UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BURNETT SPECIALISTS, STAFF FORCE d/b/a STAFF FORCE PERSONNEL SERVICES, ALLEGIANCE STAFFING CORP., LINK STAFFING, and LEADINGEDGE PERSONNEL, LTD., *Plaintiffs,*	§	
v.	§	Civil Action No. 4:22-cv-605-ALM
JENNIFER A. ABRUZZO, in her official capacity, UNITED STATES OF AMERICA, and NATIONAL LABOR RELATIONS BOARD, *Defendants.*	§	

DEFENDANTS NATIONAL LABOR RELATIONS BOARD AND GENERAL COUNSEL JENNIFER A. ABRUZZO'S MOTION TO DISMISS COMPLAINT (ECF NO. 1) FOR LACK OF JURISDICTION

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Defendants National Labor Relations Board (NLRB or Board) and NLRB General Counsel Jennifer A. Abruzzo respectfully move this Court to dismiss the Complaint (ECF No. 1) filed by Burnett Specialists and several other staffing agencies (collectively, Plaintiffs). The Complaint seeks, for the first time in the 87-year history of the NLRB, to enjoin normal administrative proceedings that are premised on a new legal theory, even if those proceedings do not involve Plaintiffs. This Court lacks jurisdiction over Plaintiffs' suit under any relevant statute, including the National Labor Relations Act (NLRA), the Administrative Procedure Act (APA), or any of the general jurisdictional provisions cited in the Complaint. Moreover, Plaintiffs lack standing, and a case brought in this posture is not ripe. Accordingly, this Court should grant Defendants' Motion to Dismiss the Complaint for Lack of Jurisdiction under Federal Rules of Civil Procedure 12(b)(1).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the NLRA's preclusion of judicial review of the General Counsel's prosecutorial functions deprives this Court of jurisdiction?
2. Whether Plaintiffs challenge final agency action within the meaning of the APA?
3. Whether the Complaint alleges a justiciable case or controversy?

BACKGROUND

A. The Structure and Functions of the NLRB under the NLRA

The NLRA establishes many of the substantive rights and procedures that are at issue here. Specifically relevant to this matter, Section 7 of the NLRA protects the rights of most private-sector employees to engage in "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Section 7

[1] 29 U.S.C. § 157. All sections of the NLRA are codified consecutively beginning at 29 U.S.C. § 151.

equally protects the right of those employees "to refrain from any or all such activities."[2] Section 8(a)(1), in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the NLRA.[3]

The NLRA, as a statute that creates and defines "public rights,"[4] also designates officials responsible for prosecuting and adjudicating claims of unfair labor practices. Specifically, Section 3(d) establishes the office of the 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."[5] 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.[6] Section 10, meanwhile, provides the procedures utilized in unfair-labor-practice proceedings, including avenues for review and enforcement of final Board orders in the courts of appeals.

B. The Unfair-Labor-Practice Process

An unfair-labor-practice proceeding is initiated when someone who is not an NLRB official or employee (known as the "charging party") files a charge. Such charges can be filed with any of the NLRB's regional offices against an employer or a union. The General Counsel and the Board itself possess no independent authority to investigate absent the filing of such a charge.[7] After a charge is

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[2] *Id.*

[3] *Id.* § 158(a)(1). Other prohibited unfair labor practices, including those applicable to labor unions, are set forth in subsequent paragraphs and subsections of Section 8.

[4] *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940).

[5] 29 U.S.C. § 153(d).

[6] *Id.* § 153(a).

[7] *Id.* at § 160(b); *see also Precision Concrete v. NLRB*, 334 F.3d 88, 91 (D.C. Cir. 2003) ("The Board . . . acting through the General Counsel . . . may not initiate a charge on its own; it may prosecute only conduct about which someone else has filed a charge.").

filed, regional staff who are accountable to the General Counsel investigate the charge. If the charge is deemed meritorious and worthy of prosecution, the regional director for that office issues an unfair-labor-practice complaint. Consistent with the structure of the NLRA, the five-seat Board plays no role in supervising the prosecutorial functions of the regional offices at this point in the process. Absent settlement, an adversarial hearing typically occurs before an administrative law judge (ALJ) who issues a decision. The ALJ's decision is only a recommendation and does not set rights or obligations for either the charging party or the respondent named in the complaint.[8]

After issuance of the ALJ's decision, the parties to the case—i.e., the charging party, the respondent, the General Counsel, and any intervenors—can file "exceptions" with the five-seat Board, which then issues a decision and final order as the culmination of the administrative process.[9] It is only the issuance of the Board's decision and final order that sets the rights and obligations of the parties. Thereafter, if a respondent does not comply with a final Board order requiring it to remedy its unfair labor practices, the Board can apply for enforcement in a federal court of appeals under Section 10(e) of the NLRA;[10] alternatively, any person aggrieved by the Board's order is entitled to petition for review in an appropriate circuit court under Section 10(f).[11]

C. The General Counsel's Memorandum Regarding Captive Audience and Other Mandatory Meetings

Since at least the early 1970s, NLRB General Counsels have routinely issued policy guidance to agency staff and the public through General Counsel memoranda. The memorandum at issue in this case—designated as Memorandum GC 22-04 and entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings" (hereinafter Memorandum)–issued on April 7, 2022. In

[8] 29 C.F.R. § 102.45(a).

[9] If no exceptions are filed to an ALJ's recommendation, the Board will typically adopt pro forma the judge's findings, conclusions, and recommendations. *Id.* § 102.48(a).

[10] 29 U.S.C. § 160(e).

[11] *Id.* at § 160(f).

the Memorandum, the General Counsel explained her view that Section 7 of the NLRA protects, among other things, "the right [of employees] to refrain from listening to employer speech concerning the exercise of Section 7 rights."[12] Consistent with this view, the General Counsel noted that the Board had historically protected the rights of employees to refrain from listening to employer speech regarding unionization,[13] before later reversing course.[14] Since then, employers have had the prerogative to force employees to listen to their views regarding the exercise of Section 7 rights in mandatory assemblies (known as captive audience meetings) or other contexts. The Memorandum's stated goal is to "ask the Board to reconsider current precedent on mandatory meetings in appropriate cases."[15]

D. Plaintiffs File the Instant Complaint

On July 18, 2022, Plaintiffs filed their Complaint with this Court, naming the General Counsel, the NLRB, and the United States as Defendants.[16] As bases for subject-matter jurisdiction, the Complaint references the general federal-question jurisdictional statute, the Little Tucker Act, and the APA.[17] The Complaint contains two counts: the first alleging that the Memorandum is final agency action that violates Plaintiffs' First Amendment rights,[18] 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.[19] Plaintiffs seek a judgment principally "declaring that Defendant Abruzzo's guidance is unconstitutional" and permanently enjoining

[12] Compl. Ex. A, at 2, ECF No. 1-1.

[13] *Clark Bros. Co.*, 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

[14] *Babcock & Wilcox Co.,* 77 NLRB 577 (1948) (reasoning that the 1947 amendments to the NLRA precluded finding captive audience meetings *per se* unlawful).

[15] Compl. Ex. A, at 3, ECF No. 1-1.

[16] Compl., ECF No. 1.

[17] *Id.* ¶ 1.

[18] *Id.* ¶¶ 34-41.

[19] *Id.* ¶¶ 42-52.

"Defendants from enforcing the new interpretation" reflected in the Memorandum.[20]

ARGUMENT

Plaintiffs Have Failed to Carry the Burden of Proving Jurisdiction.

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."[21] Courts are therefore obligated to confirm whether they have subject-matter jurisdiction over a given action.[22] And courts must begin with the presumption that they "lack jurisdiction unless the contrary appears affirmatively from the record."[23] "Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case."[24] To survive a Rule 12(b)(1) motion, "the party asserting jurisdiction" bears the burden to establish the court's jurisdiction.[25]

Here, Plaintiffs cannot satisfy that burden because their claims arise from the General Counsel's Memorandum articulating a desired change in the Board's interpretation of the NLRA. As demonstrated below, actions taken to effectuate the General Counsel's prosecutorial authority, such as the Memorandum, are not subject to judicial review in any court. The Fifth Circuit and the Supreme Court have consistently followed this rule, which is fatal to Plaintiffs' claims. Nor does the APA confer jurisdiction because, as the Supreme Court has authoritatively determined, that statute is unavailable to review "the General Counsel's prosecutorial function," and because the

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[20] *Id.* at 9-10 (setting forth prayer for relief).

[21] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

[22] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Ndon v. Garland*, 856 F. App'x 529, 530 (5th Cir. 2021) (per curiam).

[23] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (internal quotation mark omitted) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)).

[24] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam).

[25] *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Memorandum is not final agency action. Moreover, Plaintiffs have not presented an Article III "case or controversy" because they lack standing and their claims are not ripe.

A. The NLRA precludes review of prosecutorial actions in district court.

Section 10 of the NLRA sets forth the exclusive procedures, determined by Congress, for court involvement in unfair-labor-practice proceedings. These provisions provide for review in several specific circumstances: first, for general appellate review and enforcement of final Board orders; second, for the issuance of temporary injunctions in certain narrow subsets of cases.

Regarding the first set of cases, Section 10(e) allows the Board to seek enforcement of its final orders against those named as respondents in unfair-labor-practice cases. Section 10(f) provides a parallel path for "[a]ny person aggrieved by a final order of the Board" to seek judicial review.[26] Importantly, both Section 10(e) and (f) provide for all review, regardless of the identity of the petitioner, to occur only at the circuit court level and only after a final Board order issues.

The district court's lack of jurisdiction in this matter is confirmed by those limited statutory provisions that provide for direct district court jurisdiction in a second set of cases.[27] Specifically, Section 10(j) establishes district court "jurisdiction to grant the Board such temporary relief or restraining order as [the court] deems just and proper."[28] Such discretionary-injunction suits, which are filed by the General Counsel under the authority of the Board, are sought where remedial failure could result from delays in the Board's administrative processes, and any injunction granted typically remains in effect only until the Board issues its final order.[29] Section 10(l) provides a similar grant of district court jurisdiction, requiring the NLRB's regional offices to seek a temporary injunction

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[26] 29 U.S.C. § 160(f).

[27] Section 11(2) of the NLRA, 29 U.S.C. § 161(2), also provides a limited grant of district court jurisdiction to resolve disputed subpoena matters arising from NLRB "hearings and investigations." This ancillary jurisdiction is not at issue here.

[28] 29 U.S.C. § 160(j).

[29] *E.g., Boire v. Pilot Freight Carriers, Inc.,* 515 F.2d 1185, 1192–93 (5th Cir. 1975).

pending final Board action whenever unions engage in certain types of prohibited activity.[30]

Combined, the provisions of Section 10 of the NLRA confirm two principles relevant to this case: first, that Congress sought to direct the vast majority of review proceedings to the courts of appeals after final Board orders, and second, that when Congress intended for district court involvement in NLRA actions, it explicitly and knowingly created such limited jurisdiction.

Unsurprisingly, given the structure of the NLRA, the Supreme Court held shortly after the statute's passage that federal district courts lack the authority to enjoin the prosecution or adjudication of complaints in unfair-labor-practice hearings. In *Myers v. Bethlehem Shipbuilding Corp.*,[31] an employer and some of its employees sought to enjoin the prosecution of an unfair-labor-practice case, arguing both statutory and constitutional impediments to the Board proceeding.[32] The Supreme Court found in favor of the Board, in a holding that applies with equal force today:

> 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. [33]

This holding, the Court explained, rests on Congress's reasoned judgment and principles of administrative finality.[34]

The Fifth Circuit has applied *Myers* to constitutional claims similar to those raised by Plaintiffs in this matter. In *Bokat v. Tidewater Equipment Co.,* an employer sought to enjoin an unfair-labor-practice hearing on the theory that the company could not receive constitutional

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[30] 29 U.S.C. § 160(l).

[31] 303 U.S. 41 (1938).

[32] *Id.* at 46.

[33] *Id.* at 48.

[34] *Id.* at 50; *see also Boire v. Greyhound Corp,* 376 U.S. 473, 481 (1964).

due process from the NLRB unless certain allegations involving its attorney's conduct were severed from other complaint allegations and resolved first.[35] After the district court initially enjoined the Board proceeding, the Fifth Circuit, relying on *Myers,* reversed and held that the employer needed to raise these issues in the administrative proceeding. Particularly relevant to this matter, the court noted that

> The 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. . . . Denial of injunctive relief does not begin to foreclose the Employer's claim . . . . These are matters open for proof and assertion in the unfair labor practice case.[36]

In assessing the district court's role in overseeing the Board's administrative processes, the court underscored that district courts "have a very, very minor role to play in this statutory structure."[37]

These cases make clear that ongoing Board proceedings should be enjoined in only the rarest of circumstances. Plaintiffs face yet another obstacle, however, as they are seeking to enjoin the exercise of prosecutorial discretion *before* an unfair-labor-practice charge has even been filed against them. The General Counsel's discretion in this arena is even further insulated from judicial review.

The structure of the NLRA separates the prosecutorial powers of the General Counsel from the adjudicatory powers of the Board.[38] Specifically, Congress added Section 3(d) of the NLRA in 1947 to formally establish the position of General Counsel and to define that officer's powers. In relevant part, this section states the General Counsel "shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and

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[35] 363 F.2d 667, 669-70 (5th Cir. 1966).

[36] *Id.* at 672-73.

[37] *Id.* at 673; *see also Sanderson Farms, Inc. v. NLRB,* 651 F. App'x 294, 298 (5th Cir. 2016) (per curiam) (holding that even allegation of "dishonest conduct" by Board "did not confer on the district court authority to stop the Board in its tracks and short-circuit the administrative proceedings before they have concluded").

[38] *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.").

the prosecution of such complaints before the Board."[39] The decision of the General Counsel to embody her prosecutorial priorities through the issuance of the Memorandum at issue in this case does not in any way implicate the authority of the Board. Nor can the Memorandum be construed as a "final order of the Board," subject to judicial review under Section 10 of the NLRA.[40]

The unreviewable nature of this prosecutorial discretion was confirmed by the Supreme Court in *NLRB v. UFCW, Local 23*.[41] There, several unions sought judicial review of the General Counsel's dismissal of an unfair-labor-practice complaint based on a prehearing settlement. On review, despite the Board's objection to the court's jurisdiction, the Third Circuit agreed with the unions and held that the complaint should not have been dismissed without an evidentiary hearing. The Supreme Court reversed, agreeing with the Board that "the Court of Appeals had no jurisdiction to entertain this action."[42] Because the General Counsel's decision to accept the settlement and dismiss the complaint involved an exercise of prosecutorial authority, it fell outside the scope of Section 10 and was therefore unreviewable.[43]

Plaintiffs here seek the ultimate short-circuiting of this scheme of judicial review. They are not subject to an order of the Board, a complaint from the General Counsel, or even an unfair-

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[39] 29 U.S.C. § 153(d) (emphasis added).

[40] *NLRB v. United Food & Com. Workers Union, Loc. 23,* 484 U.S. 112, 128 (1987) [hereinafter *UFCW*] (noting that "[t]he structure of the Act . . . leads inescapably to the conclusion that Congress distinguished orders of the General Counsel from Board orders.").

[41] *Id.*; *see Am. Fed'n of Gov't Emps. Loc. 1749 v. FLRA,* 842 F.2d 102, 105 (5th Cir. 1988) (per curiam) ("Section 3(d) [of the NLRA] leaves to the General Counsel the decision as to what is and what is not at issue in an unfair labor practice hearing . . . . Such administrative determinations by the General Counsel are not denominated orders in the Act, and the Act makes no provision for their review.").

[42] *UFCW*, 484 U.S. at 133.

[43] *Id.* at 129; *see also NLRB v. Sears, Roebuck, & Co.,* 421 U.S. 132, 138 (1975) (observing that the General Counsel possesses "the unreviewable authority to determine whether a complaint shall be filed"); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1350 (5th Cir. 1978) ("Section 3(d) of the Act leaves to the general counsel the decision as to what is and what is not at issue in an unfair labor practice hearing.").

labor-practice charge from a charging party. Plaintiffs are not even claiming that their current or planned actions will expose them to prosecution. Rather, they contend 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 that, as result of the Memorandum, "Plaintiffs have not held such meetings nor spoken to employees about unionization."[44] Such hypothetical concerns fall far outside the scope of a reviewable Board order, directly implicate the General Counsel's unreviewable "prosecutorial function" under Section 3(d) of the NLRA,[45] and cannot meet Plaintiffs' burden of establishing subject-matter jurisdiction here.

B. The APA precludes judicial review of the Memorandum.

1. Because the Memorandum is an exercise of the General Counsel's prosecutorial authority, is it exempt from APA review.

Plaintiffs' reliance on the APA to establish subject-matter jurisdiction is not supported by law. Section 701(a) of the APA exempts from review agency action if "statutes preclude judicial review,"[46] or if the action "is committed to agency discretion by law."[47] Both exemptions apply here.

In *UFCW*, the Supreme Court concluded that the structure and history of the NLRA "clearly and convincingly" establishes that the statute precludes judicial review of the General Counsel's exercise of prosecutorial authority.[48] Allowing judicial review of such matters to occur under the APA would be, as the Court put it, "illogical in the extreme" because "Congress purposely

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[44] Compl. ¶ 32. It is curious that Plaintiffs blame the Memorandum for their supposed inability to hold "such meetings," when they themselves condition their desire to engage in that behavior on hypothetical events that may never come to pass. And it is puzzling how the Memorandum is to blame for Plainitffs' apparently categorical decision not to "sp[eak] to employees about unionization," Compl. ¶ 33, as the Memorandum governs only two narrow situations—where employees are required to attend a meeting and where they are cornered by managers while working.

[45] *UFCW*, 484 U.S. at 129.

[46] 5 U.S.C. § 701(a)(1).

[47] *Id.* § 701(a)(2).

[48] *UFCW*, 484 U.S. at 131.

excluded prosecutorial decisions" from the NLRA's own review provisions.[49] Thus, at least so far as the General Counsel's prosecutorial authority is concerned, the APA does not let review "in through the back door, when Congress has locked the front one."[50] Moreover, although the Supreme Court found it unnecessary to address whether the General Counsel's exercise of prosecutorial authority also falls within the APA's exemption of acts committed to agency discretion by law, decisions of other courts predating *UFCW* confirm its applicability.[51]

Because the General Counsel's prosecutorial acts fit squarely within the exemptions in Section 701(a)(1) and (2) of the APA, Plaintiffs may not rely on that statute as a basis for this Court to review the Memorandum.

2. The Memorandum is not a final agency action under the APA.

Even if the Memorandum were not exempt from review under the APA, it would nevertheless be unreviewable under that statute because it is not a final agency action. Section 704 of the APA, entitled "Actions reviewable," provides:

> 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.[52]

The Memorandum is not reviewable by statute, so any prospect of APA review hinges on its finality.

The APA's distinction between final and nonfinal agency action is important because "[i]f there is no final agency action, a court lacks subject-matter jurisdiction."[53] The distinction is

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[49] *Id.*

[50] *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1441-41 (2019).

[51] *See Baker v. Int'l All. of Theatrical Stage Emps.*, 691 F.2d 1291, 1297, n.15 (9th Cir. 1982); *Int'l Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 602 (9th Cir. 1982) ("The exemption provided in section 701 of the APA applies in this case because section 3(d) . . . vests in the General Counsel exclusive prosecutorial authority over unfair labor practices.").

[52] 5 U.S.C. § 704.

[53] *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 388 (5th Cir. 2014).

important for practical reasons, too. Premature judicial review "is likely to [interfere] with the proper functioning of the agency and [be] a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise."[54] Constant over-the-shoulder supervision "also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary."[55]

The action that Plaintiffs challenge here – the General Counsel's announcement, through the Memorandum, that she will urge the Board to adopt a policy change "in appropriate cases" – is preliminary, not final. Under the Supreme Court's decision in *Bennett v. Spear*, an agency action is considered "final" if it (1)"mark[s] the 'consummation' of the agency's decision making process" and (2) determines "rights or obligations"' or produces "legal consequences."[56] On the other hand, "a non-final agency order is one that 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'"[57] This analysis requires "courts to look at finality from the agency's perspective (whether the action represents the culmination of the agency's decisionmaking) and from the regulated parties' perspective (whether rights or obligations have been determined, and legal consequences flow). Deficiency from either perspective is sufficient to dismiss a claim."[58] Neither of these prongs is satisfied here.

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

The Memorandum sets forth the General Counsel's intent to urge the Board, through unfair-labor-practice litigation, to adopt a new interpretation of conduct prohibited by Section

[54] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980).

[55] *Id.*; *see also Tidewater Equip. Co.*, 363 F.2d at 673 (decrying such "over-the-shoulder supervision").

[56] 520 U.S. 154, 178 (1997) (internal quotation marks omitted).

[57] *Peoples Nat'l Bank v. Off. of Comptroller of Currency of U.S.*, 362 F.3d 333, 337 (5th Cir. 2004) (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)).

[58] *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018).

8(a)(1) of the NLRA. While the General Counsel has the authority to choose which cases and legal theories to pursue,[59] and may propose that the Board overrule its existing precedent,[60] the General Counsel cannot independently issue legally binding orders or rulings reinterpreting the NLRA. As described above, only the five-seat Board is statutorily authorized to issue a decision and order modifying the Agency's interpretation of the Act, and it has not done so here.[61]

Actions like the Memorandum that announce a prosecutorial policy do not mark the consummation of the NLRB's decision-making process. If anything, they mark its conception. The Memorandum plainly and repeatedly states the General Counsel's "plan to urge the Board to reconsider [extant] precedent" regarding mandatory meetings that she believes deprive employees of their statutorily protected right to refrain under Section 7 of the NLRA.[62] Because the Board must act before the policy position announced in the Memorandum can crystallize into final agency action, the APA does not provide jurisdiction for Plaintiffs' Complaint.

Nor do ongoing efforts by the General Counsel to persuade the Board to adopt the Memorandum's rationale via adjudication constitute final agency action. As noted by Plaintiffs' Complaint, the General Counsel has submitted an exceptions brief to the Board in an unfair-labor-

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[59] *See above* at 8-9.

[60] *See Austin Fire Equip., LLC*, 360 NLRB 1176, 1178 n.14 (2014) ("[I]t is entirely appropriate for the General Counsel to request that the Board revisit and overrule precedent . . . .").

[61] *See above* at 3. Although the General Counsel is "independent of the Board," *UFCW*, 484 US at 127, the General Counsel does not belong to or comprise a separate administrative agency. *See, e.g., Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 335, 346 (E.D.N.Y. 2012) ("[T]he position of General Counsel was established 'in order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoid the cumbersome device of establishing a new independent agency in the executive branch of the Government.'" (quoting 93 Cong. Rec. 6859 (1947) (statement of Sen. Taft))). As a result, it is impossible to imagine how the General Counsel's legal positions could constitute final agency action where, as here, they are subject to approval or rejection by the five-seat Board.

[62] Compl. Ex. A, at 1, ECF No. 1-1; *see also id.* at 2 ("I will urge the Board to correct that anomaly . . . ."); *id.* at 3 ("I will propose the Board adopt sensible assurances that an employer must convey to employees . . . ."); *id.* ("I will ask the Board to reconsider current precedent on mandatory meetings in appropriate cases").

practice case, *CEMEX Construction Materials Pacific*, asking the Board to overturn precedent and hold that captive audience meetings that lack certain safeguards violate the NLRA.[63] The Board is free to accept or reject the General Counsel's argument.[64] At most, the Memorandum and the *CEMEX* brief together show that the Board is being asked to consider the General Counsel's legal position, and it "still must make further significant decisions"[65] before a final order is issued that would mark the consummation of its decision-making process.[66] Accordingly, Plaintiffs do not challenge final agency action within the meaning of *Bennett*'s first prong.

b. The Memorandum neither affects Plaintiffs' rights and obligations nor produces legal consequences.

The Memorandum does not meet finality requirements under the second *Bennett* prong. The Fifth Circuit has found that an agency document legally affects individual rights and obligations if it binds the agency to a new legal regime.[67] Whether an action binds the agency is evident "if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding."[68]

The Memorandum is not facially binding. It contains no mandatory language and no indication that the Board will be obligated to follow the analysis set forth by the General Counsel.

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[63] Compl. Ex. B, at 66, ECF No. 1-2. Even Plaintiffs acknowledge that the General Counsel is presently seeking "to *create* this new rule in an action against an employer before the NLRB," Compl. ¶ 47 (emphasis added), implicitly conceding that the General Counsel's proposal cannot have legal effect until the Board adopts it.

[64] The Board may even refrain from ruling on the argument altogether because CEMEX has argued, in response to the General Counsel's brief, that the General Counsel's argument is untimely and therefore waived. Respondent's Answering Brief to Exceptions at 4-6, *CEMEX Constr. Materials Pac.*, No. 28-CA-230115 (May 25, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458379184b.

[65] *Luminant Generation Co. v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014); *see also Soundboard Ass'n*, 888 F.3d at 1267.

[66] *Cf. Sears, Roebuck & Co.,* 421 U.S. at 160 (noting that General Counsel's memorandum directing the filing of a complaint in a specific case is not a "final opinion" under the Freedom of Information Act, as it merely operates to "permit[] litigation before the Board").

[67] *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (cleaned up).

[68] *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 the contrary, the Memorandum repeatedly expresses an aspirational goal of convincing the five-seat Board to adopt the Memorandum's analysis in a case that is a proper vehicle.[69] The language of the Memorandum bears no semblance to language courts have found to be binding.[70] In fact, the Memorandum makes clear that even the General Counsel retains discretion to limit the theory's application to "appropriate cases." Thus, the plain language of the Memorandum lacks any indication that it is intended to bind the agency to the legal theory articulated.

Nor has the Memorandum been applied in a way that indicates it is binding on the NLRB. Again, the Memorandum and the *CEMEX* brief are part of an effort by the General Counsel, as an advocate, to persuade the five-seat Board to adopt her legal theory via adjudication. Just as a federal judge does not defer to a private litigant's interpretation of a statute in a civil case, the Board does not defer to the General Counsel's interpretation of the NLRA in an unfair-labor-practice case.[71] In addition, unless the Board overrules its own precedent, the agency's ALJs, who adjudicate unfair-labor-practice cases in the first instance, are bound to *reject* the analysis of the Memorandum because it conflicts with current Board precedent.[72] In short, because the Memorandum does not bind the

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[69] *See above*, n. 62.

[70] *Cf. Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 854 (5th Cir. Aug. 17, 2022) (plaintiff's right to "rely" on an advisory opinion bound the agency and withdrew previously held discretion); *Texas v. EEOC*, 933 F.3d at 443 (agency guidance document directing "staff that across-the-board limitations are unlawful and forbid[ing] staff from considering certain evidence—that of a balanced workforce—when deciding whether an employer has satisfied Title VII's requirements"); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (finding as facially binding an EPA guidance document providing that certain risks "must be addressed" in cleanup plans submitted for approval).

[71] *See Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748 (D.C. Cir. 1984) (declining to review Office of the Special Counsel's advisory opinion on activity prohibited by the Hatch Act where the Merit Systems Protection Board, which adjudicates Hatch Act cases presented to it by the Special Counsel, "speak[s] the final administrative word on the meaning of the statute" and "is [therefore] free to disagree with the Special Counsel").

[72] NLRB, ALJ BENCH BOOK 2022, § 13-100, https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/alj-bench-book-2022.pdf ("Administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself.").

Board, it does not bind anyone with the authority to issue an order affecting Plaintiffs' legal rights.[73]

Relatedly, the Memorandum does not produce legal consequences that would satisfy the second prong in *Bennett*. It has no "legal force or practical effect on [Plaintiffs'] daily business other than the [possibility of] disruption caused by [unfair-labor-practice] litigation," in which Plaintiffs would have the upper hand under extant precedent.[74] The Supreme Court and the Fifth Circuit have made clear that the burdens associated with such administrative proceedings are "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action."[75] The burden of defending oneself in litigation is merely "part of the social burden of living under government."[76] This reasoning applies with even greater force here, where Plaintiffs are not presently burdened by *any* administrative proceeding.

Even if unfair-labor-practice complaints were to issue against Plaintiffs based on the legal theory set forth in the Memorandum, adverse legal consequences would flow only if the Board subsequently determined that the alleged violations had occurred and then issued final orders providing remedial relief.[77] And besides being entirely speculative and contingent on possible future events, those legal consequences would be produced by the Board's order, not the Memorandum.

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[73] *Compare Texas v. EEOC*, 933 F.3d at 443 (guidance issued by Commission was binding on agency) *with Soundboard Ass'n*, 888 F.3d at 1267 (advice letter issued by staff was subject to recission and not binding on Commission), *and O'Connor*, 747 F.2d at 753 (declining to review administrative prosecutor's guidance where adjudicatory officials could reject its rationale).

[74] *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 141 (5th Cir. 2009) (internal quotation marks omitted).

[75] *Id.* (citing *Standard Oil,* 449 U.S.at 242).

[76] *Standard Oil*, 449 U.S. at 244; *see also Heller Bros. v. Lind*, 86 F.2d 862, 863 (D.C. Cir. 1936) (per curiam) (concluding that "the attendance of officers and employees at hearings, the employment of counsel, and like matters" were simply "annoying incidents" and were "not enough of themselves to establish a case for equitable relief").

[77] *Myers*, 303 U.S. at 49, n.5 ("Until such final order is made the party is not injured, and cannot be heard to complain . . . .") (internal quotation mark omitted) (quoting, with approval, H.R. Rep. No. 74-1147, at 24 (1935)).

Thus, the Memorandum constitutes merely a policy statement that does not bind the NLRB—not the Board, not the ALJs, not even the General Counsel herself—to a particular interpretation of the law. It does not reflect the consummation of the NLRB's decision-making process; instead, the Memorandum is the integral first step to initiate the Board's adjudicatory decision-making process. "In other words, if the [General Counsel] issued [the Memorandum] and then took no further action, [Plaintiffs] would have no new legal obligation imposed on [them] and would have lost no right [they] otherwise enjoyed."[78] If, on the other hand, such process results in the issuance of a final Board order adopting the analysis of the Memorandum, then such order would bind the NLRB and have legal effect. That order would then be subject to judicial review, which under Section 10(f) of the NLRA, would take place in an appropriate court of appeals upon the filing of a petition by any person aggrieved by that order.

C. Exceptions to the unreviewability of the General Counsel's prosecutorial actions are inapplicable here.

Despite these well-established limits on review, Plaintiffs may contend that jurisdiction is nonetheless established by virtue of the General Counsel's alleged infringement of their constitutional rights. The Fifth Circuit, in *Boire v. Miami Herald Publishing Co.,* perhaps tacitly acknowledged the possibility of district court jurisdiction "where there is a substantial showing that Board action has violated the constitutional rights of the complaining party."[79] The Fifth Circuit, however, has never affirmed the exercise of jurisdiction on this basis. In the first case to present this issue, *Volney Felt Mills, Inc. v. Le Bus,* the court summarily dismissed an employer's assertion of jurisdiction based on an alleged constitutional violation, holding that "exclusive initial jurisdiction over matters arising under the [NLRA] is vested, by Congressional enactment, in the [NLRB], and a

[78] *Luminant Generation Co.*, 757 F.3d at 442.

[79] 343 F.2d 17, 21 (5th Cir. 1965).

district court has no jurisdiction to entertain actions based thereon or growing thereout."[80] Then, in *Miami Herald Publishing*, an employer claimed district court jurisdiction because the Board had allegedly denied the employer due process under the Fifth Amendment by unlawfully allowing permanently replaced economic strikers to vote in a union-representation election.[81] The Fifth Circuit disagreed, noting that while there was some question as to whether the Board's conduct was contrary to statute, "the congressional policy of severely circumscribing review of representation matters requires that no injunction be issued."[82] Later, in *Bova v. Pipefitters Local* 60, an aggrieved union member claimed that the district court had wrongly dismissed his amended complaint alleging that the Board and regional staff had violated his Fifth Amendment rights by failing to pursue certain unfair-labor-practice charges.[83] The Fifth Circuit again disagreed, holding that "[t]he investigation of unfair labor practice charges and whether an unfair labor practice complaint should be issued are matters committed by Congress, in [Section 3(d)], to the unreviewable discretion of the NLRB General Counsel."[84] Other circuits that recognize this narrow exception have similarly confined its application.[85]

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[80] 196 F.2d 497, 498 (5th Cir. 1952) (per curiam).

[81] 343 F.2d at 21 n.7. The Board conducts representation elections under Section 9 of the NLRA, 29 U.S.C. § 159.

[82] *Id.* at 24–25. Although *Miami Herald Publishing* arose in the context of a representation dispute, where review is "severely circumscrib[ed]," its logic applies with all the more force in this context, where review of the General Counsel's exercise of prosecutorial authority is practically nonexistent.

[83] 554 F.2d 226 (5th Cir. 1977).

[84] *Id.* at 228.

[85] *See, e.g., Braden v. Herman,* 468 F.2d 592, 593 (8th Cir. 1972) (per curiam) (rejecting jurisdiction despite claim that failure to hold hearing over unfair-labor-practice charge violated Fifth Amendment's due process clause); *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) (finding no jurisdiction where union member challenged exclusion from bargaining unit on constitutional grounds); *McLeod v. Loc. 476, United Bhd. of Indus. Workers,* 288 F.2d 198, 201 (2d Cir. 1961) (holding that no jurisdiction exists where Board proceeded to election due to illegal union-security clause in employer's contract with existing union).

The Fifth Circuit has also expressed some skepticism towards the exercise of jurisdiction on constitutional grounds, particularly where review can be obtained through the Board's normal administrative procedures. For example, in *Miami Herald Publishing*, the court noted that the exception, as applied in other circuits, had generally been limited to unions claiming injury arising from the Board's representation process under Section 9.[86] In Section 9 representation cases, unions do not have the robust review rights that employers possess in unfair-labor-practice cases.[87] After acknowledging this out-of-circuit precedent, the Fifth Circuit struck a concordant note: "there is some question whether our prior decisions have recognized this exception, at least where an employer invokes it."[88] This skepticism has since been echoed by other circuits, some of which have outright rejected direct federal jurisdiction in the context of unfair-labor-practice proceedings, holding that such issues can be adequately reviewed after administrative remedies are exhausted.[89]

The importance of administrative exhaustion is confirmed by the Supreme Court's decision in *Board of Governors of the Federal Reserve System v. Mcorp Financial, Inc.*[90] There, a bank sought to enjoin two agency proceedings against it during the course of its bankruptcy; the Fifth Circuit agreed as to one of the two proceedings, despite the lack of statutory language authorizing such action, on the basis that the agency had exceeded the scope of its statutory authority. The Supreme Court disagreed and found no direct jurisdiction to review the agency proceedings because the bank retained the right to press its challenge after a final agency order, holding, "[i]f and when the Board [of

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[86] 343 F.2d at 21 n.7.

[87] *See Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980) (en banc).

[88] 343 F.2d at 21 n.7.

[89] *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) (casting doubt on viability of constitutional exception to jurisdictional bar); *see also Myers,* 303 U.S. at 50–53 (rejecting district court jurisdiction premised on employer's as-applied Commerce Clause challenge).

[90] 502 U.S. 32 (1991).

Governors] finds that Mcorp has violated that regulation, Mcorp will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application."[91] Because aggrieved NLRA employers also have the right to circuit court review after exhausting their administrative remedies, a jurisdictional exception permitting district court review of employers' constitutional challenges is unnecessary.

The wisdom of limitations on district court jurisdiction over employer-raised constitutional challenges is illustrated by this case. Constitutional questions should not be considered prematurely, and they should not be ruled upon "unless such adjudication is unavoidable."[92] Here, the necessity of deciding Plaintiffs' constitutional challenge to the Memorandum's legal theory arises only if the following events happen: (1) Plaintiffs choose to engage in conduct that implicates the Memorandum, (2) they face an unfair-labor-practice charge over such conduct, (3) the regional director, on behalf of the General Counsel, determines that such a charge has merit and is worthy of prosecution, and (4) the Board finds that such conduct violates the NLRA notwithstanding Plaintiffs' objections and issues a final order that aggrieves Plaintiffs. At that point, however, there would be no need for district court review; Plaintiffs would be able to obtain full review of their constitutional argument in a federal court of appeals under Section 10(f) of the NLRA. As the Supreme Court made clear in *NLRB v. Jones & Laughlin Steel Corp.*, 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."[93]

Further, "it is a well-settled principle of constitutional adjudication that courts will not pass

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[91] *Id.* at 44.

[92] *Matal v. Tam,* 137 S. Ct. 1744, 1755 (2017) (cleaned up).

[93] 301 U.S. 1, 47 (1937).

upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[94] 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 were to adhere to the view that captive audience meetings do not violate the NLRA, then the constitutional questions raised by Plaintiffs would be entirely obviated. And, under the Memorandum's rationale, the question of whether any particular mandatory meeting violates the NLRA presents a mixed question of fact and law, unique to the circumstances of each case, that would fall squarely within the Board's provenance and its administrative expertise.[95]

The principle of limited district court jurisdiction applies with equal force to the type of First Amendment "chill" claims asserted by Plaintiffs here. In *Grutka v. Barbour,*[96] 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."[97] 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 fully adequate to protect the plaintiff's constitutional rights."[98] In other words, because "the plaintiff's constitutional rights have adequate protection in the Court of

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[94] *Noel Canning v. NLRB,* 705 F.3d 490, 493 (D.C. Cir. 2013) (cleaned up), *aff'd*, 573 U.S. 513 (2014); *see Whole Woman's Health v. Smith,* 896 F.3d 362, 307–71 (5th Cir. 2018) (finding it unnecessary to determine constitutional question where case could be disposed of on statutory grounds).

[95] *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).

[96] 549 F.2d 5 (7th Cir. 1977).

[97] *Id.* at 7.

[98] *Id.* at 9.

Appeals, Congress' decision to place exclusive jurisdiction in this Court is unchallengeable."[99] The court explained that *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 it constitutional claims.[100] Because Plaintiffs similarly retain the right to raise their constitutional challenge in the event a charge is filed against them, the same result should follow here.

D. Plaintiffs' reliance on general jurisdictional statutes is unavailing.

In light of the conclusion compelled by *Myers* and *UFCW* that the NLRA's specific review provisions and its grant of "final authority" over prosecutorial matters to the General Counsel divest this Court of jurisdiction to grant the relief requested by the Complaint, Plaintiffs' reliance on general jurisdictional statues—28 U.S.C. § 1331 and 28 U.S.C. § 1346(a)(2)—will not suffice.

To establish a cause of action in the Fifth Circuit under 28 U.S.C. § 1331, "the plaintiffs must show first that their action against defendant arises under federal common law and second that section 1331 jurisdiction is not preempted by a more specific statutory provision conferring exclusive jurisdiction elsewhere."[101] As demonstrated above, Congress established a detailed scheme of court review under Section 10 of the Act that 1) requires a final Board order, and 2) vests jurisdiction exclusively in the circuit courts of appeals. This review scheme precludes general

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[99] *Id.* at 9 n.7.

[100] *Id.* 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).

[101] *Ceres Gulf v. Cooper,* 957 F.2d 1199, 1208 (5th Cir. 1992); *see also Elgin,* 567 U.S. at 9 (finding 28 U.S.C. § 1331 inapplicable where it is "fairly discernable" from underlying statute that Congress intended eventual "judicial review in a federal appellate court" to be exclusive).

jurisdiction under 28 U.S.C. § 1331.[102]

Plaintiffs also attempt to rely on 28 U.S.C § 1346(a)(2), the "Little Tucker Act," to establish jurisdiction. This statute provides for jurisdiction over "[a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department." As the Supreme Court has explained, the Little Tucker Act is inapplicable where, as here, plaintiffs seek equitable relief.[103]

E. The Complaint does not allege a justiciable controversy.

Plaintiffs have failed to demonstrate standing because the General Counsel's issuance of the Memorandum has caused them no actual injury. Further, as Plaintiffs request that this Court prematurely entangle itself "in abstract disagreements over administrative policies," this suit is not ripe for judicial review.[104]

1. Plaintiffs fail to establish they have suffered an injury in fact.

In order to meet their burden to establish standing, Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[105] In pre-enforcement cases alleging a

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[102] The Fifth Circuit's recent decision in *Cochran v. SEC,* 20 F.4th 194 (5th Cir. 2021) (en banc), *cert. granted,* 142 S. Ct. 2707 (May 16, 2022), does not assist Plaintiffs. In that case, the court found that the district court could exercise jurisdiction under 28 U.S.C. § 1331 because Cochran had raised "structural constitutional" challenges to ALJ removal procedures. *Id.* at 198. In finding jurisdiction, the court noted that adequate review was unavailable through normal administrative processes, the removal issue was collateral to the agency's enforcement action, and Cochran's challenge involved no issue of agency expertise. *Id.* at 207–08. Here, all factors relied on by *Cochran* point in the opposite direction: the issue *can* be decided and adequately reviewed in the normal course, it directly involves a merits question in deciding whether certain mandatory meetings violate the NLRA, and the determination of this threshold question falls squarely within the Board's expertise.

[103] *Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam) (holding that 28 U.S.C. § 1346(a)(2) does not empower a district court "to grant injunctive or declaratory relief"). Plaintiffs' request for attorneys' fees, *see* Compl. at 10, is insufficient to establish jurisdiction under the Little Tucker Act. *Garza v. Clinton,* No. H-10-0049, 2010 U.S. Dist. LEXIS 137093, at *10 (S.D. Tex. Dec. 29, 2010).

[104] *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

[105] *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016).

violation of the First Amendment Free Speech Clause, a showing that the threat of enforcement has chilled a plaintiff's speech or otherwise led to "self-censorship" may be a sufficient injury to confer standing.[106] But such chilling effect or self-censorship only constitutes an injury in fact where a plaintiff demonstrates that he "(1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by the [policy in question],' and (3) 'the threat of future enforcement of the [challenged policy] is substantial.'"[107] And, even in the First Amendment context, courts require that the alleged injury be "actual or imminent, not conjectural or hypothetical."[108] Further, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" because federal courts "'do not render advisory opinions.'"[109] In short, not "every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy," and such is the case here.[110]

Plaintiffs' Complaint fails to allege that the Memorandum has had any actionable chilling effect on them. To start, Plaintiffs' alleged intent to speak to employees about unionization in the future is "wholly speculative."[111] They claim that "[if] future attempts were made to unionize" amongst their employees, they would want to hold meetings about unionization "on paid time."[112] It is not at all certain that such unionization efforts will come to pass; Plaintiffs point to a single

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[106] *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021).

[107] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (alteration in original) (quoting *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 161-64 (2014)).

[108] *Zimmerman v. City of Austin*, 881 F.3d 378, 388 (5th Cir. 2018) (finding, in the context of protected speech, that the purported chilling effect was not actual or imminent because plaintiff did not demonstrate a concrete plan or a serious intent to engage in the proscribed conduct).

[109] *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

[110] *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1114 (D.C. Cir. 1969).

[111] *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 302 (1979).

[112] Compl. ¶ 32.

prior—and apparently unsuccessful—attempt to unionize a group of workers at Plaintiff Burnett's job site. They do not claim that unionization efforts are ongoing or imminent.[113] Plaintiffs therefore have no concrete plans to speak to employees about unionization, because any such plans are expressly contingent upon a unionization drive that may never happen and are therefore merely hypothetical.[114] Thus, Plaintiffs have not sufficiently alleged an intent to engage in a course of conduct arguably affected with a constitutional interest.

Further, the conduct Plaintiffs claim they want to engage in is not "arguably proscribed" by the Memorandum. To start, as discussed on pages 15-16, above, the Memorandum has no legal power or effect and therefore "proscribes" nothing. The Memorandum merely explains the General Counsel's legal theory that the NLRA *itself* proscribes meetings in which employees are coerced to listen to employer speech about unionization against their will. Under the Board's current interpretation of the NLRA, which *does* have the legal effect of proscribing specific conduct, employers do not commit an unfair labor practice when they require employees to attend meetings discussing unionization.[115] The Memorandum does nothing to change this fact, and indeed only a decision of the Board reversing that caselaw could make such conduct unlawful.

But even assuming the Memorandum has the legal effect of proscribing conduct, Plaintiffs do not evince an intent to engage in conduct that would be violative of the NLRA even under the legal theory espoused in the Memorandum. As noted above, Plaintiffs claim that they may want to hold meetings about unionization "on paid time." But the Memorandum does not propose an

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[113] Compl. ¶ 30. The Board has previously noted that employers are generally aware when unionizing activity is afoot in their workplaces. *See* 79 Fed. Reg. 74,308, 74,320-21 (Dec. 15, 2014).

[114] *See Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 546 (5th Cir. 2008) ("Without concrete plans or any objective evidence to demonstrate a 'serious interest' in [violating the policy, plaintiff] suffered no threat of *imminent* injury.").

[115] *See, e.g., Babcock & Wilcox,* 77 NLRB at 578; *2 Sisters Food Group*, 357 NLRB 1816 (2011) (tacitly declining to adopt dissenting Board member's view that *Babcock* be overruled).

interpretation of the NLRA that would make all meetings about unionization "on paid time" unlawful. Quite the contrary, the Memorandum makes clear that only those meetings in which employees are *forced* to listen to employer speech about unionization or other Section 7 activity would violate the Act. The Memorandum suggests that where employers "force[employees] to convene on paid time," those employees "will understand their presence . . . to be required," but goes on to recommend that the Board adopt "sensible assurances" employers may use to convey that employee "attendance is truly voluntary."[116] Plaintiffs do not claim that they won't provide such assurances, and indeed, they do not even claim a desire to hold *mandatory* meetings or otherwise force unwilling employees to listen to their speech. Thus, Plaintiffs' proposed future conduct is not "arguably proscribed" by the Memorandum, because Plaintiffs do not claim an intent to violate the NLRA under the General Counsel's interpretation. And even more importantly, her interpretation in fact "proscribes" nothing, as explained above.

Finally, any alleged self-censorship experienced by Plaintiffs is based entirely on a subjective "chill" and is not a "specific present objective harm."[117] Given Plaintiffs' own explanations of their intentions, the threat of future enforcement as to them is remote and comes with no attendant consequences.[118] Plaintiffs refer to the General Counsel's "unilateral authority to investigate charges of unfair labor practices" and to initiate complaints, and claim that the initiation of a complaint is a "serious affair" because it could lead to an unfair-labor-practice hearing before an administrative law

[116] Compl. Ex. A, at 2, 3, ECF No. 1-1.

[117] *Laird*, 408 U.S. at 13.

[118] In *Speech First*, the Fifth Circuit held that in "pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity… courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." 979 F.3d at 335 (quoting *N.H. Right to Life PAC v. Gardner*, 99 F.3d 9, 15 (1st Cir. 1996)). Here, Plaintiffs do not challenge an actually enacted policy or rule similar to a statute, so that assumption is inapplicable. In any event, as discussed below, there is compelling evidence that the threat of prosecution is not substantial.

judge.[119] The Complaint suggests that the "gravity of investigations and complaints" is what is causing the alleged chilling effect and self-censorship that Plaintiffs claim as their injury. But the cause-and-effect relationship Plaintiffs seek to draw does not withstand scrutiny. First, under the circumstances presented by Plaintiffs, only Board action leading to a final order could result in legal consequences[120] – neither being subject to an investigation nor participating in an administrative hearing can do so.[121] Accordingly, Plaintiffs need not "bet the farm" by speaking as they choose.[122] Further, as discussed on page 20, above, for an agency investigation to commence based on the facts alleged in the Complaint, multiple events would need to take place, all of which are merely

[119] Compl. ¶¶ 15, 16.

[120] Plaintiffs' Complaint, even liberally construed, does not suggest any fear of actual liability stemming from an ultimate Board determination that they committed an unfair labor practice. Of course, a chilling effect rooted in such a fear would not be traceable to the Defendants' conduct as the Board has done nothing to suggest it would so rule. *Cf. Speech First*, 979 F.3d at 322 (finding standing based on chilling effect of speech regulations which were *actually adopted* by the university). In any event, any such alleged fear would constitute a mere "subjective chill" as a Board order here is even more speculative than the initiation of an investigation and issuance of a complaint. Further, even if found liable under the Memorandum's legal theory, Plaintiffs would not face any fines, penalties, jail time, or other similar consequences which might tend to chill their speech.

[121] *Cf. Speech First*, 979 F.3d at 332 (in which the university's speech policies listed "'punitive sanctions,' all the way up to 'criminal prosecution'").

[122] *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). To the extent Plaintiffs' Complaint can be construed as arguing that a "chilling effect" results from the potential economic cost of defending against an unfair-labor-practice allegation, in the administrative context, courts are generally wary of finding sufficient injury based on "mere litigation expense, even substantial and unrecoupable cost." *Renegotiation Bd. v. Bannecraft Clothing Co.*, 415 U.S. 1, 24 (1974) (explaining, in denying an injunction, that the statutory proceedings and remedy at law under the Renegotiation Act were "adequate protection against injury"); *see also Standard Oil*, 449 U.S. at 244 (accepting company's contention that "the burden of defending [an administrative] proceeding will be substantial," but adhering to the view that "the expense and annoyance of litigation is part of the social burden of living under government" (cleaned up)); *Energy Transfer Partners*, 567 F.3d at 141-42 (noting that, before a final agency decision has issued, the adjudicatory process "has no 'legal force or practical effect' on [the company's] daily business other than the disruption caused by litigation" (quoting *Standard Oil*, 449 U.S. at 243)). *But see Cochran*, 20 F.4th at 209 (distinguishing *Standard Oil* on the basis that Cochran challenged "the entire legitimacy of her proceeding" and not just whether the agency had taken "final agency action" under the APA). A logical corollary to the premise that the unrecoupable legal costs of defending oneself before an administrative agency do not constitute irreparable harm is that *fear* of such costs certainly cannot cause such injury.

hypothetical. In particular: Plaintiffs' employees would need to initiate unionization efforts; Plaintiffs would then have to force their employees to listen to them speak about unionization; and someone would need to timely file an unfair-labor-practice charge. Each of these three steps are fully outside of the General Counsel's control and demonstrate that investigating Plaintiffs under the legal theory espoused in the Memorandum is not merely a matter of her "unilateral authority." Still further, the General Counsel would next need to determine *both* that an unfair labor practice has been committed *and* that it is appropriate under the circumstances to issue a complaint. Even presuming the General Counsel were to find that one or more Plaintiffs committed an unfair labor practice under the legal theory presented by the Memorandum, it is not at all clear that she would choose to proceed against them on the basis of such a violation alone.[123] Thus, the hypothetical, attenuated, and limited consequences Plaintiffs might someday encounter for speaking as they choose demonstrate that Plaintiffs' allegations are insufficient to confer standing.

As discussed at great length above, the Supreme Court has long ruled that parties accused of unfair labor practices by the NLRB cannot circumvent the administrative process "by asserting that the charge on which the complaint rests is groundless and that the mere holding of the proscribed administrative hearing would result in irreparable damage."[124] Permitting Plaintiffs' claims to move forward would be to go even further than what *Myers* expressly forbids, because it would mean finding that mere subjective *fear* of a groundless investigation and proscribed hearing is sufficient injury to circumvent the administrative process. That cannot be the case. Accordingly, the

[123] Indeed, in the *CEMEX* case cited by Plaintiffs, the complaint filed against the respondent included allegations of dozens of unfair labor practices both related and unrelated to its conduct in captive audience meetings, all of which are based on *current* Board law. In fact, the General Counsel did not initiate an enforcement action against CEMEX based on the theory espoused in the Memorandum. Instead, she presented her views on such meetings in conjunction with an appeal to the Board on other issues and asks only that the Board adopt her legal theory for *future* cases.

[124] *Myers*, 303 U.S. at 51.

Complaint does not sufficiently allege that Plaintiffs have been injured, and it should therefore be dismissed.

2. Plaintiffs' case is not ripe for review.

The review requested here "threatens the kind of 'abstract disagreements over administrative policies' that the ripeness doctrine seeks to avoid."[125] To determine if a case is ripe for adjudication, courts consider the "fitness of the issues for judicial decision" and any "hardship" to the parties of withholding court consideration. In the agency context, the Fifth Circuit has distilled the "fitness" prong into whether the issues presented are purely legal and whether the challenged action constitutes final agency action under the APA.[126] The "hardship" prong requires determining "whether the challenged agency action has or will have a direct and immediate impact upon the petitioners" and "whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency."[127]

The issues presented in this case are not fit for judicial resolution. To start, as discussed on pages 11-17, above, the Memorandum is not final agency action under the APA.[128] And the issues are not purely legal, as a court determining the validity of the NLRB's "captive audience meeting" doctrine would certainly "benefit from further factual developments of the issues presented," including the Board's actual determination of the issue.[129] Indeed, review subsequent to the agency's

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[125] *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 736 (1998) (quoting *Abbott Labs.*, 387 U.S. at 148).

[126] *Energy Transfer Partners*, 567 F.3d at 139-40 (relying on *Abbott Labs.*, 387 U.S. at 149-54).

[127] *Id.*

[128] *See UFCW*, 484 U.S. at 130-33; *Energy Transfer Partners*, 567 F.3d at 140-41 (noting in the context of ripeness that the Federal Energy Regulatory Commission's "orders alleging violations of the [Natural Gas Act] and setting the matter for hearing before an ALJ" were not final agency action, because they were not definitive in their impact on the rights of the parties and because "no statutory violation had been finally determined").

[129] *Ohio Forestry*, 523 U.S. at 733. For example, the circumstances leading up to a meeting would be relevant to whether employee attendance was voluntary or mandatory.

application of any newly adopted interpretation would provide a reviewing court with a factual underpinning on which to analyze the underlying legal questions. "Review where the consequences have been reduced to more manageable proportions, and where the factual components [were] fleshed out by some concrete action . . . would significantly advance [a reviewing court's] ability to deal with the legal issues presented and would aid . . . in their resolution."[130]

With respect to hardship, as discussed at greater length on pages 24-29, above, any hardship to Plaintiffs of withholding a decision here is minimal or nonexistent. Further, given that there are currently unfair-labor-practice cases being litigated before the NLRB involving this exact issue, reviewable final agency action is likely forthcoming. Thus, there is no reason "why the [Plaintiffs] must bring [this] challenge now in order to get relief."[131] In contrast, a judicial decision at this stage is likely to harm the agency's adjudicatory process. "[H]ere, the possibility that further consideration will actually occur before the [policy] is implemented is not theoretical, but real."[132]

CONCLUSION

For the foregoing reasons, Defendants NLRB and General Counsel Abruzzo respectfully request that the Court grant their motion to dismiss the Complaint in its entirety.

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[130] *Id.* at 736 (internal quotations omitted); *accord O'Connor*, 747 F.2d at 755-56.

[131] *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 723-24 (5th Cir. 2012) (quoting *Ohio Forestry*, 523 U.S. at 734).

[132] *Ohio Forestry Ass'n*, 523 U.S. at 727 (noting that, "from the agency's perspective, immediate judicial review . . . could hinder agency efforts to refine its policies: (a) through revision . . . , or (b) through application of the [policy] in practice").

Respectfully submitted,

DAWN L. GOLDSTEIN
Assistant General Counsel

KEVIN P. FLANAGAN
Supervisory Attorney

ELISABETH H. CAMPBELL
TYLER J. WIESE
Trial Attorneys

/s/Aaron D. Samsel
AARON D. SAMSEL (N.Y. BAR # 5832696)
Trial Attorney
Tel: (202) 273-1923
Fax: (202) 273-4244
Aaron.Samsel@nlrb.gov

National Labor Relations Board
Contempt, Compliance, and Special Litigation Branch
1015 Half Street, SE, 4th Floor
Washington, D.C. 20570

Attorneys for Defendants NLRB and Jennifer A. Abruzzo

Dated: October 11, 2022
Washington, D.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the above DEFENDANTS NATIONAL LABOR RELATIONS BOARD AND GENERAL COUNSEL JENNIFER A. ABRUZZO'S MOTION TO DISMISS COMPLAINT via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3) on this 11th day of October 2022.

/s/Aaron Samsel
AARON SAMSEL
(N.Y. BAR # 5832696)
Trial Attorney
National Labor Relations Board
1015 Half St. SE, 4th Floor
Washington, DC 20570

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BURNETT SPECIALISTS, STAFF FORCE d/b/a STAFF FORCE PERSONNEL SERVICES, ALLEGIANCE STAFFING CORP., LINK STAFFING, and LEADINGEDGE PERSONNEL, LTD., *Plaintiffs,*	§	
v.	§	Civil Action No. 4:22-cv-605-ALM
JENNIFER A. ABRUZZO, in her official capacity, UNITED STATES OF AMERICA, and NATIONAL LABOR RELATIONS BOARD, *Defendants.*	§	

ORDER GRANTING DEFENDANTS NATIONAL LABOR RELATIONS BOARD AND JENNIFER A. ABRUZZO'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Having read and considered the briefs and arguments submitted both in support of and in opposition to Defendants National Labor Relations Board and General Counsel Jennifer A. Abruzzo's Motion to Dismiss the Complaint filed by Plaintiffs Burnett Specialists Staff Force d/b/a Staff Force Personnel Services, Allegiance Staffing Corp., Link Staffing, and LeadingEdge Personnel, Ltd., (collectively "Plaintiffs") and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants NLRB and Abruzzo's motion is granted and Plaintiffs' Complaint is hereby dismissed for lack of jurisdiction.