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. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace ("CDW"), by and through undersigned counsel, bring this action against the National Labor Relations Board (the "Board" or "NLRB") seeking (1) injunctive relief to enjoin the NLRB from enforcing its final rule regarding changes to the representation election process (the "Rule"); (2) a declaratory judgment holding that the promulgation of the Rule is contrary to the National Labor Relations Act, 29 U.S.C. §§ 151-169. ("NLRA") and the First and Fifth Amendments to the U.S. Constitution, violates the Administrative Procedures Act , 5 U.S.C. § 702 ("APA"), and violates the Regulatory Flexibility Act , 5 U.S.C. § 611 ("RFA"); and (3) all other appropriate relief.

JURISDICTION AND VENUE

1. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 (Federal question jurisdiction). This action arises under and concerns provision of the NLRA, 29 U.S.C. §§ 151 - 169. This Court has jurisdiction to review a final agency action pursuant to the APA, 5 U.S.C.

§ 702 ("[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"), and the RFA, 5 U.S.C. § 611.

2. Venue is proper in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1391(c) in that: (i) Defendant resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim occurred in the District of Columbia; and (iii) Plaintiff the Chamber is headquartered in the District of Columbia and CDW does business in the District of Columbia.

3. This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706, and the RFA, 5 U.S.C. § 611, and because the Rule is contrary to the First Amendment to the U.S. Constitution and the NLRA, 29 U.S.C. §§ 158-159.

PARTIES

4. Plaintiff Chamber of Commerce of the United States of America is a non-profit organization created and existing under the laws of District of Columbia. The Chamber's headquarters are located at 1615 H Street, N.W., Washington, D.C.

5. The Chamber is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region throughout the country.

6. An important function of the Chamber is to represent the interests of its member-employers in employment relations matters, including matters relevant to the Rule, before the courts, the Congress, the Executive Branch, and independent regulatory agencies of the federal

government.

7. Chamber members are subject to the Board's Rule, and many of its members do not currently have unionized or entirely unionized employees. Those members confront representation-election issues arising from the Rule, and also engage in pre-election hearings governed by the Rule.

8. The Chamber is authorized to bring this action on behalf of itself, its members, and its member companies.

9. Plaintiff CDW represents millions of businesses of all sizes from every industry and every region of the country. The CDW's membership includes hundreds of employer associations as well as individual employers and other organizations. Included within the CDW's membership and represented by the CDW are many employers who will be required to comply with the Rule. Many such member employers reside in and do business in Washington, D.C.

10. Defendant NLRB is an independent federal agency. NLRB's headquarters are located at 1099 14th St., N.W., Washington, D.C.

11. The Board consists of a chairman and two members. Mark G. Pearce, in his official capacity, is Chairman of the Board.

12. Craig Becker, in his official capacity, is a member of the Board. His recess appointment as a member of the Board expires when the first session of the 112th Congress ends in December 2011 or January 2012.

13. Brian Hayes, in his official capacity, is also a member of the Board.

14. Lafe Solomon, in his official capacity, is the Board's acting General Counsel.

FACTUAL BACKGROUND

15. For more than 75 years the NLRB has conducted workplace elections to

determine whether employees do or do not wish to be represented for purposes of collective bargaining.

16. On June 21, 2011, the Board, with Member Hayes dissenting, proposed unprecedented and sweeping changes to the procedures regarding such workplace elections.

17. The next day, a Notice of Proposed Rulemaking ("Proposed Rule") was published in the Federal Register. 76 Fed. Reg. 36,812 (June 22, 2011). Among other things, the Proposed Rule was designed to significantly speed up the existing union election process and limit employer participation.

18. In his dissenting view, Member Hayes denounced the inappropriateness of the Board's "expedited rulemaking process in order to implement an expedited representation election process." *Id.* at 36,829. "Both processes . . . share a common purpose: To stifle debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation." *Id.*

19. On July 18 and 19, 2011, less than 30 days after the Proposed Rule was published, the Board held a two-day hearing at which some 66 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the proposed rule.

20. The comment period regarding the Proposed Rule closed on September 6, 2011, and the Board received *mor*e than 65,000 comments on the proposed rule (hereinafter "65,000 comments"). Many comments were opposed to the proposed rule.

21. On August 22, 2011, the CDW filed extensive comments objecting to the proposed rule. The CDW noted, among other things, that the proposed rule is "contrary to many provisions, policies and purposes of the National Labor Relations Act."

22. The Chamber also filed extensive comments on August 22, 2011, objecting to the

proposed rule. Among other things, the Chamber voiced serious concerns about the rulemaking process and noted that the "Board's shortening of the election process will deny employers and employees their free speech rights to communicate about union representation and collective bargaining."

23. A little over two months after the comment period closed, on November 18, 2011, the Board announced that it would hold a public meeting on November 30, 2011 during which NLRB members would vote on a resolution regarding whether to proceed to draft a modified final rule concerning election procedure changes. The Board did not, on November 18, 2011, release the resolution that was to be the subject of the November 30, 2011 vote.

24. On November 18, 2011, Member Hayes wrote a letter to Representative John Kline, Chairman of the House Committee on Education and the Workforce, documenting the extraordinary actions of the Board and its rush to make an "unprecedented and sweeping series of changes to the Board's representation election procedures" before Member Becker's recess appointment expires. Among the irregularities identified by Member Hayes was the Board's apparent intention to ignore its Executive Secretary Memorandum No. 01-01, which provides that a dissenting Board member shall be afforded 90 days to draft and circulate a dissent. In addition, Member Hayes alerted Representative Kline that the Board intended to ignore its longstanding tradition of overruling Board precedent only if a three-member majority voted to do so.

25. On November 21, 2011, Chairman Pearce responded by letter to Member Hayes. In that letter, Chairman Pearce acknowledged that the Board has a tradition of overruling its precedent only if three members voted to do so, but asserted, without support, that this tradition does not apply to a rulemaking. Chairman Pearce also argued, again without any support, that

Executive Secretary Memorandum No. 01-01 does not apply to a rulemaking.

26. On November 29, 2011 at approximately 2:30 p.m. Eastern Daylight Time (EDT), the Board released to the public the resolution to be voted upon at the November 30 meeting.

27. On November 30, 2011, at approximately 2:30 p.m. ETD, the Board commenced its meeting and voted 2-1 to adopt the resolution released the day before, including certain changes that differed from those set forth in the Notice of Proposed Rulemaking.

28. Notwithstanding the opposition to the proposed rule and criticism of the irregular and hurried rulemaking process, on information and belief the Board promulgated the Final Rule on or about December 20, 2011.

29. On information and belief, the Chairman Pearce and Member Becker voted in favor of the Final Rule. On information and belief, Member Hayes voted against it.

30. On information and belief, as of December 20, 2011, no comprehensive summary exists that reproduced or categorized each portion of every comment pertaining to each of the respective provisions set forth in the Proposed Rule. It does not seem possible that during the period between June 22, 2011 to December 20, 2011, any Board Member, even with support from his/her regular staff, could read all 65,000 comments.

31. On information and belief, the Final Rule overrules existing Board precedent and, contrary to longstanding Board tradition, does so upon the affirmative votes of only two Board members.

32. The hasty action of the Board to promulgate the Final Rule was taken just before the expiration of Member Becker's recess appointment, which will reduce the Board to two members thereby preventing it from taking any further action. *See New Process Steel v. National Labor Relations Board*, 130 S. Ct. 2635 (2010).

33. In promulgating the Final Rule, the NLRB violated the APA, 5 U.S.C. § 706 and the RFA, 5 U.S.C. § 611. The Final Rule is also contrary to the NLRA, 29 U.S.C. §§ 151-169, and the First and Fifth Amendments.

CLAIMS FOR RELIEF

COUNT I
(The Final Rule is Not in Accordance With the NLRA, Exceeds Statutory Authority, and is Contrary to the First and Fifth Amendments)

34. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 33 of this Complaint, as though fully set forth below.

35. The NLRA gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156.

36. Section 9(c) of the NLRA provides that, when a petition for a representation election is filed, the Board must investigate that petition and hold a pre-election evidentiary hearing to determine if a question concerning representation exists. 29 U.S.C. § 159(c)(1). Section 9(c) further provides that the Board shall direct that a secret ballot election be held if, upon the record of that hearing, a question concerning representation exists. *Id.*

37. The Rule, however, on information and belief, substantially curtails the statutorily mandated pre-election hearing.

38. At the November 30, 2011 hearing, Chairman Pearce and Member Becker stated that this amendment to the Board's Rules & Regulations would permit the hearing officer to reject evidence as to the supervisory status of employees included in the putative bargaining unit and defer consideration of any such issue until after the election. This amendment would similarly authorize the hearing officer to reject evidence as to the eligibility of other employees

to vote in the election.

39. On information and belief, the Final Rule also eliminates a party's right to seek Board review of a Regional Director's pre-election rulings – which is deferred until after the election is held – and even then the Final Rule makes any review by the Board discretionary. Therefore, under the Final Rule, union representation elections may occur without any decision by the NLRB, at any time, regarding the unit that is appropriate for purposes of collective bargaining.

40. Section 9(b) of the NLRA provides that "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act," the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b).

41. On information and belief, by permitting the hearing officer to reject evidence as to the eligibility of certain employees to vote in the election, by deferring any hearing, ruling or availability of Board review regarding important issues until after the election, by making Board review discretionary, and by depriving potential unit employees of relevant information, and by decreasing the available time for employees to decide whether they favor or oppose union representation, among other things, the Rule fails to assure employees the "fullest freedom" in exercising their rights under the Act and is otherwise contrary to the Act.

42. On information and belief, by curtailing pre-election hearings and eliminating pre-election requests for Board review, the Rule violates the Fifth Amendment's guarantee of due process of law.

43. Section 8(c) of the NLRA protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice

under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "merely implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

44. By guaranteeing their freedom of speech, Congress clearly intended that employers would be given the opportunity to participate in the election process. Specifically, Congress intended that employers would have the opportunity to communicate with its employees on the subjects of union organizing and collective bargaining.

45. The Rule, however, on information and belief, curtails an employer's right to communicate with its employees by substantially shortening the election period. Further, by authorizing the hearing officer to reject evidence and defer ruling on the supervisory status of certain employees, the Rule prevents employers from exercising their Section 8(c) right and the First Amendment to communicate their views through their supervisory agents.

46. The Board's actions are not in accordance with law, are contrary to constitutional rights, and exceed statutory authority. 5 U.S.C. § 706(2)(A)-(C).

47. Unless enjoined, the Rule will cause immediate, irreparable damage to Plaintiffs and their members. Without immediate injunctive relief, elections held under the final rule will be adversely impacted and the rights of Plaintiffs and their members will be violated, including but not limited to their right under Section 8(c) of the Act to communicate with their employees during the election process. There is no remedy for such harm.

48. At the same time, the NLRB will suffer no harm as the result of issuance of injunctive relief. Plaintiffs, therefore, request that bond be waived.

COUNT II
(The Board's Actions are Arbitrary, Capricious, and an Abuse of Discretion)

49. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 48 of this Complaint, as though fully set forth below.

50. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)).

51. As pointed out in Member Hayes's dissent to the Notice of Proposed Rulemaking, the Board used "a rulemaking process that is opaque, exclusionary, and adversarial." 76 Fed. Reg. at 36,830.

52. The Board rushed through the rulemaking process because it was committed to put the Rule in place before the end of Member Becker's recess appointment, following which there would be no majority support among Board members in favor of the Resolution or the Final Rule and the Board itself would be reduced to two members, rendering it incapable of further action.

53. A little over two months after the period for submitting comments closed, the Board announced that it would consider a modified version of the proposed rule, held a meeting one day after disclosing the contents of the modified rule, and did not provide the public with an opportunity to consider or submit comments on the modified rule.

54. As a result, the Board failed to meaningfully consider numerous legal, policy, and economic considerations, or to articulate a rational basis for rejecting them.

55. The Board also contravened, without rational basis, its own internal operating rules and procedures by, *inter alia*, depriving Member Hayes of any reasonable opportunity to

consider the text of the final rule or draft and circulate a dissent for consideration by the two-member majority prior to the issuance of the final rule.

56. In addition, on information and belief, the Board contravened, without rational basis, its longstanding tradition of overruling existing Board precedent only by the affirmative vote of three members of the Board.

57. The actions of the NLRB are arbitrary, capricious, an abuse of discretion, and were without observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

COUNT III
(The Board's Action Violated the RFA)

58. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 57 of this Complaint, as though fully set forth below.

59. The RFA requires an agency to "prepare and make available for public comment an initial regulatory flexibility analysis" describing, among other things, "the impact of the proposed rule on small entities." 5 U.S.C. § 603(a).

60. An agency can avoid preparing an initial regulatory flexibility analysis if the head of the agency certifies that the rule, if promulgated, will not have a significant impact on a substantial number of small entities. 5 U.S.C. § 605. A factual basis must be given for such certification. *Id.*

61. The Board concluded that the proposed Rule will not affect a substantial number of small entities. 76 Fed. Reg. at 36,833.

62. In making the certification, however, the Board failed to provide an adequate factual basis and understated the impact the Rule would have on small businesses.

63. According to the Board, the Rule would not affect a substantial number of small entities because in the past "the number of small employers participating in representation

proceedings each year is less than one-tenth of one percent of the small employers in this country." 76 Fed. Reg. at 36,833.

64. The Board's position, however, is flawed for many reasons. For example, it wrongly assumes that only employers participating in representation proceedings would incur direct costs as a result of the Rule.

65. In addition, it is incorrect to assume that the proposed rule impacts a "substantial number" of small entities only if it impacts a substantial percentage of the six million small entities in the United States. A rule impacting only 1% of small employers in this country would impact 60,000 small businesses.

66. The Board's analysis is also incomplete because it looks only on a per year basis, ignoring the accumulative impact of the rule.

67. The Board also understates the economic impact of the Rule by focusing on administrative costs (and savings) as opposed to the significant economic impacts expedited elections would have on small businesses.

68. The Board identifies only four new requirements that "might" impose a cost on small employers: (1) Posting and distribution of notices; (2) completing the Statement of Position; (3) providing names and information about employees at issue at or before a hearing; and (4) providing additional job and contact information concerning employees eligible to vote.

69. The Board failed to provide specific estimates for any of these costs nor any factual bases for its conclusion that they would be de minims.

70. The Board also failed to consider the economic impact of speeding up the election process, the principal purpose of the Rule.

71. Member Hayes, in his dissenting view, explains how the expedited election

process would have a significant economic impact on small entities: "It may be that employers of a certain size have legal counsel or labor consultants readily available to evaluate the election petition and proposed bargaining unit, identify any issues to be contested, and prepare the required statement in a week or less. However, the Board conducts many representation elections among employees of small business owners who have no such counsel readily at hand, have no idea how to obtain such counsel in short order, and are themselves unaware of such legal arcania as appropriate unit, contract bar, supervisory status, and voter eligibility. The Proposed Rule, if implemented, will unconscionably and impermissibly deprive these small business owners of legal representation and due process." 76 Fed. Reg. at 36,832.

72. The Board does not address or respond to these issues raised by Member Hayes.

73. The Board also failed to describe "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c).

74. Accordingly, the Board's actions violate the RFA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court enter judgment in its favor and:

1. Issue a preliminary injunction temporarily barring enforcement or application of the Rule;
2. Declare that Defendant violated the APA and RFA in issuing the Rule;
3. Declare that the Rule is contrary to the First and Fifth Amendments to the U.S. Constitution and the NLRA;
4. Declare that the Rule is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;

5. Vacate and set aside the Rule;

6. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with Defendant from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Rule;

7. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and

8. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: December 20, 2011

Respectfully submitted,

/s/ Howard M. Radzely

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