United States Court of Appeals

for the

Third Circuit

Case No. 24-3043

SPRING CREEK REHABILITATION AND NURSING CENTER LLC,
DBA 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,

1199SEIU UNITED HEALTHCARE WORKERS EAST,

Intervenor-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 2-24-CV-09016,
THE HONORABLE JAMEL K. SEMPER

BRIEF FOR INTERVENOR-APPELLEE

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ISSUES PRESENTED

1. Whether National Labor Relations Board ("NLRB" or "Board") Member removal protections, 29 U.S.C. §153(a), or Administrative Law Judge ("ALJ") removal protections, 5 U.S.C. §7521, violate Article II of the Constitution. *See* JA2; JA25-30; JA84-89; JA129-138; JA178-84; JA206-214.

2. Whether a plaintiff seeking preliminary injunctive relief to enjoin an ongoing NLRB proceeding based on an Article II challenge to removal protections for NLRB Members and ALJs must establish causal harm to state a claim. *See* JA2; JA6-9; JA99-101; JA122-28; JA146-49; JA168-176; JA204-06.

3. Whether the President's attempted removal of Member Wilcox, after the preliminary injunction was denied, establishes causal harm as to NLRB Member and ALJ removal protections. *See* JA2; JA6-9; JA99-101; JA122-128; JA146-49; JA168-76; JA204-06.

4. Whether, if constitutionally invalid, Board Member and ALJ removal protections are severable. *See* JA2; JA128-29; JA212.

5. Whether the mere existence of allegedly unconstitutional removal restrictions is sufficient to show the irreparable harm necessary for a preliminary injunction. *See* JA2; JA6-9; JA146-49; JA151-53; JA215-16.

6. Whether the Norris-LaGuardia Act strips federal courts of jurisdiction to issue an injunction in this dispute.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. 1199SEIU is unaware of any related case within the meaning of 3d Cir. L.A.R. 28.1(a)(2).

INTRODUCTION

Appellant Spring Creek Rehabilitation and Nursing Center LLC ("Spring Creek") appeals from the denial of a preliminary injunction that would indefinitely suspend enforcement of this nation's labor laws. Spring Creek's unsupported separation of powers and causation theories would transform an "exceptional" injunctive remedy into a commonplace one by entitling any plaintiff in the Third Circuit facing an enforcement proceeding by the NLRB—which is the only entity that may enforce the federal labor laws—to injunctive relief.

This Court should reject those theories. Spring Creek's argument that Board Member and ALJ removal protections violate Article II conflicts with Supreme Court precedent and the weight of circuit authority. In any event, Spring Creek failed to establish causal harm—that the removal restrictions would make any difference in its case—as required to establish any constitutional violation.

Moreover, this Court need not even wade into those constitutional waters because Spring Creek's preliminary injunction appeal can be rejected on three independent grounds. First, even if Spring Creek established that the challenged removal protections were unconstitutional, it would be entitled only to severance

of those provisions, not vacatur of agency action. An injunction would therefore be too broad a remedy. Second, Spring Creek failed to establish that a preliminary injunction was necessary to prevent irreparable harm before the District Court decides the case on the merits. Third, the NLGA stripped the District Court of jurisdiction to grant an injunction.

STATEMENT OF CASE

I. Statutory Background

The National Labor Relations Act ("NLRA") divides responsibility over administration of private-sector federal labor law between the Board and the General Counsel. 29 U.S.C. §153(b), (d). The General Counsel, a politically accountable appointee over whom the President has unrestrained removal powers, is responsible for investigating unfair labor practice charges ("ULPs"). *See id.*; *Exela Enter. Sols. v. NLRB*, 32 F.4th 436, 445 (5th Cir. 2022). If the General Counsel determines that a charge has merit, the General Counsel may issue and prosecute a complaint in a hearing before an ALJ, 29 C.F.R. §101.10(a), whose decision is appealable to the Board, *id.* §101.12(a).

The Board is authorized to have five Members, each of whom can be removed by the President for "neglect of duty or malfeasance in office." 29 U.S.C. §153(a)-(b). ALJs are removable for "good cause," through an action brought by the Board to the Merit Systems Protection Board. 5 U.S.C. §7521. Members of

the Merit Systems Protection Board can, in turn, be removed for inefficiency, neglect of duty, or malfeasance in office. *Id.* §1202(d).

II. Procedural Background

1199SEIU has represented healthcare workers employed at a skilled nursing facility in Perth Amboy for decades. 1199SEIU's members were covered by a collective bargaining agreement that secured them insurance, a pension, job security, and other substantial benefits, before Spring Creek purchased the facility in 2021. JA49-50 ¶2. Upon assuming operations, Spring Creek refused to maintain those employment terms and conditions and unilaterally implemented inferior terms in violation of the NLRA. JA52-54 ¶10. 1199SEIU filed a ULP charge. JA49 ¶1. The NLRB General Counsel investigated the charge and, on May 22, 2024, issued a Complaint against Spring Creek and the prior owner. JA35-44. A hearing before the ALJ was scheduled for September 10, 2024, and subsequently rescheduled for September 17, 2024. JA43, 49, 57.

On September 6, 2024, Spring Creek filed a complaint in the District Court against the NLRB, its Members, the NLRB General Counsel, and the assigned ALJ. *See* JA16-34. On September 11, 2024, Spring Creek filed a motion for a temporary restraining order and preliminary injunction to enjoin the Board proceedings. JA13; JA65.

Spring Creek's motion advanced four arguments, but on appeal it pursues only its Article II challenges to the removal protections for Board Members and NLRB ALJs. JA84-98. The only evidence Spring Creek introduced to support its motion was an affidavit that described the history of the case and did not document any irreparable injury. JA65; JA68-69.

On October 24, 2024, the District Court denied Spring Creek's preliminary injunction motion, reasoning that Spring Creek failed to establish the requisite irreparable injury because it had not shown that it was harmed by the complained-of removal protections. JA6-9. Spring Creek timely appealed. JA1. Proceedings were stayed in the District Court pursuant to an unopposed motion by the NLRB. JA15. Spring Creek sought an injunction pending appeal in both the District Court and this Court, which were both denied. SA28; ECF 9. 1199SEIU moved to intervene, which this Court granted on January 2, 2025. ECF 20.

The underlying NLRB proceedings have continued while this appeal was pending. The ALJ hearing concluded in November 2024. JA226. The parties submitted post-hearing briefs in December 2024 and are awaiting an ALJ decision. SA1.

While this appeal was pending, on January 28, 2025, President Trump fired NLRB General Counsel Jennifer Abruzzo and removed Member Gwynne Wilcox, stating that Wilcox's decisions "improperly cabined" employers' First Amendment

rights and exceeded the NLRA's bounds, specifically citing a "new joint employer rule." SA4-5. Member Wilcox has a pending lawsuit challenging her removal. ECF 27-1, at 2-3; SA1.

SUMMARY OF ARGUMENT

Spring Creek seeks to overturn the District Court's denial of a preliminary injunction that would have blocked the Board's efforts to enforce the nation's labor laws on the logic that Board Member and ALJ removal protections violate Article II of the Constitution. The denial of injunctive relief should be affirmed for multiple reasons.

First, the removal protections do not violate Article II. The President's authority to remove executive officers is not "illimitable." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). Board member removal restrictions are constitutional because Congress may place reasonable restrictions on the removal of members in multimember expert agencies, an authority that Congress has exercised for well over 100 years. The Supreme Court addressed this issue in *Humphrey's Executor*, and Spring Creek's attempt to distinguish that controlling authority lacks merit.

ALJ removal protections are also constitutional. Congress may grant inferior officers reasonable tenure protections so long as they do not "deprive the President of adequate control" over the official's exercise of executive power. *Free*

Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2010). ALJ removal protections are lawful because ALJs typically perform purely adjudicative functions "or possess only recommendatory powers." *Id.* at 507 n.10. The same is true of Board ALJs.

Second, regardless of whether the challenged removal restrictions are lawful, the denial of a preliminary injunction should be affirmed because Spring Creek did not show that it will be harmed by those restrictions. The Supreme Court and every court of appeals to address the issue have required plaintiffs challenging removal protections to prove that the protections caused them harm. *See Collins v. Yellen*, 594 U.S. 220, 258-59 (2021). Spring Creek submitted no such evidence. *See* JA8. Spring Creek's theory that it need not demonstrate injury to obtain injunctive relief would grind all NLRB proceedings in the Third Circuit to a halt, rendering this nation's labor laws unenforceable and opening the floodgates to needless litigation.

Nor does it matter that President Trump has sought to remove Member Wilcox. That evidence was not before the District Court when it ruled and so should not be considered in this appeal. Even if considered, it still would not establish causation because there is no evidence that she will eventually sit on Spring Creek's case or that another Board Member would treat Spring Creek differently.

Third, as the Supreme Court has repeatedly recognized, the proper remedy for unlawful removal protections is severance of the contested provisions, not an injunction halting agency proceedings. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 232-38 (2020) (plurality opinion); *Free Enter. Fund*, 561 U.S. at 508-10.

Fourth, Spring Creek failed to demonstrate that without a preliminary injunction it would likely face irreparable injury before the District Court decides the case on the merits. Spring Creek's unjustified delay in seeking injunctive relief and its non-opposition to a stay of the District Court proceedings undermines any claim of interim irreparable harm. And any injury to Spring Creek from Board member removal protections is wholly speculative, because it is uncertain whether the Board will ever hear this case, or, if so, whether Member Wilcox would be involved in the proceeding.

Finally, the Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue an injunction because this lawsuit arises out of a labor dispute.

STANDARD OF REVIEW

This Court "review[s] a district court's denial of a preliminary injunction for abuse of discretion but review[s] the underlying factual findings for clear error and examine[s] legal conclusions de novo." *Brown v. City of Pittsburgh*, 586 F.3d 263, 268 (3d Cir. 2009). Review of denial of a preliminary injunction is deferential

because the district court necessarily ruled on an abbreviated set of facts. *Delaware State Sportsmen's Ass'n, v. Delaware Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 198 (3d Cir. 2024).

ARGUMENT

A plaintiff seeking the "extraordinary remedy" of a preliminary injunction must establish it is likely to succeed on the merits, it will suffer irreparable injury absent an injunction, the balance of equities tip in its favor, and an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *accord Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017). Spring Creek failed to make that showing. Moreover, the Norris-LaGuardia Act would deprive the District Court of jurisdiction to issue injunctive relief.

I. Spring Creek will not succeed on the merits.

A. NLRB Board member removal protections are constitutional.

This Court must start with the presumption that the NLRA is constitutional. *United States v. Morrison*, 529 U.S. 598, 607 (2000). For over a century, Congress has created independent regulatory agencies led by multimember commissions. In *Humphrey's Executor*, the Supreme Court upheld for-cause removal protections for members of such multimember agencies. 295 U.S. at 629-32. In the 90 years since, the Supreme Court has left *Humphrey's Executor* in place and has never

struck down for-cause removal protections for any multimember agency. This precedent, as other courts of appeals have recently made clear, remains controlling. *Illumina, Inc. v. Fed. Trade Comm'n,* 88 F.4th 1036, 1047 (5th Cir. 2023); *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 353-54 (5th Cir. 2024), *cert. denied*, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024); *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 761 (10th Cir. 2024), *cert. denied sub nom.*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025); *Magnetsafety.org v. Consumer Prod. Safety Comm'n*, 129 F.4th 1253, 1265 (10th Cir. 2025); *Harris v. Bessent*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025) (en banc).

1. Board Member removal protections are valid under *Humphrey's Executor*.

Since 1887, Congress has created many independent offices led by panels whose members are appointed by the President but enjoy removal protections. *Wilcox v. Trump*, --- F.Supp.3d ---, No. 25-334 (BAH), 2025 WL 720914, at *6 (D.D.C. Mar. 6, 2025) (citing examples of Interstate Commerce Act, Federal Reserve Board, and Federal Trade Commission ("FTC")); *see also Harris v. Bessent,* No. 25-5037, 2025 WL 980278, at *37 (D.C. Cir. Mar. 28, 2025), *vacated on other grounds*, No. 25-5037, (D.C. Cir. Apr. 7, 2025) (documenting history of removal protections dating back to 1789) (Millett, J., dissenting); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129, 133 & n.11

(2022) (identifying "seventy-one sets of early statutory provisions," adopted in the Federalist era, "that contradict [the view] that the President must have plenary removal power").

The Constitution is silent regarding the President's authority to remove executive officers. *See Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839). The Supreme Court has filled that silence, relying principally on "history and precedent" to do so. *Seila Law*, 591 U.S. at 214. In *Humphrey's Executor* the Supreme Court rejected the President's claim that Article II afforded him an "illimitable power of removal" over all federal officers. 295 U.S. at 629. The Court reasoned that, when Congress creates independent expert commissions that exercise "quasi legislative and quasi judicial" functions, Congress must also have, "as an appropriate incident, power to" limit the President's removal authority. *Id.* A contrary result would destroy the agency's independence and intrude on congressional authority. *Id.*; *see also Wiener v. United States*, 357 U.S. 349 (1958) (inferring removal protections for members of the War Claims Commission).

In effect, *Humphrey's Executor* recognized that, without limits on presidential removal, agencies meant to impartially execute the law would buckle to the President's will. 295 U.S. at 629. Indeed, without good cause protection, the President would have unreviewable authority to indefinitely "disable" federal agencies by depriving multimember bodies of any quorum indefinitely. *Harris*,

2025 WL 980278, at *47 (Millett, J., dissenting). Thus, a President could grind congressionally mandated enforcement to a complete halt and "kneecap" federal agencies by "prevent[ing] them from performing the work assigned them by federal law and funded by Congress." *Id.*

Congress established the NLRB mere months after the Court handed down *Humphrey's Executor*, intending that the Board faithfully execute the nation's labor laws. *See YAPP USA Auto. Sys., Inc. v. NLRB*, 748 F.Supp.3d 497, 506 (E.D. Mich. 2024). It is no surprise, then, that Congress created the NLRB with *Humphrey's Executor* in mind, modeling the Board's structure after the FTC.[1] *See* H.R. Rep. No. 74-1371, pt. 1, at 4 (1935) (stating that NLRB "is to have a similar status to that of the [FTC]" and describing express removal protections for Board members as "desirable in the light of" *Humphrey's Executor*), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3255 (1949); *Dish Network Corp. v. NLRB*, 953 F.3d 370, 375 n.2 (5th Cir. 2020) (NLRB and FTC share relevant features). The lengthy history of the NLRB and

[1] The NLRB is not alone. Congress created numerous multimember agencies led by officers with removal protections. *See, e.g.*, 42 U.S.C. §1975(e) (Commission on Civil Rights); 42 U.S.C. §7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. §7104(b) (Federal Labor Relations Authority); 46 U.S.C. §46101(b)(5) (Federal Maritime Commission); 49 U.S.C. §1111(c) (National Transportation Safety Board); 42 U.S.C. §5841(e) (Nuclear Regulatory Commission); 29 U.S.C. §661(b) (Occupational Safety and Health Review Commission).

other multimember independent agencies "liquidate[s] [and] settle[s] the meaning of" the Constitution, even though the practice "began after the founding era." *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014); *Moore v. United States*, 602 U.S. 572, 590 (2024).

These similarities show that the NLRB falls under *Humphrey's Executor*. *Harris*, 2025 WL 1021435, at *1-2; *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 695 (D.C. Cir. 2008), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010) (Kavanaugh, J., dissenting) (describing FTC and NLRB as falling under *Humphrey's Executor*). *Humphrey's Executor* identified the FTC commissioners' seven-year, staggered terms as evidence of Congress's intent to "create a body of experts who shall gain experience by length of service," which "would not be subject to complete change at any one time." 295 U.S. at 624-25. The same is true of the NLRB, a five-member body with each member serving a five-year term. 29 U.S.C. §153(a). *Humphrey's Executor* referenced the FTC's role as a "body of experts," 295 U.S. at 624, a feature that the Board also shares. *See Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd and remanded on other grounds*, 603 U.S. 109 (2024) (reading *Seila Law* as permitting "principal officers [to] retain for-cause protection when they act as part of an expert board"); *Wilcox*, 2025 WL 720914, at *7 (citing Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*,

98 Cornell L. Rev. 769, 770-71 (2013)) (noting that NLRB was designed to be independent). That there is strong historical precedent for the Board's structure further confirms its constitutionality. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (quoting *Noel Canning*, 573 U.S. at 524) ("In separation-of-powers cases th[e Supreme] Court has often 'put significant weight upon historical practice.'").

Spring Creek offers three reasons why the Board is unlike the FTC, so *Humphrey's Executor* does not control. First, Spring Creek argues that the Board "wields substantial Executive Powers." AOB 23, 29. It cites the Board's authority to appoint regional directors and other employees, issue subpoenas, promulgate regulations, petition courts for injunctive relief, and issue final decisions that award legal and equitable relief. *Id.* at 22-23, 29-30.

However, this fails to distinguish the executive authority of the FTC in 1935 from the Board's authority today. The FTC initiated investigations, issued complaints, and held hearings to determine if regulated parties were employing unfair methods of competition. *Humphrey's Executor*, 295 U.S. at 620-21; FTC Act, Pub. L. No. 63-203, ch. 311, §9, 38 Stat. 717, 722-23 (1914) (empowering FTC to issue subpoenas). The FTC issued cease-and-desist orders, *Humphrey's Executor*, 295 U.S. at 620-21, a power that "mirrors" the Board's authority to request injunctive relief, *Harris*, 2025 WL 980278, at *33 (Millett, J., dissenting).

If companies disobeyed those orders, the FTC could petition for enforcement in the Courts of Appeals, just like the Board. *Humphrey's Executor*, 295 U.S. at 620-21; *see also* 29 U.S.C. §160(e); *Dish Network Corp.*, 953 F.3d at 375 n.2. The FTC could also issue rules and regulations regarding unfair and deceptive acts. *Wilcox*, 2025 WL 720914, at *8 (citing FTC Act, §6, 38 Stat. at 722).[2]

In fact, the NLRB exercises *less* power than the FTC, which "could launch investigations at its own insistence." *Harris*, 2025 WL 980278, at *31 (Millett, J., dissenting) (quotation omitted). The Board is "unique" among its regulatory peers in the separation of powers between the agency's executive functions, as exercised by the General Counsel, and the legislative and judicial functions carried out by Board members. *NLRB v. Fed. Lab. Rels. Auth.*, 613 F.3d 275, 281 n.* (D.C. Cir. 2010). Initially, the Board depends entirely on outside entities to file unfair labor practice charges or representation petitions before it can engage in adjudication. *See* 29 C.F.R. §102.9. The NLRB's politically accountable General Counsel is responsible for all unfair labor practice investigations and prosecutions.[3] *See* 29

[2] It does not matter whether, as Spring Creek asserts, these powers might now be seen as executive. AOB 23 (citing *Seila Law*, 591 U.S. at 216 n.2). This change in terminology did not invalidate *Humphrey's Executor*. *Morrison*, 487 U.S. at 689 & n.28 (noting that FTC's powers would now be considered executive, *Humphrey's Executor* remains good law, and lawfulness of removal protections does not "turn on whether … official is classified as 'purely executive'").

[3] For example, the Board may seek an injunction only if the politically accountable General Counsel issues a complaint, a determination over which the

U.S.C. §153(d). And finally, the Board only rarely engages in rulemaking, *see Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (NLRB tends to use "adjudication rather than rulemaking" to promulgate rules), which in any event was a power that the FTC shared, and is plainly quasi-legislative under *Humphrey's Executor*. 295 U.S. at 628.

Viewed in this light, there are no grounds for concluding that Board members somehow exercise more substantial executive power than FTC commissioners, whose removal protection was upheld by the Supreme Court. And similarly, the NLRB exercises less power than the War Claims Commission, upheld in *Wiener*, which issued final and *unreviewable* decisions that ordered funds to be paid from the Treasury Department's War Claims Fund. 357 U.S. at 354-56; 29 U.S.C. §160(e) (Board must petition federal courts to enforce orders). The War Claim Commission's authority to adjudicate and set awards was an "intrinsic[ally] judicial … task," entitling the commissioners to removal protections. *Wiener*, 357 U.S. at 355.[4]

General Counsel has "final authority." 29 U.S.C. §§153(d), 160(j). And the Board can only petition for backpay if the General Counsel seeks it. *See id.* §153(d).

[4] Spring Creek also complains that the General Counsel's "authority to initiate or dismiss complaints" is executive in nature, *id.* at 30, but this reference to the General Counsel is a red herring. The General Counsel is removable at will by the President. *NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 125 (1987) (describing NLRA as "dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line");

As its second basis for distinguishing *Humphrey's Executor*, Spring Creek argues that the President may remove Board members for "neglect of duty or malfeasance" but not for "inefficiency, negligence, incompetence, or conviction of a felony." AOB 22. But *Humphrey's Executor* upheld nearly identical removal protections. *Compare* 295 U.S. at 622 (allowing removal for "inefficiency, neglect of duty, or malfeasance in office"), *with* 29 U.S.C. §153(a) (allowing removal for "neglect of duty or malfeasance in office"). And Spring Creek articulates no reason why the FTC Act's inclusion of the term "inefficiency" as a ground for removal is constitutionally relevant. *See Wilcox*, 2025 WL 720914, at *10 (describing difference as "superficial"). In any event, Consumer Product Safety Commission members, like Board members, may only be removed for "neglect of duty or malfeasance in office." *Consumers' Rsch.*, 91 F.4th at 346. And that restriction was upheld by both the Fifth and Tenth Circuits. *See id.* at 355-56; *Leachco*, 103 F.4th at 761-63.

Finally, Spring Creek argues that the Board is not covered by *Humphrey's Executor* because the Board, unlike the FTC, is not subject to a statutory partisan

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Exela Enter. Sols., 32 F.4th at 445 (President lawfully removed Board General Counsel without cause). Spring Creek's reference to the Board's authority to appoint regional directors and other employees is similarly uncompelling. Under the NLRA, it is the General Counsel that "exercise[s] general supervision over all attorneys employed by the Board" other than ALJs and assistants of the Board, "and over the officers and employees in the regional offices." 29 U.S.C. §153(d).

balancing requirement.[5] AOB 27-28. But *Humphrey's Executor* depended on the FTC's role as an independent agency, and the nature of its functions, not on its express partisan-balancing requirement. 295 U.S. at 623-24 (focusing on Congress' intent that FTC be independent from President). Similarly, when inferring removal protections for the War Claims Commission, *Wiener* considered Congress' intent to create an independent agency that exercised quasi-judicial power without so much as mentioning statutory partisan balancing requirements. 357 U.S. at 354. In any event, the Board is, in practice, subject to partisan balancing. *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 54-55 (2018) (concluding that "NLRB looks much like the statutory [partisan balance requirement] agencies in terms of the ideological preferences of appointees" and finding no statistically significant difference in partisanship); *Seila Law*, 591 U.S. at 218 (describing *Humphrey's Executor*'s use of the term "non-partisan" as referring to "a group of officials drawn from both sides of the aisle," and not mentioning statutory partisan balancing requirements); *Wilcox*, 2025 WL 720914, at *4 (concluding Board is non-partisan).

[5] Spring Creek also observes that the FTC can "act as a master in chancery in certain cases" while the NLRB cannot. AOB 29. This, it asserts, precludes a finding that *Humphrey's Executor* controls because the Board Members are not "officers of the kind here under consideration." 295 U.S. at 632. But if anything, this distinction shows that the Board has less power than the FTC.

Notably, the D.C. Circuit recently ruled that *Humphrey's Executor* remained fully binding, and that NLRB removal protections were likely lawful under that precedent. *Harris*, 2025 WL 1021435, at *1-2. The Fifth and Tenth Circuits have also upheld the constitutionality of removal protections for officers serving on multimember commissions that are similar to the NLRB. *See Leachco*, 103 F.4th at 760-63 (upholding removal protections identical to those of Board members belonging to the heads of Consumer Product Safety Commission); *Magnetsafety.org*, 129 F.4th at 1265 (same); *Consumers' Rsch.*, 91 F.4th at 352 (same, and holding that *Humphrey's Executor* rationale broadly "protects any 'traditional independent agency headed by a multimember board'") (quoting *Seila Law*, 591 U.S. at 207).

The reasoning of these decisions is sound and applies with equal force to NLRB Members. The NLRB is "a prototypical traditional independent agency, run by a multimember board." *Consumers' Rsch.*, 91 F.4th at 354 (cleaned up); *Leachco*, 103 F.4th at 762. The NLRB lacks a single-director structure, which was "the defining feature that the Supreme Court in *Seila Law* relied on to hold the [Consumer Financial Protection Bureau] unconstitutional." *Consumers' Rsch.*, 91 F.4th at 354. The NLRB also employs a "staggered appointment schedule, meaning that each President *does* have an opportunity to shape its leadership and

thereby influence its activities."[6] *Id.* at 354 (cleaned up). Ultimately, Board removal protections fit squarely within *Humphrey's Executor* and its progeny.

2. Supreme Court precedent has affirmed the continued validity of *Humphrey's Executor*.

Spring Creek asserts that *Seila Law* overturned *Humphrey's Executor* or limited the decision to the FTC.[7] AOB 24-28. Thus, Spring Creek contends, the President must "maintain 'unrestricted removal power' over all federal officials 'who wield executive power.'" AOB 21 (quoting *Seila Law*, 591 U.S. at 204). To Spring Creek, *any* officer who exercises executive power must be removable at will. But that is not so.

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[6] As the Board explained below, JA131, Board members cannot initiate adjudicatory proceedings, seek civil monetary penalties, *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940), or provide nonremedial relief, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). And the Board must petition the federal courts to enforce its orders. 29 U.S.C. §160(e)-(f). In all likelihood, Board Members wield less executive power than Consumer Product Safety Commission commissioners.

[7] Spring Creek urges this Court to narrowly interpret Supreme Court decisions and advances the commonsense proposition that a decision "is not contrary to precedent where facts are materially different." AOB 24-26. But it then proceeds to violate this precept by urging an expansive interpretation of *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023)—*see infra* at 36-37—and arguing that *Seila Law* and *Free Enterprise* have consigned *Humphrey's Executor* to the ash heap of history. Perhaps most curiously, Spring Creek cites Judge Willett's concurrence in *Consumers' Research v. Consumer Products Safety Commission*, 98 F.4th 646, 648 (5th Cir. 2024) (per curiam), which confirmed the continuing viability of *Humphrey's Executor*. Indeed, Judge Willett noted that Courts of Appeals are constrained by stare decisis and may not "precipitately shrink a Supreme Court decision's precedential scope." *Id.*

For starters, the Supreme Court has repeatedly relied on *Humphrey's Executor* as binding authority. *See Wiener*, 357 U.S. at 353 (relying on *Humphrey's Executor*); *Morrison v. Olson*, 487 U.S. 654, 685-86 (1988) (same). In *Free Enterprise Fund*, for example, the Court invalidated "unusually" restrictive, multilevel tenure protections for members of the Public Company Accounting Oversight Board ("PCAOB"). 561 U.S. at 503. But the Court limited its holding, leaving the Securities and Exchange Commission's single-layer removal protections wholly intact, and noting that the President could "hold the Commission to account for its supervision of the Board to the same extent that he may hold the Commission to account for everything else." *Id.* at 492, 495-96, 509. In doing so, it cited *Humphrey's Executor* and reaffirmed that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Id.* at 483.

Spring Creek's argument thus requires interpreting *Seila Law* as silently upending decades of precedent by replacing *Humphrey's Executor* with an impossibly narrow rule: Removal protections, even for officers on multimember boards, are unlawful if the officer exercises *any* executive power. And, critically, Spring Creek contends that *all* power wielded by agencies is executive in nature.

AOB 22-23 (citing *Seila Law*, 591 U.S. at 216 n.2). Thus, according to Spring Creek's formulation of *Seila Law*, all removal protections must be per se unlawful.

But *Seila Law* struck down a removal protection in the "novel context" of the Consumer Financial Protection Bureau ("CFPB"), which was headed by a single individual. 591 U.S. at 204. In doing so, the Court expressly disavowed any notion that it was disturbing prior precedents, explaining it did "not revisit … prior decisions allowing certain limitations on the President's removal power," *id.*, nor "revisit *Humphrey's Executor*," *id.* at 228. The Court stressed that its invalidation of the removal limits at issue was confined to "principal officers who, *acting alone*, wield significant executive power." *Id.* at 238 (emphasis added); *see also id.* at 204, 225 (refusing to extend *Humphrey's Executor* to single-director agencies, which uniquely "foreclose[] certain indirect methods of Presidential control" and "concentrat[e] power in a unilateral actor").

Indeed, *Selia Law* expressly acknowledged the constitutionality of "expert agencies led by a *group* of principal officers removable by the President only for good cause." *Id.* at 204 (emphasis in original). Seven Justices agreed that Congress could cure the CFPB's unconstitutional single-director structure by "converting the CFPB into a multimember agency." *Seila Law*, 591 U.S. at 237 (plurality opinion); *see id.* at 298 (Kagan, J., concurring in part and dissenting in part). This conclusion would make no sense under Spring Creek's view, because

the CFPB undoubtedly "wields significant executive power." *Id*. at 204. But it makes perfect sense if *Humphrey's Executor* remains binding. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Consumers' Rsch.*, 98 F.4th at 648 (Willett, J., concurring) (noting that Courts of Appeals are constrained by stare decisis and may not "precipitately shrink [*Humphrey's Executor*'s] precedential scope").

Moreover, Spring Creek's reading of *Seila Law* has been rejected by multiple circuits. In *Consumers' Research*, 91 F.4th at 355-36, the Fifth Circuit acknowledged the continued viability of *Humphrey's Executor* when it held the Consumer Product Safety Commission's structure constitutional. Indeed, as the court noted, *Humphrey's Executor*'s holding continues to "protect[] *any* 'traditional independent agency headed by a multimember board.'" *Id.* at 352 (quoting *Seila Law*, 591 U.S. at 207) (emphasis added). The Tenth and D.C. Circuits made similar observations. *Leachco*,103 F.4th at 761-63; *Harris*, 2025 WL 1021435, at *1-2. The reasoning of those decisions is sound.

B. Removal protections for NLRB ALJs are constitutional.

ALJs are "inferior officers." *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 244 n.3 (2018). The Supreme Court has long held that Congress may protect from removal subordinate officials within the Executive Branch, a category that includes inferior officers, without unconstitutionally impairing the President's Article II

powers. *See Seila Law*, 591 U.S. at 217 (citing *Morrison*, 487 U.S. 654 (1988), and *United States v. Perkins*, 116 U.S. 483 (1886)). The "good cause" removal protection that Congress has granted to ALJs, including the one assigned to Spring Creek's unfair labor practice case, is consistent with those precedents.

1. NLRB ALJ removal protections are lawful because ALJs do not wield significant executive power.

Beginning with its decision in *Perkins*, the Supreme Court held that Congress "may limit and restrict the power of" the President to remove inferior officers "as it deems best for the public interest." 116 U.S. at 485. Nearly 100 years later the Court revisited the issue and upheld a "good cause" removal restriction for an inferior officer, an independent counsel appointed to investigate and prosecute serious crimes committed by executive officers. *Morrison*, 487 U.S. at 685-93. Through this good cause removal authority, the President "retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities." *Id.* at 692. The independent counsel exercised "discretion and judgment" in carrying out the office's responsibilities, but the Court nonetheless concluded that "the President's need to control the exercise of that discretion [was not] so central to the functioning of the Executive Branch as to

require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691-92.[8]

By contrast, Congress cannot impose a restriction that prevents the President from ensuring that the laws are faithfully executed or "deprive[s] the President of adequate control" over the official's exercise of executive power. *Free Enter. Fund*, 561 U.S. at 508; *see also Morrison*, 487 U.S. at 658. Thus, in *Free Enterprise Fund*, the Supreme Court struck down a uniquely restrictive "dual for-cause" removal protection that permitted removal of members of an independent agency, the PCAOB, by Securities and Exchange Commission commissioners (who were themselves removable only for cause) only based on "unusually high" thresholds like "willful violations" of only certain laws and only after following "rigorous procedures … prior to removal." 561 U.S. at 487, 492, 495, 503, 505. As the Supreme Court noted, the PCAOB members were entrusted with great investigatory and prosecutorial discretion to pursue suspected violations of the law.

[8] Recent Supreme Court decisions have likewise acknowledged Congress's power to regulate removal of inferior officers. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 25-27 (2021) (selecting remedy for Appointments Clause violation that *restored* removal protections of Executive Branch adjudicators who perform functions similar to those of ALJs); *Seila Law*, 591 U.S. at 204 (recognizing that *Perkins* and *Morrison* establish at least that "Congress could provide tenure protections to certain inferior officers with narrowly defined duties" (emphasis omitted)); *Free Enter. Fund*, 561 U.S. at 493 (stating that Court has "upheld for-cause limitations" on department heads' power to remove inferior officers).

Id. at 485. They were "charged with enforcing the Sarbanes-Oxley Act, the securities laws, the [Security and Exchange] Commission's rules, its own rules, and professional accounting standards." *Id.* The PCAOB could promulgate its own rules, the willful violation of which was "a federal crime punishable by up to 20 years' imprisonment." *Id.* Ultimately, the Court noted that the PCAOB had "significant independence in determining its priorities[,] intervening in the affairs of regulated firms," and exercised "substantial executive authority." *Id.* at 505. And in holding PCAOB removal restrictions unconstitutional, the Court specifically stated that it "does not address that subset of independent agency employees who serve as administrative law judges," because "unlike members of the [PCAOB], many [ALJs] of course perform adjudicative rather than enforcement or policymaking functions … , *or* possess purely recommendatory powers." *Id.* at 507 n.10 (emphasis added).

Spring Creek ignores *Free Enterprise Fund*'s nuanced analysis, the Court's emphasis on the PCAOB's unique enforcement authority, and its express statement that ALJs perform completely different functions. Instead, Spring Creek's reasoning seems to be that (1) NLRB ALJs are inferior officers that enjoy a dual-layer removal protection, (2) *Free Enterprise Fund* invalidated a dual-layer removal protection, so (3) ALJs are unconstitutionally insulated. AOB 32-33. But this conclusion flies in the face of *Free Enterprise Fund* because removal

protections for Board ALJs do not "deprive the President of adequate control" over an agency that "exercise[s] significant executive power." 561 U.S. at 508, 514.

Board ALJs plainly exercise no enforcement or investigatory authority, *see* 29 U.S.C. §153(d) (vesting investigatory authority in General Counsel), unlike the "regulator of first resort" in *Free Enterprise Fund*, 561 U.S. at 508. Board ALJs do not promulgate regulations, bring enforcement actions, or investigate wrongdoing. *See* 29 U.S.C. §§153(d), 156. These features of NLRB ALJ authority are dispositive. Indeed, the *Free Enterprise Fund* majority theorized that Congress could cure the PCAOB's constitutional infirmities by simply "restrict[ing] the Board's enforcement powers." 561 at 509-10. The powers that would have been retained by the PCAOB in that case—authority to promulgate regulations and investigate wrongdoing—are far more expansive than NLRB ALJs'. And, as the Court emphasized, ALJs "perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10.

Further, even if it were the case that substantial adjudicatory authority could on its own unlawfully impair the President's executive power, Board ALJs' narrowly circumscribed adjudicatory authority could not. While ALJs are "semi-independent subordinate hearing officers" within agencies, *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 132 (1953) (cleaned up), "agenc[ies] retain[] full power over policy," 2 Paul R. Verkuil, *et al.,* ACUS, Recommendations and

Reports: *The Federal Administrative Judiciary* 803 (1992). Consistent with that design, regulations governing NLRB adjudications ensure that the five-seat Board, not ALJs, sets policy. An ALJ conducts an administrative hearing, *see* 29 C.F.R. §§102.34-.35, and issues a decision containing factual and legal determinations regarding whether a violation has occurred, as well as a recommended order, *id.* §102.45(a). The Board is not compelled to accept either the ALJ's findings of fact or conclusions of law. 29 U.S.C. §160(c). Indeed, the Board has express statutory authorization to take additional evidence upon notice to the parties. *Id.* And, crucially, the ALJ's order is not a final agency order until the Board has had an opportunity to hear and resolve any party's exceptions to the ALJ's "decision or to any other part of the record or proceedings." 29 C.F.R. §102.46(a); *see id.* §102.48. The Board may reverse any finding made by the ALJ, even if a party did not file an exception to that part of the recommended order. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 315-16 (3d Cir. 1980) (noting Board may review any ALJ finding and "even absent [a relevant] exception, the Board is not compelled to act as a mere rubber stamp for its Examiner") (cleaned up); 29 C.F.R. §102.49.

Even where no party files any exception, the Board may modify unexcepted ALJ orders to comply with Board remedial practice. *Cooling for Less, Inc.*, Case 28-CA-105006, 2014 WL 1871305, at *1 n.1 (2014). And there is no risk that an ALJ could establish binding Board policy when no exceptions have been lodged,

because the Board does not rely on unexcepted ALJ decisions as "precedential legal authority." *N.Y. Paving Inc.*, 371 NLRB No. 139, 2022 WL 4546315, at *6 n.11. Furthermore, the Board has the discretion to immediately review an ALJ's interlocutory orders. *See* 29 C.F.R. §102.26. And the Board can choose not to use ALJs at all. *See* 29 U.S.C. §160(b); 29 C.F.R. §102.34; *see also Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1134-35 (9th Cir. 2021) (finding ALJ removal restrictions lawful and noting that President could order agency heads "to change [agency's] regulatory scheme and remove ALJs from the adjudicatory process"). Put simply, this scheme ensures that NLRB ALJs follow Board policy; they do not set it.[9] *See, e.g.*, *Univ. Med. Ctr.*, 335 NLRB 1318, 1342 (2001) (ALJs "lack authority to overrule" and are "bound by" Board decisions) (citation omitted). ALJs that disobey binding legal or policy judgments can be removed for good cause. *See Soc. Sec. Admin., Off. of Hearing & Appeals v. Anyel*, No. CB7521910009T1, 1993 WL 244051 (M.S.P.B. June 25, 1993) (good cause established where ALJ ignores binding agency interpretation of law); *Nash v.*

[9] Spring Creek notes that unexcepted ALJ decisions become decisions of the Board. AOB 33 (citing 29 C.F.R. §102.48(a)). But the ALJ's order still would not itself be final; rather, it is converted into a final order by dint of the Board's authority. The Board could also promulgate new regulations such that it no longer relies on ALJs in issuing recommended orders. 29 U.S.C. §160(b); 29 C.F.R. §102.50. Thus, at most, Spring Creek's concern could support a challenge to the regulation. The Board may modify that regulation whenever it sees fit. *See Decker Coal*, 8 F.4th at 1134-35.

Bowen, 869 F.2d 675, 680 (2d Cir. 1989) ("An ALJ … is subordinate to the [agency] in matters of policy and interpretation of law."). And unlike the PCAOB, which wielded enforcement authority that lacked any "historical precedent," removal protections for inferior adjudicatory officers have a rich history. *Free Enter. Fund*, 561 U.S. at 505, 507 n.10 (noting that parties "identified only a handful of isolated positions" with similar protections and that the "Government … refused to identify" ALJs as precedent for the PCAOB); *Lucia*, 585 U.S. at 259 (Breyer, J. concurring and dissenting in part) (noting that ALJs have existed since 1946); *see Zivotofsky ex rel. Zivotofsky*, 576 U.S. at 23 (placing great weight on historical practice).

2. The weight of circuit authority confirms that NLRB ALJ removal restrictions are lawful.

The Sixth, Ninth, and Tenth Circuits have all recognized that ALJ removal protections are valid. *Decker Coal*, 8 F.4th at 1129-36 (holding that Congress could grant tenure protections to Department of Labor ALJs); *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 319-20 (6th Cir. 2022), *rev'd per curiam on other grounds*, 598 U.S. 623 (2023) (suggesting same for Federal Deposit Insurance Corporation ALJs); *Leachco*, 103 F.4th at 764 (same for Consumer Product Safety Commission ALJs). Those decisions are well-reasoned and should be followed here.

In *Decker Coal*, 8 F.4th at 1130, the Ninth Circuit held 5 U.S.C. §7521 constitutional under *Free Enterprise Fund* even though it "provide[d] a second level of for-cause protection from removal for [Department of Labor] ALJs." As the Ninth Circuit explained, *Free Enterprise Fund* "did not broadly declare all two-level for-cause protections for inferior officers unconstitutional." *Id.* at 1132. After examining the structure of Department of Labor ALJs, the court held the removal protections were lawful because the ALJs performed "a purely adjudicatory function" rather than "policymaking and enforcement functions." *Id.* at 1133. Like NLRB ALJs, they "cannot sua sponte initiate investigations or commence a … case," and Congress did not "mandate[] that the [Department of Labor] employ ALJs in adjudicating" administrative cases. *Id.* at 1133.

The Sixth Circuit adopted a similar approach in *Calcutt*, 37 F.4th 293 (6th Cir. 2022). The Court of Appeals explained why it "doubt[ed] Calcutt could establish a constitutional violation from the ALJ removal restrictions." *Id.* at 319. That doubt arose from *Free Enterprise Fund* itself, which "took care to omit ALJs from the scope of its holding" because ALJs perform adjudicative functions "or possess purely recommendatory powers." *Calcutt*, 37 F.4th at 319 (quotation omitted). The Sixth Circuit also referenced then-Judge Kavanaugh's circuit-level dissent in *Free Enterprise Fund*, which emphasized that "the for-cause removal protections for ALJs are distinguishable because agencies can choose not to use

ALJs in adjudications … and many ALJs perform adjudicatory functions that are subject to review by higher agency officials." *Id.*

More recently, the Tenth Circuit followed *Decker Coal* in rejecting a challenge to the removal protections for an ALJ employed by the Consumer Product Safety Commission, an independent, multimember federal agency like the NLRB. *See Leachco*, 103 F.4th at 764. The Tenth Circuit agreed that *Free Enterprise Fund*'s rationale did not apply because the ALJ "performed 'a purely adjudicatory function,' Congress did not statutorily require that the Consumer Product Safety Commission use ALJs for administrative adjudications, and the 'good cause' standard in the provision restricting—but not precluding—ALJs' removal is a 'lesser impingement' than the standard at issue in *Free Enterprise Fund*." *Id*. (quoting *Decker Coal*, 8 F.4th at 1135)).

Contrary to this weight of authority, Spring Creek relies almost exclusively on the Fifth Circuit's split panel decision in *Jarkesy*, 34 F.4th 446 (5th Cir. 2022), which held that removal protections for Securities and Exchange Commission ALJs are unconstitutional.

Jarkesy is unpersuasive because it sweepingly applied *Free Enterprise Fund*'s holding to ALJs without grappling with the Supreme Court's emphasis that the PCAOB members served as leadership of a regulatory body with vast policymaking and enforcement powers. 561 U.S. at 505, 507 n.10. That is one

reason that *Leachco* declined to follow *Jarkesy*. As the Tenth Circuit remarked, *Jarkesy* "seemed to disregard the distinction between the PCAOB members in *Free Enterprise Fund*, who exercised executive functions, and ALJs, who perform adjudicatory functions. Supreme Court precedent establishes that this distinction matters." *Leachco*, 103 F.4th at 764 (citation omitted). Spring Creek also cites a district court decision, AOB 32, 34-35 (citing *VHS Acquisition No. 7 v. NLRB*, --- F.Supp.3d ---, No. 1:24-CV-02577, 2024 WL 5056358 (D.D.C. Dec. 10, 2024)), that employed a similarly broad reading of *Free Enterprise Fund* and reasoned that even though ALJs exercise sharply circumscribed adjudicatory power, their power is executive because ALJs are officers of the executive branch. *VHS Acquisition*, 2024 WL 5056358, at *7-8. But this proposition would make *Free Enterprise Fund*'s distinction between "adjudicative," "enforcement" and "policymaking functions" meaningless. 561 U.S. at 507 n.10; *see also Wiener*, 357 U.S. at 355 (describing power of War Claims Commission, which was housed in executive branch, as "judicial"); *Humphrey's Executor*, 295 U.S. at 624 (similar). Under that interpretation of executive power, every officer exercises executive power, once again collapsing *Free Enterprise Fund*'s cabined holding into a categorical bar against two-layered removal restrictions. *Cf. Wilcox*, 2025 WL 720914, at *9 n.11

(describing similar argument as tautological). *VHS Acquisition* is also in the clear minority among district courts.[10]

C. Spring Creek failed to establish the removal restrictions will harm Spring Creek.

Even if there were a constitutional problem with removal protections for Board Members or ALJs, a plaintiff challenging a removal protection is not entitled to relief without a showing that the challenged protection "inflict[ed] compensable harm." *Collins*, 594 U.S. at 258-59. Unlike an officer who was unlawfully appointed, and therefore never had lawful executive authority to exercise, an officer subject to an unlawful removal protection is not "strip[ped]" of the lawful authority to exercise the "responsibilities of his office." *Id.* at 258-60 & 258 n.23. Thus, even if a "statute unconstitutionally limit[s] the President's authority to *remove*" an official, Spring Creek could not prevail on the merits without showing that the removal restriction mattered. *Id.* at 257-60 (emphasis in original). Spring Creek did not do so.

1. The mere existence of removal restrictions is not enough to show harm.

[10] *See, e.g.*, *Loren Cook Co. v. NLRB*, No. 6:24-CV-03277, 2024 WL 5004534, at *3-5 (W.D. Mo. Nov. 27, 2024); *Alivio Medical Center*, No. 24-CV-7217, 2024 WL 4188068, at *11 (N.D. Ill. Sept. 13, 2024); *YAPP*, 748 F.Supp.3d at 509. Further, the same court declined to enjoin the underlying Board proceeding because the unlawful removal restriction could be severed. *VHS Acquisition*, 2024 WL 5056358, at *6; *see infra* at 45-46 (articulating severance argument).

Spring Creek contends that it will automatically suffer an irreparable, "here-and-now" injury even if the President has no interest in removing the Board members or ALJs who hear its case. AOB 17. But this Court rejected that argument last year, holding that an unconstitutional removal provision does not, "in and of itself, create[] a here-and-now injury." *Consumer Fin. Prot. Bureau v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 615 (3d Cir. 2024), *cert. denied*, 2024 WL 5112295 (Dec. 16, 2024); *see also NLRB v. Starbucks Corp.*, 125 F.4th 78, 88 (3d Cir. 2024) (similar). Instead, "there must be an actual, compensable harm in order for there to be an injury from an impermissible insulation provision."[11] *Nat'l Collegiate*, 96 F.4th at 615. Every other circuit to have considered claims based on the alleged unconstitutionality of tenure protections has required plaintiffs to show causal harm.[12]

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[11] *National Collegiate* treated causal harm as an element of the merits. 96 F.4th at 613-16. *Starbucks*, on the other hand, framed causal harm as a standing issue. 125 F.4th at 88. Whether analyzed as a merits or standing issue, causal harm is a necessary element of any constitutional challenge to removal restrictions. *Collins*, 594 U.S. at 259-60; *see, e.g.*, *Collins v. Dep't of Treasury*, 83 F.4th 970, 982-84 & n.12 (5th Cir. 2023) (affirming grant of motion to dismiss for failure to state a claim because plaintiff did not plead facts showing causation); *Bhatti v. Fed. Hous. Fin. Agency*, 97 F.4th 556, 562 (8th Cir. 2024) (same).

[12] *See Consumer Fin. Prot. Bureau v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2579 (2024); *K & R Contractors v. Keene*, 86 F.4th 135, 148 (4th Cir. 2023) ("Here, … we would be required to deny the petition because K & R has not asserted any harm resulting from the allegedly unconstitutional statutes…."); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 631 (5th Cir. 2022), *rev'd and*

Spring Creek asserts that *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023), overrode *Collins*' requirement that plaintiffs establish causal harm. AOB 17. But while *Axon* explained that a plaintiff suffers a "here-and-now injury" that "cannot be undone" when it is subjected "to an illegitimate proceeding, led by an illegitimate decisionmaker," 598 U.S. at 191, Spring Creek takes that statement out of context. *Axon* did not purport to address the merits of a removal-protections claim (nor the showing necessary to warrant injunctive relief). *Axon* was a case about whether the possibility of review of the constitutional challenge through administrative agency proceedings stripped the federal courts of subject matter jurisdiction to hear the claim (the Court's answer was no). In fact, the Court, when addressing removal protections similar to those raised by Spring Creek, emphasized that its "task [was] not to resolve those challenges; rather, it [was] to decide where they may be heard." *Id.* at 180; *see also Starbucks*, 125 F.4th at 87 ("[T]he question in *Axon* was whether the [agency's enabling legislation] precluded district courts from exercising jurisdiction over a challenge where no FTC administrative proceeding had taken place."). Put differently, *Axon* addressed

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remanded on other grounds, 601 U.S. 416 (2024), *and reinstated in part by* 104 F.4th 930 (5th Cir. 2024); *Calcutt*, 37 F.4th at 317; *Bhatti*, 97 F.4th at 559; *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 35 F.4th 734, 742-43 (9th Cir. 2022); *Leachco*, 103 F.4th at 753-57; *Rodriguez v. Soc. Sec. Admin.*, 118 F.4th 1302, 1314-15 (11th Cir. 2024).

only whether a district court could consider a constitutional challenge to an agency's structure where the petitioner would normally need to wait for a final agency action before seeking judicial review. *See Starbucks*, 125 F.4th at 88 (noting, in similar context, that "*Axon* is … off point"). It did not modify the substantive elements of a removal restriction claim.

This Court already recognized in *National Collegiate* that *Axon* did not overrule *Collins*. *National Collegiate,* 96 F.4th at 615 (citing *Axon* and rejecting plaintiff's claim that unlawful removal restrictions, absent causation, constitute here-and-now injuries). *National Collegiate* rejected a similar constitutional challenge to agency removal protections because "there [wa]s no indication that th[e] suit would [not] have been undertaken *but-for* a president's authority to remove the CFPB's Director." *Id.* (emphasis in original); *see also Starbucks*, 125 F.4th at 88 (decided post-*Axon* and requiring causal harm); *Leachco*, 103 F.4th at 765 ("The Supreme Court's jurisdictional analysis in *Axon* did not change the relief analysis required under *Collins*.").

Spring Creek also points to language from *Seila Law* that it claims disavowed the causal harm requirement. AOB 18-19. But that discussion, and *Seila Law* more broadly, states only that a plaintiff need not show causation to establish *standing* to challenge removal restrictions. *Seila Law*, 591 U.S. at 211 (rejecting argument that absence of causal harm deprives plaintiff of standing); *see*

Leachco, 103 F.4th at 759 ("*Seila Law* concerned standing, *not* entitlement to injunctive relief.") (emphasis in original). Lest there be any doubt, *Collins* clarified that what the Court "said about standing in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction." 594 U.S. at 259 n.24. Nothing in *Axon* calls this directly applicable holding into question.

Spring Creek's argument that causal harm is not required in cases seeking prospective relief fares no better. AOB 19. Spring Creek makes no effort to explain *why* causal harm would be required for retrospective but not prospective relief. Nor could it. The causal harm requirement stems from the fact that unlawful "removal provisions do[] not strip [officers] of the power to undertake the … responsibilities of" the office. *Collins*, 594 U.S. at 258 & n.23. A properly appointed officer who is protected by unconstitutional removal restrictions retains lawful authority to exercise the powers of their office until the President expresses an intent to remove them from office. *Id.* at 258. No part of this reasoning turns on the retrospectivity of the relief sought in *Collins*. *See id.* at 257 (addressing only retrospective relief because plaintiffs' claim for prospective relief was "no longer … live"). Indeed, every circuit court to address the distinction between

prospective and retrospective relief has rejected it.[13] And while this Court has not yet had opportunity to address the argument, it has expressed agreement with those decisions. *Starbucks*, 125 F.4th at 88 ("[I]t is worth noting that other courts of appeal have declined to distinguish between retrospective and prospective relief when applying *Collins*.").

Spring Creek relies on *Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194 (5th Cir. 2021) (en banc), *aff'd and remanded sub nom. Axon*, 598 U.S. 175 (2023), which it argues disavowed the causal harm requirement. AOB 11-12. But Spring Creek overreads *Cochran*, which, like *Axon*, dealt solely with the federal courts' subject-matter jurisdiction to entertain pre-enforcement challenges to administrative proceedings. 20 F.4th at 210. *Cochran* did not hold that a plaintiff can succeed on a removal-restriction claim without showing causal harm (nor that unconstitutional removal restrictions constitute irreparable harm, *see infra* at 47-

[13] *L. Offs. of Crystal Moroney*, 63 F.4th at 180 (declining to "read *Collins* so narrowly"); *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 631 ("But Collins did not rest on a distinction between prospective and retrospective relief."); *Calcutt* 37 F.4th at 316 (noting distinction between retrospective and prospective relief "does not matter here"); *Leachco*, 103 F.4th at 757 (agreeing "with the Second, Fifth, and Sixth Circuits that *Collins'* relief analysis applies to both retrospective and prospective relief").

50). 20 F.4th at 209-10; *see also Cmty. Fin. Servs. Ass'n*, 51 F.4th at 631 (decided post-*Cochran* and endorsing causal harm requirements).[14]

2. Intervening factual developments do not provide a basis for overturning the District Court's order.

On appeal, Spring Creek submitted evidence that the President expressed dissatisfaction with Member Wilcox's performance and removed her. SA4-5. But these factual developments occurred after the District Court issued its decision. As such, they provide no basis for overturning the decision below. "The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court." *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (3d Cir. 1986.); *Glasco v. Hills*, 558 F.2d 179, 180 (3d Cir. 1977) ("The narrow question for decision in this appeal from a denial of a request for a preliminary injunction is whether we should reverse the district court judgment on the basis of the record before the trial court at the time it denied the request."). While 1199SEIU stipulated that the facts Spring Creek seeks to introduce to the appellate record are judicially noticeable, ECF 27-1 at 2, that "does not support [Spring Creek's] asking this Court to reverse a [d]istrict [c]ourt judgment based on

[14] Spring Creek cites district court cases in support of its no-causal-harm-necessary argument. Those cases are all currently on appeal, and all but one are in the Fifth Circuit. *See* AOB 12. And they "fail to persuasively explain why the *Collins* harm standard did not apply to the removal claims there." *YAPP*, 748 F.Supp.3d at 511 n.5 (responding to two district court decisions cited by Spring Creek).

facts not tendered to the [d]istrict [c]ourt." *Moore v. City of Philadelphia*, 461 F.3d 331, 344 n.5 (3d Cir. 2006), *as amended* (Sept. 13, 2006).

The cases cited by Spring Creek are not to the contrary. AOB 37 (citing *In re Application of Adan*, 437 F.3d 381 (3d Cir. 2006), *abrogated on other grounds by Golan v. Saada*, 596 U.S. 666 (2022); *Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199 (3d Cir. 2009)). Neither decision suggests that this Court may reverse a district court's denial of a preliminary injunction based on facts that were not before the district court. If Spring Creek contends that the facts have changed, Spring Creek can file a new preliminary injunction motion in the District Court. Or this Court can dismiss the appeal and remand the case back to the District Court to consider the new facts.

In any event, even if this Court could properly consider the after-the-fact evidence, it would not establish that removal restrictions are a but-for cause of any injury to Spring Creek. *See Nat'l Collegiate*, 96 F.4th at 615-16 (embracing but-for causation requirement); *Cortes v. NLRB*, No. CV 23-2954 (JEB), 2024 WL 1555877, at *6 (D.D.C. Apr. 10, 2024) (listing cases requiring but-for causation); *Collins*, 594 U.S. at 274 (Kagan, J., concurring in part) (plaintiffs are "entitled to injunctive relief … only when the President's inability to fire an agency head affected the complained-of decision").

To establish causation, a plaintiff must show not only that the President intends to remove an officer but also that there is a "nexus between the desire to remove and the challenged actions taken by the insulated actor." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 632. The nexus prong is satisfied upon a showing that "but for the removal restriction, President Trump would have removed [the officer] *and* that the [agency] would have acted differently" as to the challenged actions. *Id.* at 633 (emphasis in original); *see also Nat'l Collegiate*, 96 F.4th at 615; *L. Offs. of Crystal Moroney*, 63 F.4th at 180 (finding removal restrictions to not be but-for cause of injury because investigation of defendant spanned multiple "[d]irectors appointed by three different Presidents"); *Bhatti*, 97 F.4th at 561 (plaintiffs must "plausibly allege that the inability to remove [officer] frustrated the administration's goals" with respect to challenged administrative action).

Spring Creek's evidence could not possibly prove but-for causation. As an initial matter, this evidence does not refer to ALJs at all, much less to the ALJ who presided over Spring Creek's hearing, so it could not plausibly establish causation as to Spring Creek's claims that ALJs are unconstitutionally insulated. SA4-5.

Nor does the President's statement and action show causation for Spring Creek's challenge to the removability restriction on Board Members. The removal protections extended to Board Members are not implicated by the commencement of a hearing before an ALJ, and it is entirely speculative that this case will

percolate up to the Board. If no party files an exception to an ALJ's recommended decision and order, Board Members may never hear or decide the case. 29 U.S.C. §160(c); *see* 29 C.F.R. §102.48(a). Moreover, even if a party to the instant proceeding before the ALJ does ultimately seek review of a final decision by the ALJ, the resulting Board consideration of the matter would not be imminent. Parties have at least 28 days from the issuance of a decision by the ALJ to file exceptions and weeks of additional time for cross-exceptions, answering papers and replies. Spring Creek would have ample time to renew its motion in that eventuality.

Further, Wilcox may not be on the Board if or when this proceeding reaches the NLRB.[15] Even if she is, and the Board hears an appeal from the ALJ's determination, there is no guarantee that Wilcox would be on the panel hearing that appeal. 29 U.S.C. §153(b) authorizes the Board to delegate authority to three-member panels. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (discussing Board panels).

And even if Spring Creek could prove that Member Wilcox will participate in the adjudication of its case, it still could not show that a different Board Member

[15] To be clear, 1199SEIU contends that Wilcox's termination was unlawful. But it is possible that Wilcox would not be reinstated by the time Spring Creek's proceeding would reach the Board.

would take a different position on the issues before the Board, which is a bare requirement of this Court's but-for causation standard. In *National Collegiate*, this Court rejected a challenge to CFPB removal protections because there was "no notion … that the CFPB would have taken" a different action had the President been able to remove the officers in question, a conclusion supported by the CFPB's "consistent" litigation strategy across multiple directors, some of whom were removable at will. 96 F.4th at 615; *see also West v. Saul*, No. 20-CV-5649, 2022 WL 16781547, at *17 (E.D. Pa. Nov. 8, 2022) (Sitarski, Mag. J.) (dismissing removal claim where no indication "the President would have removed the Commissioner and appointed a new Commissioner who would have decided" plaintiff's challenged action differently).

The same is true here. President Trump expressed a desire to remove Member Wilcox based on her decisions about employer speech and the Board's joint employer rule. SA4-5; *supra* at 5-6. But the ULP charge against Spring Creek relates to neither issue. It does not even relate to a decision that Member Wilcox has issued. Instead, the Board's run-of-the-mill enforcement action arises from a completely unrelated legal doctrine—unilateral changes of employment terms in violation of an employer's statutory duty to bargain—that predates Member Wilcox's membership on the board by decades. *See NLRB v. Katz*, 369 U.S. 736 (1962); JA52-55 ¶10-11.

D. Even if they were constitutionally invalid, the removal restrictions would be severable.

Even if Spring Creek could show that the removal provisions are unconstitutional, Spring Creek still could not prevail on its claim for injunctive relief because the appropriate final remedy would be to invalidate and sever those restrictions—*not* to enjoin all Board proceedings.

The Supreme Court has refused to enjoin agency proceedings because of unlawful removal restrictions. Rather, the Court has consistently held that unconstitutional removal protections are severable from an agency's enabling statute. *See Seila Law*, 591 U.S. at 232-38; *Free Enter. Fund*, 561 U.S. at 508-10; *see also Lofstad v. Raimondo*, 117 F.4th 493, 501 (3d Cir. 2024) (holding that severance, not voiding of contested agency action, was proper remedy for unconstitutional appointment provision); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (denying injunction in challenge to removal protections and noting that "severance of the unconstitutional provision is the chosen remedy" in separation-of-powers cases).

In *Free Enterprise Fund*, for example, the Court rejected the plaintiffs' attempt to enjoin the PCAOB's operations and instead severed the offending statutory provisions, which left the PCAOB members freely subject to removal by the Securities and Exchange Commission. 561 U.S. at 508, 513. Similarly, in *Seila Law*, the Court held unconstitutional removal protections for the CFPB

Director. 591 U.S. at 232. But instead of limiting the agency's operations, it severed the Director's removal protection. In doing so, the Court noted that "[t]he provisions of the [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. The same is true here; Board removal protections are severable from the NLRA. 29 U.S.C. §166 (express NLRA severability clause); *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 625 (2020) (acknowledging "a strong presumption of severability").

An injunction against administrative proceedings is inappropriate where, as here, severance rather than voiding of agency action is the appropriate final remedy. *See Free Enter. Fund*, 561 U.S. at 513; *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 222 (1974) (when "relief sought produces a confrontation with one of the coordinate branches of the Government," "framing of relief" may be "no broader than required" to address "concrete injury"); *VHS Acquisition*, 2024 WL 5056358, at *9 (holding severance to be appropriate remedy). Indeed, if the only remedy Spring Creek could obtain is severance, then a preliminary injunction would grant Spring Creek a greater remedy than it could obtain at final judgment. *See 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.").

II. Spring Creek did not show likely irreparable harm absent a preliminary injunction.

Spring Creek had the burden to show that, absent a preliminary injunction, it would suffer irreparable harm before the District Court could decide the case on the merits. *Delaware State Sportsmen's Ass'n*, 108 F.4th at 204. It failed to make this showing.

Even if Spring Creek had established a constitutional violation (which it did not), the existence of a constitutional violation is not enough to show immediate irreparable harm. *Id.* at 204; *see also John Doe Co.*, 849 F.3d at 1135 ("[V]iolation of separation of powers by itself is not invariably an irreparable injury.") (quotation omitted); *Tilton v. Sec. & Exch. Comm'n*, 824 F.3d 276, 286 (2d Cir. 2016) (holding, in Appointments Clause suit, "being subjected to an unconstitutional adjudicative procedure" not irreparable in itself).

Thus, Spring Creek was required to show that it would suffer real and significant irreparable harm if the District Court did not issue a preliminary injunction. Spring Creek did not. It did not show that anything would happen, beyond its participation in an ALJ proceeding, before the District Court could decide the merits.[16] *Cf. Space Expl. Techs., v. NLRB*, 129 F.4th 906, 910 (5th Cir.

[16] The ALJ hearing has concluded, and the parties submitted their post-hearing briefs. AOB 9-10. All that is left is for the ALJ to render a decision. *Id.* at 10. Spring Creek's Complaint suggests that its injury stems from "undergoing

2025) (participating in unconstitutional ALJ proceedings was not sufficiently serious to justify immediate appeal where plaintiff did not show it would "suffer any consequences" by participating).

Axon does not affect this analysis. Despite Spring Creek's repeated assertions to the contrary, *Axon*'s reference to a "here-and-now injury" referred only to a court's jurisdiction to consider the merits of separation of powers claims. *Supra* at 36-37. Even if an agency's exercise of unlawful authority injures a participant in agency proceedings, *Axon* does not hold that every such injury is irreparable or is substantial enough to satisfy the irreparable injury prong required for an injunction. *See VHS Acquisition Subsidiary No. 7 v. NLRB*, No. 1:25-cv-02577 (TNM), 2024 WL 4817175, at *6 (D.D.C. Nov. 17, 2024) (concluding that *Axon* did not so hold). On the record, Spring Creek has given this Court no reason to believe that "[v]acatur, even at the appeal-from-final-judgment stage," would not "fully vindicate" Spring Creek's constitutional rights. *In re al-Nashiri*, 791 F.3d 71, 80 (D.C. Cir. 2015).

Further, Spring Creek fails to prove irreparable harm for two additional, independent reasons. Spring Creek's delay in seeking relief undermines its claim

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protracted administrative proceedings." JA19; *see also* JA26. But Spring Creek has fully participated in the ALJ's proceedings. It is implausible that the ALJ's written order could by itself constitute an irreparable injury that would justify a preliminary injunction.

for relief as to Board ALJ proceedings. "Equity is contextual. It turns on the facts, and it supplements remedies at law only when needed." *Delaware State Sportsmen's Ass'n*, 108 F.4th at 206. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018). Preliminary injunctions are granted when "[t]here is an urgent need for speedy action to protect the plaintiffs' rights." *Delaware State Sportsmen's Ass'n*, 108 F.4th at 203 (quotation omitted). But delay "in seeking enforcement of those rights … tends to indicate at least a reduced need for such drastic, speedy action." *Id.* (quotation omitted).

In *Delaware State Sportsmen's Association*, this Court held that a four-month delay in pursuing preliminary relief in a case challenging a state statute on constitutional grounds "suggest[ed] that [plaintiff] felt little need to move quickly" and militated against issuing an injunction. 108 F.4th at 206; *see also Orson, Inc. v. Miramax Film Corp.*, 836 F.Supp. 309, 312 (E.D. Pa. 1993) ("Clearly plaintiff's own [50-day] delay in filing the motion shows that irreparable harm ... is not imminent as is required for a preliminary injunction."). The same is true here. After the Board notified Spring Creek of the ALJ hearing, Spring Creek waited over 100 days to file suit in the District Court. JA24; JA67.

Moreover, Spring Creek agreed to stay the District Court proceeding while this appeal was pending. JA15. The underlying District Court case does not

appear to turn on disputed facts. Spring Creek could have moved for summary judgment and received a decision on the merits by now. This also shows there was no need for a preliminary injunction.

Finally, to support a preliminary injunction, "the risk of irreparable harm must not be speculative." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 488 (3d Cir. 2000). The injury must also be imminent. *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). Spring Creek's claimed injuries from Board removal protections were neither. As noted *supra* at 42-43, the NLRB itself may never even hear or decide the case, and if it does, Wilcox may not be on the Board or on the panel that hears this case. For these reasons as well, Spring Creek was not entitled to preliminary injunctive relief.

III. The balance of equities and public interest do not favor an injunction.

When a plaintiff's showing on the balance-of-equities and public-interest factors is weak, injunctive relief should be denied. *Benisek*, 585 U.S. at 158. Injunctions are an exceptional remedy that "[c]ourts rightly hesitate" to grant when doing so would "interfere with exercises of executive or legislative authority." *Delaware State Sportsmen's Ass'n, Inc.*, 108 F.4th at 199, 205. That is because "great 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 Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 760 (8th Cir. 2003).

Spring Creek asks this Court to enjoin the *only* agency empowered to enforce this nation's labor laws. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). It boldly claims that "[d]efendants … would not be harmed if this injunction is granted" because the Government can have no valid interest in enforcing an unlawful proceeding. AOB 35-36. But "[t]here is always a public interest in prompt execution" of the laws. *Nken v. Holder*, 556 U.S. 418, 436 (2009); *see also Delaware State Sportsmen's Ass'n*, 108 F.4th at 205. If the Board is enjoined, 1199SEIU's members will have no way to challenge Spring Creek's unfair labor practices. And if Spring Creek's position is accepted, nearly every unfair labor practice case connected to this circuit will be stalled by indefinite injunctions. Such a holding would leave thousands of workers without any remedy for federal labor law violations, and would contravene this Court's assurances that injunctions are exceptional. *Delaware State Sportsmen's Ass'n, Inc.*, 108 F.4th at 199.

Spring Creek further contends that an erroneous injunction would merely delay proceedings at a time when the Board lacks a quorum and is therefore unable to take final action in the underlying case. AOB 36. But the factual basis for this argument is speculative at best. Since Spring Creek filed its brief, Member Wilcox was returned to office, *see Wilcox*, 2025 WL 720914, and the Board resumed

issuing decisions for several weeks until her reinstatement was stayed, *Harris*, 2025 WL 980278. As of the filing of this brief, Member Wilcox was again reinstated. *Harris*, 2025 WL 1021435, at *1-2. Even if the Board were again to lose its quorum, the President could appoint new members to fill vacancies on the Board. Just one such appointment would restore a quorum, even without Member Wilcox.

Even absent a quorum, the Board's General Counsel and regional offices continue their normal operations, which includes processing unfair labor practice charges and representation cases. *Information For the Public on NLRB Office of the General Counsel Authority For Continuing Operations, Representation Case Processing, and Court Litigation*, NLRB (Feb. 1, 2025), https://www.nlrb.gov/news-outreach/news-story/information-for-the-public-on-nlrb-office-of-the-general-counsel-authority. The same is true of ALJs, who continue holding hearings and issuing recommended orders. *See generally Administrative Law Judge Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions (last visited Apr. 6, 2025) (listing recommended orders issued when Board lacked quorum).

By contrast, Spring Creek will suffer little harm from denial of an injunction. Its nebulous claims that it will suffer irreparable harm by continuing to participate in proceedings are too vague to outweigh the substantial harm wrought

by a preliminary injunction. *Cf. Space Expl. Techs.*, 129 F.4th at 910. And, if this Court takes Spring Creek's lack-of-quorum argument seriously, Spring Creek will also not suffer an injury if this injunction does not issue.

IV. The Norris-LaGuardia Act stripped the District Court of jurisdiction to issue an injunction.

The District Court's preliminary injunction denial should be affirmed for another reason. Congress provided that "court[s] of the United States" lack jurisdiction to issue injunctions "in any case involving or growing out of a labor dispute" absent specific showings that were not made here. 29 U.S.C. §107.[17]

This case unquestionably "grow[s] out of" a "labor dispute," which includes "any controversy concerning terms or conditions of employment." 29 U.S.C. §113; *see also Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982) (noting "critical element" is whether controversy involves an employer-employee relationship). The underlying Board proceeding involves terms and conditions of employment—it stems from Spring Creek's refusal "to assume all terms and conditions of the expired collective bargaining agreement"

[17] The Board did not raise this argument below. But the Norris-LaGuardia Act ("NLGA") withdraws jurisdiction to grant the remedy of injunctive relief. 29 U.S.C. §101. Lack of jurisdiction can be raised at any time. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 76-77 (3d Cir. 2003); *see also Green v. Obergfell*, 121 F.2d 46, 54 (D.C. Cir. 1941) (NLGA injunction-bar unwaivable).

when it purchased a skilled nursing facility in New Jersey.[18] JA54; *see VHS Acquisition*, 2024 WL 4817175, at *5 (holding similar constitutional challenge to NLRB grew out of labor dispute because challenge would not exist but for ULP charges and proceeding).

Thus, two narrow exceptions notwithstanding,[19] the federal courts may issue an injunction only after holding a hearing and finding that "substantial and irreparable injury to complainant's property will" occur absent an injunction. 29 U.S.C. §107; *see also United Tel. Workers, AFL-CIO v. W. Union Corp.*, 771 F.2d 699, 703-04 (3d Cir. 1985) (reversing injunction when court did not hold evidentiary hearing and make findings of fact as required by 29 U.S.C. §107).

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[18] The NLGA applies to claims against the NLRB. *See Armco, Inc. v. United Steelworkers*, 280 F.3d 669, 678-81 (6th Cir. 2002) (injunction against government officials impermissible because it would interfere with union's rights in labor dispute); *see also New Negro All. v. Sanitary Grocery Co.*, 303 U.S. 552, 560-61 (1938); *Nexstar Media, Inc. Grp. v. NLRB*, 746 F.Supp.3d 464, 473 (N.D. Ohio 2024) (noting that suit was "intended to divert the NLRB's ability to administratively resolve the dispute initiated by" a union).

[19] Those exceptions are "to reconcile Norris-LaGuardia with the mandates of a specific federal statute" and "to accommodate [NLGA's] 'strong policy favoring arbitration.'" *Dist. 29, United Mine Workers v. New Beckley Min. Corp.*, 895 F.2d 942, 946 (4th Cir. 1990) (quoting *Jacksonville Bulk Terminals*, 457 U.S. at 711-13). Neither exception applies here. Spring Creek's constitutional claim does not arise from a federal statute. *See Lukens Steel Co. v. United Steelworkers of Am. (AFL-CIO)*, 989 F.2d 668, 678 (3d Cir. 1993). And it seeks a preliminary injunction, "a judge-made remedy" "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Nor is Spring Creek seeking to enforce a contractual arbitration clause.

Spring Creek presented no evidence of substantial injury to its "property" or to a property-like interest, such that a hearing would be justified. 29 U.S.C. §107 (b); *see also id.* §107(e) (requiring finding that "public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection"); *Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union*, 22 F.3d 8, 13 (1st Cir. 1994) (explaining that the NLGA's injury requirement is stricter than the requirement that applies for ordinary preliminary injunctions).

The NLGA separately strips courts of jurisdiction to grant an injunction when the "complainant … has failed to comply with any obligation imposed by law which is involved in the labor dispute." 29 U.S.C. §108. The NLRB's General Counsel concluded, after an investigation, that Spring Creek violated federal labor law by refusing to recognize the union. JA41. It has therefore not complied with its legal obligations.

Multiple district courts have held, in other constitutional challenges to Board removal protections, that the NLGA barred an injunction. *See, e.g.*, *VHS Acquisition*, 2024 WL 4817175, at *4-7; *Amazon.com Services LLC v. NLRB*, No. 2:24-cv-09564-SPG-MAA, 2025 WL 466262, at *3-5 (C.D. Cal. Feb. 5, 2025). The same is true here.

CONCLUSION

The District Court's order should be affirmed.

Date: April 7, 2025

Respectfully submitted,

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COMBINED CERTIFICATIONS

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2. **Word Count, Typeface, and Type Style:** I certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(f) because the brief was produced using Microsoft Word and contains 12,936 words, excluding those portions excluded by Rule 32(a)(7)(C). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because it has been prepared in the proportionally spaced typeface, Times New Roman, size 14.

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April 7, 2025