No. 23-60495

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INCORPORATED, now known as EXXONMOBIL TECHNOLOGY & ENGINEERING COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT/CROSS-PETITIONER THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board ("the Board") submits that the present case does not require oral argument. The Board plainly did not abuse its discretion by vacating a previously issued decision due to a subsequently discovered conflict of interest or by re-adjudicating the case with a new, undisputedly valid panel. The Board's unfair-labor-practice findings are fully supported by the record evidence. However, if the Court determines oral argument would be of assistance, the Board requests the opportunity to participate.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of ExxonMobil Research & Engineering Co., Inc., now known as ExxonMobil Technology & Engineering Co. ("ExxonMobil") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Decision and Order issued by the Board on August 25, 2023, and reported at 372 NLRB No. 138. The Board had

jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., as amended ("the Act"). 29 U.S.C. § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and cross-application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether the Board abused its discretion by vacating a prior decision due to the undisputedly improper participation of one Board member.

2. Whether substantial evidence supports the Board's findings that ExxonMobil violated the Act by failing to bargain in good faith over the discrete issue of affording supervisors discretion to grant time off, and by making coercive statements during bargaining.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; Disputes Between ExxonMobil and the Union

ExxonMobil is engaged in the research and development of energy-sector technologies and products out of a facility located in Annandale, New Jersey. (ROA.3222; ROA.34.)[1] Independent Laboratory Employees Union ("the Union")

[1] "ROA" refers to the administrative record filed with the Court. References preceding a semicolon are to the Board's findings; those following are to supporting evidence. "Br." refers to ExxonMobil's opening brief.

represents approximately 165 employees at the New Jersey facility, most of whom are research technicians. (ROA.3222; ROA.197-198.) The Union has represented the same bargaining unit since 1941. (ROA.3206.)

Across several years preceding the events at issue in the present case, a number of disputes arose between ExxonMobil and the Union. (ROA.3206.) In November 2015, the Union filed a contractual grievance regarding ExxonMobil's decision to begin permanently subcontracting bargaining-unit jobs. (ROA.3206; ROA.78.) An arbitrator later found merit to the Union's grievance and ruled that the parties' contract forbade such subcontracting. (ROA.3207; ROA.80.)

In May 2016, the Union filed an unfair-labor-practice charge alleging that ExxonMobil had unlawfully denied a bargaining-unit employee's request for personal time off in retaliation for the Union's grievance filing. (ROA.3211; ROA.110.) The parties informally settled the case in August 2016. (ROA.3206; ROA.722-724.) Shortly thereafter, ExxonMobil announced that it was eliminating supervisory discretion to grant personal time off. (ROA.3206; ROA.112-113.) In November 2016, the Union filed a second unfair-labor-practice charge alleging that ExxonMobil unlawfully rescinded such supervisory discretion in retaliation for the Union's unfair-labor-practice charge in the previous case. (ROA.3211; ROA.112-113.) The Board's Regional Director declined to issue complaint and dismissed the second charge. (ROA.3206; ROA.114.)

In November 2017, ExxonMobil announced a policy providing eight weeks of paid parental leave for all employees not represented by a union. (ROA.3206; ROA.82-83.) ExxonMobil declined to extend the same benefit to the bargaining-unit employees represented by the Union. (ROA.3206; ROA.82-83.)

B. The Parties' Negotiations Over a Successor Contract

The collective-bargaining agreement between ExxonMobil and the Union expired in May 2018 and the parties began negotiating a successor agreement. (ROA.3206; ROA.460.) ExxonMobil's lead negotiator was manager Russell Giglio, and the Union's lead negotiator was Union President Michael Myers. (ROA.3206.) The Union's negotiating team was composed entirely of bargaining-unit employees, including Myers, who also served as union officers. (ROA.3222; ROA.34-35, ROA.109.) The parties engaged in negotiations across 23 bargaining sessions, though the present case involves just two narrow issues. (ROA.3206.)

From the outset of bargaining, the Union presented numerous proposals seeking a restoration of supervisory discretion to grant time off. (ROA.3207; *e.g.*, ROA.2659, ROA.2854.) ExxonMobil consistently refused to consider those proposals or to give ground on the issue. (ROA.3207; ROA.97, ROA.129, ROA.332-333, ROA.2144, ROA.2365-2367.) Giglio stated that ExxonMobil saw a "real downside to having inconsistencies" in how the old practice had been administered at the supervisory level, and that such downside "has certainly been

demonstrated by this leadership team in [the Union] that you are quick to grieve, quick to ULP, quick to file lawsuits." (ROA.3212 n.18; ROA.2144.) During a bargaining session on July 9, Giglio told the Union's negotiating team that ExxonMobil was "not interested" in restoring supervisory discretion regarding time-off "because of the Union's filing of the ULP in 2016 and [its] aggressive actions." (ROA.3211; ROA.333.)

During a bargaining session on September 4, Giglio acknowledged that ExxonMobil formerly maintained "an unwritten process" permitting supervisors to grant time off in their discretion. (ROA.3211, ROA.3238; ROA.2365-66.) Giglio stated that such practice ended when "[the Union] brought an unfair labor practice allegation," prompting ExxonMobil management to "[say], you know what, that gravy train has now moved on because we have to defend ourselves." (ROA.3211, ROA.3238; ROA.2365-66.) Giglio further stated that the Union had brought the situation upon itself and that the Union "should have worked through the [proper] channels." (ROA.3211; ROA.2367.) Giglio added that "the catalyst" for a bad relationship developing between ExxonMobil and the Union was Myers taking over as Union President. (ROA.3211; ROA.2368-2369.)

From the outset of bargaining, the Union also sought to secure for the bargaining-unit employees the same eight weeks of paid parental leave that ExxonMobil had recently granted to all unrepresented employees. (ROA.3207;

ROA.84.) When asked by the Union what concessions were necessary to obtain the same eight weeks of leave, and despite having previously stated that the Union needed to make such concessions, ExxonMobil consistently demurred. (ROA.3207, ROA.3212-3213; *e.g.*, ROA.85, ROA.88-91, ROA.1269-1280.) The Union eventually proposed giving up a $5,000 signing bonus offered by ExxonMobil in exchange for the eight weeks of paid parental leave. (ROA.3207; ROA.2103-2104.) At a July 8 bargaining session, Giglio expressed incredulity, stating, "[D]o you really think you are doing your constituents the right thing by saying no ratification bonus? Do you really think 144 of those people would want [parental leave] versus $5,000 up front?" (ROA.3213 & n.22; ROA.2103-2104.)

The next day, during the parties' July 9 bargaining session, Myers asked what it was going to take to secure eight weeks of paid parental leave for the bargaining-unit employees. (ROA.3207; ROA.2170.) Giglio responded that the employees should "[w]alk away from the bargaining agreement." (ROA.3213; ROA.2170.) Myers asked Giglio to clarify what he meant, and Giglio reiterated that if the employees "weren't covered by a [collective-bargaining agreement] … [they] would have eight weeks of [paid parental leave]." (ROA.3213; ROA.2171.) Myers replied, "So you are saying if [we] get [de]certified, you will give us eight weeks of [paid parental leave]?" (ROA.3207; ROA.2717.) Giglio responded by stating, "You said that, I didn't." (ROA.3207; ROA.2717.) During a sidebar

discussion later in the day, Giglio again stated that to get the full eight weeks of paid parental leave the employees should "go without a union." (ROA.3213; ROA.107, ROA.333.)

II. PROCEDURAL HISTORY

Based on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued an unfair-labor-practice complaint alleging numerous violations of the Act by ExxonMobil during the parties' 2018 contract negotiations. (ROA.3221.) Following an evidentiary hearing, an administrative law judge issued a recommended decision and order finding, as relevant here, that ExxonMobil violated the Act by refusing to bargain in good faith over the issue of supervisory discretion to grant time-off, by conveying to employees that it was doing so in retaliation for the Union having filed unfair-labor-practice charges, and by promising employees paid parental leave on the condition that they decertify the Union. (ROA.3211-3212.) The judge also found merit to numerous additional unfair-labor-practice allegations—ultimately reversed by the Board and not at issue on review—involving ExxonMobil's conduct during bargaining. (ROA.3237-3243.) ExxonMobil filed exceptions with the Board. (ROA.3206.)

On September 28, 2020, the Board (Chairman Ring, Members Kaplan and Emanuel) issued a decision and order, reported at 370 NLRB No. 23, reversing the judge's unfair-labor-practice findings, finding instead that ExxonMobil did not

violate the Act, and dismissing the complaint in its entirety. (ROA.3066-3073.) The Union did not petition for review of the Board's decision, though the Act places no time limit on such petitions. (ROA.3195.) *See* 29 U.S.C. § 160(f).

Several months later, Member Emanuel filed a financial disclosure report that caused concern with the Board's Designated Agency Ethics Official ("the Board's Ethics Official") about potential conflicts of interest. (ROA.3050.) Pursuant to regulations promulgated under the Ethics in Government Act, 5 U.S.C. §§ 13101, et seq., federal agencies are required to designate such an ethics official with primary responsibility for resolving conflicts of interest. 5 C.F.R. § 2638.104. In May 2021, at the request of the Board's Ethics Official, the Board's Inspector General opened an investigation into Member Emanuel's financial holdings and previous disclosures. (ROA.3050.) The Inspector General is a presidentially appointed, non-partisan official who conducts investigations independent of agency control. 5 U.S.C. § 403(a).

On August 21, 2021, the Inspector General issued a report to the Board's Ethics Official concluding that Member Emanuel had improperly participated in the present case and several other cases in which he held financial conflicts of interest in violation of a criminal statute, 18 U.S.C. § 208(a), and its implementing regulations, 5 C.F.R. § 2640.201(b)(2)(i). (ROA.3041; ROA.3050-3052.) The Inspector General concluded that Member Emanuel's subsequent claim that he

lacked knowledge of the conflicts of interest was "without merit." (ROA.3051.) The Inspector General presented the matter to the U.S. Attorney's Office for the District of Columbia, which declined criminal prosecution. (ROA.3051.) After reviewing the Inspector General's report, the Board's Ethics Officer determined that Member Emanual should have been disqualified from participating in the present case, and the Board affirmed such determination. (ROA.3041.)

On January 7, 2022, the Board (Chairman McFerran, Members Kaplan, Ring, Wilcox, and Prouty; Member Ring, dissenting in part) issued a notice to show cause why the prior decision and order in this case should not be vacated based on Member Emanuel's improper participation on the panel. (ROA.3041-3042.) The Board unanimously agreed that Member Emanuel should have been disqualified from the case, and that the positions of the parties should be solicited as to whether the Board should vacate its September 2020 decision. (ROA.3043.)

On August 19, 2022, the Board (Chairman McFerran and Member Wilcox; Member Ring dissenting) issued an order, reported at 371 NLRB No. 128, vacating the September 2020 decision and order. (ROA.3191-3205.) The Board determined that vacating the prior decision and order would best preserve public confidence in the integrity and impartiality of the Board's processes. (ROA.3192.) Accordingly, the Board held the case for adjudication by a new Board panel. (ROA.3197.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 25, 2023, after re-adjudicating the merits of the case de novo, the Board (Chairman McFerran, Members Wilcox and Prouty; Member Kaplan, dissenting; Member Prouty, dissenting in part) issued a new Decision and Order reversing the judge in substantial part, but affirming the judge in part to find that ExxonMobil violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith over supervisory discretion to grant time off, violated Section 8(a)(1) by suggesting it was doing so in response to the Union's filing of unfair-labor-practice charges, and violated Section 8(a)(1) by making statements implying that employees would be better off without the Union because they would receive more paid parental leave. (ROA.3206-3216.) Member Kaplan dissented on the procedural ground that the September 2020 decision should not have been vacated. (ROA.3217.) Member Prouty agreed with the violations found but would have found additional unfair labor practices and dissented in part. (ROA.3217-3221.)

The Board's Order requires ExxonMobil to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (ROA.3216.) The Board's Order also requires ExxonMobil to post a remedial notice at its New Jersey facility. (ROA.3216-3217.)

SUMMARY OF ARGUMENT

The initial issue in this case is whether the Board permissibly set aside a decision issued by a panel featuring a Board member who was subsequently discovered to have had improper financial conflicts of interest at the time of the decision in contravention of a federal criminal statute. The Board acted well within its discretion when it remedied that Board member's improper participation by vacating the initial decision and by subsequently issuing a new Decision and Order by a validly constituted panel. Vacating the initial decision and adjudicating the case anew advanced important statutory and institutional interests in preserving public confidence in the integrity and impartiality of the agency. And whether or not the Board was *required* to vacate the original decision, ExxonMobil has failed to show that the Board's decision to do so was an abuse of discretion. Instead, ExxonMobil merely repeats arguments against vacatur that the Board already carefully considered and rejected below.

After a new, undisputedly valid panel re-adjudicated the case, the Board found three discrete violations of the Act based on ExxonMobil's actions during contract negotiations with the Union. Substantial evidence supports the Board's findings as to all three violations. While the Board found that ExxonMobil did not approach bargaining with an overall lack of good faith, the Board found that at several points ExxonMobil crossed the line into unlawful territory. In particular,

the record shows that, as to the Union's specific proposal to restore supervisory discretion to grant time off, ExxonMobil violated the Act by failing to approach bargaining with the degree of good faith mandated by the Act. ExxonMobil further violated the Act by making statements suggesting its refusal to bargain in good faith was the result of the Union having filed unfair-labor-practice charges in the past, and by separately making coercive statements suggesting employees would be better off without the Union as to the distinct issue of parental paid leave. On review, ExxonMobil has failed to rebut the Board's analysis or to show that enforcement is unwarranted pursuant to the deferential standard of review.

STANDARD OF REVIEW

Judicial review of the Board's decisions is "limited and deferential." *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018). The Court reviews the Board's procedural rulings for an abuse of discretion. *UNF W., Inc. v. NLRB*, 844 F.3d 451, 457 (5th Cir. 2016). That includes Board procedural rulings as to whether to vacate or modify an already issued decision. *NLRB v. USA Polymer Corp.*, 272 F.3d 289, 296 (5th Cir. 2001) (reviewing Board determination not to entertain party's untimely motion for reconsideration); *NLRB v. Con-Pac, Inc.*, 509 F.2d 270, 272 (5th Cir. 1975) (reviewing Board determination to reconsider decision without holding hearing); *accord NLRB v. Tri-County Elec. Coop., Inc.*, No. 21-60887, 2023 WL 5040960 (5th Cir. Aug. 8, 2023).

The Court will uphold the Board's unfair-labor-practice findings "if they have a reasonable basis in the law and are not inconsistent with [the Act]," and the Board's findings of fact "so long as they are supported by 'substantial evidence.'" *In-N-Out*, 894 F.3d at 714. Substantial evidence means that which is "sufficient for a reasonable mind to accept as adequate to support a conclusion," and which will only be found lacking "in the most rare and unusual cases." *Flex Frac Logistics LLC v. NLRB*, 746 F.3d 205, 207-08 (5th Cir. 2014).

ARGUMENT

I. The Board Did Not Abuse Its Discretion By Vacating Its Prior Decision Due to the Undisputedly Improper Participation of Member Emanuel

Although ExxonMobil briefly challenges the Board's unfair-labor-practice findings, as discussed below, *infra* pp. 26-36, its primary focus on review is the Board's August 2022 order that vacated the original September 2020 decision in response to the improper participation of Member Emanuel. As shown below, however, the Board acted well within its discretion in concluding that the prior decision should be vacated and the case adjudicated de novo by a new Board panel—the validity and composition of which no party challenges.

A. The Board Reasonably Determined That Vacatur of the Prior Decision Would Best Preserve Public Confidence in the Agency

No party disputed below—and all five Board Members agreed—that Member Emanuel should have been disqualified from participating in the present

case due to a financial conflict of interest. As the Board's Inspector General found, Member Emanuel's participation violated a criminal statute, 18 U.S.C. § 208(a), and its implementing regulations, 5 C.F.R. § 2640.201(b)(2)(i). However, the issue before the Court is much more narrow: whether the Board permissibly determined that, in order to preserve public confidence in the integrity and impartiality of the agency, it would vacate the September 2020 decision and have a new Board panel, not including Member Emanuel, re-adjudicate the case.

Section 10(d) of the Act grants the Board the broad power to "modify or set aside" its orders "at any time, upon reasonable notice and in such manner as it shall deem proper," until it loses jurisdiction by filing the administrative record with a reviewing court. 29 U.S.C. § 160(d); *see* 29 C.F.R. § 102.49; *Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 508-09 (5th Cir. 2002); *Con-Pac*, 509 F.2d at 272. There is no dispute that the Board retained jurisdiction over the present case as of August 2022—when it issued its order vacating the September 2020 decision—or that the Board provided ExxonMobil ample notice and an opportunity to be heard on whether vacatur was an appropriate remedy.

Applying its statutory discretion, the Board found "powerful reasons" for vacating the September 2020 decision and for adjudicating the case with a new Board panel not including Member Emanuel. (ROA.3192-3194.) Most important of all, vacating the prior decision "demonstrates to the public that the agency is

determined to protect the integrity of its decision-making process." (ROA.3192-3193.) Vacatur similarly advances the congressional policy underlying Section 208(a), which seeks to bolster public confidence in the integrity of federal decision-making and prohibit financial conflicts of interest by federal officials regardless of whether actual bias is proven, and which Member Emanuel contravened by participating in the prior decision. (ROA.3192.) In addition, vacatur based on Member Emanuel's improper participation alone avoids "difficult" factual inquiries into the adjudicatory process leading to the September 2020 decision, promotes consistent results in future cases involving similar facts, and creates an additional incentive for Board members to maintain an awareness of their financial holdings and to comply with the provisions of the law. (ROA.3193.)

Furthermore, the Board noted that vacating the September 2020 decision and assigning the case to a new panel avoided a risk of judicial reversal and further delay in resolving this matter. (ROA.3193-3194.) In a leading opinion by the Third Circuit—the circuit in which the underlying unfair labor practices took place—the court remanded a case to the Board based on allegations that a Board member should have been disqualified, and instructed the Board to reconsider the case with a new panel if the allegations were upheld. *Berkshire Emps. Ass'n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941). Over the years, courts of appeals have unanimously reached similar conclusions when faced with the potentially improper

participation of an agency adjudicator. (ROA.3193 (citing cases); *see infra* pp.20-22.) If the Board had failed to vacate its initial decision here, it faced a significant risk of reversal and remand by a reviewing court. (ROA.3194.)

In sum, the Board reasonably concluded that vacatur was warranted in the present circumstances to "eliminat[e] any possibility that a decision tainted by bias based on a financial conflict of interest will have legal effect." (ROA.3192.) The Board observed that whether or not it was *compelled* to vacate the prior decision, vacatur was "well within [its] discretion." (ROA.3192, ROA.3195.) The case was thereafter re-adjudicated by a new Board panel—the validity of which no party disputes—and ExxonMobil's due process rights were not prejudiced.

B. ExxonMobil Has Not Shown the Board Abused Its Discretion

On review, ExxonMobil renews several arguments that the Board already carefully considered and rejected. (ROA.3194-3196.) In simply repeating these arguments to the Court, ExxonMobil fails to make the difficult showing that the Board abused its discretion by vacating its September 2020 decision in an abundance of caution and to avoid any appearance of impropriety.

First, ExxonMobil asserts that the Board "improperly" utilized its statutory authority under Section 10(d) to vacate the September 2020 decision. (Br. 23-25.) There is no basis in logic or precedent for ExxonMobil's position. As the Supreme Court observed long ago, Section 10(d) establishes "in plain terms" the broad

power of the Board to vacate or modify its orders at any time prior to the transfer of the administrative record to a reviewing court—even when, unlike here, a petition for review has already been filed. *In re NLRB*, 304 U.S. 486, 492-95 (1938). Just as a "master in chancery [may] modify or recall his report to a court after submission but before action by the court," the Board may vacate an order to "correct errors," consider "new evidence which would render the order inadequate or unjust," and ensure that the order "comport[s] with right and justice." *Id.*

ExxonMobil's attempt to transform these examples into *limitations* on the Board's authority to vacate a previously issued order (Br. 24-25) is untenable: in the very case it cites, the Supreme Court affirmed the Board's decision to vacate and reconsider an order based on intervening changes to Board procedure that granted parties greater due process protections. *In re NLRB*, 304 U.S. at 489. That case did not involve "errors" or "new evidence" as ExxonMobil suggests. (Br. 24.) Indeed, the Board routinely invokes its Section 10(d) authority to modify or vacate issued orders through its universally approved procedure for permitting parties to move for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *Raven Servs.*, 315 F.3d at 508-09.[2]

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[2] This Court has interpreted parallel language in other statutes to confer "broad power" on an administrative agency to set aside or reconsider decisions—whether sua sponte or in response to a motion for reconsideration—as long as the agency retains exclusive jurisdiction. *Tex. E. Transmission Corp. v. FERC*, 102 F.3d 174,

In any event, even if the Court were to accept ExxonMobil's unwarranted gloss on the text of Section 10(d), the Board observed here that Member Emanuel's participation in the original decision *was* an "error" needing correction, and that the subsequently discovered conflict of interest rendered the original decision "inadequate [and] unjust." (ROA.3194 (quoting *In re NLRB*, 304 U.S. at 492).)

Second, as a consequence of refusing to accept the Board's express statutory authority to modify or set aside its orders "at any time" prior to filing the record with a reviewing court, 29 U.S.C. § 160(d), ExxonMobil cites inapposite caselaw discussing agencies' non-statutory, "inherent" authority to modify or reconsider their actions within a "reasonable" period of time. (Br. 25-27.) But as the Board explained, it was not relying on non-statutory "inherent authority" when it vacated the September 2020 decision, and a "reasonable time" requirement is inconsistent with the terms of Section 10(d). (ROA.3194.) ExxonMobil cites no precedent involving Section 10(d) or a similar adjudicatory body. (ROA.3194.)

In any event, even assuming a reasonable-time requirement were apposite, ExxonMobil's assertion that the Board engaged in "inappropriate" delay in this case (Br. 26) is unfounded. The possibility of Member Emanuel having financial conflicts of interest did not come to light until after the September 2020 decision

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189-90 (5th Cir. 1996). It is "perfectly proper" for an agency to withdraw an initial decision and to take a "fresh look" at a case. *Id.*

had already issued. The Board's Inspector General—an independent official who conducts investigations beyond the control of the Board itself, 5 U.S.C. § 403(a)—issued a report on Member Emanuel's conflicts of interest to the Board's Ethics Officer on August 26, 2021. The Board's Ethics Officer then reviewed the Inspector General's report and conveyed to the Board her determination that Member Emanuel should have been disqualified from participating in this case. The Board reviewed the Ethics Officer's determination and affirmed her conclusion that Member Emanuel should have been disqualified.

On January 7, 2022, just over four months after the Inspector General issued his report, and after being forced to decide how to respond to what all parties agree was a highly abnormal situation, the Board issued a notice to show cause why the original decision in this case should not be vacated. The Board then reviewed the responses to the notice to show cause filed by ExxonMobil and the Board's General Counsel and carefully considered how to proceed.[3] On August 19, 2022,

[3] ExxonMobil misconstrues (Br. 26, 36) the Board's October 2021 motion for remand in *1199SEIU, United Healthcare Workers East v. NLRB*, No. 21-1152 (D.C. Cir. motion filed Oct. 26, 2021), on review of the Board's decision in *George Washington University Hospital*, 370 NLRB No. 118 (Apr. 30, 2021), *vacated*, 372 NLRB No. 109 (July 25, 2023). At that time, the Board had not yet taken any position as to how to address Member Emanuel's conflicts of interest, and it merely sought to return the administrative record in that case so that it would have jurisdiction to evaluate how to proceed. In any event, an additional "two month" delay before issuing the notice to show case in the present case (Br. 26, 36) would hardly have been unreasonable.

the Board issued its order vacating the September 2020 decision. The foregoing timeline was far from unreasonable given the circumstances. Indeed, this Court has repeatedly upheld similar or longer lapses in time. *E.g.*, *Raven Servs.*, 315 F.3d at 508-09 (upholding November 2001 order granting untimely motion for reconsideration and modifying June 2000 order); *Tex. E. Transmission*, 102 F.3d at 189-90 (holding that August 1995 order effectively overruling March 1992 and June 1993 orders was "perfectly proper"). Nor has ExxonMobil shown or alleged any meaningful prejudice arising from the resulting delay.

Third, ExxonMobil argues that vacatur of the September 2020 decision was "inappropriate" because Member Emanuel's vote as part of a unanimous three-member panel was not dispositive to the outcome. (Br. 28-30.) ExxonMobil's argument falls against the overwhelming weight of judicial precedent, including recent Supreme Court precedent addressing the participation of one potentially biased adjudicator on a multi-adjudicator panel.

In *Williams v. Pennsylvania*, 579 U.S. 1 (2016), the Supreme Court had "little trouble" concluding that the improper participation of an interested judge on a multi-judge panel "is a defect 'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive." *Id.* at 14. As the Court explained, "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues." *Id.* at 15. Not only is the

"process of deliberation" inherently collaborative, but, in the absence of vacatur, "the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Id.* at 15-16. In response, ExxonMobil fails to engage with the Court's substantive reasoning. ExxonMobil instead seeks to distinguish the facts of why the judge's participation was improper in *Williams* and to make the very type of "harmless error" argument the Court held is inappropriate when confronted with one adjudicator improperly participating on a multi-adjudicator panel. (Br. 29 n.9.)

Moreover, *Williams* is merely the latest in a long line of cases reaching the same conclusion. Courts have consistently held that vacatur or remand is warranted regardless of whether the conflicted adjudicator cast a deciding vote, including in the Third Circuit case discussed above. *Berkshire Emps. Ass'n*, 121 F.2d at 239 ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way … whereby the influence of one upon the others can be quantitatively measured."); *see also Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) ("The rationale for remanding the case despite the fact that former Chairman Dixon's vote was not necessary for a majority is well established."); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) ("The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not

necessary for a majority."); *cf. Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (noting that "the presence of one biased member [may] contaminate[] the tribunal"); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) ("Even though [Commissioner] Cox recused himself prior to the filing of the SEC's final decision, there is no way of knowing how Cox's participation affected the Commissioners' deliberations."). Thus, ExxonMobil can hardly show that the Board abused its discretion in choosing to vacate its prior decision here. (ROA.3195.)

Even assuming the Board could have reached a different conclusion and chosen to let its September 2020 decision stand—a possibility the Board did not foreclose (ROA.3193, ROA.3195)—ExxonMobil cites no precedent on review supporting its position that the Board was *prohibited* from vacating its decision in these circumstances. In *Hodosh v. Block Drug Co.*, 790 F.2d 880, 881-82 (Fed. Cir. 1986)—which, as the Board observed, is seemingly irreconcilable with the Supreme Court's reasoning in *Williams* (ROA.3195 n.24.)—the Federal Circuit suggested in dicta that the improper participation of one judge on a unanimous three-judge panel might not require vacatur. But ExxonMobil's burden on review is to show the Board abused its discretion, not that vacatur was "unnecessary"

(Br. 28) or that the Board might have made a different choice. Moreover, *Hodosh* involved a distinct recusal framework not directly applicable to the present facts.[4]

Finally, ExxonMobil attempts a conceptual sleight of hand by insisting that the statute guiding the recusal of federal judges, 28 U.S.C. § 455, somehow required the Board to let its September 2020 decision stand and to ignore the separate criminal statute governing financial conflicts of interest, 18 U.S.C. § 208(a). But as the Board explained, the question below was "not whether Member Emanuel was disqualified, but whether the Board should vacate its prior decision and order." (ROA.3195.) Regardless of whether Member Emanuel's disqualification would have also been required under the provisions of Section 455—a statute governing federal judges, not administrative adjudicators—his participation in this case undisputedly contravened Section 208(a). No party disputed before the Board that Member Emanuel *should have* been disqualified

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[4] *Hodosh* also relied in turn on *Maier v. Orr*, 758 F.2d 1578 (Fed. Cir. 1985), which stated, again in dicta, that a petition for rehearing would be unwarranted if one judge should have been disqualified from a unanimous panel—based on the logic that even if rehearing were granted the other two judges "would decide the appeal the same way." *Id.* at 1583. Although again in tension with *Williams*, such premise—evidently underlying both *Maier* and *Hodosh*—is also inapposite here. As the Supreme Court has explained, the practice and statutory authority of the courts of appeals to issue two-judge opinions when a third judge is disqualified is "a world apart" from that of the Board to issue two-member decisions. *New Process Steel LP v. NLRB*, 560 U.S. 674, 686 (2010) (invalidating more than two years' worth of Board decisions based on lack of valid three-member quorum).

from participating on the panel that issued the September 2020 decision. Thus, as the Board explained, Section 455 "simply does not speak" to the distinct issue presented below: whether, faced with the improper participation of a disqualified Board member in a decision that has already issued, the Board should vacate its initial decision and reconsider the case anew. (ROA.3195.)[5]

Moreover, even assuming, arguendo, that Section 455 were controlling here, the Board explained that it would have reached the same conclusion and vacated the September 2020 decision under that framework as well. (ROA.3196.) In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Supreme Court observed that Section 455 "neither prescribes nor prohibits any particular remedy" for an adjudicator's improper participation in a case, but instead leaves to the discretion of the adjudicatory body "the task of fashioning the remedies that

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[5] Accordingly, the fact that individual Board members or other administrative agencies have at times looked to Section 455 for guidance when prospectively evaluating whether recusal is appropriate (Br. 30-33) does not answer the operative question of whether vacatur is appropriate. In addition, the Board itself has never held that Section 455 governs "the Board's own rulings involving member-disqualification or recusal, much less the Board's choice of a remedy in cases where a disqualified member improperly participated." (ROA.3195 n.27.) Nor does ExxonMobil cite any precedent for its implicit suggestion that undisclosed conflicts of interest would not, at a minimum, call an adjudicator's impartiality into question and warrant disqualification under Section 455 as an "appearance of impropriety." (ROA.3195.) ExxonMobil insists that "there is no evidence Member Emanuel was even aware of his [financial] holdings." (Br. 35 n.14.) However, after conducting a full investigation, the Board's Inspector General concluded "Member Emanuel's position that he lacked knowledge of the conflicting financial interest is without merit." (ROA.3051.)

will best serve the purpose of the legislation." *Id.* at 862. Relevant factors in deciding whether to vacate an already issued judgment pursuant to Section 455 include "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

All three factors strongly favored vacatur here. ExxonMobil was not prejudiced by being subjected to an order issued by a new, valid Board panel—even if ExxonMobil prefers the conclusions reached by the original panel in this particular matter. The only risk of injustice would have resulted from the Board *not* vacating the original order or re-adjudicating the case. Furthermore, failing to vacate the decision here would "set a dangerous precedent, threatening injustice in *other* cases where a Board member's participation violated [Section 208(a)]," and—of particular concern—would "seriously undermine public confidence in the Board's decision-making process." (ROA.3196.) ExxonMobil cannot show the Board abused its discretion by taking these important considerations into account and concluding that vacatur was the better course of action.

II. Substantial Evidence Supports the Board's Findings That ExxonMobil Violated the Act by Failing To Bargain in Good Faith Over a Discrete Issue and by Making Coercive Statements During Bargaining

After re-adjudicating the case de novo—and largely in agreement with the vacated September 2020 decision—the Board reversed most of the unfair-labor-

practice findings made by the administrative law judge and dismissed the complaint in relevant part. However, the Board found three unfair labor practices stemming from ExxonMobil's conduct during bargaining, which at times crossed the line into unlawful territory. To remedy these three discrete violations, the Board's Order requires ExxonMobil to cease and desist from the unfair labor practices found and to post a remedial notice. As shown below, the Board's Order is supported by substantial evidence.

A. ExxonMobil Violated the Act by Failing To Bargain in Good Faith Over Reinstating Supervisory Discretion To Grant Time Off and by Coercively Suggesting It Was Doing So In Retaliation for the Union Having Filed Unfair-Labor-Practice Charges

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively" with its employees' designated collective-bargaining representative. 29 U.S.C. § 158(a)(5). The Act requires an employer to fulfill its duty to bargain by conferring "in good faith" with its employees' union regarding mandatory subjects of bargaining. 29 U.S.C. § 158(d). Accordingly, the duty to bargain in good faith "requires more than 'the mere meeting' of the parties; negotiations must grow out of a 'serious intent to adjust differences and to reach an acceptable common ground.'" *Carey Salt Co. v. NLRB*, 736 F.3d 405, 412 (5th Cir. 2013). An employer violates Section 8(a)(5) by failing to approach discussions over a given issue with an "open and fair mind, and a sincere desire to find a basis of agreement." *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 46 (5th Cir. 1974).

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their statutory rights. 29 U.S.C. § 158(a)(1). To find a violation of Section 8(a)(1), the Board examines whether, under the totality of the circumstances, an employer's conduct would have had a reasonable tendency to coerce employees. *NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 459 (5th Cir. 1983); *accord Atl. Grp., Inc. v. NLRB*, No. 22-60442, 2023 WL 5584119 (5th Cir. Aug. 29, 2023). Any violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1). *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 657 (5th Cir. 2012).

Substantial evidence supports the Board's findings that ExxonMobil violated Section 8(a)(5) and (1) by failing to bargain in good faith over the specific issue of reinstating supervisory discretion to grant personal time off, and violated Section 8(a)(1) by conveying to employees that it was doing so in retaliation for the Union having filed unfair-labor-practice charges. (ROA.3211-3212.) As the Board observed, ExxonMobil's lead negotiator, Russell Giglio, candidly stated at the parties' July 9 bargaining session that ExxonMobil was not interested in bargaining over restoring supervisory discretion to grant time off, *because of* "the Union's filing of the [unfair-labor-practice charge] in 2016 and its aggressive actions." (ROA.3211; ROA.333.) Even standing alone, such admission would be sufficient to support the Board's finding that ExxonMobil's refusal to consider the Union's

proposals was not prompted by legitimate business considerations, but by a desire to punish the Union for having exercised its statutory right to file unfair-labor-practice charges over the time-off policy in 2016. (ROA.3211-3212.)

ExxonMobil's retaliatory motive is only further demonstrated by other statements made at the bargaining table. At a May 24 bargaining session, Giglio admitted ExxonMobil's purportedly neutral justification for refusing to consider the Union's proposals—a desire to avoid inconsistencies in application of the old policy—was based on the Union's current leadership team having shown itself to be "quick" to file unfair-labor-practice charges. (ROA.3212 n.18; ROA.2144; *see also* ROA.94.) Likewise, during a September 4 bargaining session, Giglio again admitted that ExxonMobil had no qualms about supervisory discretion to grant time off *until* the Union filed the 2016 unfair-labor-practice charge, which "is when [management] said, you know what, that gravy train has now moved on because we have to defend ourselves." (ROA.3238; ROA.2365-2366; *see also* ROA.2339.) Giglio stated the Union had brought the situation upon itself by failing to work through the proper channels, and personally attacked Union President Myers for creating a "bad" relationship with ExxonMobil. (ROA.3211; ROA.2366-2369.)

The foregoing evidence of ExxonMobil's bad-faith intent in refusing to consider the Union's proposals amply supports the Board's conclusion that ExxonMobil did not approach bargaining with the requisite "open and fair mind,"

Big Three, 497 F.2d at 46, and that it unlawfully refused to bargain in good faith over the Union's time-off proposals in violation of Section 8(a)(5) and (1) of the Act. (ROA.3212.) The Board also found that ExxonMobil's statements at the bargaining table, as discussed above, separately violated Section 8(a)(1), because they would have reasonably tended to coerce the employees in attendance by signaling that ExxonMobil was refusing to bargain in retaliation for the protected filing of unfair-labor-practice charges. (ROA.3212.) *See, e.g.*, *Mesker Door, Inc.*, 357 NLRB 591, 597 (2011) (finding statements linking adverse consequences to the filing of unfair-labor-practice charges tend to chill the statutory rights of "all employees" and to have "the likely long-term effect of deterring employees from filing future charges").

In response, ExxonMobil denies that it "refused to bargain" over the time-off proposal, and notes that the issue was repeatedly discussed in bargaining. (Br. 37-39.) As just explained, however, the Act requires an employer to bargain *in good faith*, not merely to go through the motions of bargaining. Although parties are under no obligation to make concessions or reach agreement on a particular issue, they must approach negotiations with the appropriate "frame of mind," and may not use the formalities of bargaining to conceal an unlawful purpose. *Big Three*, 497 F.2d at 46-47. The record fully supports the Board's finding that ExxonMobil approached the time-off issue without the good faith contemplated by the Act.

ExxonMobil also renews the vague claim that its refusal to consider restoring supervisory discretion was motivated by a desire to avoid "the pitfalls of inconsistency." (Br. 39.) ExxonMobil fails to explain what such inconsistencies entailed other than the fact that the Union raised "challenges" in 2016. (Br. 39.) As the Board found, Giglio's statements at the bargaining table and the record as a whole demonstrate that ExxonMobil's real intent was to retaliate against the Union for having filed an unfair-labor-practice charge. (ROA.3211-3212 n.18.) And contrary to ExxonMobil's suggestions on review (Br. 38-39), an employer violates its statutory duty to bargain in good faith by conditioning agreement or modifying proposals based on a union having filed unfair-labor-practice charges. *10 Ellicott Square Ct. Corp.*, 320 NLRB 762, 772 (1996) (citing cases), *enforced*, 104 F.3d 354 (2d Cir. 1996) (unpublished). If an employer refuses to consider a proposal based on the union's filing of charges—as opposed to legitimate considerations amenable to concessions by the union—it is in effect shutting down all further negotiations unless the union gives in and agrees to forego its statutory right to file such charges with the Board. That objective contravenes the Act.[6]

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[6] The Board's decision in *Bulk Transport Service*, 267 NLRB 65 (1983), cited by ExxonMobil (Br. 38-39), is inapposite. The issue in that case was whether an employer's decision to eliminate an employee's position as superfluous—based on "economic lessons learned" from grievances filed by *other* employees—was discriminatorily motivated by an unrelated grievance filed by the discharged employee months earlier. *Id.* at 66. That case had nothing to do with whether an employer approached collective bargaining in bad faith.

Finally, the Board's decision does not require "the making of a concession" by ExxonMobil, and it does not have anything to do with the substance of the Union's bargaining proposals. (Br. 38.) The Board's Order merely requires ExxonMobil to cease and desist from refusing to bargain in good faith and from conveying to employees that it is doing so in response to the filing of unfair-labor-practice charges. (ROA.3216.) The Board's Order does not require ExxonMobil to agree to any proposal made by the Union, and the Board's decision takes no position on the substance of the underlying issue.

B. ExxonMobil Made Coercive Statements Conveying That Employees Would Be Better Off Without the Union

Although an employer is entitled to express its views about unionization, an employer violates Section 8(a)(1) by predicting adverse consequences within its own control, or by "trying to induce employees to rid themselves of the union by promising they would be better off without it." *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659-60 (6th Cir. 2005). When an employer's statements cease being abstract expressions of opinion but are made in the context of concrete actions at the bargaining table, they may cross the line into unlawful attempts "to discredit [a union] and its agents and to persuade the employees that they really [do not] need [a union] and were in fact better off without it." *Herman Sausage Co.*, 122 NLRB 168, 172 (1958), *enforced*, 275 F.2d 229 (5th Cir. 1960).

Substantial evidence supports the Board's finding that ExxonMobil violated Section 8(a)(1) by conveying to employees that, at least with respect to parental leave, they would be better off without the Union. (ROA.3212-3213.) Throughout the parties' negotiations, ExxonMobil was consistently evasive when asked by the Union about the costs and necessary tradeoffs for receiving the same eight weeks of paid parental leave granted to unrepresented employees. (ROA.3213 n.21.) When the Union proposed giving up a signing bonus in return for the paid parental leave, Giglio expressed incredulity about the Union's bargaining choices, stating, "[D]o you really think you are doing your constituents the right thing by saying no ratification bonus? Do you really think 144 of those people would want [paid parental leave] versus $5,000 up front?" (ROA.3213 & n.22; ROA.2103-2104.)

During a subsequent July 9 bargaining session, after being asked by Myers what it was going to take to get eight weeks of leave, Giglio expressly stated that the employees should "[w]alk away from the bargaining agreement." (ROA.3213; ROA.2170.) When asked to clarify what he meant, Giglio doubled down, stating that if the employees "weren't covered by a [collective-bargaining agreement] … [they] would have eight weeks of [paid parental leave]." (ROA.3213; ROA.2171.) During a separate sidebar discussion later in the day, Giglio again reiterated that to get the full eight weeks of paid parental leave the employes should "go without a union." (ROA.3213; ROA.107, ROA.333.) These statements were made in the

presence of employees on the negotiating committee, and in the context of ExxonMobil's demonstrated unwillingness to meaningfully discuss extending to represented employees the paid parental leave that it had granted to unrepresented employees. As a result, the Board concluded that Giglio's July 9 statements would reasonably be understood to convey the unlawful message that employees would be better off if they abandoned union representation. (ROA.3213.)

In response, ExxonMobil first attacks the Board's unfair-labor-practice finding on the procedural ground that it was based on an "unpled theory" rather than the theory alleged in the complaint. (Br. 40.) But the Court lacks jurisdiction to entertain ExxonMobil's argument on this point, because ExxonMobil failed to raise it to the Board. Section 10(e) of the Act dictates that "[n]o objection that has not been urged before the Board … shall be considered by the court … [absent] extraordinary circumstances." 29 U.S.C. § 160(e); *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1396 (5th Cir. 1983). Here, ExxonMobil forfeited any objection to the Board's revised theory of liability by failing to raise it in a timely motion for reconsideration. *See Woelke & Romero*, 456 U.S. at 665; *Gulf States*, 704 F.2d at 1396. Indeed, faced with identical circumstances in *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975), the Supreme Court held that the employer had forfeited any "objection that it was denied procedural due process because the Board based its order upon a theory of liability … not charged

or litigated before the Board." *Id.* at 281 n.3. There, as here, the employer failed to raise such claim to the Board in a timely motion for reconsideration. *Id.*

In any event, it is well established that the Board may find a violation not alleged in the complaint as long as the issue was "closely connected to the subject matter of the complaint" and was "fully litigated" at the hearing. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990). Both prongs were satisfied here. As the Board explained, the complaint allegation and the slightly different violation found by the Board were rooted in the same statements made by Giglio, and the parties fully litigated the overarching question of how employees would have understood those statements in the context of the parties' bargaining. (ROA.3212 n.20.) ExxonMobil offers no substantive rebuttal.

As to the merits, ExxonMobil disregards the context and substance of Giglio's statements and attempts to reframe them as "sarcasm" or as "meaningless, frustrated remark[s]." (Br. 40-42.) But the Board properly evaluated how reasonable employees would construe Giglio's statements in the context they were made. (ROA.3213.) Giglio did not merely state that he thought the employees would be better off without the Union or make a negative remark about the Union, but expressly stated—in the context of the Union's repeated, unsuccessful efforts to secure equivalent paid parental leave through concessions at the bargaining table—that employees would only receive such benefit if they chose to stop being

represented. And ExxonMobil's implication that Giglio's statements represented a momentary loss of composure is contrary to the facts: Giglio repeated the same sentiment multiple times across the day. (ROA.107, ROA.333, ROA.2170-2171.)[7]

Moreover, ExxonMobil's concession that Giglio was "frustrated" when he made his statements (Br. 41-42) merely reinforces the Board's analysis. The employees in attendance would have understood Giglio as earnestly expressing his annoyance at the Union and, in a moment of unguarded sincerity, affirming that the employees would be better off if they abandoned their chosen collective-bargaining representative. ExxonMobil's suggestion that employees would have interpreted Giglio's statements as mere sarcasm (Br. 42) is internally inconsistent and contrary to the evidence. And the fact that emotions may run high during negotiations does not license a management official to make coercive statements. *See, e.g.*, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1073-74 (D.C. Cir. 2016) (upholding

[7] ExxonMobil wrongly claims that the Union's representatives testified that they did not understand Giglio's statement "to be serious." (Br. 41.) Myers merely testified that it was "ridiculous" to think he would abandon the Union to secure paid parental leave, as Giglio had earnestly suggested. (ROA.172.) Likewise, Union Vice President Thomas Fredriksen testified that he found Giglio's proposal "absurd," but that the employees caucused and discussed what Giglio had meant. (ROA.351.) Six other bargaining-unit employees were present who did not testify at the hearing. (ROA.109.) In any event, it is well settled that the test for finding a violation of Section 8(a)(1) is an objective one, and that it does not matter whether the speaker intended to coerce employees or "whether the employees [were] in fact coerced." *Brookwood Furniture*, 701 F.2d at 459.

Section 8(a)(1) finding based on "frustrated" manager's statement that he was going to find a reason to fire employee on bargaining committee).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying ExxonMobil's petition for review and enforcing the Board's Order.

Respectfully submitted,

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May 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INCORPORATED, now known as EXXONMOBIL TECHNOLOGY & ENGINEERING COMPANY	)	No. 23-60495
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 22-CA-218903, 22-CA-223073, 22-CA-232016
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, D.C.,
this 29th day of May, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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v.	)	
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Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,293 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 365.

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