United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 28, 2025
Lyle W. Cayce
Clerk

No. 21-60532

UNITED NATURAL FOODS, INCORPORATED, *doing business as* UNITED NATURAL FOODS, INCORPORATED and SUPERVALU, INCORPORATED,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the
National Labor Relations Board
NLRB No. 19-CA-249264
NLRB No. 19-CB-250856

ON REMAND FROM
THE UNITED STATES SUPREME COURT

Before HIGGINBOTHAM, HIGGINSON, and OLDHAM, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

After the Acting General Counsel of the National Labor Relations Board withdrew an unfair labor practice complaint that his predecessor had issued against a union, the aggrieved employer requested permission to appeal the complaint's withdrawal to the Board. The Board denied the

request, concluding that the Acting General Counsel's decision was an unreviewable act of prosecutorial discretion. The employer then petitioned this court for review of the Board's order. We denied the petition, relying primarily on the Supreme Court's holding in *NLRB v. United Food & Commercial Workers Union, Loc. 23 (UFCW)*, 484 U.S. 112 (1987), which relied in part on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536 (5th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 2708 (2024) (mem.). Thereafter, the Supreme Court overturned *Chevron* in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The Court then granted certiorari in this case, vacated the judgment, and remanded the case to our court for further consideration in light of *Loper Bright*. We again determine that we have jurisdiction and DENY the petition.

I.

On October 28, 2019, United Natural Foods Inc. ("UNFI") filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or the "Board").[1] As amended, the charge alleges that International Brotherhood of Teamsters Local 117 and Local 313 (the

[1] This opinion uses the term "NLRB" when referring either to the agency generally or to enforcement officials within the agency, such as the agency's General Counsel and regional directors. It uses the term "Board" when referring specifically to the five-member body that performs a quasi-judicial function. *Compare* 29 U.S.C. § 153(a) (creating a "National Labor Relations Board" of five members), *and id.* § 160(c) (authorizing the "Board" to adjudicate labor disputes), *with id.* § 153(d) (creating a "General Counsel of the Board" who "shall exercise general supervision over all attorneys employed by the Board" and "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board"); *see also Exela Enter. Sols., Inc. v. Nat'l Lab. Rels. Bd.*, 32 F.4th 436, 443 (5th Cir. 2022) (explaining that the Board was created "to execute quasi-legislative, quasi-judicial functions," in contrast to NLRB's General Counsel, who "perform[s] quintessentially prosecutorial functions").

"Unions") violated the National Labor Relations Act ("NLRA") by (1) attempting to impose union representation on certain of UNFI's employees, (2) attempting to cause UNFI to discriminate among its employees, and (3) refusing to collectively bargain with UNFI. Local 117 also filed an unfair labor practice charge against UNFI.

On July 29, 2020, NLRB's Regional Director for Region 19 (the "Regional Director"), acting on behalf of NLRB's General Counsel at the time, Peter B. Robb, issued a Consolidated Complaint alleging that the Unions had violated subsections 8(b)(1)(A), 8(b)(2), and 8(b)(3) of the NLRA. The Consolidated Complaint also alleged that UNFI had violated various provisions of the NLRA. A hearing was scheduled to take place before an administrative law judge on March 2, 2021.

In January 2021, President Biden removed Robb from the office of NLRB General Counsel and designated Peter Sung Ohr as Acting General Counsel. Subsequently, the Unions moved to postpone the scheduled hearing so that Acting General Counsel Ohr could review the complaint and determine whether his office wished to continue pursuing the case. The Regional Director granted the request, rescheduling the hearing to April 6. The Unions also wrote directly to Ohr to request that he reconsider the decision to issue a complaint against them.

On February 1, UNFI filed with the Board a motion to sever the case against UNFI from the case against the Unions, to transfer the case against the Unions from the administrative law judge to the Board, and for summary judgment against the Unions. Before the Board ruled on the motion, the Regional Director, now acting on behalf of Acting General Counsel Ohr, issued an order (the "RD Order") severing the claims against UNFI[2] and

[2] UNFI ultimately settled this case, leading to a dismissal of the charges.

withdrawing the Consolidated Complaint to the extent that it alleged claims against the Unions. The RD Order explained that after reviewing "the allegations in the Consolidated Complaint," the Acting General Counsel had decided to exercise "his prosecutorial discretion" and dismiss the charges against the Unions.

UNFI filed with the Board both a request for special permission to appeal the RD Order and the appeal itself,[3] arguing that the Acting General Counsel had no authority to unilaterally dismiss the charges against the Union after UNFI had filed its motion for summary judgment and that the appointment of Acting General Counsel Ohr was unlawful. UNFI also filed an appeal with the Acting General Counsel.[4]

The Board denied UNFI's request for special permission to appeal the RD Order on May 11. The Board reasoned that UNFI's request "is not properly before the Board" because "the Regional Director has the prosecutorial discretion to withdraw a complaint sua sponte at any time before the hearing" and "[h]is exercise of that discretion is not subject to Board or court review." The Board explained that even though UNFI had moved for summary judgment, the complaint had not "advanced so far into the adjudicatory process that a dismissal takes on the character of an adjudication." The Board further stated that because it did not have jurisdiction to review the RD Order, it would not consider UNFI's arguments regarding the appointment of Acting General Counsel Ohr.

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[3] *See* 29 C.F.R. § 102.26 (providing that the rulings of Regional Directors "may not be appealed directly to the Board except by special permission of the Board" and that "[r]equests to the Board for special permission to appeal" must be filed "together with the appeal").

[4] *See* 29 C.F.R. § 102.19 (providing that a Regional Director's decision to withdraw a complaint may be appealed to the General Counsel).

However, the Board did note that "UNFI may appeal the Regional Director's decision to withdraw the complaint to the General Counsel consistent with Section 102.19."

The Acting General Counsel denied UNFI's appeal on June 22. He rejected UNFI's argument that by dismissing the charges against the Unions he "was adjudicating the merits of the case, rather than acting in his prosecutorial capacity." Rather, he stated that he had "simply reviewed the evidence and determined that a violation had not occurred and a complaint was not appropriate."

UNFI petitioned this court for review of the Board's order denying it permission to appeal the RD Order.[5] NLRB subsequently filed a motion to dismiss the petition for review for lack of jurisdiction. A panel of this court carried the motion with the case.

We concluded that we had jurisdiction but otherwise agreed with NLRB, holding that Acting General Counsel Ohr's designation was valid and that the Board permissibly determined that Acting General Counsel Ohr had discretion to withdraw the complaint against the Unions. *United Nat. Foods*, 66 F.4th at 548-49. We therefore denied both NLRB's motion to dismiss the petition for review for lack of jurisdiction and UNFI's petition for review. JUDGE OLDHAM dissented.

In June 2024, the Supreme Court issued *Loper Bright*, overruling *Chevron*. *Loper Bright*, 603 U.S. at 412. The Court shortly thereafter granted UNFI's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Loper Bright*. *United Nat. Foods, Inc. v. Nat'l Lab. Rels. Bd.*, 144 S. Ct. 2708 (2024) (mem.). The parties filed

[5] UNFI did not—and could not—appeal the Acting General Counsel's denial of its appeal of the RD Order.

letter briefs addressing the impact of *Loper Bright*, and we again heard oral argument.

II.

We first consider NLRB's jurisdictional challenge. Because this issue is unaffected by the overruling of *Chevron*, our analysis remains unchanged.

"Except as authorized by statute, a court of appeals does not have jurisdiction to review actions of the Board." *Shell Chem. Co. v. NLRB*, 495 F.2d 1116, 1119 (5th Cir. 1974). Section 10 of the NLRA, 29 U.S.C. § 160, "is the sole provision vesting review [of Board actions] with the courts of appeal." *Id.* That provision authorizes "[a]ny person aggrieved by a final order of the Board" to petition for review in an appropriate federal appellate court. 29 U.S.C. § 160(f). NLRB maintains that we do not have jurisdiction over UNFI's petition because the Board order at issue in this case is not "final."

"[T]he phrase 'a final order of the Board', as used in [§ 160(f)], refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found." *Shell Chem.*, 495 F.2d at 1120 (quoting *Laundry Workers Int'l Union Loc. 221 v. NLRB*, 197 F.2d 701, 703 (5th Cir. 1952)). The Board's order in this case "denied" UNFI's "request for special permission to appeal" the RD Order, which had itself "withdrawn" part of the Consolidated Complaint and "dismissed" the charges against the Unions. Because the Board's order allowed an order dismissing a complaint to remain in place, the order had the practical effect of dismissing the complaint. Accordingly, the Board's order qualifies as "a final order of the Board" under *Shell Chemical*. *Cf. U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016) (describing "the 'pragmatic' approach" that the Supreme Court has "long taken to finality" (citation omitted)).

NLRB points us to several cases in which courts dismissed for lack of jurisdiction petitions for review brought under 29 U.S.C. § 160(f). However, these cases all prove inapposite. In *Laundry Workers*, we held that we did not have jurisdiction to review the Board's decision not to issue a pre-complaint subpoena. 197 F.2d at 702-04. In *Shell Chemical*, we concluded that we could not review "the quashing of the notice of a section 10(k) proceeding," an action that occurs before the issuance of any complaint alleging unfair labor practices. 495 F.2d at 1121.[6] And in *J. P. Stevens Employees Educational Committee v. NLRB*, the Fourth Circuit determined that it did not have jurisdiction to review a Board order denying a request for special permission to appeal the denial of a motion to intervene, explaining that "the Board's denial of a motion to intervene is reviewable in this court after the Board has concluded the unfair labor practice hearing and issued its final order." 582 F.2d 326, 328-329 (4th Cir. 1978). Because none of these cases involved a Board order that effectively dismissed a complaint, they do not support NLRB's argument that we lack jurisdiction over this petition.

The most analogous case that the parties have identified is *Boilermakers Union Local 6 v. NLRB*, 872 F.2d 331 (9th Cir. 1989). In that case, the underlying Board order had held that the General Counsel had prosecutorial discretion to withdraw a complaint, reversing an administrative law judge's order denying the General Counsel's motion to withdraw. *Id.* at 331-32. Thus, as in this case, the *Boilermakers* petitioner was challenging a Board order concluding that the General Counsel had discretion to withdraw

[6] Section 10(k) proceedings are a method of resolving jurisdictional disputes between labor unions "without the cumbersome, fault determining, and coercive process of an unfair labor practice proceeding under section 8(b)(4)(D)." *Shell Chemical*, 495 F.2d at 1121; *see* 29 U.S.C. §§ 158(b)(4)(D), 160(k). In cases where Section 10(k) applies, "a complaint on a section 8(b)(4)(D) charge does not issue until after the provisions of section 10(k) have been satisfied." *Shell Chemical*, 495 F.2d at 1122.

a complaint. However, NLRB did not ask the Ninth Circuit to dismiss the petition for lack of jurisdiction. Instead, the agency argued that the "court's review is limited to deciding whether the General Counsel's decision was an act of prosecutorial discretion," and the Ninth Circuit agreed. *Id.* at 332. *Boilermakers* thus supports the proposition that we *do* have jurisdiction to review the Board's conclusion that the Acting General Counsel had prosecutorial discretion to withdraw the complaint against the Unions.[7]

NLRB argues that, regardless of this pre-1990 lower court caselaw interpreting the NLRA, the Board's order does not qualify as "final" under later-in-time Supreme Court decisions elucidating general principles of administrative law. The Supreme Court set forth the following test for finality in a case involving the Administrative Procedure Act ("APA"):

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted); *see also Sackett v. EPA.*, 566 U.S. 120, 126-27 (2012) (applying the *Bennett* test). NLRB points out that when the Board issued its order on May 11, 2021, UNFI's appeal to the Acting General Counsel remained pending. Therefore, NLRB argues, the Board's order did not consummate the agency's decision-making process or cause any legal consequences.

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[7] As discussed further below, the Ninth Circuit ultimately denied the petition for review in *Boilermakers*, holding "that the General Counsel's decision to withdraw the complaint was an act of prosecutorial discretion which is non-reviewable." 872 F.2d at 332, 334.

However, when applying *Bennett* to this case, we must keep in mind that while *Bennett* interpreted the APA, which authorizes judicial review of "final *agency* action," 520 U.S. at 177 (emphasis added) (quoting 5 U.S.C. § 704), UNFI invokes the NLRA as the source of this court's jurisdiction. The NLRA "distinguishe[s] orders of the General Counsel from Board orders," *UFCW*, 484 U.S. at 128 (citing 29 U.S.C. §§ 153, 160), and it authorizes judicial review only of "final order[s] of *the Board*." 29 U.S.C. § 160(f) (emphasis added); *see also UFCW*, 484 U.S. at 129 (explaining that § 160(f) "provides that final decisions 'of the Board' shall be judicially reviewable" but "plainly cannot be read to provide for judicial review of the General Counsel's prosecutorial function"). Thus, when determining whether this case satisfies the first *Bennett* condition, UNFI's appeal to the Acting General Counsel is irrelevant. The question is not whether the Board's order marked the consummation of the entire agency's decision-making process but rather whether the order marked the culmination of the *Board*'s decision-making process. And the answer to that question is yes. When it denied UNFI special permission to appeal the RD Order dismissing the complaint against the Unions, the Board consummated its decision-making process. *See* 29 C.F.R. § 102.26 (providing that a Regional Director's order can only be appealed with the Board's permission); *Bennett*, 520 U.S. at 177-78.

The Board's order also satisfies the second *Bennett* condition. The order determined that the Acting General Counsel was "permitted to withdraw the complaint" against the Unions. Moreover, by permitting the Acting General Counsel to dismiss the complaint against the Unions, the order rendered moot UNFI's pending motion for summary judgment. The Board's order thus had "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178.

In sum, the Board order at issue in this case qualifies as "final" under the Supreme Court's decision in *Bennett*, this court's decision in *Shell Chemical*, and the Ninth Circuit's decision in *Boilermakers*. The cases that NLRB cites provide no reason to think otherwise. An agency must carry a "heavy burden" to rebut the "strong presumption favoring judicial review of administrative action," *Salinas v. United States R.R. Ret. Bd.*, 592 U.S. 188, 197 (2021) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015)), and NLRB has not carried that burden here. Accordingly, we have jurisdiction over UNFI's petition for review. *See* 29 U.S.C. § 160(f).

III.

UNFI raises two issues in its petition for review and reaffirms both challenges in its supplemental briefing. First, it argues that the Acting General Counsel (acting through the Regional Director)[8] lacked authority to withdraw the complaint against the Unions because UNFI had filed a motion for summary judgment. Second, it argues that the Acting General Counsel lacked authority to withdraw the complaint because former General Counsel Robb had been improperly removed from office. Because the second issue is unaffected by *Loper Bright*, as UNFI acknowledges in a footnote, our analysis of that issue remains unchanged.

A.

"[T]he language, structure, and history of the NLRA, as amended, clearly differentiate between 'prosecutorial' determinations, to be made solely by the General Counsel and which are not subject to review under the

[8] *See* 29 U.S.C. § 153(d) (providing that the General Counsel has "final authority . . . in respect of the prosecution of . . . complaints before the Board" and "exercise[s] general supervision over all attorneys employed by the Board . . . and over the officers and employees in the regional offices").

[NLRA], and 'adjudicatory' decisions, to be made by the Board and which are subject to judicial review." *UFCW*, 484 U.S. at 130. UNFI argues that when it filed a motion for summary judgment against the Unions, the decision of whether to withdraw the complaint against the Unions became an adjudicatory decision to be made by the Board.

The Board rejected this argument as to its own authority. It explained that even though "UNFI had filed its motion for summary judgment before the Regional Director withdrew the complaint," the Board had not "issued a Notice to Show Cause," and accordingly "the case had not yet transferred to the Board." For this reason, the Board did not view the complaint as having "advanced so far into the adjudicatory process that a dismissal takes on the character of an adjudication." Rather, the Board concluded that "the Regional Director has the prosecutorial discretion to withdraw a complaint sua sponte at any time before the hearing" and that "[h]is exercise of that discretion is not subject to Board or court review."

In our prior opinion in this case, we observed that courts accord deference to NLRB's "reasonable interpretations of ambiguous provisions in the NLRA" under *Chevron*. *United Nat. Foods*, 66 F.4th at 543 (quoting *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 292 (5th Cir. 2015)). Following *Loper Bright*, we no longer accord such deference. We must instead "exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright*, 603 U.S. at 412. Still, "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry," and "when a particular statute delegates authority to an agency consistent with constitutional limits, [we] must respect the delegation." *Id.* at 412-13. Moreover, the Supreme Court made clear that, by overturning *Chevron*, it did "not call into question prior cases that relied on the *Chevron* framework," and that those cases are "still subject to statutory *stare decisis* despite our change in interpretive methodology." *Id.* at 412.

The NLRA provides that the General Counsel "shall have final authority . . . in respect of the prosecution of . . . complaints before the Board." 29 U.S.C. § 153(d). Given this text, along with the NLRA's structure and history, the Supreme Court has "h[e]ld that it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial." *UFCW*, 484 U.S. at 125-26. The Court reasoned that since the General Counsel has "the concededly unreviewable discretion to file a complaint," they must also have "the same discretion to withdraw the complaint before hearing if further investigation discloses that the case is too weak to prosecute." *Id.* at 126. Here, the Regional Director (acting as an agent of the Acting General Counsel) withdrew the complaint against the Unions on February 24, 2021, well before the scheduled hearing date of April 6. Accordingly, we reasoned in our prior opinion that the Board's conclusion—i.e., that the General Counsel has discretion to withdraw an unfair labor practice complaint where a motion for summary judgment has been filed but no hearing has occurred and the Board has neither issued a Notice to Show Cause nor transferred the case to itself—fits squarely within the holding of *UFCW*. Thus, in keeping with *UFCW*, we found this to be a permissible interpretation of the NLRA.

That conclusion endures but is no longer dispositive. *UFCW* remains good law, *see Loper Bright*, 603 U.S. at 412, and therefore, our determination that NLRB's view is at least a reasonable interpretation of the NLRA holds true as well. However, whereas previously we could defer to NLRB's reasonable interpretation, we must instead, following *Loper Bright*, "exercise [our] independent judgment in deciding whether [NLRB] has acted within its statutory authority." 603 U.S. at 412.

Although UNFI acknowledges that the "legal rule governing this question, all agree, comes from" *UFCW*, it asserts that *UFCW* does not "squarely control because of the factual differences between the two cases."

UNFI has attempted to distinguish *UFCW* by pointing out that in that case, the Court stated that it was addressing the "narrow" issue of "whether a postcomplaint, prehearing informal settlement" between the General Counsel and a charged party—which, under NLRB regulations, does not require Board approval—"is subject to judicial review." *UFCW*, 484 U.S. at 121, 122-23. Accordingly, UNFI reasons, *UFCW* does not apply to cases such as this one, where the General Counsel unilaterally withdraws a complaint even though a party has filed a motion for summary judgment. UNFI also emphasizes that under the Board's own precedents, "[a]t some point . . . a complaint may be said to have advanced so far into the adjudicatory process that a dismissal takes on the character of an adjudication," *Sheet Metal Workers Int'l Ass'n Loc. Union 28 (American Elgen)*, 306 N.L.R.B. 981, 982 (1992), and that, in drawing the line between prosecutorial and adjudicatory actions, the Board has stated that "the General Counsel has unreviewable discretion . . . to withdraw a complaint after the hearing on it has opened but before any evidence has been introduced, *at least so long as there is no contention that a legal issue is ripe for adjudication on the parties' pleadings alone*," *id.* at 981 (emphasis added). Therefore, UNFI concludes, if a party has filed a motion for summary judgment in an NLRB unfair labor practice case, Board precedent supports the proposition that the General Counsel does not necessarily have discretion to withdraw the complaint any time before the hearing, and Supreme Court precedent does not compel a different holding.

Indeed, UNFI maintains, the Board's conclusion that the General Counsel can withdraw a complaint after a party has filed a motion for summary judgment is irrational. After all, whenever the Board receives a motion for summary judgment, NLRB regulations provide that "the Board may deny the motion or issue a Notice to Show Cause why the motion may not be granted." 29 C.F.R. § 102.24(b). This decision turns on whether

"there is a genuine issue for hearing." *Id.* Pointing to Federal Rule of Civil Procedure 56(a), UNFI argues that the Board's inquiry into whether a summary judgment motion has sufficient merit to warrant issuance of a Notice to Show Cause "is a classic example of an adjudicative determination." A federal court plaintiff cannot unilaterally dismiss a complaint once the defendant has filed a motion for summary judgment, FED. R. CIV. P. 41(a)(1)(A)(i), and UNFI insists that an analogous rule must apply in NLRB proceedings.

In response, NLRB stresses that when the Acting General Counsel withdrew the complaint, the Board had not yet taken any action on UNFI's motion for summary judgment. As explained above, when the Board receives a summary judgment motion, it may either deny the motion or issue a Notice to Show Cause. 29 C.F.R. § 102.24(b). Additionally, when "the Board deems it necessary to effectuate the purposes of the [NLRA] or to avoid unnecessary costs or delay, it may . . . order that [a] complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it," 29 C.F.R. § 102.50, and the Board stated in its order that it transfers a case whenever it issues a Notice to Show Cause. Here, although UNFI had filed a summary judgment motion, the Board had neither issued a Notice to Show Cause nor transferred the case to itself at the time that the complaint was withdrawn. NLRB argues that "the Board reasonably determined that before the General Counsel is divested of the prosecutorial authority to withdraw a pre-hearing complaint, the Board must at least have taken the initial step to issue a Notice to Show Cause and to transfer the complaint and related proceedings to itself."

As before, we agree with NLRB. We are reluctant to place too much weight on UNFI's analogies to the Federal Rules of Civil Procedure, since the Supreme Court has cautioned against "attempt[s] to analogize the role of the General Counsel in an unfair labor practice setting to other contexts,"

stating that such analogies are "of little aid." *UFCW*, 484 U.S. at 126 n.21. Unsurprisingly, we place greater weight on the Supreme Court's authoritative holding in *UFCW* that "it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial." *Id.* at 125-26. Relying on this holding, we previously determined that the Board's conclusion is a permissible interpretation of the NLRA. Exercising our independent judgment as directed by *Loper Bright*, we now further conclude that the Board acted within its statutory authority when it determined that Acting General Counsel Ohr had discretion to withdraw the complaint against the Unions.

As explained by the Supreme Court in *UFCW*, "[t]he NLRA, as originally enacted, granted the Board plenary authority over all aspects of unfair labor practice disputes: the Board controlled not only the filing of complaints, but their prosecution and adjudication." 484 U.S. at 117. The NLRA was amended in 1947, and "[o]ne of the major goals" of those amendments was "to divide the old Board's prosecutorial and adjudicatory functions between two entities." *Id.* at 117-18. Consequently, when reconciling the House and Senate versions of the legislation, the Conference Committee "determine[d] that the General Counsel of the Board should be independent of the Board's supervision and review." *Id.* at 118.

Using the "traditional tools of statutory construction," the Supreme Court explained in *UFCW* that the "words, structure, and history of the [1947] amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line." *Id.* at 123-24. Starting, of course, with the statutory text, the Court underscored that "[§] 3(d) of the NLRA provides that the General Counsel has 'final authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice complaints," and that "[c]onversely, when the authority of the

Board is discussed (with regard to unfair labor practice complaints) [in § 10], it is in the context of the adjudication of complaints." *Id.* Turning to legislative history, the Court highlighted, among other things, the House Conference Report on the 1947 amendments, which stated that the General Counsel "is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, *and in respect of the prosecution of such complaints before the Board*." *Id.* at 124-25 (emphasis in original) (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 37 (1947), U.S. Code Cong. Serv. 1947, p. 1135).

As the Supreme Court observed, "the general congressional framework, dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern." *Id.* at 125. The remaining question then is whether the specific agency decision at issue—here, the Acting General Counsel's dismissal of the complaint—falls on the prosecutorial side or the adjudicatory side of that line.[9] First, as discussed above and at length in *UFCW*, the text and history of the statute uniformly confirm that the General Counsel holds authority over the issuance and prosecution of complaints. This demonstrates both that the General Counsel is given decision-making authority regarding which matters to prosecute and that this prosecutorial authority does not end with the issuance of a complaint. Moreover, the NLRA provides that the Board discharges its separate adjudicatory responsibility by conducting an evidentiary hearing and, thereafter, issuing findings of fact and an appropriate order. 29 U.S.C.

[9] Relying on *Chevron*, the Supreme Court explained in *UFCW* that "[o]ur task . . . is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible." 484 U.S. at 125. Because *Loper Bright* eliminated *Chevron* deference, 603 U.S. at 412, our task now is "judicially to categorize each agency determination," *UFCW*, 484 U.S. at 125.

§§ 160(a)-(c). This statutory division of responsibilities supports the conclusion that the General Counsel retains the prosecutorial authority to dismiss a complaint prior to the scheduled hearing, when the Board is set to begin adjudication.

Second, since the creation of the General Counsel, NLRB has consistently recognized the General Counsel's "full and final authority . . . to dismiss charges." Statement of Delegation of Certain Powers of National Labor Relations Board to General Counsel of National Labor Relations Board, 13 Fed. Reg. 654 (Feb. 13, 1948); *see also* 29 C.F.R. §§ 101.5-.6. Although such agency interpretations are not dispositive, "[c]ourts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes." *Loper Bright*, 603 U.S. at 371; *see also id.* at 374 ("[I]n an agency case in particular, the reviewing court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

Third, as a factual matter, the Board here had taken no action prior to the Acting General Counsel's dismissal of the complaint. A hearing was scheduled before an Administrative Law Judge but had yet to commence. The Board had neither issued a Notice to Show Cause nor transferred the case to itself. Still, UNFI argues that NLRB crossed the line from the General Counsel's prosecutorial function to the Board's adjudicatory function upon the filing of UNFI's summary judgment motion. But that reading would allow a private party, acting unilaterally and prematurely, to divest the General Counsel of their "final authority" over the prosecution of complaints, particularly to resolve weak cases through dismissal or settlement. That reading cannot be squared with the statutory text's

delineation of prosecutorial and adjudicatory authority or, less importantly, with NLRB's historic practice.

The dissent's[10] theory—adopted by UNFI for the first time in its petition for writ of certiorari and repeated in its supplemental briefing—that Federal Rule of Civil Procedure 41(a)(1)(A)(i) applies in unfair labor practices proceedings is similarly flawed. *See United Nat. Foods*, 66 F.4th at 551 (Oldham, J., dissenting). The dissent relies on 29 U.S.C. § 160(b), *id.* at 550–52, which says that "[a]ny such proceeding shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district court of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28," 29 U.S.C. § 160(b) (emphasis added). The dissent reasons that because "the Board never claimed that following Rule 41 would be impracticable," § 160(b) "requires" the Board to follow Rule 41. *United Nat. Foods*, 66 F.4th at 551 (Oldham, J., dissenting).

To begin, UNFI never argued in its initial briefing that § 160(b) forces NLRB to follow Rule 41. Unpersuaded by the arguments that UNFI *did* make, the dissent asserts what it thinks is a better one. *See generally id.* at 549–51. But our "adversarial system of adjudication . . . . is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument[s] entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375-75 (2020) (cleaned up). UNFI did not ask us to base our holding in § 160(b), and it

[10] JUDGE OLDHAM's present dissent incorporates by reference the analysis from his prior dissent in our now-vacated 2023 decision. Thus, for clarity's sake, we refer to his prior dissent simply as the "dissent" with appropriate citations thereto.

would be improper for us to cross the bench to counsel's table and litigate the case for it.

There are good reasons why UNFI didn't ask us to interpret § 160(b) as requiring NLRB to use Rule 41(a)(1)(A)(i). At least four of our sister circuits have rejected the dissent's premise that § 160(b) incorporates the entire Federal Rules of Civil Procedure into Board proceedings. *See DirectSat USA LLC v. NLRB*, 925 F.3d 1272, 1276-77 (D.C. Cir. 2019) (holding that proper inquiry on review of NLRB denial of a motion to intervene is whether NLRB "exercised its discretion in an arbitrary way and not whether its analysis is consistent with the standards set forth in FED. R. CIV. P. 24."); *NLRB v. Valley Mold Co.*, 530 F.2d 693, 694 (6th Cir. 1976) (holding that this language "does not require the Board to follow the discovery procedures set forth in the Federal Rules of Civil procedure"); *N. Am. Rockwell Corp. v. NLRB*, 389 F.2d 866, 871 (10th Cir. 1968) (similar); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961) (similar). *But see NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 475 (2d Cir. 2009) (interpreting similar language in 29 C.F.R. § 101.10(a) as meaning "that the Board's procedures are to be controlled by the Federal Rules of Civil Procedure as far as practicable" (cleaned up)). Indeed, NLRB has promulgated regulations adopting some but not all the requirements of the Federal Rules of Civil Procedure, including different deadlines for filing motions for summary judgment and to dismiss than those set by the Federal Rules, *compare* 29 C.F.R. § 102.24(b) *with* FED. R. CIV. P. 56(b), FED. R. CIV. P. 12(b), *and* FED. R. CIV. P. 12(h)(2).

In setting a procedure for withdrawing complaints, NLRB did not adopt the requirements of Rule 41(a)(1)(A)(i). Under 29 C.F.R. § 102.18, "[a] complaint may be withdrawn before the hearing by the Regional Director on the Director's own motion." 29 C.F.R. § 102.18. Unlike Rule 41—which does not permit a plaintiff in a civil action to dismiss the action

after "the opposing party serves . . . a motion for summary judgment," FED. R. CIV. P. 41(a)(1)(A)(i)—§ 102.18 gives the Director the ability to withdraw a complaint so long as the Director does so "before the hearing."[11] Therefore, if Rule 41 did apply to keep the Director from withdrawing a complaint before the hearing but after "the opposing party serve[d] . . . a motion for summary judgment," FED. R. CIV. P. 41(a)(1)(A)(i), the phrase "before the hearing" in § 102.18 would be meaningless. This alone renders enforcement of Rule 41(a)(1)(A)(i) against the Board not "practicable" within the meaning of § 160(b).

Applying Rule 41(a)(1)(A)(i) instead of § 102.18 would also undermine NLRB's ability to prosecute unfair labor practices charges. Congress gave the General Counsel "final authority" to "prosecut[e] . . . complaints before the Board." 29 U.S.C. § 153(d). It follows that the General Counsel must "have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins." *UFCW*, 484 U.S. at 422. But under the dissent's theory, a party who suspects that NLRB intended to informally settle a complaint could defeat the settlement—and Supreme Court precedent—by racing to file a summary judgment motion. Rule 41(a)(1)(A)(i) is accordingly incompatible with the statutory scheme.

Finally, even assuming that the dissent is right and Rule 41(a)(1)(A)(i) does apply, the dissent misunderstands how Rule 41(a)(1)(A)(i) would

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[11] The dissent argues that a plaintiff proceeding under Rule 41(a)(1)(A)(i) may "withdraw[]" "the complaint . . . on the plaintiff's motion." But this is an inaccurate characterization of Rule 41(a)(1)(A)(i). Rather, pursuant to this rule, a "plaintiff may dismiss an action *without a court order*" by merely filing "a notice of dismissal," not a motion. FED. R. CIV. P. 41(a)(1)(A)(i) (emphasis added). Notably, the case the dissent cites in support of this proposition concerns a different rule, Rule 41(a)(2), which provides for dismissal "by court order." FED. R. CIV. P. 41(a)(2); *see Templeton v. Nedlloyd Lines*, 901 F.2d 1273, 1274 (5th Cir. 1990). The dissent's confusion on this point belies how poor of a fit Rule 41 is for unfair labor practice proceedings.

operate in this case. Under this rule, "the *plaintiff* may dismiss an action" by filing a notice of dismissal "before the *opposing party* serves . . . a motion for summary judgment." FED. R. CIV. P. 41(a)(1)(A)(i) (emphasis added). To the extent that we can analogize between civil litigation and an unfair labor practice proceeding, *see UFCW*, 484 U.S. at 126 n.21, UNFI is not an "opposing party" to NLRB in the instant case. UNFI is a party aggrieved by the Unions' alleged unfair labor practices. UNFI filed a charge with NLRB, and NLRB decided to prosecute the charge by issuing a complaint. Only if the Unions had moved for summary judgment would Rule 41(a)(1)(A)(i) have been triggered to stop NLRB from unilaterally dismissing the complaint.

Two further observations support the Board's conclusion. First, the order is consistent with the only circuit case identified by the parties that addresses a similar question. *See Boilermakers*, 872 F.2d at 333-34 (holding that "Administrative Law Judges and the Board have no authority to review NLRB's General Counsel's decision to withdraw an unfair labor practice complaint after the hearing has commenced but before evidence on the merits," in part because "the General Counsel always exercises nonreviewable prosecutorial discretion when he withdraws a complaint because he no longer believes the evidence supports it").

Second, we are unpersuaded by UNFI's argument that the Board's order "conflicts with longstanding Board precedent holding that when the merits of a case are being considered by an ALJ or the Board, the General Counsel no longer has unreviewable authority over the complaint." The Board decisions that UNFI cites all prove readily distinguishable from this case. In *UPMC*, an administrative law judge had already conducted a hearing and issued an order before the Board approved a settlement over the objections of the General Counsel. 365 N.L.R.B. 1418, 1418-19 (2017) (*overruled on other grounds by Metro Health, Inc. d/b/a Hosp. Metropolitano Rio*

Piedras & Unidad Laboral De Enfermeras(Os) Y Empleados De La Salud, 373 N.L.R.B. No. 89, 2024 WL 3916103, at *1 (Aug. 22, 2024)). In *Independent Stave Co.*, the Board granted a summary judgment motion over the General Counsel's objection, but only after it had "issued an order transferring the proceeding to the Board and a Notice to Show Cause." 287 N.L.R.B. 740, 740-43 (1987). And in *Robinson Freight Lines*, the Board affirmed a regional director's decision to continue litigating an unfair labor practice charge even though the parties had reached a private settlement. 117 N.L.R.B. 1483, 1484-86 (1957). The Board did not hold in any of these cases that the General Counsel's authority over a complaint becomes reviewable at some point *before* either a hearing has commenced or the Board has issued a notice to show cause and transferred the case to itself.[12]

For the above reasons, we hold that the Board acted within its statutory authority under the NLRA when it concluded that the Acting General Counsel's decision was an unreviewable act of prosecutorial discretion. *See Loper Bright*, 603 U.S. at 412.

B.

UNFI also argues that Acting General Counsel Ohr lacked authority to withdraw the complaint "because his designation was invalid." President

[12] We are also unpersuaded by UNFI's argument that the Board's emphasis on a lack of a Notice to Show Cause is "especially arbitrary here because the Unions have acknowledged in [related] federal district court litigation, which concededly involves the same disputed issues, that . . . these issues are appropriate for summary-judgment resolution." The Unions (who were granted permission to intervene in this case) deny that the federal district court litigation involves the exact same issues. The record does not contain the relevant district court filings. But regardless of the status of this parallel litigation, UNFI cites no authority for the proposition either that the Board must issue a Notice to Show Cause or that the General Counsel cannot withdraw a complaint in cases where the charged party has acknowledged in a related case that the issue is ripe for summary judgment.

Biden removed General Counsel Robb from his office before the end of Robb's four-year term, and UNFI maintains that the President had no authority to do so without cause. UNFI then reasons that because "the President had no power to remove Robb, he had no power to designate Ohr to serve as Acting General Counsel," making "the actions Ohr took as Acting General Counsel . . . void."

This court recently rejected an identical argument. In *Exela Enterprise Solutions v. NLRB*, we considered the petitioner's contention that an unfair labor practice complaint issued by Acting General Counsel Ohr "was *ultra vires* because the President unlawfully removed the former General Counsel without cause." 32 F.4th 436, 441 (5th Cir. 2022). After an extensive analysis of the NLRA's text and structure, we held "that the NLRA does not provide tenure protections to the General Counsel of the Board." *Id.* at 445. Accordingly, we concluded that "President Biden lawfully removed former-General Counsel Robb without cause." *Id.*

Given our decision in *Exela*, this issue is foreclosed.

IV.

We conclude that we have jurisdiction over this petition for review, that Acting General Counsel Ohr's designation was valid, and that the Board correctly determined that Acting General Counsel Ohr had discretion to withdraw the complaint against the Unions. Accordingly, we DENY both NLRB's motion to dismiss the petition for review for lack of jurisdiction and UNFI's petition for review.

ANDREW S. OLDHAM, *Circuit Judge*, dissenting:

As I have already explained, the Board's decision plainly violates 29 U.S.C. § 160. *See United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536, 549 (5th Cir. 2023) (Oldham, J., dissenting), *vacated*, 144 S. Ct. 2708 (2024) (mem.). I write again only to underscore what today's decision says about the rise and fall of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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By requiring courts to defer to "permissible" agency interpretations of statutes, *Chevron* "triggered a marked departure from the traditional approach" to statutory interpretation. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 396–97 (2024). Thankfully, *Loper Bright* ended that misguided experiment by demanding that courts fulfill their constitutional duties to exercise independent judgment on legal questions. By restoring "the traditional understanding of the judicial function," *Loper Bright* dramatically changed the law. *Id.* at 394. And the Supreme Court GVR'd the majority's opinion in this case "for further consideration in light of *Loper Bright*." *United Nat. Foods*, 144 S. Ct. at 2708.

It turns out that "further consideration" was an empty formality. With little new analysis, the majority once again sides with the NLRB, recycling the same reasons it provided two years ago to justify deferring to the Board. Same reasoning, same result, different day.

Not only does that result conflict with *Loper Bright* and the Supreme Court's GVR order, it also reveals the panel's disregard for the old *Chevron* regime. Two years ago, the panel purported to find a "genuine ambiguity" after "exhaust[ing] all the 'traditional tools'" of statutory interpretation. *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9). In effect, it declared that "Congress's instructions ha[d] . . . run out,

leaving a statutory gap." *Loper Bright*, 603 U.S. at 400 (quotation omitted). But lo and behold, there was no gap at all. The majority needed just a couple more paragraphs of analysis to figure out the "single, best meaning" of the statute. *Ibid.* And voila—the NLRB wins again.

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I hope this is not a harbinger of things to come.

In the past, inferior courts have "underruled" Supreme Court precedents they dislike or have "narrowed them from below." *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–88 (1989) (underruling); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923 (2016) (narrowing). Take, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008):

> *Heller* was born as a landmark and perhaps even revolutionary decision. But the passage of time has seen *Heller*'s legacy shrink to the point that it may soon be regarded as mostly symbolic. That transition has happened not in the Supreme Court, but rather in the lower courts. *Heller* has been narrowed from below.

Re, *supra*, at 962–63; *see also, e.g.*, *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447–49 (2015) (Thomas, J., dissenting from denial of certiorari) (noting the Seventh Circuit "limited *Heller* to its facts," adopted a "crabbed reading of *Heller*," and exhibited "noncompliance with our Second Amendment precedents"); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17, 22 (2022) (articulating that after *Heller*, lower courts "coalesced" around a "means-end scrutiny" test that "*Heller* and *McDonald* expressly rejected"); *Wilson v. Hawaii*, 145 S. Ct. 18, 18, 21 (2024) (Thomas, J., statement respecting denial of certiorari) (explaining that "the Hawaii Supreme Court ignored" *Bruen* and "resist[ed the Supreme Court's] decisions" on the

Second Amendment). Regrettably, our court has been part of that effort. *See, e.g.*, *United States v. Peterson*, 127 F.4th 941, 946–47 (5th Cir. 2025) (holding suppressors are "firearms" for purposes of federal statutes but somehow are not "arms" for purposes of the Second Amendment and hence are categorically excluded from any constitutional protection).

Or take the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Supreme Court has said over and over and over that AEDPA's modified *res judicata* rule means federal courts cannot grant habeas relief to a state prisoner unless the relevant state-court decision was *so* wrong that *all* fair-minded jurists would disagree with it. *See, e.g.*, *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam); *Sexton v. Beaudreaux*, 585 U.S. 961, 964–65 (2018) (per curiam); *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam); *Woods v. Etherton*, 578 U.S. 113, 116–17 (2016) (per curiam); *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam). Still, some inferior court "judges have acquired a taste for disregarding AEDPA and [the Supreme Court's] cases on how to apply it." *Davis v. Smith*, 145 S. Ct. 93, 93 (2025) (Thomas, J., dissenting from denial of certiorari) (quotation omitted). Those inferior court judges do so by first announcing their preferred disposition of the case and then asserting (sometimes in a single sentence) "that no fair-minded jurist could possibly disagree with [their] analysis." *Id.* at 95–96 (quotation omitted). That is obviously not how AEDPA works, which is why the Supreme Court has reversed the Sixth Circuit alone "at least two dozen times for misapplying [the statute]." *Id.* at 97.

I hope *Loper Bright* is not destined for the same fate. As this case illustrates, the same judges who might otherwise say "we defer to the agency" might now be tempted to say "the agency's reading of the statute is the best and only permissible one." Or, as some judges do with AEDPA, "I prefer this rule, so any other rule is unreasonable." I do not think that is what *Loper Bright* envisioned, nor do I think it is what the GVR order in this case

contemplated. It would be most unfortunate if the Supreme Court overruled *Chevron* only for inferior courts to continue delegating the judicial power to administrative agencies.

I respectfully dissent.