No. 15-50497

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Associated Builders and Contractors of Texas Inc., et al.,

Plaintiffs/Appellants,

-v-

National Labor Relations Board,

Defendant/Appellee.

On Appeal from an Order of the United States District Court
for the Western District of Texas

BRIEF FOR *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Retail Litigation Center, Inc. discloses the following:

- Retail Litigation Center, Inc. is not a publicly held corporation or other publicly held entity.
- Retail Litigation Center, Inc. has no parent corporation.
- No publicly held company owns 10% or more stock in Retail Litigation Center, Inc.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* Retail Litigation Center, Inc. discloses the following:

- No counsel for a party authored this brief in whole or in part.
- No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief.
- No person other than *amicus curiae*, its members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

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STATEMENT OF INTEREST

The retail industry is one of the nation's largest private sector employers, supporting more than 20 million jobs and contributing significantly to annual Gross Domestic Product (GDP). The Retail Litigation Center, Inc. ("the RLC") is a public policy organization affiliated with the Retail Industry Leaders Association that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include some of the country's largest and most innovative retailers (publicly disclosed at www.rila.org/enterprise/retaillitigationcenter). The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for hundreds of billions of dollars in annual sales. The RLC seeks to provide courts with the perspective of the retail industry on important legal issues, and to highlight the potential consequences to the industry, as well as to the economy generally, of significant pending cases.

The RLC believes that rules issued by the National Labor Relations Board ("the Board") governing the processing of representation petitions ("the New Rules") are contrary to the Board's authority under the National Labor Relations Act and are otherwise arbitrary and capricious. Revisions to Rules Governing Representation Case Procedures, 79 Fed. Reg. 74308-74490 (December 15, 2014) (amending 29 C.F.R. § 102.60 *et seq*) (hereinafter cited as "New Rules, 79 Fed.

Reg. at __"). The New Rules impermissibly harm the rights of employers and employees by failing to ensure that critical threshold election issues, such as voter eligibility and voting unit inclusion, are decided *before* a representation election. The New Rules also deprive employees of meaningful access to information from their employers that can balance the single perspective that unions typically provide when seeking the legal right to represent employees. As discussed herein, the real world challenges that the New Rules present when applied in the retail context aptly illustrate the legal bases upon which the Court should invalidate the New Rules.

Given the impact of these regulations on employers and employees generally and retail employers and employees in particular, the RLC submits that it has a significant interest in the New Rules that justifies participation in this case. The parties to this case have consented to the RLC's participation as *amicus curiae*.

ARGUMENT

I. Under the Administrative Procedure Act, the Court Has Authority to Invalidate the New Rules to the Extent They Are Inconsistent with the National Labor Relations Act or Otherwise Arbitrary and Capricious.

Section 706 of the Administrative Procedure Act ("the APA") directs federal courts to set aside agency actions that are contrary to law, in excess of the agency's statutory authority, or that are otherwise arbitrary, capricious, or an abuse of discretion. Congress has provided for judicial oversight of the rules and regulations issued by federal agencies by providing:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. ***The reviewing court shall -***
>
> **…**
>
> ***(2) hold unlawful and set aside agency action, findings, and conclusions found to be -***
>
> ***(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;***
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> …
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (emphasis added). While the District Court below recognized its authority to overturn the New Rules, and appears to have correctly cited the

standards for doing so, it failed to consider the major defects of the NLRB's actions when it denied the Plaintiffs' motion for summary judgment and instead granted the Board's.

Specifically, while review of an agency's rulemaking activities is governed by a deferential standard, *Ring Precision, Inc. v. Jones*, 722 F.3d 711, 717 (5th Cir. 2013) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)), the APA leaves final determinations to the courts. The APA specifically instructs the courts to "decide" and "interpret" the law and mandates that the courts "shall" set aside agency actions when the agency action is "not in accordance with the law." 5 U.S.C. § 706(2). Further, the courts are empowered to set aside an agency's action deemed "arbitrary and capricious" under Section 706(2)(A) after "consider[ing] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Ring Precision*, 722 F.3d at 723. An agency is required to provide the reasoning for adopting a rule, and the Supreme Court has made clear that courts should set aside an agency's action if the agency, among other things, "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

The New Rules fail to withstand scrutiny under the APA's standards in numerous ways, as eloquently explained by Board Members Miscimarra and

Johnson in dissenting from the adoption of the New Rules. New Rules, 79 Fed. Reg. at 74430. However, rather than repeat the dissent or the arguments raised by the Plaintiff-Appellants, the RLC focuses on two key aspects of the New Rules that are particularly suspect and that have an especially severe impact on employers and employees in the retail industry: (a) those provisions that permit the NLRB's Regional Director to refuse evidence and decline to decide important issues of voter eligibility and unit inclusion *before* an election; and (b) those provisions that prioritize the speed of the election ahead of ensuring employees have access to balanced information and are fully informed before voting. The application of these elements of the New Rules to the retail industry illustrates why the New Rules cannot withstand APA scrutiny.

II. The Court Should Invalidate the New Rules to the Extent They Permit the NLRB's Regional Directors To Refuse Evidence and Avoid Deciding Issues of Voter Eligibility and Unit Inclusion Prior to an Election.

A. Sections 9(b) and 9(c)(1) of the Act Necessitate Decisions On Voter Eligibility and Unit Inclusion Prior to an Election.

The National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, sets forth the substantive rights and responsibilities of employees, employers and unions, as well as the authority of the National Labor Relations Board to administer the Act. Section 9 of the Act, 29 U.S.C. § 159, governs union representation elections Significantly, Section 9(b) requires the Board to decide the appropriate unit in each case. 29 U.S.C. § 159(b). To effectuate Section 9(b), Section 9(c)(1) provides in

relevant part: "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board, … the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1) (emphasis added).

Congress has twice rejected the view that the hearing requirement can be satisfied by post-election hearings like those prescribed by the New Rules. *See* New Rules, 79 Fed. Reg. at 74437 (explaining the actions taken by Congress and the related legislative history in the 1947 and 1959 amendments to the Act). Furthermore, in several cases over the years (including unanimous decisions issued by the Clinton Administration's Board), the NLRB has found that the denial of a pre-election hearing and decision on critical issues of voter eligibility and unit inclusion fails to meet the requirements of the Act. *See, e.g., North Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (failure to permit evidence of unit inclusion of several classifications of employees and directing such employees to vote subject to challenge and post-election proceedings "did not meet the requirements of the Act"); *Barre-National, Inc.*, 316 NLRB 877 (1995) (unanimous 5 member Board finding that the failure to permit evidence of supervisory status (and voter eligibility and unit inclusion) of 24 group and line leaders "did not meet the requirements of the Act"); *Angelica Healthcare Services Group*, 315 NLRB 1320

(1995) (a pre-election hearing must be held that affords the parties "full opportunity to present their respective positions and to produce the significant facts in support of their contentions").

Despite the language and the legislative history of the Act, as well clear NLRB precedent, the current Board majority dispenses with the requirement of a pre-election hearing as to any issue of voter eligibility and unit inclusion in the New Rules because the majority simply considers those issues less important than getting to a vote as quickly as possible. New Rules, 79 Fed. Reg. at 74383-74393. As set forth in the minority dissent, this "election now, hearing later" approach is contrary to the Act's requirement of an "appropriate hearing," fundamentally at odds with the Act's purpose of providing for free and fair elections, and fails a common sense test as to how best to protect employee rights to make an informed decision about unionization. *Id*. at 74430-74441. As a result, the New Rules are contrary to the Administrative Procedure Act and, as explained herein, the Court should invalidate the New Rules at least to the extent they permit issues of voter eligibility and unit inclusion to be deferred until post-election proceedings.

B. Refusal to Determine Voter Eligibility and Unit Inclusion Issues Prior to a Vote Severely Prejudices the Rights of Both Employees and Employers.

In any election, the two most important questions are (a) who gets to vote, and (b) what they are voting on. In the union election context, the latter question

includes voter knowledge of who will be included in the bargaining unit with them and who will not. For the Board majority to decide that these issues are somehow less important than the speed with which the vote occurs suggests that, like Alice, they have somehow fallen through a rabbit hole into an alternate universe where what is important is unimportant, and vice versa. Lewis Carroll, *Alice's Adventures in Wonderland,* Chapter 12 ("Sentence first – verdict afterwards.").

The challenge of determining voter eligibility and unit inclusion starts with the fact that the Board does not require a union to specify the unit with precision when the union first files a representation petition. As the Board majority recognizes, unions may (and often do) file petitions seeking to represent a bargaining unit vaguely described as "including all full time and regular part-time production employees" and "excluding all professional employees, guards, and supervisors as defined by the Act." New Rules, 79 Fed. Reg. at 74384. These terms are not self-defining, however, and their application in many modern workplaces (including those in the retail industry as discussed infra at Section II(C)) is far from obvious.

The Board majority recognizes that the failure to address voter eligibility and unit inclusion issues prior to the vote leaves unresolved questions of "(1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory exclusion and

cannot be in the unit." *Id*. at 74384. Nonetheless, despite putting its finger directly on the problem, the Board majority offers no solution. Indeed, it concludes that it is not really a problem at all, and certainly not a problem that needs to be resolved in advance of the vote. *Id*. at 74391 (Board majority proclaiming that "balanced against any asserted employer or employee interests in pre-election litigation of individual eligibility or inclusion questions is the statutory interest in prompt resolution of questions of representation").

This leaves Members Miscimarra and Johnson to explain in their dissent the very real problems that arise when employees are asked to vote in advance of understanding who is actually eligible to vote and what the bargaining unit may look like in the event the union prevails. *Id*. at 74438, fn. 581. For the members of the RLC, the following situations can easily arise in the retail store context:

- Store employees who may be "included" under the description of the unit may not know of their inclusion until after the union prevails and they are then advised that the union legally represents them, can seek mandatory dues or fee payment, and has the exclusive right (even over their objections) to negotiate as to their terms and conditions of employment.[1]

[1] As explained infra in Section II(C), many store employees hold positions in potentially, but not obviously, supervisory positions that would not know whether they are included in a unit description that vaguely states that the voting unit "includes all full-time and regular part-time store employees, but excludes … supervisors as defined by the Act." For example, many retailers have employees titled as "team leaders" performing various responsibilities. However, the title alone will not tell either the employee or his co-workers whether he is included in the possible bargaining unit. A similar problem exists in defining who is a "regular" part-time employee. It is almost certain that employees in these potentially large groups would not know before an election whether they can vote and whether they are potentially bound by the union's prospective right to exclusively represent them in all aspects of their employment relationship.

- An employee who is "excluded" may engage in debate with co-workers not knowing of his exclusion, thereby influencing the election (in either direction), while ultimately not being bound by the results.

- All employees, unaware of who is "in" and who is "out," are unable to determine what the bargaining unit will look like in the event the union prevails – an important consideration for an employee wanting to make an informed decision as to whether unionization is a good choice for her.

    - For example, the potential strength of a unit will depend on the employees who are included. An employee who believes that the unit includes certain employees who are later excluded may have voted for the putative bargaining unit because she thought that the unit would have more bargaining leverage than it actually does.

    - Similarly, an employee may vote for a union because the employee believes that certain other employees (such as lead cashiers and department managers who are arguable supervisors) will be excluded, only to learn after the vote that the union will now represent the interests of these employees in addition to her own.

- In the absence of a ruling on supervisory status, employees who may be statutory supervisors (and excluded from representational rights under the Act) may either participate in gathering support for the union (resulting in supervisory taint) or – since no ruling has been made declaring them supervisors – the employer may refrain from using them to communicate its position to employees (thereby depriving the employer of its free speech rights under the First Amendment and Section 8(c) of the Act).

- Allowing an election to proceed without first clearly and properly deciding voter eligibility and unit inclusion issues prejudices the rights of all parties by substantially increasing the likelihood of post-election litigation that then can take years to proceed through the processes of the Board (and often the federal courts of appeal).[2]

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[2] The Board's desire to rush the election by eliminating pre-election determinations of the issues substantially increases the likelihood of post-election challenges and litigation, including to the federal appeals courts, which will substantially delay the determination of the parties' rights and the commencement of any actual collective bargaining.

These problems are readily resolved by conducting the "appropriate hearing" required by the Act, and calling on the Board and its Regional Directors to issue decisions on these matters *before* the election. If the concern is that making decisions on voter eligibility and unit inclusion slows the process for getting to a vote, then the obvious solution is for the Board and its Regional Directors to issue decisions more quickly (or for the parties to stipulate to these issues and thus avoid the need for hearing and resolution by the Board). *See also* New Rules, 79 Fed. Reg. at 74459. To the extent that the Board majority argues that decisions cannot be made any faster, *see id.* at 74403 (transfers of cases to the Board "has led to extended delays in the disposition of petitions"), the Board underscores the relative complexity of the underlying issues, which in turn highlights the importance of a full hearing and due consideration of the issues in advance of a vote. Regardless, for employees and employers in the retail industry, including the RLC's members, these issues are critical and the Board's failure to consider them and make a reasoned decision during the regulatory process warrants the invalidation of the New Rules by the Court.

C. Specific Employee Eligibility and Unit Inclusion Issues That Arise in the Retail Context Illustrate the Need for Pre-Election Resolution of Such Issues.

In promulgating the New Rules, the Board majority made no effort to consider the practical application of the New Rules and their potential

disproportionate impact on some industries. This "one size fits all" approach ignores important aspects of the problem created by the "election now, hearing later" approach that arise when the New Rules are applied to typical retail store environments.

1. Due to Inconsistencies in Board Precedent, Supervisory Status in the Retail Environment Is Often Uncertain.

At first blush, the question of "Who is a supervisor?" may appear like an easy and routine one that can be answered quickly by an agency that has eight decades of experience in administering the Act. If only that were the case. Instead, the determination of supervisory status (and therefore voter eligibility and unit inclusion/exclusion of such individuals) has long plagued the Board and those practicing before it as a particularly troublesome and sticky issue that turns on an array of factual circumstances. As explained in the Board's own publication regarding the law and procedure of representation cases:

> Supervisory issues are among the most common in representation cases, and the Board volumes are replete with findings of both supervisory and nonsupervisory status in a veritable myriad of factual situations, sometimes simple but more often complex. A number of factors are considered in resolving supervisory issues. ... The problem, however, lies mainly in the application of these factors in order to ascertain from the relevant facts and circumstances whether or not the terms of the statutory definition are met. It is an individual's duties not job title that determines status.
>
> Supervisory status cannot be measured in individually distinct terms, nor can hard-and-fast rules be laid down. In each case, the differentiation must be made between the exercise of independent

> judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact.

NLRB General Counsel, *An Outline of Law and Procedure in Representation Cases* 221 (Higgins, ed., 2012).

For the retail industry and the RLC's members, the problem of determining supervisory status appears regularly, particularly in the store environment where a number of employees may hold positions that could be considered supervisory based on the individual facts of a given situation – including, assistant managers and "third keys,"[3] department managers, crew leaders, lead cashiers, customer service leads, and receiving coordinators. Supervisory status issues exist in both large stores that have 100 or more employees and in smaller stores that have only a handful of employees on staff and only a few employees on duty at any given time. So, for example, a retail employee with a "department manager" title might be considered a "supervisor" within the meaning of the Act in a larger store because there are more subordinate employees and despite more overall management presence in the store, but not a "supervisor" in a smaller store even though the employer may view him or her as having even more overall responsibility.

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[3] A "third key" is an employee who is frequently charged with opening or closing a retail store (usually in a smaller store environment) and, therefore, quite literally carries the keys to unlock the doors in the morning and lock them at night. Such employees typically do not have authority over hiring, firing or discipline decisions, but may (or may not) have authority to responsibly direct (and sometimes evaluate) subordinate employees in the store.

To further confuse the matter, decisions by the Board as to supervisory status in store environments are all over the map both in terms of the reasoning applied and the conclusions drawn. *See, e.g., Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) (finding that an employee who was left in charge of the store and another employee who oversaw 8 to 10 maintenance employees were not supervisors); *Wal-Mart Stores, Inc*., 335 NLRB 1310 (2001) (finding employee who evaluated other employees and therefore impacted pay increases was a supervisor); *Rite Aid Corp*., 325 NLRB 717 (1998) (finding pharmacy managers in some stores were supervisors, but those in other stores were not); *Sears, Roebuck and Co.*, 292 NLRB 753 (1989) (reversing determination by hearing officer that employee in charge of receiving area was a supervisor).

The RLC mentions these varying decisions not to criticize them, but to illustrate the fact that the determination of supervisory status is not necessarily easy or obvious, especially in the retail environment. These issues must be resolved whenever possible *before* a vote occurs so that employees know who is eligible to vote and who would be included in the bargaining unit if the union prevails – information that is essential to an informed employee decision about union representation. Employers, too, must know which employees are supervisors to understand which employees can lawfully be asked to present information on the employer's behalf (and for whose conduct the employer will be

responsible if the purported supervisor oversteps permissible bounds). *See, e.g.*, *NLRB v. Big Three Industries Gas & Equipment Co.*, 579 F.2d 304 (5th Cir. 1978) (conduct of low ranking supervisors was imputable to the company). There is no reasoned basis why such determinations should not be made before a vote occurs.

2. Due to Inconsistencies in Board Precedent, the Eligibility of Part-Time, Seasonal, and Other Workers Is Often Unclear.

Uncertainty regarding the status of part-time and seasonal employees further clouds the picture when employee eligibility issues are not resolved before an election. The retail industry, including the RLC's members, relies on part-time employees to complement the full-time workforce, especially to meet the needs presented by peak shopping times, such as in the early weekday evenings and on the weekends. For some retailers, the majority of employees are part-timers working as little as a few hours per week. Likewise, part-time employment suits some segments of the population who want to work only limited hours, including workers who have other jobs and are looking only for supplemental income, or those who are only interested in limited employment, such as some students or senior citizens.

Whether a part-time worker is properly included in a proposed bargaining unit is, however, subject to a range of variable and shifting standards. *See* NLRB General Counsel, *An Outline of Law and Procedure in Representation Cases* 255-263 (Higgins, ed., 2012). The Board has long held that "regular" part-time

employees should be included in a bargaining unit with full-time employees who perform similar work with similar wages, benefits, and other working conditions. *See Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003). But the standard for "regularity" has varied, with the Board frequently (but not always) finding that an employee who works as little as four hours per week over the most recent calendar quarter is a "regular" part-time employee. *Id*. (citing *Davison-Paxon Co*., 185 NLRB 21 (1970)). This standard has been applied at times in the retail context. *See, e.g., Allied Stores of Ohio*, 175 NLRB 966 (1969). But other standards have also been applied to include or exclude part-time employees in the retail environment. *See, e.g., Scoa, Inc.*, 140 NLRB 1379 (1963) (15 days in the prior calendar quarter); *Haag Drug Co*., 146 NLRB 798 (1964) (part-time employee excluded where he only worked when available from full time job); *G.C. Murphy Co.*, 128 NLRB 908 (1960) (on-call employee was excluded where employment was sporadic). Similar issues arise with respect to seasonal and student workers, which are two other segments of the labor force that are also employed by the retail industry. *See* NLRB General Counsel, *An Outline of Law and Procedure in Representation Cases* 260-263 (Higgins, ed., 2012) (discussing briefly the treatment of seasonal and student workers).

Again, the RLC mentions these issues of unit determination not to criticize any particular decision of the Board's, but rather to underscore that the need to

determine who may vote and who will be included in the future bargaining unit if the union prevails is not a hypothetical, isolated or simple issue. Representation cases and elections in the retail environment regularly present these issues and their outcome is often critical to whether a unit will ultimately be certified.

Employees also need to understand before the election whether part-time and full-time workers will be included together in a bargaining unit so that they . can make an informed decision. For example, some employees may want to have all full-time and part-time employees in a future bargaining unit together for leverage. Or, some full-time employees may seek to exclude part-timers because the full-time employees want their union to bargain to obtain additional work opportunities for full-time employees at the expense of the part-timers. How the specifics play out in any given situation is not the point; the point is that employees must understand who will be in a bargaining unit in order to ensure a free and fair election.[4]

[4] It bears noting that the Board's foray into creating department-only, micro-units further muddies the issue of appropriate unit scope thereby heightening the need for clarity on voter eligibility and inclusion issues. *See Macy's, Inc.*, 361 NLRB No. 4 (2014) (finding petitioned for unit including only employees in the fragrances and cosmetics department in integrated department store to be an appropriate unit for bargaining). The decision in *Macy's* is pending review already in this Court in Case No. 15-60022.

D. Applying the APA's Review Standards, the Provisions of the New Rules That Permit the Regional Directors To Refuse Evidence and Decline To Decide Issues of Voter Eligibility and Unit Inclusion Are Contrary to the Act and Arbitrary and Capricious.

The Court should find that the "vote now, hearing later" provisions of the New Rules simply do not withstand scrutiny under Section 706 of the Administrative Procedure Act. As stated, these provisions fail to comply with the mandate in Sections 9(b) and 9(c)(1) of the Act that the Board decide the unit and conduct an "appropriate hearing" whenever a representation petition is filed and an election is to be held – a mandate confirmed by the legislative history and indeed the Board's own precedent under decades of administering the Act. Beyond the Act's mandate, the Board majority never explains why such fundamental issues of voter eligibility and unit inclusion are unimportant in fulfilling its duties. Instead, the Board majority justifies its change in the rules by arguing that it has authority to alter the rules and by asserting (without reasonable justification) that the speed of the vote outweighs who can vote and what they are voting on.

In the end, the Board majority merely dismisses concerns regarding the impact on employee rights with a wave of the hand and a one paragraph rebuttal to critics that (erroneously) claims that the same result can happen under the prior rules stating:

> Nor does the Board agree that the proposed amendments improperly deprive employees of the ability to make an informed choice in the election. As explained above, under the amendments, as

> under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of the election. … Although the employees may not know whether particular individuals or groups ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that is also the case under the Board's current rules, because, as explained above, regional directors were free to defer deciding individual eligibility or inclusion questions prior to directing an election ….

New Rules, 79 Fed. Reg. at 74389. This rationalization by the Board majority ignores the decisions in North Manchester Foundry and Barre-National, but also tries to convert the rare occurrence in which a Regional Director may defer a decision now into a common (indeed, inevitable) one under the New Rules. More importantly, to justify this imprudent consequence of the New Rules by merely reciting that the prior rules might permit the same result is exactly the sort of arbitrary and capricious decisionmaking that the APA authorizes the federal courts to invalidate. See *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (courts may invalidate agency action that "entirely fails to consider an important aspect of the problem" or "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). The Board majority's analysis lacks the sort of "reasoned decision making" that would entitle it to the benefit of judicial deference.

Simply put, the Board is charged with setting the ground rules for elections. Yet, in doing so here, the Board majority promulgated a rule in which the threshold issues of who is eligible to vote and what they are voting on will not be decided

until after the vote. This aspect of the New Rules is, on its face, plainly "arbitrary and capricious" and should accordingly be invalidated by the Court.

III. The Court Should Invalidate the New Rules Because They Prioritize the Speed of the Election Over Ensuring Employees Have Access to Balanced Information and Can Make a Fully Informed Choice.

A. The Act Does Not Require the Board To Prioritize the Speed of Elections Over Other Considerations Critical to Ensuring a Free, Fair and Neutral Election Process.

In addition to the "vote now, hearing later" problem, the New Rules suffer from a "vote now, understand later" problem created by the Board's myopic insistence on prioritizing the speed of the vote above all other factors needed to ensure a free, fair and neutral election. New Rules, 79 Fed. Reg. at 74430-33. As explained by the dissent:

> The Rule improperly shortens the time needed for employees to understand relevant issues, compelling them to "vote now, understand later." … [The] Rule takes self-contradictory positions that are contrary to common sense, contrary to the Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing *enough* time for making important decisions. The Rule operates in reverse, making the available time as short as possible.

Id. at 74430. The New Rules are contrary to the Act's obvious purpose of ensuring employee free choice in deciding whether or not to vote for union representation.

The Board majority points to no provision of the Act that directs the Board to conduct elections as quickly as possible. *Id*. at 74432. Rather, in contrast to the New Rules, the Act's provisions are focused on ensuring a free and fair process –

one that is neutral, provides employees with access to information, and is consistent with American democratic principles and the exercise of free speech rights. *Id*. at 74432-33. The Board majority fails to accommodate these statutory principles, all in the interest of conducting a "speedy" election which has no meaningful support in the Act.

B. The Democratic Process Requires Employees To Have Access to Information from Their Employers on Unionization.

It should go without saying that employees must have access to information concerning both the pros and cons of union representation in order to have the fullest freedom of choice in exercising their right to vote. An uninformed vote does not empower employees to exercise their rights. Unions, however, may withhold less flattering information about the costs and risks of union membership, including the cost of dues and union expenditures, the loss of individual voice and bargaining rights, the risks and possible consequences of strikes, and other real limitations of union representation when trying to organize employees. Instead, employees often hear this information only from the employer. Obviously, to make an informed choice, employees need to hear all sides, have a chance to digest and discuss the information, and have an opportunity to challenge those who give them dubious information. Throwing large volumes of information at employees in a short timeframe provides little opportunity for a thoughtful and considered decision. In prioritizing a quick vote after the union has gathered support and

filed a petition, the New Rules undoubtedly and impermissibly put a thumb (if not a whole hand) on the union side of the election scale.[5]

These principles are self-evident, but the Court need only look to the Act itself and the Supreme Court to find authority for the fact that the Board majority's view that speed trumps knowledge is arbitrary, capricious and inconsistent with the Act. Section 8(c) of the Act – commonly known as the "free speech" provision – clearly embodies congressional intent to promote a robust exchange of ideas in the context of labor-related matters. And, the Supreme Court has observed that Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008); *see also Healthcare Ass'n of New York State v. Pataki*, 471 F.3d 87, 98-99 (2nd Cir. 2006) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present").

[5] Any claim to the contrary is disingenuous. Unions may gather support, obtain authorization cards, and campaign for weeks or months before a petition is filed – often without the employer ever knowing about such activity. The New Rules further incentivize a union to keep initial organizing efforts underground since the employer will have little time post-petition to share information that might counter what the union has provided to employees. If one of the goals of the New Rules is "transparency," as the Board majority claims, then an appropriate rule would require a union to provide notice that it was attempting to organize at the outset of such efforts, rather than waiting until it files a petition seeking an election.

C. In Promulgating the New Rules, the NLRB "Failed to Consider Various Important Aspects of the Problem," Which Provides Sufficient Basis for the Court To Invalidate the New Rules

In prioritizing speed *uber alles*, the Board majority failed to consider various important aspects of how best to protect employee rights. This failure is itself sufficient cause for the Court to invalidate the New Rules. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

1. The NLRB Failed to Consider the Importance of Employees Receiving Information From All Sides.

The Board majority, in its rationale supporting the New Rules, failed to consider the impact of its changes on employees' ability to receive information from both unions and employers (and, indeed, from their co-workers) before the election. While the Board majority notes that employers can communicate before a petition is filed (and found that "many" do), there was no meaningful analysis of whether employees will be able to receive information regarding unionization from all sides. Indeed, there was no analysis of how much time a union may spend campaigning and gathering support before the employer becomes aware of the union drive or how the shortened post-petition campaign period might impact the overall ability of employees to obtain information.

More tellingly, however, the Board majority completely disregarded the *value* to employees of receiving information from all sides. Rather than fulfilling Congress' "policy judgment … favoring uninhibited, robust, and wide-open

debate," *Chamber of Commerce v. Brown*, 554 U.S. at 67-68, the Board majority appeared to dismiss altogether the value that employees get from receiving information from their employer (and debating the issue with each other) as to the potential consequences of unionization.

2. The NLRB Failed To Consider That Its Own Rules Already Severely Limit Employer Access to Employees.

In a similar vein, the Board majority failed to recognize that existing Board law already severely limits the contact that employers are permitted to have with employees during the critical period between petition filing and election. Although an employer has access to employees in the workplace during this pre-election period, employers are prohibited from engaging in home visits, *Peoria Plastic Co.*, 117 NLRB 545 (1957), and restricted as to workplace communications in the final 24 hours before the vote. *Peerless Plywood Co*., 107 NLRB 427 (1953). In contrast, unions have unlimited access to employees outside the workplace, and modern technology (particularly, ubiquitous smart phones) essentially gives unions access to most workers at all times wherever they are. In issuing the New Rules, the Board majority did not consider the interplay of the new time limits with pre-existing restrictions that limit employee access to information and employers' ability to exercise their free speech rights.

3. The NLRB Failed To Consider the Impact on Communication with Part Time Employees, As Well As Those Whose Primary Language Is Not English.

Beyond the impact of the New Rules on access to information for employees generally, the Board failed to consider the significant impact that reducing the time for employer communication would have on particular groups of employees. Indeed, the Board's analysis appears to presume that all employees are full-time, English-speaking employees for whom information may be more available, accessible, and understood. But many employee groups fall outside the Board's assumption – including part-time workers and those for which English is not their primary language.

As noted above, the retail industry hires a large number of part-time employees both to fulfill retail needs and because some employees prefer part time work. In some cases, the number of part-timers may even exceed the number of full-time employees. Many of these employees may only work once or twice per week, and then for less than a full day. In issuing the New Rules, the Board majority failed to consider or address the impact of scheduling elections "as soon as practicable" on the ability of such part time employees to get sufficient information to make an informed choice. Indeed, if elections are held as early as 14 days following the filing of a petition, a retail employer may have only one or two opportunities to provide information on unionization to some of its employees.

Sufficient time for communication in the retail context is also important given the number of languages that retail employees in any one store may speak. Retailers hire employees from a broad swath of society, not all of whom speak English as their primary language. One retailer advises that in one store alone they have employees who speak multiple dialects of Spanish because the employees hail from Spain, Mexico, Colombia, Cuba, Puerto Rico, Guatemala and other countries in Central and South America. In addition the same store has associates who speak Urdu, Hindi, Arabic, Filipino, French, Portuguese, Cantonese, and Russian. In the real world, retail employers cannot simply wave a magic wand – or issue a regulatory pronouncement – to speed up the process; meaningful communication with such a diverse employee population about complex issues requires sufficient time.[6] The failure to consider these implications for such a significant portion of the American workforce was arbitrary and capricious and an abuse of discretion.

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6 It should also be noted that just because an employer may be able to communicate with a non-native speaker regarding routine daily job activities does not imply that it can just as easily communicate on issues of union representation and explain such complex and nuanced issues as exclusive representation, mandatory membership, dues and agency fees, union financial disclosures, the collective bargaining process, and the risk of strikes and replacement workers. Further, although employees who have been in the United States for many years may have some exposure and general understanding of American-style unionization, many workers from other countries may have misconceptions based on other models (e.g., even Canadian labor law is substantially different than U.S. labor law), and some workers may have almost no exposure to or understanding of unions and unionization.

D. The Shortened Pre-Election Time Period in the New Rules Impermissibly Tramples Employee and Employer Rights.

In sum, the overall goal and impact of the New Rules to shorten the time period between petition and election adversely affects the ability of employees to obtain information from their employers as to the pros and cons of unionization – information that may be critical to an employee's balanced, fully informed view prior to her vote. By elevating speed above all other concerns necessary to a free, fair, and neutral election, the Board exceeded its authority under the Act. Even if the Board was acting within its authority, its decision making is inconsistent with the purposes of the Act and failed to consider various important aspects of the problem. Accordingly, the Court should invalidate the New Rules under Section 706 of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, the Retail Litigation Center urges the Court to reverse the decision of the District Court below and to invalidate the New Rules issued by the National Labor Relations Board governing the conduct of representation petitions and elections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, the foregoing Brief for Amicus Curiae Retail Litigation Center, Inc. was served via the Court's CM/ECF Document Filing System upon all counsel of record.

Counsel also certifies that on August 17, 2015 the foregoing Brief was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF Document Filing System.

Counsel further certifies that (1) no required privacy redactions were called for to be in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document being filed in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

1. This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because this brief contains 6,929 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman 14-point type face.

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