No. 24–3043

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SPRING CREEK REHABILITATION AND NURSING CENTER LLC, d/b/a Spring Creek Healthcare Center,

Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, a federal administrative agency; JENNIFER ABRUZZO, in her official capacity as the General Counsel of the National Labor Relations Board; LAUREN M. MCFERRAN, In her official capacity as the Chairman of the National Labor Relations Board; MARVIN E. KAPLAN; GWYNNE A. WILCOX; JEFFREY GARDNER, in his official capacity as an Administrative Law Judge of the National Labor Relations Board; DAVID M. PROUTY, in his official capacities as Board Members of the National Labor Relations Board,

Defendants-Appellees, and

1199SEIU UNITED HEALTHCARE WORKERS EAST,

Intervenor.

On Appeal from the United States District Court for the District of New Jersey, No. 2:24-cv-09016

BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), because the district court's October 24, 2024, Order is an interlocutory order denying an injunction, and under 29 U.S.C. § 110, because the requested injunction involves or grows out of a labor dispute.

A party seeking relief from a federal court bears the burden of establishing that the case or controversy fits within the court's "limited jurisdiction," since federal courts possess "only that power authorized by the Constitution and statute." *Erie Ins. Exch. by Stephenson v. Erie Indem. Co.*, 68 F.4th 815, 818 (3d Cir. 2023) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The NLRB acknowledges that the district court has jurisdiction over Plaintiff-Appellant Spring Creek Rehabilitation and Nursing Center LLC's ("Spring Creek") removal-restrictions claims under 28 U.S.C. § 1331. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 185 (2023). However, the district court lacked jurisdiction over Spring Creek's Seventh Amendment claim, which it has not raised in this appeal, *see* n. 2 below.

Regardless of whether the district court had subject-matter jurisdiction over any of Spring Creek's claims, injunctive relief on those claims is jurisdictionally barred by statute because this case involves or grows out of labor disputes under the Norris-LaGuardia Act. 29 U.S.C. §§ 101, 104, 107.

COUNTERSTATEMENT OF THE ISSUES

1. Does the Norris-LaGuardia Act jurisdictionally bar the preliminary injunctive relief Spring Creek seeks?

2. Did the district court abuse its discretion in denying Spring Creek a temporary restraining order and preliminary injunction where Spring Creek has failed to show that: (a) it has met this Circuit's causal-harm standard for removability claims; (b) an injunction would prevent irreparable harm; (c) an injunction, not severance, is the proper remedy for its removability claims; and (d) the balance of the equities and public interest weigh in its favor?

COUNTERSTATEMENT OF RELATED CASES

- Amboy Nursing and Rehabilitation Center and Spring Creek Rehabilitation and Nursing Center, LLC, and 1199 SEIU United Healthcare Workers East, NLRB Case No. 22-CA-281616.

COUNTERSTATEMENT OF THE CASE

I. Legal Background

The National Labor Relations Board ("NLRB") is the exclusive federal agency designated to protect employee rights under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, to form and join unions, and engage in concerted activity for mutual aid and protection, or to refrain from such activities. 29 U.S.C. § 157. One of the key functions of the Agency is its role in processing

allegations that an employer or union has committed an unfair labor practice ("ULP"). *Id.* § 160. Such allegations arise from charges filed by members of the public; formal proceedings do not commence unless and until the NLRB's General Counsel, or a delegate of the General Counsel, finds merit to the charge and issues a complaint, *id.* § 160(b), usually accompanied by a notice of hearing before an administrative law judge (ALJ).

The NLRB's ALJs are appointed in accordance with the Civil Service Reform Act (5 U.S.C. § 3105) and the NLRA (29 U.S.C. § 154(a)). *See WestRock Servs., Inc.* 366 NLRB No. 157, slip op. at 2–3 (2018). Once an ALJ issues "a proposed report, together with a recommended order" in a ULP case, 29 U.S.C. § 160(c), the parties may file "exceptions" on any contested issue, asking the Agency's Board to rule upon the matter. 29 C.F.R. § 102.46(a).

The NLRB's Board consists of up to five members who are appointed by the President with the advice and consent of the Senate and serve staggered terms of up to five years. 29 U.S.C. § 153(a). Three members "constitute a quorum," though two members suffice whenever the Board delegates its authority to a subgroup of three or more members. 29 U.S.C. § 153(b). The Board issues final decisions in ULP cases under Section 10(c) (29 U.S.C. § 160(c)), conducts and certifies the outcome of representation elections under Section 9 (*id.* § 159), and promulgates rules and regulations under Section 6 (*id.* § 156).

Under Section 10(c) of the NLRA, the Board is given "broad discretionary" authority to remedy ULPs by ordering "such affirmative action . . . as will effectuate the policies of this Act." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215–16 (1964) (citing 29 U.S.C. § 160(c)). The Board has traditionally sought to "restor[e] the situation, as nearly as possible, to that which would have obtained but for the [ULP]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Orders of the Board, however, are not self-enforcing. Section 10(e) of the NLRA provides that the Board must seek enforcement of its orders from an appropriate court of appeals for such orders to become enforceable as judicial injunctions. 29 U.S.C. § 160(e). Section 10(f) of the NLRA provides that any "aggrieved person" may seek to set aside a final Board order in a court of appeals. *Id.* § 160(f). Only upon enforcement by a court of appeals does a Board order become fully effective against a respondent. *See, e.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938); *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1159 (6th Cir. 1996) ("An NLRB remedial order is not self-executing, and the respondent can violate it with impunity until a court of appeals issues an order enforcing it.").

Removal of ALJs and Board members is defined by statute. With a handful of listed exceptions, 5 U.S.C. § 7521(a) states that "[a]n action may be taken against an [ALJ] . . . by the agency in which the [ALJ] is employed only for good

cause established and determined by the [MSPB] on the record after opportunity for hearing before the [MSPB].” Under this formulation, removing an ALJ would require two steps: (1) the NLRB’s Board must bring an action to remove an ALJ; and (2) the MSPB must determine that good cause for removal has been established. Section 3(a) of the NLRA states that Board members “may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U.S.C. § 153(a). A statute also restricts the removal of MSPB members. 5 U.S.C. § 1202(d) (“Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”).

II. Procedural History

A. *Administrative proceedings*

1199 SEIU United Healthcare Workers East (“Union”), a union representing a unit of Spring Creek’s employees, filed a ULP charge, subsequently amended, with the NLRB (Case No. 22-CA-281616), alleging that Spring Creek violated the NLRA by refusing to honor the terms of a collective-bargaining agreement between the Union and Spring Creek’s predecessor (Amboy Nursing and Rehabilitation Center), as well as by failing to provide the Union with relevant information it had requested. [JA 49–55]. Following an investigation, the Regional Director for the NLRB’s Region 22 office in Newark, New Jersey found merit to

the allegations, and, on May 22, 2024, issued a Complaint and Notice of Hearing in Case No. 22-CA-28161, setting a date for hearing before an NLRB ALJ. [JA 35–44]. An Amended Complaint and Notice of Hearing subsequently issued July 23, 2024, and Spring Creek filed answers to both pleadings. [JA 49–58*; id*. at 24, ¶¶ 46–47]. The ULP hearing was held before NLRB ALJ Jeffrey Gardner and has concluded. [ECF 23–1, at ¶1(a)]. The parties have filed post-hearing briefs, and the case is now pending the ALJ's disposition.[1]

B. ***Court proceedings below***

On September 6, 2024, Spring Creek filed a Complaint in the U.S. District Court for the District of New Jersey, alleging that the NLRB's Board members and its ALJs are unconstitutionally insulated from removal, and that the NLRB's adjudicative process violates the Seventh Amendment. [JA 16–34]. The complaint sought, among other things, a declaration that the statutory removal protections for Board members and ALJs are unconstitutional. [JA 33–34]. It further sought an order preliminarily enjoining the NLRB from proceeding on its administrative complaint and permanently enjoining the NLRB from "implementing or carrying out" the statutory removal protections for Board members and administrative law

[1] The NLRB's docket for this unfair-labor-practice proceeding can be found at https://www.nlrb.gov/case/22-CA-281616 (last visited Apr. 4, 2025).

judges. [*Id.*]. On September 11, 2024, Spring Creek moved for a preliminary injunction and temporary restraining order.[2] [JA 65–67].

On October 24, 2024, the district court denied Spring Creek's motion for a preliminary injunction and temporary restraining order, finding that Spring Creek had failed to demonstrate irreparable harm from the challenged statutory removal protections for NLRB Board Members and ALJs. [JA 2]. Specifically, the court determined that Spring Creek's reliance on *Axon Enterprise Inc. v. FTC*, 598 U.S. 175, 195 (2023), to establish irreparable harm was "misplaced," as that case "did not address the merits of a removal-protections claim or the showing necessary to warrant injunctive relief." [JA 6–9]. Rather, the court explained that *Axon* "decided the narrow question of whether a district court has jurisdiction to hear structural constitutional challenges to ongoing agency proceedings" and "did not modify what a plaintiff needs to prove to demonstrate that the proceeding and decisionmakers it faces are illegitimate, nor did it overrule *Collins v. Yellen*, 594 U.S. 220 (2021) without indicating as much." [JA 8]. The court also noted that "[t]aken to Plaintiff's logical conclusion, interpreting *Axon* to require a preliminary

[2] Although Spring Creek raised a Seventh Amendment claim and a combination-of-functions argument in its brief supporting its motion before the district court, JA 89–99, it has since abandoned those arguments by electing not to raise them on appeal. *See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 145 (3d Cir. 2017) ("[A]n appellant's opening brief must set forth and address each argument the appellant wishes to pursue in an appeal.").

injunction any time a party challenges administrative proceedings on constitutional grounds would disrupt law enforcement efforts by federal agencies across the government and overwhelm the courts with preliminary injunction requests amounting to judicial preclearance." [JA 9]. Accordingly, the court found "unavailing" Spring Creek's argument that "the mere assertion of a constitutional challenge to the structure of a government agency entitles it to extraordinary relief," and concluded that Spring Creek had "failed to offer any evidence of irreparable harm stemming from the alleged constitutional violations." [*Id.*].

On November 4, 2024, Spring Creek filed with the district court a motion for stay and injunction pending appeal, which the district court denied two days later. [SA 22–28]. In denying the motion, the court ruled that Spring Creek's "continued reliance here on *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023) is misguided." [*Id.* at 25]. The court also found that Spring Creek was not entitled to an injunction for a separate reason: its failure to establish causal harm from the challenged removal restrictions. [*Id.* at 25–27]. The court rejected Spring Creek's argument that it need not explain how removal protections for the NLRB Board members or the NLRB ALJs would specifically impact Spring Creek's administrative proceeding, *id.* at 25–26, instead relying upon this Court's decision in *CFPB v. National Collegiate Master Student Loan Trust*, 96 F.4th 599 (3d Cir. 2024), *cert. denied*, No. 24-185, 2024 WL 5112295 (Dec. 16, 2024). There, this Court

confirmed that "there must be an actual, compensable harm in order for there to be an injury from an impermissible insulation provision." [*Id.* at 26 (citing *Nat'l Collegiate*, 96 F.4th at 615)]. The district court further noted that in *National Collegiate,* this Court specifically rejected the argument that improper removal restrictions create a "presupposition of harm." [*Id.*]. The lower court also concluded that Spring Creek's arguments regarding the alleged distinction between the retrospective relief sought in *Collins* and the prospective relief sought here were "similarly unavailing." [SA 26–27]. As the district court recognized, "every circuit that has addressed whether the *Collins* causal-harm requirement applies equally to prospective relief has held that it does." [*Id.* at 27].

On November 6, 2024, Spring Creek filed a motion for a stay and injunction pending appeal with this Court [ECF 6]. That same day, the NLRB filed an opposition [ECF 8] and this Court issued an order denying the motion. [ECF 9].

C. *Further developments*

On January 27, President Trump removed Gwynne A. Wilcox from her position as a member of the NLRB. *Wilcox v. Trump*, No. 1:25-cv-00334, --- F. Supp. 3d ----, 2025 WL 720914, at *4 (D.D.C. Mar. 6, 2025), *appeal docketed*, No. 25-5057 (D.C. Cir. Mar. 7, 2025). This removal had the effect of leaving the Board with just two members, one short of a quorum. *Id.* at *5; *see* 29 U.S.C. § 153(b).

Wilcox subsequently filed a lawsuit challenging her removal. *Wilcox*, 2025

WL 720914. On March 6, the district court granted summary judgment to Wilcox and ordered that Chairman Marvin E. Kaplan "as well as his subordinates, agents, and employees, are enjoined, during [Wilcox's] term as a member of the NLRB, from removing plaintiff from her office without cause or in any way treating plaintiff as having been removed from office, from impeding in any way her ability to fulfill her duties as a member of the NLRB, and from denying or obstructing her authority or access to any benefits or resources of her office." *Wilcox*, 2025 WL 720914, at *18 (hereinafter, "*Wilcox* Order").

The government appealed and filed an emergency motion for a stay of the *Wilcox* Order pending appeal. On March 28, a motions panel for the D.C. Circuit granted the stay. *Harris v. Bessent*, No. 25-5037, 2025 WL 980278, at *1 (D.C. Cir. Mar. 28, 2025).[3] But on April 7, 2025, by a 7-to-4 vote, the en banc D.C. Circuit vacated the stay entered by the motions panel. *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Apr. 7, 2025) (en banc), at https://media.cadc.uscourts.gov/orders/docs/2025/04/25-5037.25-5057.EN1.pdf. A majority of the en banc court also denied the government's request that vacatur be stayed for 7 days to enable the Solicitor General to seek emergency relief from the Supreme Court. *Id.*

[3] Merits briefing in the *Wilcox* appeal has been expedited, and oral argument is scheduled to take place on May 16, 2025.

SUMMARY OF THE ARGUMENT

Because this case involves or grows out of a labor dispute, as defined by the Norris-LaGuardia Act, 29 U.S.C. § 101 *et. seq.* ("Norris-LaGuardia" or "NLGA"), and because the NLGA's jurisdiction-limiting provisions apply even to cases that do not directly involve employers and employees, federal courts lack jurisdiction to issue an injunction based on Spring Creek's claims.

But even if injunctive relief were available, the district court should be affirmed because Spring Creek is unable to meet the requirements to receive a preliminary injunction. First, it is unlikely that Spring Creek's claims that the NLRB's Board members and ALJs are unconstitutionally protected from removal will succeed, because Spring Creek has failed to show "any link whatsoever between the removal provision and [its] case." *Nat'l Collegiate*, 96 F.4th at 615 (quoting *Kaufmann v. Kijakazi*, 32 F.4th 843, 850 (9th Cir. 2022)). That failure, as the district court concluded, is sufficient on its own to deny the relief sought. [JA 6–9].

Second, as the district court correctly concluded, irreparable harm is not established merely by Spring Creek's allegation that it has to participate in the NLRB's administrative process. [JA 6–9]. Indeed, this Court has held that "a mere allegation that the unconstitutional provision inherently caused [the plaintiff] harm is insufficient" and that "there must be something more." *Nat'l Collegiate*, 96 F.

4th at 615. Here, there is nothing more. [JA 6–8]. And, in any event, Spring Creek would not be entitled to an extraordinary injunction of NLRB proceedings when the most it can obtain at final judgment is severance.

Third, the balance of the equities and the public interest factors, which merge when the government is a party, weigh decisively in favor of affirming the district court's denial of an injunction here. The NLRA creates no private right of action. Proceeding before the NLRB is the only option available to Spring Creek's employees for vindication of their NLRA rights. Depriving employees of this sole avenue for the peaceful resolution of labor disputes cannot serve the public interest, especially when Spring Creek may pursue these same claims in a court of appeals should the Board ultimately issue an adverse decision. And the widely applicable nature of Spring Creek's claims means that an injunction here would likely cause many NLRB proceedings within or connected to this Circuit to grind to a halt, allowing labor unrest to fester indefinitely. Accordingly, granting an injunction would undermine, not serve, the public interest.

STANDARD OF REVIEW

When reviewing the denial of a preliminary injunction, this Court reviews the district court's findings of fact for clear error, its conclusions of law *de novo*, and the ultimate decision for abuse of discretion. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). As this Court recently explained, "[p]reliminary

injunctions are not automatic. Rather, tradition and precedent have long reserved them for extraordinary situations." *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 198 (3d Cir. 2024), *cert. denied sub nom. Gray v. Jennings*, No. 24-309, 2025 WL 76443 (U.S. Jan. 13, 2025).

To obtain a preliminary injunction, a plaintiff must make "a clear showing" that it is "entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008), by establishing "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest," *id.* at 20. The third and fourth factors—harm to others and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Benisek v. Lamone*, 585 U.S. 155, 158–59 (2018) (per curiam) (explaining that balance of equities and public interest factors may overcome other two factors even in cases involving constitutional claims). Issuance of a preliminary injunction based on one factor alone would improperly "collapse[] the four factors into one." *Del. State Sportsmen's Ass'n*, 108 F.4th at 202.

ARGUMENT

I. As a threshold matter, the Norris-LaGuardia Act jurisdictionally bars the injunctive relief Spring Creek seeks.

Absent a statutory exception, Congress has jurisdictionally barred all "court[s] of the United States" from issuing injunctions "in any case involving or

growing out of a labor dispute." Norris-LaGuardia Act, 29 U.S.C. § 107; *see id.* § 101 *et seq*; *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 253 (1970).[4] This case "involve[s]" and "grow[s] out of" a labor dispute. 29 U.S.C. § 113(a). As Congress explained:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c).

Here, the Union filed a charge with the NLRB alleging, among other things, that it was entitled to represent certain of Spring Creek's employees for purposes of collective bargaining. [JA 49–52]. In other words, this case originated because of a "controversy . . . concerning the association or representation of persons in negotiating . . . conditions of employment." 29 U.S.C. § 113(c). Accordingly, "'the

[4] Owing to the abbreviated timeframe upon which this injunction request was briefed below and the complexity of other issues presented by Spring Creek (two of which it has abandoned on appeal, *see* n. 2, above), this issue was not raised below. Because the NLGA's jurisdictional requirements go to the district court's power to grant a request for injunctive relief, its application "can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). But, if necessary, the NLRB urges that this question be remanded to the district court to make particularized findings. As the party asserting jurisdiction, Spring Creek has the burden of showing that the relief sought is not subject to the NLGA's jurisdictional limitations. *See, e.g., Gould Elecs. Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000), *holding modified by Simon v. United States*, 341 F.3d 193 (3d Cir. 2003) (proponent bears burden of establishing federal subject-matter jurisdiction).

employer-employee relationship [is] the matrix of the controversy,'" and the NLGA must be applied. *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712–713 (1982) (quoting *Columbia River Packers Ass'n, Inc. v. Hinton*, 315 U.S. 143 (1942)); *Armco, Inc. v. United Steelworkers*, 280 F.3d 669, 679–80 (6th Cir. 2002) (NLGA is properly applied where the claim "would not exist but for the underlying [labor dispute]").[5]

It is of no import that Spring Creek's quarrel in the present action is nominally with the government and its procedures rather than an employee or

[5] Two district courts have recently found that the NLGA prohibited materially indistinguishable efforts to enjoin pending NLRB proceedings. *See Amazon.com Servs. LLC v. NLRB*, 2025 WL 466262, No. 2:24-cv-09564-SPG-MAA at *4 (C.D. Cal. Feb. 5, 2025) ("Although Plaintiffs assert constitutional challenges to the NLRB's authority, their claims nonetheless grow out of the current labor dispute with the Union, whose allegations spurred the current NLRB action against Plaintiffs"), *appeal docketed*, No. 25-886 (9th Cir. Feb. 11, 2025); *VHS Acquisition Subsidiary No. 7 v. NLRB*, No. 1:24-CV-02577 (TNM), 2024 WL 4817175, at *5 (D.D.C. Nov. 17, 2024) ("The [NLGA] has great breadth. It precludes jurisdiction when a suit merely 'grow[s] out of a labor dispute.' [The Plaintiff's] beef with the Board is due to its conflict with the Union.") (cleaned up)), *appeal dismissed by stipulation*, No. 24-5270 (D.C. Cir. Dec. 26, 2024). A third declined to reach the NLGA issue but stated that it was "unpersuaded" by arguments resisting the NLGA's applicability. *Nexstar Media, Inc. Grp. v. NLRB*, 746 F. Supp. 3d 464, 473 (N.D. Ohio 2024). These decisions are consistent with analogous circuit law. *See Lukens Steel Co. v. United Steelworkers*, 989 F.2d 668, 677 (3d Cir. 1993) (noting the Supreme Court has "consistently declined to construe [the term 'labor dispute'] narrowly"); *cf. AT&T Broadband, LLC v. Int'l Bhd. of Elec. Workers*, 317 F.3d 758, 760 (7th Cir. 2003) (Easterbrook, J.) ("That the arbitration is not *itself* a 'labor dispute' does not make this suit less one 'growing out of' a labor dispute.").

union. Norris-LaGuardia may not be construed so narrowly. "*Congress was intent upon taking the federal courts out of the labor injunction business* except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act." *Jacksonville Bulk Terminals*, 457 U.S at 712 (quoting *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960)); *see In re Trump Ent. Resorts, Inc.*, 534 B.R. 93, 105 (Bankr. D. Del. 2015) (declining to extend automatic bankruptcy stay to union boycott because of the limitations of the NLGA).[6]

Congress understood that NLRA disputes would be subject to Norris-LaGuardia's requirements; it included in Section 10 of the NLRA a limited exception to Norris-LaGuardia allowing injunctions *only* in relation to enforcement or review of final orders of the Board or upon the Board's application for temporary relief. 29 U.S.C. § 160(h). To countenance an injunction against *non-final* Board action would enlarge this limited exception in contravention of the NLGA's plain meaning. *See Buffalo Forge Co. v. United Steelworkers*, 428 U.S.

[6] The Supreme Court has recognized two exceptions to the NLGA's strict requirements: "1) those to accommodate the strong federal policy in favor of [collectively bargained] arbitration; and 2) those to reconcile Norris-LaGuardia with other federal statutes." *Lukens Steel*, 989 F.2d at 678. Spring Creek cannot point to a federal statute that would require reconciliation with Norris-LaGuardia because the injunctions sought here are "a judge-made remedy." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Such injunctive relief is "subject to express and implied statutory limitations." *Id*.

397, 407 (1976) (exceptions to Norris-LaGuardia's anti-injunction policy to accommodate other laws are to be construed narrowly).

And significantly, the relevant inquiry under Norris-LaGuardia is not whether the suit *itself* constitutes a labor dispute, but whether it "involved" or "gr[e]w out" of such a dispute. 29 U.S.C. § 107. A lawsuit need not be between an employer and an employee or a union to involve or grow out of a labor dispute. In *United Steelworkers v. Bishop*, 598 F.2d 408, 414 (5th Cir. 1979), the Fifth Circuit held that the NLGA prohibited an injunction in a replevin action requiring a strike-bound steel fabricating plant to return customer-provided steel to the customer. *Id.* at 410. "The injunction . . . did not directly address or enjoin union activity"; nor did it even "mention the strike" at the plant. *Id.* at 415. Even so, the Court found that the NLGA applied because of "the effect of an injunction on the labor dispute." *Id.* By relieving the fabricating plant of the risk of a potential suit by the customer seeking damages, the replevin injunction functionally "disarm[ed] the [u]nion . . . and altered the bargaining stance" between the employer and the union. *Id.* Thus, in *Bishop*, "[t]he fact that the labor dispute was between the employer . . . and its employees' [u]nion," while the case before the district court involved the employer and its customer, did not and "cannot control" for NLGA purposes. *Id.* at 414; *see Lee Way Motor Freight v. Keystone Freight Lines*, 126 F.2d 931, 933–34 (10th Cir. 1942) ("The labor dispute originating between plaintiff and the unions

thus projected itself into the relationship between defendants and their employees. Clearly the subject matter of plaintiff's action involved and grew out of a labor dispute, within the intent and meaning of the [NLGA]"); *Johnston Dev. Grp., Inc. v. Carpenters Loc. Union No. 1578*, 728 F. Supp. 1142, 1149 & n.10 (D.N.J. 1990) (in accepting stipulated dismissal, opining that future orders to enforce settlement that would restrict labor activity of nonparties to the agreement may run afoul of the NLGA).[7]

The fact that the instant litigation also involves the government and disputes of a constitutional character makes no difference. Even in cases under 42 U.S.C. § 1983, where constitutional rights and governmental parties are involved, injunctions that limit, rather than protect, employee rights are impermissible under

[7] The dispute here is unlike *In re Continental Airlines, Inc.*, 484 F.3d 173 (3d Cir. 2007). In that case, this Court found that the NLGA was not a barrier to an injunction against airline pilots from one of two merged airlines arbitrating claims pursuant to a defunct collective-bargaining agreement. *Id.* at 185. The pilots demanding arbitration were seeking an award against another group of pilots, not an employer. *Id.* at 184 (pilots admitted that they hoped to "use whatever award [they] receive[] against the Continental pilots to have those pilots bargain with Continental to share their seniority [with the pilots demanding arbitration]"). Because the dispute involved "one employee group's claims for money damages against another employee group[,]" the court concluded "the 'matrix' of this controversy cannot fairly be considered the 'employer-employee relationship.'" *Id*. Not so here, where an injunction would place a thumb on the scale on the side of an employer in its dispute with its employees and their union. And significantly, the award sought by the pilots in *Continental* was precluded by a bankruptcy discharge and the arbitration would have depleted assets of the estate, implicating important policies of another federal statute. *Id.* at 180, 185; *see Lukens Steel*, 989 F.2d at 678 (noting exception to NLGA to accommodate other federal statutes).

the NLGA. The Sixth Circuit explained this in *Armco,* 280 F.3d at 669. There, an employer (Armco) sued a union for breach of a collective-bargaining agreement, later adding local government officials and alleging a conspiracy to violate Armco's constitutional rights. *Id.* Armco sought entry of a consent decree negotiated with the government defendants enjoining the alleged conspiracy. *Id.* A Section 1983 injunction is permissible if it is "consistent with the purpose of the [NLGA]: to protect workers in exercising their organizing powers." 280 F.3d at 681 (citing *Reuter v. Skipper*, 4 F.3d 716, 720 (9th Cir. 1993)). But in *Armco*, the consent decree was found impermissible because it purported to restrict the union's power to effect change in the underlying labor dispute. *Id.*

This Court thus must consider the origin of the dispute and the practical effect of injunctive relief, rather than the plaintiff's cause of action or the identity of the parties. Otherwise, for example, "an employer could be relieved of much of the economic impact of a strike without actually enjoining the strike itself." *Bishop*, 598 F.2d at 414. Here, even if Spring Creek is suing the NLRB and its officers, it is nonetheless attempting to relieve itself of particular NLRA obligations that the NLRB can order it to follow, namely the duty "to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5). That cannot be done by means of a preemptive lawsuit like this one. Rather, Spring Creek can directly challenge any such final Board order—and any alleged

constitutional infirmities that led to that order—in a petition for review under Section 10(f) of the NLRA. 29 U.S.C. § 160(f); *see Myers*, 303 U.S. at 49 (reversing preliminary injunctions and observing that Section 10(f) review can include "all questions of the jurisdiction of the Board and the regularity of its proceedings, [and] all questions of constitutional right or statutory authority" (quoting *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 47 (1937))).

Spring Creek also fails to satisfy a separate standard established by Norris-LaGuardia—that even where injunctive relief is permitted under that statute, the applicant must both [1] "comply with any obligation imposed by law" *and* [2] "make every reasonable effort to settle the dispute," including through government dispute-resolution machinery. 29 U.S.C. § 108; *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27, v. Toledo, P. & W.R.R.,* 321 U.S. 50, 56–57 (1944). These requirements are conjunctive. *Id.* And they apply even if the asserted basis for the injunction arose after the labor dispute. *See id.* at 56 (finding that "[i]f [statutory procedures] had been used, it would have averted . . . the need for an injunction").[8]

Here, Spring Creek's refusal to exhaust an administrative avenue to resolve a controversy—here, the NLRB's ULP proceedings—constitutes a bar to injunctive

[8] This provision was added to ensure applicants for injunctive relief operated with "clean hands" and was intended to deny such relief to those who "deliberately and steadfastly" refused to utilize statutory procedures. *Trainmen*, 321 U.S. at 66.

relief. *See Lukens Steel*, 989 F.2d at 678 (injunction precluding labor arbitration contravened 29 U.S.C. § 108); *BNSF Ry. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers—Transp. Div.*, 973 F.3d 326, 342 (5th Cir. 2020) (failure to pursue proceedings under Railway Labor Act precluded injunction).[9] And Spring Creek has failed to make "every reasonable effort" to resolve its differences with its employees—and its employees' union—before invoking the equitable powers of a federal court. 29 U.S.C. § 108. Indeed, Spring Creek's position appears to be that it is entitled to an injunction against the operation of the very "obligation[s] imposed by law" it is jurisdictionally obligated to exhaust prior to seeking injunctive relief. *Id.*

Because Spring Creek cannot meet its burden to demonstrate any exception to Norris-LaGuardia's limitations, it is barred from obtaining injunctive relief. Accordingly, the district court's denial of Spring Creek's motion for a preliminary injunction can be affirmed on this ground alone.

[9] Consistent with these limitations, courts may not issue injunctions preventing unions or employees from resolving differences with an employer in non-judicial forums. *See Lukens Steel*, 989 F.2d at 676–79; *AT&T Broadband v. IBEW Loc. 21*, 317 F.3d 758, 759–62 (7th Cir. 2003); *Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union*, 22 F.3d 8, 11–13 (1st Cir. 1994); *Camping Constr. Co. v. Iron Workers*, 915 F.2d 1333, 1342–46 (9th Cir. 1990); *In re Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 74–76 (D.C. Cir. 1983) (each holding that the NLGA applies to employer-filed complaints seeking to enjoin labor arbitrations).

II. The district court correctly denied Spring Creek's request for a preliminary injunction.

A. *Spring Creek is unlikely to succeed on its claims.*

Spring Creek challenges the constitutionality of the statutory removal restrictions that apply to NLRB Board members, 29 U.S.C. § 153(a), and administrative law judges, 5 U.S.C. § 7521(a). Br. 7–8.[10] As the Sixth Circuit has remarked, "[t]hese separation of powers questions are both complicated and consequential, but [a court] need not address them at the preliminary injunction stage." *YAPP USA Auto. Sys., Inc. v. NLRB*, No. 24-1754, 2024 WL 4489598, at *2 (6th Cir. Oct. 13, 2024), *emergency application for writ of injunction denied*, No. 24A348, 2024 WL 4508993, at *1 (U.S. Oct. 15, 2024) (Kavanaugh, J., in chambers). Instead, Spring Creek's removal claims fail at the threshold because it cannot show it was "cause[d] harm" by an officer serving under an unconstitutional removal provision. *Collins v. Yellen*, 594 U.S. 220, 259–60 (2021).[11]

[10] References to Spring Creek's principal brief in this matter, ECF 22, are to "Br. X," referring to the document's internal pagination.

[11] The Department of Justice recently notified Congress that it would not continue to defend the constitutionality of the multiple layers of removal restrictions for administrative law judges in 5 U.S.C. § 7521, or the for-cause removal protections that apply to members of multi-member regulatory commissions, including the NLRB. *See* Letter from Sarah M. Harris, former Acting Solicitor General, to the Honorable Mike Johnson, Speaker of the United States House of Representatives

An unlawful removal restriction does not deprive properly appointed officers of "the authority to carry out the functions of the[ir] office[s]." *Id.* at 258. So long as they are validly appointed, officials are not exercising power that they do "not lawfully possess." *Id*. Here, there is no dispute concerning the appointment of the NLRB's ALJs and Board members. Thus, to state a claim that the removal provisions applicable to those officials are unconstitutional, Spring Creek must show that the provisions "cause[d it] harm." *Id.* at 259–60. In *Collins*, the Supreme Court identified two "hypotheticals" under either of which a claimant might show causal harm: (1) where the President attempts to remove an official "but [is] prevented from doing so by a lower court decision holding that he [does] not have 'cause' for removal;" and (2) where "the President [makes] a public statement expressing displeasure with actions taken by [an official] and . . . assert[s] that he would remove the [official] if the statute did not stand in the way." *Id.*

This Court and the other circuit courts that have addressed the issue unanimously hold that challengers must show that an allegedly unconstitutional

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(Feb. 20, 2025), https://www.justice.gov/oip/media/1390336/dl?inline; Letter from Sarah M. Harris, former Acting Solicitor General, to the Honorable Mike Johnson, Speaker of the United States House of Representatives (Feb. 12, 2025), https://www.justice.gov/oip/media/1389526/dl?inline. Conversely, however, as noted above, the NLRB is presently prohibited by a court order from "denying" Member Wilcox's authority to function in office. Consistent with these requirements, in opposing Spring Creek's request for preliminary injunctive relief, the NLRB does not rely on any arguments defending the constitutionality of the tenure provisions at issue here.

removal provision inflicted actual harm to obtain relief. *See, e.g.*, *NLRB v. Starbucks Corp.*, 125 F.4th 78, 88–89 (3d Cir. 2024) (ALJ case); *Nat'l Collegiate*, 96 F.4th at 614–15 (CFPB Director); *Rodriguez v. Soc. Sec. Admin.*, 118 F.4th 1302, 1315 (11th Cir. 2024) (Social Security Commissioner, Appeals Council, and ALJ); *Leachco, Inc. v. CPSC*, 103 F.4th 748, 757–58 (10th Cir. 2024) (CPSC commissioners and ALJ), *cert. denied*, No. 24-156, 2025 WL 76435 (Jan. 13, 2025); *Bhatti v. Fed. Hous. Fin. Agency*, 97 F.4th 556, 559–62 (8th Cir. 2024) (FHFA Director); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023) (ALJ case); *CFPB v. L. Offs. of Crystal Moroney, P.C.,* 63 F.4th 174, 180 (2d Cir. 2023) (CFPB Director), *cert. denied*, 144 S. Ct. 2579 (2024); C*alcutt v. FDIC*, 37 F.4th 293, 318–20 (6th Cir. 2022) (FDIC Board members and ALJ), *rev'd per curiam on other grounds*, 598 U.S. 623 (2023); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1138 (9th Cir. 2021) (ALJ case).[12] As the Fifth Circuit

[12] This Circuit's *Starbucks* decision analyzed the causal-harm requirement as relating to Article III standing. 125 F.4th at 88. The NLRB respectfully disagrees. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 217 (2020) (holding that allegedly unconstitutional removal restrictions create a "here-and-now injury" sufficient to confer standing upon "private parties aggrieved by an official's exercise of executive power"). Rather, the lack of causal harm means that a removal-restrictions challenger has failed to state a claim and should therefore lose on the merits. *See Collins v. Dep't of Treasury*, 83 F.4th 970, 983 n.12 (5th Cir. 2023); *cf. YAPP*, 2024 WL 4489598, at *3 (explaining that the failure to show causal harm "could mean that [a challenger] is not likely to succeed on the merits or that [the challenger] has not shown that it will suffer irreparable harm"). But regardless of how the causal-harm analysis is considered—whether as an element of standing, an

has explained, this requires a showing of three demanding requirements: "(1) a substantiated desire by the [appointing official] to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor." *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) ("*CFSA*"), *reversed and remanded on other grounds*, 601 U.S. 416 (2024), *opinion reinstated in relevant part*, 104 F.4th 930 (5th Cir. 2024), *petition for cert. filed*, No. 24-969 (Mar. 7, 2025).

Given this high standard, efforts to halt ongoing agency proceedings based on allegedly unconstitutional removal restrictions have repeatedly failed. For example, in *Leachco*, the Tenth Circuit affirmed a district court's denial of a preliminary injunction seeking to stop a CPSC proceeding because the challenger in that case could not show that "the challenged removal provisions actually impacted, or will impact, the actions taken by the [agency] against it." 103 F.4th at 757. Similarly, the Sixth Circuit declined to enjoin a pending NLRB proceeding on removability grounds because the plaintiff could not show that either ALJs' or Board members' removal protections caused any harm. *YAPP*, 2024 WL 4489598,

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indispensable component of the merits, or an aspect of irreparable harm—Spring Creek is not entitled to injunctive relief because causal harm is entirely absent.

at *2–3.[13]

Multiple district courts, including in the instant case, have applied causal-harm principles to deny various forms of relief sought by removal-restrictions challengers in cases involving the NLRB. *See, e.g.*, SA 22–27 (*Spring Creek Rehab. & Nursing Ctr. LLC v. NLRB*, No. 24-09016, 2024 WL 4690938, at *3–4 (D.N.J. Nov. 6, 2024) (denying motion for injunction pending appeal)); *Avila v. NLRB*, No. CV 24-1688 (RC), 2025 WL 859223, at *7–8 (D.D.C. Mar. 19, 2025) (dismissing complaint); *Amazon*, 2025 WL 466262, at *5–6 (denying motion for preliminary injunction); *HonorHealth v. NLRB*, No. CV-24-03009-PHX-DJH, 2024 WL 4769772, at *3–4 (D. Ariz. Nov. 13, 2024) (denying motion for temporary restraining order); *Ares Collective Grp. LLC v. NLRB*, No. CV-24-00517-TUC-SHR, 2024 WL 4581436, at *2 (D. Ariz. Oct. 25, 2024) (denying motion for temporary restraining order); *see also Kerwin v. Trinity Health Grand Haven Hosp.*, No. 1:24-cv-445, 2024 WL 4594709, at*4–5 (W.D. Mich. Oct. 25, 2024) (denying motion for judgment on the pleadings filed by removal-restrictions

[13] Several courts of appeals, including this Court in this very case, have summarily rejected removability claims as grounds to enjoin administrative proceedings pending appeal. *See* JA000015 (Order, *Spring Creek Nursing & Rehab. Ctr. LLC v. NLRB*, No. 24-3043 (3d Cir. Nov. 6, 2024), ECF No. 9); Order, *Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 20, 2025); Order, *H&R Block, Inc. v. Himes*, No. 24-2626 (8th Cir. Sept. 13, 2024), *reconsideration en banc denied* (8th Cir. Oct. 15, 2024);Order, *Heldreth v. Garland*, No. 24-4128 (9th Cir. Aug. 27, 2024), ECF No. 8.

challenger), *appeal docketed*, No. 24-1975 (6th Cir. Nov. 5, 2024); *Cortes v. NLRB*, No. 1:23-cv-02954, 2024 WL 1555877, at *7 (D.D.C. Apr. 10, 2024) (dismissing the plaintiffs' complaint for injunctive and declaratory relief), *appeal docketed*, No. 24-5152 (D.C. Cir. June 10, 2024).

Here, Spring Creek has not shown causal harm stemming from the removal restrictions. As an initial matter, there is no evidence that the Board desires to remove any of its ALJs or that the Board perceives that it is unable to effectuate such removals.[14] Additionally, Spring Creek points to nothing which would demonstrate a causal nexus between the tenure protections it challenges and the administrative case pending against it. In other words, Spring Creek has not even attempted to show that its case would be processed or decided differently under a different ALJ or complement of Board members. *See Starbucks*, 125 F.4th at 88 (rejecting argument that ALJ "might have altered his behavior" if removal protections were eliminated as "simply speculation").

The rapidly unfolding litigation surrounding President Trump's removal of

[14] It is, of course, well-settled that the power to appoint implies the power to remove. *Myers v. United States*, 272 U.S. 52, 161 (1926). Accordingly, for purposes of causal harm, because the President appoints Board members, the potentially removing official for those Board members is the President. Likewise, because the Board appoints ALJs, the Board members are the potentially removing officials for ALJs.

Member Wilcox does not change the analysis.[15] Even though the *Wilcox* Order is presently in effect, Spring Creek *still* cannot show causal harm because it has not alleged any facts indicating that its ULP case would be processed or decided differently. *See Nat'l Collegiate*, 96 F.4th at 615 ("There is no notion . . . that the CFPB would have taken this action but for the President's inability to remove the Director."); *Bhatti*, 97 F.4th at 556 (affirming dismissal of case where plaintiffs failed to "plausibly allege that the inability to remove [an officer] frustrated the administration's goals" with respect to a specific issue); *Collins v. Dep't of Treasury*, 83 F.4th at 983–84 (rejecting as "speculation" plaintiffs' complaint allegations that "only conceivably give rise to a conclusion" that the plaintiffs would have received different treatment had an officer been removed); *CFSA*, 51 F.4th at 633 (finding plaintiffs failed to demonstrate harm where they could not show that but for removal restriction, the President would have removed agency director *and* agency "would have acted differently" in promulgating a rule). Since Spring Creek has not met the very high bar of showing that the challenged removal

[15] Contrary to Spring Creek's assertions, Br. 20, President Trump's removal of Wilcox plainly fails to satisfy the second *Collins* hypothetical. This is because President Trump and the Department of Justice have made their position clear that the removal restrictions covering Board members are unconstitutional and unenforceable, which demonstrates that the President will *not* treat them as obstacles to his ability to exercise control over the Executive Branch. In other words, there is no perceived inability to remove. *Nat'l Collegiate*, 96 F.4th at 615; *Collins*, 594 U.S. at 259–60.

restrictions caused harm, the district court correctly found that Spring Creek is not entitled to a preliminary injunction. [JA 7–10].

Spring Creek ignores its obligations under *Collins*'s causal-harm rubric and argues instead that the district court's analysis was wrong because it "did not address any of the Fifth Circuit cases . . . cited by Spring Creek." Br. 17. The cases Spring Creek refers to are a footnote in *Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021), and a handful of outlier decisions reached by Texas-based district courts, all of which are on appeal. *See Space Expl. Techs. Corp. v. NLRB*, 741 F. Supp. 3d 630, 639 (W.D. Tex. 2024) ("*SpaceX*"); *Energy Transfer, LP v. NLRB*, 742 F. Supp. 3d 755, 759–61 (S.D. Tex. 2024); *Aunt Bertha v. NLRB*, No. 4:24-CV-00798-P, 2024 WL 4202383, at *4 (N.D. Tex. Sept. 16, 2024).[16] The trouble for Spring Creek is that those cases are either inapposite or misapply the law.[17]

The Fifth Circuit's en banc decision in *Cochran* does not assist Spring Creek. *Cochran* was a case about jurisdiction, not entitlement to relief. The Fifth

[16] Appeals from these decisions were consolidated before the Fifth Circuit under lead case number 24-50627. The matter was argued on February 5, 2025.

[17] Spring Creek, at Br. 17, also obliquely refers to its prior reliance on an unpublished, per curiam order granting an administrative stay in *Amazon.com Services LLC v. NLRB*, No. 24-50761 (5th Cir. Sept. 30, 2024), ECF No. 46-2. That order simply gives the Fifth Circuit additional time to decide a pending motion for injunction pending appeal and expressly states that "[n]othing in this order is to be construed as a comment on the ultimate merits" of the underlying case. *Id.* at 2.

Circuit recognized as much, stating that the "case presents only the issue of whether the Exchange Act divested district court jurisdiction over claims that SEC ALJs are unconstitutionally insulated from the President's removal power; *our holding extends no further.*" 20 F.4th at 211 (emphasis added); *see also FTC v. U.S. Anesthesia Partners, Inc.*, No. 24-20270, 2024 WL 5003580, at *3 (5th Cir. Aug. 15, 2024) (unpublished order dismissing appeal) (explaining that *Axon*, 598 U.S. 175—*Cochran*'s companion case before the Supreme Court—"is a case about the original jurisdiction of federal courts under 28 U.S.C. § 1331").

Spring Creek points to footnote 16 of the en banc majority's opinion in *Cochran* as support for its position that causal harm principles do not apply "where only prospective relief is sought in a removal authority case." Br. 11.[18] But that footnote simply responds to—and rejects—the dissenting opinion's argument that improper appointment of an ALJ creates a "more serious injury" than improper restrictions on the removal of an ALJ. *Id.* at 244 (dissenting opinion). Conspicuously absent from footnote 16 is any mention of retrospective or prospective relief or whether *Collins* permits plaintiffs to obtain prospective relief without first showing causal harm. Indeed, just ten months later, the Fifth Circuit—

[18] Spring Creek claims that a "circuit split" exists on this point. Br. 21. To the contrary, as this Court has observed, "courts of appeal have declined to distinguish between retrospective and prospective relief when applying *Collins*." *Starbucks*, 125 F.4th at 88. *See* discussion below at 31–32.

with a panel of three circuit judges who had joined in the *Cochran* en banc majority—issued *CFSA*, which held that there is no distinction between retrospective and prospective relief under *Collins*. *See* 51 F.4th at 631.[19]

Nor do the Texas-based district court decisions help Spring Creek. *Energy Transfer* made the same mistake Spring Creek repeats here by reading *Cochran* to mean that the *Collins* injury requirement is "readily satisfied," 742 F. Supp. at 761, whenever a party alleges it is "simply being made to participate in an unconstitutional proceeding," *id.* at 760 n.4. Since *Aunt Bertha* simply follows *Energy Transfer* without further analysis, that decision should not be followed either. 2024 WL 4202383, at *3. And in *SpaceX*, the district court erroneously held that *Collins* was inapplicable where there is a live claim for prospective relief. 741 F. Supp. at 639. But, as noted, the Fifth Circuit had previously held that *Collins* "did not rest on a distinction between prospective and retrospective relief." *CFSA*, 51 F.4th at 631. And every other court of appeals to have addressed the issue agrees. *See Leachco*, 103 F.4th at 757 ("*Collins*' relief analysis applies to both retrospective and prospective relief."); *YAPP*, 2024 WL 4489598, at *3 (holding that the distinction between retrospective and prospective relief "does not matter");

[19] Spring Creek characterizes the *Cochran* footnote as being "consistent with" *Seila Law*. But in the same breath, Spring Creek concedes that *Seila Law* discusses only "the causation required for *standing*" and not whether a removal protection challenger is likely to succeed on the merits. Br. 18 (emphasis added).

Crystal Moroney, 63 F.4th at 180–81 (explaining that *Collins* "applies with equal force regardless of the relief sought by the party").

Because Spring Creek cannot show causal harm, it cannot succeed on the merits of its removability claims. Thus, the district court's denial of a preliminary injunction can be affirmed on this ground.

B. *Spring Creek has not met its burden to show irreparable harm.*

1. The mere allegation of an *Axon* claim is insufficient to demonstrate irreparable harm.

The Supreme Court has repeatedly stated that the "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray,* 415 U.S. 61, 88 (1974). Put another way, to obtain the injunction it seeks, Spring Creek would have to show the district court would be unable to "decide the case or give [Plaintiff] ... meaningful relief." *Del. State Sportsmen's Ass'n*, 108 F.4th at 205. This harm must either be "immediate" "or a presently existing actual threat." *Cont'l Grp., Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980). "Establishing a risk of irreparable harm is not enough." *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987).[20]

[20] Notably, in the limited circumstances where injunctions are permissible under the NLGA, the court must satisfy itself that "substantial and irreparable injury to complainant's property will follow" in absence of relief and that the "complainant has no adequate remedy at law." 29 U.S.C. § 107; *see Amazon*, 2025 WL 466262, *5 (finding that this showing was not made).

Spring Creek largely ignores this indispensable element of injunctive relief. This is fatal to its injunction bid. *S. Camden Citizens in Action v. N.J. Dep't of Env't Prot.*, 274 F.3d 771, 777 (3d Cir. 2001) (failure to demonstrate likelihood of success or irreparable harm "must necessarily result in the denial of a preliminary injunction").

The constitutional nature of Spring Creek's claims do not fill the gap. "Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Del. State Sportsmen's Ass'n*, 108 F.4th at 203 (cleaned up).[21] This is because "[e]quity is contextual. It turns on facts." *Id.* at 205.[22] Therefore, "one seeking relief on that ground must further show that he is entitled to it on some clear ground of equity jurisdiction." *Id*.

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[21] *See, e.g.*, *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1337 (D.C. Cir. 2024) (injunction not warranted based on Appointment's Clause claim because challenger "ha[d] not demonstrated that it faces irreparable harm stemming from participating in FINRA's hearing"), *petition for cert. filed*, No. 24-904 (Feb. 20, 2025); *Leachco*, 103 F.4th at 753 (unconstitutionally structured proceeding is not irreparable harm); *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012) ("[E]quitable relief depends on irreparable harm, even when constitutional rights are at stake."); *Richmond Hosiery Mills v. Camp*, 74 F.2d 200, 200 (5th Cir. 1934) (parties are not entitled to injunctive relief "merely because an act is unconstitutional"); *accord Space Expl. Techs., Corp. v. NLRB*, 129 F.4th 906, 910 (5th Cir. 2025).

[22] The only cases where constitutional claims may support a presumption of irreparable harm are ones involving First Amendment rights or personal privacy interests. *See, e.g., Elrod v. Burns*, 427 U.S. 347 (1976). Such claims are not present here.

But there are no facts or circumstances supporting Spring Creek's claim of irreparable harm here. Instead, Spring Creek argues that an administrative proceeding suffering from alleged constitutional defects necessarily inflicts such harm on unwilling participants. That broad proposition was rejected nearly 90 years ago. *See Myers*, 303 U.S. at 51 (rejecting a similar argument that "the mere holding of the prescribed administrative hearing would result in irreparable damage"). And the argument has not done any better in modern times. Ultimately, as the Fifth Circuit recently observed, "defending charges brought by an agency does not constitute a 'serious, perhaps irreparable, consequence.'" *Space Expl. Techs*, 129 F.4th at 910 (quoting *EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 133 (5th Cir. 1991)). Thus, the district court below correctly rejected Spring Creek's theory of harm, finding Spring Creek's "mere assertion of a constitutional challenge to the structure of a government agency" did not entitle it to preliminary injunction absent evidence of irreparable harm stemming from alleged constitutional injuries. [JA 9].

Lacking the requisite evidence of irreparable harm, Spring Creek feebly attempts to argue that the Supreme Court's jurisdictional holding in *Axon*, 598 U.S. at 185, obviates the need to show irreparable injury, Br. 17–21. This "overreads *Axon*." *Alpine*, 121 F.4th at 1335. As the D.C. Circuit recently explained, *Axon* "did not speak to what constitutes irreparable harm for purposes of the extraordinary

remedy of a preliminary injunction." *Alpine*, 121 F.4th at 1336. And it certainly "does not say that every agency proceeding already underway must immediately be halted because of an asserted constitutional flaw." *Id.*; *see also Leachco*, 103 F.4th at 765 ("The Supreme Court's jurisdictional analysis in *Axon* did not change the relief analysis required under *Collins*."); *YAPP*, 2024 WL 4489598, at *3 ("As the district court correctly noted, *Axon* 'did not address issues of relief or injury.'"); *Amazon*, 2025 WL 466262, at *6 (noting "it is well-settled that being subjected to an unconstitutionally structured agency based on removal limitations, alone, does not inherently establish a likelihood of irreparable harm").

To be sure, *Axon* states that an "illegitimate proceeding, led by an illegitimate decisionmaker" produces a "here-and-now injury" that "is impossible to remedy once the [administrative] proceeding is over." 598 U.S. at 191. But the combined effect of those observations is that a party subjected to such proceedings has Article III standing to challenge a removal restriction, *see* above at n. 12, and a district court has jurisdiction over the challenge even if a statutory review scheme "specif[ies] a different method to resolve claims about agency action," 598 U.S. at 185. The Supreme Court in *Collins* explicitly warned against treating its recognition of a "here-and-now injury" arising from structural claims as sufficing to establish "a party's entitlement to relief based on an unconstitutional removal restriction." 594 U.S. at 258 n.24; *see Leachco*, 103 F.4th at 759 ("We will follow

the Supreme Court's words of caution when interpreting the same 'here-and-now injury' language from *Axon*—we will not misunderstand what was said about jurisdiction in *Axon* "as a holding on a party's entitlement to relief based on an unconstitutional removal provision." (quoting *Collins*, 594 U.S. at 258 n.24)).

At bottom, then, *Axon* determined where and when a plaintiff can challenge removal protections. But it did not erase what a plaintiff needs to prove to enjoin an ongoing proceeding. Because Spring Creek has presented no independent proof—or even significant evidence—of irreparable harm, the district court correctly denied it an injunction.

2. Preliminary injunctive relief is unavailable where severance can resolve the threat of appearing before an unconstitutionally insulated adjudicator.

Even assuming Spring Creek could meet the burden to prevail on its claims under *Collins*—which it has not attempted to do—the availability of an adequate statutory remedy would preclude injunctive relief. *TD Bank N.A. v. Hill*, 928 F.3d 259, 282 (3d Cir. 2019). There is "a strong presumption of severability," under which courts "invalidate[] and sever[] unconstitutional provisions from the remainder of the law rather than raz[e] whole statutes or Acts of Congress." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 625, 627 (2020). Generally, statutes are severable if "the remainder of the law is capable of functioning independently and thus would be fully operative as a law." *Id.* at 630. And "it is

fairly unusual for the remainder of a law not to be operative." *Id.* at 628. Should the district court find the removal restrictions at issue to be unconstitutional, it could sever the offending portions of the relevant statutes.

"When Congress has expressly provided a severability clause, [the Court's] task is simplified." *Seila Law*, 591 U.S. at 234. Here, Congress provided such a clause in the NLRA. 29 U.S.C. § 166. And severance is how the Supreme Court has repeatedly dealt with unlawful removal protections. *See Collins*, 594 U.S. at 257–60; *Seila Law*, 591 U.S. at 232–38; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508–10 (2010).[23] In *Free Enterprise Fund*, the Court found the Public Company Accounting Oversight Board's ("PCAOB") removal protections unconstitutional, but it rejected the plaintiffs' attempt to enjoin the PCAOB's operations and instead severed the offending statutory provisions, leaving the members of the PCAOB freely subject to removal by the Securities and Exchange Commission. 561 U.S. at 508, 513. Likewise, in *Seila Law*, the Court found the removal protections for the Director of the Consumer Financial Protection Bureau (CFPB) unconstitutional. 591 U.S. at 232. But it did not limit any of the CFPB's operations, either generally or as exercised in that particular case. Instead, it severed the Director's removal protection, noting that "[t]he provisions of the

[23] It is not necessary for this Court to decide now precisely how severance would operate at final judgment in order to affirm.

[statute] bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction" and that "[t]hose provisions are capable of functioning independently." *Id.* at 235.

Because severance would be the appropriate final remedy, Spring Creek is not entitled to an injunction (preliminary or otherwise) of the administrative proceedings. *See Space Expl. Techs. Corp. v. Bell*, 701 F. Supp. 3d 626, 635 (S.D. Tex. 2023) (holding that the plaintiff "ha[d] not shown it is entitled to an injunction instead of severance on its removal claim"); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (when "the relief sought produces a confrontation with one of the coordinate branches of the Government," the "framing of relief" may be "no broader than required" to address any "concrete injury"). Issuing an injunction at this stage of the case would afford Spring Creek a greater remedy than it could obtain at final judgment, incentivizing not only copycat lawsuits but also dilatory tactics to avoid a final judgment that would cause the preliminary injunction to expire.

***

Spring Creek has not shown irreparable harm or entitlement to a remedy beyond severance. Under these circumstances, enjoining the NLRB's

administrative proceedings against Spring Creek is unnecessary to preserve the district court's ability to grant effective final relief. *See Del. State Sportsmen's Ass'n*, 108 F.4th at 200–01. Therefore, the district court's denial of preliminary injunctive relief should be affirmed.

C. *Should this Court reach the public interest and the balance of the equities, these factors further counsel against an injunction.*

In denying Spring Creek's request for a preliminary injunction, the district court did not address the public-interest and balance-of-the-equities factors, which merge here. Instead, it found Spring Creek's failure to establish irreparable harm sufficient. [JA 6–9]. Nevertheless, this final factor weighs heavily against issuing the extraordinary relief Spring Creek requested. The balance-of-harms and public-interest inquiry is not a mere formality; if a plaintiff's showing there is weak, injunctive relief should be denied. *Benisek*, 585 U.S. at 158–61. As this Court recently held, the four-factor test for injunctive relief is not a "mechanical algorithm." *Del. State Sportsmen's Ass'n*, 108 F.4th at 203. While a court "must weigh all the factors before granting relief," a movant's inability to satisfy "any one factor may [be] reason enough to . . . deny[] an injunction." *Id*; *see also id.* at 202–03 (even assuming irreparable harm is established, balance of equities and public interest are "independent grounds" to deny relief without reaching the merits).

Halting duly enacted laws, as Spring Creek requests, threatens serious harm to the public. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). "[G]reat weight" should be given to "the fact that Congress already declared the public's interest and created a regulatory and enforcement framework." *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003) (cleaned up); *see also Del. State Sportsmen's Ass'n*, 108 F.4th at 206 (concluding that, in the context of a request for preliminary injunction, "[w]ithout the clarity of a full trial on the merits, . . . we must err on the side of respecting state sovereignty").

The NLRA was enacted in 1935 to help pull the country out of the Great Depression by diminishing the harm of labor unrest, and it exclusively empowers the NLRB to protect the "fundamental right" of employees to engage in union-related or other concerted activity "without restraint or coercion." *Jones & Laughlin*, 301 U.S. at 33. Frustration of Congress's intent to protect the NLRA's "public rights," *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 366 (1940), would be especially damaging here, given that the NLRA's procedures are the sole mechanism for enforcing the NLRA, *Nathanson v. NLRB*, 344 U.S. 25, 27 (1953).

In other words, there is no private right of action for employees under the NLRA; only the NLRB can provide a remedy for Spring Creek's employees, should the alleged ULPs be proven. Depriving these employees of the only avenue to vindicate their longstanding NLRA rights cannot serve the public interest, especially when Spring Creek may obtain an adequate remedy in a court of appeals if the Board ultimately issues an adverse decision. *See above* at 4, 19–20.

Even a temporary delay in the NLRB's proceedings could harm Spring Creek's employees and their union representative in meaningful ways. Delay raises the likelihood that, in the interim, "records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *Loc. Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419 (1960) (cleaned up) (quoting H.R. Rep. No. 80-245, at 40 (1947)). Delay may also irreparably aggravate employee disaffection with the Union, since unremedied refusals to bargain—like the ones alleged in the ULP complaint against Spring Creek—tend to "discredit the [labor] organization in the eyes of the employees." *Karp Metal Prods. Co.*, 51 NLRB 621, 624 (1943), *quoted in Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011); *see also HTH Corp.*, 650 F.3d at 1362 ("[V]iolations of § 8(a)(5), continuation of that unfair labor practice, failure to bargain in good faith, has long been understood as likely causing an irreparable injury to union representation."); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996)

("The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable."). Workers, who will lose critical workplace protections if the NLRB is indefinitely enjoined from fulfilling its statutory mandate, cannot fairly be treated as collateral damage to this proceeding.

Furthermore, if Spring Creek's position were accepted, then nearly every ULP case connected to this Circuit would be susceptible to indefinite injunctions. ALJs and Board members participate in every contested ULP case, *see* 29 U.S.C. § 160(b)-(c), so the arguments Spring Creek advances in this litigation are available to every ULP respondent. Therefore, enjoining Spring Creek's administrative proceeding would likely result in the unabated "burdening or obstructing [of] commerce" that Congress explicitly enacted the NLRA to prevent. 29 U.S.C. § 151.

Spring Creek's assertion, Br. 35–36, that a preliminary injunction "will do the NLRB no harm whatsoever" completely ignores the aforementioned harm to the employees and the public that is caused by delaying NLRB proceedings.[24] Its

[24] Spring Creek also suggests, Br. 36, that the time it took for the NLRB to investigate the allegations contained in the ULP charges proves that there is no harm by further delaying proceedings. The NLRB, however, processed and investigated the allegations with all reasonable diligence. In any event, the Supreme Court has flatly rejected the notion that "the consequences of [NLRB] delay, even if inordinate" should fall "upon wronged employees to the benefit of wrongdoing employers." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969).

argument, moreover, that that the government suffers no harm from enjoining unconstitutional proceedings is incorrect, because as *Collins* teaches, removal restrictions, even if unconstitutional, do not affect the power of lawfully appointed officers to act. *See* above at 23–27. Accordingly, for all the foregoing reasons, the district court's denial of injunctive relief to Spring Creek can also be affirmed solely on balance-of-harms grounds.[25]

CONCLUSION

This Court should affirm the district court's denial of Spring Creek's motion for a temporary restraining order and preliminary injunction.

[25] Spring Creek notes that the Board "cannot take final action" unless it has a quorum. Br. 36. But, by virtue of the *Wilcox* Order, the Board recognizes that it has three sitting members—enough to constitute a quorum, 29 U.S.C. § 153(b)—as of the date this brief is submitted. See NLRB, *The Board*, https://www.nlrb.gov/about-nlrb/who-we-are/the-board (reflecting three sitting members) (last visited Apr. 7, 2025). And contrary to Spring Creek's suggestion that an injunction could not harm a quorum-less Board, Br. 36, such an injunction would delay the underlying administrative case from reaching a reconstituted Board and the members' respective staffs.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to L.A.R. 28.3(d) and 46.1(e), I hereby certify that I am a member in good standing of the State Bar of Illinois and am representing an agency of the United States in the present case.

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Dated this 7th day of April, 2025.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface, type-style, and length requirements in Federal Rules of Appellate Procedure 27(d)(2)(A) and 27(d)(1)(E), because it contains 10,991 words, excluding those exempted by Federal Rule of Appellate Procedure 32(f), which are proportionally spaced, 14-point Times New Roman font, and the word-processing software used was Microsoft Word for Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of the filing to all counsel of record.

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