APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES

Benoit Brookens,
Plaintiff

v.

LaRhonda Gamble, et al
Defendants

and

Benoit Brookens,
Plaintiff

v.

Dino Drudi, et al
Defendants

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5049 September Term, 2021

1:20-cv-01740-CRC Filed On: May 31, 2022

Benoit Brookens,
Appellant
v. Larhonda Gamble, President Local 12, AFGE, AFL-CIO, et al.,
Appellees

No. 21-7020
1:20-cv-00695-CRC
Benoit Brookens, Appellant
v.
Dino Drudi, et al.,
Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Millett, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson*, Circuit Judges; and Sentelle, Senior Circuit Judge

O R D E R Upon consideration of appellant's petition for rehearing en banc filed in case No. 21-5049 and in case No. 21-7020, and the absence of a request by any member of the court for a vote, it is * Circuit Judge Jackson did not participate in this matter.
USCA Case #21-7020 Document #1948576 Filed: 05/31/2022

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5049 September Term, 2021

ORDERED that the petition filed in these cases be denied.

Per Curiam FOR THE COURT: Mark J. Langer, Clerk BY: /s/ Anya Karaman Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 21-5049 September Term, 2021

FILED ON: MARCH 28, 2022
BENOIT BROOKENS,
APPELLANT v.
LARHONDA GAMBLE, PRESIDENT LOCAL 12,
AFGE, AFL-CIO, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-01740)

No. 21-7020
BENOIT BROOKENS, APPELLANT
v.
DINO DRUDI, ET AL.,
APPELLEES
Appeal from the United States District Court for the District of Columbia (No. 1:20-cv-00695)

Before: ROGERS and RAO, Circuit Judges, and SENTELLE, Senior Circuit Judge.
USCA Case #21-7020 Document #1940817
Filed: 03/28/2022 Page 1 of 3

No. 21-5049 September Term, 2021 No. 21-7020

J U D G M E N T

These cases were considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. See D.C. Cir. R. 36(d).

For the reasons set forth below, it is ORDERED AND ADJUDGED that the orders of the district court be affirmed.

Appellant Benoit Brookens appealed the granting of motions to dismiss in favor of appellees in two related cases. Due to the overlapping factual and legal backgrounds of the cases, we heard only one, consolidated argument.

Brookens—a former employee of the Department of Labor; a former member of American Federation of Government Employees, Local 12; and a former elected delegate to American Federation of Government Employees, Council 1—brought this action against Local 12 and members of the Council 1 election committee for expelling him from Local 12 and preventing him from running for president of Council 1. Brookens asserted jurisdiction for his claims in the district court under 29 U.S.C. § 412, which provides: Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. This section permits an aggrieved person to bring an action against a labor organization that exists for the purpose of "dealing with employers." § 402(i). However, the statute excludes "the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof," from its definition of "Employer." § 402(e).

We affirm for the reasons provided by the district court. Brookens v. Gamble, et al., No. 20-cv-1740

(CRC), Docket Entry 26 (D.D.C. Oct. 19, 2020). Because Local 12 and Council 1 are composed exclusively of government employees, the district court rightly dismissed Brookens's claims. To the extent that Brookens contends that Council 1, unlike Local 12, is subject to the Labor-Management Reporting and Disclosure Act because it is a "joint council," § 402(i), that argument was forfeited because it was not raised in the district court, see Keepseagle v. Perdue, 856 F.3d 1039, 1054 (D.C. Cir. 2017). 2 USCA Case #21-7020 Document #1940817 Filed: 03/28/2022 Page 2 of 3

No. 21-5049 September Term, 2021 No. 21-7020 Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Daniel J. Reidy Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS, Plaintiff,
v. DINO DRUDI, et al.,
Defendants.
Case No. 20-cv-695 (CRC)
ORDER

Plaintiff Benoit Brookens moves to alter or amend the Court's October 5, 2020 judgment dismissing this case for lack of jurisdiction.

The Court will deny the motion.

Federal Rule of Civil Procedure 59(e) provides that a party may file "[a] motion to alter or amend a judgment" within 28 days after the entry of the judgment. "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotation marks omitted).

"[M]ere disagreement does not support a Rule 59(e) motion." Smith v. Lynch, 115 F. Supp. 3d 5, 12 (D.D.C. 2015) (quoting United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002)).

Here, the crux of Mr. Brookens's argument for relief under Rule 59(e) is that he purportedly exhausted his administrative remedies, or that he should be excused from any requirement to do so, before

litigating this action. However, the Court did not dismiss the Complaint in this case for failure to exhaust administrative remedies. Rather, the Court found that it lacked jurisdiction because the union whose conduct Brookens challenged—American Federation of Government Employees Council 1—represents only public-sector workers and Case 1:20-cv-00695-CRC Document 19 Filed 01/26/21 Page 1 of 2

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therefore is not a "labor organization" covered by the Labor Management Reporting and Disclosure Act. Brookens v. Drudi, No. 20-cv-695 (CRC), 2020 WL 5891450, at *4-*5 (D.D.C. Oct. 5, 2020). Brookens's motion to alter or amend the judgment fails to rebut, or even respond to, the reasons the Court articulated for dismissing the case.
Therefore, it is hereby ORDERED that [17] Plaintiff's Motion to Alter or Amend October 5, 2020 Order is DENIED.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: January 26, 2021

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS, Plaintiff,

v. LARHONDA GAMBLE, et al., Defendants.

Case No. 20-cv-1740 (CRC)

ORDER

Plaintiff Benoit Brookens moves to alter or amend the Court's October 19, 2020 judgment dismissing this action. The Court previously determined that it lacked jurisdiction to rule on Mr. Brookens's claims, which relate to a dispute over his membership status with the American Federation of Government Employees ("AFGE") Local 12. Because Brookens fails to show any error in that prior ruling, the Court will deny the instant motion.

I. Background

The Court assumes the parties' familiarity with the factual background of this case, which the Court set out in its previous Memorandum Opinion. Brookens v. Gamble, 20-cv-1740 (CRC), 2020 WL 6134266, at *1-*2 (D.D.C. Oct. 19, 2020). Briefly, Local 12 is a union composed entirely of current U.S. Department of Labor ("DOL") employees, former employees who retired from DOL, and former employees who were terminated by DOL without cause. Gamble Decl. ¶ 3, ECF No. 8-2. Brookens became a member of Local 12 around January 1990. Compl. ¶ 5. In his telling, he

has been a "retired" member of Local 12 since approximately August 2007. Id. Local 12, however, considers Brookens a nonmember. Gamble Decl. ¶ 12. Consistent with that position, Local 12 allegedly stopped accepting Brookens's dues, enlisted Case 1:20-cv-01740-CRC Document 31 Filed 01/26/21 Page 1 of 5 2 help from DOL to prevent him from attending membership meetings, and denied him the right to vote on a new collective bargaining agreement that was ratified in 2020. Compl. ¶¶ 15, 18, 21.

In March and June 2019, Brookens submitted administrative charges to the Federal Labor Relations Authority ("FLRA"), complaining of his exclusion from Local 12 meetings by Local 12 and DOL officials. Compl. Exhs. 3, 4. The FLRA dismissed those charges, and Brookens appealed those dismissals to the FLRA's Office of General Counsel. Compl. ¶ 26. At the time of the Complaint, the Office of General Counsel had not ruled on the appeals. Id. ¶ 27.

In June 2020, Brookens filed this pro se action against Local 12, its president LaRhonda Gamble, Secretary of Labor Eugene Scalia, and DOL security officer Timothy Deane. The fivecount Complaint cited two federal statutes—the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7116 et seq., and the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411 et seq.—as bases for jurisdiction. Compl. ¶ 3. Brookens also alleged that

certain actions by Deane and Gamble violated the First and Fourteenth Amendments. Id. ¶ 29.

The Court dismissed the Complaint in October 2020 for lack of subject matter jurisdiction. The Court concluded that it lacked jurisdiction over Brookens's LMRDA claims because Local 12 represents only public-sector workers and therefore is not a "labor organization" covered by the LMRDA. Brookens, 2020 WL 6134266, at *5. The Court also held that it had no power to entertain unfair labor practice claims under the CSRA, id. at *7, and that Brookens could not pursue his constitutional claims in court without first exhausting his administrative remedies under the CSRA, which he had failed to do, id. at *8.

Undeterred, Brookens filed a motion to alter or amend the Court's judgment under Federal Rule of Civil Procedure 59. He claims that the Court erred in its analysis of two issues. First, he contends that he exhausted his internal union remedies "at the local, intermediate, and Case 1:20-cv-01740-CRC Document 31 Filed 01/26/21 Page 2 of 5 3 national levels of" AFGE because "the national union, when presented with the opportunity to review Mr. Brookens' appeal of his membership status, . . . failed to do so." Mot. to Alter or Amend Judgment ("Mot.") 2. Second, he argues that he has a private right of action under the LMRDA—a right purportedly recognized by DOL regulations. See id.; Reply 6. The union defendants and the government defendants

separately filed oppositions to the motion, to which Brookens has replied.

II. Legal Standard Federal Rule of Civil Procedure 59(e) provides that a party may file "[a] motion to alter or amend a judgment" within 28 days after the entry of the judgment. "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotation marks omitted). "[M]ere disagreement does not support a Rule 59(e) motion." Smith v. Lynch, 115 F. Supp. 3d 5, 12 (D.D.C. 2015) (quoting United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002)).

III. Analysis

The Court has carefully reviewed Mr. Brookens's arguments in favor of altering the judgment and the materials attached to his motion papers. The Court finds no error in its previous decision and no reason to alter the judgment. First, assuming it is true that Brookens exhausted all internal union remedies, including at the national union level, that fact does not require the Court to revise its jurisdictional analysis as to the constitutional or LMRDA claims in the Complaint. Case 1:20-cv-01740-CRC Document 31 Filed 01/26/21 Page 3 of 5 4 As the Court previously explained, Brookens's constitutional

claims are intertwined with his CSRA claims, and he therefore must "exhaust his administrative remedies before turning to this Court with these constitutional challenges." Brookens, 2020 WL 6134266, at *8 (emphasis added). This means Brookens must complete the process of seeking relief from the FLRA (including the administrative appeal process), as prescribed by the CSRA. Id. at *9-*10. That Brookens may have exhausted his "internal remedies" within AFGE, Mot. 2 (emphasis added), does not excuse his failure to exhaust all administrative remedies at the FLRA.

Insofar as Brookens also means to suggest that his exhaustion of internal remedies with the national AFGE supplies the Court with jurisdiction under the LMRDA, that argument fails. As no one disputes, the national AFGE is a "labor organization" covered by the LMRDA because it represents private-sector employees as well as government workers. See Wildberger v. AFGE, AFL-CIO, 86 F.3d 1188, 1192 (D.C. Cir. 1996). Accordingly, if Brookens had pled a claim that the national AFGE violated his rights under the LMRDA, the Court might have jurisdiction. But that is not what Brookens alleged. Instead, he challenged the conduct of Local 12 exclusively. See Compl. (naming Local 12 and its president, but not the national AFGE, as defendants); id. ¶ 1 (stating that this action "challenges the fairness of the ratification vote for the Local 12 Collective Bargaining Agreement"). That Brookens unsuccessfully sought the

intervention of the national AFGE through the union's internal process does not transform this case into a challenge to the national union's actions; the Complaint's sole focus remains on Local 12, which is beyond the LMRDA's scope.

Second, Brookens argues more generally that the LMRDA provides him a cause of action in federal court, but that contention fails for the reason already stated: the LMRDA does not govern a purely public-sector local such as Local 12, even if that local has a covered parent Case 1:20-cv-01740-CRC Document 31 Filed 01/26/21 Page 4 of 5 5 union. Brookens, 2020 WL 6134266 at *5-*6; see also Wildberger, 86 F.3d at 1192 (noting that DOL regulations classify "locals composed purely of government employees" as outside the LMRDA's coverage). Seeking to sidestep this obstacle, Brookens cites a DOL rule that regulates unions representing the federal government workforce. Mot. 2 (citing Standards of Conduct for Federal Sector Labor Organizations, 71 Fed. Reg. 31,929 (Jun. 2, 2006)). But as DOL itself recognized in promulgating that rule, federal-sector unions' members are protected by the CSRA rather than the LMRDA—and "[t]he CSRA, unlike the LMRDA, does not confer jurisdiction on Federal district courts." 71 Fed. Reg. at 31,939. The cases Brookens cites in his Reply are similarly unhelpful to him because they involve unions that, unlike Local 12, represent private-sector employees and thus are subject to the LMRDA. See Reply 6-10 (citing and quoting cases).

Accordingly, the Court remains persuaded that it lacks jurisdiction over all claims in the Complaint. The Court will not alter or amend its order dismissing the case on that basis.

IV. Conclusion

For the foregoing reasons, it is hereby ORDERED that [27] Plaintiff's Motion to Alter or Amend October 19, 2020 Order is DENIED.

SO ORDERED.

CHRISTOPHER R. COOPER

United States District Judge

Date: January 26, 2021

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS, Plaintiff,
v.
DINO DRUDI, et al., Defendants.

No. 20-cv-695 (CRC)

MEMORANDUM OPINION

Plaintiff Benoit Brookens wanted to run for President of the American Federation of Government Employees ("AFGE") Council 1. The Election Committee of Council 1 denied him that opportunity, explaining that AFGE did not consider him to be a member in good standing. Proceeding pro se, Mr. Brookens has now sued individual members of the Election Committee, challenging his exclusion from the election under the Labor Management Reporting and Disclosure Act ("LMRDA"). Defendants have moved to dismiss the Complaint on several grounds, including lack of subject matter jurisdiction.

The Court agrees with defendants that it lacks jurisdiction over Brookens's claim. District courts have jurisdiction to hear LMRDA claims over the conduct of unions that represent private-sector employees, even if those unions also represent government workers. But entities that represent solely government workers fall outside the scope of the LMRDA. Council 1 undisputedly is composed entirely of union locals that exclusively represent public-sector workers. The LMRDA therefore does not apply to Council 1 and the Court must dismiss

the Complaint. Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 1 of 9 2 I.

Background
A.
Facts

The following facts are alleged in the Complaint or apparent from the declaration of current AFGE Council 1 President DeAndre Taylor, which was submitted by Defendants and whose accuracy Brookens does not dispute.

Council 1 is an entity affiliated with AFGE. Compl. ¶ 4; Tyler Decl. ¶ 5. Council 1 is composed of seven AFGE locals within AFGE District 14, including AFGE Local 12. Tyler Decl. ¶¶ 7, 8. All seven of Council 1's local affiliates represent exclusively government workers. Id. ¶ 9. As such, Council 1 does not represent any members employed by private-sector companies or other non-governmental entities. Id. ¶ 10.

Brookens considers himself a member of AFGE, Council 1, and Local 12. 1 Compl. ¶ 2. He has filed ten pending grievances with Local 12, dating back as far as 2006. Id. ¶ 10. He last attended a Local 12 membership meeting in October 2018. Id. Brookens continued to send Local 12 checks for his membership dues, but at some point, Local 12 stopped depositing those checks. Id. ¶ 8. According to Brookens, Local 12 chose not to deposit the checks or to return them with an explanation of why they would not be deposited. Id. In February 2020, Local 12 returned Brookens's dues check with a letter from its president, stating that Brookens was "not eligible

to be a member of AFGE Local 12, consistent with my emails to you on February 13 and 20, 2019." Id. 7 (Attachment 2); id. ¶ 8(B). Brookens alleges that Local 12 returned his check 1 Brookens is a former Department of Labor economist who was terminated in 2008. Brookens v. Acosta, 297 F. Supp. 3d 40, 43 (D.D.C.), summarily aff'd, 2018 WL 5118489 (D.C. Cir. 2018), cert. denied, 140 S. Ct. 572 (2019). In a separate pending case, he has alleged that he remains a retired member of Local 12. Complaint ¶ 5, Brookens v. Gamble, No. 20-cv-1740 (CRC) (D.D.C. June 25, 2020). The Court takes judicial notice of this background information but does not rely on it to decide the present Motion to Dismiss. Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 2 of 9

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"to intimidate [him] and to undermine his seeking elective office and disqualify him from voting" in union elections. Id. ¶ 8(B).

Brookens wished to run for Council 1 President in the election held March 11, 2020. Id. ¶¶ 11-12. However, about a week before the election, the Council 1 Election Committee—which includes defendants Dino Drudi, Gina Walton, and Frank Silberstein—notified Brookens by email that his name would not appear on the ballot. Id. ¶ 6. The Election Committee stated that its decision was based on the representation of the AFGE Office of General Counsel that Brookens was not an AFGE member in good standing. Id. ¶ 7. Brookens claims it was "deceitful and misleading" for the Office of General Counsel to advise the Election Committee that he was not a member in good standing, because

the General Counsel and District 14 National Vice President Eric Bunn allegedly knew that Local 12 was not depositing Brookens's dues checks. Id. ¶ 8(A). Brookens also alleges that the notice from the Election Committee "intentionally does not provide [him] an opportunity to cure any alleged defects to his 'good standing status.'" Id. ¶ 8. In his view, the notice "constitutes a wholly spurious effort by the Office of General Counsel and [Mr. Bunn] to deprive [him] of the benefits of his AFGE membership, including, seeking elected office." Id.

Shortly after receiving the notice, Brookens appealed the decision to exclude him from the ballot. Id. ¶ 9. At the time of the Complaint, the Election Committee had not ruled on the appeal. Id.

B. Proceedings in this Case

Brookens filed this lawsuit on March 10, 2020—one day before the election in which he sought to run—alleging that the Election Committee's actions violated the LMRDA. Id. ¶ 1, 3. The Complaint seeks injunctive relief to prevent the Election Committee from excluding Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20
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Brookens from the March 11 ballot, as well as "any other relief to which Mr. Brookens is entitled." Id. ¶ 12. Brookens also moved for a temporary restraining order and a preliminary injunction to force the Election Committee to place his name on the ballot.

On March 11, hours before the election, the Court held a hearing on Brookens's motions for preliminary relief. The Court found that Brookens had not satisfied his burden to show that he would likely succeed in establishing that the Court had jurisdiction over his claim, or that he was in fact eligible for AFGE membership. The Court also found that Brookens failed to show he would suffer irreparable harm without preliminary relief. Hearing Tr. 20-21. Accordingly, the Court denied the motions. Minute Order (March 11, 2020).

Defendants moved to dismiss the Complaint later that month, arguing that the Court lacks subject matter jurisdiction because Council 1 is not covered by the LMRDA; that the case is moot because the March 11 election has already occurred; that the Complaint fails to allege a cognizable LMRDA violation; and that the Complaint was not properly served on defendants. Defs .' Mem. 1-2. The motion is now fully briefed and ripe for decision.

II. Legal Standard

The Court must dismiss any claim over which it lacks subject matter jurisdiction. Auster v. Ghana Airways Ltd., 514 F.3d 44, 48 (D.C. Cir. 2008). On a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. Knapp Med. Ctr. v. Hargan, 875 F.3d 1125, 1128 (D.C. Cir. 2017). The Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," but need not

"assume the truth of legal conclusions" in the complaint. Williams v. Lew, 819 F.3d 466, 472 (D.C. Cir. 2016) (internal quotation marks omitted). The Court also "may consider materials outside the Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 4 of 9 5 pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005). 2

III. Analysis

Defendants argue that the Court lacks jurisdiction over Brookens's claim because Council 1 represents only government workers and therefore is not covered by the LMRDA. Defs.' Mem. 6. The Court agrees and will therefore dismiss the Complaint for lack of subject matter jurisdiction without reaching defendants' other arguments.

Because the sole claim in this case is that the Council 1 Election Committee's exclusion of Brookens from a Council 1 election violates the LMRDA, the Court's "jurisdiction turns on whether the LMRDA applies to" Council 1. Wildberger v. AFGE, AFL-CIO, 86 F.3d 1188, 1192 (D.C. Cir. 1996). "Congress enacted the LMRDA to protect workers from corrupt leadership in unions representing private sector employees[.]" Id. at 1193. The LMRDA provides certain rights to "[e]very member of a labor organization." 29 U.S.C. § 411(a); see also id. § 529 (no "labor organization" may "fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter."). The statute authorizes actions in federal district court to

vindicate those rights. Id. §§ 412, 529. However, the scope of the LMRDA is limited by its definition of the term "labor organization": "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is 2 Defendants seek dismissal on both jurisdictional and non-jurisdictional grounds. However, because the Court concludes that the Complaint must be dismissed under Rule 12(b)(1), it has no occasion to apply the standards for other types of motions to dismiss. Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 5 of 9 6 subordinate to a national or international labor organization, other than a State or local central body. Id. § 402(i) (emphases added). "Employer," in turn, is defined to exclude "the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." Id. § 402(e); see also Wildberger, 86 F.3d at 1192 ("The LMRDA definition of 'employer,' specifically excludes federal, state and local governments."). The definition of "employee" is limited to individuals "employed by an employer"—i.e., nongovernmental employees. Id. § 402(f). And an organization is considered to be "engaged in an industry affecting commerce" only if it fits certain criteria based on its relationship with "employees." Id. § 402(j).3 Thus, a union or similar entity that

represents only government workers is not covered by the LMRDA. The LMRDA does, however, apply to a "mixed union" 3 Section 402(j) provides in full, A labor organization shall be deemed to be engaged in an industry affecting commerce if it-- (1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or (5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body. Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20
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whose members include both governmental and private-sector workers. Wildberger, 86 F.3d at 1192.

In this case, all parties apparently agree that AFGE is a mixed union. See Defs.' Mem. 6; Opp. 6; see also Wildberger, 86 F.3d at 1192 (noting that, as of 1996, AFGE was a mixed union). It also appears undisputed that Council 1 itself exclusively represents government workers. Tyler Decl. ¶¶ 9-10. The Court therefore must determine whether the LMRDA authorizes claims in federal court against a purely public-sector council affiliated with a mixed parent union.

The D.C. Circuit has not directly addressed this question, but it has arguably hinted at a negative answer. In Wildberger, the Circuit noted that the Department of Labor had promulgated a regulation classifying "locals composed purely of government employees" as outside the LMRDA's coverage. 86 F.3d at 1192. The court did not suggest that this regulation was inconsistent with its interpretation of the LMRDA.

Most courts since Wildberger have found that the LMRDA does not authorize suits against purely public-sector affiliates of mixed unions. See, e.g., Reed v. Sturdivant, 176 F.3d 1051, 1052 (8th Cir. 1999) (purely public-sector AFGE local not a "labor organization" under the LMRDA); Hudson v. AFGE, No. 19-cv-2738 (JEB), 2019 WL 6683778, at *2-*3 (D.D.C. Dec. 6, 2019) (similar); Adams v. AFSCME Int'l, 167 F. Supp. 3d 730, 740 (D. Md. 2016) ("[A] local union that represents only public employees is not subject to the LMRDA, and the fact that its parent organization qualifies as a labor organization

for purposes of the LMRDA does not change the local union's status.") (citing, inter alia, Wildberger, 86 F.3d at 1192). The Court is aware of only one decision to the contrary. See Hillman v. AFGE, AFL-CIO, No. 18-cv-999 (RCL), 2019 WL 340841, at *3 (D.D.C. Jan. 28, 2019) (concluding, without analysis, that "[a] local union representing only government employees falls under the LMRDA as long as its Case 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 7 of 9 8 parent union represents both public and private sector workers.") (citing Wildberger, 86 F.3d at 1192-93).

The Court agrees with the majority rule that the LMRDA does not apply to a government-only local, council, or other affiliate of a mixed parent union. This rule accords with the statutory text. The LMRDA's definition of "labor organization" specifies that some entities may be covered by virtue of their status as "subordinate" affiliates of national or international labor organizations. 29 U.S.C. § 402(i). But it also makes clear that no entity, subordinate or otherwise, can qualify as a labor organization unless it is "engaged in an industry affecting commerce." Id. (defining "labor organization" as "a labor organization engaged in an industry affecting commerce," and clarifying that this definition includes certain subordinate entities that are "so engaged"). And the business of government is not an "industry affecting commerce" under the LMRDA. See id. § 402(j) (deeming an organization to be "engaged in an industry affecting commerce" if it performs certain functions with respect to "employees" or, in limited circumstances, if it "includes" an entity that performs such functions); id. § 402(e) (defining "employer" to exclude the

federal, state, and local governments); id. § 402(f) (defining "employee" as "an individual employed by an employer"). Under this statutory scheme, Council 1 is not "engaged in an industry affecting commerce" and therefore is not a covered "labor organization."

In his opposition brief, Brookens does not directly address whether the LMRDA applies to a government-only council affiliated with a mixed union. Instead, he correctly asserts that "this Court has jurisdiction over mixed unions" and quotes at length from Wildberger to support this proposition. Opp. 6-8 (capitalization altered). As already discussed, Wildberger's holding that mixed unions such as AFGE are covered by the LMRDA does not mean that governmentCase 1:20-cv-00695-CRC Document 15 Filed 10/05/20 Page 8 of 9 9 only AFGE affiliates such as Council 1 are also covered. If anything, Wildberger may support the opposite conclusion by tacitly approving the Department of Labor's regulation classifying government-only locals as beyond the LMRDA's reach. See 86 F.3d at 1192. 4

In sum, Council 1 is not subject to the LMRDA because it represents only government workers. The Court therefore lacks jurisdiction to entertain an LMRDA challenge to the Election Committee's exclusion of Mr. Brookens from a Council 1 election.

IV. Conclusion

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss.

A separate Order shall accompany this Memorandum Opinion.

Date: October 5, 2020

CHRISTOPHER R. COOPER
United States District Judge

4 Brookens also quotes from the majority and dissenting opinions in Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley, 467 U.S. 526 (1984). Opp. 8-9. There, the Supreme Court held that Title I of the LMRDA does not empower district courts to invalidate an ongoing union election and order a new election to be conducted under court supervision. Local No. 82, 467 U.S. at 550. The Supreme Court did not address the application of the LMRDA to entities that represent only government workers.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS, Plaintiff,
v. LARHONDA GAMBLE, et al., Defendants.

Case No. 20-cv-1740 (CRC)

MEMORANDUM OPINION

This case arises from a dispute about union membership. Plaintiff Benoit Brookens considers himself a retired member of the American Federation of Government Employees ("AFGE") Local 12. Local 12 says he is not eligible for membership. Consistent with that position, Local 12 stopped accepting Mr. Brookens's dues, enlisted help from the U.S. Department of Labor ("DOL") to prevent him from attending membership meetings, and denied him the right to vote on a recent collective bargaining agreement ("CBA"). Brookens, proceeding pro se, sued Local 12, its president LaRhonda Gamble, Secretary of Labor Eugene Scalia, and DOL security officer Timothy Deane. In his Complaint and accompanying Motion for Preliminary Injunction, he asks the Court to stay the effect of the new CBA on which he was not allowed to vote. The defendants move to dismiss the Complaint.

The Court concludes that Brookens's claims must be dismissed. Brookens principally claims the defendants committed unfair labor practices under the Civil Service Reform Act ("CSRA") and violated the Labor Management Reporting and Disclosure Act ("LMRDA"). But the Court cannot hear unfair labor practice claims involving the federal government's

workforce, nor can it rule on LMRDA claims regarding the conduct of unions that exclusively represent government workers, such as Local 12. Brookens's claim that the defendants violated his Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 1 of 21 2 constitutional rights similarly fails because he has not exhausted his administrative remedies—a failure that both deprives the Court of subject matter jurisdiction and prevents Brookens from stating a claim upon which relief can be granted. The Court will therefore grant the pending motions to dismiss and decline to issue a preliminary injunction.

I. Background

A. Facts

The following facts are alleged in the Complaint or drawn from the declaration of AFGE Local 12 President LaRhonda Gamble, the accuracy of which Brookens does not dispute in relevant part.

Local 12's membership consists entirely of current DOL employees, former employees who retired from DOL, and former employees who were terminated by DOL without cause. Gamble Decl. ¶ 3. Local 12's bargaining team is authorized to engage in collective bargaining with DOL. Compl. ¶ 32. According to Brookens, members of the bargaining team must be elected by Local 12's membership. Id. ¶ 31.

Brookens became a member of Local 12 around January 1990. Id. ¶ 5. In his telling, he has been a "retired" member of Local 12 since approximately August 2007. Id.1 Since he stopped working for DOL, Brookens has continued to send checks to Local 12

for his union dues, although Local 12 has rejected at least some of those checks. Id. ¶ 18. Local 12 permitted Brookens to participate in union activities until 2018. Gamble Decl. ¶ 10. 1 Brookens is a former DOL economist who also holds a law degree. DOL terminated him in 2008. Brookens v. Acosta, 297 F. Supp. 3d 40, 43 (D.D.C.), summarily aff'd, 2018 WL 5118489 (D.C. Cir. 2018), cert. denied, 140 S. Ct. 572 (2019). The Court takes judicial notice of this background information but does not rely on it to decide the present motions to dismiss. Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 2 of 21 3

In 2017, the national AFGE placed Local 12 into trusteeship although, according to Brookens, there was "no valid legal reason" to do so. Compl. ¶ 16. Brookens took "legal action" in response. Id. ¶ 17. Brookens alleges that because of his legal action, Local 12 elections were held in 2018, and the trusteeship was vacated shortly thereafter. Id.

Local 12 subsequently concluded that Brookens was no longer entitled to membership in the union. Gamble Decl. ¶ 12. Around the same time, Local 12 began excluding Brookens from membership activities and enlisting the help of DOL security officers to keep him out of union meetings held in the DOL building. According to the Complaint and attached exhibits, Brookens has been ejected from union meetings or prevented from entering the DOL building on at least five occasions. See Compl. Ex. 3 (administrative charge alleging that Ms. Gamble, then Executive Vice President of Local 12, called DOL security officers to remove Brookens from meeting in November 2018); Compl. ¶ 20-21 (alleging

similar incident in February 2019); Compl. Ex. 4 (Mr. Deane allegedly stopped Brookens from entering DOL building in May 2019 and told him he could be banned from the building for up to one year); Compl. ¶ 10 (alleged ejection from Local 12 meeting in October 2019); id. ¶¶ 18-19 (alleged collusion between Local 12 and national AFGE to exclude Brookens from AFGE National Executive Council meeting in February 2020). As a result, Brookens cannot participate in Local 12 meetings, nor can he attend events at the DOL building or access the building's facilities, including the labor law library, the post office, and exhibit spaces. Id. ¶¶ 35-37.

In March and June 2019, Brookens submitted administrative charges to the Federal Labor Relations Authority ("FLRA"), complaining of his exclusion from Local 12 meetings by Local 12 and DOL officials. Compl. Exs. 3, 4. The FLRA dismissed those charges, and Brookens Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 3 of 21 4 appealed those dismissals to the FLRA's Office of General Counsel. Compl. ¶ 26. At the time of the Complaint, the Office of General Counsel had not ruled on the appeals. Id. ¶ 27.

In or around May 2020, then-President of Local 12 Jeffrey Wheeler resigned under what Brookens describes, without elaboration, as "highly irregular and questionable circumstances." Id. ¶ 7. Gamble then assumed the presidency of Local 12. Id. Also in May 2020, Local 12 presented its membership with a new CBA, which was set to take effect on July 1, 2020. Id. ¶¶ 13, 33. The CBA was subject to ratification by a vote of Local 12 members. Id. ¶ 13.

Brookens, however, was denied the right to vote on the CBA. Id. ¶ 15.

B. Proceedings in this Case

Brookens filed this action in June 2020, days before the new CBA was to take effect. The five-count Complaint cites two federal statutes—the CSRA, 5 U.S.C. § 7116 et seq., and the LMRDA, 29 U.S.C. § 411 et seq.—as bases for jurisdiction, but it does not clearly state which claims arise under which statute. Compl. ¶ 3. Brookens also alleges that certain actions by Deane and Gamble violated the First and Fourteenth Amendments. Id. ¶ 29. The Complaint requests "injunctive relief, staying the effect of . . . the now allegedly member ratified CBA." Id. ¶ 38 (capitalization altered). Brookens immediately moved for a preliminary injunction to prevent the CBA from taking effect "on the grounds that [the] Ratification vote for the contract is obviously highly irregular and biased." Mot. for Prelim. Injunction.

The case was initially assigned to Judge Tanya S. Chutkan but was reassigned to this Court in August 2020 because a separate case brought by Brookens was pending before the undersigned. After the case was reassigned, the Court entered an order noting that no proof of service had been filed and advising the parties that the Court would not take up the preliminary injunction motion until the Complaint was properly served. Minute Order (Aug. 12, 2020). Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 4 of 21 5

Local 12 and Gamble (together "Union Defendants") moved to dismiss the Complaint for lack of subject

matter jurisdiction, for failure to state a claim upon which relief can be granted, and for failure to effect service of process. Union Defs.' Mem. 1. Deane and Secretary Scalia (together "Federal Defendants") then filed a separate motion to dismiss, arguing that the Complaint fails to state a claim because it admits that Brookens did not exhaust his administrative remedies before filing suit. Federal Defs.' Mem. 5-6.

Brookens responded to both motions with a combined filing styled "Motion to Strike Defendant Union's Motion to Dismiss and Response to Federal Defendant's Motion" ("Opp."). He argues, without citing authority, that the Union Defendants waived their arguments for dismissal by failing to raise them in their Notice of Related Cases. Opp. 2. He also argues on the merits that the Court has jurisdiction over the Complaint, that the Complaint states a cognizable claim, and that the exhaustion arguments raised by both groups of defendants should be rejected. Opp. 3-8.2

2 While the motions to dismiss were pending, Brookens also filed affidavits of service, demonstrating that he sent copies of the Complaint and Summons to each defendant by certified mail. Reasonable minds could differ on whether it was proper for Brookens to serve the defendants by personally mailing the Complaint and Summons. Generally, the person who serves a federal complaint must not be a party to the case. Fed. R. Civ. P. 4(c)(2). Another judge in this District recently held that under this federal rule, a plaintiff in federal court may not serve a defendant by personally mailing a complaint and summons, "even if the relevant state law allows parties to effect service by

personally sending the summons and complaint by certified mail," as District of Columbia law likely does. Johnson-Richardson v. Univ. of Phoenix, 334 F.R.D. 349, 354 (D.D.C. 2020). Because the Court dismisses this case on other grounds, it will not reach the issue of whether adequate service was made, nor does it express an opinion on whether plaintiffs in this District generally may effect service by personally mailing the necessary papers. Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 5 of 21 6

Both groups of defendants subsequently filed replies in support of their motions to dismiss, and Brookens filed a reply in support of his request to strike the Union Defendants' motion. The motions to dismiss and the motion to strike are now fully briefed.

II. Legal Standards

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Court must dismiss any claim over which it lacks subject matter jurisdiction. Auster v. Ghana Airways Ltd., 514 F.3d 44, 48 (D.C. Cir. 2008). The plaintiff bears the burden of establishing jurisdiction. Knapp Med. Ctr. v. Hargan, 875 F.3d 1125, 1128 (D.C. Cir. 2017). On a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," but need not "assume the truth of legal conclusions" in the complaint. Williams v. Lew, 819 F.3d 466, 472 (D.C.

Cir. 2016) (internal quotation marks omitted). The Court also "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

On its face, Rule 12(b) directs a defendant to file a motion to dismiss for lack of subject matter jurisdiction within any applicable time limit for a responsive pleading. However, "[i]t is axiomatic that subject matter jurisdiction may not be waived." Athens Cmty. Hosp., Inc. v. Schweiker, 686 F.2d 989, 992 (D.C. Cir. 1982); see also Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").3 A court should therefore consider the arguments made in a Rule 12(b)(1) motion, 3 In his reply, Brookens cites Rule 12(h) as support for his position that the Union Defendants waived their arguments for dismissal by purportedly raising them too late. Pl.'s Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 6 of 21 7 even if the motion is technically untimely. See Casanova v. Marathon Corp., 256 F.R.D. 11, 12 (D.D.C. 2009). The Court will therefore bypass Brookens's suggestion that the Union Defendants' motion was untimely and proceed to analyze the jurisdictional arguments raised by the Union Defendants.

B. Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) requires the Court, on a properly filed motion, to dismiss a complaint that fails "to state a claim upon which relief can be granted." In analyzing a motion to

dismiss under Rule 12(b)(6), the Court must determine whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "The Court takes all of the factual allegations in the complaint as true and construes those facts 'liberally in the plaintiff's favor with the benefit of all reasonable inferences derived from the facts alleged.'" Johnson v. United States, No. 17-cv-2411 (CRC), 2019 WL 2424039, at *3 (D.D.C. June 10, 2019) (quoting Stewart v. Nat'l Educ. Ass'n, 471 F.3d 169, 173 (D.C. Cir. 2006)). Dismissal for failure to state a claim is appropriate where the plaintiff is required to exhaust pre-suit administrative remedies and "the plaintiff's failure to exhaust is apparent on the face of [the] complaint." Savage v. Azar, 317 F. Supp. 3d 438, 440 (D.D.C. 2018) (Cooper, J.); see also Hidalgo v. FBI, 344 F.3d 1256, 1260 (D.C. Cir. 2003) (instructing district court to dismiss Freedom of Information Act complaint under Rule 12(b)(6) for failure to exhaust administrative remedies). Reply 2. But he fails to note that Rule 12(h) specifically excludes lack of subject matter jurisdiction from the list of defenses that are waived if not timely raised. See Fed. R. Civ. P. 12(h)(1) (addressing waiver of "any defense listed in Rule 12(b)(2)–(5)," but not Rule 12(b)(1)); id. 12(h)(3). Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 7 of 21 8

C. Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the

burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To obtain a preliminary injunction, the moving party must show: (1) that he is likely to succeed on the merits of his claim; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that a preliminary injunction is in the public interest. Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). An absence of irreparable injury is fatal to a preliminary injunction motion. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). The D.C. Circuit has suggested, without holding, that the failure to establish a likelihood of success on the merits also categorically forecloses preliminary relief. Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011). A party cannot establish a likelihood of success on the merits if it fails to show a likelihood that the Court has subject matter jurisdiction over the case. See Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 623 (D.C. Cir. 2020).

III. Analysis

A. Motions to Dismiss

Brookens's claims appear to fall into two categories: (1) statutory claims under the LMRDA or the CSRA, and (2) constitutional challenges to the same conduct attacked by the statutory claims. The Court will separately analyze each type of claim.

1. The Court lacks subject matter jurisdiction over Brookens's statutory claims.

The Complaint does not make clear which of Brookens's statutory claims arise under the LMRDA and which arise under the CSRA. Rather than attempt to sort the claims one-by-one into LMRDA and CSRA categories, the Court will follow a simpler path. First, the Court asks Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 8 of 21 9 whether the Complaint, generously construed, raises any LMRDA claims that fall within the Court's jurisdiction. Second, the Court asks the same question as to CSRA claims. Because both questions must be answered in the negative, the Court finds that it lacks subject matter jurisdiction over all statutory claims in the Complaint.

a. The Court lacks jurisdiction over a LMRDA challenge to the conduct of Local 12 and federal government officials.

The Union Defendants argue that the Court lacks subject matter jurisdiction over Brookens's LMRDA claims because this case does not involve the conduct of a labor organization covered by the LMRDA. Union Defs.' Mem. 10-11. The Court agrees. "Congress enacted the LMRDA to protect workers from corrupt leadership in unions representing private sector employees[.]" Wildberger v. AFGE, AFL-CIO, 86 F.3d 1188, 1193 (D.C. Cir. 1996). The LMRDA provides certain rights to "[e]very member of a labor organization." 29 U.S.C. § 411(a). The statute authorizes actions in federal district court to vindicate those rights. Id. § 412.

In an LMRDA case, the Court's "jurisdiction turns on whether the LMRDA applies to" the specific union

or affiliate whose actions are challenged. Wildberger, 86 F.3d at 1192. The LMRDA applies only if that entity falls within the statute's definition of the term "labor organization":

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 9 of 21 10 29 U.S.C. § 402(i) (emphases added).

"Employer," in turn, is defined to exclude "the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." Id. § 402(e); see also Wildberger, 86 F.3d at 1192 ("The LMRDA definition of 'employer,' specifically excludes federal, state and local governments."). The definition of "employee" is limited to individuals "employed by an employer"—i.e., nongovernmental employees. Id. § 402(f). And an organization is considered to be "engaged in an industry affecting commerce" only if it fits certain

criteria based on its relationship with "employees." Id. § 402(j).4 Thus, a union or similar entity that represents only government workers is not covered by the LMRDA. The LMRDA does, however, apply to a "mixed union"

4 Section 402(j) provides in full,

> A labor organization shall be deemed to be engaged in an industry affecting commerce if it-- (1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or (5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of

this subsection, other than a State or local central body. Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 10 of 21 11 whose members include both governmental and private-sector workers. Wildberger, 86 F.3d at 1192.

In another case brought by Brookens, this Court recently held that a local, council, or similar entity that represents only government workers is not subject to the LMRDA, even if its parent union is mixed. Brookens v. Drudi, No. 20-cv-695 (CRC), 2020 WL 5891450, at *4 (D.D.C. Oct. 5, 2020). As the Court explained, this rule accords with the statutory text.

> The LMRDA's definition of "labor organization" specifies that some entities may be covered by virtue of their status as "subordinate" affiliates of national or international labor organizations. 29 U.S.C. § 402(i). But it also makes clear that no entity, subordinate or otherwise, can qualify as a labor organization unless it is "engaged in an industry affecting commerce." Id. (defining "labor organization" as "a labor organization engaged in an industry affecting commerce," and clarifying that this definition includes certain subordinate entities that are "so engaged"). And the business of government is not an "industry affecting commerce" under the LMRDA. See id. § 402(j) (deeming an

organization to be "engaged in an industry affecting commerce" if it performs certain functions with respect to "employees" or, in limited circumstances, if it "includes" an entity that performs such functions); id. § 402(e) (defining "employer" to exclude the federal, state, and local governments); id. § 402(f) (defining "employee" as "an individual employed by an employer").

Id. Under this statutory scheme, a government-only local or council is not "engaged in an industry affecting commerce" and therefore is not a covered "labor organization." Id.; see also Reed v. Sturdivant, 176 F.3d 1051, 1052 (8th Cir. 1999) (purely public-sector local of mixed union not a "labor organization" under the LMRDA); Hudson v. AFGE, No. 19-cv-2738 (JEB), 2019 WL 6683778, at *2-*3 (D.D.C. Dec. 6, 2019) (similar); Adams v. AFSCME Int'l, 167 F. Supp. 3d 730, 740 (D. Md. 2016) (similar).

The Court's reasoning in Drudi applies equally in this case. The union entity at issue here is Local 12. See Compl. (naming Local 12 and its president as defendants); id. ¶ 1 (stating that this action "challenges the fairness of the ratification vote for the Local 12 Collective Bargaining Agreement"). While Local 12 is undisputedly

> affiliated with a mixed parent union, it Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 11 of 21 12 is also undisputed that Local 12 itself represents only government workers. Gamble Decl. ¶¶ 2- 3. Local 12 therefore is not a covered "labor organization" under the LMRDA. Nor, of course, do DOL and its officials qualify as "labor organizations" amenable to LMRDA claims.

To support his position that the Court has jurisdiction under the LMRDA, Brookens quotes from the D.C. Circuit's Wildberger decision. Opp. 3-4. There, the D.C. Circuit held that because the national AFGE is a mixed union, it is covered by the LMRDA. Wildberger, 86 F.3d at 1192. As this Court has previously explained, see Drudi, 2020 WL 5891450, at *4, Wildberger's holding does not imply that government-only locals of mixed parent unions are subject to the LMRDA. If anything, Wildberger supports the opposite conclusion because the opinion notes, with no hint of disapproval, that DOL regulations classify "locals composed purely of government employees" as outside the LMRDA's coverage. 86 F.3d at 1192.

Brookens also cites a fact sheet posted on the DOL website, which advises federal employees: "If the union that you allege violated your rights (whether a local union or a parent body) represents any private sector employees, your complaint is covered by the LMRDA[.]" Pl.'s Reply 3. Whatever authoritative value this document has, it is fully consistent with this Court's interpretation of the LMRDA. As

explained by the fact sheet, if Brookens's claim were that a mixed union such as the national AFGE violated certain rights, then the LMRDA might apply. But this case involves the conduct of Local 12, not its mixed parent union. The Court concludes that LMRDA does not apply to Local 12. Brookens's LMRDA claims therefore must be dismissed for lack of subject matter jurisdiction.

b. The Court lacks jurisdiction over Brookens's claims under the CSRA.

The Complaint indicates that at least some of Brookens's claims challenge alleged unfair labor practices under Title VII of the CSRA ("Title VII"). See Compl. ¶ 3 (alleging that the Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 12 of 21 13 Court has jurisdiction based on the "Duty of Fair Representation") (citing 5 U.S.C. § 7116 et seq.); id. ¶ 34 (alleging that defendants Gamble and Deane violated the duty of fair representation under the CSRA by preventing Brookens from attending and participating in Local 12 meetings). Such claims fall outside this Court's jurisdiction.

"Title VII of the [CSRA], 5 U.S.C. §§ 7101-7134, governs labor relations between federal agencies and their employees." AFGE, AFL-CIO v. Loy, 367 F.3d 932, 935 (D.C. Cir. 2004). Under Title VII, a union that serves as the exclusive collective-bargaining agent for a unit of employees "is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1). In other words, such a union has a duty of fair representation. Karahalios v. Nat'l

Fed'n of Fed. Emps., Local 1263, 489 U.S. 527, 531-32 (1989). A breach of this duty of fair representation constitutes an unfair labor practice. Id. at 532. When unions representing federal employees are accused of unfair labor practices under Title VII, those complaints are adjudicated by the FLRA. Id. (citing 5 U.S.C. § 7118). While the statute provides for review of final FLRA orders in U.S. Courts of Appeals, id. (citing 5 U.S.C. § 7123(a)),5 it does not authorize suits in federal district court alleging breaches of the duty of fair representation. 5 An FLRA Regional Director's decision to dismiss a charge without issuing an administrative complaint, or the FLRA General Counsel's decision to affirm such a dismissal, does not constitute a final FLRA order subject to review in the Courts of Appeals. Turgeon v. FLRA, 677 F.2d 937, 940 (D.C. Cir. 1982) (concluding that "Congress clearly intended the General Counsel of the Federal Labor Relations Authority to have unreviewable discretion to decline to issue unfair labor complaints"). Therefore, if the FLRA General Counsel affirms the dismissal of Brokens's unfair labor practice charges, Brookens will have no further opportunity to press the CSRA claims covered by those charges, either before the FLRA or before any court. However, if the General Counsel decides to issue a complaint, the FLRA will then afford Brookens an administrative hearing. See 5 U.S.C. § 7118(a)(6). If the FLRA rules against Brookens after such a hearing, that final order will subject to review in an appropriate Court of Appeals. See id. § 7123(a).

Karahalios, 489 U.S. at 536-37. District courts therefore lack jurisdiction over such suits. See Steadman v. Governor, U.S. Soldiers' & Airmen's Home, 918 F.2d 963, 966-67 (D.C. Cir. 1990); Corrigan v. Nat'l Treasury Emps. Union, 690 F. Supp. 2d 1, 4 (D.D.C. 2010).

invoking the CSRA as a basis for jurisdiction in his Complaint, Compl. ¶ 3, Brookens does not press this argument in his opposition brief, pivoting instead to the separate contention that the Court has jurisdiction to entertain his LMRDA claims. See Opp. 3-4, 6. He thus appears to abandon his position that the Court should exercise jurisdiction over his CSRA unfair labor practice claims.

Even if Brookens did not concede the point, the Court would find that it lacks jurisdiction over the Complaint insofar as it pleads claims directly under the CSRA. Some of Brookens's claims are explicitly framed as challenges to alleged breaches of Local 12's duty of fair representation. See Compl. ¶¶ 3, 34; id. Counts I, IV ("Breach of Duty of Fair Representation"). Other claims in the Complaint fail to cite any specific statutory provision but are best construed as challenges to alleged unfair labor practices under the CSRA. See, e.g., id. Count III ("Differential Treatment of Members"); id. ¶ 29 (alleging "collusion between management and the union to the detriment of Union members"). These are precisely the types of CSRA claims that fall within the FLRA's exclusive purview. See Karahalios, 489 U.S. at 536-37; Steadman, 918 F.2d at 966.

Brookens's CSRA claims therefore fall outside this Court's jurisdiction. This conclusion, together with the Court's determination that it lacks jurisdiction over Brookens's LMRDA claims, means the Court must dismiss all of Brookens's statutory claims for lack of subject matter jurisdiction. Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 14 of 21 15

2. Any constitutional claim in the Complaint must be dismissed for failure to exhaust administrative remedies.

Finally, Brookens alleges that Gamble and Deane violated his constitutional rights. Specifically, Brookens alleges that Deane ejected him from a Local 12 meeting at Gamble's request in 2019, and that Deane has since prevented Brookens from entering the DOL building to attend union meetings, to access facilities including the labor law library, or for any other purpose. Compl. ¶¶ 10, 21, 34-37. Brookens claims Deane and Gamble thus violated the First and Fourteenth Amendments, as well as "applicable Labor Management Relations Statutes," by collaborating to "deprive [him] of his union right." Id. ¶ 29. Assuming that Brookens intends to plead freestanding constitutional claims regarding this alleged conduct, the Court must dismiss those claims because the CSRA requires Brookens to exhaust his administrative remedies before turning to this Court with these constitutional challenges.

The CSRA provides "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of

sound and efficient administration." United States v. Fausto, 484 U.S. 439, 445 (1988). Under this system, the FLRA has the initial responsibility for adjudicating claims that a federal agency or a labor organization representing federal employees committed an unfair labor practice banned by Title VII of the CSRA. See 5 U.S.C. § 7118; Arakawa v. Reagan, 666 F. Supp. 254, 258 n.7 (D.D.C. 1987).

To preserve the "complicated and subtle scheme" that Congress adopted, longstanding case law requires that plaintiffs exhaust the CSRA's administrative procedures before seeking judicial review of certain "CSRA-related" claims under the Constitution. Steadman, 918 F.2d at 967; see also id. at 968 (noting that after the plaintiff exhausts CSRA administrative remedies without winning relief, a federal district court may hear a constitutional claim that "survive[d] Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 15 of 21 16 [the] unsuccessful journey through the administrative process"). This exhaustion requirement applies "[w]hen the statutory and constitutional claims are 'premised on the same facts' and the CSRA remedy 'would have been fully effective in remedying the constitutional violation.'" Id. at 967 (quoting Andrade v. Lauer, 729 F.2d 1475, 1493 (D.C. Cir. 1984)). "Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court." Id.

D.C. Circuit precedent indicates that if a plaintiff improperly files a constitutional claim without exhausting administrative procedures under the CSRA, the district court should dismiss the claim for lack of subject matter jurisdiction. See Weaver v.

U.S. Info. Agency, 87 F.3d 1429, 1433 (D.C. Cir. 1996) ("Under the CSRA, exhaustion of administrative remedies is a jurisdictional prerequisite to suit.") (citing Steadman, 918 F.2d at 967-68); see also deLeon v. Wilkie, No. 19-cv-1250 (JEB), 2020 WL 210089, at *4 (D.D.C. Jan. 14, 2020).6 Alternatively, courts may appropriately dismiss a complaint for failure to state a claim where the plaintiff was required to exhaust the CSRA administrative process but failed to do so. See Fraternal Ord. of

6 One could perhaps make a colorable argument that administrative exhaustion under the CSRA would be better treated as a non-jurisdictional requirement. Cf. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1850 (2019) (holding that the requirement to file an administrative charge before bringing suit under Title VII of the Civil Rights Act of 1964 is not jurisdictional); id. at 1848 ("'Jurisdiction' . . . is a word of many, too many, meanings. In recent years, the [Supreme] Court has undertaken to ward off profligate use of the term." (cleaned up)). Indeed, the D.C. Circuit has been less than fully consistent in applying a jurisdictional framework to CSRA exhaustion. See Nat'l Treasury Emps. Union v. King ("NTEU"), 961 F.2d 240, 243 (D.C. Cir. 1992) ("The doctrine of exhaustion of administrative remedies concerns the timing rather than the jurisdictional authority of federal court decisionmaking."). Nevertheless, the D.C. Circuit's post-NTEU case law does treat exhaustion of CSRA administrative remedies as "a jurisdictional prerequisite to

suit." Weaver, 87 F.3d at 1433. That rule is binding on this Court "unless and until overturned by the [D.C. Circuit] en banc or by Higher Authority." Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc).

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Police, D.C. Lodge 1, Def. Protective Servs. Labor Comm., Inc. v. Gates, 562 F. Supp. 2d 7, 11, 14 (D.D.C. 2008).

Here, the Complaint makes clear that any constitutional claims Brookens raises arise from the same facts as his statutory claims. See Compl. ¶ 29 (claiming that alleged conduct constitutes a breach of duty of fair representation and violates both the Constitution and "applicable Labor Management Relations Statutes"). It is also clear that the remedies available in FLRA proceedings are sufficient to give Brookens adequate relief for the constitutional violations he claims, assuming those claims have merit. The FLRA has the authority to issue an order requiring a federal agency or labor organization "to cease and desist from any . . . unfair labor practice in which the agency or labor organization is engaged." 5 U.S.C. § 7118(a)(7)(A); accord Indep. Union of Pension Emps. for Democracy & Just. v. FLRA, 961 F.3d 490, 499 (D.C. Cir. 2020). The FLRA could use that power to order DOL and Local 12 to stop blocking Brookens from

entering the DOL building and attending union meetings, if it were to agree with Brookens that this action constitutes an unfair labor practice. Such an order would end the alleged constitutional violation. Indeed, if the Court were to adjudicate Brookens's constitutional claims, the judicial remedy (if any) for the claimed constitutional violation would be limited to a declaratory judgment and a forward-looking injunction along the same lines as the relief available at the FLRA.

Brookens is therefore required to exhaust his administrative remedies at the FLRA before bringing his constitutional claims to district court. He has not satisfied this requirement. According to the Complaint, Brookens has appealed the FLRA Regional Director's initial dismissal of his administrative charges concerning the allegedly unconstitutional conduct, but the FLRA General Counsel has not yet ruled on those appeals. Compl. ¶¶ 26-27. An administrative Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 17 of 21 18 appeal from the Regional Director's initial dismissal is part of the administrative process that must be exhausted before this Court may hear a CSRA-related constitutional claim. See Fraternal Ord. of Police, 562 F. Supp. 2d at 13-14 (plaintiff failed to exhaust CSRA remedies where it did not administratively appeal the initial dismissal of its unfair labor practice charge). While the Court appreciates Brookens's frustration at the length of the wait for a decision on his appeals, see Compl. ¶ 27, he cites no authority

for the notion that the Court may deem the administrative process exhausted simply because the appeal has been pending for some time.

Seeking to avoid dismissal for failure to exhaust administrative remedies, Brookens quotes the Supreme Court's remark that parents seeking a free appropriate public education for children with disabilities need not exhaust their administrative remedies "where exhaustion would be futile or inadequate." Opp. 4 (quoting Honig v. Doe, 484 U.S. 305, 326-27 (1988)). But aside from citing the length of time his administrative appeal has been pending, Brookens offers no reason to find that exhaustion would be futile or inadequate in this case. Nor is it clear that the Court could excuse Brookens's failure to exhaust his CSRA remedies even if exhaustion would be futile. As noted, the D.C. Circuit considers exhaustion under the CSRA a jurisdictional requirement, which may not be the case for exhaustion under the Individuals with Disabilities Education Act ("IDEA"). Compare Weaver, 87 F.3d at 1433 ("Under the CSRA, exhaustion of administrative remedies is a jurisdictional prerequisite to suit.") (citing Steadman, 918 F.2d at 966-68) with A.U. v. District of Columbia, No. 1:19-cv-3512 (TJK/GMH), 2020 WL 4754619, at *3 n.5 (D.D.C. July 13, 2020) ("There is some disagreement among the federal judges in this District as to whether exhaustion of administrative remedies under the IDEA is a jurisdictional prerequisite to a federal court

hearing the claim[.]"). Where exhaustion is a jurisdictional requirement, courts generally will make no exceptions, even where the plaintiff can demonstrate Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 18 of 21 19 futility. Kursar v. TSA, 581 F. Supp. 2d 7, 18 (D.D.C. 2008). In the absence of precedent recognizing a futility exception to the exhaustion requirement under the CSRA, the Court will not import one from the IDEA case law.

Brookens also responds to defendants' exhaustion arguments by citing the LMRDA, which he asserts confers jurisdiction on the Court without further administrative proceedings. Opp. 4, 6. As already discussed, that argument fails because this case does not involve a "labor organization" covered by the LMRDA.

Brookens's admitted failure to exhaust his administrative remedies therefore precludes this Court from granting relief on his constitutional claims.7 The Court will dismiss these claims both for lack of subject matter jurisdiction and, alternatively, for failure to state a claim. See

7 The validity of Brookens's constitutional claims is dubious in any event. As to the First Amendment, Brookens's theory seems to be that by denying him access to the DOL building, Deane deprived him of the opportunity to attend and participate in

union activities, thus burdening his expressive and associational rights. But Brookens likely has no First Amendment right to associate with and attend the meetings of a union that, rightly or wrongly, regards him as a nonmember. See Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 518 n.2 (3d Cir. 2013) (noting that "[m]eetings by private organizations . . . are usually closed to the public" and distinguishing such meetings from governmental proceedings to which the public has a First Amendment right of access); Presnick v. Town of Orange, 152 F. Supp. 2d 215, 223 (D. Conn. 2001) ("[A] person does not have a right to attend a private meeting of a municipal board simply because the meeting occurs within a public building[.]").

Brookens's reference to the Fourteenth Amendment is presumably intended to suggest that he was denied equal protection or deprived of a constitutionally protected interest without due process. However, these provisions of the Fourteenth Amendment do not apply to the federal government or to non-governmental actors such as Gamble. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542 n.21 (1987). While the Fifth Amendment does provide parallel protections against the

federal government, id., none of Brookens's factual allegations support an inference that DOL discriminated against him or deprived him of a constitutionally protected interest in life, liberty, or property in violation of the Fifth Amendment. Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 19 of 21 20 deLeon, 2020 WL 210089, at *4 (dismissal under Rule 12(b)(1)); Fraternal Ord. of Police, 562 F. Supp. 2d at 11-13 (dismissal under Rule 12(b)(6)).

B. Motion for Preliminary Injunction

As explained above, the Complaint must be dismissed. For substantially the same reasons, Brookens's motion for a preliminary injunction must be denied.

To begin, Brookens cannot show a likelihood of success on the merits because the Court lacks jurisdiction. Part of the burden on the party seeking a preliminary injunction is to show that the Court likely has jurisdiction to grant relief on the underlying claims. See Make the Rd. N.Y., 962 F.3d at 623. Brookens has failed to do so.

Moreover, Brookens has not carried his burden to show that he would suffer irreparable harm in the absence of preliminary relief. Brookens's preliminary injunction motion offers only three sentences of reasoning, none of which speaks to the irreparable-harm prong. Even if the Court were to take the allegations in the Complaint at face value, it would

see no basis to conclude that Brookens is irreparably harmed by the existence of a CBA he does not support. Indeed, Brookens fails to explain what concrete impact, if any, the new CBA has on the rights of former DOL employees. The Court will therefore deny Brookens's preliminary injunction motion.

* * *

IV. Conclusion

For the foregoing reasons, the Court will grant the Union Defendants' Motion to Dismiss; grant the Federal Defendants' Motion to Dismiss; deny Plaintiff's Motion for Preliminary Case 1:20-cv-01740-CRC Document 26 Filed 10/19/20 Page 20 of 21 21 Injunction; and deny Plaintiff's Motion to Strike the Union Defendants' Motion to Dismiss. A separate Order shall accompany this Memorandum Opinion.

Date: October 19, 2020

CHRISTOPHER R. COOPER
United States District Judge

29 U.S. Code § 411 - Bill of rights; constitution and bylaws of labor organizations

(a)

(1)EQUAL RIGHTS

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2)FREEDOM OF SPEECH AND ASSEMBLY

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3)DUES, INITIATION FEES, AND ASSESSMENTSExcept in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor

organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A)

in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B)

in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4)PROTECTION OF THE RIGHT TO SUE

No labor organization shall limit the right of any member thereof to institute an action in any court, or

in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5)SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b)INVALIDITY OF CONSTITUTION AND BYLAWS

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Pub. L. 86–257, title I, § 101, Sept. 14, 1959, 73 Stat. 522.)

29 U.S. Code § 412 - Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Pub. L. 86–257, title I, § 102, Sept. 14, 1959, 73 Stat. 523.)

29 CFR

PART 458 - STANDARDS OF CONDUCT

Authority: 5 U.S.C. 7105, 7111, 7120, 7134; 22 U.S.C. 4107, 4111, 4117; 2 U.S.C. 1351(a)(1); Secretary's Order No. 03-2012, 77 FR 69376, November 16, 2012; Secretary's Order No. 01-2020, 85 FR 13186 (March 6, 2020).
Source: 45 FR 15158, Mar. 7, 1980, unless otherwise noted. Redesignated at 50 FR 31311, Aug. 1, 1985.

Subpart A - Substantive Requirements Concerning Standards of Conduct

§ 458.1 General.

The term *LMRDA* means the Labor-Management Reporting and Disclosure Act of 1959, as amended (29 U.S.C. 401 *et seq.)*. Unless otherwise provided in this part or in the CSRA or FSA, any term in any section of the LMRDA which is incorporated into this part by reference, and any term in this part which is also used in the LMRDA, shall have the meaning which that term has under the LMRDA, unless the context in which it is used indicates that such meaning is not applicable. In applying the standards contained in this subpart the Director will be guided by the interpretations and policies followed by the Department of Labor in applying the provisions of the LMRDA and by applicable court decisions.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.2 Bill of rights of members of labor organizations.

(a)

(1) ***Equal rights.*** Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) ***Freedom of speech and assembly.*** Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) ***Dues, initiation fees, and assessments.*** Except in the case of a federation of national or

international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date this section is published shall not be increased, and no general or special assessment shall be levied upon such members, except:

(i) In the case of a local organization,

(A) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or

(B) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(ii) In the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations,

(A) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than 30 days written notice to the principal office of each local or constituent labor organization entitled to such notice, or

(B) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or

(C) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) ***Protection of the right to sue.*** No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceedings, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

(5) ***Safeguards against improper disciplinary action.*** No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues by such organization or by any officer thereof unless such member has been

(i) served with written specific charges;

(ii) given a reasonable time to prepare his defense;

(iii) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall not be a defense to any proceeding instituted against the labor organization under this part or under the CSRA or FSA.

(c) Nothing contained in this section shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

(d) It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each agreement made by such labor organization with an agency, Department or activity to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer, copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such

agreement. An employee's rights under this paragraph shall be enforceable in the same manner as the rights of a member.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985]

§ 458.3 Application of LMRDA labor organization reporting requirements.

The reporting provisions of parts 402, 403, and 408 of this chapter shall apply to labor organizations subject to the requirements of the CSRA or FSA.

(Approved by the Office of Management and Budget under control number 1215-0188)

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15116, Mar. 31, 1994; 63 FR 33780, June 19, 1998]

§ 458.4 Informing members of the standards of conduct provisions.

(a) Every labor organization subject to the requirements of the CSRA, the FSA, or the CAA shall inform its members concerning the standards of conduct provisions of the Acts and the regulations in this subchapter. Labor organizations shall provide such notice to members by October 2, 2006 and thereafter to all new members within 90 days of the time they join and to all members at least once every three years. Notice must be provided by hand delivery, U.S. mail or e-mail or a combination of the three as long as the method is reasonably calculated to reach all members. Such

notice may be included with the required notice of local union elections. Where a union newspaper is used to provide notice, the notice must be conspicuously placed on the front page of the newspaper, or the front page should have a conspicuous reference to the inside page where the notice appears, so that the inclusion of the notice in a particular issue is readily apparent to each member.

(b) A labor organization may demonstrate compliance with the requirements of paragraph (a) of this section by showing that another labor organization provided an appropriate notice to all of its members during the necessary time frame.

(c) Labor organizations may use the Department of Labor publication Union Member Rights and Officer Responsibilities under the Civil Service Reform Act (available on the OLMS Web site at *http://www.dol.gov/olms*) or may devise their own language as long as the notice accurately states all of the CSRA standards of conduct provisions as set forth in the fact sheet.

(d) If a labor organization has a Web site, the site must contain a conspicuous link to Union Member Rights and Officer Responsibilities under the Civil Service Reform Act or, alternatively, to the labor organization's own notice prepared in accordance with paragraph (c) of this section.

[71 FR 31492, June 2, 2006, as amended at 78 FR 8026, Feb. 5, 2013]

Trusteeships

§ 458.26 Purposes for which a trusteeship may be established.

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of (a) correcting corruption or financial malpractice, (b) assuring the performance of negotiated agreements or other duties of a representative of employees, (c) restoring democratic procedures, or (d) otherwise carrying out the legitimate objects of such labor organization.

§ 458.27 Prohibited acts relating to subordinate body under trusteeship.

During any period when a subordinate body of a labor organization is in trusteeship, (a) the votes of delegates or other representatives from such body in any convention or election of officers of the labor organization shall not be counted unless the representatives have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate; and (b) no current receipts or other funds of the subordinate body except the normal per capita tax and assessments payable by subordinate bodies not in trusteeship shall be transferred directly or indirectly to the labor organization which has imposed the trusteeship; *Provided, however,* That nothing contained in this section shall prevent the distribution of the assets of a labor organization in accordance with its constitution and bylaws upon the bona fide dissolution thereof.

§ 458.28 Presumption of validity.

In any proceeding involving § 458.26, a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution and bylaws shall be presumed valid for a period of 18 months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for purposes allowable under § 458.26. After the expiration of 18 months the trusteeship shall be presumed invalid in any such proceeding, unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under § 458.26.

Elections

§ 458.29 Election of officers.

Every labor organization subject to the CSRA or FSA shall conduct periodic elections of officers in a fair and democratic manner. All elections of officers shall be governed by the standards prescribed in sections 401 (a), (b), (c), (d), (e), (f) and (g) of the LMRDA to the extent that such standards are relevant to elections held pursuant to the provisions of 5 U.S.C. 7120 or 22 U.S.C. 4117 .

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985]

Additional Provisions Applicable

§ 458.30 Removal of elected officers.

When an elected officer of a local labor organization is charged with serious misconduct and the constitution and bylaws of such organization do not provide an adequate procedure meeting the standards of § 417.2(b) of this chapter for removal of such officer, the labor organization shall follow a procedure which meets those standards.

[62 FR 6094, Feb. 10, 1997]

§ 458.31 Maintenance of fiscal integrity in the conduct of the affairs of labor organizations.

The standards of fiduciary responsibility prescribed in section 501(a) of the LMRDA are incorporated into this subpart by reference and made a part hereof.

§ 458.32 Provision for accounting and financial controls.

Every labor organization shall provide accounting and financial controls necessary to assure the maintenance of fiscal integrity.

§ 458.33 Prohibition of conflicts of interest.

(a) No officer or agent of a labor organization shall, directly or indirectly through his spouse, minor child, or otherwise

(1) have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such labor organization, or

(2) engage in any business or financial transaction which conflicts with his fiduciary obligation.

(b) Actions prohibited by paragraph (a) of this section include, but are not limited to, buying from, selling, or leasing directly or indirectly to, or otherwise dealing with the labor organization, its affiliates, subsidiaries, or trusts in which the labor organization is interested, or having an interest in a business any part of which consists of such dealings, except bona fide investments of the kind exempted from reporting under section 202(b) of the LMRDA. The receipt of salaries and reimbursed expenses for services actually performed or expenses actually incurred in carrying out the duties of the officer or agent is not prohibited.

§ 458.34 Loans to officers or employees.

No labor organization shall directly or indirectly make any loan to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000.

§ 458.35 Bonding requirements.

Every officer, agent, shop steward, or other representative or employee of any labor organization subject to the CSRA or FSA (other than a labor organization whose property and annual financial receipts do not exceed $5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded in accordance with the principles of section 502(a) of the LMRDA. In enforcing this requirement the Director will be guided by the interpretations and policies followed by the Department of Labor in applying the provisions of section 502(a) of the LMRDA and by applicable court decisions.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.36 Prohibitions against certain persons holding office or employment.

The prohibitions against holding office or employment in a labor organization contained in section 504(a) of the LMRDA are incorporated into this subpart by reference and made a part hereof. The prohibitions shall also be applicable to any person who has been convicted of, or who has served any part of a prison term resulting from his conviction of, violating 18 U.S.C. 1001 by making a false statement in any report required to be filed pursuant to this subpart, or who has been determined by the Director after an appropriate proceeding pursuant to §§ 458.66 through 458.92 to have willfully violated § 458.27: *Provided, however,* That the Director or such other person as he may designate may exempt a person from the prohibition

against holding office or employment or may reduce the period of the prohibition where he determines that it would not be contrary to the purposes of the CSRA or the FSA and this section to permit a person barred from holding office or employment to hold such office or employment.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.37 Prohibition of certain discipline.

No labor organization or any officer, agent, shop steward, or other representative or any employee thereof shall fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of the CSRA or FSA or this subchapter.

§ 458.38 Deprivation of rights under the CSRA or FSA by violence or threat of violence.

No labor organization or any officer, agent, shop steward, or other representative or any employee thereof shall use, conspire to use, or threaten to use force or violence to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of the CSRA or FSA or of this subchapter.