

# Updated: Off the Rails? Union Asks Supreme Court to Rein in Fifth Circuit; the Court Says No.

**Labor Relations Update** on December 10, 2025

We have been tracking the wave of constitutional challenges to the National Labor Relations Board's ("NLRB" or "Board") structure and the divergent injunction standards emerging across circuits. (See [here](#), [here](#), [here](#) and [here](#).)

In the latest development, on October 31, 2025, the Office and Professional Employees International Union ("OPEIU") [asked](#) the U.S. Supreme Court to review a Fifth Circuit ruling that lets employers effectively shut down NLRB proceedings in that jurisdiction based solely on the mere existence of potentially unconstitutional job-removal protections for Board members and administrative law judges.

The Fifth Circuit's approach breaks sharply from multiple other circuits (Second, Third, Fourth, Sixth, Tenth, and D.C.), which have either held or strongly implied—consistent with Supreme Court precedent, according to the OPEIU—that a petitioner must show actual harm before courts will halt agency actions. The Fifth Circuit's stance invites immediate injunctions in response to routine NLRB cases, which destabilizes the Board's ability to function across Texas, Louisiana, and Mississippi—even as the D.C. Circuit separately evaluates the constitutionality of those same protections.

The petition squarely asks the Supreme Court to resolve the deepening split and restore a coherent injunctive-relief standard: whether a plaintiff must show compensable harm flowing directly from the removal protections or whether the process itself (i.e., appearing before an allegedly unconstitutionally insulated Board member or ALJ) reflects sufficient harm for an injunction. Until then, the Fifth Circuit's framework effectively transforms structural Article II objections into a stop button for NLRB enforcement. For employers, unions, and employees alike, that means greater uncertainty, forum-driven results, and mounting friction between the Fifth Circuit and the other courts that oversee final NLRB decisions.

**Update**

On December 8, 2025, the Supreme Court summarily denied the OPEIU's bid to overturn a Fifth Circuit ruling that job-removal protections at the Board were likely unconstitutional because they violated Article II. The August 2025 ruling effectively permitted employers in the Fifth Circuit's jurisdiction to halt ongoing NLRB proceedings by securing preliminary injunctions against the Board based on that constitutional argument. The Supreme Court gave no reason for its denial.

The Fifth Circuit's approach was consistent with the D.C. Circuit's December 5, 2025, decision, which we covered [here](#), which held that Board job-removal protections were unconstitutional because they violated Article II. The holding by the D.C. Circuit—which has plenary jurisdiction over the Board—virtually guarantees the Supreme Court will take up the issue.

This term, the Supreme Court may resolve the broader, underlying constitutional issue regarding statutory job-removal protections at federal administrative agencies in a case involving President Trump's firing of a former member of the Federal Trade Commission ("FTC"). Because the FTC has similar statutory job-removal protections as the NLRB, such a decision could also resolve the uncertainty surrounding the Board's job-removal protections.

### **Post-Update Takeaways**

As the various constitutional challenges to the Board progress through federal appellate courts, here is what employers need to know:

- The Supreme Court's refusal to review the Fifth Circuit's decision means that certain Board proceedings remain effectively paralyzed in that circuit. While the NLRB Regional Offices may still perform administrative functions such as investigating ULP charges and potentially conducting elections, employers operating in the Fifth Circuit could seek an injunction halting a proceeding prior to a hearing before an administrative law judge or review by the Board.
- Should the Supreme Court ultimately invalidate statutory job-removal protections at federal administrative agencies, then Board proceedings would presumably resume in the Fifth Circuit, and the NLRB Regions in the Fifth Circuit would begin to chip away at the ever-growing backlog of cases.
- Such a holding from the Supreme Court could also aggressively accelerate the current, but somewhat predictable, oscillation of labor policy with changes in presidential administrations. The unfettered right of an incoming administration to

immediately alter the Board's composition would likely increase regulatory uncertainty for employers.

We will continue to monitor whether the Supreme Court ultimately resolves the ongoing circuit split regarding the Board's job-removal protections and the standard for injunctive relief to stop agency actions.

[View original.](#)

#### Related Professionals

---

- **Daniel H. Dorson**  
Associate
- **Joshua S. Fox**  
Partner