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

SERVICE EMPLOYEES INTERNATIONAL UNION, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 23-1309 **NOT YET SCHEDULED FOR ORAL ARGUMENT**

PETITIONER SEIU'S RESPONSE TO EMPLOYER GROUPS' MOTION TO DISMISS

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INTRODUCTION

Petitioner Service Employees International Union ("SEIU") filed a Petition for Review in this Court, seeking review of a final rule issued by the National Labor Relations Board ("NLRB" or "Board"), the Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (to be codified at 29 C.F.R. § 103.40) (the "Final Rule"). Before the Court even scheduled SEIU's Petition for merits briefing, Intervenors Chamber of Commerce et al. (the "Employer Groups") filed a motion to dismiss SEIU's petition, contending that (1) this Court does not have subject-matter jurisdiction over SEIU's petition because challenges to Board rulemakings must be heard first in federal district courts, and (2) SEIU lacks standing because the Final Rule "addressed all of SEIU's complaints" about a prior Board joint employer rule. Mot. to Dismiss, Doc. No. 2033192, at 1-2. Both contentions fail.

This Court supplied a clear answer to the first question just over a year ago, and it squarely forecloses Intervenor's position: the National Labor Relations Act "direct[s] to the court of appeals for the purpose of direct review . . . NLRB final orders (and, per binding precedent, rules) concerning unfair labor practices." *AFL-CIO v. NLRB*, 57 F.4th 1023, 1032 (D.C. Cir. 2023) (quotation marks omitted). Because the Final Rule concerns unfair labor practices, review is proper here. While Intervenor has dismissed this Court's opinion in related litigation as "obviously wrong out-of-circuit musings," it remains binding in this Circuit. *See*

Pl.'s Opp'n to Mot. to Transfer at 21, *Chamber of Commerce v. NLRB*, No. 6:23-cv-00553 (E.D. Tex., Dec. 4, 2023), ECF No. 29.

On the second question, SEIU easily satisfies the relevant standing test because the part of the Final Rule it challenges causes it a redressable injury-in-fact notwithstanding its support for most provisions of the rule. Intervenor makes much of SEIU's support for provisions of the Rule not challenged here, but cites no authority for the proposition that a party may not challenge part of a rule when it supports other parts of the same rule. This is not surprising; no such authority exists. That SEIU's support for those other, nonchallenged provisions has been public and enthusiastic is undisputed and wholly irrelevant.

Because Intervenor's arguments are without merit, this Court should deny the motion to dismiss.

BACKGROUND

A. Statutory Structure

The National Labor Relations Act ("NLRA" or "Act") protects the rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To protect those rights, the NLRA "covers two important topics in labor relations: the protection of employees' right to elect representatives of their choice, and the prevention of unfair labor

practices." *AFL-CIO*, 57 F.4th at 1027. "The Act addresses those topics in separate sections, with section 8 prohibiting unfair labor practices and providing for enforcement against them, *see* [29 U.S.C.] § 158, and section 9 outlining the process for conducting elections by which employees may select unions to represent them, *see id.* § 159." *AFL-CIO*, 57 F.4th at 1027-28.

The NLRA "empower[s]" the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a). The Board's powers include rulemaking authority. 29 U.S.C. § 156. Rules issued by the Board are, however, "somewhat unusual" because the Board "sets almost all of its policy through adjudications rather than rules." *AFL-CIO*, 57 F.4th at 1027.

By protecting employees' right to organize, bargain, and engage in concerted activity, the NLRA imposes obligations on employers, which under the Act are defined to include "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2). The standard for identifying an employer is, therefore, central to the Board's work in preventing unfair labor practices. Indeed, where the Board finds two employers to be acting as joint employers, an employer that did not itself commit an unfair-labor practice may nevertheless be held liable for that violation if it both knew or should have known of its joint employer's unlawful conduct and acquiesced in that unlawful conduct by failing to protest the action or exercise any contractual right to resist it. *Capitol EMI Music*, 311 NLRB

997, 1000 (1993); *see also Herbert Harvey, Inc. v. NLRB*, 385 F.2d 684, 685-86 (D.C. Cir. 1967); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1200 (D.C. Cir. 2018).

B. The Final Rule

In September 2022, the Board issued a Notice of Proposed Rulemaking to "revise the standard for determining whether two employers . . . are joint employers of particular employees" under the NLRA. Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54641 (proposed Sept. 7, 2022) (to be codified at 29 C.F.R. § 103.40). The proposed rule would rescind a 2020 final rule, replacing it with a new standard "explicitly ground[ed] . . . in established common-law agency principles." *Id.* The proposed rule provided new guidance for situations "when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment." *Id.*

SEIU submitted comments on the proposed rule on December 7, 2022. Service Employees International Union, Comment on the Standard for Determining Joint Employer Status (Dec. 7, 2022), NLRB-2022-0001-11275 ("SEIU Comment").[1] In its comments, SEIU suggested modifications to the

[1] Comment available at: https://www.regulations.gov/comment/NLRB-2022-0001-11275.

proposed rule. Among other suggested revisions, SEIU "urge[d] the Board to substitute for its proposed list of 'essential' terms and conditions the already familiar category of mandatory bargaining subjects." *Id.* at 22-23. As SEIU explained, "[e]xcluding any subcategory of mandatory subjects from a defined list of 'essential' terms would permit an employer to wield control over issues the Act subjects to bargaining while allowing that same employer to escape the bargaining table." *Id.* at 24.

SEIU was not alone in advocating for a joint-employer standard that turns on employers' control over any mandatory subject of bargaining. Indeed, as the Board recounted in the Final Rule, its own General Counsel and a group of State Attorneys General, among others, "propose[d] that the Board modify the proposed rule by explicitly tying the definition of 'essential terms and conditions of employment' to the concept of mandatory subjects of bargaining for purposes of Section 8(d) of the Act." 88 Fed. Reg. at 73963 & n.143.

The Board issued the Final Rule on October 27, 2023. 88 Fed. Reg. at 73946. In the Final Rule, the Board declined to adopt the more expansive list of relevant terms and conditions that SEIU favored, instead maintaining a closed, exhaustive list. *Id.* at 73,965. Describing that decision, the Board explained that employment conditions like workplace surveillance were not covered by its closed

list. Final Rule at 73965, 73967; *see* SEIU Comment at 11 (explaining impact of workplace surveillance on conditions of employment).

The Final Rule is set to take effect on February 26, 2024, after the effective date was extended by the Board. Press Release, NLRB, Board Extends Effective Date of Joint-Employer Rule to February 26, 2024 (Nov. 16, 2023).[2]

ARGUMENT

I. THIS COURT HAS JURISDICTION.

In a line of precedent extending back more than four decades, this Court has interpreted direct review provisions concerning review of final agency "orders" to encompass regulations. *Inv. Co. Inst. v. Bd. of Governors of Fed. Rsrv. Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977); *N.Y. Republican State Comm. v. SEC* ("*NYRSC*"), 799 F.3d 1126, 1130 (D.C. Cir. 2015); *Nat'l Fed'n of the Blind v. U.S. Dep't of Transp.*, 827 F.3d 51, 55 (D.C. Cir. 2016). And in a decision issued just over a year ago, the Court recognized that the direct review provision at issue here, Section 10(f) of the NLRA, establishes direct review for rules "concerning unfair labor practices." *AFL-CIO*, 57 F.4th at 1032. This Court should decline the Employer Groups' invitation to ignore both its longstanding and recent precedent. Section 10(f) establishes direct review for regulations concerning unfair labor

[2] Press release available at: https://www.nlrb.gov/news-outreach/news-story/board-extends-effective-date-of-joint-employer-rule-to-february-26-2024.

practices, and the Final Rule, which determines the extent of unfair-labor-practice liability for employers who share or co-determine employees' working conditions, falls within that category.

A. Under Circuit precedent, direct review of orders includes agency rules.

Section 10(f) of the NLRA provides for review in a court of appeals of "a final order of the Board granting or denying in whole or in part the relief sought." 29 U.S.C. § 160(f). "For nearly four decades, it has been blackletter administrative law that, absent countervailing indicia of congressional intent, statutory provisions for direct review of orders encompass challenges to rules." *NYRSC*, 799 F.3d at 1129. That principle tracks with this Court's "generous approach to direct-review statutes: Where Congress gives us mixed signals," the Court "resolve[s] statutory ambiguity in favor of direct review in the courts of appeals." *AFL-CIO*, 57 F.4th at 1031.

This Court has interpreted direct review of orders to encompass agency rules since 1977, when it decided *Investment Company Institute*, 551 F.2d at 1270. The direct-review provision at issue there allowed "[a]ny party aggrieved by an order of the [Federal Reserve] Board under this chapter" to "obtain a review of such order" in a court of appeals. 12 U.S.C. § 1848. This Court held that provision required exclusive review of Federal Reserve Board regulations in the court of appeals, holding that "'order' is interpreted to mean any agency action capable of

review on the basis of the administrative record." 551 F.2d at 1278. Recognizing that "order" could potentially be defined more narrowly, including under the Administrative Procedure Act ("APA"), the Court reasoned that "the word 'order' has several frequently utilized meanings which vary in scope." *Id.*

Establishing an analogous rule, the Supreme Court approvingly cited *Investment Company Institute* in its decision in *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985), which held that "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts," courts "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id.* at 744-45.

Subsequent Circuit precedent has extended *Investment Company Institute*'s reasoning to other direct-review provisions. In *NYRSC*, this Court held that "courts of appeals have exclusive jurisdiction to hear challenges to rules promulgated under the Investment Advisers Act." 799 F.3d at 1128. That Act provided that "[a]ny person or party aggrieved by an order issued by the [Securities and Exchange] Commission under this subchapter may obtain a review of such order" in a court of appeals. 15 U.S.C. § 80b-13(a). The Court applied *Investment Company Institute*, recognizing that "longstanding precedent dictates that the word 'order' in the Investment Advisers Act encompasses rules." 799 F.3d at 1130.

Applying *Investment Company Institute* again in 2016, this Court held that a provision directing review to the D.C. Circuit for "a person disclosing a substantial interest in an order issued by the Secretary of Transportation" authorized direct review of Department of Transportation regulations. *Nat'l Fed'n of the Blind*, 827 F.3d at 54; *see* 49 U.S.C. § 46110(a).

Of course, the *Investment Company Institute* presumption does not apply where Congress has provided a "firm indication" of the limits of a direct-review provision. *See Loan Syndications and Trading Ass'n v. S.E.C.*, 818 F.3d 716, 720 (D.C. Cir. 2016) (quoting *Lorion*, 470 U.S. at 745). Here, however, no such firm indication exists. Instead, as in *Investment Company Institute*, *NYRSC*, and *National Federation of the Blind*, Congress provided for direct review of "orders" concerning unfair labor practices, with no language creating a separate review path for regulations concerning those practices. *See* 29 U.S.C. § 160(f). Congress's failure to explicitly provide for review of rulemaking is unsurprising in this context. At the time the NLRA was passed, "the courts generally declined to engage in pre-enforcement review of agency rules because such challenges were thought unripe." *See NYRSC*, 799 F.3d at 1134 (analyzing statutory provision passed five years after the NLRA).

This well-established line of precedent can lead to only one conclusion here: the term "a final order of the Board" in Section 10(f) of the NLRA encompasses the NLRB's final rules.

B. The NLRA requires direct review for unfair labor practice regulations like the Final Rule.

This Court interpreted Section 10(f) just over a year ago, recognizing that regulations relating to unfair labor practices fall within the scope of its direct-review provision. In *AFL-CIO*, the Court concluded that Section "10(f) 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." 57 F.4th at 1032 (quotation marks omitted). Explaining that conclusion, the Court pointed to multiple features of the statute. First, "the textual reference to 'unfair labor practice' in subsection 10(f) . . . distinguish[es] unfair labor practice rules from those addressing representation procedures." *Id.* at 1031-32. In addition, "[t]he placement of the direct-appellate-review provision within section 10 confirms that conclusion" because the section is titled "Prevention of unfair labor practices" and the surrounding subsections "make explicit their concern with unfair labor practices." *Id.* at 1032. Finally, "[t]he structure of the entire NLRA underscores Congress's separate treatment of unfair-labor-practice and union-representation matters." *Id.* at 1033.

Similarly, the Supreme Court has recognized that the purpose of Section 10 is to provide for review of all final actions concerning unfair labor practices. In *AFL v. NLRB*, 308 U.S. 401 (1940), after explaining that Section 9 addresses certification of a collective bargaining representative, the Supreme Court reasoned that "*[a]ll* other provisions for review of any action of the Board are found in [Section] 10 which as its heading indicates relates to the prevention of unfair labor practices." *Id.* at 406 (emphasis added). "[I]t is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings." *Id.* at 409.

Here, the Final Rule falls within the scope of Section 10(f) because it is a rule concerning unfair labor practices. The rule establishes a standard for "whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act," which will determine when "an entity that exercises control over particular employees' essential terms and conditions of employment" has "potential liability for unfair labor practices." 88 Fed. Reg. at 73946, 73981. The definition applies "for all purposes under the Act." *Id.* at 73982, 74017.

Indeed, in their comments on the proposed rule, the Employer Groups recognized the effect of the Final Rule on the Board's prevention of unfair labor

practices. Intervenor Chamber of Commerce recognized that the standard would define "the scope of a joint-employer's obligations—with respect to unfair labor practice liability, secondary activity, and bargaining," determining whether "Company A [is] liable in an Unfair Labor Practice proceeding" where it shares control with Company B. U.S. Chamber of Commerce, Comment on Notice of Proposed Rulemaking: Standard for Determining Joint Employer Status Under the National Labor Relations Act (Dec. 8, 2022), NLRB-2022-0001-11425, at 8.[3] Intervenor Restaurant Law Center argued that the Final Rule would create "increased risk of liability" for franchisors. Restaurant Law Center and National Restaurant Association, Comment on Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act (Dec. 6, 2022), NLRB-2022-0001-10404, at 25.[4] Those comments acknowledge what the Rule itself makes clear: the Rule sets the standard for joint-employment findings in unfair-labor practice cases. 88 Fed. Reg. at 73957, 73959, 73981-82.

In *AFL-CIO*, this Court explained that, under Section 10(f), "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." 57

[3] Comment available at: https://www.regulations.gov/comment/NLRB-2022-0001-11425.
[4] Comment available at: https://www.regulations.gov/comment/NLRB-2022-0001-10404.

F.4th at 1032 (quotation marks omitted). That approach sensibly directs regulations establishing standards for unfair labor practice liability along the same track as adjudications establishing those standards. *See Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1199-1200 (considering, on direct review, joint-employer standard established through adjudication). As a rule concerning unfair labor practices, the Final Rule falls within the scope of Section 10(f), establishing jurisdiction in this Court.[5]

C. Circuit precedent forecloses the Employer Groups' arguments to the contrary.

Notwithstanding this Court's construction of Section 10(f) in *AFL-CIO*, the Employer Groups argue for following the "default rule" of district court review. Mot. to Dismiss, Doc. No. 2033192, at 1. But resort to a default rule is both unnecessary and inappropriate where, as here, Congress provided a direct-review provision and this Court's binding precedent tells us how that provision should be interpreted.

Analyzing the text of Section 10(f), the Employer Groups raise an argument that this Court has already rejected. They point to the definition of "order" in the

[5] The Employer Groups support their jurisdictional argument by pointing out that SEIU has previously challenged a Board rule in district court. It should come as no surprise, however, that after this Court issued a decision in *AFL-CIO*, SEIU heeded its guidance by seeking direct review of a rule concerning unfair labor practices in the Court of Appeals.

APA, Mot. to Dismiss, Doc. No. 2033192, at 7, but this Court has twice expressly declined to apply that definition to interpret "order" in direct-review provisions. *Inv. Co. Inst.*, 551 F.2d at 1278; *NYRSC*, 799 F.3d at 1132. The APA's "general-purpose definitions are not a compelling reason to ignore this court's precedent specific to direct appellate review provisions in statutes" that were, like the NLRA, "enacted before the Administrative Procedure Act, when rulemaking was not yet a common method of agency decision making." *NYRSC*, 799 F.3d at 1132.

As for the Employer Groups' arguments about the meaning of textual references to "relief," this Court has already concluded that direct review of regulations is appropriate under two statutes that, like the NLRA, grant a right to review to an "aggrieved" party. *Inv. Co. Inst.*, 551 F.2d at 1273 n.3 ("[a]ny party aggrieved by an order of the Board"); *NYRSC*, 799 F.3d at 1129 ("[a]ny person or party aggrieved by an order issued by the Commission"). The Supreme Court has also recognized that parties may be "aggrieved" by an agency rulemaking. *United States v. Storer Broad. Co.*, 351 U.S. 192, 198 (1956). And those holdings make sense, because a party may seek relief in a rulemaking, as SEIU did here, by requesting changes to a proposed rule and then may be aggrieved, as SEIU was here, by agency action declining to make those changes.

The Employer Groups also point to the phrase "the unfair labor practice in question" to support their reading of Section 10(f), but this Court has correctly

characterized that language as "a venue-expanding clause." *AFL-CIO*, 57 F.4th at 1033. For final orders like the Final Rule that concern the prospective prevention of unfair-labor practices, Section 10(f) offers multiple venues: this Court and any circuit court where the aggrieved party resides or transacts business. *See* 29 U.S.C. § 160(f).

The Employer Groups seek to distinguish *Investment Company Institute* and the line of precedent extending it by arguing that those cases involved an ambiguous direct-review provision, while this case does not. Mot. to Dismiss, Doc. No. 2033192, at 16. That claim falls flat in the face of the similarity of Section 10(f) to the provisions at issue in those cases. Like Section 10(f), the provisions at issue in those cases provided for direct review of an "order," with no mention of rules. *Inv. Co. Inst.*, 551 F.2d at 1273 n.3; *NYRSC*, 799 F.3d at 1129, *Nat'l Fed'n of the Blind*, 827 F.3d at 55. The provisions also allowed parties "aggrieved" by the order to seek review. *Inv. Co. Inst.*, 551 F.2d at 1273 n.3; *NYRSC*, 799 F.3d at 1129; *see also Nat'l Fed'n of the Blind*, 827 F.3d at 55 (considering provision permitting a party "disclosing a substantial interest in" the order to seek review). This Court has previously looked to the similarity of statutory language when applying *Investment Company Institute* to other direct-review provisions. *Nat'l Fed'n of the Blind*, 827 F.3d at 55. The result should be no different here.

Finally, before this Court, the Employer Groups seek to downplay the significance of this Court's recent decision in *AFL-CIO*, Mot. to Dismiss, Doc. No. 2033192, at 17-18, which they have characterized in related litigation as "obviously wrong out-of-circuit musings." *See* Pl.'s Opp'n to Mot. to Transfer at 21, *Chamber of Comm. v. NLRB*, No. 6:23-cv-00553 (E.D. Tex., Dec. 4, 2023), ECF No. 29. Notwithstanding Employer Groups' disagreement with the outcome, the law of this Circuit sets out firmly established principles for interpreting an ambiguous direct review provision. *See LaShawn A. v. Barry,* 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (analyzing binding effect of the law of the Circuit). Under those principles of interpretation, Section 10(f) establishes direct review of the Final Rule in this Court.

II. SEIU HAS STANDING TO CHALLENGE THE FINAL RULE.

After challenging this Court's jurisdiction to consider SEIU's Petition at all, the Employer Groups pivot to claiming that SEIU's Petition should be dismissed because SEIU lacks standing to challenge the Final Rule. Mot. to Dismiss, Doc. No. 2033192, at 19-21. The Employer Groups' attempt should be rejected.

As the Employer Groups themselves pointed out earlier in this litigation, under the APA, it is "self-evident" that entities regulated by the Rule have standing to challenge it. Mot. for Leave to Intervene, Doc. No. 2029874, at 8 (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003)). Indeed, because it

is both an employer regulated by the Final Rule and represents millions of employee-members whose ability to organize and collectively bargain is directly impacted by the Final Rule,[6] SEIU's standing to challenge it is doubly established. *See Sierra Club v. E.P.A.*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("[I]f the complainant is 'an object of the action (or forgone action) at issue' . . . there should be 'little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992)).

Notwithstanding the Employer Groups' own willingness to take advantage of this expansive standing doctrine (in both this Court and the Employer Groups' parallel challenge pending in the Eastern District of Texas), they argue that the SEIU should not be permitted to challenge the Final Rule because it supports most

[6] For a Union to have standing to represent its members, (1) a member must have standing in their own right; (2) the interests asserted must be germane to the union's purpose; and (3) the individual member's participation in the litigation must not be needed. *E.g.*, *United Transp. Union v. ICC*, 891 F.2d 908, 909 (D.C. Cir. 1989). SEIU does not understand the Employer Groups to challenge SEIU's standing under the second and third requirement, which SEIU could easily satisfy. SEIU's purpose is to improve the terms and conditions of employment for workers it represents through means including collective bargaining; doing so requires effective decision makers to be present at the bargaining table. And no individual member's participation is required to adjudicate SEIU's Petition for Review, which concerns the Final Rule's failure to allow for joint-employer findings when the putative joint employer controls a mandatory subject other than the enumerated essential terms and conditions.

of the changes encompassed in that regulation. Mot. to Dismiss, Doc. No. 2033192, at 20 (citing SEIU's past support for joint-employer findings based on reserved, unexercised control and the putative joint employer's control over workplace safety and health). Unsurprisingly, the Employer Groups cite no authority for the proposition that a petitioner cannot be harmed by a regulation if that regulation grants the petitioner some—but not all—of the relief that they sought from the agency. *See id.*

Rather, rule-challenging petitioners—like any party invoking the Court's jurisdiction—must show (1) injury-in-fact, (2) causation, and (3) redressability. *Fund for Animals*, 322 F.3d at 733. SEIU satisfies all three requirements.

A cursory review of the SEIU's comments in response to the NLRB's Notice of Proposed Rulemaking shows how SEIU and its members will be harmed by the NLRB's decision to limit qualifying control to that exercised over the seven, enumerated essential terms and conditions of employment.

In its discussion of franchisor-franchisee relationships, for example, SEIU's comment described the extensive monitoring of employee performance conducted by franchisors via video surveillance, point of sale (POS) tracking, and similar systems. SEIU Comment at 11. Workplace surveillance is a mandatory subject of

bargaining,[7] but it is not one of the seven essential terms enumerated in the Final Rule. 88 Fed. Reg. at 73956.

As an additional example, policies regarding sex discrimination are a mandatory bargaining subject, *Jubilee Mfg. Co.*, 202 NLRB 272 (1973), but non-discrimination policies are not specifically listed among the Final Rule's "essential" terms and conditions of employment, 88 Fed. Reg. at 73956. The prevention of workplace sexual harassment, a form of unlawful sex discrimination, is, however, an important reason why workers organize through SEIU. SEIU Local 87, for example, organized janitorial-service workers whose work had been subcontracted by a janitorial services company to a sole-proprietorship subcontractor. A goal of the organizing campaign was to require *both* the janitorial services company and the subcontractor to take meaningful steps to stop the ongoing, severe workplace harassment by the subcontractor. *See SEIU Loc. 87 v. NLRB*, 995 F.3d 1032, 1036-38 (9th Cir. 2021).

Myriad other terms and conditions of employment—including grievance and arbitration procedures, dress codes, and no strike/no lockout provisions—fall into this same category. SEIU and its constituent labor unions, as the exclusive

[7] *E.g.*, *Anheuser Busch, Inc.*, 342 N.L.R.B. 560 (2004).

representatives of many thousands of workers in fissured workplaces,[8] need to meaningfully bargain over these terms if they are to fulfill their statutory obligation to represent these employees. And SEIU is not the only organization that is harmed by the Final Rule's closed list of essential terms and conditions; rather, as the comments submitted by numerous unions and the NLRB's own General Counsel show, the Board's limitation of relevant control to control over those seven essential terms and conditions of employment will degrade unions' and the General Counsel's ability to effectuate the policies of the Act. *See* 88 Fed. Reg. at 73963 & n.143 (collecting comments advocating tying of essential terms to mandatory subjects of bargaining).

Thus, anytime these terms are controlled by the putative joint employer but SEIU can only compel the direct employer to bargain, it will be harmed by the Final Rule's failure to rest joint-employer findings on all mandatory subjects. *See* Decl. of Barbara Rosenthal, ¶¶ 11, 14-16. Of course, SEIU's members will likewise be harmed by their inability to bring the employer with control over these terms to the bargaining table. *See id.* at ¶¶ 6-9. That loss of the ability to meaningfully bargain about these mandatory subjects is an injury in fact. *See Nat'l*

[8] The term "fissured workplaces" refer to places of employment where more than one employer controls the terms and conditions of workers' employment. *See* David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (Harvard Univ. Press, 2014).

Treasury Emps. Union v. Chertoff, 452 F.3d 839, 853 (D.C. Cir. 2006) (holding that union suffered injury in fact from final rule that restricted subjects of bargaining); *cf.* Mot. for Leave to Intervene, Doc. No. 2029874 at 8-9 (arguing that the possibility that unidentified member-employers might incur costs if the Final Rule is expanded to mandatory subjects constitutes injury in fact). Thus, both on its own and on behalf of its members, SEIU has standing to challenge a final rule that "limits the possible fruits of bargaining for the employees who are represented by the Union[]." *Nat'l Treasury Emps. Union*, 452 F.3d at 853.

Causation and redressability are easily satisfied. SEIU's injury is caused by the NLRB's choice to limit essential terms and conditions to a seven-item closed list. And its injury would be redressed by an order from this Court severing Section 103.40(d) from the Final Rule, allowing SEIU to advocate, in appropriate cases, for a joint-employer finding based on the putative joint employer's control over an unenumerated mandatory subject. Decl. of Barbara Rosenthal, ¶¶ 14-16.

As this Court has previously explained, "[s]tanding is not dispensed in gross." *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 136 (D.C. Cir. 2022) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). Instead, standing is determined for the particular claim "and for each form of relief that is sought." *Id.* (quoting *Davis*, 554 U.S. at 734). For purposes of the standing analysis, the relevant question is whether SEIU has standing for the relief it seeks here: severing

Section 103.40(d). SEIU's hypothetical standing to challenge parts of the Final Rule not at issue here is irrelevant.

In short, SEIU has standing to challenge the Final Rule, and the Employer Groups' standing-for-me-but-not-for-thee view of this Court's jurisdiction proves too much. Just as the Employer Groups fear harm from SEIU's proposed expansion of the Final Rule, SEIU is suffering harm from its undue limitation. Therefore, the Employer Groups' backup attempt to insulate the Final Rule from this Court's review should be rejected.

CONCLUSION

For the foregoing reasons, the Court should deny the Employer Groups' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies:

1. The foregoing Response to Employer Group's Motion to Dismiss complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,913 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f). As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This foregoing motion complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

s/ Adam Bellotti
Adam Bellotti

CERTIFICATE OF SERVICE

On February 20, 2024, I caused the foregoing Petitioner's Response to Employer Group's Motion to Dismiss to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Adam Bellotti
Adam Bellotti