IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS AFFAIRS COUNCIL, Plaintiff, v. FEDERAL SERVICE IMPASSES PANEL, *et al.*, Defendants.	Case No. 1:20-cv-837-CJN

DEFENDANTS' AND INTERVENOR-DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

For the reasons set forth in the attached memorandum, Defendants Federal Labor Relations Authority, Federal Service Impasses Panel and Panel Chairman Mark Carter and Intervenor-Defendant the Department of Veterans Affairs move to dismiss Plaintiff National Veterans Affairs Council's complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Dated: May 27, 2020

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MEMORANDUM IN SUPPORT OF DEFENDANTS' AND INTERVENOR-DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

In the middle of ongoing collective bargaining negotiations with the Department of Veterans Affairs (the "VA"), Plaintiff National Veterans Affairs Council ("NVAC")—the federal bargaining unit for approximately 350,000 employees at the VA—filed suit asking this Court to enjoin the parties' pending impasse proceedings before the Federal Service Impasses Panel (the "Panel"). The Panel is an entity within and under the supervision of the Federal Labor Relations Authority ("FLRA" or "Authority") statutorily charged with resolving collective-bargaining impasses between federal agencies and employee unions. In March 2020, at the VA's request—and over NVAC's objections—the Panel asserted jurisdiction over the parties' collective bargaining negotiation impasse and set a schedule for receiving briefing and issuing a decision that would resolve the disputed proposed contract terms. Compl. ¶ 37, ECF No. 3; Pl.'s Mot. at 12, ECF No. 12. Although the Panel has not yet issued a decision, NVAC challenges the Panel's authority to fulfill its statutory purpose on both constitutional and statutory grounds. But NVAC's lawsuit falls entirely outside of federal district court jurisdiction under the governing statutory scheme the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* ("the Statute") (enacted as part of the Civil Service Reform Act of 1978), and should thus be dismissed for lack of subject-matter jurisdiction.

Dismissal by this Court for lack of subject-matter jurisdiction would not leave NVAC without recourse. Rather, NVAC would retain the ability to assert its claims though the channel that Congress designed when it enacted the Statute. Under that design, the appropriate forum for NVAC's claims—along with any other claims it might raise in connection with the Panel's anticipated decision—would be an administrative proceeding before the Authority, with judicial review to follow (if necessary) before a federal court of appeals. In channeling administrative and judicial review in that fashion, the comprehensive, reticulated scheme set forth in the Statute also channels review of challenges to the Panel's authority over a bargaining dispute away from federal district courts entirely.

The United States Court of Appeals for the District of Columbia Circuit has reaffirmed that conclusion repeatedly over several decades, consistently applying the Statute's review scheme to hold that union challenges asserted under the Statute must be brought through the Authority, and from there on to a court of appeals, rather than in district court. *See, e.g.*, *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984); *Am. Fed'n of Gov't Emps. v. FLRA*, 778 F.2d 850, 857 (D.C. Cir. 1985) ("*AFGE 1985*"); *see also* 5 U.S.C. § 7123(a). As the D.C. Circuit recently held in the context of a broader challenge brought under the Statute, unions "may not bypass" the Statute's scheme "by filing suit in the district court." *Am. Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748, 761 (D.C. Cir. 2019) ("*AFGE v. Trump*"). Rather, they must follow the administrative-judicial review route Congress charted, in "painstaking detail," through the Statute's scheme. *See Elgin v. U.S. Dep't of Treasury*, 567 U.S. 1, 11 (2012); *see generally Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

As that precedent illustrates, NVAC is not the first union to try to short-circuit the Statute's exclusive review scheme by raising a statutory or constitutional challenge in district court. With one exception on grounds not present here, none has prevailed in doing so. As early as 1984, the Court in *Brewer* dismissed a challenge to a Panel decision in district court, holding that judicial review is available only at the conclusion of an unfair labor practice proceeding before the Authority. 735 F.2d at 1500; *see also Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1265 (D.C. Cir. 2006) ("*NATCA I*"). And just last year, the D.C. Circuit in *AFGE v. Trump* dismissed a broader but otherwise similar constitutional challenge brought in district court by seventeen federal unions (across several consolidated cases), finding that the statutory scheme is "exclusive with respect to claims within its scope." 929 F.3d at 755 (dismissing unions' challenges to a series of Executive Orders because they were brought outside of the statutory review scheme). Consistent with the D.C. Circuit's precedent, two district courts outside of the Circuit have even more recently reached the very same conclusion. *See Nat'l Assoc. of Agricultural Emps. v. Trump*, No. 8:19-cv-03057-GJH, 2020 WL 2571105

(D. Md. May 21, 2020) (dismissing union's challenge to three Executive Orders for lack of jurisdiction and finding the Statute's remedial scheme to be the exclusive means of litigating challenges to the Executive Orders, even though the union challenged no particular administrative determination); *Serv. Emps. Int'l Union Local 200 United v. Trump*, 1:19-cv-1073, 2019 WL 6710865 (W.D.N.Y. Dec. 10, 2019) ("*SEIU II*") (denying union's motion for preliminary injunction on the same jurisdictional basis); *Serv. Emps. Int'l Union Local 200 United v. Trump*, 1:19-cv-01073, 2019 WL 4877273 (W.D.N.Y. Oct. 3, 2019) ("*SEIU I*") (denying same union's earlier motion for temporary restraining order on same basis).

Like the statutory and constitutional claims in all of those cases, NVAC's challenge to the Panel's assertion of jurisdiction over the parties' negotiation impasse "fall[s] within the exclusive statutory scheme," *AFGE v. Trump,* 929 F.3d at 761, and NVAC cannot evade the scheme by filing suit in this Court mid-bargaining. Instead, it must follow its administrative remedies through to completion, *Steadman v. Gov'n, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 966–68 (D.C. Cir. 1990), which it has not done, opting instead to jump into district court. In doing so, NVAC seeks to bypass this weight of authority by relying on one decision that involved procedural considerations not present here—*Nat'l Air Traffic Controllers Ass'n v. Fed. Serv. Impasses Panel*, 606 F.3d 780, 787 (D.C. Cir. 2010) (*NATCA II*)—and another decision that did not even involve the Statute—*Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). But its jurisdictional arguments fail for several reasons.

First, *NATCA II* does not purport to set forth a separate basis for district court jurisdiction over a broad and unspecified category of actions seeking a declaration as to the Panel's authority to act, as NVAC suggests. As *NATCA II* itself concluded, "[t]here can be no doubt" that "district court[s] lack[] jurisdiction to review decisions of the [Panel]" whether to assert jurisdiction over a particular negotiation impasse while a bargaining dispute remains ongoing. 606 F.3d at 787. Parties seeking to challenge such decisions and actions of the Panel must first pursue the administrative

remedies available under the Statute, including remedies provided by unfair labor practice proceedings. *Id.* at 785-87. Because NVAC has not followed the statutory scheme but asks this Court to enjoin the Panel's exercise of jurisdiction over the parties' ongoing bargaining dispute, *see* Compl. at 14, 18, *NATCA II* does not give NVAC the green light for its claims to proceed in this Court.

Additionally, even under its own terms, NVAC's resort to *Free Enterprise* would fail as a basis for invoking district court jurisdiction over its challenges to the Panel's jurisdiction outside of the Statute's review scheme. In *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015), the D.C. Circuit carefully analyzed *Free Enterprise* and concluded that far from creating some "new category of collateral claims that fall outside an otherwise exclusive administrative scheme[,]" *id.* at 24, the decision rested on factors largely specific to the plaintiffs and the schematic particulars involved. *Id.* at 17-30. Most importantly, the court explained in *Jarkesy*, the "bet the farm" nature of the risks associated with inviting the kind of enforcement proceeding necessary for the plaintiff in *Free Enterprise* to actually be able to assert its constitutional claim as a procedural matter meant that the scheme did not provide for meaningful judicial review, among other concerns, and thus evaded channeling. *Id.* at 20. That is far from the case here, as NVAC fails to demonstrate that it faces anything approaching the existential risk that the plaintiff in *Free Enterprise* would have had to face simply to assert its challenge. What is more, none of the other arguments NVAC makes in its effort to bring its claims under the rubric of *Free Enterprise*—as opposed to that of the numerous other cases addressing review-channeling statutory schemes—are credible in light of *Jarkesy* and the Statute-specific D.C. Circuit precedent.

But this Court lacks jurisdiction for an independent reason: even were the Court to determine that NVAC's claims somehow evades the Statute's broad review channeling requirement and may proceed in district court, NVAC has not yet exhausted its administrative remedies before the Authority. Indeed, the Panel has yet to issue a decision resolving the negotiation impasse that may be challenged before the Authority pursuant to the Statute's review scheme. Thus, the Court should

dismiss for failure to exhaust. *See Steadman*, 918 F.2d at 966–68. That is particularly so because so much of NVAC's argument that it may never obtain meaningful judicial review depends on unadorned speculation; further administrative process before the Authority may yet dispel the speculative arguments on which the Union relies in seeking to liken its case to *Free Enterprise*.

In the end, this Circuit's precedent establishes that NVAC's only potential route to this Court is by way of the "exceptional circumstances" set out in *Leedom v. Kyne*, 358 U.S. 184 (1958). *NATCA I*, 437 F.3d at 1258 ("A federal district court may exercise jurisdiction to review a Panel order only 'in exceptional circumstances' as defined by *Leedom v. Kyne* . . . and its progeny."). The key to establishing *Leedom* jurisdiction is demonstrating "that barring review by the district court would wholly deprive [the party] of a meaningful and adequate means of vindicating its statutory rights." *Id.* at 1263 (internal quotation marks and citation omitted). NVAC cannot satisfy that requirement, because the Statute affords it a path to judicial review—and indeed, NVAC does not even argue that its lawsuit falls within *Leedom*'s exceedingly narrow jurisdictional channeling exception.

For all of these reasons, NVAC's claims should be dismissed.

BACKGROUND

I. Statutory Background

In 1978, Congress established the Statute as "a distinct regulatory framework for collective bargaining between federal agencies and their employees." *NATCA II*, 606 F.3d at 783. The Statute "grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices." *Id.* (citation omitted); *see also* 5 U.S.C. §§ 7114(a)(1), 7116. It also imposes a duty on "unions and federal agencies [to] negotiate in good faith over certain matters." *AFGE v. Trump*, 929 F.3d at 752 (citations omitted).

The Authority, a body of three members appointed for five-year terms, is charged with administering the Statute's provisions. 5 U.S.C. § 7104. And the Panel, a multi-member "entity within

the Authority," is tasked with "provid[ing] assistance in resolving negotiation impasses between agencies and exclusive representatives." 5 U.S.C. § 7119(c)(1).

The Panel "serves as a forum of last resort in the speedy resolution of disputes between a federal agency and the exclusive representatives of its employees after negotiations have failed." *NATCA II*, 606 F.3d at 783. Either a federal employer or a union may request the Panel's assistance to resolve a negotiation impasse. 5 U.S.C. § 7119(b). When it receives such a request, the Panel must "promptly investigate any impasse presented to it," 5 U.S.C. § 7119(c)(5)(A), and then "either (1) [d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction" or "(2) [a]ssert jurisdiction," 5 C.F.R. § 2471.6(a). If the Panel asserts jurisdiction, then it may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse," including holding hearings, taking testimony or depositions of persons under oath, and issuing subpoenas. 5 U.S.C. § 7119(c)(5). At the conclusion of its proceedings, the Panel may recommend contract terms. *Id.* Or it may "impose[] settlement" through a decision and order setting forth the contract terms that the parties must incorporate into their agreement. *AFGE 1982*, 691 F.2d at 569 n.26; *Interpretation & Guidance*, 15 FLRA at 567; 5 C.F.R. § 2471.6(a)(2)(ii). Decisions of the Panel are "binding on [the] parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C).

Panel decisions "are not directly reviewable by the courts." *AFGE 1985*, 778 F.2d at 854. Instead, the Statute establishes a detailed remedial scheme that channels review of Panel orders first to the Authority in an unfair labor practice proceeding and from there to a federal court of appeals.[1]

[1] A panel decision may also be challenged by an agency in the context of a negotiability appeal. A negotiability appeal is triggered if, within thirty days after the Panel issues its decision, the "head of the agency" disapproves of any Panel-ordered provision as contrary to law (in other words, "non-negotiable"). 5 U.S.C. § 7114(c)(1). A union may initiate a negotiability appeal to enforce the Panel decision after an agency head's disapproval, and such appeal goes straight to the Authority. 5 C.F.R. § 2424.30. If the Authority concludes that a Panel provision is contrary to law, then it will declare the provision "void and unenforceable," but if the Panel provision is lawful, then the agency head's

See AFGE v. Trump, 929 F.3d at 755; *see also NTEU*, 712 F.2d at 671 n.5 ("The Panel's decision is reviewable, first before the Authority, then in court, in an unfair labor practice proceeding."); *see also Brewer*, 735 F.2d at 1499 ("While [the Statute] specifically provides for judicial review of orders by the *Authority*, there is no provision for such review of *Panel* orders[.]"); 5 U.S.C. §§ 7118, 7121, 7123(a).

Either party's noncompliance with a Panel decision constitutes an unfair labor practice. 5 U.S.C. § 7116(a)(6), (b)(6) (making "fail[ure] or refus[al] to cooperate in impasse procedures and impasse decisions" by agency or union alike an unfair labor practice); *e.g.*, *Am. Fed. of Gov't Employees & Dep't of Transportation*, 16 FLRA 318, 318–19 (1984) (holding that a union committed an unfair labor practice when it refused to sign the parties' pre-negotiation agreement incorporating a Panel decision); *Interpretation & Guidance*, 15 FLRA 564, 567–68 (1984) (explaining that an agency head's erroneous rejection of a Panel decision as contrary to any applicable law, rule, or regulation under 5 U.S.C. § 7114(c) is an unfair labor practice).

"The Statute establishes essentially a two-track system for resolving" allegations of an unfair labor practice. *Overseas Educ. Ass'n v. Fed. Labor Relations Auth.*, 824 F.2d 61, 62 (D.C. Cir. 1987). First, either party may file an unfair labor practice charge. 5 U.S.C. § 7118(a)(1). Alternatively, either party may submit a grievance to an arbitrator under provisions set forth in an existing CBA. 5 U.S.C. § 7122(a). The choice of which track to pursue belongs to the complaining party. Under 5 U.S.C. § 7116(d), "[a]n aggrieved party may elect either track—the statutory complaint procedure or binding arbitration—but not both." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1344 (D.C. Cir. 2012).

Under the first track, the complaining party files an unfair labor practice charge with the Authority's General Counsel, who is responsible for investigating the charge and deciding whether grounds exist to issue a complaint. 5 U.S.C. § 7118(a)(1). If the General Counsel declines to "issue a

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rejection is considered an unfair labor practice. *AFGE 1985,* 778 F.2d at 855-61; *Interpretation & Guidance*, 15 FLRA at 565–67.

complaint because the charge fails to state an unfair labor practice" under the Statute, then "the General Counsel shall provide the person making the charge with a written statement of the reasons for not issuing a complaint." *Id.* While the General Counsel's decision not to issue a complaint may be challenged administratively, 5 C.F.R. § 2423.11, it is shielded from review in federal court, *Turgeon v. FLRA*, 677 F.2d 937, 939–40 (D.C. Cir. 1982).

If the General Counsel does issue a complaint, then the case proceeds to the Authority. The Authority's powers to resolve the unfair labor practice allegation are extensive. Like the Panel in its impasse proceedings, the Authority in unfair labor practice proceedings may hold hearings, take testimony or depositions, and issue subpoenas. *See* 5 U.S.C. § 7105(g)(1), (2). And if the Authority finds that a union or agency has violated the Statute by failing to comply with the Panel order, it can require the party to "cease and desist from" its conduct, "renegotiate a collective bargaining agreement in accordance with" its decision, *id.* § 7118(a)(7)(B), or generally "take any remedial action [the Authority] considers appropriate to carry out the policies of this [Statute]," *id.* § 7105(g)(3). *See F.E. Warren Air Force Base Cheyenne, Wyoming*, 52 FLRA 149, 161 (1996) (stating that any remedies ordered by the Authority should be those that are "reasonably necessary and . . . effective to 'recreate the conditions and relationships' with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct." (citation omitted)).

On the other hand, the Authority may conclude that any portion of the Panel order is contrary to law, thereby excusing the party's noncompliance. *Council of Prison Locals v. Howlett*, 562 F. Supp. 849, 851 (D.D.C. 1983), *aff'd sub nom. Brewer*, 735 F.2d 1497 ("In an unfair labor practice proceeding before the [Authority] the charged party may defend such noncompliance on the ground that the Authority should set aside the allegedly illegal Panel decision."); *see Dep't of Defense Domestic Dependent Elementary*, 71 FLRA 127, 133 (2019) (rendering a portion of a Panel order unenforceable because "the Panel lacked the authority to resolve the Agency's negotiability arguments concerning" a specific provision

in the parties' agreement). Whatever the Authority's decision, it is subject to review by a federal court of appeals. 5 U.S.C. § 7123(a).

Under the second track, the complaining party submits a grievance alleging an unfair labor practice to an arbitrator, and the grievance is resolved according to the procedures outlined in the parties' existing collective bargaining agreement. *See Overseas Educ. Ass'n*, 824 F.2d at 62–63. Any arbitration decision is reviewable by the Authority if the aggrieved party files an "exception" to the award. 5 U.S.C. § 7122(a). If the Authority finds that the arbitration decision is contrary to law or is deficient on other grounds, then it may take whatever action "it considers necessary[and] consistent with" the law. 5 U.S.C. § 7122(a). And although most Authority decisions involving arbitration are not reviewable in federal court, the Statute allows for judicial review of those decisions that "involve[] an unfair labor practice" under the Statute. 5 U.S.C. § 7123(a); *Overseas Educ. Ass'n*, 824 F.2d at 63 ("[A]rbitral decisions are to be subjected to judicial scrutiny *only* when the FLRA's order 'involves an unfair labor practice under section 7116 of [the Statute]'" (original alteration removed)). So when noncompliance with a Panel decision is grieved as an unfair labor practice under Section 7116 of the Statute, arbitration likewise provides a path to judicial review of a Panel decision.

II. Factual and Procedural Background

NVAC and the VA are parties to a collective bargaining agreement (CBA) that was set to expire on March 15, 2014 but has been extended indefinitely until the parties reach a new agreement. Compl. ¶ 34, ECF No. 1. In June 2018, the parties began negotiating a new agreement, starting by establishing the ground rules[2]—that is, the procedures that would govern subsequent negotiations over the substance of a CBA. *Id.* ¶ 35. In April the following year, NVAC and the VA entered into a ground rules agreement and began bargaining over the CBA's substantive provisions.

[2] "Ground rules" are "the arrangements between the parties as to how the negotiations" over the collective bargaining agreement will "be conducted." *EPA v. Am. Fed. of Gov't Employees*, 16 FLRA 602, 613 (1984).

Eventually, the parties reached an impasse and, the VA requested Panel assistance. *Id.* ¶ 36. On March 18, 2020, over NVAC's objection, the Panel asserted jurisdiction over the impasse, *id.* ¶ 37, and set a briefing deadline of July 5. Pl.'s Mot. for Preliminary Injunction at 12, ECF No. 12.

Nine days after the Panel asserted jurisdiction, NVAC filed suit in this Court. ECF No. 3. NVAC challenges the Panel's "authority to assert jurisdiction or issue any decisions" on three grounds: (1) Panel members are principal officer whose appointment by the President without Senate confirmation under 5 U.S.C. § 7119(c)(2) violates the Constitution's Appointments Clause, *id.* ¶ 39-45; (2) Panel members were appointed in violation of the Statute, because they were not appointed "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with government operations and knowledgeable in labor-management relations," 5 U.S.C. § 7119(c)(2), *id.* ¶ 46-50; and (3) the Panel is composed of biased decisionmakers and therefore cannot issue decisions consistent with the requirements of the Fifth Amendment's Due Process Clause, *id.* ¶¶ 51-54. As relief, NVAC seeks a declaratory judgment sustaining each of its claims, an injunction preventing "the Panel from issuing any decisions regarding Plaintiff until its members are properly appointed," and attorney's fees and costs. *Id.* at 18.

STANDARD OF REVIEW

"Federal courts are courts of limited jurisdiction [and] possess only that power authorized by the Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a complaint on the basis that the court lacks subject matter jurisdiction over the claims asserted, and "[t]he burden of establishing" jurisdiction "rests upon the party asserting" it. *Id.*

ARGUMENT

The Statute establishes an exclusive, comprehensive review scheme that channels challenges to Panel actions through proceedings before the Authority and from there to a court of appeals. That

reticulated scheme channels Article III review in such cases entirely away from federal district court—this Circuit's long and unbroken line of Statute-specific precedent makes that clear. That precedent makes no exception for an undefined class of claims seeking a declaration as to the Panel's authority to assume jurisdiction over a negotiation impasse, as NVAC suggests. Nor can NVAC show that any of the considerations particular to the statutory scheme in *Free Enterprise* are relevant here, as courts considering the specific unfair labor practice procedures established by this Statute have consistently concluded that they offer an avenue to meaningful judicial review. Because the Statute offers a route to judicial review, NVAC must follow the statutory scheme through to completion—at the very least exhausting its administrative remedies before pursuing its claims in federal court. Without even attempting to establish any exceptional circumstance under *Leedom v. Kyne* that might justify its preemptive challenge to the Panel's assertion of jurisdiction in this Court, NVAC's case cannot proceed. Thus, the Court should dismiss NVAC's claims so that they may be properly channeled, as Congress intended, through the Statute's exclusive administrative and judicial review scheme.

I. Controlling D.C. Circuit authority compels dismissal of NVAC's complaint for lack of district court jurisdiction under the statutory review scheme.

This case is governed by the familiar *Thunder Basin* test, the application of which shows why Congress intended for claims just like NVAC's to be channeled away from district court review under the Statute. *See infra* Part II. But the Court need not even conduct its own *Thunder Basin* analysis to reach that conclusion: a long, unbroken line of D.C. Circuit authority makes clear that federal district courts lack jurisdiction over any challenges related to a Panel decision or action, whether such challenges are asserted on statutory or constitutional grounds.

The D.C. Circuit's consistent rejection of district court jurisdiction over challenges to Panel actions goes at least as far back as *Brewer*, 735 F.2d 1497. There, the court held that a union could not evade the Statute's review scheme by asserting a district court challenge to an unfavorable Panel decision. *Id.* at 1499. Rather, the court explained, the route to Article III review the union should

have taken under the Statute was provoke an unfair labor practice by refusing to cooperate with the Panel decision, seek review of the Panel decision before the Authority on that basis, and from there (if necessary) seek judicial review before the court of appeals. *Id.* at 1500, 1502 n.9. As the court explained, "[i]n light of our examination of the statute and its legislative history, we agree with the district court that this specific review procedure, established by the statute, forecloses the assumption of general federal question or mandamus jurisdiction." *Id.* at 1500.

Moreover, the only route to an Article III court outside of the Statute's specific review scheme, the *Brewer* court held, was under the "exceptional circumstances" established by *Leedom v. Kyne*. *Id.* But the court explained that "[t]he invocation of *Leedom* jurisdiction is extraordinary; to justify such jurisdiction, there must be a 'specific provision of the Act which, although it is clear and mandatory,' was nevertheless violated by the Panel." *Id.* at 1051 (citation omitted). The union's allegations that the Panel required the parties to "agree to proposals" and failed to adequately explain its own actions did not meet that high bar, the court held. *Id.* Therefore, it had "no direct recourse to the courts," and was required to follow the unfair labor practice route established by the statutory review scheme. *Id.* at 1501-02.

Brewer recognized that the unfair labor practice procedure was not without "shortcomings." *Id.* at 1502 n.9. That proceeding, *Brewer* explained, carried potential adverse consequences for a union of "defy[ing] an existing labor contract—even if the relevant contract term were imposed by a Panel order." 735 F.2d at 1502 n.9. But the court reasoned that "[p]erhaps Congress wished to pay this price in return for swift and final Panel authority. In any event, our decision," that parties may not bypass the unfair labor practice process in seeking to overturn decisions of the Panel, "adheres to the language and legislative history of the Act." *Id.* And through the Act "Congress precluded direct judicial review of Panel orders, except in extraordinary circumstances" in accordance with *Leedom v. Kyne*. *Id.* at 1498.

The Circuit's more recent cases restate what *Brewer* already made clear: that challenges based on any Panel decision—including a decision whether to assert jurisdiction over an impasse—must be channeled through the statutory review scheme. In *NATCA I*, 437 F.3d 1256, the court affirmed a district court decision holding that it lacked jurisdiction over a challenge to a Panel decision declining to assert jurisdiction over a negotiation impasse between a union and the Federal Aviation Administration (FAA). *Id.* at 1265-66. The Panel had declined to assist the union and the FAA with their negotiation impasse because it believed that a newly enacted statutory provision stripped the Panel of jurisdiction over the subject matter of the collective bargaining dispute in that case. *Id.* at 1262. So the union brought suit in district court, seeking a declaratory judgment that the Statute required the Panel to assert jurisdiction. *Id.* Finding *Brewer* dispositive, and *Leedom v. Kyne* inapposite, the district court dismissed the unions' challenge for lack of jurisdiction. *Id.* at 1257-58. The D.C. Circuit affirmed. *Id.* at 1266.

Critical to the court's holding in *NATCA I* was its conclusion the Statute provides a route to meaningful administrative and judicial review of Panel decisions—specifically, within the context of an unfair labor practice proceeding. *Id.* at 1264-65. As the court saw it, the union had at least two grounds for bringing an unfair labor practice charge: the agency's refusal to participate in impasse proceedings and the agency's implementation of the disputed contract terms against the unions' will. *Id.* (citing 5 U.S.C. § 7116(a)(5)). In the ensuing proceeding before the Panel, the union could raise its claim that the Statute required the Panel to assert jurisdiction over the parties' impasse. *Id.* And after the Authority resolved the unfair labor practice dispute, the union could bring its claim, if necessary, to a court of appeals. *Id.* Because the union had a route to administrative and judicial review, it could not rely on *Leedom v. Kyne* to bypass the statutory scheme and bring its claim to district court. *Id.* "It is clear," the Court emphasized, "that any alleged unfair labor practices must be addressed in the first

instance by the [Authority]—not by the [Panel], the District Court, or this court." *Id.* at 1265 (citing cases).

The D.C. Circuit's later decision in *NATCA II*, 606 F.3d 780, creates no exception to the rule that Panel actions and decisions are not directly reviewable in district court. In that case, the same parties as in *NATCA I* returned to district court after the union had exhausted its administrative remedies by pursuing unfair labor practice charges against FAA for its refusal to bargain or submit to the Panel's jurisdiction. *Id.* at 785-86. But "[b]ecause the General Counsel did not issue a complaint, the question of the [Panel's] jurisdiction raised by the unfair labor practice charge was never put before the [Authority]." *Id.* at 785. So the union returned to district court.

This time, in *NATCA II*, the union did not challenge a particular Panel decision or action arising from an ongoing labor bargaining but instead sought a declaration as to whether the Panel's general policy not to assert jurisdiction over certain types of disputes was consistent with the Statute's text. *Id.* at 787. And this time, the court held that because there was no bargaining dispute at issue—that is, because "[n]othing the district court" could do in ruling on the union's claim would reverse any action of the Panel in that case—the district court could exercise jurisdiction over the union's claim. *Id.* at 787 (pointing out that the union's "complaint here identifies no specific decision of the [Panel] or the General Counsel"). The court's reasoning: without any ongoing bargaining dispute between the parties, the union had no basis for an unfair labor practice charge. *See id.* at 788. Therefore, the court suggested, it would have been futile to force a claim divorced from any collective bargaining dispute into the framework of an unfair labor practice charge for the General Counsel's initial review. *Id.*

In fact, in reaffirming its prior decisions, the D.C. Circuit in *NACTA II* again made clear that had the union's claim been raised in the context of an ongoing bargaining dispute, the district court would have lacked jurisdiction and the union would have had to pursue its claim within the statutory

unfair labor practice scheme. "There can be no doubt," the court declared—and, indeed, "the petitioners agree[d]"—that "the district court lacks jurisdiction to review decisions of the [Panel.]" *Id.* at 787; *id.* at 788 ("In the present case the Union does not seek review of a[Panel] decision; hence *NATCA I* has no bearing upon the jurisdiction of the district court."). Were it to review a Panel decision, the prior cases confirmed, the district court would "'improperly interject[] the federal judiciary, at a premature stage into [the Statute's] carefully developed system of administrative review,'" into the parties' bargaining dispute "before an unfair labor practice charge had been filed with the Authority." *NATCA I*, 437 F.3d at 1265 (quoting *Steadman*, 918 F.2d at 966)).

The D.C. Circuit gave its most recent word on the exclusivity of the Statute's review scheme just last year in *AFGE v. Trump*, 929 F.3d 748. In that case, the court affirmed what it has been saying for decades: The Statute channels all claims arising under the Statute through the Statute's "enormously complicated and subtle" administrative and judicial review scheme and away from district court entirely. *Id.* at 755. In so holding, the *AFGE v. Trump* court went even further than *NATCA II*, concluding that any challenge brought outside the context of a concrete bargaining dispute following the statutory review procedures was precluded from district court review. *See id.* at 755-61. This holding was compelled, the court determined, by the D.C. Circuit's decades of precedent following *Thunder Basin*. *Id.* at 755-57 (discussing the cases).

This conclusion led the D.C. Circuit in *AFGE v. Trump* to reject statutory and constitutional challenges brought by seventeen federal unions to a set of three Executive Orders affecting collective bargaining negotiations, among other federal government labor and personnel matters. *Id.* at 755-61. The Executive Orders set various goals for agencies to pursue in such negotiations, including caps on official time, limitations on unions' access to agency resources, the length of time CBA negotiations should last, among other labor-management decisions. *Id.* at 753. In bringing their challenges to district court, the unions requested "'pre-implementation review' of the executive orders or immediate

relief barring all agencies from implementing the executive orders." *Id.* at 755. They argued that district court jurisdiction was proper because the Statute itself foreclosed their preferred route to judicial review—it provided no avenue for bringing a "systemwide" challenge such as theirs and the Authority had no ability to provide the nationwide injunctive relief they sought. *Id.* at 757.

No matter, the court held. Even if the Statute precluded the unions' particular "pre-implementation" challenge or the specific "systemwide" relief they sought, the unions nonetheless had access to meaningful judicial review of their challenges to the Executive Orders through the Statute's "more modest administrative options" within "the context of a concrete bargaining dispute." *Id.* at 756–57 (citation and internal quotation marks omitted).

One such option, the court explained, was an unfair labor practice proceeding. The court explained that, as Circuit precedent already made clear, "if an agency follow[ed] the executive orders' goal-setting provisions while bargaining with a union, the union could charge in an unfair labor practice proceeding that the agency's adherence to those provisions amounted to bad-faith bargaining in violation of the Statute." *Id.* at 757. After receiving such a charge from the union, the Authority could "determine whether the agency had done so, and whether the agency may continue pursuing those goals during bargaining." *Id.* The court acknowledge that this route to review, along with several others applicable in that case, may not have been the unions' "preferred" route, but it nonetheless allowed for "meaningful judicial review," because it brought the unions' claims before the Authority and, ultimately, a federal court of appeals. *Id.* at 759. That meant, too, that the Authority's ability to rule on any of the unions' claims or afford the relief they sought was, ultimately, beside the point—even "if the [Authority] could not address th[ose] claims," the court held, "the circuit courts could do so on appeal from the [Authority]." *Id.* at 758.

This unbroken line of precedent—from *Brewer* in 1984 to *AFGE v. Trump* in 2019—compels dismissal of NVAC's case. Each of the D.C. Circuit's cases confirm that the Statute provides the

exclusive review scheme to challenge any Panel decision or action taken in the context of negotiation impasse proceedings. That exclusive review scheme channels jurisdiction away from district courts entirely and sends all claims to the Authority in the context of an unfair labor practice proceeding and then to a court of appeals. As NVAC has not even argued that its claims fall within the narrow *Leedom v. Kyne* exception for district court review, its request that this Court intervene in its "Pending Labor Dispute Before the Panel," Compl. at 14, PI Mot. at p. 12, and "[e]njoin the Panel from issuing any decisions regarding Plaintiff," *id.* at 18, must be dismissed as barred by controlling precedent.

Where NVAC's jurisdictional pitch goes wrong is in arguing that *NATCA II* excepts a certain category of challenges to the Panel's authority away from the Statute's exclusive review scheme. Pl.'s Mot. at 13-14. According to NVAC, Circuit precedent says only that the Statute precludes district court review of Panel "decision[s] imposing particular contract terms on the parties (or declining to assert jurisdiction)[.]" *Id.* at 13. By contrast, NVAC argues, the same precedent would allow a union to bypass the Statute's review scheme to seek generalized declaratory relief challenging the Panel's authority to act (because is allegedly "improperly constituted"). *Id.* at 15. But that position contradicts *Brewer*'s unqualified conclusion that the Statute completely "forecloses the assumption of general federal question or mandamus jurisdiction." 735 F.2d at 1500. Based on the *Brewer* court's understanding of the exclusivity of the Statute's review scheme, it rejected the union's request for a declaration that the Panel lacked authority to "direct parties to agree to proposals or make concessions." *Brewer*, 735 F.3d at 1501. Under *Brewer* and its progeny, NVAC's similar challenge to "the Panel's authority" writ large, Pl.'s Mot. at 13, must proceed through the Statute's exclusive review scheme.

Nor does *NATCA II* carve out an exception to *Brewer*'s unqualified holding. Critical to *NATCA II*'s holding that the Statute did not preclude district court jurisdiction over the union's challenge to the Panel's ongoing refusal to assert jurisdiction was the fact that the union had exhausted

the administrative remedies available within the Statute's review scheme. Although *NATCA II* does expressly use exhaustion language, its recitation of that the procedural history in the case and its affirmation of the holding reached in *NATCA I* make clear that exhaustion was the basis for its jurisdictional holding.

Recall that *NATCA I* and *NATCA II* involved the same parties and the same claims; the difference was the context in which the claims were brought. In both cases, the court was asked to determine whether the Panel's refusal to exercise jurisdiction over the parties' negotiation impasse violated a specific statutory provision. *NATCA I*, 437 F.3d at 1258; *NATCA II*, 606 F.3d at 784-86. But in *NATCA I*, the court was asked to issue a decision while the parties' bargaining dispute was ongoing—that is, "before an unfair labor practice charge had been filed with the Authority." *NATCA I*, 437 F.3d at 1265. This meant that, however the court ruled, it would be interfering with the trajectory of the parties' dispute by overturning a decision of the Panel. *NATCA II*, 606 F.3d at 787. In *NATCA II*, however, the union had filed unfair labor practice charges with the Authority's General Counsel and had followed the administrative appeal process when the General Counsel declined to issue a complaint. *Id.* at 786. Because the union had followed the administrative process through to its completion and there was no longer any pending bargaining dispute at the time it sought relief in the district court, "[n]othing the district court" could do would reverse a decision of the Panel or the General Counsel or otherwise interfere with an ongoing bargaining dispute. *Id.* at 787.

NVAC's claims are not materially different, as a procedural matter, from the one raised in *NATCA I*. To the same extent that the union in *NATCA I* sought review of an order of the Panel *declining* jurisdiction, *NATCA I*, 437 F.3d at 1258, 1262, NVAC here seeks review of the Panel's order *asserting* jurisdiction over its impasse on the grounds that the appointment of its members violates the Constitution and the Statute, Compl. ¶¶ 37-54 & p. 18. Indeed, NVAC itself acknowledges that a Panel decision "declining to assert jurisdiction" is "final and nonreviewable." PI Mot. at 13. It offers

no reason why a Panel order asserting jurisdiction should nonetheless be directly reviewable. Both claims go to the Panel's authority to act.

Moreover, NVAC's claim, like the one brought in *NATCA I*, asks the district court to overturn a Panel action and interfere with an ongoing bargaining dispute. Neither the Panel's assertion of jurisdiction nor its ultimate order puts an end to the parties' collective bargaining negotiations. Rather, the Panel's procedures are but one step in the process to finalizing a new CBA. In fact, as the Authority has recognized, "the Panel's procedures are part of the collective bargaining process"—not the culmination of that process. *U.S. Dep't of Veterans Affairs Med. Ctr. Kerrville, Texas*, 45 FLRA 457, 468 (1992). And as the Statute itself provides, Panel decisions are final and binding on the parties "unless [they] agree otherwise." 5 U.S.C. § 7119(c)(5)(C). Therefore, even after receiving a Panel decision, the parties to a collective bargaining negotiation may decide to "renegotiate all or part of the provisions ordered" by the Panel "to be included in their agreement." *Dep't of the Air Force Air Force Materiel Command*, FLRA ALJ Dec. Rep. No. 137 (Oct. 22, 1998). But even if the parties do not agree to modify the Panel decision, the collective bargaining dispute is not brought to an end. As *NATCA I* and *AFGE v. Trump* illustrate, and as further elaborated below, *supra* Part II, the Statute provides a specific method for resolving one party's objections to a Panel decision, of which the parties may avail themselves this case: bringing an unfair labor practice charge or grievance.

Thus, the particular circumstances underlying the *NATCA II* holding are simply not present here. Instead of pursuing its administrative remedies through to completion, NVAC requests that the Court enjoin the Panel from asserting jurisdiction at all. Compl. at 18. But *NATCA II* does not provide a basis for district court jurisdiction at the initial stages of a bargaining dispute where administrative remedies have not been followed through to completion. It may be, under *NATCA II*, that if NVAC's "constitutional claim survives an unsuccessful journey through the administrative process" that "the federal courts" may be "open." *Steadman*, 918 F.2d at 968 (citing *Griffith v. Fed.*

Labor Relations Auth., 842 F.2d 487 (D.C. Cir. 1988)). Until then, AALJ has no basis for taking a shortcut to district court. That is the lesson of *NATCA I* and *NATCA II*.

Finally, NVAC's resort to *Free Enterprise* as providing a basis for district court jurisdiction, Pl.'s Mot. at 15-18, fails because, as the D.C. Circuit's line of precedent shows (and as explained further below, *infra* Part II), the Statute provides a route to meaningful judicial review. The statutory procedures may "lack the directness and immediacy" that NVAC would prefer, *Am. Federation of Gov't Employees v. Sec'y of Air Force*, 716 F.3d 633, 639 (D.C. Cir. 2013) (citation omitted); but that does not justify permitting NVAC to evade the statutory procedures and seek relief in the district court. "[T]he choice of procedures" for obtaining a remedy "lies with Congress." *Id.* (citation omitted). And courts have already held that Congress's choice, in this Statute, allows parties to obtain "meaningful judicial review." *AFGE v. Trump*, 929 F.3d at 754; *Howlett*, 562 F. Supp. at 851, *aff'd sub nom. Brewer*, 735 F.2d 1497 ("In this instance the circuitous route to court prescribed by the Statute implements the legislative purpose of promoting collective bargaining by requiring quick resolution of negotiation impasses."). NVAC, therefore, must follow the route established by the Statute.

II. Applying *Thunder Basin* here confirms that the Statute's exclusive review scheme precludes district court review entirely, instead channeling NVAC's claims through administrative proceedings before the Authority with judicial review to follow before a federal court of appeals.

Even if the D.C. Circuit's longstanding precedent did not by itself compel dismissal of NVAC's complaint, application of the *Thunder Basin* review-channeling analysis would ensure the same outcome for the same reasons.

Although "[f]ederal district courts generally have 'original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,'" Congress may explicitly or implicitly divest district courts of jurisdiction over certain claims. *Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016). In particular, Congress may "preclude district court jurisdiction by establishing an alternative statutory scheme for administrative and judicial review." *AFGE v. Trump*, 929 F.3d at 754. To

determine whether it has done so, courts "use the two-step framework set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 [] (1994)." *Id.* "Under that framework, Congress intended that a litigant proceed exclusively through a statutory scheme when (i) such intent is fairly discernible in the statutory scheme, and (ii) the litigant's claims are of the type Congress intended to be reviewed within [the] statutory structure." *Id.* (cleaned up) (quoting *Jarkesy*, 803 F.3d at 15).

NVAC acknowledges that the first *Thunder Basin* factor is satisfied. *See* Pl.'s Mot. at 13 ("Generally, a party cannot obtain judicial review seeking reversal of a specific decision of the Panel" and a Panel order "imposing particular contract terms on the parties (or declining to assert jurisdiction) is final and nonreviewable.") (internal quotation marks omitted). And for good reason. As the D.C. Circuit held more than thirty years ago and reiterated in 2019, it is fairly discernible from the Statute's "enormously complicated and subtle scheme . . . that Congress intended the statutory scheme to be exclusive with respect to claims within its scope." *AFGE v. Trump*, 929 F.3d at 755; *Brewer*, 735 F.2d at 1500. Under that scheme, "Congress has restricted the courts from subjecting Panel actions to direct judicial scrutiny." *Brewer*, 735 F.2d at 1500. Instead, as this Circuit has held, Panel decisions are "reviewable, first before the Authority, then in court, in an unfair labor practice proceeding." *NTEU*, 712 F.2d at 671 n.5. Therefore, this case turns on *Thunder Basin*'s step-two analysis—whether NVAC's claims are of the type Congress intended to be channeled through the ordinary statutory scheme. They are.

Turning to *Thunder Basin*'s second step, the D.C. Circuit has emphasized that "[t]o unsettle [the] presumption of initial administrative review—made apparent by the structure of the organic statute—requires a strong countervailing rationale."' *Jarkesy*, 803 F.3d at 17 (quoting *E. Bridge, LLC v. Chao*, 320 F.3d 84, 89 (1st Cir. 2003)). Under that rationale, three factors guide the Court's analysis: (1) "if a finding of preclusion could foreclose all meaningful judicial review," (2) "if the suit is wholly collateral to a statute's review provisions," and (3) "if the claims are outside the agency's expertise."

Jarkesy, 803 F.3d at 17 (citations omitted) (cleaned up). These factors "serve as general guideposts" rather than "distinct inputs into a strict mathematical formula." *AFGE v. Trump*, 929 F.3d at 755 (quoting *Jarkesy*, 803 F.3d at 17).

Against those general guideposts, NVAC cannot show that any of the *Thunder Basin* step-two factors warrants its attempted departure from the Statute's exclusive review scheme through demonstration of the "strong countervailing rationale" that might unsettle the presumption of initial administrative review before the Authority, followed by judicial review in a court of appeals.

A. The Statute provides NVAC with a route to meaningful judicial review in a federal court of appeals.

Beginning with the first factor of *Thunder Basin*'s second-step test, requiring NVAC to proceed through the Statute's scheme would not foreclose "all meaningful judicial review." *AFGE v. Trump*, 929 F.3d at 755 (internal quotation marks omitted). That's because, as the D.C. Circuit explained decades ago, a Panel decision is reviewable by the Authority and then a federal court of appeals in the context of a dispute over an unfair labor practice. *Brewer*, 735 F.2d at 1500; *Dep't of Treasury v. FLRA*, 707 F.2d 574, 577 n.7 (D.C. Cir. 1983) ("The Panel's decision is reviewable, first before the Authority, then in court, in an unfair labor practice proceeding."); *N.Y., Div. of Military & Naval Affairs*, 2 FLRA 185, 188 (1979) ("Authority review of a final Panel Decision and Order . . . may be sought by the party objecting to the order . . . after the filing of unfair labor practice charges by the other party.").

In the context of this case, Statute's review scheme provides multiple ways for NVAC to assert its claims in the context of an unfair labor practice proceeding on the way to court of appeals review. First, because refusing to "appear before the [Panel] is undoubtedly an unfair labor practice," NVAC could provoke the VA to file an unfair labor practice charge with the Authority's General Counsel or a grievance with an arbitrator by refusing participate in Panel proceedings at all. *NATCA I*, 437 F.3d at 1265; U.S.C. § 7116(b)(6). Or if it does participate in the proceedings, NVAC may refuse to comply with the Panel's ultimate order, thus provoking VA to file an unfair labor practice charge or a grievance

after the Panel proceedings are complete. *See Brewer*, 735 F.2d at 1500 (explaining that a failure "to comply with any final action ordered by the Panel constitutes an unfair labor practice" (quotation omitted)); *Veterans Admin. Washington, D.C.*, 26 FLRA 264, 269 (1987) ("By not complying with the Panel's decision, the Respondent assumed a risk that if its position did not prevail, it would be found to have committed an unfair labor practice."); *see also* 5 U.S.C. §§ 7116(a)(6), (b)(6).

Alternatively, if the VA declines to pursue an unfair labor practice charge or grievance against NVAC, NVAC still may have an open path to judicial review. NVAC itself may attempt to file a charge or grievance against the VA based on the VA simply implementing a new CBA in the face of NVAC's refusal to abide by the Panel's decision. *See* 5 U.S.C. § 7116(a)(1), (5); *see, e.g.*, *U.S. Dep't of the Air Force Space Systems Div. Lost Angeles Air Force Base*, 38 FLRA 1485 (1991) (finding that the agency's unilateral imposition of a new policy was an unfair labor practice under 5 U.S.C. § 7116(a)(1) and (5)); *U.S. Dep't of the Treasury IRS*, 64 FLRA 426, 428 (2010); *see also Dep't of Health and Human Servs.*, National Grievance before Arbitrator Robert A. Creo (Aug. 7, 2018)[3] (finding that the agency's imposition of a ground-rules Panel decision on the union, after the agency head disapproved of the decision, was an unfair labor practice).

Additionally, NVAC could seek to reopen bargaining with VA on the Panel-imposed articles, and, if VA refuses to respond, then file an unfair labor practice charge or grievance. *See* 5 U.S.C. § 7116(a)(5); *cf. NATCA I*, 437 F.3d at 1265 ([W]here an agency has a duty to negotiate, a unilateral change in conditions of employment is a refusal to consult or negotiate in good faith and thus an unfair labor practice."); *AFGE v. Trump*, 929 F.3d at 757 ("[I]f an agency refuses to bargain . . . the unions could charge in a negotiability or unfair labor practice dispute that the agency had refused to bargain over mandatory matters in violation of the Statute.").

[3] Available at https://www.nteu.org/~/media/Files/nteu/docs/public/hhs/2019/hhs-grievance-win.pdf?la=en (last visited May 3, 2020).

No matter how an unfair labor practice proceeding is triggered, it results in a final decision by the Authority subject to review in a federal court of appeals. 5 U.S.C. § 7123(a). The Statute's two-track scheme sends any of these disputes—at the party's choosing—either before an arbitrator first and then to the Authority or directly to the Authority through the General Counsel. *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1345 (D.C. Cir. 2012). Whichever route the dispute follows, NVAC would be free to raise any of the claims it asserts in this case to defend against the enforcement of the Panel forthcoming decision. And if any of its claims are successful, the Authority may vacate the Panel decision in whole or in part. *See, e.g.*, *Dep't of Def. Domestic Dependent Elementary & Secondary Sch. Fort Buchanan, P.R.* 71 FLRA 127, 129, 134 (2019) (excusing an agency's noncompliance with certain Panel-imposed contractual terms and vacating the Panel decision in part); *see also Patent Office Prof'l Ass'n v. FLRA*, 26 F.3d 1148, 1153 (D.C. Cir. 1994) (rejecting enforcement of contract provisions imposed by an interest arbitrator acting on delegated authority from the Panel, where the arbitrator, and, consequently, the Panel lacked jurisdiction to impose those provisions). Regardless of the outcome at the administrative level, "any party aggrieved" by the Authority's decision may seek judicial review in a federal court of appeals. 5 U.S.C. § 7123(a); *Brewer*, 735 F.2d at 1500; *Dep't of Navy*, 665 F.3d at 1344-46.[4]

[4] In fact, the Statute provides yet another mechanism for parties to obtain judicial review of claims that have to do with the Panel's jurisdiction or issues of the Statute's application that raise constitutional concerns. Section 7105(a)(1) empowers the Authority to "establish[] policies and guidance" at the request of "the president of a labor organization." 5 C.F.R. § 2427.2. Under that provision, the Authority has issued statements concerning "the applicability of the First Amendment principles . . . to the revocation of federal employees' union-dues assignments," *Office of Pers. Mgmt.*, 71 FLRA 571 (2020), and delineated the Panel's jurisdiction to resolve duty-to-bargain issues that arise during negotiation impasse proceedings, *Interpretation & Guidance*, 11 FLRA 626 (1983). The Authority's decision on a request for a policy statement or general guidance is reviewable in a court of appeals under 5 U.S.C. § 7123(a). *See*, *e.g.*, *AFGE 1985*, 778 F.2d at 851.

This procedure for obtaining judicially reviewable policy and guidance statements from the Authority is not available to parties that have matters pending before the Panel, 5 C.F.R. § 2427.2(b), and thus is not accessible to NVAC in this case. But the limited availability of that procedure is more evidence that the statutory scheme channels all claims related to the Panel's resolution of a negotiation

Moreover, once in a federal court of appeals, as *AFGE v. Trump* emphasized, the scope of review under the Statute is expansive. *See* 5 U.S.C. § 7123(c). Of course, a federal court of appeals "may review the validity of the Panel order in question[.]" *Brewer*, 735 F.2d at 1500 (citing cases). It may entertain any claim raised before the Authority. And for purposes of remedy, it "may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole in or part the order of the [Authority]." *AFGE v. Trump*, 929 F.3d at 758 (quoting 5 U.S.C. § 7123(c)). There is therefore "no reason why the scheme here would prevent [a court of appeals] from resolving the union['s] constitutional" or statutory challenges. *Id.* For that reason, the D.C. Circuit has held that the unfair labor practice processes provide adequate avenues of review to the Authority and "later by the courts in review of any such proceeding." *See id.*

In spite of these available and established routes to judicial review, NVAC insists that they are not "meaningful" because the unfair labor practice proceedings would require it to "bet the farm" by taking a violative action just to bring is challenge—and that, NVAC asserts, puts it on equal footing with the petitioners in *Free Enterprise*. Pl.'s Mot. at 16. But that contention fails for several reasons.

To start with, the concerns that animated the decision in *Free Enterprise* are entirely absent here. The *Free Enterprise* petitioners were subject to an investigation by the Public Company Accounting Oversight Board, which investigation may not have resulted in a final order that was reviewable by the Commission and then an Article III court within the statutory scheme. *Id.* at 490. That left the petitioners with two options to bring their constitutional challenge within the statutory review scheme and obtain judicial review: (1) incur potential "bet the farm" penalties in the millions of dollars for intentionally violating a Board order during the course of the investigation, or (2) challenge an

impasse through an unfair labor practice proceeding—thereby decreasing the risk of parallel litigation over different claims related to the same Panel actions. *See Am. Fed'n of Gov't Employees, AFL-CIO v. Loy*, 367 F.3d 932, 936 (D.C. Cir. 2004) ("Parties cannot bifurcate their case, pursuing only statutory claims before the [Authority] while litigating closely related constitutional claims in the district court.").

unrelated Board rule at random and tack its constitutional claim along to that challenge. *Id.* at 485, 490. Because these two options confronted the petitioners with what amounted to a "constitutionally intolerable choice," *Thunder Basin*, 510 U.S. at 218, the Supreme Court concluded that the claim was not subject to jurisdictional channeling. *Free Enterprise*, 561 U.S. at 491. As the D.C. Circuit later put it in *Jarkesy*, what "led the Supreme Court to believe that Congress could not possibly have intended the accounting firm [in *Free Enterprise*] to proceed through the administrative route" was the Hobson's choice the petitioners faced there: erect a "Trojan-horse" challenge to an agency rule or "bet the farm" on violating an agency rule against the risk of truly ruinous liability[.]" *Jarkesy*, 803 F.3d at 20.

That Hobson's choice distinguished the *Free Enterprise* petitioners from the plaintiff mine operators in *Thunder Basin*, which likewise had no certain route to judicial review at the time they filed suit in district court. In *Thunder Basin*, the mine operators asserted statutory and constitutional challenges to a Mine Safety and Health Administration regulation requiring them to post information about their employees' representatives on site. 510 U.S. at 203-05. The Mine Act empowered the Secretary of Labor to issue citations for all violations of the Act, including a mining company's failure to post the required information, and the Secretary's decision to issue a citation could be challenged before the Federal Mine Safety and Health Review Commission. *Id.* at 204. The Commission, in turn, could impose any "civil penalties proposed by the Secretary," *id.* at 208, as well as other substantial sanctions, including criminal penalties, *id.* at 204 n.4. The Mine Act provided for judicial review of any final Commission decision before a court of appeals following completion of the administrative review process. *Id.* at 204.

Seeking to bypass that scheme, the mine operators in *Thunder Basin* filed suit in district court challenging the Mine Act's posting requirement after receiving a letter from the Secretary instructing them to comply with the Act, but before any enforcement proceedings had commenced before the Commission. *Id.* at 204-05. Much as NVAC argues here, the mine operators argued there that they

should be excused from following the statutory review scheme, and permitted instead to bring their action in district court, because the scheme effectively forced them to choose between "violating the Act and incurring possible escalating daily penalties, or, on the other hand, complying with the designations and suffering irreparable harm." *Id.* at 205 (internal footnote omitted).

The Court rejected the notion that those harms sufficed to place the mine operators outside the statutory review scheme. *Id.* at 216-18. Finding that Congress had intended the Mine Act's review scheme to be exclusive, the Court held that the mine operators could pursue their challenges to the posting requirement only after receiving a citation from the Secretary that was subsequently enforced against them by way of a final Commission order. *Id.* at 207-08. That was so even though the "civil penalties unquestionably may become onerous if petitioner chooses not to comply" with the Act, the Court emphasized, because such assessments would "become final and payable only after full review by both the Commission and the appropriate court of appeals." *Id.* at 218. Additionally, the Court concluded that the mine operators' assertions that complying with the Mine Act's requirements would cause irreparable harm were "entirely hypothetical on the record before [the Court]." *Id.* at 217.

Like the mine operators in *Thunder Basin*, NVAC has a route to bring its constitutional and statutory challenges to the Panel's composition within the Statute's administrative and judicial review scheme. The possibility that following the review scheme might ultimately result in a sanction against NVAC for committing an unfair labor practice is not enough on its own to give NVAC a shortcut around the scheme. That is because NVAC does not face the Hobson's choice that the petitioners faced in *Free Enterprise*. If NVAC declines to follow the Panel decision and provokes VA to file a charge against it, NVAC may be subject to a "cease and desist" order compelling it to comply with the Panel decision and continue negotiating, 5 U.S.C. § 7118(a)(7)(B)—a penalty far less severe than the debilitating fines the *Free Enterprise* petitioners risked incurring. Moreover, NVAC's assertion that its refusal to abide by hypothetical Panel-imposed CBA terms might be interpreted as a "strike, work

stoppage, or slowdown" and potentially result in decertification, Pl.'s Mot. at 16 (citing 5 U.S.C. § 7120(f)), is unsupported speculation. NVAC points to no example in which a union has actually faced decertification for failing to comply with a Panel decision. And though it claims to not know how to provoke an unfair labor practice charge, *id.*, the Statute makes clear that its refusal to participate in impasse proceedings or follow the Panel's ultimate decision both provide a clear basis for such a charge against it. *See, e.g.*, *Am. Fed. of Gov't Employees & Dep't of Transportation*, 16 FLRA 318, 318–19 (1984) (holding that a union committed an unfair labor practice when it refused to sign the parties' pre-negotiation agreement incorporating a Panel decision).

And in any event, it is possible that NVAC itself may file an unfair labor practice charge or grievance against VA, thereby putting the Panel decision before the Authority without risking incurring an unfair labor practice charge at all. To do that, NVAC need not challenge an agency rule at random as the *Free Enterprise* petitioners would have had to do. Rather, it may file an unfair labor practice charge or grievance based on any number of actions the VA takes to implement the very Panel decision that NVAC anticipates will be contrary to law on its theory that the Panel has no jurisdiction over the parties' impasse at all.

Finally, NVAC's assertion that the statutory scheme does not afford it meaningful judicial review ignores the reality of forty years of collective bargaining under the Statute. Over that period, unions have sought to pursue the same course NVAC pursues here, bypassing Authority review in the Panel-decision context in favor of (presumably quicker) district court review, and the D.C. Circuit has never signaled that the potential injuries faced by those unions warranted departure from the detailed scheme Congress established through the Statute. Quite to the contrary, in fact: as the D.C. Circuit emphasized more than thirty years ago in *Brewer*, unions may suffer injury through the imposition of Panel decisions, but the recourse provided by the Statute reflects a studied decision of Congress, and does not permit them to bypass the review scheme in favor of district court. *Brewer*,

735 F.2d at 1501-02, n.9; *see also AFGE v. Trump*, 929 F.3d at 756-57.

Finally, NVAC would be "wrong to assign [] talismanic significance" to the fact that it seeks to vindicate broad constitutional and statutory alleged harms rather than challenge the substance of any particular administrative determination. *Jarkesy*, 803 F.3d at 18. Courts have consistently held that these very types of claims must follow the statutory process created by Congress. *See Elgin*, 567 U.S. at 6-7 (constitutional challenges to Military Selective Service Act and law barring federal employment to those who willfully fail to register for the draft was precluded by exclusive statutory review scheme); *Jarkesy*, 803 F.3d at 19-20 (lawsuit charging that administrative proceeding violated Fifth Amendment Due Process Clause and the Equal Protection Clause rights precluded by exclusive statutory review scheme); *Tilton v. SEC* 824 F.3d 276, 288–89 (2d Cir. 2016) (claim that SEC administrative proceeding was unconstitutional because the presiding ALJ's appointment violated Appointments Clause was precluded by statutory review scheme); *Bennett*, 844 F.3d at 182 (suit seeking declaratory judgment that ALJ appointed in violation of Appointments Clause and Article II of the Constitution precluded by statutory review scheme); *Bank of Louisiana v. Fed. Deposit Ins. Corp.*, 919 F.3d 916, 926–27 (5th Cir. 2019) (Equal Protection Clause challenge to FDIC's decision to initiate enforcement proceedings precluded by exclusive statutory review scheme); *Bebo v. SEC*, 799 F.3d 765, 769–75 (7th Cir. 2015) (Appointments Clause challenge to authority of ALJ to preside over enforcement hearing and facial attack Section 929P(a) the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 precluded by statutory review scheme); *Hill v. SEC*, 825 F.3d 1236, 1243 (11th Cir. 2016) (Appointments Clause challenge to authority of ALJ to preside over enforcement hearing precluded by statutory review scheme). NVAC's claims are no different from those.

In sum, NVAC fails to demonstrate that the Statute's review scheme does not offer a route to meaningful judicial review under the first *Thunder Basin* step-two factor.

B. NVAC's claims are not "wholly collateral" to the statutory review scheme, because they are the "vehicle by which" it seeks to vacate the Panel's ultimate decision and thereby prevail in the administrative proceedings.

The second *Thunder Basin* factor likewise weighs against NVAC. Under this factor, the Court must determine whether NVAC's claims are "wholly collateral" to the Statute's review scheme. *Thunder Basin*, 510 U.S. at 211. A claim is not wholly collateral when it is "the vehicle by which" the party seeks to reverse the agency action. *Elgin*, 567 U.S. at 22. "This consideration is 'related' to whether 'meaningful judicial review' is available, and the two considerations are sometimes analyzed together." *AFGE v. Trump*, 929 F.3d at 759 (quoting *Jarkesy*, 803 F.3d at 22).

This case is the "vehicle by which" NVAC seeks to prevail in the administrative proceedings: NVAC's claims arise from the Panel's assertion of jurisdiction over the parties' negotiation impasse, and by this case NVAC seeks to halt the negotiation proceedings and prevent enforcement of any ensuing Panel decision. *See Bennett*, 844 F.3d at 187 (challenge to the appointments of Securities Exchange Commission ("SEC") ALJs was not wholly collateral to the statutory review scheme when the challenge "ar[ose] out of the [SEC] enforcement proceedings," "provide[d] an affirmative defense" against the enforcement of a final Commission order against the petitioner, and would "invalidate" the order if successful). But NVAC may obtain that precise relief—nullification of the Panel's assertion of jurisdiction and any ensuing Panel decision—by adjudicating its claims through the statutory scheme. *See AFGE v. Trump*, 929 F.3d at 760 (finding that the unions' challenges to the constitutionality of three executive orders affecting collective bargaining were not wholly collateral because the relief the unions sought—"rulings on whether the executive orders are lawful and directives prohibiting agencies from following the executive orders during bargaining disputes"—could also be obtained through proceedings before the Authority and then a federal court of appeals). Accordingly, NVAC's claims are not wholly collateral to the statutory review scheme.

NVAC says that the statutory and constitutional challenges it raises in this case are wholly collateral to the statutory review scheme because they do not address the merits of any specific Panel decision. Pl.'s Mot. at 17. But that formulation of the "wholly collateral" test, as *Jarkesy* explained, was rejected by the Supreme Court in *Elgin*. When the Supreme Court analyzed the "wholly collateral" factor in *Elgin*, it "asked whether the plaintiff-employees' challenge aimed to obtain the same relief they could seek in the agency proceeding," and turned to the relief sought by the complaint to answer that question. *Jarkesy*, 803 F.3d at 23. "As evidenced by their district court complaint," *Elgin* stated, "petitioners' constitutional claims are the vehicle by which they seek to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action." *Id.* (quoting *Elgin*, 567 U.S. at 22). On that basis, the Court held that the claims were not "wholly collateral" to the statutory review scheme, regardless of whether the petitioners' particular constitutional challenges touched on the merits of the underlying administrative decision. *See id.*; *see also Bennett*, 844 F.3d at 186-87 (joining *Jarkesy* in concluding that the Supreme Court's "wholly collateral" test in *Elgin* looks only to whether the claims fall within "the statute's review provisions" and not at whether the claims go to the substance of the administrative decision at issue).

A review of NVAC's complaint yields the same answer to the wholly collateral question here. In addition to its request that the Court declare the Panel's composition violates the Constitution and the Statute, NVAC seeks a declaration "that the rulings of the improperly constituted Panel are null and void" and an injunction to keep "the Panel from issuing any decisions regarding Plaintiff until its members are properly appointed." Compl. at 18. But NVAC may obtain the same relief by following the statutory review scheme through to completion. At the end of an unfair labor practice proceeding, NVAC, if successful, may receive an Authority decision ordering vacatur of the Panel decision in whole or in part. *See, e.g.*, *Dep't of Def. Domestic Dependent Elementary*, 71 FLRA 127. And if NVAC does

not obtain that relief from the Authority, it may pursue the same relief in a court of appeals. 5 U.S.C. § 7123(a). Its claims are therefore not wholly collateral to the statutory review scheme.

C. The Authority has expertise that may be brought to bear on NVAC's constitutional and statutory challenges.

The final *Thunder Basin* factor—whether agency expertise may be brought to bear on the question presented—likewise defeats NVAC's attempt to evade the statutory scheme. The inquiry under this factor focuses not on "an agency's relative level of insight into the *merits* of a constitutional question," *AFGE v. Trump*, 929 F.3d at 761 (quoting *Jarkesy*, 803 F.3d at 28–29), but instead on whether the agency has expertise that could be "brought to bear" on "the many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." *Elgin*, 567 U.S. at 22.

Thus properly assessed, the Authority's expertise may be brought to bear in this case. Even if the Authority lacks expertise relevant to the Appointments Clause, it possesses extensive expertise relevant to a host of other preliminary issues that may arise in an unfair labor practice proceeding or grievance—including any number of specific claims that may arise from a Panel order imposing collective-bargaining terms on the parties. Indeed, the theory of NVAC's case is that the Panel members' purported bias will almost certainly result in Panel-ordered contract terms favorable to the VA and adverse to NVAC. *See, e.g.*, Compl. ¶¶ 32, 53. But NVAC may contest the lawfulness of any one of the Panel-imposed contract terms that it anticipates will be adverse to NVAC in the context of an unfair labor practice proceeding; and the lawfulness of any Panel-imposed term unquestionably "lie[s] at the core of the [Authority's] 'specialized expertise in the field of labor relations.'" *AFGE v. Trump*, 929 F.3d at 760 (*quoting AFGE Council of Locals No. 214 v.* FLRA, 798 F.2d 1525, 1528 (D.C. Cir. 1986)). *See, e.g.*, *Dep't of Def. Domestic Dependent Elementary & Secondary Sch. Fort Buchanan, P.R.,* 71 FLRA 127, 134 (2019) ("*Fort Buchanan*") (Authority review of Panel-imposed contractual terms challenged in an unfair labor practice proceeding); *Veterans Admin. Washington, D.C.*, 26 FLRA 264,

268-69 (1987) (reviewing Panel decision to determine whether the Panel "exceed[ed] its authority in asserting jurisdiction" and whether its order was "contrary to law").

What is more, a Panel or Authority decision in NVAC's favor on any number of potential issues that may be raised in this case "could moot the need" for a federal court to resolve its challenge to the validity of the Panel members' appointments altogether. *Jarkesy*, 803 F.3d at 29.[5] And the potential that its claims may be mooted, rather than weigh in NVAC's favor, actually "warrants the requirement that [the Union] pursue [agency] adjudication, not shortcut it." *Id.* at 27 (quoting *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 n.11 (1980)).

Finally, even setting these threshold issues aside, the Authority's expertise relevant to the application of the Statute it daily administers may also shed light on any one of the specific claims alleged in this suit. "After all, 'there are precious few cases involving interpretation of statutes authorizing agency action in which our review is not aided by the agency's statutory construction.'" *AFGE v. Trump*, 929 F.3d at 761 (quoting *Jarkesy*, 803 F.3d at 29); *cf. Jarkesy*, 803 F.3d at 29 (finding that the Securities and Exchange Commission "could offer an interpretation of the securities laws in the course of the [administrative] proceedings that might answer or shed light on [the plaintiff's] non-delegation challenge"). And in fact, the Authority has considered in other cases whether specific Panel-ordered provisions raise any constitutional concerns. *See, e.g.*, *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 56 FLRA 119, 120, 122 (2000) (sustaining agency's objection "that enforcing the Panel's

[5] Indeed, the Panel has not even issued a decision yet. And if the Panel (despite NVAC's apparent expectation) were to rule in NVAC's favor on the disputed contract terms over which the parties are at impasse, it might moot the claims in this suit altogether. It is well established that actions involving nonfinal agency decisions are "incurably premature" and may not be reviewed by the Court. *Flat Wireless, LLC v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019); *see also NTCH, Inc. v. FCC*, 877 F.3d 408, 412 (D.C. Cir. 2017) (petition for review filed "before resolution by the full Commission is subject to dismissal as incurably premature" (internal quotation marks omitted)). This rule applies even more so in cases like this where constitutional claims are asserted, for "the very fact that constitutional issues are put forward constitutes a strong reason for not allowing a suit either to anticipate or to take the place of the agency's final performance of its function." *Steadman*, 918 F.2d at 967 (cleaned up).

Order would violate the Appropriations Clause, the doctrine of separation of powers and the doctrine of sovereign immunity contained in the United States Constitution."); *Nevada National Guard*, 7 FLRA 245, 259–61 (1981) (considering at length an agency's contention that a Panel order "which has the effect of overriding the military determination concerning technician attire" was consistent with Article I, Section 8, clauses 15 and 16 of the U.S. Constitution).

There is no reason to believe that the Authority's interpretation of any provision of its enabling Statute would not aid the Court's consideration of the Appointments Clause, due process, and statutory fitness claims raised here—all of which may require review of the specific functions of the Panel and the Authority in administering the Statute's various provisions. This is particularly so to the extent ruling on NVAC's claims calls on the Court to assess the "duties and functions" of the Panel under the Statute and whether the Panel's current members are sufficiently knowledgeable in "labor-management relations" or whether their activities create conflicts of interest that interfere with the Panel's ability to function as an unbiased tribunal. *See* Pl.'s Mot. at 26-27. The Authority's "specialized expertise in its field of labor relations," *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983), and its responsibility to administer the Statute and exercise "leadership" over the Panel, 5 U.S.C. § 7105(a), give it expertise that may be brought to bear on these issues.

In short, NVAC fails to show that any *Thunder Basin* factor warrants its attempt to evade the Statute's review scheme and bring suit in district court.

III. The fact that the General Counsel has discretion whether to issue an unfair labor practice complaint does not confer district court jurisdiction over NVAC's claims, particularly when NVAC has failed to exhaust the administrative remedies provided by the unfair labor practice scheme.

Applied to this Statute and NVAC's claims here, *Thunder Basin*'s step-two three-factor test confirms that NVAC has access to meaningful judicial review of its challenges to the Panel's assertion of jurisdiction, through the vehicle of an unfair labor practice dispute charged with the General Counsel or grieved before an arbitrator. NVAC cannot show otherwise by resorting to speculation—

as it did in its motion for preliminary injunction—about whether the General Counsel, in her discretion, would actually issue an unfair labor practice charge on NVAC's behalf. Pl.'s Mot. at 15. Its claims fall outside of district court jurisdiction under the Statute's review-channeling scheme. *See* Parts I, II, *supra*. And even if this Court were to conclude otherwise, the Statute at the very least would require NVAC to exhaust its administrative remedies before the Authority before it might bring its claims to district court, which NVAC has not done; its claims would fall outside of district court jurisdiction for that independent reason.

NVAC asserts that the Statute vests the General Counsel with discretion whether to issue an unfair labor practice complaint if she determines that "the charge fails to state an unfair labor practice[,]" 5 U.S.C. § 7118(a)(1), that the General Counsel's determination is not reviewable in federal court, *see Turgeon*, 677 F.2d at 939-40, and that such judicially unreviewable discretion favors its jurisdictional argument. Pl.'s Mot. at 15-16. That argument is wrong under the *Thunder Basin* analysis; Congress simply did not intend for an undefined category of challenges to the Panel's authority to bypass the Statute's review scheme solely on the basis of the General Counsel's role in issuing unfair labor practice charges.

And in any event, even though the General Counsel's determination is not reviewable in a federal court, it is subject to administrative appeal to the Authority. *Turgeon*, 677 F.2d at 939–40; 5 C.F.R. § 2423.11(c). That means that even if a union might be able to bypass the Statute's review scheme and bring suit in district court in some circumstances, it would have to administratively exhaust its claims before the Authority before doing so.

As courts in this Circuit have concluded, "[t]he [Statute] requires a party to exhaust administrative remedies before obtaining judicial relief for an actual or threatened injury," even if the party "asserts constitutional claims." *Fraternal Order of Police v. Gates*, 562 F. Supp. 2d 7, 12, 14 (D.D.C. 2008). That means following an unfair labor practice charge all the way through the administrative

review process, including an appeal of any General Counsel decision not to accept an unfair labor practice charge. *See NATCA I*, 437 F.3d at 1265 ("It is also clear that any alleged unfair labor practices must be addressed in the first instance by the FLRA—not by the [Panel], the District Court, or this court."); *see also Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1433 (D.C. Cir. 1996) ("Although the CSRA gives the [Office of Special Counsel] discretion whether to seek corrective action, our circuit's law affords employees in Weaver's position a right to federal court review of their constitutional claims at the end of the line."). Without demonstrating at minimum that the General Counsel would "invariably" dismiss an unfair labor practice charge from NVAC or the agency in order to obtain review of the Panel decision, NVAC cannot carry its burden of demonstrating that the Statute confers district court jurisdiction over its unexhausted claim. *Elgin*, 567 U.S. at 20; *Kokkonen*, 511 U.S. at 377 (the burden of establishing jurisdiction "rests upon the party asserting" it).

In *Gates*, for instance, the court rejected a union's attempt to bring suit in district court where the union had "pursued a remedy" by initiating unfair labor practice proceedings with the Authority, "yet [had] never exhausted its efforts." 562 F. Supp. 2d at 13. The union had filed three separate unfair labor practice charges with the General Counsel, two of which it voluntarily withdrew, and the third of which was dismissed by the General Counsel. *Id.* Instead of administratively appealing the General Counsel's dismissal of its non-withdrawn claim, the union went straight to district court. *Id.* But the court dismissed the union's claim, holding that the Statute "requires a party to exhaust administrative remedies before obtaining judicial relief for an action or threatened injury"—which in the union's case, meant following the unfair labor practice proceeding through to the very end of the administrative appeal process before attempting to pursue a claim before an Article III court. *Id.* at 12-13.

In *Irizarry v. United States*, 427 F.3d 76 (1st Cir. 2005), the First Circuit reached much the same conclusion under the Civil Service Reform Act ("CSRA"), the broader statutory scheme governing

most aspects of federal employment within which the Statute itself falls. *Irizarry* involved an employee's constitutional challenge to an agency decision to transfer him; under the provisions governing such personnel actions, the employee was required to first pursue his claim before the Office of Special Counsel ("OSC"). Upon receipt of such a claim, the OSC is obligated to investigate whether there were reasonable grounds to believe that a constitutional violation had occurred. *Id.* If it concludes that such grounds exist, the OSC may take further specified actions under the CSRA's scheme. *Id.* However, the OSC's conclusion that no such grounds existed is not reviewable either by the agency or an Article III court. *Id.* Pointing to that unreviewable discretion, the employee in *Irizarry* asserted that "he should have been excused from complaining to the OSC" and allowed to bring his claim for an allegedly unconstitutional transfer straight to district court instead. *Id.* at 79. The First Circuit rejected the employee's argument, explaining that "nothing in the [Civil Service Reform Act] suggests that Congress intended resort to the OCS to be optional." *Id.* "If federal court review is available to" the employee, the Court held, "it is only available following the exhaustion of administrative remedies." *Id.* at 80. That was true regardless of the extent of the OSC's "discretion whether to act on [the employee's] administrative complaint." *Id.* at 79.

These conclusions are consistent with *Elgin*'s jurisdictional analysis. There, the employee argued that the Civil Service Reform Act did not preclude district court jurisdiction over his constitutional claim by stressing that the administrative law judge ("ALJ") had dismissed his claim on jurisdictional grounds and thereby cut off his path to judicial review. 567 U.S. at 20. In rejecting that argument, *Elgin* concluded that the employee did "not illustrate that the [agency] will *invariably* dismiss an appeal challenging the constitutionality of a federal statute" and cut off access to judicial review. *Id.* (emphasis added). The "particular circumstances of" that employee's case, in other words, were insufficient to show that the agency would always dismiss the type of constitutional claim that

employee pursued—even if the agency itself "lack[ed] the authority to decide [the] particular claim." *Id.* at 21.

Elgin's logic applies with even greater force here, where NVAC has not exhausted its remedies and must resort instead to speculation about whether the General Counsel would exercise her discretion to issue an unfair labor practice complaint. Such speculation does not demonstrate that the General Counsel "will invariably dismiss" an unfair labor practice charge brought by NVAC or the agency—even if the claim is constitutional in nature. Nor does it excuse NVAC from the requirement that it exhaust its administrative remedies by pursuing—should it become appropriate—a charge with the General Counsel and an administrative appeal if NVAC's charge is dismissed. *Steadman*, 918 F.2d 963, 967–68. As it has not followed those procedures, NVAC raises its claims not only "in the wrong court," but also "at a premature point in the proceedings." *Gates*, 562 F. Supp. 2d at 13.

By the same token, a temporary vacancy in the Authority's General Counsel position makes no difference to *Thunder Basin*'s statute-focused analysis. In fact, the Western District of New York recently rejected that very conclusion advanced by another federal union, stating that it was "not persuaded [that] the vacancy in the [Authority's] General Counsel position (which presumably will be filled at some point) calls into question the validity of the statutory review scheme." *SEIU II*, 2019 WL 6710865 at *9. "[N]othing in *Thunder Basin* or its progeny," the court explained, "suggests that the Court should look beyond the statutory scheme itself in assessing the availability of meaningful judicial review." *Id.* That same logic applies here. Because the Statute at the very least precludes judicial review of unexhausted claims, NVAC's claims must be dismissed.

IV. NVAC does not satisfy the extremely limited *Leedom* exception permitting a litigant to pursue relief outside the statutory review scheme.

Under this Circuit's precedent, NVAC's sole avenue around the Statute's preclusion of district court review is by way of the "'exceptional circumstances' . . . defined by *Leedom v. Kyne* . . . and its progeny." *NATCA I*, 437 F.3d at 1258 (quoting *Brewer*, 735 F.2d at 1500-01). To establish jurisdiction

under *Leedom*, "a plaintiff must show, *first*, that the agency has acted 'in excess of its delegated powers and contrary to a specific prohibition' which 'is clear and mandatory,' . . . and, *second*, that barring review by the district court 'would wholly deprive [the aggrieved party] of a meaningful and adequate means of vindicating its statutory rights.'" *Id.* at 1263 (citations omitted). The burden of demonstrating the "extraordinary circumstances" warranting jurisdiction under *Leedom* is "nearly insurmountable." *U.S. Dep't of Justice v. Fed. Labor Relations Auth.*, 981 F.2d 1339, 1343 (D.C. Cir. 1993).

NVAC fails to argue at all that its claims fall under the exceptional circumstances articulated by *Leedom*, but it could not meet *Leedom*'s narrow jurisdictional exception in any event. As explained above, NVAC has a "meaningful and adequate means of" obtaining administrative and judicial review of its claims within the statutory scheme through the unfair labor practice proceeding. *NATCA I*, 437 F.3d at 1263. And the D.C. Circuit has already held, in a similar context, that the availability of the unfair labor practice proceedings prevented unions from relying on *Leedom* to obtain review of a Panel decision in district court. *Id.* at 1258, 1265. That makes sense: *Leedom* applies only to "situations in which judicial review is not available *at all*," and not "to situations in which judicial review simply is not available *yet*." *Amerco v. NLRB*, 458 F.3d 883, 890 (9th Cir. 2006). Because the Statute provides a route to meaningful judicial review, *Leedom* offers NVAC no alternative path to district court.

CONCLUSION

NVAC's suit in this Court suffers from no shortage of jurisdictional problems, any and all of them case-dispositive. That is not to say that an order from this Court dismissing NVAC's complaint for lack of jurisdiction would prevent NVAC from ever obtaining judicial review of its challenge to the Panel's authority, should it wish to seek it following the conclusion of the administrative review process before the Authority, which remains open (or at least unexhausted, if NVAC wishes to proceed no further). Rather, NVAC need only follow the detailed process set forth by Congress in the Statute. If, following the completion of that process, NVAC determines it necessary to seek judicial review as set forth in 5 U.S.C. § 7123(c), it will be up to a federal court of appeals to determine at that time whether NVAC has satisfied jurisdictional requirements under the proper channel for seeking judicial review. What matters here and now is that NVAC's suit has no proper place in federal district court under the Statute. Thus, the Court should dismiss NVAC's claims for lack of jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020 a copy of the foregoing Motion to Dismiss for Lack of Jurisdiction was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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