No. 23-558

IN THE

Supreme Court of the United States

UNITED NATURAL FOODS, INC., DOING BUSINESS AS UNITED NATURAL FOODS INC. & SUPERVALU, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Whether 29 U.S.C. § 153(d), which establishes a term of office for the National Labor Relations Board's General Counsel, but no express limitations on removal, impliedly affords the General Counsel protection from removal by the President without cause.

2. Whether a charging party's submission of a summary judgment motion to the National Labor Relations Board prior to the commencement of a hearing before an administrative law judge, without the Board accepting transfer of the case from the judge or issuing an order to show cause, precludes the General Counsel from exercising their prosecutorial discretion to withdraw the complaint and permits the charging party to force prosecution of the complaint against the General Counsel's will.

CORPORATE DISCLOSURE STATEMENT

Respondents are not nongovernmental corporate parties that have a parent corporation or have stock that is held by any publicly held company.

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INTRODUCTION

Petitioner United Natural Foods, Inc. (UNFI) asks this Court to review two questions it contends are implicated by the National Labor Relations Board's (NLRB or Board) denial of its request to specially appeal the pre-hearing decision of the Board's Acting General Counsel (AGC) to withdraw a complaint and dismiss an unfair labor practice (ULP) charge against Respondents Teamsters Local 117 and 313 (the Unions).

UNFI's first proposed question attacks the validity of any official act of the AGC on the notion that the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et. seq*., prohibited the President from removing the AGC's predecessor during his term of office. Its second question impugns the Board's finding that it lacked jurisdiction to hear UNFI's summary judgment motion because the AGC directed the complaint's withdrawal before the hearing commenced or the Board had accepted transfer of UNFI's motion, a time when the AGC retains absolute prosecutorial discretion. Running with an unprecedented theory laid out by the dissent below, UNFI contends that the Board's Rules and Regulations (the Rules) must incorporate the Federal Rules of Civil Procedure (FRCPs) or explain the reason for the Rules' departure. From this novel starting point, UNFI argues further that the Board's interpretation of its summary judgment rules—straightforwardly applied in this case—conflict with FRCP 41(a)(1)(A)(i).

UNFI raises no unsettled questions of law meriting review. The decision below, as well as the companion case addressing the first question presented, *Exela Enter. Sols. v. N.L.R.B.*, 32 F.4th 441 (5th Cir. 2022), compellingly expose the defects of UNFI's position. The Unions concur with those decisions and adopt their reasoning and conclusions by reference. However,

UNFI's Petition is worse than meritless; it is an inappropriate vehicle for considering the questions presented, even were those questions unsettled. Several issues make this case a poor candidate for certiorari.

First, UNFI fails to offer more than the barest of conclusory explanations for why the office of the NLRB General Counsel should be analogized to the multi-member, quasi-judicial tribunals for which this Court has sometimes inferred removal protections. It does not acknowledge, much less dispute, *Exela*'s thorough differentiation between the General Counsel—a quintessential prosecutor—and the five members of the Board—who adjudicate cases the General Counsel prosecutes. While there may be other executive offices that toe the conceptual lines drawn by this Court's removal jurisprudence, this case does not come anywhere near the boundary.

Second, UNFI has no right to seek this Court's view on the relationship between the Board's Rules and the FRCPs when it failed to raise that issue in its special appeal to the Board and offered only a fleeting sentence on the subject in its appellate briefing to the Fifth Circuit. These compounding omissions doubly precluded the Fifth Circuit from considering the issue on the merits, which is why the court primarily ruled on waiver grounds and only secondarily rejected UNFI's theory on the merits.

Third, a critical intervening event has transpired since UNFI commenced the appeal below which renders both of its questions presented moot: in UNFI's Section 301 lawsuit to vacate the arbitration award at issue before the Board the federal district court confirmed the award and squarely held that enforcing it does not violate the NLRA, as UNFI contends. *See United Natural Foods, Inc. v. International Brother-*

hood of Teamsters Local 117 (UNFI), 168 F. Supp.3d 1107, 1120–23 (W.D. Wash. 2022). This ruling would collaterally estop the Board from deciding to the contrary, even if this Court granted UNFI all the relief it sought and reinstated Region 19's complaint. Since the ULP charge against the Unions must be dismissed regardless of the route taken, UNFI no longer has a genuine stake in this appeal. The Court should decline to issue an advisory opinion on presidential removal authority and administrative rulemaking when neither will impact the ultimate disposition of this case.

Fourth, and relatedly, equitable considerations counsel against indulging UNFI's forum-shopping, two-front approach by reviving its long-dismissed ULP charge. To do otherwise would reward UNFI for its gamesmanship and waste judicial resources on duplicative proceedings. UNFI can already seek federal judicial review of its claim that the Unions violated the NLRA through the lawsuit it initiated in district court. There is no need to resuscitate its redundant ULP charge.

STATEMENT

A. The Underlying Dispute

The Unions served as exclusive bargaining representatives for units of employees at a grocery distribution center located in Tacoma, Washington. *UNFI*, 168 F. Supp.3d at 1111.[1] Both Unions entered into collec-

[1] As discussed in greater detail below, the federal district court decision referenced herein encompasses the same underlying dispute that is the subject of UNFI's unfair labor practice charge and the since-withdrawn administrative complaint. *See infra*, at 7-8. This Court may take judicial notice of the facts adduced by the district court, which were stipulated by the parties

tive bargaining agreements (CBAs) with grocery chain SuperValu, Inc., effective from July 15, 2018, through July 17, 2021. *Id.* UNFI acquired SuperValu on October 22, 2018, became SuperValu's successor-in-interest, and assumed SuperValu's CBA obligations. *Id.*

Both Unions' CBAs covering warehouse employees contain materially identical "Movement of Facilities" provisions. *Id.* at 1111–12. This language concerns UNFI's obligations to give Tacoma-based employees the opportunity to transfer to a new facility located within a certain geographic scope; what, if any, contract terms should apply to transferees; and under what circumstances UNFI must recognize the Unions as bargaining representatives of units at the new facility. *Id.*

On February 5, 2019, UNFI announced that it would consolidate its operations by opening a new distribution center in Centralia, Washington, while closing the Tacoma facility. *Id.* at 1112. In March 2019, UNFI disclaimed the applicability of the Movement of Facilities language to its transfer of operations from Tacoma to Centralia and refused to offer Tacoma employees the opportunity to transfer to the new facility, much less apply to them the same terms and conditions they previously enjoyed. *Id.* UNFI merely "encouraged" Tacoma-based employees to apply to work at the Centralia facility under UNFI's unilaterally-established terms. *Id.* UNFI has since laid off all of its Tacoma employees, many of whom were still unemployed as of July 2021. *United Natural Foods, Inc. v.*

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on summary judgment. *See New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 199 (2d Cir. 2001) (taking judicial notice of district court's factual findings in related contempt proceeding); *Jankovic v. Int'l Crisis Group,* 494 F.3d 1080, 1088 (D.C. Cir. 2007) (taking judicial notice of exhibits admitted into record of another court's proceedings).

International Brotherhood of Teamsters, Local 117, Case No. 2:19-cv-01736-RAJ, 2021 WL 3173317, at *3 (W.D. Wash. Jul. 27, 2021) (denying UNFI's request to reinstate stay of proceedings in part because of former employees' financial hardships stemming from unemployment).

Following UNFI's refusal to honor the terms of the contracts, the Unions filed grievances against UNFI for violating their respective CBAs' Movement of Facilities provisions. *UNFI*, 618 F. Supp.3d at 1112. On October 7, 2019, Arbitrator Joseph Duffy issued an award (the Award) finding that UNFI had indeed breached the CBAs by refusing to apply the Movement of Facilities provisions to its transfer of operations. *Id*. at 1112–14. To remedy the violation, the Award ordered UNFI to reinstate and make whole laid-off unit members, give all Tacoma employees the chance to transfer to Centralia, and apply to them the same terms and conditions they previously enjoyed. *Id*. at 1114. To date, UNFI has refused to comply with the Award.

B. Procedural History

On October 28, 2019, UNFI filed a ULP charge with Region 19 of NLRB, alleging that the Unions' effort to enforce the Award violated Sections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the Act. *UNFI*, 168 F. Supp.3d at 1114; Pet. 8; Record on Appeal (ROA) 1–4.[2] The same day, UNFI also filed a complaint in the federal district court for the Western District of Washington (the district court) under 29 U.S.C. § 185 (Section 301) seeking to vacate the Award. *UNFI*, 617 F. Supp.3d at 1114. The charge and the Section 301 suit

[2] The "ROA" refers to the administrative record filed by the NLRB with the Fifth Circuit below.

both claimed that the Award was incompatible with the NLRA because, supposedly, permitting Tacoma-based employees to transfer to the Centralia facility and enjoy their contractually-guaranteed terms of employment would impose union representation on the Centralia facility and force UNFI to discriminate against non-union employees. *Compare UNFI*, F. Supp.3d at 1120 *with* ROA 1–4.

On July 29, 2020, Region 19 of the NLRB issued a consolidated complaint in Case Numbers 19-CA-249264 and 19-CB-250856, and scheduled a hearing for March 2, 2021. Pet. 3a.

Following his inauguration, President Biden removed then-General Counsel Peter Robb from office and on January 25, 2021, appointed Peter Sung Ohr as Acting General Counsel (AGC). *Id*. On January 29, 2021, the Unions requested that AGC Ohr reconsider and withdraw the consolidated complaint, and also that the Regional Director postpone the hearing by 30 days in order to give the AGC the opportunity to evaluate the Unions' request. ROA 375, 413–14.[3]

On February 1, 2021—three days after the Unions submitted their reconsideration request and motion to extend the hearing—UNFI filed a motion to sever a related charge against it, to transfer the case against

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[3] UNFI inaccurately represented to the Fifth Circuit below that the Unions filed their own summary judgment motion with the AGC, a contention the dissenting opinion apparently accepted. Pet. 42a. As the ROA plainly shows, counsel for the Unions merely transmitted an email request to the AGC via Region 19's Deputy Director that the AGC reconsider his predecessor's decision to issue a complaint. ROA 375, 413–14. Thus, to the extent the Court deems the issue material, *only* UNFI moved for summary judgment.

the Unions to the Board, and for summary judgment in the case against the Unions. Pet. 9, 3a.[4]

On February 4, 2021, the Director of Region 19 granted the Unions' request for an extension and set a new hearing date of April 6, 2021. ROA 205–06. Three weeks later, on February 24, 2021, the Director of Region 19 withdrew the complaint and dismissed the charge against the Unions, noting that "the Acting General Counsel, pursuant to his prosecutorial discretion, does not wish to pursue the prosecution of Case 19-CB-250856." Pet. 9, 3a–4a; ROA 269–71.

On March 9, 2021, UNFI filed a request for special permission to appeal the Regional Director's order dismissing the charge against the Unions. Pet. 9, 4a; ROA 308–76. On May 11, the Board denied UNFI's request for special permission to appeal the Regional Director's order dismissing the charge against the Unions, holding that the request was not properly before it and that it had no jurisdiction to review the AGC's decision to withdraw the complaint before a hearing had commenced. Pet. 10, 4a, 45a–47a; ROA 418.

On June 30, 2021, the district court lifted the stay in the Section 301 action that had been in place pending the Board proceedings. *UNFI*, 168 F. Supp.3d at 1115. The parties then briefed cross-motions for sum-

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[4] The Petition misleadingly suggests the Unions sought reconsideration *in response* to UNFI's summary judgment motion. Pet. 9. The reverse is true. On January 28, 2021, the Unions informed counsel for UNFI of their forthcoming reconsideration request to the AGC and sought UNFI's position on its proposal to extend the hearing date. Once apprised of the Unions' request, UNFI—which had never before indicated it believed the complaint could be resolved without a hearing—dashed to preempt the AGC's exercise of prosecutorial discretion through a summary judgment motion directed to the Board.

mary judgment to the district court. On August 2, 2022, the Hon. Judge Lauren King issued an order partially granting the Unions' summary judgment motion and denying UNFI's cross-motion. *UNFI*, 618 F. Supp.3d at 1126. In substance, Judge King upheld the Award and found that permitting Tacoma-based employees the right to transfer under their contractual terms of employment, as provided in the CBAs' Movement of Facilities provisions, would not foist union representation on employees at the Centralia facility or cause UNFI to discriminate against non-transferring employees. *Id*. at 1120–23.[5] Judge King directed the parties to submit brief on the Unions' anticipated motion to remand the case to the arbitrator to address outstanding remedial issues. *Id*. at 1126. That motion has been fully briefed and is pending before Judge King. *See infra*, n.7.

Meanwhile, UNFI sought review by the Fifth Circuit of the Board's May 11, 2021, order. Pet. 10. The Fifth Circuit issued the decision below on April 23, 2023. Pet. 1a–44a. On August 21, 2023, the Fifth Circuit denied UNFI's petition for en banc review. Pet. 48a–49a. UNFI's petition for certiorari (the Petition) followed.

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[5] Judge King also rejected UNFI's separate arguments that the arbitrator's interpretation of the CBAs exceeded his authority or that the NLRB's supposedly "primary jurisdiction" over the dispute somehow entitled UNFI to summary judgment before the district court. *UNFI*, 618 F. Supp.3d at 1117–20, 1123–24.

ARGUMENT

A. The Petition should be denied because UNFI fails to make even a colorable argument that the NLRB General Counsel is akin to the executive appointees at issue in the cases it relies upon.

1. The first question UNFI asks this Court to review is one the Fifth Circuit disposed of summarily because it had recently rejected the identical argument in *Exela Enterprise Solutions, Inc. v. National Labor Relations Board*, 32 F.4th 436 (5th Cir. 2022). In that case, the Fifth Circuit held that the NLRA provision creating a term of office for the NLRB's General Counsel, 29 U.S.C. § 163(b), did not insulate that officer from removal without cause. *Exela*, 32 F.4th at 441–45. *Exela* comprehensively reviewed the relevant statutory language and jurisprudence on the President's authority to remove executive officers. *Id*. Nonetheless, UNFI rehearsed the same arguments made by the appellant in *Exela*, and unsurprisingly achieved the same result. Now, in petitioning for review, UNFI casts *Exela*—as well as a Ninth Circuit decision which reached the same conclusion, *see N.L.R.B. v. Aakash, Inc.*, 58 F.4th 1099, 1103 (9th Cir. 2023)—as somehow in tension with this Court's removal power precedents. Pet. 12–20. Further, UNFI suggests that these decisions are at war with themselves. *Id*.

While UNFI's effort to spin settled case law has myriad defects, one in particular stands out. UNFI appears to acknowledge, albeit implicitly, that this Court has authorized for-cause removal protections only for those executive officers who sit on multimember administrative bodies that perform quasi-legislative or quasi-judicial functions. *See Seila Law LLC v. CFPB*, 591 U.S. __, 140 S. Ct. 2183, 2199 (2020). In an

attempt to shoehorn the General Counsel into the removal protections textually provided only to Board members, UNFI argues that while the General Counsel "exercises some prosecutorial functions, she does so as an agent of the NLRB itself." Pet. 21. UNFI goes on to list several ancillary functions of the General Counsel that supposedly make the office "integral" to the five-member adjudicatory body. Pet. 21–22.

2. This half-baked attempt to analogize the General Counsel to the five-member Board and other quasi-judicial administrative bodies is frivolous. UNFI does not even engage with, much less refute, the Fifth Circuit's textual analysis in *Exela* that dismantles the same argument:

> . . . Exela argues that we should find removal protections implicit in the NLRA because the General Counsel is, "by virtue of its title and as evidenced by the responsibilities delegated to the position by the Board, . . . tantamount to a member of the Board." Exela fails to explain how the title of the General Counsel is "tantamount" to that of a Board Member. It is true that the statute refers to the "General Counsel *of the Board*" within a Section titled, "National Labor Relations Board." 29 U.S.C. § 153(d) (emphasis added). But, as a textual matter, that plainly does not make the General Counsel a *Member* of the Board. In the provision granting tenure protections to Board Members, the NLRA clearly and explicitly creates a Board of "five" members. *Id.* § 153(a). It does not say "some members of the Board," or "six members of the Board, including the General Counsel." The distinction between the General Counsel and Board Members is reinforced by the treatment of the two offices as distinct in the statutory provision for reappointment of "[e]ach member of the Board and the General

> Counsel." *Id.* § 154(a). That language would be redundant if we accepted Exela's reading of the statute. We are not persuaded that Congress would legislate in such an obscure manner when shielding the General Counsel from removal.
>
> The statutory text also undermines Exela's contention that the General Counsel's "responsibilities delegated to the position by the Board" render him "fully and inextricably linked to the Board itself. "The NLRA creates a stark division of labor between the General Counsel and the Board. The statute created the Board to execute quasi-legislative, quasi-judicial functions. *See id.* § 156 (authorizing the Board to promulgate regulations); *id.* § 160(c) (authorizing the Board to adjudicate labor disputes). By contrast, the NLRA created the General Counsel to perform quintessentially prosecutorial functions, including the "exercise [of] general supervision" over officers and employees in the NLRB (excepting administrative law judges and legal assistants to the Board), "investigation of charges," "issuance of complaints," and "prosecution of such complaints." *Id.* § 153(d). As the Supreme Court has recognized, "[t]he words, structure, and history of the . . . NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line." *N.L.R.B. v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 124, 108 S. Ct. 413, 98 L.Ed.2d 429 (1987). Thus, we do not find that the responsibilities of the General Counsel justify an inference of for-cause removal protection either.

Exela, 32 F.4th at 443–44 (emphasis in original, footnotes omitted). Since UNFI cannot, and does not seriously attempt to, dispute the fundamentally prosecu-

torial character of the General Counsel' position, its overall theory that there exists a tension within this Court's removal jurisprudence quickly collapses. There is no need for review of a firmly settled question.

B. The Petition should be denied because UNFI did not, at any stage below, adequately raise the alleged applicability of the Federal Rules of Civil Procedure to Board proceedings.

1. The second question UNFI asks this Court to review turns on the theory that the NLRB's Rules must either conform to the FRCPs or explain the basis for the Rules' departure. Pet. 24–28. But as the Fifth Circuit explained, UNFI did not adequately raise that argument; it was supplied by the dissent on its own initiative. App. 18a. In fact, UNFI's silence on this issue extends even further back. Nowhere in its special appeal to the Board of the Regional Director's withdrawal of the administrative complaint did UNFI contend that FRCP 41 prevented the Acting General Counsel from withdrawing the complaint and voluntarily dismissing UNFI's ULP charge. UNFI's inaction at both levels waived this argument, making it unsuitable for review by this Court. *See Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring) (". . . [W]e ought not to decide the question if it has not been cleanly presented.").

2. UNFI's initial waiver before the Board stems from Section 10(e) of the NLRA, which provides, in pertinent part, that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Absent such circumstances, Section 10(e) deprives a

Court of Appeals of jurisdiction to consider arguments asserted for the first time in a petition for review. *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645, 665 (1982); *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 23 (1986). UNFI has never asserted, much less demonstrated, that it neglected to discuss the interplay of the Board's rules and the FRCPs due to extraordinary circumstances. Such a claim would, at any rate, be incredible on its face since the issue pertains to the interpretation of long-established court and administrative rules. There were no facts unknown to UNFI which could excuse its silence. Accordingly, the Fifth Circuit could not have entertained the question now posed in UNFI's Petition, even had UNFI properly briefed the issue to the court.

3. In point of fact, UNFI did not properly brief the issue to the Fifth Circuit. UNFI claims its "opening appellate brief relied on Rule 41(a)(1)(A)(i) and argued that the Board was obligated to explain its deviation from that rule." Pet. 27. It fails to mention that its opening brief discussed Rule 41(a)(1)(A)(i) only in a postscript to a different argument: not that the Board acted in derogation of FRCP 41 or that its Rules conflict with the FRCPs but that the Board failed to correctly apply its Rules as written. Pet. 41a, n.2 (Oldham, J., dissenting) (citing UNFI's appellate brief at 26–27). UNFI principally argued that FRCP 41 was already embedded in the Board's summary judgment procedure. *Id*. In a *single sentence*, it suggested that if, on the other hand, FRCP 41 was not already incorporated into the procedure, the Board should give a "reasoned justification" why. *Id*. As the Fifth Circuit majority noted, that solitary aside did not claim there was a statutory imperative for such a justification or even mention Section 10(b), the lynchpin of Judge Oldham's dissent. Pet. 18a. The Fifth Circuit followed

established precedent in holding that UNFI's perfunctory treatment of FRCP 41 waived any argument based on a putative conflict between that rule and the Board's handling of UNFI's summary judgment motion. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356, n.7 (5th Cir. 2003) ("arguments that are insufficiently addressed in the body of the brief . . . are waived"); *Vernon Smith, etc. v. Sch. Bd. of Concordia Par.*, 88 F.4th 588, 596 (5th Cir. 2023); *United States v. Thompson*, 735 F.3d 291, 298 (5th Cir. 2013), *as modified* (Nov. 18, 2013).

4. Since UNFI neither argued to the Board that it was required to adhere to FRCP 41 in disposing of summary judgment motions nor adequately briefed the question to the Fifth Circuit, this Court may deny certiorari on this basis alone. *See Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (unpublished) (Sotomayor, J., concurring) (respecting denial of certiorari where petitioner presented question for review which it raised only in footnote of reply brief to district court and court did not address argument in ruling).

C. The Appeal is moot, or at a minimum, a poor vehicle for addressing the questions presented because a federal court has already rejected UNFI's underlying unfair labor practice theory, which would control any hypothetically revived Board proceeding.

1. This Court has long cautioned that it will not "give opinions upon moot questions or abstract propositions, or [] declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). A case becomes moot when an "interven-

ing circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation. . . ." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 478 (1990)). One such "intervening circumstance" is a decision in a collateral proceeding which effectively resolves the underlying dispute. *See Agre v. Wolf*, 139 S. Ct. 2576 (2018) (unpublished) (appeal contesting validity of state electoral map dismissed as moot after state supreme court struck down map in separate case); *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1238 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) (affirming dismissal of claim to perpetuate testimony because subpoena enforcement proceedings before different court resulted in witnesses providing sought-after testimony, rendering appeal moot); *Capriole v. Uber Techs., Inc.*, 991 F.3d 339, 343 (1st Cir. 2021) (plaintiffs' appeal of denial of preliminary injunction by first district court mooted by final judgment entered in second district court, after defendant successfully moved to transfer case and compel arbitration). Thus, if a ruling in a related case collaterally estops a petitioner from obtaining the relief it ultimately seeks, its petition for certiorari must be denied.

That is the case here. Judge King's August 2, 2022, order squarely held that the Award does not conflict with the NLRA. *UNFI*, 618 F. Supp.3d at 1120–23. This finding collaterally estops the General Counsel—whoever occupies the office—from asserting, or the Board—through summary judgment or following evidentiary hearing—from finding, that the Unions violated the NLRA by enforcing the Award.

2. The preclusive effect of Judge King's order flows from the nature of the district court's jurisdiction.

Section 301 of the Labor Management Relations Act (LMRA) grants federal courts jurisdiction to hear "[s]uits for violation of contracts between an employer and a labor organization. . . ." 29 U.S.C. § 185(a). These suits include "petitions to confirm or vacate arbitration awards." *Carter v. Health Net of California, Inc.*, 374 F.3d 830, 835 (9th Cir. 2004). Although the Board has primary jurisdiction to determine whether an employer or labor organization has committed an unfair labor practice, when a Section 301 suit involves contract terms or party conduct that is also the subject of a ULP charge, the Board and district court share concurrent jurisdiction. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962) (Board's power to adjudicate unfair labor practices "is not exclusive and does not destroy the jurisdiction of the courts in suits under s 301"). In those cases, the district court may determine whether a contract incorporates terms that violate the NLRA as part of its duty to ensure that private agreements conform to the federal government's public policies. *Kaiser Steel*, 455 U.S. at 83.

3. UNFI invoked this very authority when it sued the Unions in federal district court under Section 301 to vacate the Award. It expressly asserted that the Award violated public policy as embodied in the NLRA and requested the district court vacate the Award on that basis. *UNFI*, 618 F. Supp.3d at 1116. The district court obliged UNFI's request for a ruling, although it did not rule as UNFI would have liked. Applying well-settled law, Judge King held that the Award did not conflict with the NLRA by directing UNFI to offer Tacoma-based bargaining unit members employment at the company's new Centralia facility under members' current contractual terms of work. *Id.* at 1120–23.

4. When a federal court, in the course of interpreting a collective bargaining agreement pursuant to its Section 301 jurisdiction, decides a question of law or fact that bears on an unfair labor practice charge, the court's conclusions have preclusive effect in related Board proceedings. *N.L.R.B. v. Heyman*, 541 F.2d 796, 799–801 (9th Cir. 1976) (". . . the jurisdictional grant within s 301 carries with it both the powers necessary to enforce judgments and to give judgments effect in such quasi-judicial forums as the NLRB, through the application of such doctrines as res judicata or collateral estoppel. . . ."); *N.L.R.B. v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 33 (1st Cir. 1987) (". . . the Board was collaterally estopped from ruling, contrary to the district court, that a valid contract between Local 229 and Donna–Lee existed. . . ."); *see also Int'l Bhd. of Elec. Workers, Local 532 v. Brink Const. Co.*, 825 F.2d 207, 214 (9th Cir. 1987) (". . . [W]here the district court resolved issues not within the NLRB's primary jurisdiction . . . the goal of avoiding logically inconsistent judgments . . . will be ensured by the NLRB giving collateral estoppel effect to a final judgment of the district court."); *Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547, 551 (7th Cir. 1989), *abrogated on other grounds*, 161 F.3d 427 (7th Cir. 1998) ("when the underlying controversy is primarily contractual, the Board should defer to the courts").[6]

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[6] While the Board has equivocated on the extent to which it respects *Heyman* and *Donna-Lee Sportswear*, *see Roadway Express, Ins.*, 355 NLRB 197, 201–02 (2010) (recognizing that in some cases "giving preclusive effect to the courts' prior findings . . . represents a minimal intrusion into the Board's jurisdiction" but finding collateral estoppel inappropriate in other cases), it has not hesitated to defer to judicial findings when the contractual nature of the dispute predominates. *See Collier Elec.*, 296

In *Heyman*, the Ninth Circuit confronted two competing rulings: (a) in a Section 301 action, a district court's determination to rescind a collective bargaining agreement because there was no valid contract between a union and employer and because the union was not entitled to a presumption of majority support; and (b) a subsequent Board determination, based on a ULP charge filed by the same union, that the employer refused to bargain and repudiated a lawful agreement, in violation of Section 8(a)(5) of the NLRA. *Heyman*, 541 F.2d at 797–99. In adopting the district court's view, the Ninth Circuit reasoned that the Board's statutory authority to adjudicate unfair labor practices cannot, without eviscerating Section 301, "breathe new life into that which has expired by judicial decree." *Id*. at 800; *see also id*. ("To fail to give any effect to the district court's judgment would here render s 301 nuga-

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NLRB 1095, 1098–99 (1989) (deferring to arbitration and Section 301 suit question of whether union committed unfair labor practice by submitting unresolved bargaining issues to interest arbitration "because the underlying controversy is primarily contractual"). Here, the district court has already held the dispute is primarily contractual. *UNFI*, 618 F. Supp.3d at 1124. So the Board would likely defer and dismiss a remanded administrative complaint under *Collier Electric*. Moreover, the Board will dismiss a complaint premised on conduct upheld in an arbitration award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *See Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). *See also Olin Corp.*, 268 NLRB 573 (1984) (refining *Spielberg* factors to also require that the contractual issue be "factually parallel" to the ULP issue and that those facts be presented to the arbitrator). Here, even if the Board were not collaterally estopped, it would nonetheless defer to the Award and Section 301 action enforcing it under the *Spielberg/Olin* standard, particularly where any question of whether the Award is "repugnant to the purposes and policies of the Act" has been resolved by Judge King.

tory and defeat the intentions of Congress that alternative forums be available."). Moreover, the Ninth Circuit indicated that affording the district court's judgment preclusive effect was necessary to deter the losing party in a Section 301 action from forum-shopping for a preferred outcome. *See id.* at 799 ("An implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations[.]"). The Court therefore denied enforcement of the Board's order. *Id.* at 801.

In a case involving similar facts, the First Circuit agreed with *Heyman* and, on that basis, denied a Board order which conflicted with a prior federal court ruling on a benefits collection claim rooted in a collective bargaining agreement. *Donna-Lee Sportswear*, 836 F.2d at 35–38. The First Circuit specifically rejected the notion that collateral estoppel could not apply against a government agency, noting that the primarily "private interests" of the charging party and respondent which animated the already-adjudicated collections lawsuit were still at issue in the Board proceeding. *Id.* at 38.

5. Courts apply the five traditional elements of collateral estoppel to decide whether findings in a Section 301 suit control a later Board case: (1) the determination in the second forum must involve an issue actually litigated in the first forum; (2) the determination in the first forum must result in a valid and final judgment; (3) resolution of the overlapping issue must have been essential to rendering the judgment; (4) the issue in the second forum must be the same as in the first; and (5) the parties in the two actions must also be the same. *Donna-Lee Sportswear*, 836 F.2d at 38; *Heyman*, 541 F.2d at 800.

Each of those elements is satisfied here. First, UNFI's Section 301 action actually litigated the question of whether the Award was inconsistent with the NLRA. Indeed, it was the centerpiece of UNFI's demand for vacatur and was addressed at length in Judge King's order partially granting the Unions' summary judgment motion. *Supra*, at 7-8. Second, because it conclusively determined the Award's enforceability, Judge King's order constitutes a valid and final judgment for purposes of the collateral estoppel test. *Jackson v. Hayakawa*, 605 F.2d 1121, 1125, n.3 (9th Cir. 1979) (summary judgment is "a judgment on the merits" for preclusion purposes); *Kourtis v. Cameron*, 419 F.3d 989, 996, n.4 (9th Cir. 2005), *abrogated on other grounds as stated in Taylor v. Sturgell*, 553 U.S. 880 (2008).[7] Third, resolving the Award's compatibility with the NLRA was absolutely necessary to confirming the Award, since UNFI's denial that the two could be harmonized was the central premise of its suit to vacate the Award. Fourth, UNFI's theory in its Section 301 action is identical to the argument

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[7] Now that the Award has been confirmed, the only issue still before the district court is the appropriate remedy, which the parties agreed to resolve separately from the liability question. The parties dispute the extent of UNFI's financial exposure pursuant to the Award's make-whole remedy and which decision-maker—arbitrator or district court—has jurisdiction to answer that question. The Unions' motion to remand the case to the arbitrator is fully briefed and pending before Judge King. Since the open remedial question does not bear on the Award's compatibility with the NLRA, it does not affect the preclusion inquiry here. Nor does the prospect of UNFI appealing the district court's order to the Ninth Circuit disrupt the order's finality. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (". . . while appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality.").

which Region 19 asserted in its since-withdrawn administrative complaint against the Unions, which UNFI raised in its ULP charge giving rise to that complaint, and which UNFI attempted to put to the NLRB in its abortive summary judgment motion. Fifth, the Unions and UNFI were parties to both proceedings—the Unions as defendant/respondent, UNFI as plaintiff/charging party.[8]

6. The preclusive effect of the district court's ruling moots out both of the questions UNFI presented to this Court for review. Since the district court's decision bars the Board from reaching a contradictory conclusion, the outcome of any hypothetically remanded Board proceedings is foregone. Under *Heyman* and *Donna-Lee Sportswear*, the Board would be obligated to adopt the district court's finding that the Award is consistent with the NLRA and then dismiss the complaint. Thus, even if UNFI's petition had merit, it would avail the company nothing to have this Court determine that the former General Counsel must be reinstated, the administrative complaint refiled, or UNFI's summary judgment motion entertained by the Board. All roads lead to the complaint's eventual dismissal. Accordingly, this Court need not consider whether President Biden had the authority to remove the former General Counsel without cause or whether UNFI's un-transferred summary judgment motion prevented the Acting General Counsel from withdrawing the administrative complaint.

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[8] That the General Counsel was not a party to the Section 301 suit does not defeat the requisite overlap of party participation. *See Donna-Lee Sportswear*, 836 F.2d at 35 ("the relationship and legal interests of the Board and Local 229 are that closely identified, that it would be incongruous not to bind them both by the district court's holding. . . .").

7. At a minimum, the district court's ruling on UNFI's ULP theory, and the likelihood that the NLRB would adhere to that conclusion and dismiss the ULP, make this case a poor vehicle to address the company's arguments regarding the President's removal authority and the Board's obligation to adjudicate a ULP based on the charging party filing a motion for summary judgment. Even if UNFI were correct that its summary judgment motion required the Board to adjudicate its unfair labor practice charge—which it is not—there is no reason to think that the NLRB would have reached a different decision than the AGC or done anything other than dismiss the ULP.

D. This case is a poor vehicle to resolve the questions presented because UNFI should be bound by the results of exercising its forum privilege in choosing where to test its ULP theory and will have the opportunity for judicial review apart from this case.

1. Even without the application of collateral estoppel, this case makes a poor vehicle to address the questions presented where UNFI voluntarily commenced a lawsuit raising the same issue in an alternative forum and can obtain direct review of the district court's ruling by appealing to the Ninth Circuit. UNFI's chosen litigation strategy renders the case a bad candidate to resolve the issues presented.

2. Plaintiffs are inherently able to "select whatever forum they consider most advantageous," a right known as "plaintiff's venue privilege." *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 63 (2013) (quoting *Van Dusen v. Barrack*, 376 U.S. 614, 635 (1964)). When a party to a collective bargaining agreement believes that enforcing an arbitration award would amount to an unfair labor

practice, it "has a choice of forums: the courts or the NLRB." *Pari Mutuel Clerks Union of Louisiana, Local 328 v. Fair Grounds Corp.*, 703 F.2d 913, 918 (5th Cir. 1983); *accord Sheehy Enterprizes, Inc. v. N.L.R.B.*, 602 F.3d 839, 843, n.5 (7th Cir. 2010) (when alleged ULP also constitutes alleged contract breach, "[t]he choice between these fora"—NLRB or district court—"was the [charging party's/plaintiff's] prerogative").

After Arbitrator Duffy issued his Award, in a transparent effort to spread its risk around, UNFI filed both a Section 301 suit in federal district court to vacate the Award and a ULP charge with the Board on the very same day. *Supra*, at 5. The Section 301 lawsuit and ULP charge advanced the same legal theory for the alleged infirmity of the Award under the NLRA. *Supra*, at 6. Exactly as it sought, UNFI received a ruling from the court on its theory that the Unions had committed an unfair labor practice, although it did not receive its desired answer. But just because UNFI is dissatisfied with that ruling does not entitle it to force a second opinion from the NLRB, where the Board has disposed of the case.[9] The Court should not facilitate UNFI's forum-shopping endeavor by granting certiorari. *Cf. Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (unpublished) (Thomas, J., concurring) (in concurring with the denial of petition for certiorari by applicant for stay of execution, commenting on need for certiorari review process to avoid "rewarding gamesmanship").

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[9] UNFI can hardly complain of its inability to test its theory before the Board instead of federal court when it has taken the position below that the Board's decisions should no longer receive *Chevron* deference and should be subject to *de novo* review because of that body's alleged "recurring changes in positions." UNFI's Opening Brief to the Fifth Circuit at 17–18, n.25.

3. Restricting litigation of the underlying dispute to the Section 301 action not only respects UNFI's own litigation strategy, it also has absolutely no impact on UNFI's ability to obtain appellate review of the Award's compatibility with the NLRA. Once Judge King issues a ruling on the appropriate remedy, *supra*, n.7, UNFI may appeal her summary judgment order to the Ninth Circuit. That court will then consider the issue on the merits. The Ninth Circuit's readiness to squarely address the disputed question of federal labor law fatally undermines UNFI's Petition. Even if this Court grants UNFI all of the relief to which it believes it is entitled, the eventual conclusion of the remanded Board proceedings would lead the parties to the same precipice on which they currently stand in the Section 301 action: review by a federal Court of Appeals. If the Board rendered a decision in UNFI's favor on its summary judgment motion, the Unions would have the opportunity to petition a Court of Appeals to review the order or the Board could petition a Court of Appeals to enforce it. *See* 29 U.S.C. § 160(e), (f) (describing procedure to petition to enforce or review Board order). Similarly, if the Board ruled in the Unions' favor and dismissed the complaint, UNFI may be able to seek review of that decision as a "person aggrieved" under Section 10(f). *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local 283 v. Scofield*, 382 U.S. 205, 219, (1965) (charging parties may qualify as "persons aggrieved" for appellate purposes).

Thus, at the very least, accepting review of UNFI's Petition would open the door to a circuitous and duplicative route to appellate review of UNFI's NLRA theory, even though UNFI will have the opportunity to raise its arguments with the Ninth Circuit as part of its Section 301 challenge. Worse still, reviving the dis-

missed complaint raises the prospect of an unnecessary circuit split on the *very same facts*, should UNFI, the Unions, or the Board petition to review or enforce a hypothetical Board order in a different Court of Appeals, as UNFI did below. It would be a tremendous waste of judicial resources for this Court to decide the threshold questions of Board procedure and executive appointment powers raised in this Petition, thereby risking years of torturous duplicative litigation on remand, when the Ninth Circuit stands ready to consider any arguments on the ultimate question of law which UNFI has adequately preserved for appeal. And if the Ninth Circuit affirms the district court's decision, UNFI would of course have the right to petition this Court for certiorari at that time. The availability of this right makes the instant Petition a poor candidate for review. *Cf. California v. Rooney*, 483 U.S. 307, 313 (1987) (dismissing writ of certiorari as improvidently granted because "[e]ven if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it, with the knowledge that we are reviewing a state-court *judgment* on the issue, and that the State Supreme Court has passed upon or declined review in a case squarely presenting the issue") (emphasis in original).

CONCLUSION

For the foregoing reasons, UNFI's petition for a writ of certiorari should be denied.

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