Case No. 15-60333

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SANDERSON FARMS, INCORPORATED; SANDERSON FARMS, INCORPORATED (PROCESSING DIVISION),
Plaintiffs—Appellants,

v.

NATIONAL LABOR RELATIONS BOARD; M. KATHLEEN MCKINNEY, IN HER OFFICIAL CAPACITY AS REGIONAL DIRECTOR OF REGION 15,
Defendants—Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi, Eastern Division
Civil Action No. 2:14-cv-126

BRIEF OF APPELLEES NATIONAL LABOR RELATIONS BOARD, et al.

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

RICHARD A. BOCK
Deputy Associate General Counsel

BARBARA O'NEILL
Assistant General Counsel
(202) 273-2958

NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
(202) 273-2937

MARISSA A. WAGNER
Attorney
(202) 273-2957

NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET, S.E., 4TH FLOOR
WASHINGTON, DC 20570

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fifth Circuit Rule 28.2.1, undersigned counsel of record agrees with Appellants' listing of interested parties. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted,

/s/ Nancy E. Kessler Platt
Nancy E. Kessler Platt
Attorney of Record for Appellees

Dated at Washington, D.C.
this 25th day of August, 2015

STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of well-settled legal principles. Accordingly, the National Labor Relations Board maintains that oral argument is unnecessary.

TABLE OF CONTENTS

Headings: **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd: **Page(s)**

TABLE OF CITATIONS

Cases: **Page(s)**

TABLE OF CITATIONS

Cases-Cont'd: **Page(s)**

TABLE OF CITATIONS

Cases-Cont'd: **Page(s)**

TABLE OF CITATIONS

Cases-Cont'd: **Page(s)**

TABLE OF CITATIONS

Cases-Cont'd: **Page(s)**

TABLE OF CITATIONS

Cases-Cont'd: **Page(s)**

Statutes:

TABLE OF CITATIONS

Statutes -Cont'd: **Page(s)**

Federal Rules:

TABLE OF CITATIONS

Regulations: **Page(s)**

Other Authorities:

Legislative Materials:

COUNTERSTATEMENT OF JURISDICTION

This case is before the Court upon the appeal of Appellants Sanderson Farms, Inc. and Sanderson Farms, Inc. (Processing Division) (collectively "Appellants" or "Sanderson Farms") of a decision of the United States District Court for the Southern District of Mississippi, issued on April 15, 2015, dismissing the complaint for lack of subject matter jurisdiction, *Sanderson Farms, Inc. v. NLRB*, 2:14-cv-00126-KS-MTP, 2015 WL 1711618 (S.D. Miss. April 15, 2015). ROA.385-391.[1] Sanderson Farms timely filed a notice of appeal on May 7, 2015. ROA.393. This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291, and should affirm the District Court's dismissal for lack of jurisdiction.

COUNTERSTATEMENT OF THE ISSUE

Whether the District Court correctly dismissed for lack of subject matter jurisdiction Appellants' suit to prohibit the General Counsel of the National Labor Relations Board (the "NLRB" or "Agency")[2] from investigating unfair labor practice charges filed against Sanderson Farms, where the procedures established by the National Labor Relations Act (the "NLRA" or "Act") have not been exhausted, and provide an adequate method for judicial review if Appellants are

[1] "RE" refers to the Record Excerpts filed by Appellants in compliance with Fifth Circuit Rule 30.1. "ROA" refers to the Electronic Record on Appeal prepared by the District Court. "Br." refers to Appellants' opening brief.

[2] References to the "NLRB" or "Agency" refer to the agency as a whole; references to the "Board" refer specifically to the five-member administrative adjudicatory body created by 29 U.S.C. § 153(a).

eventually aggrieved by a final Board Order.

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

Under Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), the General Counsel of the NLRB has "final authority in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . ."[3] The General Counsel's pre-hearing exercise of his Section 3(d) "final authority" is not subject to Board or judicial review. *NLRB v. United Food and Commercial Workers Union, Local 23 ("UFCW")*, 484 U.S. 112, 124-26, 129, 131 (1987). Instead, NLRB unfair labor practice proceedings are subject to judicial review only when those proceedings have culminated in the issuance of a final Board Order, and then only in a United States court of appeals. 29 U.S.C. §§ 160(e) and (f). *See also UFCW*, 484 U.S. at 118, 130-31; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938).

Appellants filed a Complaint in the District Court alleging that the NLRB and its Regional Director, Kathleen McKinney ("the Regional Director"), acting in her official capacity, violated certain sections of the Administrative Procedures Act ("APA"), 5 U.S.C. § 702 *et seq*. Despite Appellants' repackaging of their claims on appeal, this is not a suit to review Appellants' claims about the alleged

[3] See the statutory addendum, attached to this brief, for the text of Section 3(d) and other relevant sections of the Act.

misrepresentations made by NLRB employees. This is a suit under the APA seeking review of the Regional Director's refusal to accept the request of the Laborers' International Union of North America, Local 693 ("Local 693" or "the Union") to withdraw the pending unfair labor practices charges it filed against Sanderson Farms or to dismiss certain of those charges based on Appellants' representations that they lacked merit. As the Complaint makes clear, the gravamen of Appellants' lawsuit is that the Agency had no legitimate basis for declining the withdrawal and dismissal requests and continuing its investigation of the charges. ROA.14-17. The alleged false representations made by NLRB personnel are merely one aspect of this challenged decision, and are the hook by which Appellants hope to stop the Agency's investigation in its tracks.

Under well-settled law, the District Court held that it lacked subject matter jurisdiction over Appellants' objections about the underlying administrative investigation based on Appellants' failure to exhaust administrative remedies. ROA.391. The District Court properly rejected Appellants' reliance on the very narrow and rarely used exception to the rule of no district court review of NLRB proceedings recognized by the Supreme Court in *Leedom v. Kyne*, 358 U.S. 184 (1958) ("*Kyne*"). ROA.388-390. That exception permits district courts to exercise jurisdiction under 28 U.S.C. § 1337 "to strike down an order of the Board," *id.* at 188, if, and only if, "the absence of jurisdiction of the federal courts [would]

mean[] a sacrifice or obliteration of a right which Congress has created." *Id.* at 190 (citation omitted). In this case, the District Court properly concluded that Sanderson Farms could not satisfy the two strict *Kyne* requirements to prove that the NLRB committed a plain violation of the NLRA by continuing its investigation of the charges, and that without district court review Sanderson Farms would be deprived of a meaningful opportunity to vindicate their statutory rights. *Id.*; *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Financial, Inc. ("MCorp")*, 502 U.S. 32, 43 (1991).

B. The Underlying Administrative Proceedings

1. *The relevant unfair labor practice cases*

Local 693 was the recognized collective bargaining representative for two separate bargaining units of production and maintenance employees at Appellants' processing plants in Hazlehurst, and Collins, Mississippi. The underlying administrative proceedings arose from seven unfair labor practice charges filed by Local 693 and one of its members against Sanderson Farms with NLRB Region 15 in New Orleans, Louisiana ("the Region").[4] Those charges alleged, *inter alia*, that Appellants had committed numerous violations of Sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3).

Specifically, on October 12, 2011, the Union filed unfair labor practice

[4] At issue in this case are NLRB Charge Nos. 15-CA-066574 (ROA.77), 15-CA-071103 (ROA.82), 15-CA-071104 (ROA.86), 15-CA-071119 (ROA.90), 15-CA-89244 (ROA.113), 15-CA-103890 (ROA.116), and 15-CA-109264 (ROA.118).

charge 15-CA-066574. That charge, as amended, alleges that Sanderson Farms unlawfully interfered with, restrained and/or coerced its employees in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by telling unit employees at its Collins plant that they were being disciplined because of the actions of a union official. ROA.77.[5] On December 20, 2011, the Union filed additional charges 15-CA-071103, -071104, and -071119. Those charges, as amended, allege that Sanderson Farms violated the Act by, among other things: (1) more stringently enforcing work rules and taking other adverse actions against unit employees in order to discourage them from engaging in union and/or protected concerted activity; (2) unilaterally changing certain past practices that adversely impacted the working conditions of unit employees without first bargaining with the Union; and (3) disciplining employee and union steward Tina Taylor ("Taylor") in retaliation for her union and/or protected concerted activity. These charges also concern the Collins plant. ROA.82; ROA.86; ROA.90.[6]

The Region, on behalf of the NLRB's General Counsel, conducted an investigation of the merits of these four unfair labor practice charges (15-CA-066574, -071103, -071104, and -071119) (the "Initial Four Charges"), and concluded that there was sufficient evidence to warrant issuance of an administrative complaint. A consolidated complaint and notice of hearing was

[5] There are no named discriminatees included on Charge No. 15-CA-066574.

[6] Tina Taylor is a named discriminatee in Charge Nos. 15-CA-071104 and -071119.

issued against Sanderson Farms in connection with the Initial Four Charges. ROA.92-99. However, the Region subsequently dismissed that complaint and withdrew the notice of hearing. ROA.101-103. By written correspondence on May 9, 2013, the Region explained to Appellants that it was instead deferring further proceedings on the Initial Four Charges to the parties' grievance procedures, which had been invoked concurrently, in accordance with Agency policy. The Region further represented that it would continue to monitor the Union's handling of these grievances and could, under certain circumstances, resume administrative processing of the charges.[7] ROA.218-222; ROA.225-229; ROA.232-235; ROA.237-240.

An additional three unfair labor practice charges were filed between September 2012 and July 2013, and involve the discipline and discharge of Taylor and former employee Takisha McGhee ("McGhee") (the "Subsequent Three Charges"). Shortly after Taylor was terminated, she filed unfair labor practice charge 15-CA-089244, in her individual capacity. That charge, as amended, alleges that Taylor was disciplined and discharged in retaliation for her union and protected concerted activities. ROA.113. McGhee worked at Sanderson Farm's

[7]A Region may decide to revoke deferral and resume the processing of charges if a union or employer fails to promptly process the grievance under the grievance/arbitration process, declines to arbitrate the grievance if it is not resolved, and/or if a conflict develops between the interests of the union and the discriminatees and/or charging party. *See generally* Sec.10118 of the NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, available at: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-1.pdf, describing the NLRB's deferral procedures.

Hazelhurst plant, and was also serving as a Union steward at the time of her termination on or around April 8, 2013. The Union filed two charges against Sanderson Farms on McGhee's behalf, alleging that she was suspended and terminated in violation of Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (Charges 15-CA-103890, -109264). ROA.116, 118.[8]

The Region conducted an initial investigation of the Subsequent Three Charges (15-CA-089244, -103890 and -109264), but never issued a complaint with respect to them. Instead, on April 30, 2012, the Region determined it would be appropriate to defer the Subsequent Three Charges to the parties' grievance procedures. Again, the Region explicitly stated that it could, under certain circumstances, resume administrative processing of the charges. ROA.120-124; ROA.127-130; ROA.133-136.

2. *The union's withdrawal requests and subsequent events*

On September 17, 2013, subsequent to the Region's deferral of the unfair labor practice charges discussed above, Local 693 was put into trusteeship by Laborers' International Union of North America ("the International"), and placed under the control of Trustee Robert Richardson and Deputy Trustee Darren Johnson. On February 4, 2014, Deputy Trustee Johnson sent a letter to the Region

[8] After an investigation by the Region, the other allegation in charge 15-CA-103890, concerning the alleged failure to allow an employee representation during an investigative interview, was withdrawn with approval of the Regional Director. ROA.127.

requesting that he be permitted to withdraw all seven of the above-mentioned charges. ROA.20. The Region was subsequently notified that Local 693 disclaimed its interest in the bargaining units at the Hazlehurst and Collins plants. ROA.27.[9]

By separate letters dated February 24, February 25, and February 26, 2014, the Region notified Sanderson Farms of its decision to resume processing of the seven charges and revoke their deferral status. The letters stated that this decision was based on the Union's failure to pursue the grievances, the wishes of the discriminatees for the continued investigation and prosecution of the unfair labor practice charges, and the related nature of the various charges. ROA.140-141; ROA.142-143; ROA.144-145. In response to further inquiries from the Union, Dorothy Wilson, Assistant General Counsel for the NLRB's Division of Operations-Management ("Wilson"), confirmed that the Region's determination to resume processing of the charges was appropriate under the circumstances and in accordance with outstanding Agency policy and casehandling guidance. ROA.21; ROA.25. Wilson also stated that the Region might be willing to approve the withdrawal requests after further investigation was completed. ROA.21.

[9] A *disclaimer of interest* is an initiative by an incumbent labor organization, whereby that labor organization formally disclaims its representational role as the exclusive bargaining agent for its members. "To be effective, a union's disclaimer must be clear, unequivocal, and in good faith." *United Steel Workers of America, Local 14693, AFL-CIO-CLC and Skibeck, P.L.C., Inc.*, 345 NLRB 754, 755 (2005).

Although the Region had previously determined that there was sufficient evidence to warrant issuance of an administrative complaint on the Initial Four Charges, no final decision had been reached about whether to issue complaint on the Subsequent Three Charges. Therefore, upon resumption of its investigation, the Region attempted to obtain evidence from Appellants regarding the allegations set forth in the Subsequent Three Charges. Sanderson Farms did not cooperate in the Region's resumed investigation, electing not to provide requested evidence or otherwise state its position in writing. Consequently, the Region issued administrative subpoenas to Sanderson Farms in order to obtain the requested documentary evidence and testimony. ROA.156-163. Pursuant to Section 102.31 of the NLRB's Rules and Regulations, 29 C.F.R. § 102.31, Sanderson Farms filed petitions to revoke the subpoenas with the Board. On July 23, 2014, the Board denied those petitions to revoke. ROA.191-193. Accordingly, the Region initiated a subpoena enforcement proceeding in the United States District Court for the Southern District of Mississippi, which remains pending.[10]

As the parties were awaiting the Board's decision on the petitions to revoke, Sanderson Farms sent a letter to the Regional Director expressing

[10] Sanderson Farms has moved to stay the subpoena enforcement proceeding in *NLRB v. Sanderson Farms, Inc.*, Case No. 2:14-mc-00201-KS-MTP (filed Dec. 22, 2014), based on the pendency of the instant appeal. Briefing on Sanderson Farms' stay motion has been completed and is awaiting decision by the District Court. *See id.*, Dkt. Nos. 20, 25, 29.

displeasure with the continued investigation of the charges. In particular, Sanderson Farms asserted that, as reflected by the Union's withdrawal request, most of the discriminatees did not want to be involved, and the charges involving McGhee lacked merit and should be dismissed because McGhee stated her termination was due to a workers' compensation claim. ROA.28-31. Sanderson Farms reiterated this position to Wilson a few weeks later, and further stated that they would cooperate in the investigation of the charges involving Taylor if the Region would approve the Union's withdrawal of the remaining charges and discriminatees. ROA.32-34. Wilson responded that the Union did not have the authority to withdraw charge 15-CA-089244 because Taylor filed that charge, rather than the Union, and thus was the charging party in that case. She further explained that the Region had decided to postpone making a final determination regarding the Union's remaining withdrawal requests until after the completion of the open investigation into the Subsequent Three Charges alleging unlawful disciplinary treatment of Taylor and McGhee. ROA.36. In subsequent correspondence, Sanderson Farms repeated their willingness to "settle" on similar terms to what had previously been communicated to Wilson and the Region. ROA.37-39.

C. Appellants' Complaint

Having failed to persuade the Region to approve the withdrawal of the

charges as requested, on August 11, 2014, Appellants filed a three-count Complaint against the NLRB and Kathleen McKinney, in her official capacity as Regional Director of NLRB Region 15. The Complaint alleges that the NLRB defendants violated the APA, 5 U.S.C. §§ 706(a)(2) and (2)(D), by their refusal: (1) to immediately accept the Union's withdrawal requests, and (2) to immediately dismiss charges 15-CA-103890 and -109264 (involving McGhee) based on Appellants' contention that the NLRB lacks jurisdiction over the allegations related to McGhee's termination. ROA.14-17. Appellants seek a declaratory judgment that these actions violate the APA, and a permanent injunction prohibiting the NLRB from continuing its investigation and prosecution of the pending charges against Sanderson Farms. ROA.17.

On October 16, 2014, the NLRB moved for dismissal of the Complaint on the basis that the District Court lacked subject matter jurisdiction to review the challenged prosecutorial decisions, and that administrative exhaustion before the Board was required instead. ROA.69-71; ROA.204-214.

D. The District Court's Decision

On April 15, 2015, the District Court dismissed the Appellants' Complaint for lack of jurisdiction. ROA.392. In its Memorandum Opinion and Order, the District Court found that the Regional Director's refusal to accept the Union's withdrawal requests and to continue its investigation did not satisfy the *Kyne*

exception permitting district court review of NLRB proceedings because the challenged action was "well within [the NLRB's] statutory and regulatory discretion." ROA.390. The District Court also found that "'an adequate judicial review' process is provided at 29 U.S.C. § 160(e), (f)" if Sanderson Farms is ever aggrieved by the NLRB proceedings. ROA.390-391. With respect to this latter point, the District Court correctly noted that "the NLRB has not taken any final action" against Sanderson Farms yet, and that Sanderson Farms' "apparent goal" in filing the Complaint "is to *prevent* the determination of any rights or obligations through the administrative process." ROA.391 (emphasis in original).

On May 7, 2015, Appellants filed a Notice of Appeal of the District Court's Order. ROA.393. For the reasons set forth below, the District Court should be affirmed.

STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (quoting *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005)). The issue on appeal here is whether the District Court had subject matter jurisdiction to review and/or enjoin the NLRB's unfair labor practice proceedings, as requested by Appellants in their Complaint. This Circuit reviews a district court's grant of a Rule 12(b)(1) motion

to dismiss for lack of jurisdiction *de novo*. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

SUMMARY OF ARGUMENT

Notwithstanding Appellants' efforts to repackage their claims in terms of Agency "dishonesty", the gravamen of Appellants' Complaint is that the Agency has acted arbitrarily, capriciously, and/or unlawfully under the circumstances in continuing the investigation and prosecution of the unfair labor practice charges filed against them. The allegations of false representations by NLRB personnel are simply Appellants' explanation for seeking review where none is provided and to stop an investigation in its tracks.[11] However, pursuant to the NLRA and well-settled Supreme Court precedent, the investigation and disposition of unfair labor

[11] Although not entirely clear, it appears that Sanderson Farms is alleging that NLRB personnel falsely represented that, subsequent to the withdrawal request, all nine of the discriminatees named in the various charges had been contacted by the Region, and that all nine of them indicated a desire for the administrative investigation to proceed. Br. at 8, 14, 18, 22. The NLRB invites the Court to view the disputed communications itself at: ROA.21; ROA.25. Contrary to Sanderson Farms' suggestions, those communications do not represent that all nine discriminatees had been contacted and that all of them wished for the investigation to proceed. While Wilson's reference to "the discriminatees" is less than precise, this ambiguity is in accordance with Agency policy not to identify cooperating witnesses and potential trial witnesses to the target of an investigation prior to the hearing. *See* Sections 10054.3, 10054.4, 10060.5, and 10128.3 of the NLRB Casehandling Manuel (Part One), available at: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-1.pdf. Moreover, Sanderson Farms never submitted statements from Taylor and McGhee indicating that they did not want the Region to continue its investigation. Those two individuals are named in five of the seven charges. Sanderson Farms' argument about Taylor's lack of cooperation (Br. at 19) is belied by the fact that she later filed charges against the Union alleging that certain of the withdrawal requests constituted a violation of the Act. ROA.381-384. The District Court did not resolve these disputed facts, and this Court need not either, because whether Sanderson Farms' allegations are true or not, the District Court still lacked jurisdiction over their claims for all of the reasons discussed herein.

practice charges is committed entirely to the NLRB General Counsel's discretion, and judicial review of that discretion is precluded. Federal district courts thus lack jurisdiction to enjoin NLRB investigations or to review the General Counsel's pre-hearing exercise of his prosecutorial discretion in considering whether to approve requests to withdraw charges or to dismiss charges for lack of merit. *UFCW*, 484 U.S. at 125-26, 129.

Although the Supreme Court and Fifth Circuit have recognized a narrow exception to the general rule of no district court review, that exception is inapplicable here to permit district court review of the Regional Director's decision, at present, to continue the investigation of the charges filed against Sanderson Farms. To obtain district court review under *Kyne*, a plaintiff must show both that the Agency is clearly acting in violation of a specific, mandatory provision of the NLRA, 358 U.S. at 188-89, and that there is no alternative opportunity for judicial review of the Agency's action. *Id.* at 190; *see also MCorp,* 502 U.S. at 43; *Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002). The exceptions necessary to invoke the extraordinary *Kyne* exception – permitting judicial review for clear violations of the NLRA by the NLRB – are simply absent in this case.

First, there exists no provision in the NLRA mandating that an NLRB Regional Director approve a charging party's withdrawal requests or immediately

dismiss an unfair labor practice charge upon request by the charged party. To the contrary, the NLRA gives the General Counsel broad discretion in determining how to investigate and dispose of unfair labor practice charges, and the courts have, for decades, agreed that "[t]he investigation of unfair labor practice charges and whether an unfair labor practice complaint should be issued are matters committed by Congress . . . to the unreviewable discretion of the NLRB General Counsel and the Regional Director and other staff personnel who assist him." *Bova v. Pipefitters & Plumbers Local 60, AFL–CIO*, 554 F.2d 226, 228 (5th Cir. 1977) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975)). Moreover, in carrying out this statutory mission to prevent and remedy unfair labor practices, the Agency acts not to vindicate any private rights, but in the public interest. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 182, n.8 (1967); *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307-308 (1959). Thus, the courts have long recognized that the "[NLRB] alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957), enfd. 251 F.2d 639 (6th Cir. 1958); *see also Gulf States Mfrs., Inc. v. NLRB*, 598 F.2d 896, 901 (5th Cir. 1979).

Second, *Kyne* jurisdiction is unavailable because Appellants cannot show that they lack the ability to obtain later judicial review. If Appellants are ever aggrieved by a final Board order, they can raise all appropriate legal and factual defenses either to the Fifth Circuit or the D.C. Circuit through the exclusive review

procedures established by Section 10 of the NLRA, 29 U.S.C. § 160. *Myers*, 303 U.S. at 48 n.5.

Despite Appellants' fervent protestations to the contrary, the misrepresentations alleged, even if true, are insufficient to establish the extraordinary circumstances necessary to invoke *Kyne* jurisdiction. *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667 (5th Cir. 1966), upon which Appellants rely (Br. at 13), does not provide otherwise. Indeed, *Bokat* reaffirms that the crucial consideration in determining whether extraordinary court intervention is warranted is the lack of adequate, alternative review. *Id.* at 671-72. When adequate review is available, the courts are generally loathe to stop an administrative proceeding in its tracks merely because a party under investigation feels aggrieved by the investigation. *See also Stockman v. Federal Election Com'n*, 138 F.3d 144, 154-55 (5th Cir. 1998).

Here, Appellants' complaints about the underlying administrative investigation can be addressed in the ordinary course of the proceedings. Therefore, the District Court correctly found that Appellants' claims do not present the kind of exceptional circumstances warranting *Kyne* jurisdiction. Rather, Appellants are obligated to exhaust their complaints concerning the Regional Director's withdrawal and dismissal determinations through the normal NLRA review scheme.

ARGUMENT

The District Court correctly concluded that it lacked subject matter jurisdiction over Appellants' claims. The District Court generally has no jurisdiction to review unfair labor practice proceedings, let alone to prohibit the NLRB General Counsel from undertaking his statutory duty to investigate the unfair labor practice charges filed against Sanderson Farms.

A. The District Court Properly Concluded that the Statutory Scheme of the NLRA Does Not Provide for District Court Review of NLRB Actions; Only "Final Orders" of the Board Are Judicially Reviewable in the Courts of Appeals

The NLRA guarantees employees certain rights in Section 7, 29 U.S.C. § 157, and assures those rights by making certain employer and union activity unfair labor practices in Section 8, 29 U.S.C. § 158. It also empowers the NLRB to enforce the foregoing provisions and to prevent any "person" from engaging in unfair labor practices. 29 U.S.C. § 160. As such, the NLRB is statutorily-vested with the responsibility for administering the Act. 29 U.S.C. §§153, 160; *San Diego Blg. Trades Council v. Garmon,* 359 U.S. 236, 242-43 (1959). Indeed, Congress provided the Board with the exclusive initial jurisdiction to administer the provisions of the Act. 29 U.S.C. § 160; *Amalgamated Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-65 (1940).

NLRB unfair labor practice proceedings commence upon the filing of a charge by any person. 29 C.F.R. §101.2. On behalf of the NLRB General Counsel,

the Regional Director and her staff in the office where the charge is filed then conduct an investigation and consider the merits of the charge. *Id.* at §101.4. If the Regional Director decides there is insufficient evidence to support the charging party's allegations, the Region will solicit withdrawal of the charge by the charging party, and if the charging party is unwilling to request withdrawal, will dismiss the charge. *Id.* at §101.5-101.6. If, on the other hand, the Regional Director determines that the charge has merit, she has discretion to issue an administrative complaint absent settlement. If the case does not settle and continues to formal adjudication, a hearing is conducted before an administrative law judge, who issues a decision that is subject to review by the Board. *Id.* at §§ 101.10-101.11. Ultimately, in such cases, the Board issues a decision and order, constituting the final agency determination. 29 U.S.C. § 160 (b), (c). Final orders of the Board are not self-enforcing, but instead are judicially reviewable in an appropriate United States court of appeals pursuant to Sections 10(e) and (f) of the NLRA, 29 U.S.C. §§ 160(e) and (f). *Myers,* 303 U.S. at 48-50. Congress created this particular method of review with the understanding that it provided the aggrieved party "a full, expeditious and *exclusive* method of review in one proceeding after a final [Board] order is made." H.R. 1147, 74th Cong., 1st Sess., p. 24 (1935) (emphasis added).

There is, however, no provision in the NLRA that allows for judicial review of the NLRB General Counsel's prosecutorial function in investigating and

disposing of unfair labor practice charges. In fact, Congress specifically established the Office of the General Counsel to segregate the Agency's prosecutorial, nonreviewable functions from its reviewable, adjudicatory functions. *UFCW*, 484 U.S. at 124-25 (discussing legislative history of the Act). Section 3(d) of the Act provides that the General Counsel has "final authority . . . in respect of the investigation of charges and issuance of complaints . . . [and] the prosecution of complaints before the Board." 29 U.S.C. § 153(d) (emphasis added).

The Supreme Court has repeatedly counseled that Section 3(d)'s "final authority" forecloses direct judicial review of the General Counsel's pre-hearing investigatory and prosecutorial functions, including under the APA. *See, e.g.*, *UFCW*, 484 U.S. at 129 (NLRA "discloses Congress' decision to authorize review of *adjudications*, not of *prosecutions*")(emphasis in original); *id.* at 131 ("We have already determined . . . that Congress purposely excluded prosecutorial decisions from [judicial] review . . . [I]t would be illogical in the extreme to hold that Congress did so only to permit review under the APA"); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979); *Newport News Shipbuilding & Dry Dock Co v. Schauffler*, 303 U.S. 54, 57 (1938) (NLRA "confers upon the Board exclusive initial power to make the investigation . . ." of charges). And the Courts of Appeals, including the Fifth Circuit, have consistently followed this bedrock principle. *See, e.g.*, *Bova*, 554 F.2d at 228; *Amerijet Intern., Inc. v. NLRB*, No. 12-

14657, 2013 WL 2321401 (11th Cir. May 29, 2013) at *1; *Dayton Newspapers, Inc. v. NLRB,* 402 F.3d 651, 668 (6th Cir. 2005); *Beverly Health and Rehab. Servs., Inc. v. Feinstein,* 103 F.3d 151, 153 (D.C. Cir. 1996). Not only is the General Counsel's *decision* whether to prosecute unreviewable, but the *manner* in which he makes this determination is likewise precluded from judicial review. *See, e.g., Mayer v. Ordman,* 391 F.2d 889, 889 (6th Cir. 1968).

No matter how artfully Sanderson Farms couches their claims, it is evident that what Sanderson Farms seeks is a review of the Regional Director's prosecutorial decisions concerning the disposition of pending unfair labor practice charges, and an injunction against an ongoing administrative investigation. *See generally* Compl. at ROA.6-17. The three counts of the Complaint amount to claims that the Regional Director, on behalf of the NLRB General Counsel: (1) improperly refused to accept the Union's withdrawal of the charges (ROA.14); (2) did not a have a legitimate reason for postponing her decision about whether to accept the withdrawal requests (ROA.15); and (3) continued an unwarranted investigation into matters over which Sanderson Farms believes the NLRB lacks authority (ROA.16-17). Regardless of how Appellants now describe these claims in their Brief, the challenged actions are clearly prosecutorial, and therefore the

District Court properly concluded it lacked subject matter jurisdiction over this case.[12]

Importantly, and contrary to Appellants' suggestions, this does not mean that the unfair labor practice proceedings against Sanderson Farms, including the allegations of Agency misconduct, are completely insulated from judicial review. Rather, this inquiry is simply deferred until a time when the Agency has arrived at a more definite position on the allegations and has taken action that inflicts a concrete injury on Appellants.[13] Specifically, and by congressional design, an attack on Agency proceedings can be advanced in an appropriate court of appeals, but only after the NLRB's administrative proceedings have culminated in a final Board Order. 29 U.S.C. §§ 160(e) and (f); *Myers*, 303 U.S. at 48-50.

Consequently, when a party objects to the regularity of any aspect of the NLRB's administrative unfair labor practice proceedings, that party has one

[12] Neither the Declaratory Judgment Act nor the Mandamus Act independently provide subject matter jurisdiction. *See, e.g., Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 168-69 (5th Cir. 1989).

[13] Long ago in a similar case, the Fifth Circuit found no "concrete actual controversy" or harm in a suit based on a respondent's claim that the NLRB Regional Office lacked authority to investigate an unfair labor practice charge or to request business records from it. *Elliot et al. v. American Mfg. Co.*, 138 F.2d 678, 678 (5th Cir. 1943). The same is true here. The NLRB's investigation of the charges against Sanderson Farms, standing alone, has caused no judicially cognizable harm at this point. *See Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) ("Standing alone, [agency's investigation] is lifeless, and can fix no obligation nor impose any liability on the plaintiff. It is merely preparatory to further proceedings"); *Cf. Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 226 (5th Cir. 1994) (indicating that administrative proceedings that are merely investigatory and do not fix legal rights or impose other obligations are not the kind of agency action with which the APA is concerned).

recourse only: It must wait until a final Board order issues, and then appeal such matters to a United States court of appeals and seek to have the disputed findings or remedies modified or rejected in that forum. Except in the rarest circumstances, such relief is not within the jurisdiction of the district courts. *See, e.g.*, *Amerijet*, 2013 WL 2321401 at *1 (no district court jurisdiction to prohibit the NLRB from initially investigating unfair labor practice charges); *Amerco v. NLRB*, 458 F.3d 883 (9th Cir. 2006) (no district court jurisdiction to enjoin ongoing unfair labor practices hearing); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 396 (6th Cir. 2002) (reversing district court for "enjoining the Board from prosecuting [a] complaint"); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 669 (5th Cir. 1966) (rejecting proposition that courts should "police the procedural purity of the NLRB's proceedings long before the administrative process is over"). The District Court thus properly concluded that it lacked subject matter jurisdiction over Appellants' claims, as they are simply a blatant attempt to circumvent Congress' settled procedure for judicial review of NLRB administrative proceedings. ROA.388 ("[A]ny effort by the Federal District Courts to review or supervise unfair labor practice proceedings prior to the issuance of the Board's final order is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted") (quoting *Bokat*, 363 F.2d at 671).

B. The District Court Properly Concluded that It Lacked Jurisdiction Under *Leedom v. Kyne* to Prohibit the General Counsel From Investigating the Charges Against Sanderson Farms

1. *The jurisdictional exception carved out in Leedom v. Kyne is extremely limited.*

The general rule that district courts do not have subject matter jurisdiction to review or enjoin NLRB proceedings contains only one relevant exception. Under *Leedom v. Kyne*, 358 U.S. 184 (1958), federal district courts have subject matter jurisdiction to intervene in NLRB proceedings when the Agency has acted contrary to an explicit mandatory provision of the NLRA and when there is no meaningful alternative opportunity for judicial review of the NLRB's action. *Id.* at 190; *MCorp*, 502 U.S. at 43. A party must satisfy both prerequisites before the district court has jurisdiction to review the NLRB's action under *Kyne*. *See MCorp*, 502 U.S. at 43-44*; Chao*, 298 F.3d at 469.

Appellants concede, as they must, that *Kyne* is an extremely narrow exception to the general NLRA exhaustion scheme. (Br. at 12.) The District of Columbia Circuit, where many of the cases invoking *Kyne* are filed, has described the limits of that exception as "nearly insurmountable." *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993). The Fifth Circuit has also repeatedly emphasized how difficult it is for plaintiffs to establish jurisdiction under its auspices. *See, e.g., Kirby Corp. v. Pena*, 109 F.3d 258, 268-69 (5th Cir. 1997); *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1340 (5th Cir. 1983) (stating

that the *Kyne* standard is "narrow and rarely successfully invoked") (citation omitted).

The exception is properly invoked only where "there is a plain violation of an unambiguous and mandatory provision of the statute." *American Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999) (citation and internal quotations marks omitted) (emphasis added). "[T]he exception allowing review of an agency action allegedly in 'excess of authority' must not simply involve a dispute over statutory interpretation . . . . [T]he agency's challenged action [must be] so contrary to the terms of the relevant statute that it necessitates judicial review independent of the review provisions of the relevant statute." *Id. (*quoting *Kirby*, 109 F.3d at 269). Moreover, as the District Court recognized, "review . . . is permissible only if the agency's error is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the agency's decision into justiciability." ROA.388-389 (quoting *Lundeen v. Mineta,* 291 F.3d 300, 312 (5th Cir. 2002)).

Citing *Bokat*, Appellants assert that the extraordinary *Kyne* exception is triggered here because they have presented "unrebutted" evidence that NLRB agents made false statements in the course of the underlying administrative investigation. The NLRB emphatically disputes that its agents made false representations to Appellants. In any event, Sanderson Farms mischaracterizes the

Bokat decision, which did not hold that district court intervention would have been warranted had the alleged agency misconduct been proven. Instead, that decision provides:

> There is nothing posed by this record which meets this extraordinary test. Of course, it is a shocking thing if an agent of the Government engaged in solicitation of knowingly false testimony. But the Judge did not find that this occurred. And we have no doubt that the Board, responsible for the behavior and official conduct of its staff members, will find an adequate way of dealing with this so far as the purity of governmental process is concerned . . . . Insofar as all of this bears on the private rights of the Employer and its counsel now charged with it, *there is an adequate judicial review under §§ 10(e), (f) if and when the unfair labor practice order is issued.*

363 F.2d at 672 (footnote omitted) (emphasis added). The Court explicitly indicated earlier in its decision that the district court judge had not determined one way or the other the truth of the allegations concerning the NLRB agent's solicitation of false testimony. *Id.* at 671. Despite this serious and unresolved allegation of governmental misconduct, the Fifth Circuit nevertheless held that administrative exhaustion before the Board was required. As the above excerpt illustrates, there were two principle reasons for this conclusion. First, the Court expressed its confidence in the Agency's ability, itself, to handle the alleged NLRB agent misconduct. *Id.* at 672. Second, the Court found that adequate judicial review was available in the courts of appeal if the charged party was ever aggrieved by the NLRB's proceedings. *Id*. The same is true here. It remains the case that exhaustion

before the Board is required, subject only to the *Kyne* exception, which Sanderson Farms does not meet for the reasons explained below.

2. *The NLRB General Counsel did not violate the NLRA by declining to approve the requests to withdraw and/or dismiss the charges filed against Sanderson Farms.*

There is no clear statutory mandate that the NLRB General Counsel must immediately approve a charging party's withdrawal requests or dismiss an unfair labor practice charge where it has been asserted that discriminatees no longer wish to proceed. To the contrary, the NLRA gives the General Counsel broad discretion in determining how to investigate and dispose of unfair labor practice charges. *See supra* at 19-22.

In carrying out its statutory mission to prevent and remedy unfair labor practices, the NLRB acts in the public interest, rather than to satisfy any private pecuniary interest. *See, e.g.*, *Vaca v. Sipes*, 386 U.S. 171, 182-83, n.8 (1967); *Gulf States Mfrs., Inc. v. NLRB*, 598 F.2d 896, 901 (5th Cir. 1979) (citing *Garner v. Teamsters, Chauffeurs & Helpers, Local Union 776*, 346 U.S. 485, 492 (1953)). Once the NLRB's jurisdiction is invoked by the filing of a charge, the Agency "must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it." *NLRB v. Fant Milling*, 360 U.S. 301, 308 (1959); *see also NLRB v. Federal Eng'g Co.*, 153 F.2d 233, 234 (6th Cir. 1946) (NLRB retains exclusive

discretion to determine whether it would be in the public interest to abandon administrative proceedings once a charge is filed). Accordingly, the Board and courts have long recognized that the willingness of a charging party to withdraw charges is not necessarily a ground for Regional Director approval of a request to withdraw, or the Region's dismissal of the charges, especially when the underlying unfair labor practices remain substantially unremedied. *E.g., Gulf States Mfrs.,* 598 F.2d at 901 (recognizing that even though a private party might conclude that it is in her best interest to withdraw a charge, the NLRB could still conclude that the public interest would be better served by a formal resolution of the dispute); *see also Flyte Tyme Worldwide,* 362 NLRB No. 46 at *1-2 (March 30, 2015) (citing *Robinson Freight Lines,* 117 NLRB 1483, 1485 (1957), *enforced,* 251 F.2d 639 (6th Cir. 1958)).

Sanderson Farms' argument that there is no legitimate basis for the NLRB's continued investigation because it lacks "stakeholder support" (Br. at 22) ignores that the Agency has a duty to protect the public interest in the enforcement of the NLRA by ensuring employees' free exercise of their § 7 rights, and that deterrence of future misconduct is a legitimate remedial objective. *See, e.g, NLRB v. Williams Enterprises, Inc.*, 50 F.3d 1280, 1290 (4th Cir. 1995) (Board acted properly in selecting remedy "best calculated to cure the effects of the employer's unlawful conduct and to deter its future misconduct"); *Peoples Gas System v. NLRB,* 629

F.2d 35, 50 (D.C. Cir. 1980) ("Deterrence is, of course, a legitimate remedial purpose").

In light of the serious nature of the charges' allegations (some of which the Region already found to be meritorious), and the Union's failure to resolve the grievances, the Regional Director acted well within her statutory discretion when she declined to accept the withdrawal requests and instead decided to continue the investigation into whether a formal complaint should be issued. *See, e.g., Gulf States Mfrs.*, 598 F.2d at 901; *NLRB v. United Packinghouse Workers of America, AFL-CIO*, 274 F.2d 816, 817 (5th Cir. 1960) (finding it was not an abuse of discretion for the NLRB to determine that it would be in the public interest to continue prosecution of an unfair labor practice case despite joint application by the charged and charging party seeking to have charge dismissed). The initial written correspondence to the Appellants explained that the Union's failure to pursue the grievances, the wishes of the discriminatees, and the related nature of the various charges were among the reasons why the Region was resuming its processing of the unfair labor practice charges despite the Union's withdrawal requests. ROA.140-141; ROA.142-143; ROA.144-145.

Sanderson Farms also contends that district court intervention is warranted here because the Agency violated its published rules and/or casehandling guidance. Br. at 5, 14. However, the *Kyne* exception applies only to violations of the relevant

statute. So even if Sanderson Farms accurately asserts that the NLRB acted contrary to its published instructions regarding whether to honor withdrawal requests, such conduct cannot form the basis for a *Kyne* action. *See, e.g.*, *UFCW, Local 400 v. NLRB*, 694 F.2d 276, 278-79 (D.C. Cir. 1982) (refusing to enjoin NLRB due to alleged failure to enforce its non-statutory election rule requiring employers to provide a list of eligible voters); *J.P. Stevens Employees Educ. Committee v. NLRB*, 582 F.2d 326, 328-29 (4th Cir. 1978) (refusing to enjoin NLRB based upon alleged abuse of discretion in failing to permit party intervention under its rules and regulations).[14] Rather, it is on review in the court of appeals, after a final Board order in an unfair labor practice case, that the Agency's application of its rules and published casehandling guidance is examined. *See Sears, Roebuck and Co. v. Solien*, 450 F.2d 353, 355-56 (8th Cir. 1971) (Board is proper forum to pass on claimed violation of its own rules with review available thereafter in the circuit courts); *see also Bokat*, 363 F.2d at 671 (stating that

[14] Moreover, the Agency's Casehandling Manual creates no legally enforceable duties. *See, e.g., Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000) ("the Casehandling Manual does not bind the Board; it is intended merely as guidance to the Board's staff"); *Kirkland Masonry*, 614 F.2d 532, 534 (5th Cir. 1980) ("a simple administrative directive to agency employees does not suffice to create a duty to the public"); *NLRB v. Birdsall Constr. Co.*, 487 F.2d 288, 291-92 (5th Cir. 1973). Indeed, the NLRB's Casehandling Manual states, under the heading "Purpose of the Manual": "The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. **Accordingly, the provisions of the Manual should not be used against the National Labor Relations Board in any proceeding before the Board or in Federal court.**" (emphasis in original), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-1.pdf.

"principle which requires administrative finality as a prerequisite to judicial review has particular force where, as here, the interlocutory order sought to be reviewed relates to the agency's case-handling procedures") (citation and quotations marks omitted).

Setting this problem aside, however, the NLRB has not violated its rules or casehandling instructions in this case. The NLRB's Rules and Regulations provide that "[w]ithdrawal may . . . be requested on the initiative of the complainant," 29 C.F.R. § 101.5, but further state that "[a]ny such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed . . . ." 29 C.F.R. § 102.9.[15] In determining whether to approve a withdrawal request, Section 10120.6 of the NLRB Casehandling Manual (Part One) sets forth the following guidance:

> Upon receipt of a withdrawal request, it is unnecessary to ascertain the position of the charged party. However, the Board agent should contact and solicit the position of any alleged discriminate[e]s and other individuals or entities who may be adversely affected by approval of the request. The Regional Director *should carefully consider the positions of such persons* and *all relevant circumstances* in considering whether to approve the withdrawal of the charge . . . .

(emphasis added).

[15] The NLRB Casehandling Manual (Part One) contains similar instruction. *See* Sections 10120 ("A charging party may submit a request to withdraw an unfair labor practice charge or any portion thereof at any time. However, the Regional Director has discretion whether to approve the withdrawal request").

Sanderson Farms simply cannot point to any provision of the NLRA that prohibits the way in which the Region, on behalf of the General Counsel, has handled the investigation and prosecution of the unfair labor practices in this case. Even if, as alleged, none of the named discriminatees wished to proceed with the investigation, the Union still had no right to the withdrawal of the charges without first obtaining the consent of the Regional Director. That approval of the Union's withdrawal request would also inure to Sanderson Farms' benefit is of no moment. This case essentially boils down to a dispute about whether the Regional Director exercised her discretion appropriately in deciding not to immediately accept the withdrawal and dismissal requests. Appellants believe that the Regional Director's refusal to accept these requests was arbitrary, unreasonable and/or unlawful under the circumstances. As the case law, statute, and relevant rules make clear, however, this determination was ultimately committed entirely to her prosecutorial discretion. Appellants have thus failed to meet the first *Kyne* requirement of demonstrating a "plain" violation of an "unambiguous and mandatory" provision of the NLRA.

3. *Appellants cannot show that they were aggrieved by the investigation and that they lack an alternative opportunity for judicial review.*

The Supreme Court in *MCorp* confirmed that the absence of any alternative means for judicial review to remedy a party aggrieved by agency action was

critical to the Court's decision to allow the *Kyne* plaintiffs judicial review. *MCorp*, 502 U.S. at 43. "[C]entral" to *Kyne* "was the fact that the Board's interpretation of the Act would wholly deprive the [plaintiff] union of a meaningful and adequate means of vindicating its statutory rights." *Id.*; *see also Chao*, 298 F.3d at 469 ("[E]ven if the [agency] exceeded its delegated authority . . . , we still lack jurisdiction to review [the agency's] decision under *Kyne* because [plaintiff] can obtain meaningful judicial review of the [ ] decision after this case ultimately is decided on the merits"). Here, Sanderson Farms cannot show a deprivation of a meaningful and adequate means of vindicating its statutory rights because it has access to meaningful judicial review.

Initially, the NLRB notes that, to date, no administrative complaint has been issued against Sanderson Farms. As set forth above, although complaint was initially issued on the Initial Four Charges (15-CA-066574, -071103, -071104 and -07119), that complaint was dismissed and has not been reinstated. The Region has postponed further proceedings on these matters until it completes its investigation of the Three Subsequent Charges concerning the disciplinary actions taken against Taylor and McGhee. Prior to issuance of an administrative complaint, let alone a final Board order, the Agency has done nothing to prejudice Sanderson Farms. If an administrative complaint should ever issue based on the results of the investigation, whether there is substantial evidence to support the complaint will be

decided by an administrative law judge and the Board in the normal course of an unfair labor practice proceeding, with subsequent judicial review available. The rule requiring exhaustion before the NLRB is particularly persuasive here in light of Appellants' refusal to cooperate in the Region's resumed investigation, and accordingly, the Region's inability to make any determination on the charges.

The Supreme Court long ago concluded that the review scheme provided by the NLRA "is adequate." *Myers*, 303 U.S. at 50. Upon circuit court review of a final Board order, "all questions of the jurisdiction of the Board and *the regularity of its proceedings*, all questions of constitutional right or statutory authority are open to examination by the court." *Id.* at 49 (emphasis added). Thus, if a court of appeals finds reversible error in the NLRB's handling of a case, "the Board's petition to enforce it will be dismissed, or the [opposing party's] petition to have it set aside will be granted." *Id.* at 50. These features provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* at 48. Indeed, the NLRA's judicial review provision in unfair labor practices, as a matter of law, constitutes an adequate remedy sufficient to foreclose the presence of the kind of extraordinary circumstances necessary to furnish jurisdiction under *Kyne*.[16]

[16] *See, e.g., Amerco v. NLRB*, 458 F.3d at 888-90 (rejecting application of *Kyne* to Section 10 unfair labor practice proceedings); *Bokat*, 363 F.2d at 672 (questioning *Kyne*'s applicability in unfair labor practice proceedings, where judicial review is available as a matter of right to

Sanderson Farms' main contention is that the NLRA scheme of review is inadequate here because it does not provide an opportunity for Sanderson Farms to present their complaints about the alleged misconduct by NLRB employees. In support of this argument, Appellants direct the Court's attention to the NLRB Division of Judges' Bench Book. (Br. at 26). However, reliance on the NLRB Bench Book for this proposition is misplaced. As the Bench Book cautions at page 1, it is merely a "reference guide" for administrative law judges and is not intended to be cited as binding "precedent."

Moreover, administrative law judges and the Board repeatedly have considered and allowed evidence to be admitted in appropriate circumstances when a party alleges Agency misconduct as a defense to the proceedings. *See, e.g., The Earthgrains Co.,* 351 NLRB 733, 739 n.24 (2007) (administrative law judge allowed respondent employer limited questioning regarding its accusation that a Board agent improperly solicited charges, and Board considered the alleged misconduct upon its review); *Professional Medical Transport, Inc.,* 346 NLRB 1290, 1290 n. 2 (2006) (Board considered respondent's assertions about NLRB agent misconduct upon its review of administrative law judge's decision); *Northwest Graphics, Inc.,* 343 NLRB 84, 86, 94 (2004) (administrative law judge recognized that "allegations of Board agent misconduct . . . are serious matters"

---

aggrieved persons, in contrast to representation cases "as to which there is a deferred and more limited judicial review. . . .").

but ultimately found such allegations to be unsubstantiated in that case); *Operating Engineers Local 7 (Hertz Equipment Rental)*, 335 NLRB 578, 578-80 (2001) (Board reviewed respondent union's argument that complaint should be dismissed based on NLRB agent's alleged improper investigation and failure to comply with Agency casehandling procedures). Thus, the appropriate venue for Appellants to present their evidence about the alleged misrepresentations is in the proceedings before an administrative law judge, if any ultimately occur in this case.[17]

Accordingly, for all of these reasons, Sanderson Farms cannot establish here the unavailability of judicial review – a finding that was critical to the result in *Kyne*.

C. Sanderson Farms' Remaining Arguments Are Unavailing

Appellants rely on a Sixth Circuit case discussing exceptions to exhaustion. (Br. at 24) (citing *Kentucky v. United States ex rel Hagel,* 759 F.3d 588 (6th Cir. 2014). Yet, that decision correctly noted the distinction between "jurisdictional

[17] Appellants' reliance on *Gate Guard Servs. L.P. v. Perez*, __ F.3d __, 2015 WL 4072105 (5th Cir. July 2, 2015), is unavailing. Citing to that decision, Appellants essentially argue that courts can assume "equitable jurisdiction" for alleged agency ethical misconduct. (Br. at 16). While the principles of equity are applicable in some areas of law, they are inapplicable where a court's federal subject matter jurisdiction is implicated. *See Herod v. Potter*, Case No. 07-60231, 2007 WL 4180546, at *2* (5th Cir. Nov. 27, 2007). Appellants' request that the Court assume "equitable jurisdiction" amounts to a request that subject matter jurisdiction be waived in this case. However, it is black letter law that subject matter jurisdiction can never be forfeited or waived. *Id.* (citing *Arbaugh v. Y & H Corp*., 546 U.S. 500, 514 (2006)). The District Court properly concluded that it lacked subject matter jurisdiction over the Complaint, and therefore Appellants' arguments based on equity necessarily fail. To the extent there are limited bases for excusing the NLRA's statutorily mandated exhaustion prerequisite, Appellants have failed to meet the strict requirements of those exceptions. *See supra* at 26-35.

exhaustion" and "non-jurisdictional exhaustion," and explained that when exhaustion is not a jurisdictional prerequisite, the courts have discretion to excuse it for prudential considerations, including: (1) where requiring exhaustion will result in irreparable harm; (2) where the administrative remedy is wholly inadequate, or (3) where the administrative body is biased, making recourse to the agency futile. *Id.* at 599. Section 10(f) of the NLRA, by contrast, explicitly vests judicial review with the courts of appeal and limits the right to review to parties aggrieved by a final Board order. *See, e.g., Indep. Elec. Contractors of Hous., Inc. v. NLRB*, 720 F.3d 543, 549 n.13 (5th Cir. 2013) (citing *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697, 698 (5th Cir. 1964)); *Shell Chemical Co. v. NLRB*, 495 F.2d 1116, 1119-20; 1123 (5th Cir. 1974).[18]

In any event, even if the prudential exceptions to exhaustion were to apply here, Appellants have failed to meet their requirements. First, requiring exhaustion will not result in irreparable harm. It is well settled that a party does not suffer irreparable harm by having to participate in administrative procedures prior to securing judicial review. *See, e.g., Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Myers*, 303 U.S. at 50-52. This is particularly true

[18] *See also Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (Where Congress has provided specific statutory procedures for review of agency actions "those procedures are to be exclusive")(citing *Myers*, 303 U.S. at 48); *FDIC v. Scott*, 125 F.3d 254, 259 (5th Cir. 1997) ("If Congress itself imposes an exhaustion requirement, courts must enforce its express terms . . . In such cases, failure [ ] to exhaust deprives federal courts of jurisdiction").

when the administrative proceedings in question are merely investigatory in nature.[19] Second, as demonstrated above, Appellants have an adequate administrative remedy for their complaints, including their claims of NLRB agent misconduct. *See supra* at 31-35.

Sanderson Farms' main contention is that they meet the third prong of the above-mentioned test. That is, they argue that their failure to exhaust administrative remedies is excusable because such exhaustion would have been futile based on the responses of NLRB officials in the Region and the Division of Operations-Management (an office under the supervision of the NLRB General Counsel)[20] regarding the alleged Agency misrepresentations. (Br. at 26-27). This claim fails to meet the burden of demonstrating futility because Appellants cannot establish that the administrative process is futile at every available level of consideration. As discussed above, if an administrative complaint ever issues against them, Appellants have the ability to present their misconduct allegations to an administrative law judge and/or the Board in the normal course of administrative review, and there is no evidence that it would it be futile for Appellants to raise the issue at those venues. *Cf. Gardner v. School Board Caddo Parish*, 958 F.2d 108, 111-12 (5th Cir. 1992) (analyzing administrative exhaustion

[19] *See, e.g., Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 226 (5th Cir. 1994) (dismissing an APA claim brought by the subject of a fact finding administrative proceeding because those proceedings were merely investigatory and "[did] not fix legal rights or impose obligations.").

[20] *See* https://www.nlrb.gov/who-we-are/organization-chart.

under Individuals with Disabilities Education Act (IDEA), and concluding that claimant must show the administrative process is futile at all available levels in order to meet the exhaustion exception test).[21] Furthermore, any allegation of systemic Agency bias (Br. at 9, 14) is undermined by the Regional Director's decisions permitting withdrawal of other charge allegations against Sanderson Farms. ROA.120-121; ROA.127; ROA.294.

Finally, there is no merit to Appellants' argument that the District Court committed reversible error by failing to resolve certain factual disputes raised by their Complaint. Challenges alleging lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) can be presented as "facial attacks" or "factual attacks." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980). "A 'facial attack' requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *Id.* (citation omitted). On the other hand, when a factual attack is made, the court delves into the arguments asserted by the parties and credibility of the evidence presented. *Id.* Here, the NLRB's Motion to

[21] *See also Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (futility exception applies only where an adverse decision from the agency is certain); *Shawnee Trail Conservancy v. U.S. Dep't of Agriculture*, 222 F.3d 383, 389 (7th Cir. 2000) (same); *see also Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606-07 (5th Cir. 2007) (explaining that "[o]vercoming the jurisprudential requirement for administrative exhaustion is difficult," and that the "limited bases" for excusing exhaustion are available only in "extraordinary circumstances").

Dismiss presented a facial attack on subject matter jurisdiction. ROA.365-366; ROA.378.

In its Memorandum Opinion and Order, the District Court explicitly stated that it was considering only the pleadings and undisputed facts evidenced in the record. ROA.387. The District Court did not have to resolve the disputed facts regarding the alleged misrepresentations by Agency personnel because they are immaterial to the jurisdictional question. Regardless of whether those allegations are true, Appellants cannot show that the Regional Director's actions were in plain violation of the Act, or that they lack adequate, alternative judicial review. Nothing Sanderson Farms argued below or now to this Court changes this conclusion. The District Court thus properly applied the Rule 12(b)(1) standard, which provides a district court the power to dismiss by concluding that the complaint, assumed as true, and any supplemented undisputed facts, do not allege a basis for subject matter jurisdiction. *See Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014). Accordingly, no reversible error was committed.

CONCLUSION

For the reasons stated herein, the National Labor Relations Board requests that the decision of the District Court be affirmed.

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

RICHARD A. BOCK
Deputy Associate General Counsel

BARBARA O'NEILL
Assistant General Counsel
Telephone: (202) 273-2958
Email: barbara.oneill@nlrb.gov

s/ Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
Telephone: (202) 273-2937
Email: nancy.platt@nlrb.gov

MARISSA A. WAGNER
Attorney
Telephone: (202) 273-2957
Email: marissa.wagner@nlrb.gov

NATIONAL LABOR RELATIONS BOARD
CONTEMPT, COMPLIANCE, AND SPECIAL LITIGATION BRANCH
1015 HALF STREET, S.E., 4TH FLOOR
WASHINGTON, DC 20570

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. Sec. 151 et. seq.

Section 3(d) (29 U.S.C. Sec. 153(d)):

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law . . . .

Section 10(e) (29 U.S.C. Sec. 160(e)):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28 [United States Code]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be

> excused because of extraordinary circumstances . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Section 10(f) (29 U.S.C. Sec. 160(f)):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28 [United States Code]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . .

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Appellees has been served upon the following counsel of record for Appellants via the appellate CM/ECF system:

Clyde H. Jacob III
Coats Rose
365 Canal Street, Suite 800
New Orleans, LA 70130

-and-

Richard O. Burson
Gholson Burson Entrekin & Orr
535 North 5th Avenue
Laurel, MS 39440

Respectfully submitted,

/s/ Nancy E. Kessler Platt
Nancy E. Kessler Platt
Deputy Assistant General Counsel
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, DC 20570
(202) 273-2957

Dated at Washington, DC.
this 25th day of August, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 9,871 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 font.

/s/ Nancy E. Kessler Platt
Nancy E. Kessler Platt
Attorney of Record for Appellees

Dated at Washington, DC.
this 25th day of August, 2015