre-election hearing to the narrow issue of whether a "question concerning representation" exists, and it does so by distinguishing between "appropriate unit" and "voter eligibility" issues. 76 Fed. Reg. 80,183. Both the Final Rule and the Defendant's memorandum admit that an "appropriate unit" determination is a prerequisite for finding a "question concerning representation" and therefore evidence on that issue must be taken at the pre-election hearing. 76 Fed. Reg. 80,164 ("[T]he regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question concerning representation exists . . . ."); Def. Memo. at 5 ("[S]o long as the unit is appropriate as described, that is enough to know whether there is a 'question concerning representation' and to direct the election."). The Final Rule, however, limits the "appropriate unit" determination to a general determination of the scope of the unit, without taking evidence on any dispute related to whether certain employees or groups of employees are included in that general unit description and eligible to vote. Under the Final Rule, such issues of voter eligibility and inclusion are treated as wholly divorced from determining the scope of the appropriate bargaining unit, with the introduction of evidence on voter eligibility issues postponed until after the election. 76 Fed. Reg. at 80,183.

Significantly, if voter eligibility and inclusion issues are indeed separate from "determin[ing] the unit appropriate" for bargaining as argued in the Final Rule, *then there is no*

statutory authority for the Board to delegate its powers under Section 9 to decide voter eligibility questions. Section 3(b) permits the Board to delegate only the authority to determine "the unit appropriate for the purpose of collective bargaining" and to determine "whether a question of representation exists." 29 U.S.C. § 153(b). None of the other bases for Section 3(b) delegation would cover voter eligibility disputes. Consequently, if the Final Rule's position is upheld by this Court, then under Section 3(b), the Board could not legally delegate its powers to decide voter eligibility questions, which "in each case" would then require resolution by the Board itself. 29 U.S.C. § 159(b). This is yet another incongruity in the Final rule that does violence to the legislative choices that Congress incorporated into the Act.

5. The Supreme Court reaffirmed the broad scope of an appropriate hearing in *Magnesium Casting.*

The Supreme Court's decision in *Magnesium Casting v. NLRB*, a decision curiously relied upon by the Defendant, further supports that "appropriate unit" determinations must include voter eligibility issues. 401 U.S. 137 (1971). *Magnesium Casting* arose from a factual dispute over the supervisory status for four employees, *id.* at 139-40, a dispute that the Final Rule would characterize as a voter eligibility dispute rather than a unit determination dispute. The Supreme Court, in stark contrast to the Final Rule, unambiguously classified this dispute as one falling within the broad category of appropriate unit determinations. *Id.* at 141-142 ("[R]egional directors have an expertise concerning unit determinations . . . [and] by Section 3(b) Congress did allow the Board to make a delegation of its authority over determination of the appropriate bargaining unit to the regional director."). Indeed, the Supreme Court could hardly have been clearer:

> Petitioner argues that plenary review by the Board of the regional director's unit determination is necessary at some point. Historically, the representation issue once fully litigated in the

> representation proceeding could not be relitigated in an unfair labor practice proceeding. We so held in *Pittsburgh Plate Glass Co. v. NLRB, supra*. *That case, of course, was decided when the determination of the appropriate unit was made by the Board itself.*

Id. at 141 (emphasis added); *see also id.* at 139 ("On filing of a representation petition, § 9(c)(1) provides that a hearing shall be held to determine if a question of representation exists and, if so, the *appropriate bargaining unit*.") (emphasis added). Defendant's position on the scope of the Section 9(c)(1) hearing cannot be reconciled with this U.S. Supreme Court precedent.

6. Board precedent has interpreted the NLRA to require evidence of issues such as voter eligibility be taken at the pre-election hearing.

Perhaps most damaging to Defendant's argument, its memorandum recognizes the possibility that "a voter eligibility issue [could] become[] intertwined with an appropriate unit issue," and then casually mentions that the Final Rule affords the Regional Directors discretion over taking evidence and issuing a pre-election decision on voter eligibility questions in this limited scenario. (Def. Mem. at 5.) This admission, however, shows that the Final Rule rests on an artificial distinction that is contrary to the statute and the agency's practice since the 1961 delegation to Regional Directors. In *Barre-National, Inc.*, 316 NLRB 877 (1995), for example, the Board declared that because the hearing officer refused to take evidence at the pre-election hearing on issues of supervisory status, "the preelection hearing held in this case did not meet the requirements of *the Act* and the Board's Rules and Statements of Procedures." *Id.* at 878 (emphasis added); *see also North Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (citing the Act as the basis for the pre-election hearing on voter eligibility); *Angelica Healthcare Servs. Grp.*, 315 NLRB 1320 (1995) (same).

7. The Defendant's remaining arguments fail to save the Final Rule.

Defendant raises a few additional arguments in an effort to try to save its invalid rule. None, however, provides any basis to uphold the Final Rule.

Defendant's argument that "voter eligibility issues" and "disputed supervisory issues" can be *resolved* after the election (Def. Memo. at 14-17) misses the point entirely. The issue is whether the Act entitles parties participating in pre-election hearings "to *present* witnesses and documentary evidence in support of their positions" even if those issues are ultimately not resolved until after the election. *Barre-National*, 316 NLRB at 878 (emphasis added). As the Board held in *Barre-National*, the Act requires the hearing officer to take evidence on these issues even though it is well-established "that there is no general requirement that the Board *decide* all voter eligibility issues prior to an election, although in some circumstances the size and character of the group of individuals whose status is left unresolved may be deemed a basis for invalidating the election." *Barre-National*, 316 NLRB at 879 n. 9 (emphasis added).[11]

Most of Defendant's arguments, therefore, fail to address this issue. (Def. Memo. at 14-17.) It is not relevant that in cases such as *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994), courts have recognized that the Board may defer *resolution* of questions of voter eligibility until after the election. The issue here is the right *to present* evidence on those issues at the pre-election hearing, so as to inform any decision about *whether* resolution of those issues should be deferred. It is also not relevant that "questions of supervisory status are 'heavily fact-dependent' and can be very difficult to litigate." (Def. Memo. at 16 n.14.) The statutory right to present evidence at the pre-election hearing is not limited to issues that are easy to litigate. And, similarly, it is of no moment that there has never been a right "to an authoritative determination

[11] Defendant simply ignores the fact that in *Barre-National* the Board concluded that *the Act* requires hearing officers to take evidence on issues such as supervisory status. (Def. Memo. at 15.)

of supervisory status prior to any election." (Def. Memo. at 17.) Plaintiffs are not arguing that there is such a right. Rather, Plaintiffs contend that the Board lacks the statutory authority to proceed blindly into a representation election without even the taking of evidence on all contested issues, including issues of voter eligibility and supervisory status – issues that could affect the validity of the election because they create uncertainty over which employees will ultimately be within a certified unit. *See Barre-National*, 316 NLRB at 879 n.9 ("[I]n some circumstances the size and character of the group of individuals whose status is left unresolved may be deemed a basis for invalidating the election.").

The Board's assertion that "[w]here there is no need to resolve a particular eligibility issue to determine whether there is a question of representation, there is no need to take evidence on that issue" is contrary to the statute. (Def. Memo. at 15.) The statutory purpose of the "appropriate hearing" under Section 9(c) is to provide an opportunity for the parties to present evidence on eligibility issues, even if resolution of those issues may ultimately be deferred until after the election. The evidence taken at the pre-election hearing, informs a Regional Director's pre-election decision on those issues, including a decision to defer resolution of the issue until after the election. By excluding evidence on voter eligibility issues, the hearing officer will prevent the Regional Director from making an informed decision (or any decision) on those issues. The hearing officer will be effectively recommending that those issues be deferred until after the election, which is contrary to the scope of the hearing officer's authority under Section 9(c)(1). *See* 29 U.S.C. § 159(c)(1) (providing that the hearing officer "shall not make any recommendations.").

Thus, if the Final Rule takes effect as is, the evidentiary hearing will fail to meet the required scope of an "appropriate hearing" under Section 9(c)(1) and will lead to an irreconcilable conflict between the provisions of Sections 9(c)(1) and 3(b).

B. Precluding Parties from Requesting Pre-Election Board Review and a Stay of any Action by a Regional Director is Inconsistent with the NLRA.

Plaintiffs have previously demonstrated that Congress decided (as alternative to scaling back the pre-election hearings) to authorize the Board to delegate authority to Regional Directors, *subject to* each party's right to seek pre-election Board review of "any action" by Regional Directors, including the right to seek a Board-ordered "stay" of any election. (Pls. Memo at 25-26, 31-34.) Plaintiffs have explained in detail how the right to seek review of "any action" was critical to the legislative compromise in 1959. (*Id.*) Defendant presents two arguments in support of its efforts to eliminate the statutory right to seek pre-election review and to request a stay of "any action" by a Regional Director. (Def. Memo. at 18-21.) Neither argument has any merit whatsoever.

First, Defendant argues that "it is perfectly reasonable to limit interlocutory review to issues that 'would otherwise evade review.'" (Def. Memo. at 18.) The case relied upon by Defendant for this proposition, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), however, is inapposite. (Def. Memo at 18.) *Cohen* addresses a completely different statute, Chapter 131, New Jersey Laws of 1945, N.J.S.A. 14:3-15 to 17. *Cohen*, 337 U.S. at 544 n.1. There was no dispute that the New Jersey law provided only for limited interlocutory review. *Cohen*, therefore, is of no aid to the Defendants.

The issue before this Court is not whether limited interlocutory appeals are generally favored or disfavored, but rather what type of Board review does the NLRA require. The NLRA clearly provides the parties the right to seek Board review of *all* actions of the Regional Director.

29 U.S.C. § 153(b).[12] By permitting review only of actions that "would otherwise evade review," the Board effectively eliminates the right to seek pre-election Board review and a Board-ordered stay of the election pending such review, contrary to the Act.[13] (How the Board may exercise its discretion to deny review in any particular case, is beside the point. The statute does not provide an absolute right to have the Board decide any issues pre-election or an absolute right to receive a stay.[14] Rather, the NLRA provides the opportunity to seek review and a stay, an opportunity which the Final Rule plainly, expressly and impermissibly forecloses.) By definition, a party cannot seek a stay of the election pending Board review if, as the Final Rule provides, the right to seek review is delayed until after the election.

Second, the Defendant's comparison of Board review under the Final Rule with a writ of certiorari (Defs. Memo. at 19-20), actually demonstrates why the Final Rule is *ultra vires* and must be struck down. Rule 10 of the Rules of the Supreme Court provides guidance on how the Supreme Court generally exercises its discretion. However, unlike the Final Rule, Rule 10 does not absolutely shut the courthouse door to whole categories of cases. Under Rule 10, parties may seek review and the Supreme Court retains its discretion to review any case: "The following, *although neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons the Court considers . . . ." (emphasis added). Had the two members modeled the Final Rule on Rule 10, the Final Rule would likely be consistent with the Act. Instead, the two

[12] By comparison, in 28 U.S.C. § 1292, the general interlocutory appeal provision, Congress expressly limits authority for interlocutory review to specific situations. *Id.* at § 1292(b) ("When a[n] . . . order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.").

[13] Interestingly, the Final Rule did not provide even a single example of when such a case might arise. And Defendants suggest the standard will never be met because in Defendant's opinion there will always be an adequate remedy: "to do the election all over again." (Def. Memo. at 31.) This is clearly not consistent with the NLRA.

[14] *Compare* 29 U.S.C. § 153(b) *with* 9 U.S.C. § 16(a)(1) (providing an absolute right to file an interlocutory appeal of certain preliminary orders regarding arbitration).

members clearly intended that the Final Rule preclude any pre-election Board review except under the extremely narrow circumstance where an issue could evade review.[15]

Moreover, any argument the Defendants might try to make that the rule does not foreclose a party's statutory right to seek pre-election review and a stay would be nothing more than a post-hoc rationalization inconsistent with express terms of the Final Rule:

> the [two members of the] Board ha[ve] decided . . . *to eliminate the parties' right to file a pre-election request for review of a regional director's decision* and direction of election, and instead to defer all requests for Board review until after the election.

76 Fed. Reg. at 80, 141 (emphasis added). Because the Final Rule forecloses a right plainly provided by the statute – the right to seek pre-election Board review and a Board-ordered stay – the Final Rule must be vacated. *See United Technologies Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) ("[W]e, like the district court, will reverse the agency action only if it is arbitrary, capricious, an abuse of discretion, or not in accordance with law." (internal quotation marks omitted).)

C. Delegation of Authority to Hearing Officer is Impermissible under the Act.

Defendant erroneously asserts that the Final Rule seeks "to eliminate unnecessary litigation and increase the timeliness of elections by enlarging the discretion of *Regional Directors* to resolve election issues in the manner they deem appropriate, subject to discretionary review by the Board." (Def. Memo. at 10 (emphasis added).) On its face, however, the Final Rule seeks to delegate authority to *hearing officers*, not Regional Directors. For example, the

[15] Thus, even if the two members who adopted the Final Rule wanted to inform the regulated community that it disfavored pre-election review and that a key factor in whether the Board accepted review (and/or granted a stay) was whether the issue could otherwise evade review, the Board could not eviscerate the statutory right to *seek* pre-election review and a stay. Rather, it should have done exactly what the Supreme Court did in Rule 10. This it did not do, and the Final Rule must be vacated and remanded back to the agency for any further action.

Final Rule seeks to "vest hearing officers with authority to limit the presentation of evidence." 76 Fed. Reg. at 80,141. Such delegation to hearing officers is inconsistent with the NLRA.

First, there is no basis for such delegation under Section 3, which provides that the Board is authorized to delegate its authority under Section 9 to its Regional Directors. 29 U.S.C. § 153(b).

Second, the authority granted to hearing officers under Section 9(c)(1) is very limited. The hearing officer presides over the pre-election hearing to take evidence and create a record, however, the hearing officer "shall not make any recommendations with respect thereto. 29 U.S.C. § 159(c)(1).

The Final Rule's attempt to delegate to hearing officers what is effectively decision-making (or at least decision-recommending) authority is another basis for striking down the Final Rule as inconsistent with the NLRA.

D. Quickie Elections are Inconsistent with Congress's Intent and the Act.

Finally, as explained above, the two members who adopted the Final Rule cannot ignore one objective of Congress to accommodate another. *Hammontree*, 894 F.2d at 440 (rejecting the Board's claim that a statutory provision was ambiguous in light of "competing" congressional objectives). Defendant asserts that there is no longer any purpose for a 25-day waiting period after the pre-election decision before holding the election. (Def. Memo. at 18-19). This ignores clear evidence in the legislative history that Congress intended to avoid "quickie" elections. (Pls. Memo. at 21-27, 36-37.)

Speed was not Congress's only (or even primary) objective in passing the NLRA. Even when considering whether to eliminate pre-elections hearings to speed up the election process, then-Senator John F. Kennedy Jr. considered a 30-day period for any election to be a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues."

105 Cong. Rec. 5361 (1959). (*See also* Pls. Memo. at 36.) Congress's primary objective in the NLRA is to give employees the "fullest freedom" in exercising their rights guaranteed by the Act. (Pls. Memo. at 37.) As a result of the Board's failure to accommodate this primary objective, and its myopic focus on expediting the election process, the Final Rule is inconsistent with the NLRA.

IV. ACTIONS BY THE TWO MEMBERS WHO PARTICIPATED IN THE VOTE TO ADOPT THE FINAL RULE WERE ARBITRARY AND CAPRICIOUS

As set forth in detail in Plaintiffs' opening brief, the two members who issued the Final Rule took actions that were arbitrary and capricious.[16] (Pls. Memo. at 38-45.) Nothing in Defendant's brief refutes Plaintiffs' arguments. As explained above, the Final Rule is substantial departure from existing practice and precedent. In cases such as *Barre-National, Inc.*, 316 NLRB at 878, for example, the Board held that the hearing officer's refusal to take evidence at the pre-election hearing on the supervisory status was inconsistent with both the NLRA itself and the regulations promulgated under the Act. The Final Rule, however, grants hearing officers discretion to exclude such evidence from the pre-election hearing. Although the Final Rule disputes that *Barre-National* was required by the NLRA, Defendant concedes that the Final Rule significantly alters prior practice. (Def. Memo. at 15 ("[T]he Board eliminated the regulatory predicate for this decision.").)

The Final Rule's about face will have a substantial impact on those regulated, including the employees, by affecting their "fullest freedom" in exercising their rights under the Act. In addition, these regulations do not simply govern the parties' interaction with the agency, but, as the Final Rule itself explained, also "govern the formation of collective bargaining relationships

[16] The Court need not reach whether the two members' actions issuing the Final Rule were arbitrary and capricious unless it concludes both that (i) the statutorily mandated quorum participated in adopting and approving the Final Rule and (ii) the Final Rule is consistent with the NLRA.

between employers and groups of employees in the private sector." 76 Fed. Reg. at 80,138.

Defendant's concern that subjecting its action to judicial scrutiny will discourage it from engaging in anything more than the statutory minimum process is ironic. (Def. Memo. at 34.) In this case, the Court's scrutiny is necessary to ensure that the Defendant complied with the statutory minimum process. "Courts are charged with . . . ensuring that agencies comply with the outline of minimum essential rights and procedures set out in the APA." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (internal quotation marks omitted).

Moreover, Defendant's assertion that notice and comment rulemaking does not apply because the Final Rule concerns "rules of procedure" is misplaced.[17] (Def. Memo. at 36.) "Exceptions to the notice and comment provisions of section 553 are to be recognized only reluctantly." *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (internal quotation marks omitted) (emphasis added). The procedural exception of section 553(b)(A), which Defendant attempts to invoke, does not extend to procedural rules, like the Final Rule, "that depart from existing practice and have a substantial impact on those regulated." *Schweiker*, 690 F.2d at 949 (footnote with citation omitted). The procedural exception to notice and comment thus clearly does not apply in this case.

The Defendant's assertion that it was not arbitrary and capricious for the two members to ignore prior practice regarding: (1) overruling precedent (and to incorrectly claim that they were not overruling precedent) and (2) allowing participation of a dissent, is wrong. Because the adoption of the final rule was arbitrary and capricious, the Final Rule must be vacated.

[17] Defendant's assertion that notice and comment rulemaking does not apply is irrelevant to the Platiniffs' substantive arguments and their arguments that the two members' departure (and failure to justify their departure) from past practices and precedents) was arbitrary and capricious.

A. It Was Arbitrary And Capricious To Break From The Board's Prior Practice Regarding Overruling Precedent And To Ignore The Fact That Final Rule In Fact Overrules Precedent.

In *Barre-National* and its progeny, the Board concluded that the NLRA requires the hearing officer to take evidence on a range of issues at the pre-election hearing. Defendant simply ignores the Board's prior position on what the Act requires. (Def. Memo. at 15.) Like the two members who issued the Final Rule, Defendant incredibly takes the position that the Final Rule does not overrule the Board's prior precedent (Def. Memo. at 41 n.22), despite the clear holdings of the Board to the contrary in prior cases.[18] As explained in Plaintiffs' opening brief, this ostrich-like approach is itself arbitrary and capricious because this issue was raised in comments to the proposed rule and was not adequately addressed. (Pls. Memo. at 40.) In light of the significant impact of the scope of the pre-election hearing right to this Final Rule, the two members' arbitrary and capricious actions require that the rule to be vacated. *See, e.g., E.I. Du Pont de Nemours and Co. v. NLRB*, 489 F.3d 1310, 1314 (D.C. Cir. 2007) ("Among other circumstances, the Board acts arbitrarily when it departs from its own precedent without a reasonable explanation."); *Titanium Metals*, 392 F.3d at 446 ("A Board's decision will also be set aside when it departs from established precedent without reasoned justification."); *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C.Cir. 1992) ("The Board, like any other agency, however, has a corresponding duty to give a reasoned justification for any departure from its prior policies or practices, and to present its decision in such form as to enable this court to pass intelligently on that decision." (internal quotation marks and citations omitted)).

[18] Defendant asserts that the Final Rule "supersedes" *Barre-National* and its progeny: "This is much the same as when Congress amends a statute. Congress does not necessarily mean that the courts misinterpreted the statute, Congress merely changes the statute itself, rendering the old cases inapplicable to the new Statute." (Def. Memo. at 41 n.22.) The Final Rule, of course, cannot supersede the NLRA.

Likewise, Defendant's position that the Board's prior practice of not overruling precedent absent three affirmative votes does not or should not apply to rulemaking is similarly flawed. (Def. Memo. at 40.) First, Defendant concedes that "as a matter of practice and discretion, [it] has traditionally refrained from overruling Board decisions unless there are three affirmative votes do so." (Def. Memo. at 40.) Even if the Board has departed from this practice a couple of times, Defendant clearly still recognizes it as the Board's usual practice. Defendant's attempt through analogy to split the Board into two entities – an adjudicatory body on the one hand and a regulatory body on the other – is unconvincing. In this case, there are not two separate Boards, one for adjudication and one for rulemaking. It is the same Board, which uses both adjudication and rulemaking to establish representation election procedures. Indeed, the Board itself has repeatedly explained that "the Board has interpreted and occasionally altered or created its representation case procedures through adjudication." 76 Fed. Reg. at 80,138; *see also Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking."); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011) ("Unlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication rather than rulemaking."). And Defendant cannot point to any rulemaking procedures that contradict its usual practice. Defendant's analogy also does not work because, as explained above, the Board has previously grounded the broad scope of the pre-election hearing in both the rule and the statute and Congress has not amended the statute.

Second, Defendant also asserts that the Board's practice of only overruling precedent should not apply to its rulemaking because "[t]he extended deliberation of notice and comment

rulemaking is a sufficient guarantee of stability." (Def. Memo. at 41.) This is an incredible statement, of course, in light of Defendant's (incorrect) argument that notice and comment does not apply. (Def. Memo. at 36.) In any event, as demonstrated in Plaintiffs' opening memorandum, it is illogical to apply this practice to only adjudication. (Pl. Memo. at 41.) Moreover, Defendant's argument is a non-sequitur. Notice and comment does not supplant the need for the Board's practice of not overruling precedent without three affirmative votes – a process designed to promote stability in of the Board's rules. *See Local Joint Exec. Bd. of Las Vegas*, 657 F.3d at 872 ("The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment."). The two members that issued the Final Rule were arbitrary and capricious by departing from this practice.

B. Not Accommodating Participation Of A Potential Dissenter Was Arbitrary And Capricious.

As Plaintiffs' demonstrated in their opening brief, the two members did not follow the Board's established procedure regarding the participation of dissenters. (Pls. Memo. at 44.) It cannot be disputed that dissenting opinions improve decision-making and strengthen final decisions. (Pl. Memo. at 42-43.) According to Justice Ginsberg, "My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation." Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn.L.Rev. 1, 3 (2010). In this rulemaking, participation by any dissenters was explicitly precluded from the deliberative process: "[A]ny such dissent or separate concurrence shall represent the personal statement of the Member and shall in no way alter the Board's approval of the final rule or the final rule itself." (December 15, 2012 Order, Def. Memo. Exh. 3.) Defendant's argument that it was not arbitrary and capricious for the two members to ignore

the Board's policy of accommodating dissenting opinions is misplaced.[19]

First, Defendant's reliance on prior practices of the Federal Energy Regulatory Commission and even Federal Courts is thus misplaced. (Def. Memo. at 41-42.) At issue in this case is the established procedure of the Board to accommodate dissenting opinions. Moreover, *In re Kirk*, one of the cases cited by the Defendant, demonstrates the very benefits of dissenting opinions described by Justice Ginsberg. After a tentative dissenting opinion was submitted in *In re Kirk* and a companion case, the majority opinion in the companion case "was 75% Rewritten on February 8 and again, on February 20, its content, responsive in part to observations in my dissent, was reduced 50%." 376 F.2d 936, 1130 (C.C.P.A. 1967) (Rich, J., dissenting). Therefore, although the majority apparently did not wait for Judge Rich's revised dissenting opinion before issuing the revised majority opinion, the tentative dissenting opinion was part of the deliberative process and informed the final decision.

In *Consolidated Aluminum Corp. v. TVA*, another case relied upon by the Defendant, TVA "sped up" its decision-making process by moving a meeting up about a week. 462 F. Supp. 464, 472 (M.D. Tenn. 1978) ("The change from May 25 to May 17 resulted from the . . . need to take action . . . while there is still a quorum."). Moving up a meeting is clearly distinguishable from the actions of the two-members who stifled internal debate by failing to follow the Board's established procedure.

Second, as explained above, Defendant's attempt to distinguish adjudication from rulemaking should be rejected. Tellingly, Defendants have failed to point to any rulemaking

[19] Moreover, it would have been nearly impossible for Member Hayes to have drafted a dissent. According to Member Hayes' February 23, 2012 affidavit (which again is not in the record), the 180 page draft Final Rule, which was approved by Chairman Pearce and Member Becker on December 16 and immediately sent to the Federal Register that same day, was circulated in the late afternoon only 7 days earlier, with multiple iterations sent in the intervening time period. (February 23, 2012 Hayes Affidavit, at ¶¶ 4-10.)

procedures that contradict its established procedure of allowing dissenters to participate. And as noted in Plaintiffs' opening brief (at 44-45), Congress intended for the Board to function like an "appellate court" regarding, among other things, the circulation of dissents "which one of the majority members [may see] . . . fit to answer." S. Rep. 80-105 at 9 (1947), *reprinted in* 1 LMRA Hist. 415.

Third, the Defendant's explanation that the two members had "good cause" to dispense with considering what was expected to be a dissent by Member Hayes, appears to be nothing more than an impermissible post-hoc litigation position. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (declining to provide deference to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). This reason was not given in the preamble of the Final Rule. Instead, the two members argued that the established procedure did not apply and asserted their opinion that "intramural debate between or among agency officials" is not an important part of rulemaking. 76 Fed. Reg. at 80,147. The procedure established by the two members for a subsequent "personal statement" is unprecedented at the Board and, by both design and explicit order, does not serve to inform the majority in a way that could change minds or improve the Final Rule.[20] The two members clearly gave no weight to the importance of dissent, as traditionally recognized by the Board and incorporated into its well-established practice and procedure. This about-face was arbitrary and capricious and the Final Rule should be vacated.

[20] Indeed, had the two members afforded Member Hayes the time to draft what was expected to be a dissent, he may have pointed out some of the flaws in the Final Rule described above, for example, the fact that the Final Rule impermissibly forecloses a party's statutory right to seek pre-election review and a stay. *See supra* p. 28. This discussion may have led to one or more of the issues being resolved and the need for a legal challenge to force Defendant to comply with the Act may have been avoided.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiffs' opening brief, the Chamber and CDW respectfully request that this Court deny Defendant's motion for summary judgment (and alternative motion to dismiss) and grant Plaintiffs' motion for summary judgment, hold that the Final Rule is unlawful, and set it aside.

Dated: February 28, 2012

Respectfully submitted,

/s/ Howard M. Radzely

MORGAN, LEWIS & BOCKIUS LLP
Howard M. Radzely (D.C. Bar #437957)
Charles I. Cohen (D.C. Bar #284893)
Jonathan C. Fritts (D.C. Bar #464011)
Michael W. Steinberg (D.C. Bar #964502)
David M. Kerr (D.C. Bar #475707)
David R. Broderdorf (D.C. Bar #984847)
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5996

Philip A. Miscimarra (Pro Hac Vice)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, 5th Floor
Chicago, Illinois 60601
(312) 324-1000

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and COALITION FOR A DEMOCRATIC WORKPLACE

Robin S. Conrad (D.C. Bar #342774)
Shane B. Kawka (D.C. Bar #456402)
Rachel Brand (D.C. Bar #469106)
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD Defendant.	Case No. 11-2262 Judge James E. Boasberg

PROPOSED ORDER

After considering Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment, their respective Memoranda in Support and Opposition thereto and the administrative record in this case, IT IS HEREBY

ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED;

ORDERED that Defendant's Motion for Summary Judgment is DENIED; and it is further ORDERED that judgment be entered in favor of Plaintiffs and the Final Rule of the National Labor Relations Board promulgated at 76 Fed. Reg. 80,138 (December 22, 2011) is hereby DECLARED unlawful and VACATED.

SO ORDERED this ___ day of _____, 2012.

_____
Honorable James E. Boasberg
United States District Judge