No. 23-40629

In the United States Court of Appeals For the Fifth Circuit

BURNETT SPECIALISTS, STAFF FORCE, DOING BUSINESS AS STAFF FORCE PERSONNEL SERVICES, ALLEGIANCE STAFFING CORPORATION; LINK STAFFING; LEADINGEDGE PERSONNEL, LIMITED,

Plaintiffs-Appellants,

v.

JENNIFER A. ABRUZZO, IN HER OFFICIAL CAPACITY, UNITED STATES OF AMERICA; NATIONAL LABOR RELATIONS BOARD

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas

APPELLEES' BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fifth Circuit Rule 28.2.1, undersigned counsel of record largely agrees with Appellants' listing of interested parties. Due to the withdrawal of counsel Nate Curtisi for Appellants, Appellees provide the updated chart below. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants and Counsel	Defendants-Appellees and Counsel
• Burnett Specialists • Staff Force, Inc. d/b/a Staff Force Personnel Services • Allegiance Staffing Corp. • Link Staffing • LeadingEdge Personnel, Ltd. • Robert Henneke • Chance Weldon • Matthew Miller • Clayton Way Calvin	• General Counsel Jennifer Abruzzo • National Labor Relations Board • United States of America • Adrian Garcia • Aaron Samsel • Christine Flack • Tyler Wiese • Daniel Aguilar • Kwame Samuda

• Texas Public Policy Foundation	

Respectfully Submitted.

/s/ Tyler Wiese
Tyler Wiese
Attorney of Record for
National Labor Relations Board
and Jennifer A. Abruzzo

Dated at Washington, D.C.
this 28 day of March 2024

STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of well-settled legal principles. Accordingly, Appellees maintain that oral argument is unnecessary.

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INTRODUCTION

Appellants seek, for the first time since the creation of the NLRB's General Counsel 77 years ago, to enjoin the General Counsel from pursuing a theory of liability under the NLRA in administrative proceedings. Their request would dramatically depart from established doctrines governing judicial review of agency action. Appellants nonetheless claim that because they *may* engage in future speech regarding unionization (depending on events outside either parties' control), which *may* fall within the scope of the General Counsel's theory, and which *may* result in an administrative proceeding brought against them, they have earned the right to appear before this Court.

Appellants are wrong on both points. They have failed to establish *any* basis for jurisdiction to challenge this interim agency action—not the NLRA, Administrative Procedure Act ("APA"), nor general equitable doctrines. And because they have not established any injury flowing from the General Counsel's Memorandum, Appellants lack standing. They are not subject to any Agency proceedings, are not currently engaging in conduct covered by the Memorandum, and have established no concrete intent to do so in the future.

Accordingly, the district court's well-reasoned opinion should be affirmed by this Court.

COUNTERSTATEMENT OF JURISDICTION

This case is before the Court on the appeal of Appellants Burnett Specialists, *et al*. ("Appellants" or "Burnett") of a Memorandum Opinion and Order of the United States District Court for the Eastern District of Texas, issued on August 31, 2023, dismissing the complaint for lack of subject matter jurisdiction and lack of standing. ROA.795.[1] Burnett timely filed a notice of appeal on October 25, 2023. ROA.797. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291 and should affirm the district court's dismissal.

COUNTERSTATEMENT OF ISSUES

1. Whether the district court has jurisdiction to review a non-binding interim guidance memorandum, which describes a policy goal of identifying appropriate cases in which to encourage the Board to find that certain conduct violates the NLRA.

[1] "ROA" refers to the Electronic Record on Appeal prepared by the district court. "Br." refers to Appellants' opening brief.

2. Whether Appellants have standing to challenge the policy even though they failed to plead that they would engage in covered conduct and were not subject to any charges before the Agency.

COUNTERSTATEMENT OF THE CASE

I. Structure of the NLRB

The NLRA establishes a clear dividing line between the powers of the General Counsel, which are prosecutorial, and those of the five-member Board, which are adjudicative. Specifically, Section 3(d) of the NLRA establishes the office of the NLRB General Counsel and imbues that individual with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of [administrative] complaints . . . , and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Section 3(a), in turn, establishes the five-seat Board, which issues decisions and final orders adjudicating the merits of the General Counsel's complaints, typically on review of an administrative law judge's recommended disposition. *Id.* § 153(a). The procedures governing unfair-labor-practice proceedings, including avenues for review and enforcement of final Board orders in the courts of appeals, are laid out in Section 10 of the Act. *Id.* § 160.

II. The Memorandum

On April 7, 2022, General Counsel Jennifer Abruzzo issued Memorandum GC 22-04, entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings" ("Memorandum"). ROA.486. The General Counsel directed the Memorandum to the Agency's heads of field offices throughout the country, which operate under her supervision. *Id.*

The Memorandum opens by explaining that "[i]n workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns." ROA.486. The Memorandum then states the General Counsel's theory that "those meetings [routinely referred to as "captive audience meetings"] inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech." *Id*. Thereafter, the General Counsel lays out a "plan to urge the Board to reconsider" the lawfulness of such captive-audience meetings and elaborates her legal theory for why such meetings are coercive in her view. *Id.* at 486-88.

The Memorandum concludes by stating the General Counsel's intent to "ask the Board to reconsider current precedent on mandatory meetings in appropriate cases." *Id.* at 488.

Although the General Counsel has issued several complaints pressing this argument in NLRB administrative proceedings, the Board has not yet issued a final decision regarding her proposed legal theory. *E.g., Starbucks Corp.,* 373 NLRB No. 33, slip op. at 1, n.1 (2024); *Starbucks Corp.,* 372 NLRB No. 159 (2023), slip op. at 1, n.1 (2023); *Cemex Const. Mat. Pac., LLC*, 372 NLRB No. 130, slip op. at 3, n.15 (2023) (decisions where the Board declined to pass on General Counsel's theory regarding captive-audience meetings and coerced speech).

Appellants are a group of staffing companies that operate throughout Texas, who appear to qualify as employers under the NLRA. ROA.12-13. On July 17, 2022, Appellants filed the complaint at issue in this matter. *Id.* at 11. Appellants' complaint contained two counts: the first alleging that the Memorandum is final agency action that violates Plaintiffs' First Amendment rights, and the second alleging that the Memorandum constitutes an "ongoing violation of federal law," which this Court may remedy under Article III of the Constitution by granting

equitable relief. ROA.17-19. In their complaint, Appellants did not contend that they were facing current administrative proceedings or otherwise presently engaging in conduct the Memorandum describes as coercive. Instead, they asserted that "[i]f future attempts were made to unionize Plaintiffs' work forces, Plaintiffs would hold meetings on paid time to explain the harm of unionization and hear from workers how Plaintiffs can improve the workplace." ROA.16.

On October 11, 2022, the Board and General Counsel Abruzzo moved the district court to dismiss the matter, arguing that the court lacked subject matter jurisdiction to review the Memorandum and separately that Appellants lacked standing. ROA.171, 179. The motion highlighted that Appellants were not parties to any case before the NLRB at the time the complaint was filed, were not engaging in conduct implicated by the Memorandum, and had no certain plans to do so in the future. ROA.187-88, 198, 203-04, 206.[2]

[2] While the Board's Motion to Dismiss was pending before the district court, the parties submitted cross-motions for summary judgment. *See* ROA.325, 449, 503. The district court, however, dismissed Appellant's claims for lacking subject matter jurisdiction and standing, without reaching the merits.

On August 31, 2023, the district court granted the Board's Motion to Dismiss. ROA.774.[3] The district court concluded that it lacked jurisdiction to hear the case because "(1) [t]he NLRA's structure precludes review of Abruzzo's Memorandum and (2) Plaintiffs lack standing to bring their claims of First Amendment chill." ROA.777.[4]

III. The District Court's Findings

A. The district court lacked jurisdiction to review the Memorandum.

The court relied on two independent bases for its finding that it lacked jurisdiction to hear the parties' dispute. First, the court found that the issuance of the Memorandum was a "quintessential prosecutorial function[]"under the Act, and that therefore the General Counsel's actions were "simply unreviewable" under the NLRA based on

[3] *Burnett Specialists v. Abruzzo*, No. 4:22-CV-00605 (E.D. Tex. Aug. 31, 2023) ROA.774. The district court's Order also granted the United States of America's Motion to Dismiss Complaint and for Joinder. *Id.* at 794-95.

[4] On July 31, 2023, the United States District Court for the Western District of Michigan issued an opinion and judgment in a case raising similar issues, *Associated Builders & Contractors of Michigan v. Abruzzo,* 1:23-cv-277, 2023 WL 10475293 (W.D. Mich. July 31, 2023). That case also involves a First Amendment challenge to the General Counsel's Memorandum as that presented here. And the district court there similarly dismissed plaintiff's claims for lacking subject matter jurisdiction and standing. *Id.* at 5, 7.

established Supreme Court precedent. ROA.781 (citing *NLRB v. United Food & Com. Workers Union, Local 23 ("UFCW"),* 484 U.S. 112, 130 (1987). Second, the Court found that the structure of the NLRA precluded jurisdiction. Although the district court recognized the default rule that courts possess jurisdiction over civil claims arising under the Constitution, it found that the structure of the Act demonstrates that Congress intended to limit jurisdiction of such claims by establishing an exclusive review scheme in the court of appeals, limited to final Board orders. ROA.783-84.

The district court also analyzed whether any equitable exceptions applied, supplanting the NLRA's prohibition on reviewing prosecutorial decisions and determined that they did not. ROA.782-83. The Court first analyzed whether the Memorandum could be reviewed under *Leedom v. Kyne*, "a narrow and rarely successfully invoked" exception that requires a party to demonstrate that 1) an agency violated "a clear statutory mandate" and 2) the aggrieved party has no "meaningful opportunity for judicial review." ROA.782 (citing 358 U.S. 184 (1958)). Because Appellants could not identify a violation of a clear statutory mandate, they could not satisfy *Kyne*. *Id.* at 782.

Next, the Court looked at whether the claim could be brought under *Larson v. Domestic & Foreign Commerce Corp.*, which permits suits to potentially proceed where agency officials have "acted *ultra vires* of statutorily delegated authority" or where the "statute or order conferring power upon the officer . . . is claimed to be unconstitutional." ROA.782-83 (citing 337 U.S. 682 (1949)) (cleaned up). After casting doubt on whether *Larson* even applied in the circumstances of this case, the Court found that even if it did, Appellants had not demonstrated General Counsel Abruzzo acted outside her authority under the Act. *Id.* at 783.

B. Appellants lacked standing.

As an alternative basis for dismissing Appellants' claims, the district court found that Appellants lacked standing. ROA.792.
In so doing, the district court analyzed "whether the threat of future enforcement is substantial." *Id*. The district court took Plaintiffs' argument that "they fear an unfair labor practice charge will be filed against them if they act contrary to the Memorandum" at face value. *Id.* Nonetheless, the court found a substantial threat of enforcement lacking because of the "chain of contingencies" that must occur before

any harm could befall Appellants, including a union campaign, the filing of related unfair labor practice charges, the General Counsel issuing complaint, and the Board finding a violation. *Id.* "Most of these contingencies," the court noted, "are not even remotely close to 'certainly impending,'" and therefore, the Court found "that there is sufficient contrary evidence rebutting any presumption of a credible threat of prosecution." *Id.* at 793-94.

SUMMARY OF THE ARGUMENT

Congress has established a clear statutory scheme in which the NLRB investigates and adjudicates alleged violations of the National Labor Relations Act, and the courts of appeals review final NLRB orders. District courts play no role in that review scheme, as the district court here correctly recognized, and Appellants may not invoke district court jurisdiction where Congress has precluded it.

That is particularly true when Appellants fail to challenge any final order of the NLRB, or any final agency action under the APA. Appellants challenge only prosecutorial guidance issued by the Agency's General Counsel—which has not been adopted or endorsed by the NLRB Members. As this Court has explained, plaintiffs cannot

challenge quintessentially interim agency action that does not determine rights or obligations.

For much the same reason, Appellants lack standing. They do not allege that the General Counsel has applied the guidance to them, or that she is likely to bring any enforcement proceeding against them based on the guidance. As the district court recognized, any hypothetical unfair labor practice proceeding would necessarily be premised on a series of contingent and speculative events, far from the "concrete" and "imminent" allegations of injury necessary for Article III standing.

Thus, the district court correctly dismissed the complaint for three independent but related reasons: (1) Congress divested district courts of jurisdiction within the NLRB statutory review scheme; (2) Appellants fail to challenge final agency action as required for their APA claim; and (3) Appellants fail to satisfy the requirements of Article III jurisdiction. This Court should affirm.

STANDARD OF REVIEW

"This court reviews a district court's dismissal for lack of subject matter jurisdiction de novo." *Hinojosa v. Horn*, 896 F.3d 305, 309 (5th

Cir. 2018) (citations omitted). The party asserting jurisdiction (Appellants here) bear the burden on this issue. *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998). Generally, a court considering whether a party has met its burden to establish jurisdiction may rely on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996) (quoting *Voluntary Purchasing Grps., Inc. v. Reilly,* 889 F.2d 1380, 1384 (5th Cir. 1989)). In a facial challenge like this one, the Court "look[s] to the sufficiency of the allegations in the complaint," assumes the truth of those allegations, and if they are "sufficient[,] the complaint stands." *Paterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1981).

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc.*, 143 F.3d at 1010 (cleaned up). On jurisdictional issues, "this court may affirm dismissal for any

reason supported by the record." *Walmart Inc. v. U.S. Dep't of Just.*, 21 F.4th 300, 307 (5th Cir. 2021).

ARGUMENT

I. The District Court Correctly Determined that Jurisdiction Here is Precluded by the NLRA and that Appellants do not Otherwise Possess an Equitable Cause of Action.

It is a "fundamental precept" that federal courts have limited jurisdiction, and these limitations, "whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Courts are therefore obligated to confirm whether they have subject-matter jurisdiction over a given action. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

The district court lacks jurisdiction over Appellants' claim, which challenges an unreviewable prosecutorial policy decision of the NLRB's General Counsel. Appellants have also not provided an adequate justification for circumventing the NLRA's review procedure, which does not permit district court jurisdiction over this type of claim. Accordingly, this Court should affirm the district court's dismissal of this case on jurisdictional grounds.

A. The NLRA does not establish district court jurisdiction for challenges to the General Counsel's prosecutorial decisions.

The NLRA provides several distinct avenues for challenging the Agency's actions in federal court, none of which apply here. First, the NLRA establishes appellate jurisdiction for review and enforcement of final Board orders. *See* 29 U.S.C. §§ 160(e)-(f). Second, the NLRA provides district court jurisdiction, but only in two situations and both at the Board's behest: (1) the issuance of temporary injunctions requested where remedial failure could result from delays in the Board's administrative processes, *see id.* § 160(j), (*l*); and (2) the resolution of disputed subpoena matters arising from NLRB "hearings and investigations," *see id.* § 161(2). Though the Act identifies these exclusive avenues for federal court jurisdiction over the Agency's actions, Appellants do not argue that any of these provisions are relevant to their claims.

Given this review structure, it is unsurprising that shortly after the NLRA's passage, the Supreme Court held that federal district courts lack authority to enjoin the prosecution or adjudication of complaints in unfair-labor-practice hearings. In *Myers v. Bethlehem*

Shipbuilding Corp., an employer attempted to enjoin the prosecution of an unfair-labor practice case based on alleged constitutional and statutory issues arising from that proceeding. 303 U.S. 41, 46 (1938). The Supreme Court found district court jurisdiction lacking, unequivocally stating:

> The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce" has been vested by Congress in the Board and the Circuit Court of Appeals . . . . The grant of that exclusive power is constitutional, because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board.

Id. at 48. Its holding, the Supreme Court explained, rested on Congress's reasoned judgment and principles of administrative finality. *Id.* at 50.

This Court has applied *Myers* where a plaintiff seeks to enjoin the NLRB based on constitutional claims. In *Bokat v. Tidewater Equipment Co.*, for example, the Fifth Circuit rejected an employer's attempt to enjoin an unfair-labor-practice hearing on the theory that the company would be deprived of constitutional due process by an NLRB proceeding. 363 F.2d 667, 669-70 (5th Cir. 1966). The Court held that the employer

needed to raise its claim through the administrative proceeding, explaining that "[t]he fact that the attack is voiced in conclusory language of a denial of due process and like constitutional rights does not warrant stopping the Board in its tracks." *Id.* at 672-73. Additionally, the Court asserted that its denial of injunctive relief did not foreclose the employer's claim because "th[ose] matters [were] open for proof and assertion in the unfair labor practice case." *Id.* at 673. Thus, the Fifth Circuit has recognized that district courts "have a very, very minor role to play in this statutory structure," even when constitutional arguments are raised. *Id.*

Of course, as the district court noted, Appellants here are not even seeking relief as to an ongoing unfair-labor-practice proceeding. ROA.780. Rather, Appellants' "ultimate goal" is to challenge "*potential* unfair labor practices." *Id.* (emphasis added). As such, Appellants actually challenge the General Counsel's "decision to prosecute certain cases," which the district court correctly held was unreviewable. ROA.781.

In addition to foreclosing district court jurisdiction over unfair-labor-practice proceedings, the structure of the NLRA also shields the

General Counsel's prosecutorial decisions from review. In 1947, Congress added Section 3(d) of the NLRA to formally establish the position of General Counsel and to define her powers. This amendment strictly separated the General Counsel's prosecutorial powers from the Board's adjudicatory powers. *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 443 (5th Cir. 2022) ("The NLRA creates a stark division of labor between the General Counsel and the Board."). In relevant part, Section 3(d) of the NLRA states that the General Counsel "shall have *final authority*" over investigatory and prosecutorial matters in unfair-labor-practice cases. 29 U.S.C. § 153(d) (emphasis added). The General Counsel's decisions to set prosecutorial priorities, as she did in the Memorandum, are thus distinct from the Board's authority to issue final orders subject to judicial review under Section 10 of the NLRA. *UFCW,* 484 U.S. at 128.

As a result of this separation, it is clear that the statutory provisions allowing for review of agency decisions only extend to decisions of the Board, not to prosecutorial functions of the General Counsel. *See* 29 U.S.C. §§ 160(e)-(f). The Supreme Court has expressly held that judicial review of the General Counsel's prosecutorial function

is "precluded by statute." *UFCW*, 484 U.S. at 133 n.31. In *UFCW*, the Supreme Court rejected an attempt by a charging party to obtain judicial review of the General Counsel's decision to dismiss an unfair-labor-practice case pursuant to an informal settlement between the General Counsel and the charged party. *Id.* at 114. The Court concluded that "the structure of the act . . . leads inescapably to the conclusion that Congress distinguished orders of the General Counsel from Board orders." *Id.* at 128. In this way, the Court reasoned, Congress had decided to "authorize review of *adjudications*, not of *prosecutions*." *Id.* at 129; *see id.* at 124 ("The words, structure, and history of the LMRA amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line.")

No doubt with this precedent in mind, Appellants try to distinguish the General Counsel's Memorandum from other prosecutorial decisions, claiming that the Memorandum is "essentially the same as a final rule promulgated by the Board." Br. 17. The Memorandum, however, in no way operates like a final rule. If the Board issued a final rule finding captive-audience meetings unlawful,

the entire Agency would be bound to follow it. Here, by contrast, the Memorandum announces a policy to "ask the Board to reconsider current precedent on mandatory meetings in appropriate cases." ROA.488. Indeed, the submission of the *Cemex* brief, shortly after the Memorandum's publication, did exactly that; it sought to persuade the Board to change its position on captive-audience meetings, through the normal and exclusive administrative channel for doing so. ROA.26, 117. And this attempt was unsuccessful, as the Board declined to reach the merits of that issue. 372 NLRB No. 130, slip op. at 3, n.15. If the Memorandum operated as a "final rule" as Appellants claim, then none of this subsequent internal agency action would be necessary—which confirms that it is not a "final rule."

And even if one accepts Appellants' premise that the Memorandum is somehow distinct from normal prosecutorial actions, Appellants still ignore the NLRA's separation between the rulemaking and adjudicative powers vested with the Board, and the prosecutorial powers vested with the General Counsel. Appellants do not attempt to impute the Memorandum to the Board itself, nor could they, as the Memorandum is not binding on the Board and is not even entitled to

deference. Appellants' failure to grapple with the distinction between the General Counsel's prosecutorial authority and the Board's final adjudicatory authority is fatal to their arguments here. Ultimately, Appellants fail to support their claim that the General Counsel's adoption of a prosecutorial position falls outside her statutory authority.[5]

Appellants nonetheless argue that *UFCW* is inapposite because it concerned the General Counsel's actions in "one particular case" rather than a decision to pursue a course of action in multiple cases. Br. 19 (emphasis omitted). But Appellants' strained interpretation of what falls within the scope of prosecutorial functions makes little sense.[6] If a

[5] Appellants find it "inexplicable" that the district court stated they "did not even attempt to argue that [the General Counsel's] Memorandum is outside of her prosecutorial functions." Br. 19 n.6 (quoting ROA.246-47). However, Appellants' criticism is purely semantic: whether they "attempted" to argue this point is of no consequence. The district court accurately found that Appellants failed to explain how a non-final prosecutorial policy can be the same thing as creating a new administrative rule. *See, e.g.*, ROA.782, 807-811, 817-18.

[6] Such memoranda are a critical and well-established vehicle for the General Counsel, as prosecutorial head of a nationwide agency, to guide prosecution of cases before the Board. As the court in *Associated Builders and Contractors of Michigan* noted, "[c]ourts have acted cautiously in such circumstances." 2023 WL 10475293, at *5.

prosecutor chooses to pursue a novel legal theory in a number of cases, does that transform the legal theory into binding law? Of course not. If the Board does indeed adopt the General Counsel's legal theories, then aggrieved parties may challenge that decision in a federal court of appeals under Section 10(f). But for now, the General Counsel's legal theory remains firmly within her unreviewable prosecutorial authority; it is up to the Board in the first instance to decide whether that theory has merit.

Permitting Appellants to bring their claims in district court—before a charge is filed or a complaint has issued—would circumvent the procedure Congress established for review of final Board orders. Congress's clearly defined scheme for judicial review cannot support such a result.

B. Neither Kyne *nor* Larson *support jurisdiction in this court.*

Appellants also disagree with the district court's rejection of their "*Larson* claim" challenging the General Counsel's Memorandum as *ultra vires*. Br. 25-27. *Larson* is a general jurisdictional doctrine that

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Appellants have established no grounds to abandon the caution displayed in these circumstances.

allows for suits against federal officials who act *ultra vires* or take actions that are "constitutionally void." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 701-02 (1949). Appellants argue that this claim provides an equitable basis here, under *Larson*, upon which to enjoin unlawful action by a federal officer in district court. Br. 25.

The district court correctly rejected this argument. To begin, as the district court noted, "*Larson* seems to merely encompass the same concerns in *Kyne*." ROA.783. Both doctrines involve allegations of *ultra vires* actions by agency officials. In *Kyne*, which was decided almost a decade after *Larson* and specifically involved allegations that the NLRB acted outside its statutory authority, "the Supreme Court outlined only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction." ROA.782 (quoting *Sanderson Farms, Inc. v. NLRB*, 651 F. App'x 294, 297 (5th Cir. 2016)) (internal quotations omitted). "For the exception to apply, (1) an agency must exceed the scope of its delegated authority or violate a clear statutory mandate; and (2) the aggrieved party must be deprived of a meaningful

opportunity for judicial review." ROA.782 (citing *Sanderson Farms*, 651 F. App'x 294 at 297). It is not surprising that Appellants do not rely on *Kyne*, because "they cannot point to *any* statutory mandate that [the General Counsel] violated by filing the Memorandum," ROA.782 (emphasis added), let alone a clear one.

Regardless, invoking *Larson* does not get Appellants any closer to establishing jurisdiction in district court. This is because "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr. Inc.*, 575 U.S. 320, 327 (2015). This means that "Congress may displace the equitable relief that is traditionally available to enforce federal law." *Id.* at 329.

And that is exactly what Congress did when it enacted the NLRA. In *Myers*, the Supreme Court observed that the NLRA had supplanted the federal district courts' "equity jurisdiction" to safeguard "rights guaranteed by the Federal Constitution" from purportedly unlawful NLRB action. *Myers*, 303 U.S. at 43, 50. The Court further noted that the NLRA's judicial review provisions provided an employer asserting constitutional injuries "an adequate opportunity to secure judicial

protection against possible illegal action on the part of the Board." *Id.* at 48. Because the NLRA significantly abrogated the equitable jurisdiction of the federal courts, *Kyne* is best understood to be an application of the general equitable principles described in *Larson* to the NLRA and its embedded "express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, on equity jurisdiction.

It is revealing that Appellants do not cite a single example of this Court invoking *Larson* jurisdiction in an NLRB proceeding. The Fifth Circuit has, on the contrary, correctly relied on principles of NLRA-specific equitable jurisdiction reflected in *Kyne* and related cases, consistently rejecting attempts by claimants to bring constitutional challenges to NLRB actions in district court. *See, e.g.*, *Boire v. Mia. Herald Publ'g Co.*, 343 F.2d 17, 21, 24 (5th Cir. 1965) (finding no district court jurisdiction over an Agency action in representation proceedings); *Bova v. Pipefitters & Plumbers Loc. 60,* 554 F.2d 226, 228-29 (5th Cir. 1977) (finding no jurisdiction over a union member's claim that the Agency had violated his Fifth Amendment rights by failing to pursue certain unfair-labor-practice charges). As have other circuits. *E.g.*, *Braden v. Herman,* 468 F.2d 592, 593 (8th Cir. 1972) (per curiam)

(rejecting jurisdiction over a constitutional claim); *Saez v. Goslee,* 463 F.2d 214, 215 (1st Cir. 1972) (per curiam) (same); *Balanyi v. Loc. 1031, Int'l Bhd. of Elec. Workers,* 374 F.2d 723, 726 (7th Cir. 1967) (same); *McLeod v. Loc. 476, United Bhd. of Indus. Workers,* 288 F.2d 198, 201 (2d Cir. 1961) (same).

Additionally, consistent with the reasoning in *Kyne*, the Fifth Circuit has recognized that a claimant cannot challenge NLRB action in district court where an opportunity for meaningful review already exists through the administrative process. *See Mia. Herald Publ'g,* 343 F.2d at 21 n.7; *Volney Felt Mills v. Le Bus,* 196 F.2d 497, 498 (5th Cir. 1952). This proposition has since been bolstered by other circuits, which have denied *Kyne* relief arising from unfair-labor-practice proceedings on the basis that the statutory review procedure adequately enables meaningful review. *See, e.g.*, *AMERCO v. NLRB*, 458 F.3d 883, 889-90 (9th Cir. 2006); *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240, 244-45 (6th Cir. 1979); *see also Myers*, 303 U.S. at 50-53. The Supreme Court has made clear that during proceedings to enforce or review a final Board order, "all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional

right or statutory authority, are open to examination by the court." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937). Thus, the NLRA affords aggrieved employers the right to circuit court review only after exhausting their administrative remedies.[7]

The principle of limited district court jurisdiction applies with equal force to the type of First Amendment "chill" claims asserted by Appellants here. In *Grutka v. Barbour,* 549 F.2d 5 (7th Cir. 1977), a religious employer sought to enjoin an NLRB union-representation election for lay teachers at a Catholic school, arguing that the election would interfere with the free exercise of religious beliefs under the First Amendment. The district court granted the injunction on the theory that the employer's First Amendment claims were "not clearly frivolous." *Id.* at 7. The Seventh Circuit reversed, holding that "[t]he constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are

[7] Requiring plaintiffs to raise claims administratively first is, of course, not unique to cases involving the NLRB. *See, e.g.*, *Board of Governors of the Fed. Rsrv. Sys. v. Mcorp Fin., Inc.*, 502 U.S. 32 (1991) (rejecting bank's request to enjoin two agency proceedings against it where the bank would have "in the Court of Appeals, an unquestioned right to review of both the [relevant] regulation and its application").

fully adequate to protect the plaintiff's constitutional rights." *Id.* at 9. In other words, because "the plaintiff's constitutional rights [had] adequate protection in the Court of Appeals, Congress' decision to place exclusive jurisdiction in [the circuit court] [was] unchallengeable." *Id.* at 9 n.7. Even if the union were to prevail in the election, the employer could still obtain adequate redress of its rights by refusing to bargain, which would likely result in a reviewable unfair-labor-practice order as to which the employer could press its constitutional claims.[8] *Id.* Because Appellants similarly retain the right to raise their constitutional challenge in the event a charge is filed against them, the same result should follow here.[9]

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[8] Indeed, after a similarly situated employer, the Catholic Bishop of Chicago, proceeded through the congressionally dictated process of review under Section 10, that employer ultimately prevailed on the merits. *Compare id.* at 9 (refusing to enjoin Board proceedings "because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights") *with Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977) (vacating final Board order directing church-owned parochial school to bargain with faculty), *aff'd*, 440 U.S. 490, 494-95, 506 (1979).

[9] Appellants claim that the district court "misunderst[ood]" Appellants' claimed "chill" injury. Br. 20. On the contrary, the district court explicitly acknowledged Appellants' characterization of their injury but properly concluded that "[a]lthough Plaintiffs have refrained from coloring their claims as challenging potential unfair labor practices, it is

Finally, the instant case illustrates the wisdom of limitations on district court jurisdiction over constitutional challenges to NLRB action. As a general rule, courts do not rule on constitutional questions "unless such adjudication is unavoidable." *Matal v. Tam*, 582 U.S. 218, 231 (2017) (cleaned up). And as discussed in more detail below, *see* discussion at 53-55, there are a number of contingencies that would have to occur before Appellants could conceivably face liability for holding a captive-audience meeting, including that the Board would have to adopt the General Counsel's legal theory. But at that point, there would be no need for district court review because Appellants could obtain full review of their constitutional argument in a federal court of appeals under Section 10(f) of the NLRA. 29 U.S.C. § 160(f).

Further, "it is a well-settled principle of constitutional adjudication that courts will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013)

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clear that it is their ultimate goal." ROA.780. Appellants' claim is most properly classified as an affirmative defense to a purely hypothetical unfair-labor-practice charge against them. Appellants have not cited a single case supporting district court jurisdiction over a claim of First Amendment chill caused by the General Counsel's prosecutorial actions.

(cleaned up), *aff'd*, 573 U.S. 513 (2014); *see Whole Woman's Health v. Smith*, 896 F.3d 362, 370-71 (5th Cir. 2018) (finding it unnecessary to determine constitutional question where case could be disposed of on statutory grounds). Here, the threshold issue presented by the General Counsel's legal theory is whether captive-audience meetings, absent certain safeguards, violate Section 8(a)(1) of the NLRA, not whether such a prohibition would violate the First Amendment. If the Board holds that captive-audience meetings do not violate the NLRA, the General Counsel will follow that binding decision, and then Appellants' constitutional claim would be entirely obviated. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 22-23 (2012) (presence of "preliminary questions unique to the employment context [that] may obviate the need to address the constitutional challenge" weighed against direct court review). In sum, *Larson* does not support the exercise of district court jurisdiction over Appellants' constitutional challenge.

C. *The district court correctly held that* Axon *and* Thunder Basin *do not establish district court jurisdiction over Appellants First Amendment claim.*

Appellants' claim that the district court "erred by holding that the NLRA's structure precludes jurisdiction," Br. 19-24, stems from its

misreading of the Supreme Court's decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023). *Axon* held that district courts can exercise jurisdiction over certain structural constitutional claims that are wholly separate from the merits of the agency proceeding and which the agency cannot adjudicate itself. In so holding, *Axon* did not disturb the well-settled line of cases holding that challenges to the *merits* of the agency proceeding—*i.e.*, adjudicating liability, defenses, and remedy—can be properly channeled to the court of appeals after the agency proceeding ends.

In *Axon*, the Supreme Court specifically addressed whether constitutional challenges attacking removal protections for administrative law judges and the combination of adjudicative and prosecutorial functions within an agency could be brought directly in district court. *Axon*, 598 U.S. at 180. The Court concluded that Congress had not foreclosed district court jurisdiction over these claims because they were facial "constitutional challenges to [an agency's] *structure*." *Id.* at 180 (emphasis added). Put differently, because the plaintiffs' claims accused the agency of acting "unconstitutionally in all or a broad

swath of its work," *id.* at 189, they were generally not the type of claims Congress intended to be channeled to an administrative agency.

As the district court observed, there is a stark difference between the structural claims at issue in *Axon* and Appellants' claim that the General Counsel's "'substantive decision' . . . violates their constitutional rights." ROA.787 (quoting *Axon*, [598 U.S. at 189]). Instead of challenging a structural feature of the Agency "that would call into question the very nature of being subjected to a proceeding at all," ROA.787, Appellants levy a claim that squarely challenges a specific agency action, and one affecting only a subset of unfair labor practices the NLRB adjudicates. Thus, Appellants' challenge to what is or is not an unfair labor practice "is precisely the type of" challenge "regularly adjudicated by the" NLRB, and the NLRB may resolve threshold and other questions unique to the employment context that fall squarely within the [NLRB's] expertise." *Axon,* 598 U.S. at 187 (cleaned up). For that reason, Appellants' claims—unlike those in *Axon*—are "intertwined with or embedded in matters on which the" NLRB Members "are expert." *Id.* at 195. That marked difference

cautions against interjecting district court jurisdiction into the statutory review scheme established by Congress.

Additionally, the Court in *Axon* identified three factors from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), used by courts to assess whether Congress intended a given claim to fall within a statutory review structure: (1) "could precluding district court jurisdiction 'foreclose all meaningful judicial review'"; (2) "is the claim 'wholly collateral to [the] statute's review provisions'"; and (3) "is the claim 'outside the agency's expertise.'" *Axon*, 598 U.S. at 187 (quoting *Thunder Basin*, 510 U.S. at 212-13). The Court ultimately found that all three of these factors weighed in favor of finding jurisdiction in *Axon*. *Id.* at 190-96.

But here, the *Thunder Basin* factors all point in the opposite direction. Starting with "agency expertise," Appellants have failed to show how their claims fall outside the NLRB's purview. In the words of the district court, "an employer's right to give noncoercive speech about labor practices is not unique to the First Amendment—it is embodied in the NLRA itself." ROA.787 (citing 29 U.S.C. § 158(c)). The Board has a long history of interpreting NLRA's restriction on coercion by employers

and labor organizations in light of free-speech principles.[10] *See, e.g.*, *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 660 (6th Cir. 2005); *Cook Paint & Varnish Co. v. NLRB* 648 F.2d 712, 719 (D.C. Cir. 1981); *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941); *Int'l Union of Operating Engineers, Local 150 (Lippert Components)*, 371 NLRB No. 8, slip op. at 2 (2021) (Chairman McFerran, concurring). And as noted above, the Board may very well reject the ideas the General Counsel expressed in her Memorandum without reaching any constitutional questions at all.[11]

Appellants similarly fail to demonstrate that their claim is "wholly collateral" to the NLRA's review scheme. Unlike the claims in *Axon*,

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[10] Appellants argue that their claim falls outside the Agency's expertise because "the speech the Memorandum regulates . . . is not yet said." Br. 24. But this makes little sense, as the Memorandum lays out the strategy the General Counsel will pursue in cases where employers engage in impermissibly coercive conduct. ROA.486-88. And Appellants' argument that the NLRB lacks "specialized knowledge or skill to determine that all statements made in mandatory meetings or conversations are 'inherently' threatening" is baffling. Br. 24. The NLRB's role in regulating labor relations means that it frequently determines what constitutes coercive conduct on the part of employers, *see Dayton Newspapers*, 402 F.3d at 660 ("In assessing the coercive impact of the employer's statements," the Court looks to "the NLRB's *judgment and expertise*.") (emphasis added).

[11] *See* above at 29.

Appellants' constitutional challenge is not an objection to the Agency's "power generally," *Axon*, 598 U.S. at 193, but rather an attack on "how [the Agency's] power was wielded." *Id.* *Axon* makes clear that claims directed at the "subject of . . . enforcement actions" are not collateral. *Id.* Appellants' attack here on the Memorandum necessarily challenges the General Counsel's strategy in future "enforcement actions," because the Memorandum broadly explains what cases the General Counsel will bring under its legal theory. As the district court put it, Appellants' "First Amendment claims are merely the vehicle by which they challenge a potential unfair labor practice, which does not change the character of the relief that they seek." ROA.789.

The district court's conclusion faithfully applies the Supreme Court's decision in *Elgin v. Department of Treasury*, 567 U.S. 1, 22 (2012), which similarly held that district courts lacked jurisdiction over constitutional challenges to registration requirements for the military draft. The Court held that petitioners—who had lost their federal employment for failure to register for the draft—used their constitutional challenges as "the vehicle by which they seek to reverse the removal decisions, [and] return to federal employment." *Id.* But

Congress has chosen to have such employment claims adjudicated by the Merit Systems Protection Board (MSPB) and reviewed by the courts of appeals. The Supreme Court concluded that the statutory scheme "was intended to preclude district court jurisdiction over" those constitutional claims. *Id.* at 23. Because the NLRA's statutory scheme similarly precludes district court jurisdiction over this non-collateral claim, the second *Thunder Basin* factor weighs strongly against district court jurisdiction here.

Finally, Appellants cannot show that precluding district court jurisdiction of their claim would foreclose all meaningful judicial review. Appellants claim that the injury they are experiencing by "self-censoring" cannot by remedied through the NLRA's review scheme. Br. 23. This argument is foreclosed by the Supreme Court's decision in *Myers*. Confronted with similar arguments by employers regarding being subject to unconstitutional proceedings before the Board, the *Myers* Court conclusively held that "the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in

irreparable damage." 303 U.S. at 51. *Id.* at 48. Given that the Board's powers are purely "remedial, not punitive," *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940), this does not "approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin Coal Co.*, 510 U.S. at 218. Indeed, that other employers are actively challenging captive-audience prosecutions on the same grounds that Appellants present in their lawsuit demonstrates that meaningful judicial review has not been foreclosed. Thus, denying district court jurisdiction now does not extinguish Appellants' path to full judicial review.[12]

Appellants also argue that because Section 10(f) does not provide review for the General Counsel's actions, the meaningful-review factor is satisfied. Br. 23 (citing *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010)). But *Free Enterprise Fund*, like *Axon*, was a case where parties were seeking to challenge the very

[12] This result is consistent with the Supreme Court's recognition that "'adequate judicial review does not usually demand a district court's involvement,' and review in a court of appeals 'can alone meaningfully address a party's claims.'" ROA.789 (quoting *Axon*, 598 U.S. at 190).

structure of the agency. 561 U.S. at 490. As the district court explained, in contrast here, Appellants are not seeking "structural relief," but rather "substantive relief," that is, adjudication of an anticipatory defense to potential liability. ROA.790 (quoting *Cochran v. SEC*, 20 F.4th 194, 208 (5th Cir. 2021) (en banc), *aff'd and remanded sub nom. Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023)). Appellants' challenge falls squarely within the category of claims Section 10(f) channels to the courts of appeals. That Appellants cannot challenge the General Counsel's prosecutorial strategy before they are subject to an unfair-labor-practice charge is a deliberate feature of Congress's carefully constructed review scheme, not an unintended consequence. *See UFCW*, 484 at 129.

In conclusion, the district court correctly determined that because Appellants' claim falls squarely within the NLRA's review scheme, it cannot be brought in district court.

D. The Administrative Procedure Act does not provide a basis to review Appellants' Claims.

Having failed to establish jurisdiction under the National Labor Relations Act or any equitable doctrines, Appellants fall back to arguing that the APA provides jurisdiction here. Br. at 15. This argument fails

for three independent reasons: (1) the *specific* jurisdictional contours of the NLRA preclude review under the APA; (2) the challenged action is not the consummation of the Agency's decision-making process, as required under the APA; and (3) the Memorandum does not establish any legal rights or obligations for parties.

1. The Memorandum is exempted from review under Section 701(a) of the APA because the structure of the NLRA precludes review.

In their opening brief, Appellants completely—and fatally—fail to address the primary reason why the APA does not grant jurisdiction for their claims. Specifically, Section 701(a)(1) of the APA exempts agency action from review if "statutes preclude judicial review." Here, the NLRA does just that.

As discussed above, *see* discussion at 14-21, it is beyond cavil that the NLRA exempts review of the General Counsel's actions. Nothing in the APA changes that result. In *UFCW,* the Supreme Court held that the history and structure of the NLRA "clearly and convincingly" precludes judicial review of the General Counsel's prosecutorial authority. 484 U.S. at 131. Indeed, the independence of the General Counsel's office, which Appellants emphasized in their brief (Br. 16),

formed the bedrock of the Supreme Court's opinion. *Id.* at 124-26. In light of the NLRA's statutory structure, the Court held that "[g]iven the comprehensive nature of the NLRA with regard to unfair labor practice charges, and the absurd results of allowing an APA action to be brought where there is no judicial review provided in the Act, we conclude that the exception defined in [Section] 701(a)(1) bars review here." *Id.* at 133.

2. Appellants are not entitled to review under the APA because the Memorandum does not constitute final agency action or bind parties.

Even if review were not statutorily precluded by the NLRA (and thus by the APA), the Memorandum is not the type of agency action that the APA makes reviewable. Section 704 of the APA defines the scope of reviewable agency actions: "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. In addition, "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.* This provision establishes an important threshold, requiring final agency action before the APA permits judicial

review. *Texas v. EEOC*, 933 F.3d 433, 441 n.8 (5th Cir. 2019). Because the Memorandum constitutes (at most) intermediate agency action, it is not subject to APA review.

Appellants correctly note that the two-part test announced in *Bennett v. Spear*, 520 U.S. 154 (1997), determines whether agency action is final. *Bennett* assesses whether the action (1) "mark[s] the consummation of the agency's decision making process" *and* (2) establishes "rights or obligations" or leads to "legal consequences." *Id.* at 177-78. Both conditions must be satisfied to obtain judicial review. *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018). Appellants' claims fail to satisfy either prong. The Memorandum announces the General Counsel's intent to present an interim legal position to the Board; it is the Board alone which can issue final orders that establish legal consequences for unfair labor practices.

a. The Memorandum does not mark the consummation of the Agency's decision-making process.

The Memorandum represents only the General Counsel's announced intent to urge the Board, through administrative litigation, to issue a final order finding certain captive-audience meetings unlawful. While the General Counsel has "final authority" to choose

which cases to pursue and present before the Board, 29 U.S.C. § 153(d), and in so doing, may seek to overturn existing precedent, she cannot issue binding legal orders or rulings reinterpreting the NLRA. This authority is vested solely with the Board, which has yet to act on this issue. *See* NLRB cases cited above, p. 5.

The issuance of the Memorandum does not mark the consummation of the Agency's process, since that process can only be consummated by issuance of a final Board order (or rule). But that process can only begin with the filing of a charge by an outside party, as the General Counsel has no independent investigative authority. *Chamber of Commerce of United States v. NLRB,* 721 F.3d 152, 155-56 (4th Cir. 2013). The General Counsel's sole method to urge the Board to effectuate a substantive change in Agency policy is through issuing unfair-labor-practice complaints after such a charge is filed, and making arguments in those proceedings to overturn existing precedent.

The text of the Memorandum reflects this reality. It states the General Counsel's "plan to urge the Board to reconsider [existing] precedent" regarding captive-audience meetings. ROA.486; *see id.* at 488 ("I will *ask* the Board to reconsider current precedent on mandatory

meetings") (emphasis added). This is because only the Board is empowered to effectuate such a change in precedent and issue a binding final order. Because the issuance of the Memorandum is a classic example of "intermediate" agency action, it fails the first prong of the *Bennett* analysis.

Appellants fail to grapple with this point. Although they point out that "[t]o determine finality, courts take a 'pragmatic approach,' viewing the requirement as 'flexible,'" Br. 15 (quoting *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019)), the General Counsel's actions here nonetheless constitute intermediate agency action. The cases cited by Appellants demonstrate why this is so.

For example, in *Texas v. EEOC*, the agency action in question reflected the consummation of the Commission's decision-making process; there were no further administrative actions to be taken as to that policy. Significantly, the agency also "d[id] not dispute that the Guidance binds EEOC." 933 F.3d at 443. But here, the decisionmaker, the Board, has yet to weigh in on the General Counsel's theory, and the Board is not bound in any way by that theory. *See* NLRB cases cited above, p. 5.

In this regard, the policy articulated in the Memorandum is more analogous to the challenged policies in *Walmart Inc. v. United States Department of Justice*, 21 F.4th 300 (5th Cir. 2021) (cited by Appellants, Br. 16). There, Walmart sought to challenge a series of official positions and negotiating stances, taken by the Department of Justice (DOJ). *Id.* at 308-09. Despite the fact that DOJ's positions placed Walmart in danger of criminal liability, this Court nonetheless found these policies were "mere legal theories that would succeed or fail in court based on their own merits." *Id.* at 309. The same is true as to this Memorandum—the Board may accept or reject the General Counsel's theory, in whole or in part. In line with *Walmart,* the presentation of this legal theory does not represent final agency action.

b. The Memorandum Does Not Set Any Rights or Create Legal Obligations.

The district court correctly characterized the Memorandum as a "non-binding policy letter with no legal effect." ROA.775. This Court has explained that agency guidance documents legally affect individual rights and obligations only if they bind the agency to a new legal position. *Texas v. EEOC,* 933 F.3d at 441 (cleaned up). Whether an action binds the agency, in turn, is established "if it either appears on

its face to be binding or is applied by the agency in a way that indicates it is binding." *Id.*; *see also Soundboard Ass'n,* 888 F.3d at 1267 ("[T]he 2016 Letter is issued by staff under a regulation that distinguishes between Commission and staff advice, is subject to rescission at any time without notice, and is not binding on the Commission.")

On its face, the Memorandum does not bind the Agency. It contains no mandatory language and does not bind the Board itself to take any final position on its legal theory. In fact, because the Memorandum makes clear that the General Counsel retains discretion to limit its application to "appropriate cases," it allows her to determine whether to pursue the Memorandum's legal theory on a case-by-case basis. ROA.488.

Nor does the Memorandum bind the Agency in practice. The Memorandum only represents the General Counsel's legal theory, and explains her attempt to convince the Board to change its prior position on captive-audience meetings "in appropriate cases." The Board, however, is not required to adopt this position. Indeed, despite being presented with this theory in several cases, to date, the Board has declined to adopt it. *See* NLRB cases cited above, p. 5. Further, unless

and until the Board adopts the General Counsel's position, the Agency's administrative law judges are bound to *reject it* and follow existing Board precedent, which holds that such meetings are lawful. *E.g., Waco, Inc.,* 273 NLRB 746, 749 n.14 (1984) ("It is for the Board, not the judge, to determine whether [Board] precedent should be varied.").

Even if Appellants should begin to engage in conduct covered by the Memorandum and face unfair-labor-practices charges resulting in administrative litigation, the Memorandum *still* would not produce legal consequences under *Bennett*. This is because such consequences would follow only if the Board, as part of a final order (1) decides to change its longstanding precedent regarding captive-audience meetings, (2) finds that Appellants had in fact engaged in unlawful captive-audience meetings, and (3) issues an order providing remedial relief.[13]

[13] In this regard, even if the Board did adopt some version of the legal theory espoused in the Memorandum, there is no certainty that the Board would apply it retroactively to the parties in that case. *SNE Enterprises, Inc.,* 344 NLRB 673, 673 (2005) (in determining whether to apply a new policy retroactively, "the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.").

At that point, the proximate cause of Appellants' remedial obligations would be the *Board's* final order, not the Memorandum.

Moreover, the mere initiation of administrative proceedings does not engender legal consequences, as that phrase is understood in *Bennett*. The Supreme Court and the Fifth Circuit have held that the burdens associated with administrative proceedings are "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action." *Energy Transfer Partners, L.P. v. FERC,* 567 F.3d 134, 141 (5th Cir. 2009) (citing *FTC v. Standard Oil*, 449 U.S. 232, 242 (1980)). So, if administrative proceedings are not legal consequences within the meaning of *Bennett*, then neither is a Memorandum which envisions instituting those proceedings in appropriate cases.

Appellants' fallback argument is that "agency guidance documents" meet the second prong of *Bennett*, but the precedent they cited in support is inapplicable. Br. 17. In *Texas v. EEOC*, the agency "d[id] not dispute that the Guidance binds the EEOC"; further, that guidance was categorical, "leav[ing] no room for EEOC staff *not* to issue referrals to the Attorney General." 933 F.3d at 433. But here, the

Memorandum does not bind the Agency. On its face, the policy leaves room for discretion in its application, and to date, has not resulted in any final agency action, as this theory is still being considered by the Board. ROA.488 (General Counsel "will ask the Board to reconsider current precedent on mandatory meetings in *appropriate cases*") (emphasis added). The instant Memorandum is also legally distinguishable from the DHS action found to be final in *Biden v. Texas*, 597 U.S. at 808. There, the Court held that because the challenged policy "bound DHS staff by *forbidding* them to continue the program *in any way*," it left no room for discretion. *Id.* at 808 (emphasis added). The Court therefore deemed DHS's policy final agency action which "marked the 'consummation' of the agency's decisionmaking process." *Id.* at 788 (quoting *Bennett,* 520 U.S. at 178 (cleaned up)).

In the end, this Memorandum is indistinguishable from the interim agency guidance found unreviewable in *American Federation of Government Employees v. O'Connor*, 747 F.2d 748 (D.C. Cir. 1984) and *Soundboard Association v. FTC,* 888 F.3d 1261 (D.C. Cir. 2018). In *O'Connor,* the D.C. Circuit considered the reviewability of an advisory opinion issued by the MSPB's Special Counsel regarding voter

registration activities and endorsement of presidential candidates. Although that opinion was challenged on First Amendment grounds, the court found it unreviewable, 747 F.2d at 750-51, for reasons squarely on point here:

> [T]he Special Counsel, [is] an officer who may investigate, prosecute, and extend advice but may not adjudicate Hatch Act liability. Adjudicative authority in Hatch Act enforcement cases, at the administrative level, resides exclusively in the MSPB; that tribunal is not, in law or in practice, bound to follow the Special Counsel's advice. There is no indication at this time what position the MSPB would take on the question[.]

Id. at 750. Just like MSPB's Special Counsel, the General Counsel of the NLRB investigates and prosecutes violations of federal law. And like the Special Counsel, the NLRB's General Counsel also gives advice to the regulated community, by issuing documents like the Memorandum at issue. And once again like the Special Counsel, the General Counsel cannot adjudicate liability; that task is solely in the hands of the Board. In a conclusion applying with equal force here, the court noted: "Were we to allow parties discontent with the Special Counsel's advice to proceed directly to court, bypassing the MSPB altogether, we would strip the MSPB

of the authority Congress allocated to that body as a tribunal of first instance." *Id.* at 755.[14]

The D.C. Circuit's decision *Soundboard Association* provides further reason to affirm the district court here. The *Soundboard* court found that an agency guidance letter did not constitute final action under the first *Bennett* prong, as it was "issued by staff under a regulation that distinguishes between Commission and staff advice, is subject to revision at any time without notice, and is not binding on the Commission." *Id.* at 1268. The same factors are all present here. First, because the authority of the General Counsel under Section 3(d) to issue the Memorandum stems from a different statutory basis than the

[14] Should this Court permit review of the Memorandum, it would create practical difficulties for the operations of the General Counsel. First, as the court noted in *O'Connor*, allowing judicial review of such memoranda would create a disincentive for the General Counsel to provide such public advice. *Id.* at 754. Second, permitting such interim review would "hobble the [General] Counsel in [her] role as counselor" and "would be discordant with the congressionally established scheme for deciding [unfair-labor-practice] cases." *Id. See generally Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699 (D.C. Cir. 1971) ("There are sound reasons why . . . advisory letters and opinions should not be subject to judicial review. This technique of apprising persons informally as to their rights and liabilities has been termed an excellent practice in administrative procedure.") (internal quotations and citations omitted).

Board's (which arises under Section 3(a)), the basis for distinguishing between General Counsel and Board action is even stronger than in *Soundboard* (which relied solely on internal agency regulations). Second, the General Counsel may rescind the Memorandum at any time; there is no regulation or statutory provision limiting her ability to do so. And third, as discussed above, the Memorandum does not bind the Board. Accordingly, it is not final agency action.

II. Alternatively, the District Court Correctly Concluded that Appellants Lack Standing for Their Claims

The district court correctly concluded that Appellants have not demonstrated standing for their claims for two reasons. First, a chain of contingencies stands between the challenged Memorandum and any potential prosecution of Appellants. And second, the Memorandum, in contrast to statutes or regulations, "is not legally binding and does not facially restrict any conduct." ROA.794. These conclusions are fully supported by Fifth Circuit precedent and not seriously challenged by Appellants. Finally, although not addressed by the district court, Appellants' claims are not ripe, which provides an independent basis to affirm the order on review.

A. Legal Standards

To establish standing, Appellants must show they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves,* 979 F.3d 319, 330 (5th Cir. 2020) (citing *Lujan v. Def's of Wildlife,* 504 U.S. 555, 560-61 (1992)). All elements must be satisfied in order to establish standing.

Here, the primary dispute between the parties rests on whether the Memorandum causes injury in fact to Appellants. This element is established only if Appellants can demonstrate (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) the "intended future conduct is arguably proscribed by the policy in question and (3) the threat of future enforcement of the challenged policies is substantial." *Id.* (quoting *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 162-64 (2014)) (cleaned up).

In cases like the present one, in which Appellants claim a chilling effect on speech, the Fifth Circuit has held that "when dealing with pre-enforcement challenges to recently enacted (or at least non-moribund) statutes that facially restrict expressive activity by the class to which

the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Barilla v. City of Houston*, 13 F.4th 427, 432 (5th Cir. 2021) (quoting *Speech First,* 979 F.3d at 335). Nonetheless, any allegation of chill "must have an objective basis; allegations of a subjective chill are not an adequate substitute." *Tex. State LULAC v. Elfant,* 52 F.4th 248, 256 (5th Cir. 2022) (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)) (cleaned up). And specifically, this Court has found an objective basis lacking where a "chain of contingencies" exists between the challenged policy and potential enforcement by a government agency. *Tex. State LULAC,* 52 F.4th at 257; *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018); *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). As this Court explained in *Glass*:

> If [Appellants'] allegation of harm involves a chain of contingencies, as in *Amnesty International,* then we must follow the Court's approach and identify each contingency prompting the self-censorship. Each link in the chain of contingencies must be 'certainly impending' to confer standing.

900 F.3d at 239 (quoting *Clapper v. Amnesty Int'l, USA,* 568 U.S. 398, 410-14 (2013)).

B. Any Potential Prosecution of Appellants Under the Memorandum Rests on a Remote Chain of Contingencies.

Where, as here, prosecution rests on a series of contingencies, Appellants bear the burden of demonstrating that each step in the chain is "certainly impending" in order to establish cognizable injury. Appellants have failed to meet their burden, because prosecution under the Memorandum rests on a series of remote contingencies, namely:

First, Appellants plan to engage in conduct that could fall within the scope of the Memorandum, *but if and only if* they face an active organizing campaign by a union (no Appellant alleged that it was facing or expected to imminently face an effort to organize its employees at the time of the complaint). ROA.16, at para 32. Thus, this step would require the actions of an independent third party —a union—in order to initiate the chain of contingencies leading to any challenged conduct.

Second, Appellants would then have to choose to hold a captive-audience meeting or engage in other conduct implicated by the Memorandum. Appellants have not pled or otherwise averred any specific intent to do so. Their pleadings and supporting statements only state that they would hold "meetings on paid company time," without any indication that such meetings would be mandatory or that

employees would face discipline if they chose not to attend the meetings (as would be required to be covered by the Memorandum). ROA.16, 333-34.

Third, an outside party, generally either a union or an employee, would have to file an unfair-labor-practice charge against Appellants.

Fourth, if a charge were to be filed, a regional director would have to find the charge has merit and that it would be an "appropriate case" in which to issue complaint.[15]

Fifth, the General Counsel would need to litigate the case before an administrative law judge and, if necessary, the Board. The decision to seek Board review is not automatic. For example, if there were conflicting evidence regarding the mandatory nature of a meeting discussing unionization, the General Counsel (or her designee) could decide to forgo such review on evidentiary grounds.

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[15] The General Counsel has determined that it is not appropriate to issue an unfair-labor-practice complaint based solely on conduct that is presently lawful under Board precedent. ROA.490. Thus, as things stood at the time Appellants filed their complaint, and as they still remain, Appellants will not face an administrative complaint even if they hold a captive-audience meeting, so long as they do not commit another established violation of the Act. Each of the cases cited by Appellants where captive-audience complaints have issued involved other, independent violations of the Act.

Sixth, in order for Appellants to face actual legal consequences, the Board would need to overrule extant precedent and find that captive-audience meetings are unlawful. Although the General Counsel has urged the Board to take this position, such meetings currently do not violate the law. And there is no certainty that the Board will do so—its decision-making powers are completely independent of the General Counsel's authority to issue complaint. *See Amnesty Int'l USA,* 568 U.S. at 413 ("We have been reluctant to endorse standing theories that require guesswork as to how independent decision makers will exercise their judgment.").[16]

This "chain of dominos" required for Appellants to face a credible threat of prosecution is virtually indistinguishable from what this Court deemed insufficient to find standing in *Texas State LULAC*, 52 F.4th at 257. In that case, this Court found that six contingent events needed to

[16] Appellants contend that this series of contingencies is exaggerated, and that they would face harm merely by having to appear before the Agency in an administrative proceeding. Br. 30. But even if this could constitute harm, Appellants' arguments still rest on "remote contingencies" triggered by outside parties: namely, the initiation of a union campaign and the filing of unfair-labor-practice charges by third parties against Appellants. And, as we demonstrate below, this is not a cognizable harm for purposes of standing. *See* below pp. 58-59.

happen, prior to any potential prosecution, many of which depended on the actions of independent third parties (such as a "person intentionally vot[ing] illegally" and that illegal voter being referred to a prosecutor by the voting registrar). Because of these extensive contingencies, the Court found standing was not shown. *Id.*; *Amnesty Int'l USA,* 568 U.S. at 410 ("[R]espondent's theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending."); *see also Zimmerman,* 881 F.3d at 390 (finding lack of standing where "prosecution is speculative and depends in large part on the actions of third-party donors").

Although the district court relied on precisely these contingencies in its decision, Appellants raise no serious challenge to them here. First, Appellants contend that "nothing in the Memorandum nor in Abruzzo's subsequent prosecutions indicates that there must be a unionization effort underway for the Memorandum to apply." Br. 32. In the abstract, this may be true. Standing, however, is a factual inquiry that rests on the parties' pleadings and averments. *Lower Co. River Auth. v. Papalote Creek II, LLC,* 858 F.3d 916, 925 (5th Cir. 2017) (holding that plaintiff

"may have been able to establish that the issue was ripe, but on this record, it has failed to do so"). Appellants themselves conveniently run away from their own pleadings and declarations, which only state that they would "hold meetings on paid time" *if* faced with a union campaign. ROA.16, 333-34. By conditioning their conduct on the presence of a union campaign, Appellants have made any threat of prosecution remote and dependent on third parties.

Second, Appellants contend that the district court erred by limiting the category of charging parties to unions. Br. 32. This minor quibble, however, does not change the fact that the filing of a charge is dependent on a third party, not the Agency.

Finally, Appellants contend that a formal finding by the Board is not necessary to inflict harm, claiming (without support) that a "reasonable employer will often self-censor to avoid a costly, years-long administrative process." Br. 33. But, as discussed above, Appellants have tied their own potential self-censorship to the existence of a union campaign, which is not impending at any of their facilities and, indeed, may never occur. ROA.16, 333-34. And, of course, the fact that complaints have issued against employers for continuing to hold such

meetings weighs against the assertion that "a reasonable employer will often self[]censor." *See* NLRB cases cited above, p. 5; ROA.386-90.[17]

Even setting aside these factual deficiencies, only a final order issued by the Board could result in legal consequences to Appellants. Such an order must be preceded by a regional investigation and administrative hearing. Even assuming Appellants eventually face an investigation and hearing, courts are generally wary of finding sufficient injury based on "mere litigation expense, even substantial and unrecoupable cost." *Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 24 (1974); *see also Standard Oil,* 449 U.S. at 244 (recognizing that costs of administrative proceedings "will be substantial," but finding that "the expense and annoyance of litigation is part of the social burden of living under government"). Here, of course, Appellants have not sustained *any* legal costs defending an action before the

[17] Appellants also claim that "[a]s businesses become aware of what was once a common practice—mandatory meetings and one-on-one discussions with employees about unionization—would now be considered per se violations by the person charged with prosecuting the NLRA, they inevitably change their practice." Br. 21. As with Appellants' self-censorship argument, this is complete speculation and unsupported by the record in this matter.

NLRB, as they chose to file this lawsuit preemptively. As such, they have failed to demonstrate an injury in fact.

C. The Memorandum Does Not Constitute Binding Agency Guidance.

Appellants rely primarily on this Court's decision in *Speech First, Inc. v. Fenves* to argue that the mere existence of the Memorandum creates standing, despite Appellant's lack of any present intent to engage in conduct encompassed by the Memorandum. But the instant case does not resemble *Speech First* because the Memorandum does not represent binding agency policy.

In *Speech First,* the University of Texas adopted final rules prohibiting certain types of speech, describing them as "bedrock standards to which all university members must adhere." Violations of those rules could be sanctioned by expulsion and criminal prosecution. 979 F.3d at 323, 324. Similarly, in another case cited by Appellants, *Braidwood Management v. EEOC*, 70 F.4th 914, 926 (5th Cir. 2023), the challenged policy involved final EEOC guidance, approved by the

Commissioners of the EEOC (equivalent to Board members of the NLRB).[18]

The Memorandum here is nothing like these final, binding policies. As the district court recognized, "the Memorandum is not legally binding and does not facially restrict any conduct." ROA.794. The challenged Memorandum represents the General Counsel's publicly announced intent to present a legal argument to the Board "in appropriate cases"—and nothing more. *Id.* at 488. The Memorandum is best understood as a *proposal* to change the Board's existing interpretation of the NLRA; it cannot be considered the Board's final position. As such, the action is clearly distinguishable from the regulations and final agency action at issue in *Speech First* and *Braidwood*.

D. Appellants' Remaining Arguments Regarding Injury-In-Fact Are Meritless.

Appellants contend that pre-enforcement challenges generally serve to protect against the chilling effect of government action on

[18] Importantly, in *Braidwood*, the plaintiffs "admit[ted] they are breaking EEOC guidance, which the EEOC does not seriously contest." 70 F.4th at 926. Here, Appellants have not established the same factual predicate.

speech, and in such circumstances, standing requirements are relaxed. Br. 34-35. True enough. But as the district court explained, "[w]hile Article III's injury requirement is relaxed for cases of First Amendment chill, it does not mean that Article III's requirements go away altogether." ROA.792 (citing *Freedom Path, Inc. v. Internal Revenue Serv.*, 913 F.3d 503, 507 (5th Cir. 2019)).

Here, Appellants argue that standing is established based solely on their challenge to a *proposal* to change Agency policy. However, they cite no cases analogous to the present circumstances, where Appellants challenge non-final guidance and have not engaged in conduct within the scope of the General Counsel's proposal or even expressed a concrete intent to do so in the future.

Appellants also contend that allowing the Board "to continue prosecuting under the Memorandum for years until an employer finally is able to seek judicial review ignores decades of Supreme Court and Fifth Circuit case law" providing for pre-enforcement review. Br. 35-36. Of course, pre-enforcement review of regulations governing speech can be obtained in appropriate circumstances. The precedent cited by Appellants, however, involved parties who were actively engaging in

conduct that had already resulted in prosecution (*Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); parties that faced the threat of not only proceedings, but *criminal* prosecution (as in *Susan B. Anthony List*, 573 U.S. at 166); or did not otherwise depend on the actions of any third parties to resolve outstanding contingencies (as in *Turtle Island Foods v. Strain,* 65 F.4th 211, 217 (5th Cir. 2023)). Instead, the Supreme Court's holding in *Laird v. Tatum* squarely applies here: a chilling effect cannot "arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruit of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Laird v. Tatum,* 408 U.S. 1, 11 (1972). In short, not "every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy," *Nat'l Student Ass'n v. Hershey,* 412 F.2d 1103, 114 (D.C. Cir. 1969), and Appellants have failed to do so here.

E. Appellants' Claims Are Not Ripe for Review.

Although not specifically addressed by the district court, Appellants' claims also fail because they are not ripe for review. "At its

core, ripeness is a matter of timing that serves to prevent courts from entangling themselves in cases prematurely." *Walmart*, 21 F.4th at 312. Two general considerations underlie the ripeness inquiry: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 808, (2003); *see also Walmart*, 21 F.4th at 311.

An analysis of the Supreme Court's guidance in *Abbott Laboratories v. Gardner* and *FTC v. Standard Oil* demonstrates why Appellants claims are unripe. In *Abbott Laboratories,* the Supreme Court found that claims regarding final agency regulations were ripe for review based on the following considerations: the final agency regulations presented the "definitive" agency position, "had the status of law," and the parties "would risk serious criminal and civil penalties for [violation of the regulation]." 387 U.S. 136, 153 (1967). By contrast, in *Standard Oil,* the Court found that because an agency's administrative complaint was in the process of being adjudicated, it was not ripe for review. The Court there emphasized that the complaint was not "final agency action," and lacked any "legal or practical effect" on the business

of the company (other than having to defend against charges made against it). *Standard Oil*, 449 U.S. at 242. Additionally, the Court found that such interlocutory review in the midst of an agency's processes "denies the agency an opportunity to correct its own mistakes and to apply its expertise" and would serve as "a means of turning a prosecutor into defendant before adjudication concludes." *Id.*

The challenged Memorandum here differs greatly from *Abbott Labs* and falls squarely within the *Standard Oil* framework. In contrast to *Abbott Laboratories,* the Board has not issued *any* final guidance on the issue of captive-audience meetings—that issue is currently being litigated in proceedings involving other parties. Further, Appellants here face, at best, a speculative chance of liability and no "risk [of] serious criminal and civil penalties," as such penalties are not allowed under the Act. *Abbott Labs.,* 387 U.S. at 153. And similar to *Standard Oil,* if Appellants' lawsuit is allowed to proceed, the Agency will be denied the opportunity "to apply its expertise," and the claim will have the effect of "turning a prosecutor into defendant" before the administrative process even begins. 449 U.S. at 242.

The Fifth Circuit precedent cited by Appellants does not further their cause. In *Cochran v. SEC,* this Court found a challenge to the SEC's administrative law judges ripe because there were no concerns about final agency action, due to the structural nature of the claims and the already initiated enforcement proceeding. 20 F.4th at 212-13. Similarly, in *Gulfport Energy Corp. v. FERC*, this Court deemed a challenge ripe because "the challenged orders are final, the record is complete, and [the agency] has stated its views";[19] further, the failure to provide review in that case would have the effect of rendering the agency's actions "unreviewable." 41 F.4th 667, 679 (5th Cir. 2022). By contrast, this Circuit found a claim not ripe in *Papalote Creek II*, because the claimed harm "was only a *mere possibility* that depended on a myriad of uncertainties." 858 F.3d at 925 (cleaned up) (emphasis in original).

[19] *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), also cited by Appellants, involved agency activity directed specifically at the plaintiff, not an abstract possibility of future enforcement based on a general policy. *Id.* at 237.

CONCLUSION

For the reasons discussed above, the district court's opinion should be affirmed in full, and Appellants' complaint should be dismissed for lack of subject matter jurisdiction and standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Brief was filed electronically with the Court's CM/ECF system on this date, which will send an electronic notice to all registered parties and counsel.

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The National Labor Relations Board certifies that this document complies with the typeface, type-style, and length requirements in Fifth Circuit Rule 32.1 and Federal Rules of Appellate Procedure 32(a)(5)-(7), because it contains 12,906 words, excluding those exempted by Federal Rule of Appellate Procedure 32(f), which are proportionally-spaced, 14-point Century Schoolbook font, and the word-processing software used was Microsoft Word for Office 365.

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STATUTORY ADDENDUM

TABLE OF CONTENTS (ADDENDUM)

STATUTES

Selected Provisions of the Administrative Procedure Act 5 U.S.C §§ 551–59

***

5 U.S.C. § 701 Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

***

5 U.S.C. § 704 Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Selected Provisions of the National Labor Relations Act
29 U.S.C. §§ 151–69 ("NLRA")

***

National Labor Relations Board

Sec. 3 [§ 153] (a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 *et seq.*], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

***

Sec. 3 [§ 153] (d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the

Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

***

Unfair Labor Practices

Sec. 8 [§ 158] (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;

***

Sec. 8 [§ 158] (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.

***

Prevention of Unfair Labor Practices

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Sec. 10 [§ 160] (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.

Sec. 10 [§ 160] (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.

***

Sec. 10 [§ 160] (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.

***

Sec. 10 [§ 160] (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.

***

Investigatory Powers of the Board

***

Sec. 11 [§ 161] (2) Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.