ORIGINAL

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IN THE

Supreme Court of the United States

JOSEPH GALLEGOS

Petitioner, Pro-se

v.

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD, ET, AL

Respondents

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

PETITION FOR WRIT OF CERTOIRARI

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QUESTION PRESENTED

Whether a federal court of appeals abdicates its duty of independent judicial review under *Bennett v. Spear* and *Motor Vehicle Manufacturers Ass'n v. State Farm*—and deepens a direct circuit split regarding unilateral jurisdictional recapture—by reflexively deferring to an executive agency's *post hoc* recharacterization of its signed, docketed, and served final order as a non-final "inadvertent draft" to defeat appellate jurisdiction under 28 U.S.C. § 2342 and 29 C.F.R. § 1989.112(a), creating and deepening a circuit split with the Second, Seventh and D.C. Circuits, while ignoring objective record metadata demonstrating chronological impossibility and administrative bad faith under *Citizens to Preserve Overton Park v. Volpe.*

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PARTIES TO THE PROCEEDING

Petitioner is Joseph Gallegos. Respondents are the Administrative Review Board, United States Department of Labor; and the Secretary of Labor. A Plus Personal Care Provider, LLC was the employer-respondent below.

CORPORATE DISCLOSURE STATEMENT

Not applicable to the Petitioner

RELATED CASES

Gallegos v. A Plus Personal Care Provider LLC, Case No. 2025-TAX-00009 (ALJ) entered December 17, 2025.

Gallegos v. A Plus Personal Care Provider LLC, Case No. ARB-2026-0015 (ARB) entered April 17, 2026.

Gallegos v. Administrative Review Board et al., Case No. 26-9556 (10th Cir.) entered August 12, 2026.

OPINIONS BELOW

The order of the United States Court of Appeals for the Tenth Circuit dismissing the petition for review for lack of jurisdiction (Case No. 26-9556) was entered on August 12, 2026. The order is unpublished and is reproduced in the Appendix at App. A. Petition for Rehearing was denied on August 19, 2026 and is reproduced in the Appendix at A.1 The underlying final order of the Administrative Review Board (ARB Case No. 2026-0015), the Order of Dismissal, was issued on April 17, 2026, and is reproduced at App. C. The ARB's subsequent** orders of April 22, 2026, April 28, 2026, and July 8, 2026, are reproduced at App. D, App. E, and App. F, respectively. The Administrative Law

Judge's December 17, 2025, Order Dismissing Matter (ALJ Case No. 2025- TAX-00009) is reproduced at App. B.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its order dismissing the petition for review on August 12, 2026, and denied a timely petition for panel rehearing on August 19, 2026. The mandate was issued on October 5, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition is timely filed under Supreme Court Rule 13.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the Appendix at App. N. and continued in App. S.

STATEMENT OF THE CASE

On August 12, 2026, the United States Court of Appeals for the Tenth Circuit dismissed Petitioner's petition for review for lack of jurisdiction, deferring to the agency's *post hoc* recharacterization of its signed, docketed, and served Order of Dismissal as a mere "draft." (App. A). In a one-page, unpublished order, the court concluded without further analysis that "it appears that the ARB has not yet issued a final order"—relying on the identical reasoning it issued prior to jurisdictional briefing. The underlying proceedings stem from a whistleblower retaliation complaint filed after Petitioner was terminated for reporting fraudulent conduct. The following procedural history illustrates how the agency's retroactive reclassification of its final order—and the Tenth Circuit's deference to that reclassification—has engendered a clear circuit split.

On April 17, 2026, the Administrative Review Board (ARB) issued an Order of Dismissal bearing the notation "SO ORDERED," which was formally docketed and served on all parties. The order granted Petitioner's withdrawal motion and dismissed the appeal. Under this Court's established precedent, these objective characteristics—a signed, docketed, and served disposition—consummate the agency's decision-making process and establish finality upon issuance. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Sackett v. EPA*, 566 U.S. 120, 126 (2012); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

Five days later, on April 22, 2026—following Petitioner's Motion for Reconsideration, which alleged improper manipulation of the ARB's docket by a divested Administrative Law Judge—the ARB issued a subsequent order retroactively classifying the April 17 Order of Dismissal as an "inadvertent draft" that was "not final and is void." This recharacterization constitutes an impermissible *post hoc* rationalization, deployed retroactively to unravel a finalized agency action. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

The Tenth Circuit accepted the agency's retroactive rationalization without scrutiny. Citing *Franklin v. Massachusetts*, 505 U.S. 817, 825-26 (1992), the court concluded that the ARB had "not completed its decision-making process"—not because the April 17 order lacked the objective indicia of finality, but exclusively based upon the ARB's subsequent recantation. Although the court ordered supplemental briefing from both sides, during which Petitioner comprehensively briefed eighteen distinct jurisdictional arguments, the final dismissal order did

not address them. Instead, the court restated, nearly verbatim, the rationale of its preliminary pre-briefing assessment.

The Tenth Circuit's deference to the agency's *post hoc* reasoning—effectively holding that an agency's decision-making process remains incomplete if the agency retroactively declares it so—creates a direct conflict with the Seventh Circuit. In *Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010), the Seventh Circuit held that an agency cannot unilaterally recapture jurisdiction after issuing a final order by subsequently declaring that order non-final. The procedural history detailed below demonstrates precisely how this conflict arose.

BACKGROUND & PROCEDURAL HISTORY

A. Factual Background and Initial Agency Action Petitioner

Joseph Gallegos was employed by A Plus Personal Care Provider Services LLC as a caregiver for his mother under a Colorado Medicaid In-Home Support Services waiver. In August 2024, Petitioner discovered that his employer had generated an IRS Form 1095-C falsely representing that it had offered him health insurance. On August 12, 2024, Petitioner reported this discrepancy to his supervisor—a protected activity under the Taxpayer First Act (TFA), 26 U.S.C. § 7623(d)(1)(A), and § 1558 of the Affordable Care Act (ACA), 29 U.S.C. § 218c. The following day, the employer terminated Petitioner and discharged his mother as a client, subsequently resulting in citations from the Colorado Department of Public Health and Environment for regulatory violations.

Petitioner filed a whistleblower retaliation complaint with OSHA on November 6, 2024. Following a structurally deficient investigation—in which the

agency bypassed mandatory bifurcation procedures outlined in its Whistleblower Investigations Manual and improperly excised the ACA claims—OSHA issued a merits-based dismissal under its Expedited Case Processing Program on January 15, 2025.

B. Office of Administrative Law Judges (OALJ) Proceedings

Petitioner objected to OSHA's findings, transferring the matter to the OALJ solely under the TFA. Throughout the ensuing litigation, the Administrative Law Judge (ALJ) imposed escalating filing restrictions on Petitioner while purportedly adopting the employer's characterizations without an evidentiary hearing. Despite Petitioner's repeated motions identifying severe procedural irregularities—including documented misrepresentations by opposing counsel and the suppression of exculpatory exhibits—the ALJ mischaracterized Petitioner's filings as frivolous. On December 17, 2025, the ALJ dismissed Petitioner's complaint with prejudice as a sanction.

C. Administrative Review Board (ARB) Appeal and the Final Order

Petitioner timely appealed to the Administrative Review Board (ARB). On January 15, 2026, the ARB accepted the case for review, legally divesting the ALJ of all jurisdiction, and issued a Notice and Order. Over the next three months, the ARB failed to rule on eight substantive motions filed by Petitioner detailing the lower tribunal's procedural departures.

Concluding that further administrative proceedings would be futile, Petitioner filed a Motion for Voluntary Withdrawal on April 15, 2026. On April 17, 2026, an official "Order of Dismissal" was formally transmitted to the parties via the Electronic Filing System (EFS). The two-page order was signed by an ARB

appellate judge, stamped "SO ORDERED," and unequivocally stated: "we GRANT Complainant's Withdrawal Motion and DISMISS the appeal." Under standard Department of Labor practice, a single appellate judge's signature is sufficient to execute a binding dismissal.

Contemporaneously on April 17—before learning the dismissal order had been served—Petitioner filed a Motion to Withdraw his Withdrawal, operating under the mistaken belief that exhausting all administrative avenues was a strict prerequisite to judicial review.

D. The Agency's *Post Hoc* Retraction

Following the April 17 dismissal, EFS metadata revealed a critical jurisdictional anomaly: the finalized order had been transmitted through the OALJ portal, not the ARB portal, and the divested OALJ had possession of the finalized order on April 16 at 12:00 AM—a full day before official service. Upon discovering this improper docket control, Petitioner filed a Motion for Reconsideration on April 20, 2026, formally challenging the divested ALJ's continued manipulation of the ARB's docket.

For four days following the April 17 Final Order, the agency raised no issue regarding its validity. However, on April 22, 2026—responding to Petitioner's metadata allegations—the ARB issued a subsequent order retroactively classifying the April 17 dismissal as an "inadvertent draft" that was "not final and is void." The ARB justified this retraction by claiming it had "elected not to issue" the draft because Petitioner filed his secondary motion on April 17.

This *post hoc* explanation is a chronological impossibility. The EFS metadata definitively establishes that the finalized order was already resting in

the OALJ's possession on April 16, a full twenty-four hours before Petitioner filed his secondary motion on April 17. Furthermore, Petitioner's secondary motion was not accepted into the EFS system until April 20. By refusing to formally vacate the April 17 order while simultaneously issuing contradictory orders to feign an ongoing proceeding, the agency created a jurisdictional trap designed to run out Petitioner's 60-day statutory window for judicial review under 29 C.F.R. § 1989.112(a).

E. Court of Appeals Proceedings

To preserve his rights, Petitioner filed a timely Protective Petition for Review with the Tenth Circuit on June 22, 2026, arguing that the April 17 order was an objectively final agency action and that the ARB's subsequent retractions were *ultra vires* and void.

The Tenth Circuit ordered supplemental briefing on the jurisdictional question. Petitioner submitted extensive briefing detailing eighteen distinct jurisdictional arguments, including the objective finality of the order under *Bennett v. Spear*, the divestment of ALJ jurisdiction under 29 C.F.R. § 1989.110(b), the chronological impossibility of the ARB's narrative, and the prohibition against *post hoc* rationalizations under *State Farm*.

On August 12, 2026, the Tenth Circuit dismissed the petition in a one-page, unpublished order. Ignoring the incontrovertible metadata, the agency's chronological impossibilities, and all eighteen of Petitioner's briefed arguments, the court restated its pre-briefing rationale verbatim. Citing *Franklin v. Massachusetts*, the court accepted the agency's *post hoc* framing at face value,

concluding simply that "the ARB has not yet issued a final order" because the agency claimed its decision-making process was incomplete.

The Tenth Circuit summarily denied Petitioner's timely Motion for Reconsideration on August 13, 2026. The decision took eleven minutes. This timely petition followed.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Deference to an Agency's Post Hoc Recharacterization of a Final Order Creates a Circuit Split and Contravenes Fundamental Administrative Law Principles.

The Tenth Circuit's dismissal rests on a singular, unexamined premise: that an Article III court must accept at face value an agency's *post hoc* characterization of its own signed, docketed, and served final order as a mere "draft." By deferring to this retroactive rationalization, the court below concluded that the Administrative Review Board (ARB) had "not completed its decision-making process," thereby depriving Petitioner of judicial review. This uncritical acceptance of an agency's *post hoc* revision creates a direct conflict with the Seventh, Second, and D.C. Circuits, which prohibit agencies from unilaterally recapturing jurisdiction by retroactively declaring a final order non-final.

The prohibition against *post hoc* agency rationalizations is a bedrock principle of administrative law. An agency's action must be upheld, if at all, on the basis articulated by the agency at the time of its decision. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Courts may not accept "counsel's *post hoc* rationalizations for agency action." *Id.* The Tenth Circuit's own precedent faithfully applies this rule, holding that a court cannot

"affirm the agency on a ground that it did not consider." *Allen v. Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004). Yet, in the decision below, the Tenth Circuit did exactly what *Allen* and *State Farm* forbid.

The ARB's April 17 Order of Dismissal bore every objective hallmark of finality at the time of its issuance. It was signed by an ARB appellate judge, marked "SO ORDERED," served on all parties, and explicitly dismissed the appeal. It contained no conditional language or indications of draft status. The agency's claim that the document was an "inadvertent draft" was a *post hoc* rationalization invented five days later, only after Petitioner filed a Motion for Reconsideration exposing that an administrative law judge, legally divested of jurisdiction, had improperly manipulated the Board's docket. Granting that motion would have required the ARB to acknowledge this severe jurisdictional defect. Instead, the agency engaged in calculated procedural maneuvering: it mooted the reconsideration motion and granted a delayed withdrawal motion—one not even accepted into the Electronic Filing System (EFS) until three days after the dismissal order was served.

Crucially, while the ARB claimed the April 17 order would be removed from the docket, it never actually vacated the decision. This enabled a strategic jurisdictional trap. By leaving the original order on the docket while issuing contradictory subsequent orders to feign an ongoing proceeding, the ARB positioned the 60-day statutory window for judicial review under 29 C.F.R. § 1989.112(a) to quietly expire. Petitioner was consequently forced to file a protective petition for review. The Tenth Circuit accepted the agency's subsequent

"draft" justification without scrutinizing the incontrovertible EFS metadata, which demonstrated the agency's timeline was a chronological impossibility.

This error was compounded by the Tenth Circuit's refusal to meaningfully engage with the record. The court ordered supplemental briefing on the jurisdictional question, prompting Petitioner to extensively brief eighteen distinct legal and factual arguments. The court's subsequent dismissal order ignored every one of them, restating nearly verbatim the rationale of its initial pre-briefing assessment. Citing *Franklin v. Massachusetts*, 505 U.S. 817 (1992), the court reflexively concluded that the ARB had not completed its decision-making process. When an appellate court orders jurisdictional briefing but issues a decision devoid of engagement with the briefed arguments—resting entirely on a retroactive agency narrative—it has abandoned judicial review in favor of absolute deference.

This Court has consistently prioritized practical reality over agency labels when assessing finality. *Sackett v. EPA*, 566 U.S. 120, 126 (2012). The Tenth Circuit's departure from this pragmatic approach sanctions a procedural bait-and-switch, permitting an agency to issue a final order, await a party's reaction, and unilaterally erase the order's finality if challenged.

Furthermore, the Tenth Circuit's decision deepens a circuit split regarding an agency's authority to alter final actions pending review. In *Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010), the Seventh Circuit held that an agency cannot "unilaterally recapture jurisdiction" by vacating its own final decision once appellate jurisdiction attaches. Similarly, the Second Circuit recognized that an agency lacks authority to conduct further proceedings without court approval once a petition for review is filed. *Benmar*

Transp. & Leasing Corp. v. ICC, 582 F.2d 246, 249 (2d Cir. 1978). While this Court reversed *Benmar* on narrow, fact-specific grounds—noting that the agency action did not interfere with the appellate court's jurisdiction and that all parties consented, *United States v. Benmar Transp. & Leasing Corp.*, 444 U.S. 4, 5-6 (1979) (per curiam)—those exceptions are absent here. The ARB's recharacterization directly interfered with the Tenth Circuit's jurisdiction, and Petitioner vehemently opposed the agency's maneuvering at every stage.

The D.C. Circuit has likewise held that while a pending petition for review does not automatically bar an agency from reopening proceedings, such authority remains strictly constrained by the court's supervisory power and requires a formal motion for remand. *Anchor Line v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962). The ARB sought no such remand, opting instead to bypass judicial oversight entirely by retroactively declaring a fully executed order a "draft."

The objective characteristics of the April 17 order—signed, "SO ORDERED," docketed, and served—cemented its finality upon issuance. By permitting the ARB to retroactively rewrite this reality, the Tenth Circuit directly conflicts with the Seventh, Second, and D.C. Circuits' prohibitions against unilateral jurisdictional recapture. This Court should grant certiorari to resolve this split and reaffirm that the finality of agency action is judged by its objective character at the time of issuance, not by the agency's subsequent, self-serving rationalizations.

II. The April 17 Order Was Final Under This Court's Precedent, and the Agency's Subsequent Orders Were Void.

The Tenth Circuit's dismissal fundamentally misapplied this Court's finality jurisprudence. Under *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), agency action is final if it satisfies two conditions: first, it must mark the consummation of the agency's decision-making process; second, it must determine rights or obligations or serve as the origin of legal consequences. Applying *Bennett*, this Court unanimously affirmed in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 597 (2016) that agency action is final when it marks the "end of the road" for the affected party and carries direct legal force.

The Administrative Review Board's (ARB) April 17 Order of Dismissal met both criteria. By dismissing Petitioner's appeal, the order marked the consummation of the ARB's decision-making process. It also generated immediate legal consequences: pursuant to 29 C.F.R. § 1989.111(c), the dismissal rendered the underlying Administrative Law Judge's (ALJ) decision the "final order of the Secretary of Labor," thereby triggering the 60-day statutory clock for seeking judicial review. Consequently, the ALJ's December 17 order became a final administrative decision subject to judicial scrutiny in the Tenth Circuit.

Upon issuing this final order, the ARB was divested of jurisdiction over the matter. As a foundational principle, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the [lower tribunal] of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). That principle applies with equal force to administrative agencies. *See Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010) (holding that an agency lacks unilateral authority to reopen administrative proceedings once judicial

review of its final decision has attached). Because the ARB was divested of authority, its subsequent orders of April 22, April 28, and July 8—which purported to recharacterize the April 17 final order as a mere "draft"—were jurisdictional nullities.

Even assuming *arguendo* that the April 17 order contained procedural defects, such defects do not render a judgment an absolute nullity. Decisions rendered by tribunals of limited jurisdiction may be erroneous and subject to reversal on direct appeal, but they are not void *ab initio*. *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378–79 (1940). Under *Chicot County*, the April 17 order remained binding unless overturned through proper appellate procedures.

The ARB's own record reflects the finality of its decision. In its April 22 order, the ARB denied Petitioner's Motion for Reconsideration as "moot." Under settled law, a motion for reconsideration presupposes a final underlying order. Moreover, the filing of a motion for reconsideration does not alter or suspend the finality of an agency decision. *Stone v. INS*, 514 U.S. 386, 405 (1995); *see also Harmar Coal Co. v. Dir., OWCP*, 926 F.2d 302, 309 (3d Cir. 1991) (applying *Stone* to Department of Labor administrative proceedings). The April 17 order constituted final agency action under *Bennett*. The ARB was divested of jurisdiction immediately upon its issuance, rendering all subsequent agency orders void. The Tenth Circuit's decision to the contrary represents a clear departure from this Court's controlling finality precedents.

III. The Tenth Circuit Erred by Disregarding Extra-Record Evidence of Agency Impropriety Bearing on the Threshold Jurisdictional Question.

While judicial review of agency action is generally restricted to the administrative record, this rule is subject to a vital exception: extra-record discovery and review are permitted where a party makes a "strong showing of bad faith or improper behavior" by the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Upon such a showing, the baseline presumption of administrative regularity is overcome. *See Bar MK Ranches v. Yeutter*, 994 F.2d 735, 740 (10th Cir. 1993). This Court reaffirmed the vitality of this exception in *Biden v. Texas*, 597 U.S. 785, 808–09 (2022), confirming that extra-record inquiry is required when a litigant demonstrates plausible agency bad faith or improper behavior.

Here, objective extra-record evidence bears directly on the threshold jurisdictional question, demonstrating that the Administrative Review Board's (ARB) recharacterization of the April 17 Order of Dismissal as an "inadvertent draft" constitutes an impermissible post-hoc rationalization.

A. Unauthorized Docket Control and Procedural Irregularity.

Upon the ARB's acceptance of review on January 15, 2026, the Administrative Law Judge's (ALJ) jurisdiction terminated as a matter of law. 29 C.F.R. § 1989.110(b). Electronic Filing System (EFS) metadata reveals, however, that the ARB's April 17 Order of Dismissal was generated and transmitted through the Office of Administrative Law Judges (OALJ) portal rather than the ARB's appellate portal. The ARB's subsequent April 22 order conceded this irregularity, noting that "[t]he draft Order of Dismissal will be removed from the OALJ docket." (App. D). An adjudicator whose jurisdiction has been divested

cannot lawfully manage, transmit, or control the docket of the reviewing appellate tribunal.

The ARB's subsequent procedural handling of Petitioner's motions further reveals systemic irregularity designed to obscure this jurisdictional defect. Rather than addressing Petitioner's April 20 Motion for Reconsideration on the merits—which would have necessitated acknowledging the OALJ's unauthorized docket access—the ARB declared the motion moot. Simultaneously, the ARB granted Petitioner's Motion to Withdraw Withdrawal, despite EFS records establishing that the motion was not accepted into the system until April 20, three days after the April 17 final order of dismissal had already been issued and served.

By entertaining post-dismissal motions after its jurisdiction had lapsed and issuing contradictory orders on April 28 and July 8 disclaiming the existence of a final order, the ARB attempted to retroactively alter the legal character of its April 17 order. Moreover, while the April 28 order indicated that the April 17 order would be removed from the docket, the ARB never formally vacated it—denying Petitioner's Motion to Vacate as moot instead. This created an irreconcilable procedural conflict: the 60-day statutory period for judicial review under 29 C.F.R. § 1989.112(a) was running from the April 17 order, while subsequent agency directives asserted that no final order existed. To avoid the complete forfeiture of judicial review, Petitioner was forced to file a protective petition for review on June 22, 2026. The agency's failure to formally vacate the April 17 order demonstrates that it remained operative in law, contradicting the agency's assertion that it was a mere "inadvertent draft."

B. Anachronistic Agency Explanations.

The ARB's factual explanation for the OALJ transmission—namely, that it "elected not to issue" the order due to a motion filed by Petitioner on April 17—is demonstrably refuted by the objective record. EFS metadata proves that the OALJ received the order on April 16 at 12:00 AM, a full day before Petitioner filed the motion in question. A post-hoc explanation that is chronologically impossible cannot support a finding of administrative regularity.

This dual structure—wherein the original hearing officer exercised de facto administrative control over the appellate tribunal's docket—violates the fundamental constitutional command that "a constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Due process demands a fair trial before an impartial tribunal, a principle fully applicable to administrative adjudications. *In re Murchison*, 349 U.S. 133, 136 (1955); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see also* 5 U.S.C. § 556(b).

By refusing to evaluate this threshold evidence of agency improper behavior, the Tenth Circuit abdicated its duty under *Overton Park*. This Court should grant certiorari to confirm that a court of appeals may not ignore a strong showing of agency irregularity when determining whether an administrative order is final and reviewable under Article III.

IV. The Approval of Withdrawal Rendered The ALJ's Decision a Final Administrative Order by Operation of Law, and Further Administrative Exhaustion was Structurally Futile.

The governing regulatory framework independently establishes jurisdiction in the court of appeals. When the Administrative Review Board (ARB) approved

Petitioner's withdrawal, that act did not merely terminate administrative proceedings—it converted the Administrative Law Judge's (ALJ) underlying decision into the final order of the Secretary of Labor as a matter of law. Under 29 C.F.R. § 1989.111(c):

"If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary."

That final administrative decision is immediately subject to appellate review. Pursuant to 29 C.F.R. § 1989.112(a), "[w]ithin 60 days after the issuance of a final order for which judicial review is available . . . any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals."

Petitioner does not challenge the withdrawal itself. Rather, Petitioner seeks direct judicial review of the ALJ's December 17, 2025 decision, which became the Secretary's final, reviewable order by operation of regulation upon the ARB's approval of the withdrawal. The governing scheme explicitly contemplates this path to judicial review.

The Sixth Circuit confirmed this precise rule in *Madrigal v. Holder*, 572 F.3d 239, 242 (6th Cir. 2009), holding that an administrative order approving a withdrawal is "the logical and functional equivalent" of a final order because it "gave final effect to the [underlying] judge's order" and "cut[s] off the petitioner's opportunity for a substantive appellate determination." The Eleventh Circuit reached the same conclusion, observing that "if we could not review the Board's withdrawal orders, then the Board could insulate [underlying] orders from judicial

review simply by deeming appeals withdrawn." *Franco P. Clement v. U.S. Att'y Gen.*, 75 F.4th 1193, 1198 (11th Cir. 2023). That logic applies with equal force here: an administrative agency cannot insulate an underlying adjudicative decision from Article III scrutiny by approving a withdrawal and subsequently recharacterizing its own dispositive order as a mere "draft."

The government may contend that Petitioner is precluded from seeking judicial review because he initiated the withdrawal request. That argument misinterprets the governing regulations and the record:

First, Petitioner's initial motion for withdrawal was filed on April 15, 2026, without knowledge that the divested ALJ was exercising unauthorized control over the ARB's docket through the OALJ portal. The filing was prompted by the ARB's inaction on eight pending threshold motions, not an intent to abandon the litigation.

Second, on April 17, 2026—concurrent with the issuance of the dismissal order—Petitioner filed a Motion to Withdraw the Request for Withdrawal to ensure full adjudication on the merits.

Third, the ARB subsequently granted Petitioner's Motion to Withdraw the Withdrawal (App. O). By granting that motion, the ARB acknowledged that the prior withdrawal was non-final and subject to rescission, undermining its later contention that administrative proceedings were cleanly terminated by consent.

Furthermore, any requirement of additional administrative exhaustion was excused by structural futility. Under 29 C.F.R. § 1989.109(c), an ALJ is legally prohibited from remanding a matter to the Occupational Safety and Health Administration (OSHA) for a proper investigation. This regulatory bar creates an

insurmountable structural impediment: the agency cannot remedy the defective investigation preceding the ALJ's dismissal, the ALJ lacks jurisdiction to adjudicate claims excluded by OSHA, and the ARB refused to rule on the eight pending motions addressing these defects. *(See App. S).* Where administrative regulations erect a structural bar to meaningful relief, further pursuit of agency remedies is futile and exhaustion is not required.

By dismissing the petition, the Tenth Circuit failed to evaluate the operation of 29 C.F.R. § 1989.111(c), misapplied controlling principles governing withdrawal orders, and disregarded established doctrine on regulatory futility.

V. Allowing an Agency to Unilaterally Determine the Boundaries of Article III Jurisdiction Disrupts the Separation of Powers and Threatens the Integrity of Administrative Review.

The decision below raises fundamental questions regarding Article III oversight, the separation of powers, and the integrity of administrative adjudication. If permitted to stand, the Tenth Circuit's approach—allowing an executive agency retroactively to recharacterize its own signed, docketed, and served final disposition as a non-binding "draft"—establishes a dangerous precedent. Sanctioning such administrative manipulation undermines public confidence in the rule of law and deprives litigants of meaningful judicial review.

It Provides a Blueprint for Agencies to Evade Judicial Review.

To accept an agency's post-hoc characterization of its own final order is to afford administrative bodies unbridled power to manipulate federal jurisdiction. As the Seventh Circuit warned, permitting an agency unilaterally to reopen or recharacterize proceedings after judicial review has attached "would allow the

agency to manipulate federal jurisdiction to frustrate litigants . . . and prevent or at least postpone into perpetuity unfavorable precedent." Doctors Nursing & Rehab. Ctr. v. Sebelius, 613 F.3d 672, 678 (7th Cir. 2010). If this Court ratifies the ARB's conduct, any agency facing an adverse or contested appeal could simply issue contradictory orders claiming its final decision was an "inadvertent draft" or "clerical error"—thereby mooting the petition and trapping litigants in an endless administrative loop devoid of Article III oversight.

It Subverts Public Confidence in the Administration of Justice.

The rule of law requires that administrative agencies, no less than private litigants, be bound by their formal dispositions. When an agency issues a final order, subsequently labels it a "draft" after allegations of procedural misconduct surface, and secures judicial acquiescence without meaningful inquiry, the public perception that agencies operate above the law is reinforced. Article III review must serve as a genuine constitutional check on administrative action, rather than a mechanism of automatic deference to agency convenience.

It Violates Established Jurisdictional Divestiture Precedents.

Settled jurisprudence dictates that jurisdiction, once properly vested in a court of appeals, cannot be unilaterally divested by subsequent actions of the tribunal under review. As this Court has repeatedly affirmed, "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426, 428 (1991). Furthermore, an order's "finality is not affected by the subsequent filing of a motion to reconsider." Stone v. INS, 514 U.S. 386, 405 (1995). The appellate court below was immediately vested with jurisdiction upon the filing of

the petition for review. See Stewart v. Donges, 915 F.2d 572, 576 (10th Cir. 1990) (noting that the filing of an appeal is an event of jurisdictional significance that divests the lower forum of control over the matter). The ARB's contradictory post-appeal orders are precisely the type of "subsequent events" that are legally ineffective to divest an appellate court of jurisdiction.

It Conflicts with the Separation of Powers and Independent Judicial Review.

Under the constitutional structure, it is the sole province of the judiciary—not the executive agency under review—to determine whether an administrative order is final and whether federal jurisdiction lies. The ARB's assertion that its signed, docketed, and served order constituted a mere "draft" is an unexamined legal conclusion, not an unassailable finding of fact. Following Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), courts are bound to exercise their independent judgment when interpreting legal instruments, regulations, and jurisdictional conditions. Deferring to an agency's self-serving, post-hoc characterization of its own binding orders constitutes an abdication of that essential judicial duty.

It Operates to Deny Litigants Meaningful Access to Judicial Review.

The practical consequence of the decision below is to trap a pro se litigant within an administrative forum that has refused to correct its procedural defects while attempting to shield its own record from judicial scrutiny. Such an outcome is antithetical to fundamental due process. See Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss . . . is of such intrinsic value to our society that it must be afforded to those who . . . have not yet prepared

themselves."). Allowing an administrative tribunal to delay judicial review indefinitely through contradictory and factually irreconcilable explanations effectively denies litigants their constitutional right to be heard in a competent Article III forum.

VI. Application for a Stay Pending Disposition of the Petition For a Writ Of Certiorari

Pursuant to 28 U.S.C. § 2350(b) and 28 U.S.C. § 2101(f), Petitioner respectfully applies to the Circuit Justice for a stay of the Administrative Review Board's (ARB) April 17, 2026 Order of Dismissal—and the attendant finality of the Administrative Law Judge's (ALJ) December 17, 2025 order—pending the final disposition of this Petition for a Writ of Certiorari.

The necessity for injunctive relief is urgent. The Tenth Circuit issued its mandate on October 5, 2026, purporting to restore jurisdiction to the ARB. Absent an immediate stay from this Court, the ARB may issue a new administrative determination prior to the expiration of the statutory certiorari deadline on November 17, 2026. Such unilateral agency action threatens to moot this Petition before this Court can resolve the threshold jurisdictional question presented—namely, whether an agency may retroactively divest a federal court of reviewability by declaring its executed, docketed, and served final disposition an "inadvertent draft." Section 2101(f) was enacted precisely to prevent the frustration of this Court's certiorari jurisdiction through intermediate agency action. *See Cannon v. Seay*, 140 S. Ct. 26, 26–27 (2019) (Mem.).

A Circuit Justice may grant a stay pending disposition of a petition for a writ of certiorari upon a showing of: (1) a reasonable probability that four Justices

will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will conclude the decision below was erroneous; (3) a likelihood of irreparable harm absent a stay; and (4) in close cases, a balancing of the equities. *Bellotti v. Latino Pol. Action Comm.*, 463 U.S. 1319, 1320–21 (1983) (Rehnquist, J., in chambers); *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

1. Reasonable Probability That Certiorari Will Be Granted.

This Petition presents a clear split among the Courts of Appeals on a recurring and fundamental question of administrative law: whether an executive agency possesses the unilateral authority to recapture jurisdiction by retroactively recharacterizing a final disposition as a non-binding "draft." The Second, Seventh, and D.C. Circuits have held that an agency lacks such authority once judicial review attaches. The Tenth Circuit below held to the contrary. This direct conflict on a core question of federal administrative power satisfies the traditional criteria for certiorari review under Supreme Court Rule 10(a).

2. Fair Prospect of Reversal on the Merits.

The Tenth Circuit's decision directly conflicts with this Court's established finality doctrine under *Bennett v. Spear*, 520 U.S. 154 (1997), and *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016). The April 17 order bore all objective indicia of final administrative action: it was executed, marked "SO ORDERED," entered on the formal docket, and served upon the parties. By deferring to the ARB's post-hoc characterization of its own order, the court below violated the cardinal rule prohibiting reliance on post-hoc administrative

rationalizations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Moreover, although the Tenth Circuit solicited supplemental briefing on jurisdiction—wherein Petitioner presented extensive arguments demonstrating finality—the court's eventual dismissal order adopted verbatim its initial pre-briefing analysis without addressing the threshold issues raised. Such reflexive acquiescence to agency self-interpretation directly departs from the standard of independent judicial review mandated by Article III and *State Farm*.

3. Likelihood of Irreparable Harm Absent Relief.

The irreparable harm in this posture is the permanent deprivation of Petitioner's statutory and constitutional right to judicial review of the underlying administrative record. If the April 17 order is recognized as final, the ALJ's December 17, 2025 decision becomes "the final order of the Secretary" under 29 C.F.R. § 1989.111(c), instantly enforceable while remaining insulated from appellate scrutiny. Once enforced or superseded by unreviewable administrative actions, the opportunity to obtain Article III scrutiny over a process infected by procedural defects and suppressed evidence is irretrievably lost. Severe procedural injuries that "cannot be recouped" constitute classic irreparable harm justifying stay relief pending certiorari. *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Alito, J., in chambers).

4. Balance of Equities.

A stay serves the public interest by preserving the status quo without prejudicing the agency. The ARB has repeatedly represented that the matter remains pending before it; issuing a stay merely halts administrative activity long

enough for this Court to determine whether it will exercise its appellate jurisdiction over the April 17 Final Order. The equities overwhelmingly favor Petitioner, who has been subjected to documented docket manipulation, improper filing restrictions, and an unconstitutional commingling of adjudicative roles. Should certiorari be granted, the stay "shall terminate upon the sending down of the judgment of this Court." *See Wolf v. Innovation Law Lab*, 140 S. Ct. 1564, 1564 (2020) (mem.). Granting a stay pending disposition of this petition aligns with this Court's practice, prevents the irreversible destruction of appellate jurisdiction, and preserves the integrity of Article III review.

VII. This Court Should Grant Certiorari to Resolve a Clear Circuit Split Concerning Whether an Agency May Unilaterally Recapture Jurisdiction by Retroactively Recharacterizing Its Final Order.

The Question Presented—whether an executive agency can divest a federal court of appellate jurisdiction by retroactively declaring its signed, docketed, and served disposition a non-final "draft"—has produced an irreconcilable split among the federal courts of appeals. The Seventh and D.C. Circuits hold that an agency lacks authority to unilaterally recapture jurisdiction after issuing a final order once appellate review has attached. The Tenth Circuit's unreasoned dismissal stands in direct conflict with those decisions, permitting the precise administrative manipulation those circuits have condemned.

A. The Seventh Circuit Prohibits Unilateral Agency Recapture of Jurisdiction.

In *Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672 (7th Cir. 2010), the Seventh Circuit established that an agency "may not divest the federal courts of jurisdiction by unilaterally reopening its administrative

proceedings." *Id.* at 678. The court recognized that permitting post-filing administrative retractions would empower an agency to "yank the case out of the courts" whenever it "became concerned that a Court of Appeals—or even the Supreme Court—might issue a decision adverse to its interests." *Id.* at 679. Under the Seventh Circuit's rule, jurisdiction, once vested in an Article III court, cannot be unilaterally erased by the agency whose order is under review.

B. The D.C. Circuit Requires Judicial Approval Before an Agency May Reopen Proceedings.

The D.C. Circuit similarly holds that an agency's authority over its orders is strictly constrained once appellate jurisdiction attaches. In *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), the court held that "once a petition to review has been filed in court, the [agency] has no authority to conduct further proceedings without the court's approval." *Id.* at 283. Allowing unilateral agency retractions after a petition is filed subverts the statutory architecture for judicial review and allows the executive to dictate the timing and scope of Article III scrutiny.

Likewise, in *Anchor Line Ltd. v. Federal Maritime Commission*, 299 F.2d 124 (D.C. Cir. 1962), the D.C. Circuit emphasized that while an agency retains narrow authority to correct administrative errors, it cannot exercise that authority to prejudice a litigant's right to judicial review. *Id.* at 128–29.

C. The Tenth Circuit's Decision Deepens a Direct Conflict Among the Circuits.

The Tenth Circuit's order—dismissing the petition for review without reasoned analysis—holds the exact opposite of the Seventh and D.C. Circuits. By deferring to the ARB's *post hoc* reclassification of its signed, docketed, and served

Order of Dismissal as a non-final "draft," the court below permitted the agency to unilaterally recapture jurisdiction and terminate judicial review.

This conflict creates a dangerous blueprint for administrative evasion: an agency may issue a final disposition, monitor whether a petition for review is filed, and retroactively recharacterize the order as non-final if challenged. This procedural bait-and-switch undermines the integrity of judicial review and renders statutory appeal deadlines a trap for unwary litigants.

D. The Time-of-Filing Rule Under *Freeport-McMoRan* Confirms Irrevocable Appellate Jurisdiction.

This Court has held that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam). Because the April 17 Order was final when Petitioner filed his protective petition for review on June 22, 2026, jurisdiction vested in the Tenth Circuit at that moment. The ARB's subsequent orders—retroactively labeling the April 17 disposition a "draft"—were subsequent administrative events incapable of divesting Article III jurisdiction.

The Tenth Circuit failed to address the *Freeport-McMoRan* time-of-filing rule. It conducted no inquiry into whether the April 17 Order was final upon issuance, ignoring the objective hallmarks of finality—a signed, "SO ORDERED," docketed, and served disposition. Instead, the court deferred to the ARB's *post hoc* explanation, disregarding this Court's mandate that agency action must be judged "on the basis articulated by the agency at the time of its decision." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

E. The Decision Below Repudiates Tenth Circuit Precedent Governing Finality.

The dismissal below also conflicts with Tenth Circuit jurisprudence. In *Impact Energy Resources, Inc. v. Salazar*, 693 F.3d 1239 (10th Cir. 2012), the court held that an agency's objective conduct—not its *post hoc* labels—controls the finality determination, requiring courts to look to "the circumstances at the time of the agency's decision." *Id.* at 1245–46.

Here, the ARB's objective conduct demonstrated finality. In its April 22 order, the ARB denied Petitioner's Motion for Reconsideration as "moot"—a disposition that logically presupposes a final underlying order. An order's "finality is not affected by the subsequent filing of a motion to reconsider." *Stone v. INS*, 514 U.S. 386, 405 (1995). The agency cannot simultaneously treat an order as final to deny reconsideration relief and as non-final to evade appellate review.

F. The Issue Is Recurring and Demands Resolution by This Court.

Whether an executive agency may retroactively declare its final order non-final is a recurring question of administrative law that arises whenever an agency seeks to alter its disposition after a petition for review is filed. The split among the courts of appeals is clean, well-defined, and expanding. *See, e.g., Columbus Park Nursing & Rehab. Ctr. v. Sebelius*, 940 F. Supp. 2d 805, 812 (N.D. Ill. 2013) (applying *Doctors Nursing* to bar agency jurisdictional recapture).

This Court frequently grants certiorari to resolve circuit splits regarding the threshold finality of agency dispositions. *See, e.g., Sackett v. EPA*, 566 U.S. 120, 125 (2012). Certiorari should be granted here to resolve this direct conflict and reaffirm that agency finality is determined by objective legal characteristics at issuance, not by after-the-fact administrative recantations.

CONCLUSION

This case presents a critical opportunity to address a systemic breakdown in administrative regularity—one that threatens both the integrity of congressional whistleblower protections and the fundamental due process rights of those who invoke them. The Tenth Circuit's summary dismissal sanctions procedural gamesmanship, permitting an agency to issue a final order, observe whether a petitioner seeks judicial review, and subsequently recharacterize its own disposition as a mere "draft" to evade Article III scrutiny. This Court should grant certiorari to resolve the deepening circuit split regarding whether an agency may unilaterally recapture jurisdiction through such *post hoc* characterizations.

This petition does not merely allege an isolated procedural error; it exposes a structural failure within the administrative adjudicatory process. The agency's initial investigation was structurally compromised, the administrative adjudicator suppressed material evidence and adopted opposing counsel's representations without independent factual review (App. M), and the appellate board abdicated its oversight role before employing irregular docket maneuvers to shield the proceedings from judicial review. As the First Circuit has recognized, whistleblower statutes are remedial and must be interpreted broadly to effectuate their protective purpose. *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1192 (1st Cir. 1994). When an agency's procedural framework becomes so structurally defective that it penalizes the complainant rather than protecting them, the legislative purpose of the statute is entirely inverted.

The resulting harm is not theoretical. Petitioner has suffered severe financial and reputational prejudice through the very administrative apparatus

designed to afford him statutory protection. A good-faith complaint reporting unlawful employer conduct was effectively weaponized against him. The Seventh Circuit has acutely recognized this danger, warning that when administrative tribunals apply "unduly stringent and arbitrary requirements" that prevent whistleblowers from receiving a hearing on the merits, the administrative process itself becomes the punishment. *See Delgado v. Merit Sys. Prot. Bd.*, 880 F.3d 913, 925 (7th Cir. 2018).

The Tenth Circuit's refusal to look beyond the ARB's *post hoc* "draft" designation allowed these systemic failures to evade essential appellate scrutiny. Although the court ordered supplemental briefing on jurisdiction, Petitioner's briefs raising eighteen distinct jurisdictional arguments were left completely unaddressed, as the court restated nearly verbatim its initial pre-briefing assessment. The court failed to engage with the objective record evidence of docket manipulation, the chronological impossibility of the agency's defense, and the strong showing of bad faith under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). This Court should grant certiorari to reaffirm that federal courts possess an affirmative duty to examine the practical reality of agency action rather than deferring blindly to retroactive labels designed to insulate defective proceedings from judicial review.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

[s/] Joseph Gallegos

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Date: October 18, 2026

APPENDIX

(Attached as **Additional Booklet)**** Appendix A – Order of the Court of Appeals (Aug. 12, 2026) Appendix B – Administrative Law Judge's Order Dismissing Matter (Dec. 17, 2025) Appendix C – ARB Order of Dismissal (Apr. 17, 2026) Appendix D – ARB Order Denying Reconsideration as Moot (Apr. 22, 2026) Appendix E – ARB Order (Apr. 28, 2026) Appendix F – ARB Order (July 8, 2026) Appendix G – Petitioner's Motion for Leave to File Amended Petition for Review (10th Cir. July 6, 2026) Appendix H – Petitioner's Supplemental Jurisdictional Memorandum (10th Cir. July 2026) Appendix I – Secretary of Labor's Response Brief (10th Cir. Aug. 7, 2026) Appendix J – Petitioner's Emergency Motion to Hold Ruling in Abeyance (10th Cir. Aug. 10, 2026) Appendix K – Petitioner's Reply Brief on Jurisdiction (mailed Aug. 9, 2026) Appendix L – Petitioner's Motion for Reconsideration (10th Cir. Aug. 12, 2026) Appendix M – ALJ's Motive and EFS Metadata Analysis Appendix N – Statutory and Regulatory Provisions PART 1 Appendix O – ALJ'S Motive in Granting the April 17, 2026 Order of Dismissal Appendix P – The Separate Record InferenceAppendix Q – Declaration of Joseph Gallegos Appendix R – OSHA's Expedited Case Processing Program: Violation of the Statutory Duty to Investigate Appendix S – Statutory and Regulatory Provisions PART 2

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that this petition, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d), including the Table of Contents, the Table of Cited Authorities, the caption, and the appendices, contains approximately 8,950 words, which is within the 9,000-word limit set forth in Supreme Court Rule 33.1(a). I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 2026.

/s/ Joseph Gallegos]

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