ORAL ARGUMENT NOT YET SCHEDULED
Nos. 18-1161 & 18-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 773,

Intervenor for Respondent.

On Petition For Review Of An Order Of The National Labor Relations Board
Case 04-CA-205359

AMICI CURIAE BRIEF IN SUPPORT OF UPS GROUND FREIGHT, INC. BY COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, HR POLICY ASSOCIATION, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FOOD DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, RESTAURANT LAW CENTER, AND RETAIL INDUSTRY LEADERS ASSOCIATION

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association certify that:

(A) Parties and *Amici*

Except for *amici curiae* Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association, all parties, intervenors, and *amici* appearing in the proceedings before the National Labor Relations Board and in this Court are listed in the Brief for Petitioners. *Amici curiae* are aware of the U.S. Chamber of Commerce's intention to file a brief of *amicus curiae*.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioner.

(C) Related Cases

As stated in the Brief for Petitioner, this case was not previously before this Court or any other court. *Amici* are not aware of any related cases pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amici curiae* Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association certify that: *amici curiae* have no outstanding shares or debt securities in the hands of the public and have no parent company. Therefore, no publicly held company has a 10% or greater ownership interest in each *amicus curiae*.

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GLOSSARY OF ABBREVIATIONS

ABC	Associated Builders and Contractors
ARD	Acting Regional Director
Board	National Labor Relations Board
CDW	Coalition for a Democratic Workplace
HR Policy	HR Policy Association
IEC	Independent Electrical Contractors
IFDA	International Food Distributors Association
Law Center	Restaurant Law Center
NAM	National Association of Manufacturers
NFIB	National Federation of Independent Business
NLRB	National Labor Relations Board
NRF	National Retail Federation
RILA	Retail Industry Leaders Association
Union	International Brotherhood of Teamsters, Local Union No. 773
UPS	UPS Ground Freight, Inc.

STATUTES AND REGULATIONS

All applicable statues, etc., are contained in the Statutory Addendum to Brief of Petitioner/Cross-Respondent, UPS Ground Freight, Inc., filed October 15, 2018.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The Coalition for a Democratic Workplace ("CDW") is a business association comprised of nearly 500 organizations[1] representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW members are joined by their mutual concern over changes to labor law that threaten entrepreneurs, other employers, employees, and economic growth. One of CDW's primary missions is addressing regulatory overreach by the National Labor Relations Board ("NLRB" or the "Board"). CDW believes that the NLRB has changed well-established labor law, including the election procedure administered by the NLRB, without regard to the negative consequences of doing so for employees, employers, and the economy.

CDW has been at the forefront of employer attempts to combat the Board's issuance and application of its 2015 Final Rule on Representation Case Procedures ("Election Rule" or "Rule"). CDW participated in the Board's notice and comment rulemaking process and was one of several plaintiffs that brought a facial challenge to the Rule before the United States District Court for the District of Columbia after the Rule was issued. CDW, by virtue of its vast representation of employers in nearly every industry across the country, maintains a distinct

[1] A full list of CDW's members is available at https://myprivateballot.com/about/.

perspective on the importance of a fair, transparent, and thorough election process for employees to choose whether they want to be represented by a union.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

HR Policy Association ("HR Policy") is the lead public policy organization of chief human resource officers from large employers, consisting of over 360 of the largest corporations doing business in the United States and globally. Collectively, HR Policy member companies employ more than 10 million people in the United States. One of HR Policy's principal missions is to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

Independent Electrical Contractors ("IEC") is a nonprofit trade association federation representing over 3,300 member businesses throughout the United States and educating over 10,000 electricians and systems professionals each year through world-class training programs. IEC contractor member companies are responsible for over $8.5 billion in gross revenue annually and are comprised of some of the industry's premier firms.

International Food Distributors Association ("IFDA") is the trade organization representing nearly 150 companies in the foodservice distribution industry, who operate hundreds of distribution facilities across North America and represent billions of dollars in annual sales. IFDA provides the important perspective of leading foodservice distributors on legislative and regulatory matters.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

National Association of Wholesaler-Distributors ("NAW") advocates the interests of direct member companies in the wholesale distribution industry, together with a federation of national, regional, state, and local associations and their member firms, which collectively total more than 30,000 companies with locations in every state in the United States.

National Federation of Independent Business ("NFIB") is the nation's leading small business association representing over 325,000 small and independent businesses and advocating the views of its members in Washington, D.C. and all 50 state capitals. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing approximately $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other food service outlets employing almost 14.7 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. The Law Center seeks to provide courts with the industry's perspective on legal issues significantly impacting the industry. Specifically, the Law Center highlights

the potential industry-wide consequences of pending cases, such as the one here, through amicus briefs on behalf of the industry.

The Retail Industry Leaders Association ("RILA") is a trade association of retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, more than 42 million American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

These *amici* have identified this case as a prime example of the Board's failure to police the discretion that the Election Rule affords Regional Directors. The then-Acting Regional Director's ("ARD") abuse of discretion is not limited to just this case; rather, it is characteristic of abuses of discretion in representation cases nationwide. The *amici* therefore respectfully submit this brief in order to urge the Court to grant UPS's Petition for Review. Granting review in this case will help establish parameters to ensure that the Board's implementation of the Election Rule meets the basic principles of due process and the ultimate goal of holding fair and well-informed elections, rather than slavishly pursuing an objective of speed at all costs in holding representation elections.

The Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, the National Association of

Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association contemporaneously move this Court pursuant to Federal Rule of Appellate Procedure 29(b) for permission to file this brief as *amici curiae*.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE *AMICI CURIAE* BRIEF

Pursuant to Circuit Rule 29(d), counsel for *amici curiae* Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association (collectively, *amici*) hereby certifies that *amici* are filing a separate brief from *amicus curiae* U.S. Chamber of Commerce (the "Chamber") in this case because it would be impracticable to join in a single brief given the distinct issues that the Chamber's brief addresses, which are not duplicative of the issues that the *amici* are presenting in their brief.

Amici believe that the Chamber's *amicus curiae* brief will focus on why the Court should not apply *Auer* deference to the Board's decision in this case and issues related to *Auer* deference, which are distinct from the issues and arguments raised by *amici*'s brief. *See Auer v. Robbins*, 519 U.S. 452 (1997).

Because the briefs of *amici* and the Chamber each address separate and distinct issues in this case, we respectfully submit that it makes sense to file separate briefs on these issues.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Counsel for *amici curiae* Coalition for a Democratic Workplace, Associated Builders and Contractors, HR Policy Association, Independent Electrical Contractors, International Food Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center, and Retail Industry Leaders Association authored this brief, and no party or counsel for a party authored any part of this brief. No person other than *amici* contributed money to fund the preparation or submission of this brief.

BACKGROUND

The National Labor Relations Board is the administrative agency charged with, among other things, conducting secret-ballot elections for employees to choose whether they wish to be represented by a union. In late 2014, the Board issued the Election Rule, which elevated speed above due process and other important policy goals, such as ensuring that employees are well-informed before they vote in an election, reducing post-election disputes, and promoting successful collective bargaining. *See* Representation Case Procedures, 79 Fed. Reg. 74,308 (Dec. 15, 2014) (codified at 29 C.F.R. Parts 101, 102, 103); *id.* at 74,436 (dissenting views of Members Miscimarra and Johnson) ("The Final Rule's emphasis on speed stands in marked contrast to all of the other contexts in which Congress, courts, and Federal agencies have emphasized the need to guarantee *more* time, not less, when individuals are expected to exercise free choice about representation and other significant matters in a group setting."); *see also* 29 C.F.R. § 102.67(b) ("The Regional Director shall schedule the election for the earliest date practicable consistent with these Rules.").

Because the Election Rule failed to balance these other important policy objectives, it was met with immediate judicial challenge by several employer organizations and associations, including CDW, who brought a facial challenge to the Rule in the United States District Court for the District of Columbia. *See*

Chamber of Commerce of U.S. v. NLRB, 118 F. Supp. 3d 171, 180–81 (D.D.C. 2015). The plaintiffs in that case identified the problems the Rule was likely to cause, including the curtailment of the pre-election hearing process and an overemphasis on speed by the Board and its Regional Directors in holding elections rather than on fairness and administrative due process for the affected parties. *Id.* at 206. Although the facial challenge was rejected by the District Court and the Rule was upheld, the District Court's ruling was based, in substantial part, on the "considerable discretion" that the Rule afforded to Regional Directors in its administration. *Id.* at 189. The District Court reasoned that the Rule would "not necessarily lead to the outcomes to which plaintiffs object[ed], because it afford[ed] the Board's regional directors considerable discretion to apply its provisions in a manner that [was] appropriate to individual circumstances." *Id.*

Since the District Court's decision in 2015, however, Regional Directors across the country have unfortunately, but predictably, not exercised their discretion in an appropriate manner. When employers have objected to Regional Directors' decisions, the Board and its General Counsel have generally failed to take action to contain the discretion afforded by the Election Rule. That leaves the Courts of Appeals as the next (and often last) forum to address the problems the Rule has created, on a case-by-case basis. For many employers, this process can be costly and time-consuming because it requires employers to exhaust the election

procedure and, if the union wins the election, to commit an unfair labor practice by refusing to bargain with the union in order to obtain judicial review of the Regional Director's underlying decision in the election case. As a result, Regional Directors' abuses of discretion often escape judicial review.

This case serves as a prime example of how the Rule has been applied to deny employers due process and how the Board has failed to remedy those problems. Consequently, this Court is now involved. The Court should grant UPS's Petition for Review to redress the wrongs in this case, which are characteristic of the problems experienced by many employers under the Rule as it has been applied by the Board and its Regional Directors.

ARGUMENT

I. The Election Rule, by Affording Too Much Discretion to Regional Directors, Has Created More Litigation for the Courts of Appeals.

One consequence of the discretion afforded to Regional Directors under the Election Rule is that it results in more post-election litigation. The overriding mandate of the Rule is speed at virtually any cost. *See* 29 C.F.R. § 102.67(b) ("The Regional Director shall schedule the election for the *earliest date practicable* consistent with these Rules.") (emphasis added). In rushing to an election, errors are made and issues are deferred until after the election.

In fact, the Board may never address a Regional Director's errors or abuses of discretion if the union loses the election or if the Regional Director's errors or abuses are not viewed to have a determinative effect on the outcome of the election. This leaves the Courts of Appeals as the only forum in which employers can obtain meaningful review of a Regional Director's decision. This problem was highlighted by Member Miscimarra in his dissent in this case:

> [B]ecause my colleagues deny review on most issues the Employer raises, the parties here—and most parties in other election cases—will *never* obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts, which defeats the purpose of mandating that elections occur on the "earliest date practicable."

UPS Ground Freight, Inc., 365 NLRB No. 113, slip op. at 6 (2017) (Miscimarra, dissenting).

The problem is exacerbated because the Board's decisions in election cases are not subject to direct judicial review. In order to obtain judicial review, the employer must refuse to bargain with the union (if the union prevails in the election), which will trigger a finding that the employer has committed an unfair labor practice. The Board's order in the unfair labor practice case can be appealed along with the Regional Director's decision in the underlying election case. *See AFL v. NLRB*, 308 U.S. 401, 405, 409–11 (1940); *see, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001). This circuitous path of litigation is, in many cases, the only way for an employer to obtain review of a Regional Director's decision implementing the Election Rule.

The Board's failure to adequately police the discretion afforded to Regional Directors is ultimately counter-productive because it leads to long delays in the final resolution of election disputes, as Member Miscimarra noted in this case:

> [T]his case demonstrates that the Election Rule's extensive changes to the Board's preelection procedures inevitably draw parties into a game of 'hurry up and wait.' . . . As the Board's decision reflects, this delay [of more than 17 months since the petition was filed] was at least in part due to the need to address important issues that were not resolved in the regional Director's Supplemental Decision.

UPS Ground Freight, Inc., 365 NLRB No. 113, slip op. at 6 (Miscimarra, dissenting).

The primary goal of the Election Rule, which is to expedite the election process, must be balanced against other equally important statutory goals and

protections, such as the right to an "appropriate hearing," the right of employers and employees alike to understand whether certain employees are eligible to vote in the election, and whether certain employees are actually supervisors (and agents of management). Regional Directors should exercise their discretion in a way that is more balanced and consistent with due process.

This case is a prime example of the Board's failure to constrain a Regional Director's abuses of discretion during the pre-election hearing process. *See, e.g.*, *European Imports, Inc.*, 365 NLRB No. 41, slip op. at 4 (2017) (Miscimarra, dissenting) (Regional Director's "refusal to permit litigation" over the date of the election caused the employer to be unfairly prejudiced and denied due process); *Yale Univ.*, 365 NLRB No. 40, slip op. at 2 (2017) (Miscimarra, dissenting) ("[M]oving forward with the elections here disregards the fundamental fact that important election-related questions will likely require many months and possibly years to resolve.").

The *amici* urge the Court to grant Petitioner UPS's Petition for Review in order to redress the Acting Regional Director's arbitrary decisions in this case, which are symptomatic of the virtually unrestrained discretion afforded to Regional Directors under the Election Rule.

II. The Hearing Officer and the ARD Failed to Decide Issues of Supervisory Status and Voter Eligibility Before the Election.

In this case, the Hearing Officer and the ARD abused their discretion under the Election Rule when they failed to decide a critical issue concerning the supervisory status of a lead union organizer, as well as a question of voter eligibility for certain dual-function employees.

A. The Decision Not to Address Frank Cappetta's Supervisory Status *Before* the Election Was Arbitrary and Capricious.

Whether an employee is a statutory supervisor impacts not only whether the individual can vote in the election, but whether the individual will be treated as an agent of management during the election campaign. As many courts have recognized, it is important that supervisors do not participate in union organizing campaigns because such participation "destroys laboratory conditions and prevents employees from exercising an uncoerced vote." *NLRB v. Island Film Processing Co.*, 784 F.2d 1446, 1451 (9th Cir. 1986) (citing *Wright Mem'l Hosp. v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985)); *Fall River Sav. Bank v. NLRB*, 649 F.2d 50, 56 (1st Cir. 1981)) (denying the NLRB's application for enforcement of its bargaining order because the hearing officer erred in finding that the conduct of purported supervisors did not taint the election); *ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB.*, 658 F.2d 934, 936 (2d Cir. 1981) ("It is well-established that the participation of a supervisor in a union election may in some circumstances so

undermine the employees' freedom of choice as to warrant setting the election aside.").

In this case, UPS litigated the supervisory status of dispatcher Frank Cappetta at the pre-election hearing and presented evidence that Cappetta played a central role in the union's organizing campaign. After the ARD stated that the supervisory taint issue would be "investigated administratively," the ARD declined to decide the issue before the election, so the Board was left to decide the issue *17 months after the election* and at a time when the ruling could not unwind the damage done to the election process. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1–3; *see also* Decision and Direction of Election at 13, *UPS Ground Freight, Inc.*, No. 04-RC-165805 (NLRB Jan. 5, 2016) ("D&DE")[2].

The ARD's refusal to decide this issue of supervisory status was arbitrary and an abuse of discretion. In rejecting the facial challenge to the Rule in 2015, the District Court found that the Rule did not *categorically prohibit* consideration of these issues at the pre-election stage and did not "preclude the Board from granting an employer's request for review and finding that a particular regional director abused his discretion in a particular instance in the future." *Chamber of Commerce*, 118 F. Supp. 3d at 201–02.

[2] Available at http://apps.nlrb.gov/link/document.aspx/09031d4581f6399d.

Failing to decide an issue of supervisory status involving one of the main proponents of the Union's organizing campaign is an abuse of discretion because it threatens the integrity of the election and leaves the employer in the dark as to whether the individual is a supervisor who can speak for management or whether the individual must be treated as an employee who is eligible to vote in the election. *See Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1272 (D.C. Cir. 2012) (citing *Ne. Iowa Tel. Co.*, 346 NLRB 465, 466 (2006)) (recognizing that a statutory supervisor's pro-union conduct may require setting aside an election); *Terry Mach. Co.*, 332 NLRB 855, 855–56 (2000) (same).

In other cases, the Board has found that employees whose supervisory status is in doubt may engage in conduct that will later require overturning the election. *See, e.g.*, *SNE Enters.*, 348 NLRB 1041, 1043–44 (2006) (setting aside the election result even though supervisors who engaged in pro-union conduct had been eligible voters in three prior Board elections, stating that it does not matter "that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors"); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004) ("The essential point . . . is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.").

Failing to decide an issue of supervisory status prior to an election – especially when the putative supervisor is actively campaigning for the union – is a fundamental problem under the Rule. As was pointed out by the dissenting Board members when the Rule was issued, an unresolved issue of supervisory status places the employer "in an untenable situation" because it creates uncertainty about whether the putative supervisors "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 Fed. Reg. at 74,438 n.581 (dissenting views of Members Miscimarra and Johnson).

The ARD's arbitrary failure to decide the issue in this case was an error that should be corrected.

B. The ARD's Failure to Resolve a Voter Eligibility Issue Before the Election Was Arbitrary and Capricious.

In addition to the supervisory status issue, the Hearing Officer refused to take evidence on, and the ARD refused to consider before the election, whether two potential members of the bargaining unit (including Cappetta), whom UPS had planned to argue were dual-function employees, were appropriately included in the bargaining unit of approximately thirty employees. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. 4. This was an error because it is imperative that voters understand the scope of the bargaining unit before the election so that they may "make an informed choice of a collective bargaining representative." *NLRB*

v. Parsons Sch. of Design, 793 F.2d 503, 507–08 (2d Cir. 1986) (finding a post-election change in unit size of about 10 percent denied employees the right to an informed vote); *see also NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys., N.Y., Inc. v. NLRB*, 743 F.2d 136, 140–41 (2d Cir. 1984) (ruling that reduction of unit by 50 percent and removal of two classifications rendered election results void).

Here, the ARD found that the Hearing Officer "appropriately excluded evidence" on the voter eligibility issue and concluded that the issue did not need to "be resolved before the election because the resolution of the issue would not significantly change the size or character of the unit." *See* D&DE at 13. There is, however, no question that it would be better to have such issues resolved before the election. Both the employer and the employees should know who is eligible to vote in the election and who will ultimately be included in the bargaining unit if the union prevails in the election. The Rule's overriding emphasis on holding an election at the "earliest date practicable," 29 C.F.R. § 102.67(b), causes Regional Directors to reflexively ignore these legitimate interests in the rush to an election. This single-minded focus on speed to the detriment of all other interests is a problem that is inherent in how the Rule is applied, and it should be corrected.

III. The NLRB Denied UPS an "Appropriate Hearing" in Violation of the Act and Due Process.

The ARD and the Hearing Officer made a series of decisions that denied UPS an "appropriate hearing" in violation of Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1), and normal principles of due process. An "appropriate hearing" is required because it provides the basis for the Board to determine whether and how an election shall occur. *Id.* Congress did *not* intend this hearing to be a perfunctory exercise. Quite to the contrary, Congress intended that the NLRB would "provide for a hearing in which interested parties shall have *full and adequate* opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification." *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 708 (1945) (emphasis added).

As UPS experienced in this case, however, the NLRB's Regional Directors and Hearing Officers have applied the Election Rule in a way that denies employers the "appropriate hearing" that the Act mandates.

A. UPS's Reasonable Requests for Extensions of Time Were Arbitrarily Denied.

A Regional Director's refusal to grant reasonable requests for extensions of time, for no other reason than to serve the Rule's objective of rushing the parties to an election at the "earliest date practicable," 29 C.F.R. § 102.67(b), most negatively affects the employer who is responding to the election petition. The

union controls when the election petition is filed and can strategically file it at a time that is most problematic for the employer – such as a holiday period when the volume of business is at its peak and the demands on management are most intense.[3]

In addition to not knowing when the election petition will be filed, the employer does not know which group of employees the union will seek to include in the unit for the election or which employees will be excluded. The employer also does not know the proposed date, time, location, or method (manual or mail ballot) of the election until the petition is filed. The employer must figure all of this out, and what legal and practical issues are presented by the union's petition, within a period of seven days after the petition is filed. The challenge of doing all of this in a week's time is exacerbated if the employer does not have labor counsel engaged and available to handle the petition immediately.

Once the union files the election petition on the date of its choosing, the Election Rule provides Regional Directors with almost limitless discretion to deny the employer any extension of the very tight deadlines established by the Rule.

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[3] The Board facilitates the union's ability to strategically time its election petition, and the consequent hearing date, by publishing a complete list of pre-determined hearing dates and deadlines for filing the employer's Statement of Position based on when the election petition is filed. *See, e.g.*, Operations-Management Memoranda 16-16, Hearing Dates and Statement of Position Due Dates, 2016–17, https://apps.nlrb.gov/link/document.aspx/09031d45821092db.

This includes the seven-day deadline to file a Statement of Position and to hold a pre-election hearing on the eighth day after the petition is filed. 29 C.F.R. § 102.63(a), (b). Extension requests for up to two business days may be granted based on ill-defined "special circumstances." *Id.* "Extraordinary circumstances," which are undefined, is the standard for any longer extension. *Id.* § 102.63(b)(1). The Board's former General Counsel issued guidance concerning the application of the Rule in 2015, which is still in effect, but that guidance did not provide any additional clarification as to how Regional Directors should determine whether a party's circumstances are "special" or "extraordinary." *See* NLRB General Counsel Memorandum 15–06 at 7 (Apr. 6, 2015).

Here, the ARD denied UPS's modest requests to extend the deadline for filing its Statement of Position, and to postpone the commencement of the pre-election hearing, *by only two business days*. UPS justified these requests by explaining that the Union had filed its petition near the business peak of the December holiday season and, given the demands placed on UPS's managers and employees during that time of the year, it would be exceedingly difficult for UPS to investigate and be prepared to litigate the multiple issues raised by the petition without a short extension.

The ARD arbitrarily decided to extend the Statement of Position deadline and to postpone the hearing each by *just one business day*, rather than the two days

requested by UPS. *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 5 (Miscimarra, dissenting). The ARD made this decision, apparently with little consideration (or acknowledgement) of the difficulties faced by UPS in responding to the petition – namely that "[t]he petition, hearing, and election spanned the year-end holiday season, arguably one of the busiest periods of the year for [UPS] and its employees[.]" *Id.* (Miscimarra, dissenting).[4]

This is the sort of arbitrary decision-making that CDW feared when it presented its facial challenge to the Election Rule in 2015. In that case, the District Court rejected CDW's argument that the Rule's pre-election scheduling provisions violated employers' due process rights because the Rule "accord[s] regional directors the discretion to grant an extension to an employer who needs additional time to file and serve its Statement of Position." *Chamber of Commerce*, 118 F. Supp. 3d at 206. The District Court reasoned that the Rule's "built-in flexibility" meant that an employer would not "necessarily be deprived of its due process rights in every set of circumstances." *Id.*

[4] The Regional Director's decision to afford only a one-day extension was actually of benefit to the Union. By extending the Statement of Position deadline by one day instead of two, UPS was required to file its Statement of Position on a Friday instead of the following Monday. Thus, whereas UPS received very little additional time to prepare the Statement of Position, the Union was given two extra days – Saturday and Sunday – to analyze UPS's Statement of Position and prepare arguments before the pre-election hearing on Monday.

In this case, however, the Election Rule's "built-in flexibility" unfortunately did nothing to protect UPS's legitimate interests and due process rights, even though UPS provided sound and compelling reasons for its modest extension requests and even though granting UPS's requests, in full, would not have prejudiced the proceedings or materially delayed the election.

B. UPS's Reasonable Requests for Sufficient Time to Present Evidence and Argument at the Hearing Were Arbitrarily Denied.

The same overemphasis on speed over due process infected the hearing itself. The Election Rule provides that "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." 29 C.F.R. § 102.64(b). In doing so, the Rule affords Hearing Officers the discretion to allow the parties "to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence." *Id.* § 102.66(a).

The Hearing Officer in this case arbitrarily denied UPS's requests for sufficient time to present witnesses and arguments during the crammed *one-day* pre-election hearing that began in the morning and carried on past 7:00 p.m. *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 5 (Miscimarra, dissenting). The Hearing Officer denied UPS's numerous requests to adjourn the hearing until the second day. *Id.* (Miscimarra dissenting). UPS made its initial request to

adjourn when it became clear that the parties would not be able to complete live witness testimony within a reasonable period of time on the first day of the hearing. When that request was denied and the witness testimony did not conclude until approximately 7:00 p.m., UPS requested that the parties be allowed to prepare oral arguments overnight and to present them the next day. *Id.* (Miscimarra dissenting).

The Hearing Officer denied this request – without any apparent rationale other than a desire to conclude the hearing on the day it began – despite the Election Rule's provision that hearings "shall continue from day to day until completed," the fact that the hearing had already continued well past normal business hours without a significant break, and the multiple issues on which UPS sought to present argument. *Id.* (Miscimarra, dissenting) (citation omitted). Not only did the Hearing Officer deny UPS's request to prepare its oral argument overnight, the Hearing Officer gave the parties just 30 minutes to prepare their oral arguments despite the Election Rule's provision that parties shall be entitled "to a reasonable period at the close of the hearing for oral argument." *Id.* (Miscimarra, dissenting).

The Hearing Officer's denials of UPS's requests were patently unreasonable and inconsistent with due process and the Act's "appropriate hearing" requirement.

C. UPS's Reasonable Request to File a Post-Hearing Brief Was Arbitrarily Denied.

A "reasonable period at the close of the hearing for oral argument" is the *bare minimum* requirement under the Election Rule. 29 C.F.R. § 102.66(h). Parties are entitled, "upon special permission of the Regional Director," to file written post-hearing briefs "within the time and addressing the subjects permitted by the regional director." *Id.* In this case, the ARD arbitrarily denied UPS's request to file a post-hearing brief, and then denied UPS a reasonable period of time to prepare its oral argument at the close of the hearing.

As Member Miscimarra explained in his dissent, all of these "procedural shortcuts" risk "produc[ing] an outcome that is unfair, arbitrary, contrary to the Act, and a denial of due process." *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 7 (Miscimarra, dissenting); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" (citations and internal quotation marks omitted)).

UPS – like many other employers under the Election Rule – was denied opportunities before, during, and after the pre-election hearing to marshal evidence, prepare arguments, and to have its position adequately heard.

CONCLUSION

For all of the foregoing reasons, the *amici* urge the Court to grant UPS's petition for review and deny the Board's cross-application for enforcement.

Dated: October 22, 2018

Respectfully submitted,

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Dated: October 22, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed the foregoing *Amici Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Service was accomplished by the CM/ECF system on all counsel of record.

Dated: October 22, 2018

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