No. 25-622

# In the Supreme Court of the United States

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, PETITIONER

*v.*

SPACE EXPLORATION TECHNOLOGIES CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE GOVERNMENT RESPONDENTS IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's motion to intervene for the purposes of seeking a writ of certiorari to review the court of appeals' interlocutory decision affirming a preliminary injunction after the government decided not to do so.

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## OPINIONS BELOW

The order of the court of appeals (Pet. App. 47a-50a) is unreported but available at 2025 WL 2917088. The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 151 F.4th 761. The memorandum opinion and order of the district court (Pet. App. 51a-60a) is available at 2024 WL 4202383.

## JURISDICTION

The judgment of the court of appeals was entered on October 14, 2025. The petition for a writ of certiorari was filed on November 21, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, regulates labor relations and prohibits unfair labor practices by employers and unions. Under the NLRA, the National Labor Relations Board (NLRB or Board) determines whether unfair labor practices have occurred and addresses any such violations of federal law. See 29 U.S.C. 160. The Board is composed of five members appointed by the President with the advice and consent of the Senate who are, under the Act, removable only "for neglect of duty or malfeasance." 29 U.S.C. 153(a).

Board proceedings can occur only after a member of the public files charges of an unfair labor practice. See 29 C.F.R. 102.9. If the NLRB's General Counsel or delegee finds merit to the charge, the General Counsel will issue a complaint. 29 U.S.C. 153(d), 160(b). Such complaints are usually accompanied by a notice of hearing before an administrative law judge (ALJ), see *NLRB Casehandling Manual, Part One: Unfair Labor Practice Proceedings*, § 10268.2 (Feb. 2026), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/ulp-manual.pdf, who, similar to the members of the Board, is removable only for cause, see 5 U.S.C. 7521(a). Alternatively, a hearing may also be held "before the Board or a member thereof." 29 U.S.C. 160(b).

2. a. Petitioner, a union, filed charges against Aunt Bertha, doing business as Findhelp, alleging that the company unlawfully terminated "several [of petitioner's] supporters." Pet. 6. As a result of petitioner's charges, "the NLRB issued a complaint against Findhelp and scheduled an administrative hearing before an ALJ." Pet. App. 52a.

Before the administrative hearing opened, Findhelp filed this action in the United States District Court for the Northern District of Texas.[1] Among other claims, the company alleged that the statutory removal restrictions that apply to NLRB Board Members and ALJs are unconstitutional. Pet. App. 10a. The company sought, and, on September 16, 2024, received, a preliminary injunction halting the NLRB's administrative proceedings. *Ibid.*; see *id.* at 51a, 59a. The NLRB appealed the next day, see D. Ct. Doc. 31 (Sept. 17, 2024), and the court of appeals consolidated the appeal with two others involving preliminary injunctions against the NLRB raising the same issues, see Pet. App. 3a-4a.

While those appeals were pending, on March 5, 2025, the United States informed the court of appeals that it was "no longer relying on its previous argument[s]" that the removal protections for Board members and ALJs are constitutional. 24-50627 C.A. Doc. 210-1, at 1.

b. On August 19, 2025, the court of appeals affirmed the district courts. The court concluded that the "removal protection[s]" for ALJs conflicted with circuit precedent and precedent from this Court. Pet. App. 4a; see *id.* at 20a-22a. The court of appeals also rejected the NLRB's argument "that the Board Members' removal protections are constitutional under" *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Pet. App. at 23a. "The NLRB's structure and powers take it outside that narrow exception." *Id.* at 28a; see *id.* at 23a-28a. The court reached this issue notwithstanding its recognition that the NLRB "no longer" relied on its constitutional arguments, *id.* at 4a n.4, and thus "the merits favor[] the" plaintiff companies, *id.* at

[1] All references to documents filed in the district court (D. Ct.) are to documents filed in that case (No. 24-cv-798).

20a n.58. As the court explained, the NLRB "reaffirmed its remaining arguments," including—as relevant here—that the companies had not shown irreparable harm. *Id.* at 4a n.4; see *id.* at 5a n.5. The agency was therefore "seek[ing] reversal of the" preliminary injunctions. *Id.* at 5a n.5.

The court of appeals further held that *Collins* v. *Yellen*, 594 U.S. 220 (2021), does not require a plaintiff challenging a removal restriction to show compensable harm—that is, "a distinct injury flowing from the constitutional violations"—to establish irreparable harm for purposes of injunctive relief. Pet. App. 28a. Judge Wiener dissented on this point. *Id.* at 44a-45a (Wiener, J., concurring in part and dissenting in part); see *id.* at 38a.

3. This petition does not, however, involve the court of appeals' constitutional analysis or analysis of irreparable harm. Instead, the only issue concerns petitioner's attempts to intervene.

Petitioner did not seek intervention in the district court and instead filed an *amicus curiae* brief supporting the NLRB. See D. Ct. Doc. 19 (Sept. 6, 2024). It first attempted to intervene after the NLRB appealed on September 17, 2024, framing the request as seeking intervention as of right or, alternatively, permissive intervention. See 24-10855 C.A. Doc. 18, at 1 (Oct. 1, 2024). A single circuit judge denied the request on October 11, 2024. Pet. App. 71a. Petitioner then filed an amicus brief. See 24-50627 C.A. Doc. 63 (Nov. 4, 2024).

Eight days before argument on February 5, 2025, petitioner disclaimed any "interest in representing the bargaining unit" at Findhelp. 24-50627 C.A. Doc. 194, at 31 (Feb. 18, 2025). And two days before argument, the NLRB informed the court of appeals that the

United States' position was that the for-cause removal restriction for Board members is unconstitutional. See 24-50627 C.A. Doc. 175-1, at 1 (Feb. 3, 2025); 24-50627 C.A. Doc. 175-2, at 1 n.1 (Feb. 3, 2025). Thus, the NLRB would "limit" its argument "to the other grounds [it] briefed." 24-50627 C.A. Doc. 175-1, at 1.

On the day of argument, petitioner again moved to intervene, relying on the analysis in its initial request for intervention and adding that the NLRB's decision not to present argument about the constitutionality of Board members' for-cause removal protections meant the agency "no longer adequately represented" petitioner's interests. 24-50627 C.A. Doc. 179, at 2 (Feb. 5, 2025). The motion did not, however, ask the court of appeals to reschedule the argument set for that day. The court granted the motion a few minutes before argument, see Pet. 10 & n.8; petitioner "failed to appear," Pet. App. 49a. A month after argument, the NLRB informed the court it was "no longer relying on its" arguments that the tenure protections for ALJs and NLRB Board members are constitutional. 24-50627 C.A. Doc. 210-1, at 1.

After argument, the plaintiff companies filed oppositions to petitioner's renewed motion to intervene and the court of appeals, construing them as motions for reconsideration, granted them on April 22, 2025, and vacated its intervention order. Pet. App. 63a. The court observed that the Federal Rules of Appellate Procedure lack any explicit rule governing intervention in appeals from district court decisions, and that, under its precedent, appellate intervention is appropriate "only in an exceptional case for imperative reasons." *Id.* at 64a (quoting *McKenna* v. *Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (per curiam)). The court

explained that it has "granted intervention [on appeal] where the intervenors 'assert a significant stake in the matter on appeal, where it is evident that their interest cannot adequately be represented * * * ,' and where the 'lack of timely intervention below may be justified' by the district court's failure to provide notice." Pet. App. 65a (quoting *United States* v. *Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975)).

The court of appeals determined that those "elements * * * are not present" here. Pet. App. 65a. Petitioner "disclaimed its interest" in representing Findhelp's bargaining unit; already "express[ed] its views" in its *amicus* brief; the NLRB "did not withdraw its argument" about the constitutionality of the Board's for-cause removal protections but had "rested on its briefing;" and petitioner did not "intervene at the district court level." *Ibid.* (emphasis omitted). The court then observed that "the practicalities of the moment weigh against" petitioner. *Ibid.* "The case has been fully briefed and argued, and [petitioner] did not appear at oral argument despite the grant of its motion earlier that afternoon." *Ibid.* Judge Wiener disagreed, viewing the Government as having, through its letters to the court, withdrawn "its arguments on Board-member and ALJ removability." *Id.* at 63a n.*.

After the court of appeals issued its judgment affirming the district court, petitioner moved to intervene for a third time for the purpose of filing a petition for a writ of certiorari on the question of what a plaintiff challenging a removal restriction must show to establish irreparable harm, see 24-50627 C.A. Doc. 274, at 1-2, 8 (Oct. 1, 2025)—an argument the NLRB has continuously pressed in this case, see Pet. App. 4a n.4; see *id.* at 5a n.5; see also 24-50627 C.A. Doc. 210-1, at 2 (in-

forming the court of appeals that outside of the constitutional issues, the agency "maintains its positions"). Petitioner justified this third request by arguing that it "met all of the requirements to intervene as of right" under the rules applicable to intervention in district court pursuant to Federal Rule of Civil Procedure 24. 24-50627 C.A. Doc. 274, at 5. Petitioner argued that the NLRB was not adequately representing its interests because it "declared that it will not seek" a writ of certiorari. *Id.* at 2. Petitioner also interpreted *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, 595 U.S. 267 (2022), to mean that intervention on appeal could not be limited to "exceptional cases for imperative reasons." 24-50627 C.A. Doc. 274, at 18 (citation omitted).

The court of appeals denied this third request for intervention in an unpublished, single-judge order. Pet. App. 47a-50a. The order noted that except for whether the NLRB "adequately represented [petitioner's] interests" because it was not seeking further review of the court's judgment, all of the reasons why the court had granted the motion for reconsideration "remain unchanged." *Id.* at 49a. Even assuming that petitioner's motion was timely, the court concluded, those "remaining reasons for denial remain dispositive." *Id.* at 50a. As a result, the court reasoned, "[t]his is not" one of the "'truly exceptional cases'" justifying intervention on appeal. *Ibid.* (citation omitted).

Petitioner then filed this petition seeking review of the latest denial of its request to intervene. In addition, petitioner filed a separate motion requesting "leave to intervene for the purpose of filing a petition for writ of certiorari" to review the judgment of the court of appeals. 25M35 Mot. for Leave to Intervene at 1, *Office & Prof'l Emps. Int'l Union* v. *Space Exploration Techs.*

*Corp.* (Oct. 31, 2025) (*OPEIU*). The question on which petitioner sought review was whether a plaintiff could receive an injunction against agency proceedings by showing "only that [the] removal protections afforded" to agency officers "are likely unconstitutional, without any further showing of harm." Pet. at i, *OPEIU*, *supra* (No. 25M35). On December 8, 2025, the Court denied petitioner's motion. *Office & Prof'l Emps. Int'l Union* v. *Space Exploration Techs. Corp.*, No. 25M35, 2025 WL 3506982, at *1 (Dec. 8, 2025).

4. On remand in the district court, petitioner moved for intervention as of right or, alternatively, for permissive intervention. D. Ct. Doc. 44, at 1 (Dec. 17, 2025). On January 7, 2026, the court denied the motion because it was untimely; because petitioner "lacks a legally protectable interest" in the "constitutionality of the NLRB's removal and tenure protections and the availability of injunctive relief against the agency and its officers;" because denying intervention would not impair any interest petitioner may have since it can "seek leave to participate as amicus;" and because petitioner's "disagreement with the NLRB concerns litigation emphasis and strategy, not a concrete divergence of interests." D. Ct. Doc. 53, at 2; see *id.* at 1-2. Petitioner did not appeal that order, and the time for appeal has passed.

Findhelp and the NLRB have now completed summary judgment briefing in the district court. In its summary judgment brief, the NLRB preserved "for further review its arguments that" Findhelp must show that the statutory removal protections for Board members and ALJs "have caused or will cause it to suffer harm" to obtain an injunction. D. Ct. Doc. 59, at 8 (Jan. 23, 2026).

## ARGUMENT

Further review is manifestly unwarranted. Petitioner contends (Pet. 13-19, 23-29) that it is entitled to intervene so as to seek this Court's review of the court of appeals' affirmance of a preliminary injunction. But the court of appeals correctly denied petitioner's third, belated request to intervene, appropriately accounted for petitioners' asserted interests, and rendered a decision that does not conflict with any decision of this Court or another court of appeals. Petitioner's contrary view incorrectly superimposes the criteria governing intervention in district court as a straitjacket on courts of appeals—an approach this Court rejected when directing courts of appeals to instead look to "the *policies* underlying" Federal Rule of Civil Procedure 24. *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022) (emphasis added; citation omitted). The court of appeals correctly held that this is not the rare case where intervention on appeal is warranted given that petitioner does not represent any bargaining unit and has, at most, an attenuated interest in the litigation; that the NLRB is still pressing the only argument that petitioner wants the Court to review, and simply differs on the tactics for litigating that issue further; and that petitioner has repeatedly, unsuccessfully, and here, belatedly attempted to intervene on shifting grounds on appeal while failing to appeal the denial of intervention in the district court at a later stage of litigation. This case is also a particularly poor vehicle for reviewing the question presented because it presents unusually complex remedial issues. Petitioner seeks not only summary reversal of the court of appeals' denial of its third attempt to intervene, but—because the time to petition for a writ of certiorari to review the court's judgment

has passed—also seeks vacatur of the court's judgment on the merits affirming the grant of a preliminary injunction so that the court can reissue the decision and petitioner can file a timely petition. Such a request would put to waste much of the litigation that has already occurred—not least because the case has now proceeded to summary judgment. Further, this case is an independently poor vehicle because the Advisory Committee on Appellate Rules is engaged in ongoing rulemaking to address appellate intervention. This Court should deny the petition.

1. a. Because there is currently no "rule that governs appellate intervention," courts of appeals "consider[] the 'policies underlying intervention' in the district court," where Federal Rule of Civil Procedure 24 governs intervention. *Cameron*, 595 U.S. at 277 (quoting *Int'l Automobile Workers* v. *Scofield*, 382 U.S. 205, 217 n.10 (1965)). Whereas Rule 24 distinguishes between intervention as a matter of right and permissive intervention, courts of appeals look to the "policies underlying intervention" more broadly. *Scofield*, 382 U.S. at 217 n.10 (looking to Fed. R. Civ. P. 24(a)(2) and (b)(2) (1963)). That is because the case is now at a later stage; unlike the district court, appellate courts are ill-suited to wade into highly fact-specific allegations about an intervenor's interests in the case and whether they would be prejudiced; and intervention on appeal heightens the risks of derailing the litigation.

In the absence of a "statute or rule governing intervention" in an appeal from a district court order, "resolution of [such] a motion is committed to [the appellate court's] discretion." *Association for Educ. Fairness* v. *Montgomery Cty. Bd. of Educ.*, 88 F.4th 495, 498 (4th Cir. 2023). Relevant factors for intervention on appeal

include whether the movant "asserts a substantial legal interest," the motion's timeliness, and the prejudice to the movant and non-movants. See *Cameron*, 595 U.S. at 277, 279, 281-282. Those factors are "non-exhaustive." *Association for Educ. Fairness*, 88 F.4th at 499.

In exercising their discretion, appellate courts limit intervention on appeal to "truly exceptional cases." *Richardson* v. *Flores*, 979 F.3d 1102, 1104 (5th Cir. 2020); see Stephen M. Shapiro et al., *Supreme Court Practice* § 6.16(c), at 6-62 (11th ed. 2019) (intervention is "rare" and involves "extraordinary factors"); see, *e.g.*, *East Bay Sanctuary Covenant* v. *Biden*, 102 F.4th 966, 1000-1001 (9th Cir.), cert. denied, 145 S. Ct. 415 (2024); *Mohamed* v. *George Washington Univ.*, No. 23-7127, 2024 WL 2239015, at *2 (D.C. Cir. May 16, 2024) (per curiam); *Public Serv. Co.* v. *Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017), cert. denied, 584 U.S. 968 (2018); see also *Craig* v. *Simon*, 980 F.3d 614, 618 n.3 (8th Cir. 2020) (per curiam) (denying intervention as "untimely" and citing *Richardson*, and its observation that "intervention on appeal should be allowed only 'in an exceptional case for imperative reasons'") (quoting *Richardson*, 979 F.3d at 1104-1105); *Amalgamated Transit Union Int'l* v. *Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam), appeal dismissed, 475 U.S. 1042 (1986), and cert. denied, 475 U.S. 1046 (1986) ("Although the Supreme Court has recognized that 'the policies underlying intervention may be applicable in appellate courts,' courts of appeals have developed their own standards of intervention in order to take account of the unique problems caused by intervention at the appellate stage.") (quoting *Scofield*, 382 U.S. at 217 n.10).

Such reluctance is appropriate. Permitting intervention on appeal puts at risk "the rights of the existing parties," may interfere "with the orderly processes of the court," *McDonald* v. *E. J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970), and permits intervenors "to evade [the] deferential standard" of review applicable to district court denials of motions to intervene, *Association for Education Fairness*, 88 F.4th at 499.[2] Further, because intervention "is to be determined from all the circumstances," it is an inherently fact-intensive exercise. *NAACP* v. *New York*, 413 U.S. 345, 366 (1973).

b. The court of appeals did not abuse its discretion in denying petitioner's third motion to intervene. Pet. App. 49a-50a. As the court observed, it had vacated the order granting petitioner's second request for intervention because the NLRB was adequately representing petitioner's interests; because petitioner had disclaimed its interest in representing Findhelp's bargaining unit; because the court had considered petitioner's legal argument; and because petitioner failed to seek intervention in the district court and failed to appear for oral argument. *Id.* at 49a. That is, the court had assessed the adequacy of the NLRB's representation; petitioner's stake in the litigation; and timeliness in vacating its earlier order granting intervention. See *id.* at 65a-66a (order vacating grant of intervention). In addressing petitioner's third motion, the court observed

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[2] Petitioner argues (Pet. 17) that there is no risk of evasion of the standard of review because courts of appeals review denials of intervention of right *de novo*. That again superimposes the framework of district-court intervention on the more flexible approach for appellate intervention, and in all events ignores that timeliness is always subject to abuse-of-discretion review. See, *e.g.*, *NAACP* v. *New York*, 413 U.S. 345, 366 (1973).

that "[a]ll but the first of those reasons remain unchanged." *Id.* at 49a. The court explained that while that meant "the NLRB's interests no longer fully align with" petitioner, and assumed timeliness, the "remaining reasons * * * remain dispositive." *Id.* at 49a-50a. Thus, the court concluded, this was *still* not "an exceptional case" where intervention for the first time on appeal was warranted due to "imperative reasons." *Id.* at 50a (citation and emphases omitted).

Petitioner's counterarguments lack merit and certainly do not warrant summary reversal.

*First*, petitioner is incorrect that, assuming timeliness and inadequacy of representation, the courts of appeals *must* permit intervention where the moving party has an interest in the property or transaction at issue, and resolving the case could impair its protection of that interest. See Pet. 23-24. Petitioner provides no authority for that proposition. It discusses *Scofield* (Pet. 24-25) to argue it has an interest in this case that could be impaired by its resolution. But *Scofield* does not establish that meeting the requirements to intervene as of right in the district court means a court of appeals has to grant a motion for appellate intervention. *Scofield* simply notes that Rule 24 can provide a "helpful" analogy in this context. 382 U.S. at 216. By contrast, in *Cameron*, this Court cited the rule for intervention-of-right in district court for why "the legal 'interest' that a party seeks to 'protect' through intervention on appeal" is relevant to a motion to intervene on appeal, 595 U.S. at 277 (quoting Fed. R. Civ. P. 24(a)(2)), while describing such a request as "a motion for *permissive* intervention" and reviewing the court of appeals' decision for abuse-of-discretion, *id.* at 278 (emphasis added); see *id.* at 278-279. Simply put, in the absence of a "statute or

rule governing intervention," a motion to intervene on appeal "is committed to" the discretion of the court of appeals. *Association for Educ. Fairness*, 88 F.4th at 498; see, *e.g.*, *Connor* v. *Peugh's Lessee*, 59 U.S. (18 How.) 394, 395 (1856) (holding, before promulgation of the rules of civil procedure, that a "motion [by a tenant in possession] * * * made to have [an ejectment] judgment set aside, and for leave to intervene, was an application to the sound discretion of the court").

*Second*, petitioner incorrectly argues (Pet. 24-27) that its interest is of the same magnitude as the successful party in *Scofield*, which "mandates a finding that [it] has a legal interest * * * sufficient to warrant intervention." Pet. 27. Rather, the court of appeals gave appropriate weight to petitioner's disclaimer of interest. See Pet. App. 49a. By unilaterally severing its bargaining relationship with Findhelp, petitioner diminished the strength of its interest in the outcome of this case. Absent an ongoing collective bargaining relationship, petitioner lacks the same "vital private rights" that support intervention when a union seeks to intervene in NLRB litigation adjudicating bargaining obligations. *Scofield*, 382 U.S. at 220 (internal quotation marks omitted).

Petitioner argues (Pet. 27-28) that the court of appeals conflated its disclaimer of interest as a collective-bargaining representative with disclaiming its interest in the litigation as a whole and further contends (Pet. 27) that *Scofield* "mandates a finding" that petitioner had the requisite legal interest to intervene. But that petitioner does not intend to represent Findhelp's bargaining unit at least reduces its interest in this litigation. Contra Pet. 24-26. *Scofield* is also distinguishable because it analyzed "whether intervention should be granted to [a] successful charging party." *Scofield*,

382 U.S. at 217. The Court held it should be, linking the charging party's interest to its success before the Board, see *id.* at 220 (referencing the party's "vital 'private rights' in the Board proceedings"); *id.* at 222 ("The charging party * * * should not be prejudiced by his success."), and "the statutory design of the" NLRA, *id.* at 210—specifically the provisions governing a charging party's role in Board proceedings, see *id.* at 219. *Scofield* is not about "the strong private interest that charging parties have in litigating their unfair labor practice cases," Pet. 24, but about charging parties' interest in defending their "success before the agency," *Scofield*, 382 U.S. at 222. It certainly does not suggest that petitioner's claimed "legal interest in seeing * * * proceedings go forward," Pet. 24, or "practical interest in vindicating the rights of" its supporters, Pet. 26, mandates intervention so that petitioner can seek this Court's review of the question of whether a plaintiff must show compensable harm from an unconstitutional removal restriction to enjoin agency action. And *Scofield* is even further afield because it involved direct court of appeals review of agency action. See 382 U.S. at 208; cf. Fed. R. App. P. 15(d) (addressing intervention in direct review of agency action, but not in appeals from district court decisions).

Further undermining petitioner's position is that petitioner "failed to appear at oral argument" after its second intervention motion was granted. Pet. App. 49a. To be sure, the motion was granted the day of argument. See Pet. 28. But petitioner also *filed* the motion that day. See 24-50627 C.A. Doc. 179, at 2. And petitioner knew two days before argument of the decision not to address the constitutionality of the Board member's removal restrictions at the argument. See *id.* at 5-6.

Petitioner claims it had no time "to appear" for argument, Pet. 28, but it had time to arrange to have counsel present, or to convey to the court of appeals that counsel wished to appear but was unable to appear in time.

*Third*, the NLRB's representation of petitioner's interests was not inadequate. Here (Pet. 23 n.14) as in the court of appeals, see 24-5067 C.A. Doc. 274, at 5, 12-13, petitioner rests only on the NLRB's decision not to seek a writ of certiorari. While that arguably means petitioner's and the NLRB's "interests no longer fully align," Pet. App. 49a, the divergence is one of "litigation strategy"—as petitioner admitted in the district court. D. Ct. Doc. 44, at 14. More significantly, contra Pet. 23 n.14, the NLRB never "acquiesced" to the court of appeals' holding that a party challenging a removal restriction need not show compensable harm to receive prospective relief. Rather, the Board on remand preserved its ability to seek "further review" of the issue after final judgment. D. Ct. Doc. 59, at 8. That petitioner would have taken a different approach does not justify intervention on appeal so that petitioner can seek this Court's review of an interlocutory decision. "[D]ifferences in [litigation] strategy * * * are not enough to justify intervention." *United States* v. *City of Los Angeles*, 288 F.3d 391, 402 (9th Cir. 2022).

Subsequent events have further validated the court of appeals' judgment. On remand, the district court denied petitioner's request to intervene, see D. Ct. Doc. 53, at 1, and petitioner failed to timely appeal. Petitioner's acquiescence to participation as an *amicus* instead of appealing and urging that it should be allowed to intervene before final judgment undermines its claims that, after the court of appeals affirmed the grant of

preliminary relief, it had protectable interests at stake that the NLRB was not adequately representing.

*Finally*, petitioner does not discuss "the effect on [it] and the current parties of granting or denying intervention." *Association for Educ. Fairness*, 88 F.4th at 499; see *Cameron*, 595 U.S. at 281. But, as the court of appeals noted in vacating its original intervention order, "the practicalities of the moment weigh against" petitioner. Pet. App. 65a. After the court's decision, "the positions of all interested parties have been fixed and fully addressed by the trial and appellate courts." *Donovan*, 771 F.2d at 1553. Permitting petitioner to intervene to file a petition for a writ of certiorari risked denying the NLRB and lower courts "any meaningful opportunity" to address new arguments petitioner would make. *Ibid.* It would also risk delaying the litigation and wasting party resources. By contrast, the interlocutory posture meant that petitioner could intervene in the district court on remand and protect its interests. That petitioner failed to appeal the denial of its request to intervene on remand belies its assertions here that allowing the case to proceed in its absence will significantly prejudice its rights.

c. Petitioner asserts (Pet. 13-17) that the court of appeals disregarded *Cameron* in limiting intervention to exceptional cases. As just described, however, the court of appeals considered the same factors this Court considered in *Cameron*. Compare Pet. App. 49a-50a, 65a-66a (evaluating petitioner's legal interest, the adequacy of the NLRB's representations, and timeliness), with *Cameron*, 595 U.S. 277-282 (considering those factors). Petitioner was therefore not deprived "of any opportunity to have the Rule 24(a) factors applied to" its motion. Pet. 15. Petitioner simply disagrees with

the court of appeals' assessment of those factors—a fact-bound dispute that does not warrant this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Nor does *Cameron* require courts of appeals to implement "a 'broad policy favoring intervention.'" Pet. 14 (citation omitted). *Cameron* arose from a challenge to a Kentucky law regulating abortion procedure. 595 U.S. at 271. The district court held the law was unconstitutional after a bench trial and its decision was affirmed on appeal. *Id.* at 272. Thereafter, the state official who was defending the law decided not to seek further review and the state's attorney general sought to intervene to do so. *Id.* at 273. The court of appeals denied intervention. *Ibid.*

This Court reversed. Looking to "the policies underlying intervention in the district courts," *Cameron*, 595 U.S. at 277 (citation and internal quotation marks omitted), the Court held that the court of appeals had "failed to account for the strength of the Kentucky attorney general's interest in" defending the state law and thus abused its discretion, *id.* at 279. The Court further explained that the attorney general's motion to intervene was timely because he moved to intervene "two days after learning" that the prior official would "not continue to defend" the law. *Id.* at 280. And the Court found no prejudice from permitting intervention. See *id.* at 281-282.

At no point, however, did the Court hold that the factors set out in Rule 24 are exclusive. To the contrary, that the Court looked to "the *policies* underlying intervention," *Cameron*, 595 U.S. at 277 (emphasis added; citation and internal quotations marks omitted), suggests the factors set out in the rule are "non-exhaustive,"

*Association for Education Fairness*, 88 F.4th at 499. Indeed, *Cameron* itself fits the mold of "an exceptional case" where "imperative reasons" justified intervention. Pet. App. 50a (citations and emphases omitted). It involved a final judgment holding a state law unconstitutional. See *Cameron*, 595 U.S. at 272. Intervention thus rested in large part on "constitutional considerations" directing that "a State's opportunity to defend its laws in federal court should not be lightly cut off." *Id.* at 277. "No such sovereignty concerns are present in this case." *Humane Soc'y* v. *United States Dep't of Agric.*, 54 F.4th 733, 735 (D.C. Cir. 2022) (per curiam) (Tatel, J., concurring in the denial of the motion to intervene). And because this case was on interlocutory appeal, petitioner's ability to protect its interests was not cut off by the court of appeals' denial of intervention. What cut off petitioner's ability to defend its interests was its failure to appeal the subsequent district court order denying intervention.

Because the court of appeals' decision here does not conflict with *Cameron*, by definition the bar for summary reversal is not met. See *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting) (looking to whether "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error"); see also *Goldey* v. *Fields*, 606 U.S. 942, 943 (2025) (per curiam).

2. Further militating against granting the petition is that, as petitioner admits (Pet. 29), "[a] simple grant * * * would not allow [it] to timely file a petition for certiorari" seeking review of the court of appeals' merits decision. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994) (the time limit to file a petition in a civil case is "mandatory and jurisdictional") (citation

omitted). To avoid that issue, petitioner (Pet. 29-30) proposes that the Court summarily reverse the order denying intervention and vacate the court of appeals' judgment affirming the district court's preliminary injunction. "In this scenario," petitioner continues, the court of appeals "could"—but not "would"—"re-issue its judgment, thus allowing [petitioner] to timely petition for a writ of certiorari." Pet. 30.

Setting aside that petitioner does not establish that summary reversal is appropriate, petitioner does not explain why the Court should grant its request for extraordinary relief in the hope that the court of appeals simply reissues its decision. Furthermore, petitioner's request would be enormously disruptive. Since the court of appeals issued its opinion, litigation has been ongoing and summary judgment briefing has concluded, with the parties litigating in reliance on the court's interlocutory decision. Vacating the court's decision would mean much, if not all, of that effort would be wasted and slowdown the ultimate resolution of this litigation—a resolution that will supersede the preliminary injunction order petitioner wants the Court to review and could well result in NLRB enforcement proceedings restarting. See *infra* p. 27 (discussing how the NLRB's severance argument would result in enforcement proceedings continuing); Pet. App. 18a (holding district courts should consider severability when it "considers final relief").

Nor does petitioner point to an example of the Court doing what it requests. Petitioner cites (Pet. 30) *Hedican* v. *Walmart Stores East L.P.*, 142 S. Ct. 1357 (2022). But in that case, the judgment the Court vacated was a decision affirming a final judgment. See *EEOC* v. *Walmart Stores E., L.P.*, 992 F.3d 656, 658 (7th Cir.

2021), abrogated by *Groff* v. *DeJoy*, 600 U.S. 447 (2023). The interlocutory posture of this case makes vacatur more disruptive. It also means petitioner could protect its interest in a less disruptive way: by moving to intervene in district court—something this Court has suggested is the appropriate way to address a denial of appellate intervention. See *Texas* v. *Cook County*, 141 S. Ct. 2562, 2562 (2021) (denying an application to intervene after the court of appeals denied intervention on appeal from a partial final judgment "without prejudice to" the applicant seeking intervention in the district court and then appealing). That petitioner did so—and that the district court denied petitioner's motion for intervention and petitioner failed to appeal—underscores that this avenue was available, yet petitioner opted against fully pursuing it.

Petitioner (Pet. 30 n.17) floats further alternatives for relief, but they are equally problematic. The first two involve petitioner's motion before this Court to intervene and file a petition for a writ of certiorari. Those options are no longer viable, since this Court denied that motion. *Office & Prof'l Emps. Int'l Union* v. *Space Exploration Techs. Corp.*, No. 25M35, 2025 WL 3506982, at *1 (Dec. 8, 2025). Alternatively, petitioner suggests (Pet. 30 n.17) "equitably tolling the deadline" to file a petition for certiorari. But the "statute-based filing period for [certiorari in] civil cases is jurisdictional," and "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Bowles* v. *Russell*, 551 U.S. 205, 212, 214 (2007).

3. Petitioner asserts that the Fifth Circuit's non-binding order denying intervention "generates a circuit split," pointing to two non-binding orders from the Third and Sixth Circuit permitting unions to intervene

in similar cases. Pet. 4-5 (citing 24-1754 C.A. Doc. 33 (6th Cir. Nov. 21, 2024) (*YAPP* Order), and 24-3043 C.A. Doc. 20 (3d Cir. Jan. 2, 2025) (*Spring Creek* Order)); see Pet. 17-19.

These nonprecedential orders do not establish a circuit split. First, petitioner is incorrect that they involve "materially indistinguishable facts." Pet. 17. In *YAPP USA Automotive Systems, Inc.* v. *NLRB*, No. 24-1754, 2025 WL 2606098 (6th Cir. Aug. 4, 2025), and *Spring Creek Rehabilitation & Nursing Center LLC* v. *NLRB*, 160 F.4th 380 (3d Cir. 2025)—unlike here—the motions to intervene were unopposed and filed before the court of appeals issued its decision. See *Spring Creek* Order at 1; *YAAP* Order at 1. Neither decision suggests that those courts would have viewed petitioner's contested, post-judgment motion—its third attempt to intervene in the court of appeals, preceding its final attempt in the district court—any differently than the Fifth Circuit. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 (1993) (per curiam) (questions of intervention are "always * * * bound up in the facts of the particular case").

Second, the Third Circuit, like the Fifth Circuit, has observed that intervention on appeal is appropriate only in "exceptional circumstances for imperative reasons." *In re Grand Jury Investigation*, 587 F.2d 598, 601 (1978) (relying on Fifth Circuit caselaw). Petitioner argues (Pet. 18) that the Third Circuit in actuality applies the standards for intervention of right or permissive intervention. The *Spring Creek* Order, to be sure, purports to grant intervention as of right and permissive intervention. See *Spring Creek* Order at 2. But the Third Circuit never suggested in the order that it had to treat the motion as a district court would. Rather,

the court acknowledged that "no rule[ ] * * * govern[s] appellate intervention" and that Rule 24 only provides "guidance." *Id.* at 1.

The two cases petitioner claims (Pet. 18 n.13) take "a similar approach" to the Third Circuit also do not treat a motion to intervene on appeal like a motion to intervene in district court. The Ninth Circuit, while evaluating the factors for intervention-of-right, not only reaffirmed circuit precedent that "[i]ntervention at the appellate state is * * * unusual and should ordinarily be allowed only for imperative reasons," *East Bay Sanctuary Covenant*, 102 F.4th at 1000 (citation and internal quotation marks omitted), it also confirmed that "[o]ther circuits similarly distinguish between intervention at the district court and intervention on appeal," *id.* at 1001 n.1 (collecting cases) and rejected the argument that the policy favoring intervention as of right in the district court applied to a motion to intervene on appeal, *id.* at 1001 n.2. The court denied the motion to intervene, finding an absence of a "protectable interest to support intervention as of right" and declining "to exercise [its] discretion to allow the States to intervene permissively." *Id.* at 1002. This Court declined to review that decision. *Kansas* v. *Mayorkas*, 145 S. Ct. 415 (2024) (No. 23-1353). The Tenth Circuit has similarly explained that it considers the "requirements of" intervention as of right in evaluating "motions to intervene on appeal," but did not apply "a liberal view" of those factors, as it would in reviewing a district court order denying intervention. *Public Serv. Co.*, 857 F.3d at 1113. Instead of rigidly applying the intervention-as-of-right factors, the court views them as "capturing the practical circumstances that justify intervention." *Ibid.*

In sum, none of those cases suggest that the Fifth Circuit could not consider whether exceptional circumstances or imperative reasons justified intervention. Nor do any of them conflict with how the court of appeals analyzed the policies underlying Rule 24. Indeed, in *Public Service Co.*, the Tenth Circuit declined to permit intervention in part because the court considered the movant's arguments as *amicus curiae*, 857 F.3d at 1114, which is a reason the court of appeals denied intervention here, see Pet. App. 50a.

Likewise, there is no conflict between this order and the *YAPP* Order and the cases from the Fourth and Seventh Circuits that petitioner claims "straightforwardly apply[] Rule 24(a)." Pet. 18 n.12 (discussing *Association for Educ. Fairness*, 88 F.4th at 498, *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 558 (7th Cir. 2014), cert. granted, judgment vacated, 575 U.S. 901 (2015), and the *YAPP* Order). The *YAPP* Order, to be sure, does not reference "exceptional circumstances" or "imperative reasons." But it does not go so far as to suggest that intervention on appeal must track the analysis for intervention in district courts.

For example, the Sixth Circuit in the *YAPP Order* explained that it "*may* grant intervention on appeal, either as a matter of right under Federal Rule of Civil Procedure 24(a) or permissively under Rule 24(b)." *YAPP* Order at 1 (citing *Northeast Ohio Coal. for Homeless & Servs. Emps. Int'l Union* v. *Blackwell*, 467 F.3d 999, 1006 (6th Cir. 2006) and *Carter* v. *Wells-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir. 2010) (order)) (emphasis added). And the Seventh Circuit in *Sebelius*, citing *Scofield*, observed that "intervention is permitted" on appeal "as a matter of federal common law, with Rule 24 supplying the standard for

determining whether to permit intervention in a particular case." 743 F.3d at 558.

Those cases thus establish that the factors governing intervention of right and permissive intervention are *relevant* in determining whether to permit intervention on appeal—but none state that intervention on appeal is in all respects the same as intervention in the district courts. Nor do they suggest that those courts would have viewed petitioner's request differently than the Fifth Circuit. For instance, in *Northeast Ohio Coalition*, 467 F.3d at 1006, and *Sebelius*, 743 F.3d at 558, the party seeking intervention on appeal had also moved to intervene in the district court and sought to intervene before the court of appeals ruled; here, petitioner failed on both fronts, see Pet. App. 50a.

The Fourth Circuit in *Association for Education Fairness* is even more explicit that the standards for intervention in the district courts are guides for evaluating a request to intervene on appeal. The court of appeals did not differentiate between intervention as of right and permissive intervention, instead explaining that in the absence of "any statute or rule governing intervention" on appeal, "resolution of" such a motion "is committed to [the court's] discretion." *Association for Educ. Fairness*, 88 F.4th at 498. In exercising that discretion, the court considers "a non-exhaustive list of factors" that includes the factors governing intervention-as-of-right as well as the fact that "those seeking to force their way into lawsuits * * * generally must do so while the case is pending before a trial court rather than waiting to do so on appeal," and that courts of appeals "must police against attempts to evade [the] deferential standard [applicable to review of denials of motions to intervene] by [movants] declining to seek review of an

adverse district court decision and then filing a fresh motion to intervene on appeal." *Id.* at 499. In doing so, the court cited the Fifth Circuit's decision in *Richardson* favorably, see *ibid.*, and the court of appeals' order here relies on that case, see Pet. App. 50a. And the Fourth Circuit ultimately denied intervention in *Association for Education Fairness*, concluding that on the facts before it the putative intervenor's interests would be adequately represented. See 88 F.4th at 500-502. There is no reason to conclude that if faced with "the specific factual situation" of this case, *id.* at 500, the Fourth Circuit would have granted petitioner's request to intervene.

4. This case is also a poor vehicle for the Court to address the question of appellate intervention. As noted, the jurisdictional time limit to petition from the court of appeals' August 19, 2025, judgment involving the underlying irreparable-harm ruling has long since elapsed. See Sup. Ct. R. 13.1. Petitioner's intervention motion, and the underlying court of appeals decision it wants this Court to review, arise from an appeal of a preliminary injunction. But, were this Court to grant review of the question presented concerning intervention, the proceedings on remand will likely render that issue moot—as well as petitioner's underlying objection to the court of appeals' ruling regarding irreparable harm in removal challenges. Petitioner seeks to avoid that problem by requesting summary reversal on the denial of intervention and obtaining the extraordinary remedy of vacating the underlying preliminary injunction judgment to boot. Pet. 29-30. That drastic remedy would be especially bizarre given that petitioner did not appeal the denial of intervention on remand in further district court proceedings. *Supra* pp. 20-21.

On top of that, the underlying issue of whether plaintiffs must show compensable harm from an unconstitutional removal provision in order to receive prospective relief is also likely to become moot. Specifically, the government is arguing that the removal restrictions at issue "are severable from the remainder of the statute," *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 508 (2010), thus leaving the Board's administrative enforcement powers otherwise intact, see *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 237 (2020) (plurality opinion) ("Congress would prefer * * * a scalpel rather than a bulldozer in curing the constitutional defect."). See D. Ct. Doc. 59, at 9-12 (arguing for severance on summary judgment); cf. Pet. App. 18a (severability "belongs to the merits phase, when the court considers final relief"). As a result, there would be no basis for a permanent injunction on the plaintiff companies' removal challenge. The plaintiff companies have not alleged any compensable harm caused by the removal restriction, and what the panel described as a "here-and-now injury" of "being subject to unconstitutional agency authority," Pet. App. 31a (citation omitted), would be addressed by severance as opposed to permanently enjoining federal officers from carrying out their otherwise lawful duties, see *Walmart, Inc.* v. *Chief Administrative Law Judge of the Office of the Chief Administrative Hearing Officer*, 144 F.4th 1315, 1349 (11th Cir. 2025) (explaining that "it is not evident that Congress would have preferred no ALJs at all, as opposed to ALJs removable at will by the" Department Head).

Finally, the Advisory Committee on the Federal Rules of Appellate Procedure has been deliberating a proposal to add a rule governing intervention in appeals

from district court decisions. See Advisory Comm. on the App. Rules, *Minutes of the Spring 2022 Meeting of the Advisory Committee on the Appellate Rules* 19 (Mar. 30, 2022). As discussed, whether to allow intervention on appeal raises difficult questions; it can interfere with the rights of parties and the orderly process of a case and can involve factual disputes courts of appeals are institutionally ill-suited to handle. It is therefore a "problem * * * which peculiarly calls for" the exercise of the rulemaking power Congress delegated to the Court. *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960); see 28 U.S.C. 2072(a). Whether intervention in any particular case is appropriate "is always to some extent bound up in the facts of the particular case," so "it is unlikely that" reviewing the court of appeals decision will generate "any new principle of law." *Izumi*, 510 U.S. at 33. Rulemaking, by contrast, ensures that "basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." *Miner*, 363 U.S. at 650. The question presented is thus one of diminishing significance in light of the rulemaking process underway.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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