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 JENNFIER A. ABRUZZO'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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The Response (ECF No. 19) of Burnett Specialists and three other staffing agencies (collectively, Plaintiffs) to the Motion to Dismiss filed by Defendants National Labor Relations Board (NLRB or Board) and NLRB General Counsel Jennifer A. Abruzzo (ECF No. 16), fails to establish this Court's subject-matter jurisdiction, their standing to bring this suit, or the ripeness of their claims. Despite firmly established precedent recognizing that judicial review of the General Counsel's prosecutorial function is "precluded by statute,"[1] Plaintiffs nevertheless insist that their "*Larson* claim" (Resp. 13) empowers this Court to exercise general equitable jurisdiction and review General Counsel Memorandum GC 22-04 (Memorandum). However, as Defendants' Motion explained, the well-established limits on district courts' nonstatutory equitable jurisdiction over NLRB and General Counsel action bar review. (Mot. 7–10, 17–22). Furthermore, Plaintiffs' attempt to frame the Memorandum as reviewable "final agency action" (Resp. 6–8), is not only inconsistent with the text and history of the National Labor Relations Act (NLRA), but wholly ignores the Board's primacy in interpreting the statute's provisions. And even if Plaintiffs could establish subject-matter jurisdiction, their failure to satisfy standing and ripeness requirements is independently fatal.

I. Plaintiffs have failed to establish equitable subject-matter jurisdiction.

Plaintiffs now claim that subject-matter jurisdiction over the Complaint's Count II exists under the nonstatutory equitable-jurisdiction doctrine established in *Larson v. Domestic & Foreign Commerce Co.*[2] (Resp. 13–15). They also argue Defendants have not explained "why this Court would lack jurisdiction over Plaintiffs' *Larson* claim." (Resp. 13). Neither assertion withstands scrutiny.

Plaintiffs use "*Larson* claim" to refer to a federal court's nonstatutory equitable jurisdiction to review certain actions by government officials. *Larson* holds that sovereign immunity does not bar

[1] *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 133 n.31 (1987) ("*UFCW*").
[2] 337 U.S. 682, 689–90 (1949); *see also Malone v. Bowdoin,* 369 U.S. 643, 647 (1962).

suits against federal officials for actions that are beyond "the officer's statutory powers" or are "constitutionally void."[3] Such a lawsuit, in the absence of a statutory cause of action, asserts a claim which is a "creation of courts of equity."[4] Nevertheless, "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."[5] And so, "Congress may displace the equitable relief that is traditionally available to enforce federal law."[6] Here, Plaintiffs fail to recognize that Congress significantly constrained such relief in NLRA cases.

Soon after the NLRA was enacted, the Supreme Court explained in *Myers v. Bethlehem Shipbuilding Co.*[7] that Congress had largely supplanted federal district courts' "equity jurisdiction" to safeguard "rights guaranteed by the Federal Constitution" from purportedly unlawful Board action.[8] The Court observed that the NLRA's unfair-labor-practice procedures and 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."[9]

Two decades later, in *Leedom v. Kyne*,[10] the Supreme Court recognized a limited exception permitting district courts to exercise equitable jurisdiction of certain NLRB actions. "Under [*Kyne*], district courts have subject-matter jurisdiction to review an agency action (1) 'when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate,' and (2) if the

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[3] 337 U.S. at 689–90. Several years after *Larson* was decided, Congress enacted a partial waiver of sovereign immunity as to judicial review under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 702. This development makes it debatable "whether, in suits against federal agency officials, the constitutional exception to sovereign immunity still survives." *Anibowei v. Barr*, No. 3:16-cv-3495-D, 2019 U.S. Dist. LEXIS 24105, at *11 (N.D. Tex. Feb. 14, 2019).

[4] *Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 327 (2015).

[5] *Id.*

[6] *Id.* at 329.

[7] 303 U.S. 41 (1938).

[8] *Id.* at 43, 50.

[9] *Id.* at 48.

[10] 358 U.S. 184 (1958).

aggrieved party would be deprived of a meaningful opportunity for judicial review."[11] As the Fifth Circuit has emphasized, *Kyne* "provides a 'narrow' exception with 'painstakingly delineated procedural boundaries.'"[12]

Viewed in this light, *Larson* is simply a generalized articulation of *Kyne*'s NLRA-specific test. Unlike *Larson*, however, *Kyne* takes into account the important ways Congress has suffused the NLRA with "express and implied statutory limitations"[13] on equity jurisdiction. It appears that the Fifth Circuit has never invoked *Larson* jurisdiction in any NLRB proceeding—and Plaintiffs cite no examples of it doing so. Instead, the Fifth Circuit has correctly relied on principles of NLRA-specific equitable jurisdiction established by *Kyne*.[14] Defendants' Motion addressed cases applying those principles and explained why they are of no assistance to Plaintiffs here. (Mot. 17–21).

Though not discussed in *Kyne*, which involved Board action in a representation-election case rather than an unfair-labor-practice case, another statutory limitation on equitable jurisdiction is relevant here. As explained in Defendants' Motion (Mot. 10), the Supreme Court has held that the NLRA's grant of "final authority"[15] over prosecutorial matters to the NLRB's General Counsel "clearly and convincingly" precludes statutory review of such actions.[16] By this language, the NLRA expresses Congress's unmistakable intent to insulate the General Counsel's "prosecutorial function" from direct judicial review, regardless of the basis for the lawsuit.[17] The "enforcement decisions and

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[11] *Sanderson Farms, Inc. v. NLRB,* 651 F. App'x 294, 297 (5th Cir. 2016).

[12] *Id.* at 298.

[13] *Armstrong*, 575 U.S. at 327.

[14] *Boire v. Mia. Herald Publ'g Co.,* 343 F.2d 17, 21 (5th Cir. 1965); *Bova v. Pipefitters Loc. 60,* 554 F.2d 226, 228 (5th Cir. 1977).

[15] 29 U.S.C. § 153(d).

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

[17] *Id.* at 129. By insulating the General Counsel's "prosecutorial function" from review, *UFCW* necessarily interprets Section 3(d) to cover a broader range of actions than charging decisions in individual cases, contrary to Plaintiffs' assertion otherwise. (Resp. 15).

guidance" (Resp. 7) that Plaintiffs seek to enjoin here are classic exercises of prosecutorial judgment.

As *Myers* and its progeny show (Mot. 17–21), claims of constitutional violations—like those alleged by Plaintiffs here—do not change this conclusion. Furthermore, Plaintiffs' assertion (Resp. 14) that equitable jurisdiction attaches upon mere invocation of a constitutional claim is undermined by *Elgin v. Department of Treasury.*[18] There, the Supreme Court determined that constitutional claims raised by former federal employees under the Civil Service Reform Act should be heard first by the Merit Systems Protection Board (MSPB), not district courts. Applying *Thunder Basin*,[19] the Court concluded that such claims did not escape the agency's statutory review scheme because (1) a court of appeals was "fully competent to adjudicate [the challengers'] claims" upon review of the MSPB's decision, (2) the constitutional claims arose in the context of a "personnel action regularly adjudicated by the MSPB," and (3) agency expertise on ancillary issues and matters of statutory interpretation could "obviate the need to address the constitutional challenge."[20]

The same result should follow here. First, Plaintiffs can obtain meaningful relief from the Board or a reviewing court by litigating their constitutional challenge in any unfair-labor-practice case involving them.[21] Second, Plaintiffs' constitutional argument is essentially a merits defense to unfair-labor-practice liability, which is hardly an issue "'wholly collateral' to the type of dispute the agency is authorized to hear."[22] Third, Board expertise applied to threshold questions—including

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[18] 567 U.S. 1 (2012).

[19] *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 212–13 (1994).

[20] 567 U.S. at 17, 22–23.

[21] In *Elgin*, meaningful relief was available notwithstanding the fact that "the MSPB has repeatedly refused to pass upon the constitutionality of legislation." *Id.* at 16. The Board, by contrast, does engage with constitutional issues raised in its proceedings. *E.g., Int'l Union of Operating Eng'rs Loc. 150 (Donegal Services, LLC)*, 371 NLRB No. 28, slip op. at 1, n.4 (Sept. 28, 2021) (discussing First Amendment concerns raised by potential prohibition on stationary display of banners by unions).

[22] *Cf. Cochran v. SEC,* 20 F.4th 194, 207–08 (5th Cir. 2021) (en banc) (finding that "structural" challenge seeking to invalidate administrative law judges' removal protection was "wholly collateral to the [applicable] statutory-review scheme"), *cert. granted*, 142 S. Ct. 2707 (argued Nov. 7, 2022).

whether mandatory meetings about the exercise of NLRA rights violate the statute—would, if resolved in Plaintiffs' favor, eliminate the need to reach their constitutional claim.[23] Thus, as in *Elgin,* Plaintiffs' constitutional challenge should be routed through the normal administrative processes established by Congress, not short-circuited by immediate district court review.[24]

II. Plaintiffs have failed to establish jurisdiction over final agency action.

As for Count I, Plaintiffs have failed to muster a persuasive argument that the Memorandum constitutes "final agency action."[25] Plaintiffs treat the NLRB's Office of the General Counsel as an independent agency unto itself (Resp. 7), but that notion cannot be squared with the text or history of the NLRA. As explained in the Motion, the General Counsel is an officer of the NLRB, not a separate administrative agency. (Mot. 13 n.61).[26] Moreover the General Counsel's "final authority" to decide how and whether to prosecute unfair-labor-practice cases does not change the fact that final agency action interpreting the NLRA occurs only when the five-seat Board acts. (Mot. 2).[27]

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[23] *Weinberger v. Bentex Pharm. Inc.*, 412 U.S. 645, 653 (1973) (declining equitable relief where issues were "peculiarly suited to initial determination" by the agency).

[24] Plaintiffs' improbable hypothetical (Resp. 7–8) would similarly be routed through the administrative process, as an employer alleging discrimination on a prohibited basis could obtain meaningful relief from the Board and, if necessary, a circuit court of appeals. In addition, other remedies beyond normal statutory review exist to guard against agency prosecutions that are not "substantially justified." 5 U.S.C. § 504(a)(1) (permitting eligible parties to recover "fees and other expenses" incurred in adversary adjudications).

[25] Compl. ¶ 35, ECF No. 1.

[26] When Congress established the Office of General Counsel in 1947, it specifically rejected a proposal "to create a separate administrative agency, independent of the Board, and known as the 'Office of the Administrator of the National Labor Relations Board.'" *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960).

[27] Plaintiffs' reliance on *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844 (5th Cir. 2010) (Resp. 7) is misplaced. *El Paso Disposal* does not address finality under the APA. Rather, that case concerned the Board's limited delegation of authority permitting the General Counsel to seek temporary injunctions in district court at a time when the Board lacked a quorum to act. Furthermore, Plaintiffs gain nothing by citing to decisions reviewing final rules promulgated by the five-seat Board under Section 6 of the NLRA. (Resp. at 5, 13). Unlike the General Counsel's prosecutorial authority, the Board's rulemaking authority is expressly subject to the provisions of the APA. *See* 29 U.S.C. § 156.

One of Plaintiffs' own cases illustrates this principle in analogous circumstances. In *Dhakal v. Sessions* (Resp. 7), the Seventh Circuit decided that an immigration official's "final denial" of an asylum application did not constitute final agency action under the APA because, under federal immigration laws, the Board of Immigration Appeals gets to adjudicate asylum applications prior to any judicial review of those decisions.[28] Like the Labor Board here, only the Board of Immigration Appeals "speaks with final authority for the executive branch" as to matters within its purview.[29] Thus, the Memorandum here is akin to the immigration official's denial letter in *Dhakal*—that is, unreviewable because it is "'more like a tentative recommendation than a final and binding determination,' or 'the ruling of a subordinate official' when viewed in light of the intended, complete administrative process."[30]

Plaintiffs further claim that legal consequences flow from the Memorandum because it purportedly chills Plaintiffs' speech through the "threat of prosecution." (Resp. 7). But administrative proceedings are not "legal consequences" for purposes of an APA finality analysis (Mot. 16), and neither are claims of chill.[31] In *Freedom Path, Inc. v. Lerner*, the Northern District of Texas dismissed a constitutional challenge to "the IRS's use of certain policies and procedures to target conservative organizations for heightened review of applications for tax-exempt status," in part because the plaintiff had failed to demonstrate final agency action.[32] In so doing, the court

[28] 895 F.3d 532, 535, 541 (7th Cir. 2018).

[29] *Id.* at 540.

[30] *Id.* (quoting *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992)); *see also Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 757 (D.C. Cir. 1984).

[31] *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1274 n.6 (D.C. Cir. 2018) ("Unlike reviewability doctrines developed by courts, final agency action is a statutory requirement set by Congress. We have found no decision of this Court, and no decision of any other circuit court, holding that the presence of constitutional claims eases the Supreme Court's two-part *Bennett* test for final agency action.").

[32] *Freedom Path, Inc. v. Lerner,* Civ. Action No. 3:14-CV-1537-D, 2015 U.S. Dist. LEXIS 22025, at *35–36, *115 (N.D. Tex. Feb. 24, 2015).

implicitly rejected Freedom Path's argument that a chill to the exercise of First Amendment rights is itself a legal consequence under the APA. Instead, the court determined that "the use of these policies and procedures neither marks the consummation of the IRS's decisionmaking process nor determines Freedom Path's rights or obligations or precipitates legal consequences."[33] Plaintiffs' argument that the Memorandum causes legal consequences by chilling their speech should be similarly rejected.[34]

III. Plaintiffs have failed to show that this matter is justiciable.

Plaintiffs still have not established that they have suffered an injury in fact. While standing requirements are relaxed for First Amendment claims,[35] they are not erased.[36] Plaintiffs have not pleaded a cognizable injury in fact by sufficiently showing that (1) they intend to engage in a course of conduct arguably affected with a constitutional interest; (2) such conduct is arguably proscribed by the Memorandum; and (3) the threat of enforcement is substantial.[37]

Defendants previously called attention to the hypothetical phrasing of Plaintiffs' Complaint, (Mot. 10 & n.44, 24–25), which notably conditions Plaintiffs' desire to hold mandatory meetings about NLRA rights on potential unionization efforts that may never occur. Instead of walking back

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[33] *Id.* at 35–36.

[34] Plaintiffs' references to the Declaratory Judgment Act (Resp. 3, 8, 16) add nothing. That law merely enlarges the range of remedies available to a court; it does not confer jurisdiction to act. *Frye v. Anadarko Petro. Corp.*, 953 F.3d 285, 293 (5th Cir. 2019) ("A claim under the Declaratory Judgment Act is insufficient to confer federal question jurisdiction under 28 U.S.C. § 1331.").

[35] We note that *Cooksey v. Futrell,* 721 F.3d 226 (4th Cir. 2013), which Plaintiffs twice cite as Fifth Circuit precedent (Resp. 4, 9), was decided by the Fourth Circuit.

[36] *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972) (stating that "[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").

[37] *Speech First Inc. v. Fenves,* 979 F.3d 319, 330 (5th Cir. 2020). Plaintiffs lead their "injury in fact" argument with an incorrect legal standard drawn from an Eleventh Circuit decision involving the same plaintiff, Speech First, as this Fifth Circuit case (*see* Resp. 8). The Eleventh Circuit's *Speech First* decision stands for the proposition that a threat of enforcement is not necessary for a chilling effect. But the opposite is true in the Fifth Circuit. (Mot. 24).

this narrative, Plaintiffs' Response fully embraces it. (Resp. 12 & n.2). Thus, Plaintiffs have not cleared the first hurdle because they have failed to show an intent to engage in conduct arguably affected with a constitutional interest.

Nor have Plaintiffs shown that their conduct is "arguably proscribed" by the Memorandum.[38] It is not enough for Plaintiffs to claim their conduct "would be subject to Defendant Abruzzo's interpretation of the NLRA." (Resp. 11). Undoubtedly, the General Counsel can take the position—either generally or in a specific unfair-labor-practice case—that certain conduct violates the NLRA. She cannot, however, "proscribe" conduct by announcing interpretations carrying the force of law.[39] Only the Board can do that. And so, Plaintiffs have not cleared the second hurdle.

For reasons similar to those already discussed, Plaintiffs have also failed to show a substantial threat of enforcement. Naturally, the threat of enforcement will be low where, as here, the party seeking pre-enforcement review expresses only a possible desire to one day engage in conduct that could trigger an enforcement proceeding.[40] The "fact-thin quality of the case . . .

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[38] Plaintiffs claim that the Memorandum "sweeps broadly" (Resp. 11), but they do not examine—or even acknowledge—the various and indisputably noncoercive ways in which employers frequently communicate their views on NLRA activity to their employees. Indeed, the Memorandum itself acknowledges that employer-called meetings concerning the exercise of NLRA rights would remain unobjectionable under the General Counsel's legal theory, so long as employers convey "sensible assurances" to employees that respect their rights "to refrain, or not, from listening." Compl. Ex. A, at 3, ECF No. 1-1.

[39] *Cf. Jackson v. Wright,* Civil Action No. 4:21-CV-00033, 2022 U.S. Dist. LEXIS 8684, at *24 (E.D. Tex. Jan. 18, 2022) (finding speech proscribed where a university's policy indefinitely suspended a professor's academic journal due to accusations of racism).

[40] It is for this reason that Plaintiffs need not be concerned about retroactive application (Resp. 8–9), as they insist that they are taking no current action that would subject them even to an unfair-labor-practice charge, much less a complaint brought by the General Counsel. Moreover, only the Board can decide, after considering various factors, whether one of its decisions applies retroactively. *See SNE Enters.*, 344 NLRB 673, 673 (2005) (explaining that the Board considers "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").

precludes a court from holding, with fidelity to Supreme Court precedent, that 'a genuine threat of enforcement' has been demonstrated here."[41] In addition, because an unfair-labor-practice proceeding cannot take place unless a charge is filed first, the magnitude of the threat of enforcement is necessarily diminished. Plaintiffs' conclusory assertion that there is a "very high" risk that they will be future respondents to an unfair-labor-practice complaint does not suffice to clear the third hurdle. (Resp. 12).

The caselaw offered by Plaintiffs does not support their claim of injury in fact. Those cases found sufficient harm only when plaintiffs faced criminal prosecution,[42] a far cry from administrative proceedings before an agency enforcing a "remedial" statute which "does not prescribe penalties or fines."[43] As made clear previously (Mot. 24–26), Plaintiffs' fear of being subject to proceedings is speculative, and the consequences are not sufficiently substantial to constitute an injury in fact.[44]

Nor have Plaintiffs shown that the constitutional issue they wish to litigate here is ripe for adjudication. A case is ripe only if it meets certain fitness and hardship requirements. (Mot. 29). For the same reasons Plaintiffs have not established an injury in fact (*see* above at 7–9), they have not demonstrated sufficient hardship to show the case is ripe. As with the injury-in-fact analysis, the additional cases Plaintiffs cited to support hardship deal only with threats of criminal prosecution

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[41] *O'Connor*, 747 F.2d at 757. The D.C. Circuit noted that in *Steffel v. Thompson*, 415 U.S. 452, 455–56 & n.4, 459 (1974), the plaintiffs were subject to two threats of arrest and a companion actually had been arrested, making prosecution likely. *See also Kaplan v. Hess*, 694 F.2d 847 (D.C. Cir. 1982) (threat by judge to jail for contempt demonstrated a sufficient threat).

[42] *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 166 (2014) (finding injury where administrative proceedings were "backed by the additional threat of criminal prosecution"); *Cooksey*, 721 F.3d at 238 (plaintiff subjected "to a 'credible threat' of the criminal penalties"); *Hat v. Landry*, No. 6:20-CV-00983, 2021 U.S. Dist. LEXIS 86868, at *17 (W.D. La. May 5, 2021) (finding injury where plaintiffs "fear[ed] a felony prosecution").

[43] *Republic Steel Co. v. NLRB*, 311 U.S. 7, 10 (1940).

[44] *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 (1979) (emphasizing the criminal nature of the threat and cautioning that "'persons having no fear of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs'").

and are not analogous to this case.[45]

Finally, Plaintiffs' claims do not meet the fitness requirement. The Memorandum is not a final agency action that is fit for review. (*See* above at 5–7; Mot. 11–17, 29–30, n.132). In addition, Plaintiffs improperly ask this Court to resolve a constitutional question before a threshold question of statutory interpretation has been answered—namely whether captive audience meetings violate the NLRA's "right to refrain" as argued in the Memorandum. This is not how federal courts decide constitutional issues. (Mot. 20-21). Moreover, Congress has clearly indicated that the task of interpreting the NLRA is for the Board, not district courts, which play "a very, very minor role in the statutory structure."[46] Accordingly, this matter is unfit for judicial resolution,[47] and Defendants' Motion to Dismiss (ECF No. 16) should be granted.

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[45] *Driehaus,* 573 U.S. at 166 (finding injury where administrative proceedings were "backed by the additional threat of criminal prosecution"); *United States v. Stevens*, 559 U.S. 460, 474 (2010). (provision "create[d] a criminal prohibition of alarming breadth"); *Babbitt*, 442 U.S. at 302 (finding sufficient injury where "the criminal penalty provision applies in terms to '[any] person . . . who violates any provision' of the Act"); *Steffel*, 415 U.S. at 459 (addressing provisions of state law which provide "the basis for threats of criminal prosecution").

[46] *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 673 (5th Cir. 1966); *see Loc. 926, Operating Engr's v. Jones*, 460 U.S. 669, 682 (1983) (identifying coercion as a "question[] of federal labor law [that] should be resolved by the Board").

[47] Plaintiffs' reference to *Associated Builders* (Resp. 5) does not support their claim of fitness. That case involved a regulation promulgated through notice-and-comment rulemaking, which immediately impacted all employers under the Board's jurisdiction. *Associated Builders & Contractors of Tex., Inc. v. NLRB,* 15-CV-026, 2015 U.S. Dist. LEXIS 78890, at *2, 4 (W.D. Tex. 2015); *see also* n.27, above.

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Dated: November 8, 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 JENNIFER A. ABRUZZO'S REPLY IN SUPPORT OF MOTION TO DISMISS via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3) on this 8th day of November 2022.

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