ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5250

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

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

Appellees,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellant.

On Appeal from the United States District Court for the District of Columbia,
No. 11-cv-02262, Judge James E. Boasberg

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The following is a list of all parties and their respective counsel who appeared in the District Court and in this Court:

1. Plaintiffs-Appellees

Chamber of Commerce of the United States of America (the "Chamber")

> 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. The Chamber 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.

Coalition for a Democratic Workplace ("CDW")

> 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 proposed regulation at issue in this case. Many such member employers reside in and do business in Washington, D.C.

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B. Rulings Under Review

The rulings under review in this appeal are (1) the District Court's May 14, 2012 Order (by Judge James E. Boasberg) denying Defendant's Motion for Summary Judgment and Alternative Partial Motion to Dismiss and granting Plaintiff's Motion for Summary Judgment, JA300-317, and (2) the District Court's July 27, 2012 Order (by Judge James E. Boasberg) denying Defendant's Motion to Alter or Amend Judgment, JA374-383.

C. Related Cases

This case has not previously been on review in this Court or any other court. Counsel knows of no "other related cases" in "any other court" as defined under Circuit Rule 28.1(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Counsel for the Chamber and CDW state the following:

There are no parent corporations or any publicly held corporations that holds 10% or more of stock in the Chamber. There are no parent companies, subsidiaries or affiliates of the Chamber that have any outstanding securities in the hands of the public.

There are no parent corporations or any publicly held corporations that holds 10% or more of stock in CDW. There are no parent companies, subsidiaries or affiliates of CDW that have any outstanding securities in the hands of the public.

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DOCKETED CASES AND ADMINISTRATIVE DECISIONS

STATUTES, RULES, AND OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

Term	Abbreviation
Chamber of Commerce of the United States of America	Chamber
Coalition for a Democratic Workplace	CDW
National Labor Relations Act	NLRA
National Labor Relations Board	NLRB or the Board
Notice of Proposed Rulemaking	NPRM

JURISDICTIONAL STATEMENT

The Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace ("CDW") are satisfied with Appellant's jurisdictional statement.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court correctly held that two members of the National Labor Relations Board ("NLRB" or the "Board") violated the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, by issuing a purported final rule with only two members participating in the vote on the final rule. JA157 (76 Fed. Reg. 80,138, 80,140 (Dec. 22, 2011) (the "Final Rule")).

STATEMENT OF THE CASE

The NLRA provides that "three members of the Board shall, *at all times*, constitute a quorum of the Board." 29 U.S.C. § 153(b) (emphasis added). Throughout its brief, the Board dismisses this quorum requirement as "hyper-technical" and "empty formalism." The Supreme Court, however, has rejected that view, making clear that "the Board quorum requirement … should not be read as [an] easily surmounted technical obstacle[ ] of little to no import." *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644 (2010).

The violation of the quorum requirement in this case could not be clearer. On December 22, 2011, a Final Rule was published based on votes from only two Board members, with an explanation that the only other Board member at the time

"has *effectively* indicated his opposition to the final rule by *voting against* publication of the NRPM and *voting against* proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011." JA163 (emphases added).

Since then, the Board has taken a variety of shifting positions in trying to convince the district court (and now this Court) that the Board's quorum requirement was satisfied—despite the Board's official explanation (set forth in the Federal Register) that the third member only "*effectively* indicated" his opposition to the Final Rule by voting on earlier procedural matters.

None of the Board's arguments (or evidence), however, can resuscitate the Final Rule. Indeed, the Board's flippant attitude toward the quorum requirement throughout this litigation lays bare the Board's underlying view that Congress's quorum requirement can simply be ignored, a position recently rejected by the Supreme Court. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644 (2010) ("[W]e are not persuaded by the Government's argument that we should read the statute to authorize the Board to act with only two members in order to advance the congressional objective of Board efficiency.").

The Board's newest argument—made for the first time on appeal—is that it is entitled to deference in devising the procedure that was fashioned specifically for the hurried "adoption" of the proposed rule before the recess appointment of

one of the Board Members expired. The Board's *post hoc* deference argument is waived and, even if it were not, none of the Board's litigation positions in this case is entitled to deference. The Board's rush to promulgate the final rule based on the "effective opposition" of one of the Board Members demonstrates not only its indifference towards the quorum requirement, but also the absence of any principled effort to comply with an important statutory limitation on the Board's power.

BACKGROUND

An understanding of how the Final Rule was "promulgated" and subsequently defended in this litigation illustrates how the Board mistakenly ignored the quorum requirement.

A. Notice Of Proposed Rulemaking And The Public Hearing

In June 2011, the Board published a Notice of Proposed Rulemaking (the "NPRM") in the Federal Register, proposing sweeping changes to the procedures regarding workplace elections. JA21. Among other things, the proposed rule would significantly speed up the existing union election process and limit employer participation.

The NPRM included the dissenting view of then-Member Hayes. JA38-42. Hayes denounced the inappropriateness of the Board's "expedited rulemaking process in order to implement an expedited representation election process." JA38.

"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*.

Less than 30 days after the NPRM was published, the Board held a two-day hearing at which 66 witnesses testified (with each witness having approximately 5 minutes to speak). JA159-60. Many witnesses testified against the proposed rule. *Id.* When the comment period regarding the proposed rule closed, the Board had received more than 65,000 comments on the proposed rule, many opposing it. JA162. Appellees the Chamber and the CDW filed extensive comments objecting to the proposed rule. JA159-160.

B. Resolution To Draft A Modified Final Rule Regarding Changes To Election Procedures

A little over two months after the comment period closed, the Board announced that it would hold a public meeting during which NLRB members would vote on a resolution regarding whether to proceed to draft a modified final rule concerning changes to the election procedures.

Only the day before the meeting, the Board Chairman released to the public the resolution to be voted on at that meeting. JA61-62. The resolution outlined the policy principles that the Chairman proposed to incorporate into the election procedures. *Id.* The resolution required subsequent action by the Board to adopt the actual text of the final rule: "no final rule shall be published until it has been

circulated among the members of the Board and approved by a majority of the Board." JA62. The Board voted 2-1, with then-Member Hayes voting against the resolution, to adopt the resolution and proceed with drafting a final rule. JA102.

C. The Final Rule And Subsequent Lawsuit

Notwithstanding the opposition to the NPRM and criticism of the irregular and hurried rulemaking process, a final rule was drafted and adopted about two weeks after the meeting by two members of the Board (Chairman Pearce and then-Member Becker). JA163, 206. The Final Rule asserted that "Member Hayes has *effectively indicated* his opposition to the final rule by voting against publication of the NPRM and voting against proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011." JA163 (emphasis added).

Four days after the Board adopted the Final Rule, the Chamber and CDW filed a complaint alleging that it violated the NLRA, the Administrative Procedure Act, 5 U.S.C. § 702, and the Regulatory Flexibility Act, 5 U.S.C. § 611.[1] JA1.

D. Preliminary Meet-And-Confer Regarding The Quorum Requirement

Because it appeared on the face of the Final Rule that the Board failed to meet the National Labor Relations Act's quorum requirement, counsel for the

[1] Because the district court concluded that the Board lacked authority to promulgate the Final Rule, it did not reach Appellees' other procedural and substantive challenges to the rule. JA317. Therefore, as the Board indicated, if this Court reverses the district court's decision, this case should be remanded for the district court to consider Appellees' other claims. Bd. Br. 29.

parties met at Appellees' request on January 13, 2012, to discuss whether the Board had satisfied the quorum requirement when it issued the Final Rule. *Chamber of Commerce v. NLRB*, No. 11-2262, Pl's Mtn. for Three-Day Extension 1-2, Jan. 30, 2012, ECF No. 15 (D.D.C.). At this meeting, the Chamber and CDW requested "any evidence that Mr. Hayes in fact voted or participated in issuing the Final Rule." *Id.* Kerr Declaration ¶ 6.

In response, the Board—shortly before summary judgment motions were due—produced new evidence: a procedural order signed on January 30, 2012 *nunc pro tunc* December 15, 2011 ("the December 15 Order" or "the Order") with a supporting affidavit by the Executive Secretary dated January 30, 2012.[2]

The December 15 Order provided that the final rule would be submitted to the Federal Register for publication "[i]mmediately upon approval of a final rule by a majority of the Board." JA117. The Order also states that "[i]t is further ORDERED that this Order shall constitute the final action of the Board in this matter." JA118.

[2] According to the Executive Secretary, "[a]s of December 15, 2011, all three Board members voted on this Order. Chairman Pearce and Member Becker voted in favor of the Order, and Member Hayes voted against the Order …. Due to an inadvertent administrative oversight, I did not sign the attached Order on December 15, 2011. Today I have signed the attached Order correcting that inadvertent administrative oversight." JA119 ¶¶ 3, 5, 6.

E. The Board's Summary Judgment Brief

Echoing the position set forth in the Federal Register, the Board argued in its opening summary judgment brief that votes on the November 30, 2011 Resolution and the December 15 Order were all that were required to adopt the Final Rule:

> The Board here voted *twice* to make these amendments: first it voted to proceed to draft, circulate, and publish a rule making these eight specific amendments; and it voted again, after circulating the draft of the preamble and final rule, to publish. This second vote, on an order to publish the final rule, was expressly designed to be "the final action of the Board in this matter." *Nothing more is required.*

Chamber of Commerce, Board's S.J. Memo. 42, Feb. 3, 2012, ECF No. 21 (internal citations omitted; second emphasis added).

F. The Board's Opposition Brief

Perhaps recognizing that the procedural votes before December 16 did not constitute participation in the final vote to approve the Final Rule, the Board in its opposition brief below presented a second argument: that "*mere presence is enough* to create a quorum." JA241 (emphasis in original). To support its "mere presence" argument, the Board again produced new evidence—an affidavit signed by then-Member Hayes on February 23, 2012—related to the procedure in which the Final Rule was issued. JA247-249.

According to Hayes, under the Board's standard procedures a "case or rule is moved to issuance when votes are recorded for *all* Board Members *as to the final*

versions of all circulated documents." JA247 ¶ 6 (emphases added). "In situations where a particular Board Member has not voted and immediate action is desired, the Executive Secretary or Solicitor may convey, by phone or e-mail, a request to act." JA248 ¶ 11.

In the present rulemaking, however, "[a]fter [Hayes] voted against the procedural Order on December 15 and indicated that [he] would not attach a personal statement to the Final Rule, [he] gave no thought to whether further action was required of [him]." JA248 ¶ 11. He "was *not* asked by email or phone to record a final vote in [the Board's intranet Judicial Case Management System ("JCMS")] before or after the Final Rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16." JA248-49 ¶ 11 (emphasis added).

The parties moved jointly to allow the Chamber and CDW to respond to the Board's new "mere presence" argument "that the quorum … [is] created by the mere presence of a majority." JA262 (internal quotation marks omitted).

In their seven-page reply, Appellees pointed out, among other things, that by arguing that Hayes was "present" at the vote under the Board's notation voting procedure, the Board in effect was arguing that quorum is the same as Board membership. JA266.

G. Summary Judgment Granted In Favor Of The Chamber And CDW

Over four months after the Final Rule had been published—and a couple of weeks before the district court's decision—the Board published, on the day the Final Rule became effective, separate concurring and dissenting statements by Chairman Pearce and then-Member Hayes, respectively.[3] JA272. Under the December 15 Order, these subsequent "personal statements" had no effect on the "adoption" of the Final Rule: "[P]rovided further that any such dissent or separate concurrence shall represent the personal statement of the Member and shall in no way alter the Board's approval of the final rule or the final rule itself." JA118.

The district court rejected both of the Board's arguments and granted summary judgment to the Chamber and CDW: "Member Hayes cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions related to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up." JA301.

H. The Board's Motion To Reconsider

The Board filed a motion to reconsider seeking, for the third time, to introduce new evidence—this time an affidavit from Chief Information Officer Brian Burnett. JA320-342. According to Burnett, "[t]he electronic room is

[3] Becker was no longer on the Board at this time and thus could not have filed such a statement.

designed to close the voting automatically once all Board Members vote on all documents circulated in a case." JA336 ¶ 19. On December 16 at 11:54 a.m., "Chairman Pearce voted 'APPROVED W/ MODS' and attached further modifications to the final rule." JA337 ¶ 28. At 12:05 p.m., then-Board Member Becker voted to approve the Final Rule. JA338 ¶ 29. And "at 12:37:21 p.m., Board Member Hayes' Deputy Chief Counsel opened th[e] task" related to the Final Rule. JA338 ¶¶ 31. The Board asserted for the first time that Hayes "deliberately abstained" from voting. JA320.

The district court correctly concluded that this was too little, too late: "The NLRB's argument based on Hayes's prior actions has already been adjudicated, and any aspects of that argument that were not previously raised certainly could have been. In any event, the expanded argument does not change the outcome." JA378-379. The district court thus denied the Board's motion to reconsider. JA383. This appeal followed.

SUMMARY OF ARGUMENT

The Board must have a statutorily required three-member quorum to exercise its authority. In contravention of that requirement, the Board engineered a one-off rulemaking procedure in this case that did not require participation by all three members. As a result, only two members participated in the final vote (and simply assumed, based on earlier procedural votes, that the third member opposed

the rule). The district court correctly held that the three-member quorum requirement was not satisfied under those circumstances, and its judgment should be affirmed.

None of the Board's contrary arguments alter that conclusion. First, the Board's arguments in the summary-judgment briefing—that then-Member Hayes participated in the final vote by voting on prior procedural orders, and that then-Member Hayes's *mere presence* on the Board satisfied the quorum requirement—were insufficient on their face to show that the three-member quorum requirement was satisfied. Second, the Board's argument in its motion to reconsider—that Hayes opposed drafting any final rule, and then abstained until the day the rule became effective, at which time he cast a (meaningless) dissenting "vote" (after the Final Rule had already been "approved" and published)—similarly falls short of showing that the Board complied with the statute.

Now, for the first time, the Board argues before this Court that its interpretation of quorum—specifically, its specially designed rulemaking process—is entitled to deference. Even if not waived, this eleventh-hour argument should be rejected because it would be inappropriate to defer to Board counsel's *post hoc* litigation position—especially given the constantly shifting arguments the board has advanced in this litigation to justify its failure to satisfy the quorum requirement.

Even if the Board's deference claim were not waived or precluded, the Board's *ultra vires* rulemaking should still be vacated because it violates a clear expression of congressional intent—that the Board only act with a three-member quorum. The Board's shifting arguments about how the three-member quorum requirement was satisfied are not entitled to deference and should be rejected. The bottom line is that only two members of the Board participated in the final vote to adopt the Final Rule, when the statute requires three. The district court's summary judgment should be affirmed.

ARGUMENT

I. TWO MEMBERS OF THE BOARD ISSUED THE FINAL RULE WITHOUT THE STATUTORILY REQUIRED PARTICIPATION BY THREE MEMBERS

It is undisputed that then-Member Hayes did not vote on December 16 and was not asked, pursuant to the Board's standard practice, to vote on the Final Rule itself. JA248-49. According to the preamble of the Final Rule, "Member Hayes has *effectively indicated his opposition to the final rule* by voting against publication of the NPRM and voting against proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011." JA163 (emphasis added).

The other two members erroneously asserted that the quorum requirement was satisfied because of the Board's *total membership*: "The final rule has been

approved by a two-member majority of the Board. The Board currently has three members, a lawful quorum under Section 3(b) of the Act." *Id.* The two members who approved the Final Rule obviously believed they did not need then-Member Hayes's participation in any way in the final vote on the rule. They were mistaken.

The Board's quorum requirements—including delegation procedures—are set forth in section 3(b) of the NLRA, which provides, in relevant part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise …. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, *except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.*

29 U.S.C. § 153(b) (emphasis added).

In its recent *New Process Steel* decision, the Supreme Court described these provisions as:

> (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group.

130 S. Ct. at 2640 (citing 29 U.S.C. § 153(b)).[4]

Thus, under the plain language of the statute, the Act permits the Board to take action with only two members participating under the limited circumstances where the Board "delegate[s] to any group of three or more members any or all of the powers of the Board." 29 U.S.C. § 153(b); *see also New Process Steel*, 130 S. Ct. at 2639 ("It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to the three-member group … and the last sentence authorized two members of that group to act as a quorum of the group.").

The Supreme Court repeatedly noted in *New Process Steel* that two members have authority to act on behalf of the Board *only* where there has been a valid delegation to at least three members: "We have no doubt that Congress intended 'to preserve the ability of two members of the Board to exercise the Board's full powers, *in limited circumstances*,' as when a two-member quorum of a *properly constituted delegee group* issues a decision for the Board in a particular case." *Id.* at 2644 n.6 (internal citation omitted; emphases added). Indeed, "Congress *changed* [the quorum] requirement to a three-member quorum for the Board …. [I]f Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two." *Id.* at 2644.

[4] *New Process Steel* concerned the question whether following a valid delegation of the Board's authority to three members, two members may continue to exercise that delegated authority when the Board's membership falls to only two members. *Id.* at 2638. The Court held that two members do not have such authority. *Id.*

"Furthermore," the Supreme Court emphasized, "if Congress had intended to allow for a two-member Board, it is hard to imagine why it would have limited the Board's power to delegate its authority by requiring a delegee group of at least three members." *Id.*[5]

The Board itself, in its brief to the Supreme Court in *New Process Steel*, likewise recognized what the statute makes clear—two members may act only pursuant to a valid delegation to a group of three or more members. *See, e.g.*, *New Process Steel, L.P. v. NLRB,*, No. 08-1457, 2010 WL 383618, at *12 (U.S. Feb. 2, 2010) (NLRB Merit Brief) ("Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum.").[6]

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[5] Even the dissent in *New Process Steel* agreed that under the statute's plain terms, "[t]wo members of the Board *could not conduct any business unless they were previously designated by the full Board* as members of a delegee group with such authority." *New Process Steel*, 130 S. Ct. at 2647 (Kennedy, J., dissenting) (emphasis added).

[6] When the NLRA was enacted in 1935, Congress established a three-member Board—of which two members constituted a quorum. *See New Process Steel*, 130 S. Ct. at 2650. Congress increased the size of the Board to five members in 1947, and increased the Act's quorum requirement to three members. *See id.* at 2638. At the same time, however, in a compromise between competing bills, "Congress preserved the Board's authority to act through a two-member quorum whenever the Board exercised its delegation authority." NLRB *New Process Steel* Br.. 2010 WL 383618, at *26. "[H]ad Congress wanted to provide for two members alone to act as the Board [absent delegation], it could have maintained the NLRA's original two-member Board quorum provision." *New Process Steel*, 130 S. Ct. at 2641.

The Board has previously recognized that only a proper delegation to three or more members allows two members to act on behalf of the Board—making use of this provision itself when the Board only has three members and one is precluded from participating. JA17. Of course, if the statute permitted the Board to act in all cases with two members when the Board has only three members—which it does not—the Board would not have had to issue a delegation to its three members for two members to act.

The Board does not (and could not) argue that there was any such delegation in this case. As a result, Chairman Pearce and then-Member Becker lacked authority to issue the Final Rule without then-Member Hayes' participation. Accordingly, the district court appropriately struck down the rule as contrary to law. *See, e.g.*, *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("If [an agency] lacks authority …, then its action is plainly contrary to law and cannot stand.").

II. ALL OF THE BOARD'S SHIFTING ARGUMENTS LACK MERIT

Since the Final Rule was issued, the only thing consistent about the Board's explanations for why two members could issue the Rule when the statute requires three is inconsistency. At various times in this litigation, the Board has essentially raised three arguments. Some are waived, and all lack merit.

A. Participation In Procedural Votes Does Not Constitute Participation In Final Votes

In its summary judgment motion, the Board argued that then-Member Hayes "participated" in approving the Final Rule by voting on the November 30 resolution and the December 15 procedural order. *Chamber of Commerce*, Board's S.J. Memo. 42 & Exs. 3-4, Feb. 3, 2012, ECF No. 21. That argument—that Hayes "effectively indicated his opposition"—was the Board's official position in the Federal Register when the Final Rule was published. JA163.

The Board has apparently abandoned that argument on appeal. And it is easy to see why. Voting to proceed to drafting and publishing a final rule, and voting to approve the final rule as drafted, are two very different things. Indeed, if the Chamber and CDW had brought this suit on December 15, 2011, based on the agency's actions up to (and including) that date, the district court would have properly dismissed the case as unripe because "to be 'final,' an agency action 'must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature.'" JA309 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005)).

"Interlocutory" decisions such as the votes relied upon by the Board, by their very nature, cannot satisfy the statutory requirement that at least three members must participate in the final vote. JA309.

B. Mere Presence On The Board Is Insufficient To Satisfy The Quorum Requirement

Perhaps recognizing that interlocutory procedural decisions cannot satisfy the quorum requirement of a three-Member vote on a final rule, the Board has argued (in its opposition brief below) that "*mere presence is enough* to create a quorum." JA241. That argument fares no better. By arguing that then-Member Hayes's "mere presence" was sufficient to satisfy the quorum requirement, the Board in effect argues that quorum is the same as Board membership. That is clearly wrong and cannot be reconciled with the statute itself or Supreme Court precedent.

The Supreme Court in *New Process Steel* explained unequivocally that "[t]he requisite membership of an organization, and the number of members who must participate for it to take action, are separate (albeit related) characteristics." 130 S. Ct. at 2643 n.4. "A quorum is the number of members of a larger body that *must participate* for the valid transaction of business." *Id.* at 2642 (emphasis added). "We thus understand the quorum provisions merely define the number of members *who must participate* in a decision." *Id.* at 2643 (emphasis added). In short, there is a difference between being a member of a body and participating in an action by that body.

C. Then-Member Hayes Did Not Abstain

The Board's third argument—raised for the first time in its motion to reconsider—focuses on then-Member Hayes's statements before the final vote (rather than his preliminary votes) to assert that then-Member Hayes deliberately abstained.[7] JA321. Recognizing, however, that Hayes did not "abstain" from voting as that term is traditionally understood, the Board now creates a new concept of "temporary abstention."

The Board spends much of its opening brief to this Court (at 13-20) on its "temporary abstention" argument, but provides no basis for it. Because the Board first introduced its argument that then-Member Hayes previously opposed the rule—"*abstained* for the present, and dissented later," Bd. Br. 13—in its motion to reconsider, the district court's rejection of this argument is reviewed under an abuse of discretion standard. *See infra* Section IV. Regardless of what standard is applied, however, the Board's argument fails for at least four independent reasons.

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[7] In its opposition, the Board refers to the concept of abstention and cites some authorities regarding abstention, but its argument is focused on the alleged significance of then-Member Hayes's "mere presence": "The Supreme Court has held for over a hundred years that *mere presence is enough* to create a quorum, and that abstaining voters are counted toward the quorum." JA241. Notably, the Board did not at that time affirmatively assert that Hayes purposely and deliberately chose to abstain in the final vote. The Board's mere reference to abstention and citations were insufficient to preserve the argument. *See, e.g.*, *Int'l Union of Painters & Allied Trades v. NLRB*, 309 F.3d 1, 6 (D.C. Cir. 2002) ("A litigant must do more than simply [give a citation] and ask the court to discern which arguments he seeks to advance.").

1. A Member's Vote Cannot Be Assumed By Statements Made Before The Final Vote

Statements (and votes) before the final vote cannot constitute a vote (or abstention) on the final rule. The Board agrees that on December 16, an *updated*, final version of the rule was circulated for a final vote. Bd. Br. 7, 16. The Board asserts, however, that the events of December 16 are "immaterial" and that the district court incorrectly focused on the final vote. Bd. Br. 15-16. But the final vote is the very point at which the agency decides whether or not to exercise its authority. *See, e.g., Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1975) ("By institutional decision, we mean, of course, a decision by the majority vote duly taken. That is the rule of the common law, which we have hitherto applied to administrative action.").

As the district court pointed out, "deciding whether to adopt a regulation that will bind the public is perhaps the agency's weightiest responsibility." JA311. Countless decisions, statements, posturing, compromising, and revising occur before a final decision is made to adopt (or not adopt) a rule. But it is *that* final decision that "transforms words on paper into binding law." *Id.* Therefore that final decision required a quorum of three members. And in this case, that final decision—the final agency action—took place on December 16, 2011.

The Board's assertion (at 16) that then-Member Hayes's decision to abstain was "final" on December 15 is thus misplaced, because the time to act was on

December 16. The fallacy of the Board's position is perhaps best illustrated by a hypothetical. Under the Board's argument, if then-Member Hayes had been tragically killed in an accident on December 15, the two remaining members could have nonetheless voted to approve the Final Rule on December 16. But that would be inconsistent with Section 3(b) of the NLRA's quorum requirement and the Supreme Court's decision in *New Process Steel*, which made clear that "if Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two" (instead of changing it to three). 130 S. Ct. at 2644.

Moreover, "an abstention is no less a legislative act than a 'yes' or 'no' vote." *Coogan v. Smyers*, 134 F.3d 479, 489 (2d Cir. 1998). So its attempt to assume an abstention by invoking its notional voting system (at 15) does not help the Board, because assuming an abstention is as problematic as assuming a yes or no vote. There is no dispute that "the quorum acting on a matter need not be physically present together at any particular time." *Braniff Airways, Inc. v. Civ. Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967). Nor is there any dispute that a quorum need not act "on the same day." Bd. Br. 15; *Braniff*, 379 F.2d at 460 ("Under the notation practice the views and votes of the members of a regulatory agency may be recorded separately rather than in joint session, and circulated to the remaining members for their attention."). Even with notational voting,

however, a quorum must act on the matter at hand—here, approving or disapproving a final rule—and a quorum must "act" before a rule is promulgated.

The Board's reliance on the FCC rulemaking procedure is misplaced. Bd. Br. 16 & n.6. The Board asserts that the FCC "commonly holds a final vote to adopt new rules, and then publishes those final rules in the ensuing months without holding a second vote." Bd. Br. 16. In the example cited, however, when the FCC voted to adopt the new rule, *it voted on the text of the final rule*. *See* FCC 04-168, *Report & Order, Fifth Report & Order, Fourth Memorandum Opinion & Order, & Order*, ¶ 340 & App'x C (Aug. 6, 2004), http://www.800ta.org/content/fccguidance/FCC_04-168_08.06.04.pdf. Unlike in this case, the text of the final rule was part of the order adopted by the Commission. The Board's assertion that the text of the rule was "issued" four months after the rule was adopted is simply incorrect. In addition, the vote was unanimous and thus clearly a quorum participated. *See* Press Release, FCC Adopts Solution to Interference Problem Faced By 800 MHz Public Safety Radio Systems (July 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-249414A1.pdf.

The Board (at 16 n.6) is partially correct in that small changes were made to the rule between its adoption by the full Commission and its publication. Specifically, in the intervening months there were three errata issued to correct "errors or omissions." *In the Matter of Improving Public Safety Communications*

in the 800 MHz Band, 19 F.C.C.R. 14,969 et al., 2004 WL 1780979, at *19,650-61, 21,818-20 (F.C.C. 2004). These non-substantive changes were not made by the Commission, however, but by the Chief of the Wireless Telecommunications Bureau under very limited and expressly delineated delegated authority: "The Chief, Wireless Telecommunications Bureau shall not have [rulemaking] authority … except such orders involving ministerial conforming amendments to rule parts, or orders conforming any of the applicable rules to formally adopted international conventions or agreements where novel questions of fact, law, or policy are not involved." 47 C.F.R. § 0.331(d). Far from establishing that the FCC commonly votes to adopt a new rule that is substantively updated without a second vote, the Board's example actually confirms that the quorum requirement must be met in *adopting* and *approving* the final rule, and that even errata require appropriately delegated authority.

So even if, as the Board asserts, the text of a final rule may be altered after it is *adopted*, a quorum must still participate in the initial decision to adopt the final rule.[8] Because that did not happen here, the Board's attempt to establish quorum

[8] The Board also relies upon a statement from the FCC chairman that "[t]here is nothing procedurally inappropriate in making changes, substantive or non-substantive, after adoption to further elucidate the rationale for the Commission's decision." Bd. Br. 16 n.6. This statement, however, does not appear in the document cited and thus is impossible to evaluate. In any event, there is no indication that less than a quorum participated in making the referenced post-adoption edits. Moreover, the fact that the edits are post-adoption distinguishes

based on then-Member Hayes "opposition to the rule" before December 16 should be rejected.

2. There Is No Evidence That Then-Member Hayes Intended To Abstain

Under the authority cited by the Board, "[a]bstention and the absence of a voter are not to be treated alike. The abstaining voter is counted in determining the presence of a quorum while the absent voter is not included." 59 Am. Jur. 2d Parliamentary Law § 15. The evidence establishes that then-Member Hayes was an absent voter.

According to Hayes, on the day of the vote he "gave no thought to whether further action was required of [him]." JA248 ¶ 11. As the district court concluded, "Hayes himself has averred that he neglected to vote on the final rule not out of an intent to abstain or to block the rule's promulgation, but rather because he did not realize that his further participation was required." JA316. The other members of the Board were under the same mistaken impression as Hayes—that participation was not necessary. As Hayes observed, "[i]n retrospect, I believe that my colleagues viewed their approval of the procedural Order of December 15 providing for subsequent issuance of personal statements as obviating the need for any further action by me." JA249 ¶ 11; *see also* JA163 (Preamble to Final Rule).

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that situation from this case in which the rule itself was not adopted with a quorum participating.

Neglecting or otherwise failing to participate, for whatever reason, is not the same as deliberately refraining from voting on the final decision. Only the latter is an abstention. The former is simply an absent voter. Indeed, the BLACK'S LAW DICTIONARY definition of "abstain" provided by the Board makes clear that a voter cannot unknowingly abstain: "[t]o *voluntarily* refrain from doing something." Bd. Br. 14 (*quoting* BLACK'S) (emphasis added).

Then-Member Hayes also stated that he "was not asked by email or phone to record a final vote in JCMS *before or after* the Final Rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16." JA248-249 ¶ 11 (emphasis added). Thus, Hayes never affirmatively refused to vote.

More important, the Final Rule did not record Hayes as an abstention or otherwise note that he was abstaining. Instead, the final rule stated that he "effectively" voted against the rule. JA163.

In fact, five days after the final rule was purportedly approved by a quorum, Board spokeswoman Nancy Cleeland stated that "Hayes[ ] *has yet to cast a vote on the final rule*, and has until the April 30 effective date to publish a dissent." JA137 (emphasis added). There was no mention that Hayes's non-vote was being treated as an abstention.

Nor does the word "abstain" or the concept of abstention appear anywhere in then-Member Hayes's Affidavit. JA247. The notion that Hayes "abstained" is simply a litigation construct devised by the Board with no evidence whatsoever to support it.

3. There Is No Basis For "Temporary Abstention"

The Board's dilemma in this case is obvious—it cannot argue that then-Member Hayes outright abstained, because he filed a subsequent dissenting statement. Nor can the Board argue that he officially opposed the rule, because he did not cast a vote on December 16 so indicating. So to bridge that gap, the Board has seized upon the concept of "temporary abstention," arguing that Hayes "*abstained* for the present, and dissented later." Bd. Br. 13. But there is no basis in law or logic for the Board's "abstain-now-dissent-later" argument.

Indeed, the Board's argument contradicts the very idea of what it means to abstain—that is, to *refrain* from a yes or no vote altogether, whether to "dodge[ ] difficult or controversial issues," *Wrzeski v. City of Madison, Wis.*, 558 F. Supp. 664, 668 (W.D. Wis. 1983), or "where the voter lacks sufficient information to vote 'yes' or 'no.'" *Coogan*, 134 F.3d at 489. Given the very nature, then of what it means to abstain, it is not surprising that the Board can supply no basis for its "abstain now, dissent later" theory.

The Board is left to argue (at 18) that "courts and agencies" have used procedures of a "majority issu[ing] its decision before the dissent has been prepared." That is true, but irrelevant. None of those cases involved situations, like here, where the dissenter had not *voted*. Thus, quorum was not at issue in those cases. For example, in *Drummond v. Fulton County Department of Family & Children's Services*, 547 F.2d 835, 837 (5th Cir. 1977), the quorum requirement was satisfied regardless of the dissenter's participation. *See* 28 U.S.C. § 46(d) ("A majority of the number of judges authorized to constitute a court or panel thereof … shall constitute a quorum."). And in *SEC v. Chenery Corp*., Justice Frankfurter and Justice Jackson *had dissented*, but that "*the detailed grounds for dissent* will be filed in due course." 332 U.S. 194, 209 (1947) (emphasis added); *see also*, *e.g.*, *S Cal. Edison Co.*, 124 FERC ¶ 61,308, 2008 WL 4416776, at *8 (Sept. 30, 2008) ("Commissioner Moeller dissent in part with a *separate statement* to be issued at a later date.").[9] Here, by contrast, then-Member Hayes did not participate in the vote on the Final Rule. The Board's attempt to construe his "effective opposition" to the Rule as a "temporary abstention" makes no sense and should be rejected. JA163. Notably, no court stated that a judge had "effectively" opposed the

[9] The Board's examples from Marshall J. Breger & Gary L. Edles, *Established in Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000), are similarly misplaced. *See id.* at 1249 ("A majority… may act even if the minority delays in completing any dissenting *statements*." (Emphasis added)).

majority's decision. The Board simply has provided no support for its proposed temporary abstention, quorum-saving doctrine.

That conclusion is confirmed by the Board's own Order, which makes clear that any subsequent dissenting statements "shall represent the *personal* statement of the Member *and shall in no way alter the Board's approval of the final rule or the final rule itself*." JA118 (emphasis added). The Board's attempt to manufacture quorum by conflating casting a vote, as an initial matter, and issuing a dissent, as a secondary matter, makes no sense and should be rejected.

Of the same piece with the Board's disdain for Congress's quorum requirement is its disregard for dissent, which plays a valuable role in the deliberative process. As Justice Ginsburg has explained, one should not presume to know how a decisionmaking body will rule in any particular case until it takes final action on the matter at hand—because, for example, "a dissent [may] be so persuasive that it attracts the votes necessary to become the opinion of the Court." Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010-2011).

In addition, the Board's trivialization of the participation of dissenters in the deliberative process underscores its lack of regard for the statutory quorum requirement, which prevents two members from acting on behalf of the Board

unless there has been an effective delegation of the Board's authority to those members. It is undisputed that there was no such delegation in this case.

4. The Quorum Requirement Is Not "Empty Formalism"

The issue in this case is whether the quorum requirement is a "fundamental constraint on the exercise of the Board's power," JA316, as the district court concluded, or simply "empty formalism" as the Board repeatedly asserts, Bd. Br. 19. The answer is straightforward: Congress intended it to be the former.

The Board is a "creature of statute" and possesses only that power that has been allocated to it by Congress." *Michigan*, 268 F.3d at 1081. Indeed, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The quorum requirement is more than a procedural nicety; it is a prerequisite for the Board to exercise its authority. *Cf. Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981) ("Section 2675 is more than a mere statement of procedural niceties. It requires that jurisdiction must exist at the time the complaint is filed.").

As the district court concluded, then-Member "Hayes's actions are the equivalent of failing to attend, whether because he was unaware of the meeting or for any intentional reason. In any event, his failure to be present or participate means that only two members voted, and the rule was sent for publication that very

day." JA314-315. It is not, as the Board asserts, the "barest technicality" to exclude from the quorum a member who failed to attend the final vote. The appropriate number of members attending the final vote is the very nature of a quorum requirement: "A quorum is the number of members of a larger body that must participate for the valid transaction of business." *New Process Steel*, 130 S. Ct. at 2642.

To allow two members of the Board to rely on mere Board membership, to count an "effective opposition," or to invent an alternative "temporary abstention" theory would "degrade the quorum requirement from a fundamental constraint on the exercise of the Board's power to an 'easily surmounted technical obstacle[ ] of little to no import.'" JA316 (quoting *New Process Steel*, 130 S. Ct. at 2644). The Board's attempts to evade the statutorily mandated quorum requirement should be rejected and the district court's entry of summary judgment affirmed.

III. THE BOARD COUNSEL'S *POST HOC* ARGUMENT FOR DEFERENCE IS WAIVED AND, IN ANY EVENT, IS PLAINLY WRONG

The Board's claim—for the first time on appeal—that it is entitled to deference on the question of quorum is nothing short of incredible. Bd. Br. 11-13. Throughout this rulemaking and litigation, the Board has asserted a bewildering array of methods for counting quorum, including:

- The number of members participating in procedural votes;

- The number of members on the Board; and
- The number of members who "effectively indicate" how they will vote plus the number of members who actually participate in the final vote.

With so many different meanings for the word quorum, the Board is applying the logic of Humpty Dumpty: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" Lewis Carroll, *Through the Looking Glass*, THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939). The Board's assertion that it is entitled to deference should be rejected.

A. The Board's Deference Argument Is Waived

As an initial matter, "this court reviews only those arguments that were made in the district court, absent exceptional circumstances." *Potter v. Dist. of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009). As the district court observed, "[n]either party mentions the deferential *Chevron* standard for reviewing an agency's interpretation of the statutes it administers in their arguments on the quorum issue." JA311 n.2. The Board's argument that it sought deference by merely citing cases that "require at least as much deference as *Chevron*" does not hold water. Bd. Br. 12 n.4. Arguments must be articulated to be preserved. *Cf. Town of Norwood v. F.E.R.C.*, 962 F.2d 20, 25 (D.C. Cir. 1992) ("Mere reference to an argument presented elsewhere, however, is not sufficient to raise it here.").

By not raising the deference issue below—either in its summary judgment briefing or in its motion to alter or amend the judgment—the Board has waived this argument. *Benoit v. Dep't of Agric.*, 608 F.3d 17, 21 (D.C.Cir. 2010) ("These arguments are forfeit, however, because the plaintiffs did not raise them in the district court."); *Johnson v. Bolden*, No. 10-5135, 2012 WL 5894892, at *1 (D.C. Cir. Nov. 9, 2012) (same).

B. Counsel's *Post Hoc* Litigation Position Not Entitled To Deference

Even if not waived, the Board's argument should be rejected because it is a *post hoc* litigation position not entitled to deference. "[*Chevron*] does not apply to an agency's litigation position, which provides a post hoc rationalization." *Menkes v. Dep't of Homeland Sec.*, 637 F.3d 319, 345 (D.C. Cir. 2011).

As set forth above, the Board has repeatedly changed its explanation of how the quorum requirement was allegedly satisfied in this case. And the Board's latest explanation—"temporary abstention"—bears no resemblance to its official position in the Final Rule.

The Board has thus not even made a purposeful determination about what "quorum" means, let alone defined the term in a rulemaking. For example, the Board has not produced any evidence predating this litigation about whether the Board even allows its members to abstain from voting and how any abstentions would be treated. The Board's claim that its method for counting quorum is

entitled to deference should therefore be rejected because its explanations are nothing more than a shifting series of *post hoc* rationalizations. In short, Humpty Dumpty is not entitled to *Chevron* deference.

C. Deference Is Not Due When The Intent of Congress Is Clear

Even if the Board's claim for deference were not waived or precluded—and it is both—it still should be rejected because, as the district court noted, "[a]nalyzing this question through *Chevron* lens . . . would yield the same result" because "the NLRA unambiguously precludes the agency's preferred interpretation of the quorum requirement." JA311 n.2. And "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *See Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As set forth above, *supra at* Section I, the intent of Congress to require the Board to only act with at least a three-member quorum is indisputable. This case, like *New Process Steel*, simply requires this Court to give effect to the clear intent of Congress.[10]

"Regardless of how serious the problem an administrative agency seeks to address … it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown &*

[10] Tellingly, there was no discussion of deference in *New Process Steel*.

Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The Board's assertion that it has authority "to devise procedures appropriate to the particular situation, where the Board was about to lose a quorum," thus misses the point. Bd. Br. 12. The Board does not have authority under any circumstances to ignore the clear intent of Congress. As the Supreme Court has noted, Congress required the participation of three members to meet the quorum requirement. *New Process Steel*, 130 S. Ct. at 2644.

The Board's argument (at 22 n.8) that it "has the discretion to fashion a procedure where Member Hayes abstains for now and dissents later" is not only bereft of statutory authority, but also of any evidence. Other than the Board's own briefs in this case, there is no evidence that it has fashioned any such "temporary abstention" system. This is not changed by the Board's assertion that "[u]nder the voting construct used in the Board's electronic voting room during this rulemaking, Member Hayes's abstaining at the time the rule was sent to the Federal Register had the *effect* of preserving his opportunity to cast a vote and attach a dissenting statement later." *Id*. (emphasis added). There is no evidence that the Board (or Hayes) intended—by inaction on December 16—to have this "effect."

To the contrary, the Board's own statement confirms that Hayes did not participate because it expressly acknowledges that he still has an "opportunity to cast a vote." Bd. Br. 22 n.8. As described above, the Board's usual procedures appeared to give effect to the statutorily mandated three-member quorum, while the new hurried procedures ignored the requirement.

IV. THE BOARD FAILED TO SATISFY RULE 59(e)

The Board's attempt, after the entry of judgment, to put yet another spin on the quorum requirement (with still more new evidence) was too little too late, as the district court correctly concluded. The district court did not abuse its discretion in refusing to reconsider its decision.

"[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11C WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2810.1 (2d ed. 2012). "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments *or present evidence that could have been raised prior to the entry of judgment*.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (emphasis added).

This Court reviews the denial of a motion for reconsideration for an abuse of discretion. *See, e.g., Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004) ("Nor do we find any abuse of discretion in the district court's refusal to

vacate its judgment based on their allegedly valid ACAA claim as this argument was available to them earlier."). Courts have stressed that "Rule 59 requires that the factual matter at issue in the motion previously have been unavailable." *Lostumbo v. Bethlehem Steel, Inc.*, 8 F.3d 569, 570 (7th Cir. 1993). A "Rule 59(e) motion cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment." *Garner v. Arvin Indus. Inc.*, 77 F.3d 255, 258 (8th Cir. 1996) (citation omitted).

The Board easily could have presented the additional evidence about an action of then-Member Hayes's Deputy Chief Counsel and could have argued that Hayes "deliberately abstained" before the entry of summary judgment. Moreover, even if the evidence is considered, it does not change the fact that Hayes did not participate in the vote to adopt the Final Rule. As the district court correctly concluded, "even were the Court to excuse Defendant's failure to present this evidence at the appropriate time, the NLRB has not succeeded in demonstrating that the Court made 'clear error' when it determined that Hayes did not participate in the December 16th vote to adopt the final rule." JA381.

A. New Evidence About Electronic Voting Room Was Inappropriate For The Board's Motion To Reconsider

The Board does not, and cannot, claim that it presented newly *discovered* evidence with its motion to reconsider. The only explanation the Board gives for not presenting the new evidence (and not raising the new argument) before its

motion to reconsider—that the "Chamber's initial briefing in this case, filed in January and February 2012, appeared to concede that Member Hayes had *abstained* from voting"—is specious at best and does not satisfy the standard for Rule 59(e). Bd. Br. 27 (emphasis in original). The Board's argument that it is not equitable to expect it to have introduced evidence about the Board's voting procedures earlier in the litigation is meritless for at least three reasons.[11]

1. Appellees Did Not Concede That Then-Member Hayes Abstained

The Board contends that Appellees "apparent[ly]" conceded below that then-Member Hayes abstained, but Appellees did no such thing. As the district court correctly concluded—and as quotations from the relevant briefing make quite clear—Appellees simply argued that then-Member Hayes had not *participated* in

[11] For the same reasons, there is no manifest injustice based on the "new" affidavit, as any alleged injustice "might have been avoided through the exercise of due diligence" on the part of the Board. *Fox*, 389 F.3d at 1296. The failure of the Board to submit its "new" evidence and make its new quorum argument is even less justified than the failure to respond to the motion to dismiss in *Fox*. In *Fox*, counsel for appellants failed to receive electronic notice of the motion to dismiss, *id.* at 1294, but in the present case, the Board was on notice of Appellees' quorum argument before summary judgment was even filed, *Chamber of Commerce*, Kerr Declaration, ¶¶ 3-4, Jan. 30, 2012, ECF No. 15. "[M]anifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Ciralsky v. CIA*, 355 F.3d 661, 665 (D.C. Cir. 2004) (internal quotation marks omitted); *see also id.* at 673 ("By failing to advise the court in a timely fashion—i.e., before the court ruled on the motion to dismiss—that there was a limitations problem and that he was prepared to further shorten his complaint, Ciralsky forfeited any claim to an abuse of discretion.").

the vote to issue the Final Rule. JA231-38; *id.* at 231 ("Two Members Of The Board Issued The Final Rule Without The Statutorily Required *Participation* By Three Members." (Emphasis added)); *id.* at 235 ("Chairman Pearce and then-Member Becker lacked authority to issue the Final Rule on December 16, 2011 without Member Hayes' *participation*." (Emphasis added)); *id.* at 236 ("Chairman Pearce and then-Member Becker concede, as they must, that not all three members *participated* in the action challenged here, issuing the Final Rule.") (Emphasis added); *id.* at 238 ("In closing, only two members *participated* in the vote to approve (or not) the Final Rule." (Emphasis added)).

Notably, when Appellees made that argument, the Board's position—as stated in the Federal Register—was that then-Member Hayes had "effectively opposed" the Final Rule. JA236-37. There was no basis for Appellees even to surmise—much less to "concede"—that Hayes "abstained" from the vote to approve the Final Rule.

That the Board would attempt to manufacture a "concession" only betrays the weakness of the Board's position. In making its argument, the Board seizes on a parenthetical in Appellees' briefing below citing this Court's decision in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970), for the proposition that "[a]pproving the Final Rule is a collective act by the Board and thus requires a decision by a congressionally mandated quorum. *See*, *e.g.*, *Greater*

Boston Television Corp. v. FCC, 444 F.2d 841, 861 (D.C. Cir. 1970) (Commissioners that entirely abstained from voting not counted towards quorum requirement.)." JA236-37 n.6. But that is no "concession" that then-Member Hayes abstained in this case.

In *Greater Boston*, this Court concluded that the Commission could legally act because "four out of seven Commissioners constitutes a quorum … [and] out of the four Commissioners *casting votes* three Commissioners cast their vote in favor of an award." 444 F.2d at 861 (emphasis added). The other three Commissioners, characterized as "abstaining completely," "did not participate in the decision." 444 F.2d at 848, 861. Because the abstaining Commissioners were not needed for (and thus not counted toward) the quorum, this Court did not (and did not need to) address whether their lack of participation made them absent voters or abstaining voters. Appellees' citation of *Greater Boston* (and in a footnote, no less) cannot bear the weight the Board would place on it. As the district court aptly put it, the Board's argument simply "slice[s] [Appellees'] opening brief too thin." JA380 (internal quotation marks and citation omitted).

In all events, there is no basis for the Board's argument that the purported "concession" somehow prevented the Board from introducing all the evidence it had relating to the vote on the Final Rule and making all the arguments it could to try to demonstrate that the quorum requirement was met. Indeed, Appellees

informed the Board in advance that they would be making a quorum argument in their opening brief and specifically requested the Board provide any evidence demonstrating that a quorum had issued the Final Rule and that Member Hayes had "voted or *otherwise participated* in issuing the Final Rule." *Chamber of Commerce*, Mot. for Three-Day Extension, Kerr Declaration ¶ 6, Jan. 30. 2012, ECF No. 15, (emphasis added). The Board thus could have made an argument in its opening brief that then-Member Hayes purposefully abstained in its opening brief and presented all relevant evidence regarding the vote on the Final Rule.

The Board, however, chose not to do so. Instead, the Board made a tactical decision to pursue its argument that then-Member Hayes's participation in preliminary procedural votes was enough to satisfy the quorum requirement—probably because that was what was set forth in the Final Rule itself. *Chamber of Commerce*, Board's S.J. Memo. 42, Feb. 3, 2012, ECF No. 21; JA163. As the district court concluded, "[i]nstead of arguing that Hayes participated in the final vote or providing [Appellees] or the Court any evidence to that effect, the NLRB relied on his involvement in preliminary decisions. That was a tactical decision and not dictated by [Appellees'] position." JA380.

The Board nonetheless complains (at 28) that it "should not be penalized for failing to respond when the Chamber mov[ed] the goal posts in its … reply brief" and implicitly criticizes the district court for purportedly violating the rule that

arguments not raised until reply briefs are generally deemed waived. This assertion is particularly ironic considering the Board's own tactic in this lawsuit of dribbling out evidence and constantly shifting its arguments. It is also simply wrong. As the district court correctly determined, the Board's "insistence that it was blindsided … does not hold water. And even if it had been caught off guard by [Appellee's] Reply, it was certainly free to seek leave to file a Surreply on the ground that new arguments had been raised." JA380.

The Board certainly had plenty of time to do so. The reply brief filed by the Chamber and CDW was not "last minute," as the Board asserts (at 27), but was filed (with the joint motion to adjust the briefing schedule) on March 22, 2012. JA265. The district court did not issue its decision until May 14, 2012. JA300. The Board thus had time to file a reply on the quorum issue. The Board should not be allowed to second guess its tactical decision not to do so.[12]

Throughout the litigation below, the Board had ample opportunities to make its arguments and present its evidence. That it chose not to present certain

[12] The Board asserts that "[t]he district court's decision was based upon an argument first articulated in a special, last-minute brief filed by the Chamber on March 22, 2012." Bd. Br. 27. It appears, however, that the basis of the district court's decision was that, according to the Board itself, Member Hayes had "'effectively indicated his opposition.'" JA300-301. As set forth above, the Chamber and CDW stressed this point to the Board when the parties met at the outset of the case and continued to make the point throughout the briefing process. The Board's attempt now to say it was somehow surprised at the end of the briefing is at best baseless.

arguments (or evidence) has nothing to do with anything Appellees did (or did not do). And the Board's own litigation decisions certainly do not amount to an abuse of discretion on the district court's part in concluding that the Board failed to satisfy the standards to seek reconsideration of a judgment under Rule 59(e).[13]

B. The Board Fails To Demonstrate It Satisfied The Statutory Quorum Requirement, Let Alone Establish That The District Court Made A Clear Error

Even if the Board had timely submitted its evidence and made its temporary abstention argument at the outset, it is of no avail. As the district court observed, "the final rule itself did not suggest that Hayes had abstained." JA382.

> Instead, it stated that Hayes had "effectively indicated his opposition" to the rule—presumably by his actions on previous days. Final Rule, 76 Fed. Reg. at 80,146. Hayes's own testimony, moreover, **is inconsistent with the agency's abstention theory**. *See* Hayes Aff., ¶ 11. … Like the remainder of the Board, he seems merely to have been under the misimpression that his having 'effectively indicated his opposition" via prior statements and votes sufficed, Final Rule, 76 Fed. Reg. at 80,146,

[13] Additionally, as described above and in more detail below, the Board's argument that Member Hayes deliberately abstained from voting on this rule is expressly contradicted by Member Hayes own statement that "[he] gave no thought to whether further action was required of [him]." JA248 ¶ 11. Plainly Rule 59(e) cannot be used to submit evidence or argument that contradicts evidence or arguments previously advanced by the party. *Cf. Thomas ex rel. Kattan v. Dist. of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("Ordinarily Rule 59 motions for either a new trial or a rehearing [which are analogous to a Rule 59(e) motions] are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings." (citation omitted)).

> and he thus "gave no thought to whether further action was required of [him]." Hayes Aff., ¶ 11.

JA382 (emphasis added).[14] The Board's new evidence about the electronic voting room (and votes taken on other matters on the same day that the final vote was called for the Final Rule) does not refute the existing evidence, including the Final Rule itself. Specifically, there is still no indication that then-Member Hayes, as the Board argues, *deliberately chose* not to cast a vote. As the district court concluded, "Burnett's testimony would have been useful at the summary-judgment stage, but it likely would not have changed the outcome even then, and it certainly does not establish 'clear error' or 'manifest injustice' now." JA383.

The Board's efforts to relegate "a fundamental constraint on the exercise of the Board's power to an 'easily surmounted technical obstacle,'" JA316 (quoting *New Process Steel*, 130 S. Ct. at 2644), must be rejected as its arguments fail for at

[14] The Board (at 27) criticizes the district court for "simply ignoring" the Fourth Circuit's decision in *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110 (4th Cir. 1997). But the district court did no such thing. *Lockheed Martin* stands for the unremarkable proposition that affidavits (or other evidence) may help show that a Rule 59(e) motion should be granted "to correct a clear error of law or prevent manifest injustice." 116 F.3d at 112 (internal quotation marks omitted). Putting aside that *Lockheed Martin* is not binding precedent in this Circuit, the district court's analysis was fully consistent with *Lockheed Martin* in reviewing the evidence and correctly providing at least four independent reasons that the "new" evidence did not demonstrate that "the Court made 'clear error' when it determined that Hayes did not participate in the December 16th vote to adopt the final rule." JA381.

least three independent reasons (in addition to the arguments set forth above and in the district court's analysis).

First, the district court concluded that, just like the Hayes's voting on earlier procedural matters, "Hayes's presence for and participation in other votes taken [on December 16th] do not necessarily establish his presence for the vote in question. He must have been present for *this* vote to be counted toward *this* quorum." JA381 (emphasis in original).

Second, the district court also concluded that "even if Hayes's employees were authorized to cast votes on his behalf with respect to the other actions up for consideration that day, there is no indication that they were authorized to vote or abstain on his behalf with respect to the decision to adopt the final rule." *Id*. The fact that then-Member Hayes's Deputy Chief Counsel "opened the task," therefore, does not demonstrate that *Hayes* deliberately abstained. Hayes did not "open the task" himself and there is no evidence that Deputy Chief Counsel had been instructed to open the task or otherwise act on this particular matter.[15] Indeed, there is no evidence that Hayes even knew his Deputy Chief Counsel had "opened the task," as Hayes made no mention of it in his affidavit.

[15] The Board itself recognizes the distinction between a member and his or her staff: On December 16 "Member Hayes directed eighteen votes to be cast in the room." Bd. Br. 22 (emphasis added).

As the district court explained in discussing *United States v. Ballin*, 144 U.S. 1, 5-6 (1892): "Although the members of the House need not have taken any action *after* they showed up for the vote, the NLRB's argument only confirms that *they needed to actually be there in the first place*." JA315 (second emphasis added). Of course, a House Member's Chief of Staff could not go to the House floor in a physical vote setting and be counted as part of the quorum. That, however, is exactly what the Board is now arguing: "Because Member Hayes, through his staff, was present and participating in the voting room when his vote was requested … he is properly counted in the quorum under *Ballin*." Bd. Br. 22. Similarly, the Wisconsin state police could not have arrested a Democratic Senator's staff member in order to drag the staff member back to the capitol to be counted toward the necessary quorum. *See* Monica Davey, *Wisconsin Bill in Limbo as G.O.P. Seeks Quorum*, N.Y. TIMES, Feb. 18, 2011, A14 (cited at JA316).[16]

[16] History is replete with examples at the federal and state level of efforts to force *members* to the Chamber floor to establish a quorum. For example:

> [T]he Senate occasionally directed its sergeant at arms to arrest members. But the first openly physical act of compulsion did not occur until 1988. On February 24, 1988, in an attempt to establish a quorum on a campaign finance reform bill, Capitol police carried Oregon Republican Senator Robert Packwood into the chamber feet first at 1:17 a.m.

U.S. SENATE, *Quorum Busting*, http://www.senate.gov/artandhistory/history/mi-

The "new" facts show at most that the Deputy Chief Counsel—not Hayes himself—was in the room. If Congress' quorum requirement in the NLRA is to retain any meaning whatsoever, something more than a staff member "opening the task" in the JCMS is required.[17] And, of course, as the evidence the Board submitted earlier in this case makes clear, after December 15, then-Member Hayes "gave no thought to whether further action was required of [him]" with respect to the final rule.

Third, the district court further concluded that "even assuming that specific authorization was not required and Hayes's deputy chief counsel's opening the voting task could be attributed to Hayes, the NLRB has not provided any indication that the rule was sent for publication *after* that took place." JA381-82 (emphasis in original).

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nute/Quorum_busting.htm (last visited Dec. 27, 2012). Translating this concept to an electronic voting system requires at a minimum some effort to compel the member into the voting room, which is the Board's usual practice. JA248 ¶ 11.

[17] The Burnett affidavit states that "[i]n most offices, the Board Member selects one or more staff members to perform the *ministerial function* of logging in to the electronic room, monitoring events, and entering the Board Member's actions." JA334 ¶ 8 (emphasis added). This is essentially the equivalent of a U.S. Senator having a staff member stationed on or near the floor of the Senate in order to notify the Senator when she must come to the floor to cast a vote. But to be counted in the quorum, the staff member must notify the Senator of the vote *and* the Senator must either go to the floor to vote or be compelled to the floor to vote. Here, the equivalent of this simply failed to happen.

According to the Board's new evidence, then-Member Hayes' Deputy Chief Counsel "opened the task" over 30 minutes after then-Member Becker voted to approve the modified version of the draft final rule. JA337-38 ¶¶ 28-31. According to the December 15, 2011 Order, however, the solicitor was instructed to submit the Final Rule for publication "*immediately* upon the approval … by a majority of the Board." JA117 (emphasis added). Although allegedly only a few minutes, under the evidence submitted by the Defendant, the Final Rule had already been submitted when then-Member Hayes' staff "opened th[e] task."[18]

Whatever online voting schemes the Board uses, at a minimum the member must know and be specifically asked to cast a vote and decline to do so. Even the Board concedes as much, mightily struggling to argue, despite the undisputed evidence to the contrary, that then-Member Hayes deliberately and "temporarily

[18] The Board also criticizes the district court for "attaching significance to evidence that the voting task may not have been opened by Member Hayes's staff until after the final rule had been approved by the majority and send off for publication." Bd. Br. 24 n.9. What matters, however, is whether the agency had authority at the time the action was taken—here, adoption of the final rule on December 16. *Cf. Braniff Airways*, 379 F.2d at 459 ("In our view it is plain that once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the ministerial act of service, of a member needed for a quorum."). On December 16, apparently sometime shortly after noon, the Final Rule was "[s]igned in Washington, DC," JA299, and, according to the December 15 Order, "immediately" submitted for publication. At that time, the rule-making process was complete. This is not changed by the fact that the Final Rule had not yet been published or that the Board could have (acting with an appropriate quorum) taken *further agency action* to halt its publication.

abstained." Bd. Br. 14. But then-Member Hayes himself stated he did not even know that he was supposed to vote, probably because Chairman Pearce and then-Member Becker incorrectly believed his participation in that vote was not necessary, and because the Board itself failed to follow its own normal procedure of having the "Executive Secretary or Solicitor … convey … a request to act."

The Board's attempts to circumvent the quorum requirement after judgment was entered were just as unavailing as their prior attempts. The most that can be said of the Board's "new" (post-judgment) evidence and argument is that then-Member Hayes' Deputy Chief Counsel "showed up" (and even that point is not correct). The demanding "clear error" standard, therefore, was not met and the district court did not abuse its discretion by denying the Board's motion to reconsider.

CONCLUSION

For the foregoing reasons, the district court's summary judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that this brief complies with the applicable type-volume word count option limitations with 12,014 words. This certificate was prepared in reliance on the word count of Microsoft Office Word used to prepare this brief.

/s/ *Allyson N. Ho*
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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2012, a copy of the foregoing Brief of Appellees was electronically filed and served through the Court's CM/ECF system on all counsel of record.

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