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**

EMPLOYER GROUPS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

In the 88 years since Congress created the National Labor Relations Board, not one challenge to Board rulemaking has been heard first in a court of appeals. This is not by mistake but by design. Congress provided in 28 U.S.C. § 1331 that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." And nothing in the National Labor Relations Act (NLRA) displaces that default rule when it comes to Administrative Procedure Act (APA) challenges to Board rulemaking.

The Service Employees International Union (SEIU) nevertheless seeks this Court's initial review of the Board's new Joint Employer Rule, invoking a section of the NLRA that provides for direct appellate review of "final orders of the Board." But courts across the country have repeatedly recognized—in line with the surrounding statutory text and the Board's prior arguments—that this provision refers only to adjudicative proceedings resulting in "orders of the Board prohibiting unfair labor practices." *American Fed'n of Lab. v. NLRB*, 308 U.S. 401, 409 (1940). It does not apply to Board rulemakings.

Historical practice confirms this plain-text reading. If the NLRA in fact authorizes direct circuit-court review of Board rulemaking, one would expect someone to have sought such review before now. Yet this petition is the first. In

fact, SEIU's suit against the Board's previous Joint Employer Rule is still pending in *district* court.

What's more, SEIU is not injured by the Board's new Rule. To the contrary, the Board addressed all of SEIU's complaints about the prior (2020) iteration of the Joint Employer Rule. SEIU has publicly supported the new Rule—calling it "welcome," "necessary," and "commonsense." Joint Letter of SEIU, International Brotherhood of Teamsters, and AFL-CIO to United States House of Representatives ("SEIU Letter"), Doc. # 2029874 at 21, 23 (Nov. 2, 2023). SEIU even told Congress that it "strongly oppose[s] any effort to nullify" the Rule as it stands today. *Id.* at 21.

Simply put, this Court lacks jurisdiction twice over: nothing authorizes direct appellate review of the Board's new Rule, and SEIU lacks standing to challenge it. The Court should therefore dismiss SEIU's petition for review.

BACKGROUND

Congress enacted the NLRA to protect commerce by guaranteeing the right of employees to bargain collectively through representatives of their choosing. 29 U.S.C. § 151. The Act goes about that objective in several ways. Section 7 establishes employees' rights. *Id.* § 157. Section 8, in turn, makes it an "unfair labor practice" for an employer to interfere with its employees' section 7 rights. *Id.* § 158. Section 9 outlines the procedures for exercising those rights through selecting a representative. *Id.* § 159. And section 10 describes "the procedures [the Board]

must follow to decide unfair labor practice cases." *NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 124 (1987); 29 U.S.C. § 160. The NLRA also grants the Board general rulemaking authority in section 6, but that section says nothing about judicial review. 29 U.S.C. § 156.

Only section 10 provides for direct review of Board action in a court of appeals. Specifically, section 10(f) allows "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" to "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." 29 U.S.C. § 160(f).

In this case, no "unfair labor practice" has been alleged to have been committed, and no "relief" has been "sought" from the Board by any person. Rather, SEIU challenges a prospective rule the Board promulgated pursuant to its section 6 rulemaking authority—specifically, a rule that defines (incorrectly) who is a "joint employer" under the NLRA. *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 73,956 (Oct. 27, 2023) (codified at 29 C.F.R. § 103.40) ("Joint Employer Rule").

Although SEIU challenged the Board's prior joint employer rule in the U.S. District Court for the District of Columbia, *SEIU v. NLRB et al.*, No. 21-cv-2443-RC (D.D.C. filed September 17, 2021)—and although the new Rule resolves all of

SEIU's objections to that prior rule—SEIU sought review of the new Rule directly in this Court (within the 10-day period to secure a forum under the circuit lottery statute, 28 U.S.C. § 2112(a)(1), (3)).

Meanwhile, Proposed Intervenors Chamber of Commerce of the United States of America *et al.* (hereinafter, the Employer Groups) did what every other party seeking to challenge a Board rule (including SEIU) has done in the history of the NLRA: they filed suit in district court. *See Chamber of Com. of U.S. v. NLRB*, No. 6:23-cv-553-JCB (E.D. Texas filed Nov. 9, 2023). Shortly thereafter, the Employer Groups moved for summary judgment, and the court adopted the parties' jointly proposed briefing schedule that will allow the court to decide that motion prior to the Rule's effective date. ECF. No. 23. Indeed, the Board responded to the Employer Groups' summary-judgment motion earlier this week. ECF No. 34. The Board separately moved to transfer that action to this Court—arguing that section 10(f) requires a Board rulemaking challenge to be brought first in a court of appeals. The Employer Groups opposed (the fully briefed transfer motion remains undecided), and moved to intervene here to seek dismissal.

ARGUMENT

I. CHALLENGES TO BOARD RULEMAKING MUST BE HEARD FIRST IN DISTRICT COURTS

A. District Courts Generally Exercise Original Jurisdiction Over APA Challenges

Unless Congress directs otherwise, agency rulemakings are subject to challenge in federal district court. Under 28 U.S.C. § 1331, district courts "shall have original jurisdiction of all civil actions" arising under federal law. "Not *may* have jurisdiction, but *shall*. Not *some* civil actions arising under federal law, but *all*." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 205 (2023) (Gorsuch, J., concurring). That includes actions for "judicial review" under the APA, 5 U.S.C. § 702, which arise under federal law, *e.g.*, *Abuzeid v. Mayorkas*, 62 F.4th 578, 583 (D.C. Cir. 2023).

Thus, the "normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals." *National Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012) (internal quotation marks and citation omitted). Initial review at the appellate level occurs "only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) (Kavanaugh, J.).

B. Section 10(f) Of The NLRA Does Not Displace The Default Rule For Rulemaking Challenges

SEIU cites section 10(f) of the NLRA as the basis for this Court's jurisdiction. But text, structure, history, the Board's prior positions, and relevant precedent all show that section 10(f) is inapplicable here. And it is not a close call.

1. The Text Of Section 10(f) Limits Direct Appellate Review To Orders Resolving Unfair Labor Practice Cases

Section 10 of the NLRA, titled "Prevention of unfair labor practices," 29 U.S.C. § 160 (reproduced in full in the Addendum), includes a direct-review provision that states:

> 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 resides or transacts business, or in the United States Court of Appeals for the District of Columbia by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 160(f). This language, which then-Judge Jackson construed as "quite specific and relatively narrow," *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68, 83 (D.D.C. 2020), plainly excludes review of Board rulemaking.

Start with the focus on "final order[s]." Although the NLRA does not define "order," the APA does. *See Watts*, 482 F.3d at 413 (looking to the APA's definition of "order" when "agency's direct-review statute did not define" the term); *National Mining Ass'n v. Department of Lab.*, 292 F.3d 849, 856 (D.C. Cir. 2002) (per curiam) (same). And it provides that an "order" is the "final disposition *** of an agency in a matter *other than rule making*." 5 U.S.C. § 551(6) (emphasis added).

Section 10(f), moreover, refers to a specific type of "order"—namely, one that "grant[s] or den[ies]" some sort of "relief" that has been "sought." 29 U.S.C. § 160(f). This language clearly refers to *adjudicative* orders resolving unfair labor practice cases. *See International Ladies' Garment Workers Union, Loc. 415-475, AFL-CIO v. NLRB*, 501 F.2d 823, 830 (D.C. Cir. 1974) (reading section 10(f) to cover Board action that "finally ends an unfair labor practice proceeding by 'granting or denying in whole or in part the relief sought'"), *abrogated on other grounds by United Food*, 484 U.S. at 112. Indeed, at the Board's urging, courts have long understood the phrase "final order of the Board" to "*refer[] solely* to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found—in either case an order entered as *the culmination of*

the procedure described in Section 10(b) and (c) of the Act." *E.g.*, *Laundry Workers Int'l Union, Loc. 221 v. NLRB*, 197 F.2d 701, 703 (5th Cir. 1952) (emphases added) (adopting, as its own holding, this quotation from the Board's brief); *see also International Ladies*, 501 F.2d at 827-828 (recognizing Board's same argument).[1]

Meanwhile, agency *rules* (unlike orders) do not "grant" or "deny" "relief" sought by particular parties—at least not in the way those terms are commonly used. "Relief" is usually "sought" (and then granted or denied) in an adjudicatory setting. *See Relief*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "relief" as the "redress or benefit *** that a party asks of a court"); *Prayer for Relief*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A request addressed to the court and appearing at the end of a pleading; esp., a request for specific relief or damages."); *see also SEC v. McCarthy*, 322 F.3d 650, 657 (9th Cir. 2003) ("parties seek legal and/or equitable relief before a court of law through the filing of a formal complaint").

Other features of section 10(f) reinforce its limitation to unfair labor practice adjudications, not rulemakings. The subsection defines the appropriate venue by reference to "*the* unfair labor practice *in question* [that] was alleged to have *been*

[1] The Board reiterated this point in court as recently as 2020. *See* Br. in Supp. of Defs.' Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 8, *International Ass'n of Machinists & Aerospace Workers v. Ring*, No. 2:19-cv-3214-BHH (D.S.C. Jan. 31, 2020), ECF No. 25-1 ("Section 10(e) and (f) provides for review, in an appropriate court of appeals, *only* of a 'final order of the Board' entered in an unfair labor practice proceeding under Section 10.") (emphasis added).

engaged in"—which assumes that a specific unfair labor practice is being adjudicated. 29 U.S.C. § 160(f) (emphases added). That would of course be true in an unfair labor practice proceeding granting or denying relief—but not a general rulemaking.

Finally, section 10(f) instructs "the aggrieved party" to file in the appellate court "the record in the proceeding, certified by the Board." 29 U.S.C. § 160(f). Yet the only "proceeding" section 10 contemplates is the "hearing" held to resolve charges of unfair labor practices. *See id.* § 160(b) ("In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the *said proceeding* and to present testimony. Any such *proceeding* shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States[.]") (emphases added); *id.* § 160(c) (if "evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties *to the proceeding* a proposed report, together with a recommended order") (emphasis added); *see also Administrative Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("usu[ally] adjudicatory in nature"). What's more, requiring "the aggrieved party" to file the record makes no sense in the context of a *rulemaking* proceeding where "the record"

is the "administrative record before the agency at the time the decision was made." *Environmental Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981).

At bottom, section 10(f)'s plain text limits direct review to Board orders in unfair labor practice proceedings. Board rulemakings are not covered.

2. Section 10's Structure Confirms Subsection (f)'s Limited Reach

Section 10's structure compels the same reading. The section concerns the "*adjudication* of [unfair labor practice] complaints." *United Food*, 484 U.S. at 124. And every subsection within it "exclusively" concerns such "proceedings." *American Fed'n of Lab*, 308 U.S. at 407:

- Subsection (a) authorizes the Board "to prevent any person from engaging in any unfair labor practice *** affecting commerce," 29 U.S.C. § 160(a);
- Subsection (b) sets out the Board's procedures for "[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice," *id.* § 160(b);
- Subsection (c) provides that if the Board finds by a "preponderance of the testimony taken" that "any person named in the complaint has engaged in *** any such unfair labor practice, then the Board shall state its findings of fact and shall issue *** an order requiring such person to cease and desist from such unfair labor practice," *id.* § 160(c);
- Subsection (d) then allows the Board to "modify or set aside, in whole or in part, any finding or order made or issued by it" so long as "the record" has not yet "been filed in a court," *id.* § 160(d); and
- Subsection (e) empowers the Board to "petition any court of appeals of the United States *** for the enforcement of such order," *id.* § 160(e).

Read in its entirety, section 10 "exhaustively sets out the stages" of adjudicatory proceedings brought to halt unfair labor practices—"from the filing of a complaint, to a Board determination, and to judicial enforcement and review." *United Food*, 484 U.S. at 131. By its terms, the section simply does not cover *rulemakings* of any sort. And Congress would not incongruously hide within it a provision that does.

At the very least, subsection (f) should be read in harmony with subsection (e). Both subsections concern appellate review of Board orders: subsection (e) allows the Board to seek *enforcement*, while subsection (f) allows an "aggrieved party" to seek *review*. 29 U.S.C. §§ 160(e)-(f). Subsection (f) even cross-references subsection (e). *Id.* § 160(f) ("[T]he court shall proceed in the same manner as in the case of an application by the Board under subsection (e)."). And the Board's regulations treat Board enforcement and party review as two sides of the same coin. *See* 29 C.F.R. § 101.14 ("If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent or any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board's order.").

Subsection (e), moreover, refers only to orders in unfair labor practice cases. It follows subsections (c) and (d), which address orders in unfair labor practice cases,

and empowers the Board to petition for enforcement of "such order[s]." *See* 29 U.S.C. §§ 160(c)-(e); *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 766 (2023) ("word 'such' usually refers to something that has already been 'described' or that is 'implied or intelligible from the context or circumstances'") (citation omitted). Indeed, it would make no sense for the Board to go to a court of appeals to enforce a legislative "rule" (unlike an adjudicatory "order"). Subsection (e) is thus further proof that Congress contemplated judicial enforcement and review of adjudicatory orders alone.

3. Consistent Historical And Modern Practice Reflect The Same Interpretation

If the overwhelming textual evidence were not enough, reading section 10(f) as limited to orders in unfair labor practice cases also adheres to established practice and understanding.

Since the NLRA was enacted in 1935, the Board has issued countless orders in unfair labor practice cases and published many rules. Review of each has followed a well-worn path: challenges to orders in unfair labor practice cases go first to courts of appeals, while challenges to rules go first to district courts. *Compare, e.g.*, *Enterprise Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 542 (D.C. Cir. 2016) (petition for review of order in unfair labor practice case); *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 75 (D.C. Cir. 1999), *with, e.g.*, *National Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34 (D.D.C. 2012) (district-court challenge to unfair labor

practices rule), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013); *Chamber of Com. of U.S. v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012) (same), *aff'd*, 721 F.3d 152 (4th Cir. 2013); *Associated Builders & Contractors of Tex., Inc. v. NLRB*, No. 1:15-cv-26-RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015) (district-court challenge to rule amending election regulations), *aff'd*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Com. of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (same); *Chamber of Com. of U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012) (same); *American Hosp. Ass'n v. NLRB*, 718 F. Supp. 704 (N.D. Ill. 1989) (district-court challenge to rule defining collective-bargaining units), *rev'd*, 899 F.2d 651 (7th Cir. 1990), *aff'd*, 499 U.S. 606 (1991).

In fact, to the Employer Groups' knowledge, until this action no one had *ever* challenged a Board rule first in a court of appeals.

As noted, courts have also historically read section 10(f) as limited to orders granting or denying relief in unfair labor practices proceedings. For example, the Supreme Court said that the NLRA "on its face *** indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor [practices]." *American Fed'n of Lab*, 308 U.S. at 409; *see also United Food*, 484 U.S. at 129 ("Section 10 specifies the procedure for *adjudicating* unfair labor practice charges.").

This Court has likewise read section 10(f) to cover only Board action that "finally ends an unfair labor practice proceeding." *International Ladies*, 501 F.2d at 830. And other courts have done the same. *See United Nat'l Foods, Inc. v. NLRB*, 66 F.4th 536, 540 (5th Cir. 2023) (section 10(f) "refers solely" to Board adjudications); *Manhattan Constr. Co. v. NLRB*, 198 F.2d 320, 321 (10th Cir. 1952) (similar); *Inland Container Corp. v. NLRB*, 137 F.2d 642, 643 (6th Cir. 1943) (similar). To be sure, these cases largely involved questions about the finality of adjudicatory orders, not the proper forum for challenging Board rulemakings. But the long and uniform judicial understanding of section 10(f) as permitting review only of Board adjudicatory orders—along with the absence of any direct-review challenges to NLRB rulemaking for the first 88 years of the Board's existence—strongly supports the plain-text reading.

Finally, though the Board has argued in relation to this case that section 10(f) applies to agency rulemakings, *see* Mot. to Transfer, *Chamber of Comm. of U.S. v. NLRB*, No. 6:23-cv-553-JCB (E.D. Tex. Nov. 20, 2023), ECF No. 25, it had *never* made that argument before 2020. *See* Board Reply at 26, *AFL-CIO v. NLRB*, Nos. 20-5223 & 20-5226 (D.C. Cir.) (admitting position on section 10(f) is "new"); *NFIB v. Department of Lab.*, 595 U.S. 109, 119-120 (2022) (finding a "lack of historical precedent" a "telling indication" that an agency's position is wrong). As noted, the Board's regulations refer only to review or enforcement of adjudicatory orders,

including any "findings" therein. 29 C.F.R. § 101.14 (court of appeals "reviews the record and the Board's findings and order"). To this day, the Board's website describes orders eligible for direct appellate review as those issued "in a contested unfair labor practice case," Agency Court Filings, National Labor Relations Board,[2] and dubs "actions to review Board rulemaking" as "*not* statutorily based on Sections 10(e) and (f) of the Act," Contempt, Compliance, and Special Litigation Branch Briefs, National Labor Relations Board (emphasis added).[3]

Notably, when SEIU sought to challenge the Board's prior (2020) iteration of the Joint Employer Rule, it did so in district court—and the Board has never tried to dismiss that challenge on jurisdictional grounds. Instead, SEIU and the Board have repeatedly moved to maintain the case in abeyance—even after SEIU filed the petition for review at issue here. Unopposed Mot. for Further Extension of Litig. Stay, *SEIU*, No. 21-cv-2443-RC (D.D.C. Nov. 15, 2023), ECF No. 47.

C. This Court's Prior Decisions Do Not Require A Different Reading

1. None of this is to say that a direct-review provision referring to agency "orders" can never cover agency rules. Indeed, this Court has read the term "order" in other direct-review provisions to cover rules. *See, e.g., New York Republican*

[2] *Available at* https://www.nlrb.gov/guidance/memos-research/agency-court-filings (last visited Dec. 22, 2023).

[3] *Available at* https://www.nlrb.gov/guidance/memos-research/agency-court-filings/contempt-compliance-and-special-litigation-branch (last visited Dec. 22, 2023).

State Comm. v. SEC, 799 F.3d 1126 (D.C. Cir. 2015) ("*NYRSC*"); *Investment Co. Inst. v. Board of Governors of Fed. Rsrv. Sys.*, 551 F.2d 1270 (D.C. Cir. 1977). But the Court did so in those cases because it found the direct-review provisions "ambiguous" in scope. And "when a direct review provision's applicability to an agency action is 'ambiguous,' [this Court] presume[s] that Congress intended to locate jurisdiction in the courts of appeals." *NYRSC*, 799 F.3d at 1133.

Section 10(f), by contrast, is not at all ambiguous. As shown above, the text and structure of section 10 "ma[ke] 'rather clear' that 'Congress used the term 'order' to refer to an adjudicatory [unfair labor practices] order, not the promulgation of a regulation." *NYRSC*, 799 F.3d at 1133 (quoting *National Mining*, 292 F.3d at 856-857). Thus, this Court's "presumption" of direct review is inapplicable; Congress's words control. *See Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 720 (D.C. Cir. 2016) ("[T]he presumption, however helpful, cannot overcome the commands of Congress."); *NYRSC*, 799 F.3d at 1129 (recognizing that the term "order" may not encompass rules if there is "countervailing indicia of congressional intent"); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985) ("Whether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress[.]").

Besides, the main reason for applying the presumption is absent here. In *Florida Power & Light*, the Supreme Court stressed that the direct-review

presumption is meant to avoid "bifurcat[ed]" review. 470 U.S. at 743. But a bifurcated system *already exists* under subsection 10(f): this Court concluded in *AFL-CIO v. NLRB* that the subject of a section 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." 57 F.4th 1023, 1033 (D.C. Cir. 2023). Thus, sending rules "concerning unfair labor practices" to courts of appeals would create a *trifurcated* system, in which all adjudicatory orders go directly to courts of appeals, while rulemaking is reviewed in different forums depending on the topic. *Id*. at 1032-1033. No court should read the NLRA to "creat[e] such a seemingly irrational *** system." *Florida Power & Light*, 470 U.S. at 742.

To the extent that "requiring petitioners challenging regulations to go first to the district court results in unnecessary delay and expense," *Investment Co.*, 551 F.2d at 1276, that is true for all APA cases. Yet starting in district court is still the "default rule." *National Auto. Dealers*, 670 F.3d at 270. Indeed, absent a contrary instruction, that is what 28 U.S.C. § 1331 requires.

2. In the end, all SEIU has to hang its jurisdictional hat on is *AFL-CIO*'s passing suggestion that section 10(f) might encompass not only Board orders but also Board rules "concerning unfair labor practices." 57 F.4th at 1331-1332. But this Court never actually resolved that question. The Court held that "the district court *correctly* exercised jurisdiction over the AFL-CIO's challenge to the 2019

Rule" because section 10(f) does *not* permit direct review of rules concerning representation elections. *Id.* at 1032-1033 (emphasis added). And given that holding, the Court had no need to decide whether section 10(f) applies to rules "concerning unfair labor practices" because, "*even accepting that 'final order' also extends to rules*," it did not apply to the rule at issue. *Id.* at 1033 (emphasis added).

In other words, "whether section [10(f)]'s reference to 'orders' in the context of unfair labor practice disputes should be interpreted to include 'rules' that pertain to unfair labor practices *** [wa]s not before" this Court or the district court. *AFL-CIO*, 466 F. Supp. 3d at 87 n.9 (Jackson, J.).

Even assuming section 10(f) covers rules "concerning unfair labor practices"—which would make no sense given the above textual analysis—the new Joint Employer Rule does not qualify. The Rule is not specific to unfair labor practices; nor does the Rule make it an unfair labor practice for an employer to be deemed a "joint employer." Instead, the Rule defines a term that is relevant to whether an entity is subject to the NLRA as a threshold matter and that applies "for *all* purposes under the Act." 88 Fed. Reg. at 73,982, 74,017 (emphasis added). A rule "concerning unfair labor practices," on the other hand, must be more targeted toward unfair labor practices specifically. Otherwise, there may as well be no distinction between rules at all. (And the difficulty of drawing that line further shows that this is the wrong approach.)

All in all, section 10(f) confers no direct appellate jurisdiction over SEIU's petition for review, and no precedent compels this Court to ignore that pellucid reading.

II. SEIU LACKS STANDING

If that were not enough, this Court lacks jurisdiction for another reason: SEIU lacks standing to challenge the Board's new Joint Employer Rule.

"Article III of the Constitution limits the judicial power of the United States to 'cases' or 'controversies, ensuring that federal courts act only as a necessity in the determination of real, earnest and vital disputes." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (alterations omitted) (quoting *Muskrat v. United States*, 219 U.S. 346, 351, 359 (1911)). "To present a justiciable case or controversy, litigants must demonstrate standing[.]" *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). And that requires an "injury in fact that was caused by the conduct of the defendants and that can be redressed by judicial relief." *Id.*

SEIU cannot show injury here because the Joint Employer Rule does not cause it any "concrete and particularized and *** actual or imminent" harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted).

Consider first the objections SEIU made to the Board's prior iteration of the Joint Employer Rule. SEIU complained that (1) the previous rule precluded using a

firm's "reserved, unexercised control" to provide the basis for a "joint employer" finding and (2) the previous rule did not include "safety and health conditions" in its list of essential terms and conditions of employment. Compl. ¶¶ 75-87, *SEIU v. NLRB*, No. 21-cv-2443-RC (D.D.C. Sept. 17, 2021), ECF No. 1.

The Board's new Joint Employer Rule redresses both complaints. It allows a "joint employer" finding based on reserved, unexercised control alone. 29 C.F.R. § 103.40(c), (e)(1). And it includes "[w]orking conditions related to the safety and health of employees" in its list of essential terms and conditions of employment. *Id.* § 103.40(d). In other words, SEIU got everything it wanted.

That success explains why, just days before filing this petition for review, SEIU sent a joint letter to Congress singing the Rule's praises. *See* SEIU Letter, Doc. # 2029874 at 20. According to SEIU, the "welcome," "necessary," "clear," and "commonsense" Rule "will ensure that workers have a real voice at the bargaining table." *Id.* at 21, 23. Thus, SEIU "urge[d]" Congress to support the Rule and stressed their "strong[] oppos[ition]" to "any effort to nullify or weaken [it]." *Id.* at 21.

SEIU now contends that the Rule actually isn't entirely "welcome" because the Rule defines the "essential terms and conditions of employment" to include a "closed list" of "terms of employment," SEIU Resp. to Employer Groups' Mot. to Intervene, Doc. # 2031591, at 3, rather than "all mandatory subjects of collective

bargaining[,]" Statement of Issues, Doc. # 2030428, at 2. But the "closed list" covers the waterfront of "mandatory subjects of collective bargaining"—*i.e.*, the subjects that one would expect in a collective-bargaining agreement. SEIU has never identified any specific subject missing from the list (besides "safety and health conditions," which was added), nor could SEIU identify something new for the first time in this Court. Accordingly, any suggestion that the current definition will somehow harm SEIU is "fatally speculative and therefore does not suffice to confer standing." *Union Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989).

In the end, this petition is exactly what Article III's case or controversy requirement is meant to prevent: a manufactured dispute.

CONCLUSION

The Court should grant the Employer Groups' motion to dismiss.

Dated: December 22, 2023

Respectfully submitted,

/s/ Pratik A. Shah

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CERTIFICATE OF COMPLIANCE

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

1. The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,098 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/ Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I certify that on December 22, 2023, I caused the foregoing Motion to Dismiss of Employer Groups 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/ *Pratik A. Shah*
Pratik A. Shah

ADDENDUM

TABLE OF CONTENTS

United States Code

Title 29. Labor

Chapter 7. Labor-Management Relations

Subchapter II. National Labor Relations

29 U.S.C. § 156

§ 156. Rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents--

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor

organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless

such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 159

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

29 U.S.C. § 160

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings or orders prior to filing record in court

Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

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 resides or transacts business, or in the

United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order

The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title

When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by chapter 6 of this title.

(i) Repealed. Pub.L. 98-620, Title IV, § 402(31), Nov. 8, 1984, 98 Stat. 3360

(j) Injunctions

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization

maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.

(m) Priority of cases

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

Code of Federal Regulations

Title 29. Labor

Subtitle B. Regulations Relating to Labor

Chapter I. National Labor Relations Board

Part 101. Statements of Procedures

Subpart B. Unfair Labor Practice Cases Under Section 10(a) to (i) of the Act and Telegraph Merger Act Cases

29 C.F.R. § 101.14

§ 101.14 Judicial review of Board decision and order.

If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent or any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board's order. If a petition for review is filed, the respondent or aggrieved person must ensure that the Board receives, by service upon its Deputy Associate General Counsel of the Appellate Court Branch, a court-stamped copy of the petition with the date of filing. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's judgment, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.