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**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MARCIA WILLIAMS and KAREN WUNZ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 18-cv-370-RAL
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Defendant.	)	
	)	
	)	

**REPLY IN SUPPORT OF THE  
NATIONAL LABOR RELATIONS BOARD’S MOTION TO DISMISS**

The National Labor Relations Board (“NLRB” or “Board”) respectfully submits this Reply to Plaintiffs Maria Williams and Karen Wunz’s (“Williams and Wunz”) opposition [Doc. 20] to the NLRB’s Motion to Dismiss [Doc. 15-1] (hereinafter “MTD”). In their opposition, Williams and Wunz argue that “modern administrative law” requires that their challenge to an NLRB representation case decision regarding their decertification petition be heard in this Court. Williams and Wunz’s Opposition to NLRB’s Motion to Dismiss [Doc. 20] (hereinafter “Opp.”) 23. On the contrary: Case law construing the National Labor Relations Act (“NLRA” or “Act”) and other statutes over the last seven decades has remained remarkably consistent in delineating when non-statutory review is available, and those circumstances are not present here. All parties agree that preclusion of judicial review must be shown by “clear and convincing evidence.” Opp. 30. But Williams and Wunz fail to acknowledge that the Supreme Court and circuit courts have repeatedly found that the NLRA’s statutory scheme meets that high standard. Williams and Wunz’s attempt to reframe their Complaint as a facial attack on rule under the Administrative Procedure Act (“APA”) fails, both because they are making an as-applied challenge to a

particular representation decision and because they are not challenging a “rule” under the APA, but an adjudicative policy. As neither Williams and Wunz’s statutory claims nor their constitutional claims meet the narrow requirements for non-statutory review under *Leedom v. Kyne*, 358 U.S. 184 (1958) (“*Kyne*”), the instant Complaint must be dismissed for lack of subject matter jurisdiction.

**I. Preclusion of Judicial Review Depends Upon Statutory Language and Legislative History; the Supreme Court Has Construed the NLRA’s Language and History to Preclude Judicial Review of Representation Decisions**

The NLRB agrees with Williams and Wunz that, generally, judicial review of administrative action is presumed. Opp. 8, 10. However, this presumption of judicial review can be overcome by “specific language or specific legislative history that is a reliable indicator of congressional intent or specific congressional intent to preclude judicial review that is fairly discernable in the detail of the legislative scheme.” *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 673 (1986) (internal quotations omitted). As the Third Circuit has explained, the “question whether a statute precludes judicial review ‘is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.’” *McDougal-Saddler v. Herman*, 184 F.3d 207, 212 (3d Cir. 1999) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)).

Using this method of construction in *Bowen*, the Supreme Court found that Congress did not intend to preclude review of the method by which certain Medicare benefits are computed. *Id.* at 675-77. Similarly, in *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483-84 (1991), the Court found no clear congressional language mandating preclusion of federal jurisdiction. *See also Geisinger Cmty. Med. Ctr v. Burwell*, 73 F. Supp. 3d 507, 514 (M.D. Pa. 2014) (citing

*Bowen* to find that judicial review of the agency’s method of decision making was permitted), *rev’d on other grounds sub nom, Geisinger Cmty. Med. Ctr. v. Dep’t of Health & Human Servs.*, 794 F.3d 383, 390 (3d Cir. 2015).

Using this same method of construction, the Supreme Court reached a different result with regard to representation case decisions under the NLRA, which are reviewable only when they form the basis for an unfair labor practice case that reaches a final order. *Am. Fed’n of Labor v. NLRB*, 308 U.S. 401 (1940);<sup>1</sup> *see, e.g., NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979) (hereinafter “*Interstate Dress Carriers*”) and MTD 9-13. Later, Congress reconsidered this choice during the 1947 debates over the Taft-Hartley amendments, and considered whether to permit unions to obtain direct review of representation. “[T]he House Committee Report in support of such an amendment noted the potential unfairness for ‘the employees, who also have no appeal,’ but ultimately decided not to include immediate review of representation case decisions.” *Interstate Dress Carriers*, 610 F.2d at 108 (quoting H.R. Rep.

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<sup>1</sup> Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an ‘order’ of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10(f) is emphasized by the clauses of § 9(d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

*Id.* at 409.

No. 80-245, at 43 (1947)); *see also U.S. v. Erika, Inc.*, 456 U.S. 201, 208 (1982) (statutory language and legislative history provided “persuasive evidence that Congress deliberately intended to foreclose” judicial review).

Williams and Wunz do not truly attempt to question the NLRA’s long-held construction as precluding review of representation decisions. Instead, they attempt an end-run around this precedent by insisting that they are not challenging a particular factual determination but instead are challenging a rule or regulation. See Opp. 11-18, specifically 12 n.4. As explained below, Williams and Wunz are indeed seeking review of the representation determination in their case, and not challenging a rule as defined under the APA.

**A. Williams and Wunz are challenging the Board’s Settlement Bar policy as a vehicle by which to seek review of the dismissal of Williams’s decertification petition**

Williams and Wunz’s Complaint demonstrates that they are not seeking to facially challenge a regulation or policy. The prayer for relief asks this Court to declare unlawful “the ‘Settlement Bar,’ *as applied to Plaintiffs*,” as well as the “NLRB’s Dismissal Order applying the ‘Settlement Bar’ rule to dismiss *Plaintiffs’ decertification petition*.” Complaint 11 (emphasis added). Williams and Wunz’s request for an injunction asks that this Court “prevent[] the NLRB from applying the *Poole Foundry* ‘Settlement Bar’ rule to *Plaintiffs’ decertification petition*” and “requir[e] the NLRB to exercise its statutory duty under Subsection 9(c) to determine whether a question concerning representation exists regarding *Plaintiffs’ decertification petition*.” Complaint 11-12. (emphasis added). All these requests demonstrate that Williams and Wunz are challenging the NLRB’s application of the settlement bar to Williams’s decertification petition, not facially challenging a general policy.

**B. Williams and Wunz are not challenging a rule under the Administrative Procedure Act**

Williams and Wunz assert that they are challenging a rule under the APA, 5 U.S.C. § 551, *et seq.* Opp. 11-12. They further assert that because the statutory text and legislative history of the NLRA are silent about the judicial forum for challenging NLRB rules and regulations, the APA permits review of what they describe as the settlement bar “rule.” Opp. 11-23. But the Board’s settlement bar is not a “rule” under the APA; rather, it is the product of the Board’s adjudicative process.

The APA divides administrative action into two categories: rulemaking and adjudication. *Jean v. Nelson*, 711 F.2d 1455, 1475 (11th Cir. 1983) *reh’g denied* 727 F.2d 957 (1984); *see also NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) (The “Board has primary discretion to choose between rulemaking and adjudication.”). “[A]n agency either issues an ‘order’ by ‘adjudication’ or a ‘rule’ by ‘rulemaking.’” *Jean*, 711 F.2d at 1475. A “rule,” defined by Section 551(4) of the APA, is “the whole or part of an agency statement of general or particular applicability and *future effect*.” 5 U.S.C. § 551(4) (emphasis added). Generally, rules are applicable to an open class and “have only future effect” *Safari Club Int’l v. Zinke*, 878 F.3d 316, 332-33 (D.C. Cir. 2017) (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66 (1969) (plurality opinion) (Fortas, J.)).

An adjudication, by contrast, results in an order – “the whole or part of a final disposition . . . of an agency in a matter other than rulemaking.” *Id.* at § 551(6), (7). Those orders “immediately bind parties by retroactively applying law to their past actions.” *Safari Club Int’l*, 878 F.3d at 333 (citing *Wyman-Gordon Co.*, 394 U.S. at 763-66); *see also Neustar, Inc. v. FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017) (“[A]djudication is by its nature retroactive.”); *Catholic*

*Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013)

(“[A]n adjudication *must* have retroactive effect, or else it would be considered a rulemaking”).

Policies created by adjudication are “fundamentally different” from APA rules or regulations because they evolve in the context of cases “where parties have litigated their unique concerns and can only be applied in a similar context.” *Am. Hosp. Ass’n v. NLRB*, 718 F. Supp. 704, 715 (N.D. Ill. 1989), *rev’d. on other grounds*, 899 F.2d 651 (7th Cir. 1990). Adjudications “may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . But this is far from saying, as [Williams and Wunz] suggest [here], that commands, decisions, or policies announced in adjudications are ‘rules’” as defined by the APA. *Wyman-Gordon Co.*, 394 U.S. at 765-66; *see also Bell Aerospace Co.*, 416 U.S. at 294 (The “Board is not precluded from announcing new principles in an adjudicative proceeding.”); *Neustar, Inc.*, 857 F.3d at 894 (“The fact that an order rendered in an adjudication ‘may affect agency policy and have general prospective application,’ does not make it rulemaking subject to APA section 553 notice and comment.”).

Williams and Wunz attempt to obscure the fact that the settlement bar is *not* the product of an APA rulemaking, but was instead borne of the Board’s adjudicative process, in *Poole Foundry & Mach. Co.*, 95 NLRB 34 (1951). Opp. 11-22. The Board’s order in *Poole* was particularized and binding as a matter of law only the parties to the case. *See Safari Club Int’l*, 878 F.3d at 332. Further, when the Fourth Circuit reviewed and enforced the Board’s decision, it did so under Section 10 of the Act, which provides for review of final Board adjudicative orders in unfair labor practice proceedings, *see Poole Foundry & Mach. Co. v. NLRB*, 192 F.2d 740,

743 (4th Cir. 1951); the Fourth Circuit was not relying upon the APA’s statutory provision for reviewing regulations, 5 U.S.C. § 702.<sup>2</sup>

Once a statutory scheme precludes judicial review, the APA cannot supply jurisdiction. 5 U.S.C. § 701(a)(1); *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Local 542, Int’l Union of Operating Engineers v. NLRB*, 328 F.2d 850, 854 (3d Cir. 1964) (APA does not “extend[] the jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence.”). Williams and Wunz may not skirt the jurisdiction-channeling provision of the NLRA by repackaging their request for review of a representation case decision as a challenge to an APA rule; consequently, this Court must dismiss Williams and Wunz’s Complaint for lack of subject matter jurisdiction.<sup>3</sup>

## **II. Williams and Wunz Do Not Meet the Requirements for Non-Statutory Review of Their NLRA Claims Under *Kyne***

Williams and Wunz cannot meet the exception to the non-reviewability of representation cases set forth in *Kyne*, because the NLRB has not violated a clear and mandatory provision of the NLRA. Without such a violation, Williams and Wunz’s arguments regarding the availability of judicial review are irrelevant. Additionally, Williams and Wunz cannot support their assertion

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<sup>2</sup> Even if Williams and Wunz were indeed challenging an APA rule in the context of a Board proceeding to which they were parties, they would still be required to follow the normal statutory review process, or else demonstrate that they meet the requirements for non-statutory review under *Kyne*. See *Nyunt v. Broad. Bd. of Governors*, 589 F.3d 445, 448-49 (D.C. Cir. 2009) (“Federal employees may not circumvent the [Civil Service Reform Act] requirements and limitations by resorting to the catchall APA to challenge agency employment actions. That principle applies to a systemwide challenge to an agency policy interpreting a statute just as it does to the implementation of such a policy in a particular case.”) (quotation omitted).

<sup>3</sup> If Williams and Wunz wish to challenge the Board’s settlement bar policy generally, not the result in their own case, they are free to file a petition for rulemaking under the APA, 5 U.S.C. § 553(e), which enables any individual to seek wholesale review of a Board policy. See, e.g., petition for rulemaking to eliminate the settlement bar, among other suggested changes, filed by the National Right To Work Legal Defense Foundation, Inc., on December 3, 2018. (Attached as Exhibit 1.)

that the *Kyne* exception is no longer narrow or that it only applies to legal determinations. Opp. 20-21, 28-30.

**A. Williams and Wunz do not make out a violation of a clear and mandatory provision of Section 9**

Williams and Wunz cannot support their assertion that the settlement bar as applied to them violates a clear and mandatory provision of Section 9. Opp. 30. The relevant provisions of Section 9 are “not sufficiently clear and mandatory to fall within the exception engrafted by *Leedom v. Kyne*.” *U. S. Metal Co. Emp. Ass'n v. NLRB*, 478 F. Supp. 861, 863 (W.D. Pa. 1979) (memorandum opinion). Though Section 9 requires the NLRB (1) to investigate election petitions and (2) to provide for an appropriate hearing upon due notice, if the NLRB determines that a question concerning representation exists, the statute does not provide detailed or specific instruction for carrying out those directives. As discussed below, this is evidence of Congress’s express delegation to the NLRB to fill in those statutory gaps.

Section 9 investigations are “particularly within the Board’s discretion; the nature and scope of those proceedings were intentionally not specific in the Act but were to be developed in light of the Board’s experience and expertise.” *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 633 F.2d 1079, 1081 (4th Cir. 1980). Thus, it is not for the courts to “judge the accuracy of the Board’s selective investigative technique;” the Board has “the authority to determine the scope of an investigation necessary to act on a decertification petition.” *Id.* at 1082. Short of NLRB arbitrary action, no court “has the subject matter jurisdiction to quantitatively gauge the Board’s representation investigation.” *Id.*

Without caselaw to support the argument that courts can dictate the *scope* of the NLRB’s investigation, Williams and Wunz rely on cases in which courts found the NLRB did not investigate at all. See Opp 31-33. Each of those cases is inapposite. Williams and Wunz rely

upon *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971), and *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972), but the Fifth Circuit only intervened in those cases because it found the NLRB did not investigate at all. Those cases dealt with “the very unusual situation” where the NLRB applied its blocking charge policy (a different bar to an election) “as a per se rule without making a determination in each case ‘whether the violation alleged is such that the consideration of the election petition ought to be delayed or dismissed.’” *Bishop v. NLRB*, 502 F.2d 1024, 1031 (5th Cir. 1974). See also MTD 4, 5, 17. “Only where the NLRB acts with the high degree of arbitrariness exhibited in *Templeton* and *Surratt* can the Board be said to have acted in violation of the Act, and thus fall within the prohibition of *Kyne*.” *Id.* (emphasis added). Thus, district court jurisdiction is “something to be expected rather less often than a bloom on a century plant.” *Id.* at 1032.

In the instant case, the Regional Director’s decision demonstrates that the NLRB fulfilled its duty to investigate Williams’ decertification petition, evaluated all the relevant facts, and did not “mechanistically” apply the settlement bar rule. See Doc. 1-2, pp. 36-44. There is no truth to Williams and Wunz’s assertion that the NLRB applied the settlement bar as a per se rule, arrogated its discretion to make a careful determination based on the facts of this individual case, or promulgated a rule that it would not investigate petitions when a settlement agreement is present. Opp. 33.<sup>4</sup>

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<sup>4</sup> Williams and Wunz’s citation to *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1654-55 (2015), Opp. 8, 10, 30, aids the Board’s position that the Regional Director’s investigation is sufficient under Section 9. There, although the Court found that the EEOC was required to engage in conciliation, it also found that the statutory text gave the EEOC such “expansive discretion” over the conciliation process that a sworn affidavit stating that the EEOC attempted conciliation would be sufficient.

When faced with the allegations such as those raised by Williams and Wunz, “it is tempting for a court to second-guess the Board . . . However, this is precisely what the Supreme Court cautioned against in *American Federation of Labor, Leedom v. Kyne*, and *Boire v. Greyhound*.”<sup>5</sup> *Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1313 (D.C. Cir. 1984). Therefore, “*any colorable support for the Board’s ruling should be treated as a jurisdictional defect dictating dismissal.*” *Id.* (quotation omitted).

Any Board policy that has obtained circuit court approval has, at the very least, “colorable support” sufficient to render a district court without jurisdiction in a case challenging that policy. Here, the circuit courts’ repeated approval of the settlement bar evidences such support. *See Randall Div. of Textron, Inc. v. NLRB*, 965 F.2d 141, 145-46 (7th Cir. 1992) (affirming the Board’s use of the settlement bar and explaining the importance of its rationale); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1111 (1st Cir. 1981) (explaining rationale for settlement bar), *abrogated on other grounds by NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775 (1990); *NLRB v. All Brand Printing Corp.*, 594 F.2d 926, 929 (2d Cir. 1979) (discussing the validity and purpose of the settlement bar); *NLRB v. Universal Gear Serv., Corp.*, 394 F.2d 396, 398 (6th Cir. 1968) (acknowledging validity of the rationale of the settlement bar); *W.B. Johnston Grain Co. v. NLRB*, 365 F.2d 582, 586 (10th Cir. 1966) (affirming the validity of the settlement bar); *NLRB v. Commerce Co.*, 328 F.2d 600, 601 (5th Cir. 1964) (affirming the Board’s reliance on unfair labor practice settlement bar to dismiss a decertification petition); *NLRB v. Stant Lithograph, Inc.*, 297 F.2d 782 (D.C. Cir. 1961) (per curiam) (enforcing a Board order based solely on its agreement with the reasoning of *Poole Foundry*).

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<sup>5</sup> 376 U.S. 473 (1964).

In the face of this overwhelming support, Williams and Wunz cannot prevail in their argument that the NLRB's application of the settlement bar violates a clear and mandatory provision of the Act. Without such a violation, Williams and Wunz do not meet the requirements for non-statutory review under *Kyne* of their statutory claims.<sup>6</sup>

**B. Under *Kyne*, the unavailability of an alternative means of judicial review is irrelevant without a violation of a clear and mandatory provision of Section 9**

Williams and Wunz put the proverbial cart before the horse by asserting that they meet the *Kyne* exception merely because they have no alternative means for judicial review. Opp. 27-28. “[T]he absence of an alternative means of redress is irrelevant when a plaintiff can point to no violation of a clear statutory mandate.” *Hartz Mountain*, 727 F.2d at 1313. That Williams and Wunz will have no alternate means of review “is not *by itself* enough to trigger the *Kyne* exception.” *Id.* at 1312; *see also Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991) (explaining that both *Kyne* prongs must be met to obtain non-statutory judicial review); MTD 12.

This Court has acknowledged that meeting only the second prong of *Kyne* is insufficient to confer subject matter jurisdiction. In *U.S. Metal Co. Employees' Ass'n*, the United Steelworkers of America filed an election petition pursuant to Section 9(c). 478 F., Supp at 862. After the pre-election hearing, a second labor organization claimed to be the bargaining representative for the employees in question and, among other things, filed a petition with the NLRB to intervene in the election. *Id.* After the Regional Director denied the petition and the Board affirmed, that organization and the employer filed a complaint before this Court. *Id.* This

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<sup>6</sup> By contrast, in *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994), Opp. 15-16, the D.C. Circuit found that the National Mediation Board promulgated a rule in “gross violation” of the plain language and legislative history of the Railway Labor Act, which provides no rulemaking authority to that agency. *Id.* at 662.

Court found there was no jurisdiction under *Kyne* because the parties could not demonstrate a violation of a clear and mandatory provision; it did not require an analysis of the second prong. *Id.* at 864. The Court further acknowledged that while the employer could obtain judicial review by drawing an unfair labor practice charge, the organization would be unable to obtain post-election review of its constitutional challenge. *Id.* The unavailability of review did not alter the Court's decision to dismiss the complaint. *Id.*

**C. The *Kyne* exception remains narrow and is not limited to factual questions**

None of the cases cited by Williams and Wunz demonstrate that the *Kyne* exception is no longer “narrow.” See Opp. 28-30. Instead, most of these cases cite *Kyne* for the familiar proposition, explained above, that judicial review will not be cut off unless there is a persuasive reason to believe that was Congress's purpose. The key fact here is that these cases, including *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), and *Interstate Dress Carriers*, 610 F.2d at 106, reaffirm that the NLRA does not permit non-statutory review unless both prongs of the *Kyne* exception have been met. And to the extent that Williams and Wunz allege that “[s]ubsequent cases have refined the *Kyne* doctrine,” Opp. 29, those cases have not expanded the *Kyne* exception in the manner charged by Williams and Wunz; instead, courts have further restricted the availability of the *Kyne* exception to provide non-statutory review.<sup>7</sup>

Williams and Wunz's assertion that *Boire v. Greyhound* limits *Kyne*'s application to factual questions is flatly wrong. See Opp. 20-21. They argue that the *Kyne* exception is reserved for factual questions because the *Boire v. Greyhound* Court found there was no subject matter

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<sup>7</sup> *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977), and *MCorp Financial, Inc.*, 502 U.S. at 44, (Opp. 29), simply make the point that *Kyne* does not provide non-statutory judicial review when the statutory language expressly forecloses such review. See also *Clinton Cty. Commr's v. EPA*, 116 F.3d 1018, 1028-29 (3d Cir. 1997).

jurisdiction when the NLRB's "erroneous assessment of the particular facts . . . led it to a conclusion which [did] not comport with the law." See Opp. 20-21. The Seventh Circuit addressed this "unfortunate" misunderstanding of *Boire v. Greyhound* decades ago in *Chicago Truck Drivers, Helpers & Warehouse Workers Union v. NLRB*, 599 F.2d 816 (7th Cir. 1979). There, the court found that such a "broad interpretation" of *Boire v. Greyhound* would provide judicial review in every representation case in which the sole disputed issue was legal, which would "violate Congress' intent as expressed in the legislative history of the statute" and "contradict the express purpose for [*Boire v. Greyhound's*] discussion of *Kyne*: to reexplain the earlier decision's 'narrow,' 'painstakingly delineated procedural boundaries . . .'" 599 F.2d at 818 (quoting *Boire v. Greyhound*, 376 U.S. at 481); see also *Hartz Mountain Corp.*, 727 F.2d at 1311 (*Boire v. Greyhound* "expressly restricted the *Kyne* exception to instances where the error of the Board is patently an incorrect construction of the Act. A finding of fact, though contrary to the weight of the evidence, is not reviewable under the *Kyne* exception.").

Over the last twenty years, *Kyne* has been applied to preclude judicial review of many legal questions, such as due process concerns raised in *Amerco v. NLRB*, 458 F.3d 883, 888-90 (9th Cir. 2006), and the proper interpretation of the NLRA in *Pacific Maritime Ass'n v. NLRB*, 827 F.3d 1203, 1210-12 (9th Cir. 2016) (examining Sections 8(b)(4)(d) and 2(3)), and *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 399-401 (6th Cir. 2002) (construing reach of Section 10(b)); see also *MCorp Financial, Inc.*, 502 U.S. at 42-44 (considering validity of Board of Governors of the Federal Reserve System's "source of strength" regulation). *Kyne's* test remains extraordinarily difficult to meet; Williams and Wunz have not come close to approaching its requirements.

### **III. Williams and Wunz Do Not Meet the Requirements for Non-Statutory Review of Their Constitutional Claims**

Williams and Wunz’s bare assertions of constitutional violations fail to overcome the high jurisdictional bar to obtaining non-statutory review. *See Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005) (a court need not credit a plaintiff’s “bald assertions” or “legal conclusions” when deciding a motion to dismiss). Thus, only a “strong and clear” constitutional violation supports non-statutory review. Such a violation cannot be shown here in light of the decades of circuit law upholding the Board’s properly delegated authority to construe Section 9. See Section II.A above. Moreover, because this case is “of the type Congress intended to be reviewed within th[e] statutory structure,” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994), Williams and Wunz’s attempt to gain admission to the courthouse through a non-statutory backdoor fails.

#### **A. Allegations of constitutional violations must be “strong and clear” to invoke non-statutory review**

“Since Congress expressly restricted judicial review [of Board proceedings] in order to prevent delay in certification and to expedite the settlement of labor disputes,” an allegation of a deprivation of constitutional rights must be “strong and clear” to invoke district court jurisdiction. *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968); *Squillacote v. Int’l Bhd. of Teamsters, Local 344*, 561 F.2d 31, 38 (7th Cir. 1977) (hereinafter “*Teamsters, Local 344*”) (quoting *Libbey-Owens-Ford Glass Co.*); *cf. Barnes v. Chatterton*, 515 F.2d 916, 920 (3d Cir. 1975) (acknowledging an exception to doctrine of exhaustion of administrative remedies where agency action “clearly and unambiguously” violates constitutional rights”).

In *Teamsters, Local 344*, the Seventh Circuit affirmed the dismissal of a union’s constitutional challenge to the Board’s dismissal of its representation petition, which alleged that

the Board's decision unconstitutionally penalized the rights of association between the union and its members. 561 F.2d at 37. There, the court noted that district court jurisdiction premised on constitutional claims that are merely "not transparently frivolous" would be "fundamentally inconsistent with repeated Supreme Court admonitions regarding the 'narrow limits' and 'painstakingly delineated procedural boundaries of *Kyne*.'" *Id.* at 38 (quoting *Boire v. Greyhound*, 376 U.S. at 481). Other courts have reached similar conclusions. *See Greensboro Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 32 (4th Cir. 1967) (rejecting assertion that an alleged constitutional violation merely not "transparently frivolous" confers district court jurisdiction in a representation case); *Boire v. Miami Herald Pub. Co.*, 343 F.2d 17, 25 (5th Cir. 1965) (finding a "bare allegation" that the NLRB's "contravention of the statute results in a denial of due process . . . is not substantial enough to vest jurisdiction in the district court"). As explained below, Williams and Wunz's constitutional claims do not make out the requisite strong and clear showing of a constitutional violation.

**B. Williams and Wunz's claims that the NLRB has violated separation of powers, nondelegation doctrine, and due process, fail to make out a strong and clear showing of a constitutional violation.**

Williams and Wunz argue that the NLRB usurped legislative power from Congress when it created the settlement bar, and alternatively, that Congress unconstitutionally delegated to the Board the authority to change the plain meaning of the statute. Opp. 25-26. In addition, they allege the settlement bar deprives them, without due process, of the protected statutory right to refrain from unionization. Opp. 26-27. Williams and Wunz have failed to provide persuasive legal support for these claims.

Neither the principle of separation of powers, nor the nondelegation doctrine, "prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*,

488 U.S. 361, 372 (1989). Although Congress may not delegate legislative power, Congress “may confer on an executive agency the discretion to implement and enforce laws if Congress provides an intelligible principle.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). A delegation is “constitutionally sufficient if Congress clearly delineates the general policy [to be pursued], the public agency which is to apply it, and the boundaries of th[e] delegated authority.” *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

The Court “ha[s] ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001) (“*American Trucking*”) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). In the Nation’s history, only twice has the Court found that delegations exceeded Congress’s authority. *American Trucking*, 531 U.S. at 474. Those were both instances in which “Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.” *Mistretta*, 488 U.S. at 373 n.7 (emphasis added).

As a general matter, the NLRB has been properly delegated by Congress the authority to interpret the NLRA in the first instance. *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (“When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency’s decision controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. Because this case involves that kind of express delegation, the Board’s views merit the greatest deference.”) (quotation omitted); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 147 (3d Cir. 1994) (finding the NLRB “is charged with the responsibility of interpreting and enforcing the Act”) (Alito, J.). Moreover, Section 9(c)(2) of the Act—enacted as part of the 1947 Taft-Hartley amendments—makes even more clear that the

Board has authority to fashion adjudicatory principles to decide representation issues. That provision states:

In determining whether or not a question of representation affecting commerce exists, the same regulations *and rules of decision* shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

29 U.S.C. § 159(c)(2) (emphasis added).<sup>8</sup> Accordingly, Section 9 of the Act recognizes the Board’s power to develop and apply rules of decision through adjudication when determining whether a petition raises a question concerning representation.

The same conclusion is evident when examining the *American Power & Light* criteria for non-delegation, 329 U.S. at 105. First, Section 1 of the NLRA specifically prescribes the general policy Congress charged the Board with pursuing.<sup>9</sup> Second, the NLRA designates the NLRB as the public agency meant to apply the policies of the Act. And finally, the boundaries of the NLRB’s delegated authority have been specified because Section 9 requires that the Board investigate petitions, and if a question concerning representation is found, hold an election.

Nevertheless, statutory gaps exist in that scheme. As then-Judge Alito recognized, Congress empowered the NLRB to fill in the such statutory gaps by “adopt[ing policies] through case-by-case adjudication, to flesh out the concept[s]” relevant and necessary to the

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<sup>8</sup> Since at least 1938, the term “rules of decision” has been understood to encompass adjudicatory decisions with precedential effect. *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>9</sup> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

administration of the Act. *Stardyne, Inc.*, 41 F.3d at 147-48 (examining the Board’s interpretation of whether a second company was an alter ego of the employer); *see also Wyman-Gordon Co.*, 394 U.S. at 767 (“Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives.”). This gap-filling concept has been applied by the Supreme Court in non-NLRA cases as well. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (A “statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress”).

Congress left the NLRB to fill the statutory gap of determining how a representation case investigation should proceed. See Section II.A above. Moreover, the manner in which the NLRB filled the statutory gap in this case did not violate Williams and Wunz’s due process rights. Even assuming for the sake of argument a protectable interest predicate to a due process injury — which Williams and Wunz have the burden to establish — they fail to show that the process afforded to them was constitutionally inadequate. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (noting that the requirements of due process are “flexible and call for such procedural protections as the particular situation demands”) (brackets and quotation marks omitted). Here, Williams had notice of the NLRB’s initial determination that her petition was barred pursuant to a settlement agreement, and “a meaningful opportunity to present [her] case” to the Board regarding that determination. *See Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). Moreover, there is no constitutional requirement that review by an Article III tribunal be available to every

adjudication of a public right. *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 588 (1985). Accordingly, there is no merit to Williams and Wunz’s due process claim.

A second statutory gap—how to define a question concerning representation in a situation where an employer executed an agreement settling unfair labor practice charges by promising to bargain with a union—has also been properly filled by the Board, by creating the settlement bar in *Poole Foundry*. When the Fourth Circuit enforced that Board order, it approved the NLRB’s resolution of Section 9’s statutory ambiguity. *See Poole Foundry*, 192 F.2d at 743. Contrary to Williams and Wunz’s assertions, the courts have upheld the Board’s interpretation of Section 9 as well within the clearly delineated “boundaries of [its] delegated authority.” *Am. Power & Light Co.*, 329 U.S. at 105.

At base, this suit presents a dispute about whether the NLRB may apply a policy judgment to a question within its expertise in a particular case. To allow plenary district court review of run-of-the-mill statutory interpretation disputes under the ill-fitting guise of constitutional claims would create an exception that would swallow the preclusive rule Congress established. Parties “may not dress up a claim with legal clothing to invoke this Court’s jurisdiction.” *Pareja v. Attorney Gen. of U.S.*, 615 F.3d 180, 187 (3d Cir. 2010). Because Williams and Wunz’s attempt to adorn their claims in constitutional garb does not bear scrutiny, such claims do not create jurisdiction in this Court.

**C. The constitutional claims alleged here are of the type Congress intended to be reviewed within the NLRA’s statutory structure**

To no avail, Williams and Wunz rely upon *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), and *Webster v. Doe*, 486 U.S. 592 (1988), to provide an alternative path to non-statutory judicial review [Opp. 23-25]. Even if those cases were to be considered applicable in the NLRA context, Congress’s intent to have litigants proceed exclusively through the Act’s framework of

administrative and judicial review has long been considered “fairly discernible” from the NLRA’s statutory scheme. *Elgin*, 567 U.S. at 9; MTD 9-11.

Thus, the remaining question to determine the availability of non-statutory review is whether the claims at issue are “of the type Congress intended to be reviewed within th[e] statutory structure.” *Thunder Basin*, 510 U.S. at 212. To aid this inquiry, the Supreme Court has outlined considerations that weigh in favor of non-statutory review jurisdiction: if the suit is “wholly collateral to a statute’s review provisions;” if the claims are “outside the agency’s expertise;” and if “a finding of preclusion could foreclose all meaningful judicial review.” *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-90 (2010); see *Jarkesy v. SEC*, 803 F.3d 9, 17 (D.C. Cir. 2015) (explaining that these “general guideposts” do not create a “strict mathematical formula”).

Here, Williams and Wunz’s suit is hardly “wholly collateral” to the NLRA’s review provisions. Rather, this suit seeks to fundamentally interfere with them. Nor are these claims outside the Board’s expertise. Like those in *Thunder Basin*, 510 U.S. at 214, these claims “at root require interpretation of the parties’ rights and duties” under the statute; they can only be addressed by engaging in a thorough exploration of the NLRB’s delegated authorities under Section 9. See Section II.B above; MTD 13-16. Finally, while the NLRA precludes judicial review of representation case decisions unless they become the basis of an unfair labor practice case, the present controversy is clearly “of the type” Congress intended to be reviewed within the NLRA’s structure. *Thunder Basin*, 510 U.S. at 212; see also *Jarkesy*, 803 F.3d at 17. Accordingly, where, as here, Congress “creates procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.” *Free*

*Enterprise Fund*, 561 U.S. at 489 (internal quotations omitted).<sup>10</sup> Williams and Wunz’s constitutional claims cannot provide a judicial forum contrary to limitations imposed by Congress.

### CONCLUSION

For the foregoing reasons, and those articulated in the NLRB’s Motion to Dismiss, this Court lacks jurisdiction to review the NLRB’s dismissal of Williams’ decertification petition. Accordingly, this Court should dismiss the Complaint.

Respectfully submitted,

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<sup>10</sup> As the Supreme Court has explained, rather than creating a "rigid scheme" to enforce rights of individuals, "[t]he Act . . . entrusts to an expert agency the maintenance and promotion of industrial peace." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957) (Congress entrusted to the Board the "difficult and delicate responsibility" of balancing "conflicting legitimate interests" in exercising its statutory function of effectuating national labor policy); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

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