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

Service Employees International Union, Petitioner, v. National Labor Relations Board, Respondent, Chamber of Commerce of the United States, *et al.*, Intervenors.	Case No. 23-1309

RESPONDENT'S OPPOSITION TO INTERVENORS' MOTION TO DISMISS

Intervenors Chamber of Commerce of the United States of America, et al. assert that this Court lacks jurisdiction over the petition for review of the National Labor Relations Board's[1] Joint Employer Rule ("Final Rule") filed by Service Employees International Union ("SEIU"), and that the district courts have jurisdiction of pre-

[1] "NLRB" used herein refers to the agency as a whole; "the Board" refers to the presidentially appointed decision-making body of the agency.

enforcement challenges to that rule under 28 U.S.C § 1331. However, as shown below, jurisdiction is proper here because 29 U.S.C. § 160(f) of the National Labor Relations Act ("NLRA")[2] vests exclusive original jurisdiction of petitions to review NLRB rulemakings pertaining to unfair labor practices in the Circuit Courts of Appeals.

BACKGROUND

SEIU's petition for review challenges a final rule issued by the Board on October 27, 2023. *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (to be codified at 29 C.F.R. § 103.40) ("Final Rule"). The Final Rule, effective February 26, 2024, reinstates and refines the longstanding common-law standard for determining whether two or more employers are a joint employer under the NLRA.

The NLRB is an independent federal agency created by Congress in 1935 to administer the NLRA. The agency's adjudicatory and rulemaking functions are vested in a five-seat Board. While the Board has historically tended to effectuate and interpret the NLRA through case-by-case adjudication, Section 6 gives it the authority to engage in

[2] 29 U.S.C. §§ 151–69.

rulemaking "in the manner prescribed by [the Administrative Procedure Act] . . . as may be necessary to carry out the provisions of this Act."[3]

Generally, the Board handles two types of disputes. First, when a question arises about employee representation for collective bargaining, Section 9 of the NLRA empowers the Board to investigate and, if necessary, resolve the matter through certification.[4] If a union is chosen as the exclusive representative of employees, both the employer and the union must meet and negotiate in good faith regarding wages, hours, and employment terms as mandated by law.[5] Second, through cases brought by the NLRB's General Counsel under Section 10 of the NLRA, the Board determines whether employers and unions have committed unfair labor practices that are set forth by Section 8.

By operation of these statutory provisions, an entity's status as an employer determines whether it has a duty to bargain with a properly designated or selected union and whether it may be held liable for

[3] 29 U.S.C. § 156.

[4] 29 U.S.C. § 159.

[5] 29 U.S.C. § 158(d).

unfair labor practices. Thus, accurately identifying whether an entity qualifies as an employer is critically important. In many workplaces, it is common for multiple entities to control or have the right to control critical aspects of the employment relationship.[6] In such scenarios, "[t]he existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other."[7]

In 2020, the Board issued a rule that limited joint-employer status to employers that exercised direct and immediate control over terms and conditions of employment;[8] that rule is currently subject to legal challenge.[9] The Final Rule challenged in the instant litigation rescinds

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[6] *See, e.g.*, Standard for Determining Joint Employer Status, 88 Fed. Reg. at 73,980 (referring to comments received during the rulemaking which "note that modern business practices often result in multiple firms sharing control over aspects of employees' terms and conditions of employment").

[7] *N. Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382 (5th Cir. 1980).

[8] Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020).

[9] *SEIU v. NLRB et al.*, No. 21-cv-02443 (D.D.C. filed Sept. 17, 2021). Prior to any party taking positions on jurisdiction or the underlying merits, the district court stayed that litigation based on the Board's stated intention to revisit the 2020 rule. The current stay lasts through March 11, 2024. Minute Order Granting Unopposed Motion for Further Extension of Litigation Stay, dated Jan. 9, 2024.

and replaces the 2020 rule, and broadens the standard to determine a joint-employer relationship. The Final Rule, like the 2020 rule, applies in both the representation-case and unfair-labor- practice-case contexts, rendering certain individual employers jointly liable for unfair labor practices and/or obligated to recognize and bargain with a union.[10]

On November 6, 2023, SEIU filed a Petition for Review of the Final Rule with this Court. Subsequently, on December 4, 2023, Intervenors filed a Motion for Leave to Intervene. Following this, on December 12, 2023, Intervenors filed their initial Motion to Dismiss.

By order dated February 1, 2024, the Court granted the Motion for Leave to Intervene and directed that the lodged Motion to Dismiss be filed.

ARGUMENT

Intervenors assert that jurisdiction to review SEIU's challenge to the Final Rule lies with the district courts under 28 U.S.C. § 1331.[11] But Section 10(f) of the NLRA directs judicial review of any final unfair-

[10] 88 Fed. Reg. at 73,957; 85 Fed. Reg. at 11,188.

[11] Motion to Dismiss (hereafter, "Mot."), 5–19. Intervenors further allege that SEIU lacks standing to challenge the Final Rule. *See id.* at 19–21. The NLRB will not address that portion of Intervenors' argument.

labor-practice "order"—a term that, as explained below, courts have deemed broad enough to encompass rules issued after notice and comment—to the circuit courts of appeals, not the district courts.[12] Accordingly, because this case is appropriately brought as a petition for review in a circuit court of appeals—the only appropriate court—Intervenors' Motion to Dismiss should be denied.

I. Jurisdiction to review the Final Rule lies exclusively in the courts of appeals.

Although the text of the NLRA's rulemaking provision, Section 6,[13] does not expressly address where judicial review of final Board rules occurs, the NLRA contains a direct-review provision, codified in Section 10(f):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person

[12] 29 U.S.C.§ 160(f).

[13] 29 U.S.C. § 156 ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of [the NLRA]").

> resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .[14]

A corollary provision in Section 10(e) empowers the Board "to petition any court of appeals of the United States" to enforce its orders.[15]

Section 10 thus channels review of final Board orders to the courts of appeals. As explained below, precedent of both this Court and the Supreme Court confirms that 10(f) covers final rules concerning unfair labor practices.

A. Precedent in both the D.C. Circuit and the United States Supreme Court establishes that direct review provisions should be construed as broadly as their text permits.

As an initial matter, while the "normal default rule" is that "persons seeking review of agency action go first to district court rather than to a court of appeals,"[16] that "default rule" is reversed where a statute channels review of agency action directly to the circuit courts.[17] In *Florida Power & Light Co. v. Lorion*,[18] the Supreme Court announced

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[14] 29 U.S.C. § 160(f).

[15] 29 U.S.C. § 160(e).

[16] *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

[17] *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)).

[18] 470 U.S. 729 (1985).

a presumption favoring circuit-court review where an agency's organic statute contains a direct-review provision. In that case, the Court considered certain "problematic" and "vexing" ambiguities in the statutory sections governing review of final orders issued by the Nuclear Regulatory Commission.[19] Where the application of a direct-review statute channels review of an agency's actions to the circuit courts, but is ambiguous in its scope, direct review in the circuit courts is appropriate absent a "firm indication" that Congress intended otherwise.[20] To determine congressional intent, the Court sought "guidance in the statutory structure, relevant legislative history, congressional purposes expressed in the choice of [statutorily described process for] review, and general principles respecting the proper allocation of judicial authority to review agency orders."[21]

Among the most important of those "general principles" is the presumption—enunciated by this Court in *Investment Co. Institute v. Board of Governors of the Federal Reserve System*—that the word

[19] *Id.* at 736.

[20] *Id.* at 745.

[21] *Id.* at 737.

"order" should be read broadly when it appears in a direct-review statute.[22] It is "blackletter administrative law that, absent countervailing indicia of congressional intent, statutory provisions for direct review of orders encompass challenges to rules."[23] Indeed, "absent contrary congressional intent, a statutory provision creating a right of direct judicial review in the court of appeals of an administrative 'order' authorizes such review of any agency action that is otherwise susceptible of review on the basis of the administrative record alone."[24]

Consistent with this presumption of "interpret[ing] ambiguities in direct-review statutes in favor of appellate jurisdiction,"[25] federal courts have, without hesitation, interpreted generalized direct-review statutes

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[22] 551 F.2d 1270, 1278 (D.C. Cir. 1977) *cited in Lorion*, 470 U.S. at 743, 744–45.

[23] *N.Y. Republican State Comm'n v. SEC*, 799 F.3d 1126, 1129–30 (D.C. Cir. 2015) ("*NYRSC II*"); *Nat'l Fed. of the Blind v. DOT*, 827 F.3d 51, 55 (D.C. Cir. 2016); *see also* 33 CHARLES A. WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE § 8299 (2006) (internal quotation omitted).

[24] *NYRSC II*, 799 F.3d at 1131; *see also Nat'l Fed. of the Blind*, 827 F.3d at 55.

[25] *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 720 (D.C. Cir. 2016).

broadly to encompass most final agency actions.[26] As noted above, in *Investment Company*, the D.C. Circuit construed the term "order" within a judicial-review provision to encompass rulemaking.[27] Since *Investment Company*, this Court and other circuit courts have exercised direct review of agency rules promulgated under many other statutes that similarly provided for direct review of agency action.[28]

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[26] *Id.*; *see also United Farm Workers v. Adm'r, EPA*, 592 F.3d 1080, 1083–84 (9th Cir. 2010); *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1367 (Fed. Cir. 2010) ("When there is a question whether judicial review was meant to be in district courts or courts of appeals, that ambiguity is resolved in favor of court of appeals review.").

[27] 551 F.2d at 1278.

[28] *N.Y. Republican State Comm'n v. SEC*, 70 F. Supp. 3d 362, 370–71 (D.D.C. 2014) ("*NYRSC I*"), *aff'd*, *NYRSC II*, 799 F.3d at 1129–30 (Investment Advisers Act of 1940); *Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep't of Energy*, 764 F.2d 896, 903 & n.37 (D.C. Cir. 1985) (Waste Act of 1982); *City of Rochester v. Bond*, 603 F.2d 927, 932–35 (D.C. Cir. 1979) (Federal Aviation Act and Communications Act of 1934); *Nat'l Parks & Conservation Ass'n v. FAA*, 998 F.2d 1523, 1526–28 (10th Cir. 1993) (Federal Aviation Act); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1314 (8th Cir. 1981) (following *Investment Company*); *Sima Prods. Corp. v. McLucas*, 612 F.2d 309, 312–14 (7th Cir. 1980) (relying extensively on *Investment Company* to review regulation promulgated under the Federal Aviation Act); *see also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 193–94 (2d Cir. 2004) ("[r]ulemaking proceedings do not ordinarily necessitate additional factfinding by a district court to effectuate the review process").

B. Section 10(f) of the NLRA establishes this Court's jurisdiction over petitions to review the Final Rule.

Given the foregoing, it should come as no surprise that this Court has clearly indicated that 10(f) is broad enough to encompass review of NLRB regulations. In *American Federation of Labor & Congress of Industrial Organizations v. NLRB* ("*AFL-CIO*"),[29] this Court construed 10(f) as "provid[ing] direct review in federal appellate courts of at least some 'final order[s] of the Board.'"[30] The Court explained that when Congress enacted the NLRA, Congress spoke of "orders" as shorthand for final agency action, including rules.[31] Contrary to Intervenors' claim,[32] this was no mere "passing suggestion," but an explicit determination that a rule "concerning unfair labor practices" would be covered by 10(f) under circuit precedent.

To be sure, the rule in question there—Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019)—exclusively concerned the Board's processing of representation cases under Section 9 of the

[29] 57 F.4th 1023 (D.C. Cir. 2023).

[30] *Id.* at 1031 (quoting 29 U.S.C. § 160(f)).

[31] *Id.* (citing cases).

[32] Mot. 17.

Act. And this Court held that rules that solely govern representation cases must be challenged first in district courts—finding, in effect, that even the powerful presumption of *Lorion* and *Investment Co. Institute* was overcome by textual indicators that anchored 10(f) to unfair labor practices.[33] But *AFL-CIO* also clarified that final Board orders (including rules) pertaining to unfair labor practices *should* be directly reviewed in the courts of appeals.[34] "Subsection 10(f)," this Court explained, "communicates that what is being directed to the court of appeals for the purpose of direct review is NLRB final orders (and, per binding precedent, rules) concerning unfair labor practices."[35]

This Final Rule satisfies *AFL-CIO*'s straightforward rubric for direct review because it alters the substantive law of bargaining obligations and derivative liability, thus affecting the adjudication of unfair labor practices under Section 8(a). Indeed, the Final Rule applies "for all purposes under the Act"[36] and will determine the extent to which separate entities may be found jointly and severally liable for the

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[33] *AFL-CIO*, 57 F.4th at 1033.

[34] *Id.* at 1031.

[35] *Id.* at 1032 (cleaned up).

[36] 88 Fed. Reg. at 73,982, 74,017.

commission of unfair labor practices by the other. Intervenors conceded as much in parallel litigation they initiated against the Final Rule in the Eastern District of Texas (which the NLRB has moved to transfer to this Court).[37]

Section 10(f)'s jurisdictional trigger is "a final order of the Board" that grants or denies some form of "relief." All of these required elements are present. The rule before this Court is indisputably "final"; it is the culmination of the Board's decision-making process and legal consequences flow from it.[38] The rule is also an "order of the Board"; as explained, this Court has consistently held that a final rule is a type of "order" for purposes of a direct-review statute.[39] Lastly, by altering whether an entity may be considered the joint employer of another employer's employees, the Final Rule both granted and denied "relief

[37] Case No. 6:23-cv-553 (E.D. Tex.), ECF 1, ¶32 (potential joint employers subject to "injunctive relief and monetary penalties"). "Penalties" are in fact not available under the NLRA, but even compensatory monetary relief is available only through unfair-labor-practice proceedings.

[38] *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

[39] *Above*, at 9.

sought."[40] Such relief was requested not only by the Board itself in its Notice of Proposed Rulemaking ("NPRM"), but also by various members of the pubic who submitted comments in response to the NPRM, including SEIU and the Intervenors.

Accordingly, this case should proceed in this Court.

II. Intervenors' contrary arguments are unpersuasive.

Intervenors hurl a slew of debatable interpretations at the wall to meet their burden to show Section 10(f) "plainly exclud[es] review of Board rulemaking."[41] None stick.

A. Section 10(f) is textually ambiguous as to whether it covers rules relating to unfair labor practices.

Intervenors begin by referencing the Administrative Procedure Act's ("APA") definition of "order" in an attempt to narrow the meaning of the term "order" in Section 10(f).[42] This Court has recently and

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[40] "Relief" is an extremely broad term. *E.g., Relief*, NEW WEBSTERIAN 1912 DICTIONARY ILLUSTRATED 690 (1912) (*inter alia*, "release from some post of duty" or "redress"); *Relief*, OXFORD ENGLISH DICTIONARY (3d ed. 2009) (*inter alia*, "formal release, esp. in law, from some hardship, burden, or grievance" or "legal remedy or redress").

[41] Mot. 7.

[42] *Id.*

expressly rejected this precise argument.[43] The APA is not a jurisdictional grant,[44] and therefore can provide no guidance as to which court is to review final rules.

Next, Intervenors claim that 10(f)'s requirement that the order grant or deny relief sought "clearly refers to *adjudicative* orders."[45] But the cases cited say no such thing; they merely apply the statutory requirement of finality in various contexts. Intervenors admit as much in their brief.[46] They are thus inapposite—unlike the variegated non-final Board orders addressed in Intervenors' cases, rulemakings are indisputably final.

The principal case Intervenors rely upon is the Supreme Court's decision in *AFL v. NLRB*.[47] But the quote that they pull from *AFL* comes at the end of a paragraph comparing ULP cases to representation

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[43] *See Nat'l Fed'n of the Blind v. DOT*, 827 F.3d 51, 55 (D.C. Cir. 2016); *NYRSC*, 799 F.3d at 1132.

[44] *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

[45] Mot. 7. This argument is functionally identical to their later argument from "established practice and understanding," *id.* 12–15, and are addressed together here.

[46] *Id.*

[47] 308 U.S. 401 (1940).

cases and has nothing to do with rulemaking.[48] The holding of *AFL* is clear—orders directing elections and certifications in representation cases are not "final orders of the Board."[49] Because such orders are not final, they fail to satisfy 10(f)'s jurisdictional hook; there is no action for any court, district or circuit, to take in response to Board orders concerning a representation petition.[50]

Each of the other cases cited by Intervenors is equally flawed—without exception, the proceeding in question was some form of adjudication.[51] the question of whether 10(f) could apply to rulemaking was neither presented nor even contemplated. Thus, to the extent that those cases contain language sweeping beyond the circumstances

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[48] Mot. 13 (citing *AFL*, 308 U.S. at 409).

[49] *Id.* at 407–08.

[50] *Accord Boire v. Greyhound Corp.*, 376 U.S. 473 (1965) (district courts generally have no jurisdiction to review Board representation-case orders).

[51] Mot. 7, 13–14 (citing *AFL*, 308 U.S. at 409 (1940); *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536, 540 (5th Cir. 2023) (order concerning withdrawal of complaint); *Int'l Ladies' Garment Workers Union, Loc. 415-475 v. NLRB*, 501 F.2d 823, 830 (D.C. Cir. 1974) (informal settlements); *Laundry Workers Int'l Union, Loc. 221 v. NLRB*, 197 F.2d 701, 703 (5th Cir. 1952) (jurisdictional-dispute hearings); *Manhattan Const. Co. v. NLRB*, 198 F.2d 320, 321 (10th Cir. 1952) (order dismissing a charge); *Inland Container Corp. v. NLRB*, 137 F.2d 642, 643 (6th Cir. 1943) (order directing an election)).

presented therein, they represent precisely the kind of "drive-by" jurisdictional dicta that the Supreme Court has repeatedly reminded courts "have no precedential effect."[52] And although prior Board rules have been challenged in district courts in the first instance, none of those cases examined whether courts of appeals possess initial jurisdiction to review Board rules.

Intervenors' quotations of out-of-context Board positions (and even a forced reading of the agency website) are even less persuasive than their quotations of out-of-context caselaw.[53] It's undoubtedly true that during the period of time when the Board was not regularly engaging in rulemaking, it gave no thought to whether such nonexistent rules might be reviewable in circuit, rather than district, court. But that's precisely what makes subject-matter jurisdiction unique—"[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."[54] Similarly, there is nothing "notable" about the Board's

[52] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

[53] Mot. 14–15.

[54] *Sebelius*, 568 U.S. at 153.

decision not to seek to dismiss or transfer SEIU's challenge to the 2020 iteration of the Joint Employer Rule.[55] That case has been in abeyance since 2021. Parties ought not waste courts' time on matters that need not be decided. If such a need had arisen, the NLRB would have moved to transfer, as it has in every other rulemaking challenge brought since 2018.

In the absence of any on-point caselaw, Intervenors turn to an assortment of textual arguments, but none can overcome the *Investment Company* presumption. They claim that Board final rules do not "'grant' or 'deny' 'relief' sought by particular parties," quoting fragments of sources defining "relief" in an effort to restrict its meaning to an adjudicatory context.[56] But as noted above at 14, the well-established definition of that term is far broader than the examples Intervenors cherrypick, and the remaining sources do no more than show that relief can be sought through the vehicle of an adjudication. That does not, and logically cannot, prove the inverse proposition—that relief *cannot* be sought through the vehicle of a rulemaking.

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[55] Mot. 15.

[56] Mot. 8.

Next, Intervenors point out that 10(f) contains a venue clause which provides for review in "any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein [the aggrieved] person resides or transacts business, or [the D.C. Circuit]."[57] But crucially, "venue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience[.]"[58] Indeed, it is settled law that every geographical circuit court of appeals has subject-matter jurisdiction to review Board orders.[59]

Certainly, 10(f)'s venue clause finds its clearest application when the matter being venued is an unfair-labor-practice adjudication. But it easily accommodates initial circuit court review of pre-enforcement challenges to NLRB rules. Where there is no "unfair labor practice in question," that venue option simply does no work. Even so, every aggrieved person seeking to set aside a Board rule will have access to a

[57] 29 U.S.C. § 160(f) (emphasis added).

[58] *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

[59] *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48–51 (1938).

venue (and usually multiple venues) for review "wherein such person resides or transacts business, or [the D.C. Circuit]."

Intervenors argue that 10(f)'s phrase "the record in the proceeding" must refer to a hearing "held to resolve charges of unfair labor practices."[60] Sections 10(b) and (c) do use the term "proceeding" as a self-contained reference to unfair-labor-practice cases, i.e., the proceedings actually being discussed in those paragraphs. But there is nothing to suggest that Congress intended reuse of the same banal term to limit the breadth of Section 10(f). Judicial opinions and statutes routinely refer to rulemakings as "proceedings."[61] Intervenors also make a confusing argument regarding an outdated part of 10(f) directing *petitioners* to file the record, but under the multidistrict circuit-race statute, the Board is *always* the party to file the record, which it cannot do before the forum that will hear competing petitions to review has been selected.[62]

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[60] Mot. 9.

[61] *E.g.*, *In re Nat'l Nurses United*, 47 F.4th 746, 750 (D.C. Cir. 2022) ("rulemaking proceeding"); 29 U.S.C. § 3226 ("The provisions of this section [this note] shall not affect any proceedings, including notices of proposed rulemaking").

[62] 28 U.S.C. § 2112(a).

B. Statutory context, legislative history, and the relevant caselaw do not eliminate Section 10(f)'s ambiguity.

Next, Intervenors spend considerable ink[63] arguing that the "structure" of Section 10 of the NLRA concerns only the *adjudication* of unfair labor practices. They contend that its placement is indicative of Congress's intent to exclude rulemakings from 10(f) review.[64]

But Congress's decision to place the NLRA's direct-review language in Section 10 had nothing to do with rulemaking. Its overriding concern, as summarized by the Supreme Court in *American Federation of Labor v. NLRB* ("*AFL*"), was to prohibit direct judicial review of *representation cases* conducted pursuant to Section 9.[65] The purpose of this division, in other words, was to end the then-prevailing regime whereby any time the NLRB or one of its predecessors ordered a representation election, those elections would be tied up for years in judicial proceedings in district court.[66] So Congress separated judicial

[63] Mot. 10–12.

[64] Mot. 10.

[65] 308 U.S. 401, 410–11 (1940).

[66] *Id.*

review of unfair labor practices provided in Section 10 from the NLRA's provisions relating to representation certifications in Section 9.

This history is all well known, but tells us nothing about judicial review of *rulemaking*, which was not before the Supreme Court in *AFL*. As previously noted by this Court, "when Congress enacted the NLRA in 1935 courts generally declined to engage in pre-enforcement review of agency rules . . . so Congress spoke of 'orders' as shorthand for final agency action."[67] This reluctance did not change until the Supreme Court issued its landmark decision in *Abbott Laboratories v. Gardner*.[68] Thus, it is likely that the 1947 Congress simply assumed judicial review of Board rules could occur only in the post-enforcement context.[69] There is no evidence that Congress even considered the locus for judicial

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[67] 57 F.4th at 1031 (cleaned up).

[68] 387 U.S. 136 (1967).

[69] *See* Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 1110–11 (3d ed. 1992); *accord PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2060 (2019) (four-Justice concurrence in the judgment) ("To be sure, this Court's decision in *Abbott Laboratories v. Gardner* revolutionized administrative law by *also* allowing facial, pre-enforcement challenges to agency orders, absent statutory preclusion of such pre-enforcement review.") (citation omitted); *cf. RadNet Mgmt. v. NLRB*, 992 F.2d 1114, 1121–23 (D.C. Cir. 2021) (rejecting post-enforcement arguments that the Board's representation-case rules were "facially unlawful").

review of rulemaking under that section. Rather, it set out a broad general principle (review of final Board orders should occur in circuit courts) and, outside of representation proceedings, largely left it to further judicial refinement. It is well settled that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,"[70] so this history poses no obstacle to the NLRB's interpretation here.

If anything is to be gleaned from the structure of the NLRA, it is that Congress intended district courts to "have a very very minor role to play."[71] Congress gave the courts of appeals exclusive jurisdiction to review final Board action[72] and granted district courts jurisdiction in just two specific, narrow respects (enforcement of subpoenas and *pendente lite* injunctions), both of which may only be invoked by the Board itself.[73] Circuit courts directly shape the very decrees which give the Act its force in their enforcement or review of final Board orders,

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[70] *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75, 79 (1998).

[71] *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 673 (5th Cir. 1966).

[72] 29 U.S.C. §160(e) ("Upon the filing of the record with it the jurisdiction of the court shall be exclusive.").

[73] *See* 29 U.S.C. §§ 160(j), 161(2); *accord Bokat*, 363 F.2d at 673.

while district courts act only on ancillary matters requiring swift action.[74]

Intervenors' suggestion that 10(e) impacts the direct-review provision in 10(f) does not move the needle.[75] This section grants *the Board* the "power to petition any court of appeals . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, *for the enforcement of such order* . . . ."[76] A phrase like "such order" is a context-specific grammatical shorthand, and since 10(e) does not define the term, it must reference the Board's order issued under 10(c). By contrast, 10(f) is self-contained. So while 10(e) is drafted to be understood in reference to the preceding subsections of Section 10, it is not "further proof" that 10(f) is exclusive to adjudications. Where two phrases have different referents, as with 10(e) and (f), they are not the kind of parallel phrases that must be construed to have parallel meanings.[77]

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[74] *NLRB v. Warren Co.*, 350 U.S. 107, 112–13 (1955).

[75] Mot. 11–12.

[76] 29 U.S.C. § 160(e).

[77] *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (same words in different sections of a statute may have different

C. Intervenors' policy arguments are wrong.

For the reasons described above, the presumption set forth in *Lorion* and *Investment Company* is fully applicable to 10(f), at least where the rule at issue involves unfair labor practices, like the Final Rule does. As a last-ditch effort, Intervenors ask this Court to find that "the main reason for applying" the presumption "is absent here."[78] They state that a bifurcated system already exists under 10(f) because this Court concluded in *AFL-CIO* that the subject of a 10(f) petition "must be an NLRB action that pertains to unfair labor practices as opposed to any other topic that the agency might have acted to address."[79] They go on to state that sending unfair-labor-practice rules to courts of appeals would "create a trifurcated system where all adjudicatory orders go directly to courts of appeals, while rulemaking is reviewed in different forums depending on the topic."[80]

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meanings "[w]here the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different").

[78] Mot. 16.

[79] 57 F.4th 1023 (D.C. Cir. 2023).

[80] Mot. 17.

Intervenors badly misinterpret *AFL-CIO*. That decision found that 10(f) could apply only to cases in some way involving unfair labor practices.[81] This is not the first time this Court has felt itself obligated to find that Congress created a bifurcated system of judicial review.[82]

But there is no possibility of creating a "trifurcated" system, nor (after *AFL-CIO*) is there any possibility of recreating a unitary one absent *en banc* action. The only question for this Court is, given that some NLRB cases (unfair-labor-practice adjudications) go to circuit court, and others (representation-case rules) go to district court, which of the two buckets do unfair-labor-practice *rules* fall into? As articulated in *Lorion* and *Investment Company*,[83] the indisputable benefits of direct review mean that courts should put every possible case into the direct-review bucket except where doing so would manifestly conflict with congressional intent. Here, if anything, the NLRB's position is *more* consistent with congressional intent to exclude district courts from labor policymaking. It makes no sense that the locus of review for the

[81] *AFL-CIO*, 57 F.4th at 1033.

[82] *See, e.g., Am. Petroleum Inst. v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013).

[83] 470 U.S. 737 (1985); 551 F.2d 1270 (D.C. Cir. 1977).

NLRB's joint-employer standard should hinge solely on the procedural vehicle by which that standard was announced.[84]

D. The Final Rule obviously pertains to unfair labor practices.

Finally, Intervenors argue that "even assuming section 10(f) covers rules "concerning unfair labor practices . . . the new Joint Employer Rule does not qualify."[85] They acknowledge that the Rule *applies* to unfair-labor-practice cases, but argue that it "must be more targeted towards unfair labor practices specifically."[86] *AFL-CIO* held only that "some kind of unfair labor practice [must be] at issue"[87] for 10(f) to apply, not that the rule in question must exclusively or even "specifically" (whatever that means) target unfair labor practices.

CONCLUSION

Intervenors' Motion to Dismiss should be denied.

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[84] *See Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 45 (D.C. Cir. 2022); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1221 (D.C. Cir. 2018).

[85] Mot. 18.

[86] Mot. 20.

[87] 57 F.4th at 1032 (cleaned up).

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