

The National Labor Relations Board and the United States Constitution: the New Deal Revisited?

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I. INTRODUCTION

Congress created the National Labor and Relations Board (“NLRB” or “Board”) in 1935 when it enacted the National Labor Relations Act (“Act” or “NLRA”). The NLRA is also known as the Wagner Act, and it declared that the “policy of the United States” is to “encourage[e] the practice and procedure of collective bargaining” and to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”³ The Act created the Board as an “agency of the United States,”⁴ and it authorized the president to appoint up to five members “by and with the advice and consent of the Senate . . . for terms of five years each[.]”⁵ The Act directed the president to “designate one member to serve as Chairman of the Board,” and “[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”⁶

The Act also directed the president to appoint a “General Counsel of the Board, by and with the consent of the Senate, for a term of four years.”⁷ The general counsel would be – and still is – the Board’s prosecutor, and the Act established a process for the Board to enforce NLRA’s protections. Regional directors, attorneys, administrative law judges, and other staff investigate, prosecute, and adjudicate alleged violations of the NLRA, and the Board acts as an administrative appellate tribunal.⁸

The Board’s creation was part of President Franklin Roosevelt’s New Deal legislation to expand the administrative state to try to remedy the economic struggles of the Great Depression. The Board’s structure and processes were initially subject to criticism and challenged as unconstitutional. In 1937, the Supreme Court rejected constitutional challenges to the Act and the Board and ratified the Board’s status as a federal law enforcement agency.

In recent years, however, the Supreme Court and other federal courts have issued decisions that create doubt about whether the Act, the Board itself, and the Board’s enforcement scheme comply with the United States Constitution. For example, some courts have determined that the Act’s limits on the president’s authority to remove Board members and administrative law judges violate the Constitution.

Collectively, the Court’s decisions have significant implications for the power, structure, and authority of the Board. They also present opportunities for regulated individuals and entities to assert relatively new and, at times, novel defenses and challenges to the Board and its enforcement actions.

³ 29 U.S.C. § 151.

⁴ 29 U.S.C. § 153(a).

⁵ 29 U.S.C. § 153(a).

⁶ 29 U.S.C. § 153(a).

⁷ 29 U.S.C. § 153(d).

⁸ *E.g.*, 29 U.S.C. §§ 153(b), 160, 161.

This paper focuses on judicial scrutiny of the NLRB and its members. Numerous organizations recently challenged the constitutionality of the NLRB’s internal structure, including whether its members and administrative law judges (“ALJs”): (1) are inappropriately appointed; (2) deny employers the right to a jury trial; and (3) are inappropriately shielded from removal. Many challengers assert that the NLRB’s structure and processes violate the Constitution’s Appointments Clause, Seventh Amendment, and Take Care Clause, respectively.

Some courts have rejected these constitutional challenges. Other courts, including the U.S. Court of Appeals for the Fifth Circuit, have sustained such challenges. The courts have not reached a consensus on the constitutionality of the NLRB, and constitutional challenges to the Board continue to percolate in the federal courts.

This paper proceeds generally in chronological order as follows:

Section II begins with a discussion of the NLRB’s history and details its establishment during the New Deal Era. It also describes the landmark 1937 decision in *NLRB v. Jones & Laughlin Steel Corporation*, in which the Supreme Court upheld the NLRB’s constitutionality on multiple grounds. The Supreme Court has never overruled the *Jones & Loughlin Steel Corporation* decision.

Section III discusses the NLRB’s internal structure and the appointment of members and the general counsel, the Board’s enforcement authority, and the removal process established by the NLRA, all of which are facing challenges in the courts.

Section IV focuses on the constitutional challenges to the NLRB under the Appointments Clause, the Seventh Amendment, and the Take Care Clause. It also discusses recent case law developments.

Finally, the paper includes an Appendix that contains relevant excerpts from the United States Constitution.

II. THE HISTORY OF THE NATIONAL LABOR RELATIONS BOARD

A. Establishing the National Labor Relations Board

Franklin Roosevelt became president of the United States in 1933. He and Congress then implemented a vast expansion of the federal government known as the New Deal. New Deal legislation created a wide array of federal agencies that New Dealers hoped would help solve the economic and related problems of the Great Depression.⁹

During the era of New Deal legislation, Congress created the NLRB when it enacted the NLRA in 1935. The NLRA protected the “the exercise by workers of full freedom of

⁹ President Roosevelt clearly signaled in his first election campaign that he had a radically new vision of government’s role in response to the hardships of the Great Depression.” Shannon M. Roesler, *Constitutional Resilience*, 80 WASH. & LEE L. REV. 1523, 1551 (2023) (citing 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS, 284 (1998) (“Despite its discordant and fragmentary character, the general direction of Roosevelt’s campaign was clear enough--away from limited government and toward the activist regulatory state.”)).

association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”¹⁰ It also vested the NLRB with vast powers over labor relations in the United States, including the authority to investigate, prosecute, and adjudicate allegations of unfair labor practices, and to issue regulations.¹¹

During President Roosevelt’s first term, the Supreme Court repeatedly rejected as unconstitutional the New Deal’s “federal incursions into the social and economic realms.”¹² The Court relied upon the nondelegation doctrine and the Commerce Clause to do so.¹³

In 1935, the Court decided *Humphrey’s Executor v. United States*.¹⁴ In that case, the Court determined that Congress could create administrative agencies led by a group of principal officers removable by the President only for good cause prescribed by statute. In particular, the Court upheld a statute that protected the Commissioners of the Federal Trade Commission (“FTC”) from removal by the president except for “inefficiency, neglect of duty, or malfeasance in office.”¹⁵ The Court reached this conclusion after it determined that the FTC functioned “as an agency of the legislative or judicial departments of the government” and not as an executive agency.¹⁶ *Humphrey’s Executor* therefore established an exception to the president’s otherwise illimitable removal power.

The Court did not decide whether the NLRA’s removal protections for Board members violated the president’s removal power.

In 1936, President Roosevelt proposed to expand the number of justices beyond the nine seats that then (and now) comprise the Supreme Court. President Roosevelt’s “court-packing” scheme did not become law,¹⁷ and in November 1936, voters elected President Roosevelt to a second term as president.

In 1937, the Supreme Court began rejecting challenges to New Deal legislation and administrative agencies. The Court’s changed approach effectively ended any remaining possibility that Congress would adopt President Roosevelt’s court-packing proposal, and the Court’s ratification of the New Deal became known as the “switch in time that saved nine.”¹⁸

¹⁰ 29 U.S.C. § 151.

¹¹ 29 U.S.C. §§ 153, 155–56, 159–61, 164.

¹² Roesler, *supra* note 2 at 1552.

¹³ *Id.*

¹⁴ *Humphrey’s Executor*, 295 U.S., 630–32.

¹⁵ *Id.* at 620 (quoting 15 U. S. C. § 41).

¹⁶ *Id.* at 628.

¹⁷ Roesler, *supra* note 2 at 1552.

¹⁸ After a series of cases denying presidential and congressional power to regulate, President Roosevelt proposed to expand the size of the Supreme Court. Congress declined to enact it. After President Roosevelt won reelection in 1936, and in 1937, the Supreme Court began rejecting challenges to New Deal legislation. The Court’s personnel did not change from 1936 to but the Court’s voting patterns did. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (“All of us live in the modern era that begins with the Supreme Court’s

According to one commentator, “the New Deal Court went from protecting contractual rights to disregarding them as a constitutional matter.”¹⁹ In the years that followed, the Court consistently upheld federal legislation in the labor sphere against challenge.²⁰

B. Upholding the National Labor and Relations Board

In the landmark 1937 decision, *NLRB v. Jones & Laughlin Steel Corporation*, the Supreme Court rejected a constitutional challenge to the NLRA.²¹ In that case, an employer, Jones & Laughlin Steel Corporation, claimed that the NLRA “is in reality a regulation of labor relations and not of interstate commerce” and did not apply to the Company’s “relations with its production employees, because they are not subject to regulation by the federal government.”²² The Company asserted that the NLRA violated four provisions of the U.S. Constitution: (1) the Commerce Clause; (2) the judicial power established by Article III, section 2; (3) the Fifth Amendment; and (4) the Seventh Amendment right to a jury trial.²³

The case arose when a labor organization, the Beaver Valley Lodge No. 200 (of the Amalgamated Association of Iron, Steel and Tin Workers of America) filed an unfair labor practice charge against Jones & Laughlin with the NLRB.²⁴

The NLRB issued a complaint against the company, sustained the union’s charge, and found that Jones & Laughlin violated the NLRA. In particular, the Board found that the Company “engag[ed] in unfair labor practices affecting commerce” by “discriminating against members of the union with regard to hire and tenure of employment,” “coercing and intimidating its employees in order to interfere with their self-organization,” and firing certain employees.²⁵ The NLRB ordered Jones & Laughlin to “cease and desist” its “discrimination and coercion,” to offer to reinstate certain employees, to pay those employees’ lost wages, and to post notices on-site that Jones & Laughlin “would not discharge or discriminate against members, or those desiring to become members, of the labor union.”²⁶

‘switch in time’ in 1937, in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality.”); *see also* Roesler, *supra* note 2 at 1525 (“For nearly one-hundred years, regulatory agencies at the federal level have implemented policies to correct market failures with detrimental impacts to the public welfare.”).

¹⁹ D.A. Jeremy Telman, *Rights Mediation: Contracts Law and the First Amendment*, 48 OKLA. CITY U. L. REV. 209, 217 (2024).

²⁰ *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (National Labor Relations Act of 1935 was constitutional in face of as-applied challenge); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937); *see also* Roesler, *supra* note 2 at 1553 (collecting cases).

²¹ *Jones & Laughlin*, 301 U.S. at 49.

²² *Id.* at 25.

²³ *Id.*

²⁴ *Id.* at 22.

²⁵ *Id.* at 22, 25.

²⁶ *Id.* at 22.

When Jones & Laughlin did not comply with the NLRB's mandate, the Board petitioned the U.S. Court of Appeals for the Fifth Circuit to enforce its order.²⁷ The Fifth Circuit denied the NLRB's petition. The court found that the Board's order was outside the ambit of federal power because "the Constitution does not vest in the federal government the power to regulate the relation as such of employer and employee in [the] production or manufacture."²⁸

The Supreme Court granted certiorari.²⁹

The Court found that the Constitution's Commerce Clause provided Congress with the "constitutional power to enact" the NLRA, and the Court may not "deny effect" to such provisions "by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute."³⁰ The Court relied on principles of statutory interpretation, recognized its obligation "to save and not to destroy"—if there are two possible statutory interpretations, where under one the statute would be unconstitutional and the other it would be valid, the Court must "adopt that which will save the act."³¹

Guided by those principles, the Court found that the NLRA indeed can "be construed so as to operate within the sphere of constitutional authority."³²

The Court found that the procedural provisions of the NLRA did "not offend against the constitutional requirements governing the creation and action of administrative bodies"³³ because the Act established the NLRB's standards, authority, and processes.³⁴ The Court determined that the procedural provisions "afford[ed] adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."³⁵ Indeed, the NLRA authorized the NLRB to order reinstatement of terminated employees.³⁶

The Board also had the authority to order payment of lost wages: far from contravening the Seventh Amendment's jury trial guarantee for "suits at common law," the Board's order

²⁷ *Id.*

²⁸ *Id.* at 79; *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 999 (5th Cir. 1936), *rev'd*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) ("The making and fabrication of steel by Jones & Laughlin Steel Corporation is production regulable by the state of Pennsylvania, notwithstanding the corporation also engages in interstate commerce regulable by Congress in bringing in its raw materials and again in selling and delivering its products. No specific present intent appears to impede or destroy interstate commerce by means of a strike in a manufacturing plant, or other like direct obstruction to or burden on interstate commerce.")

²⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 299 U.S. 534 (1936).

³⁰ *Jones & Laughlin*, 301 U.S. at 30.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 46–47.

³⁴ *Id.* at 47.

³⁵ *Id.*

³⁶ *See id.* at 47–48.

provided for monetary recovery incidental to equitable relief and did not implicate the Seventh Amendment.³⁷

After *Jones & Laughlin*, the pattern was set—the Supreme Court would ratify practically all aspects of the New Deal, and the NLRB’s constitutional authority remained unquestioned by the Supreme Court for almost nine decades.

In recent years, however, the Supreme Court and other federal courts issued decisions that sometimes endorsed novel theories about whether the structure and actions of the Board comply with the Constitution.

III. THE NATIONAL LABOR RELATIONS BOARD STRUCTURE

A. The Board’s Purpose

As noted above, Congress created the NLRB in 1935 to “pursue its policy of ‘encouraging the practice and procedure of collective bargaining’ to better resolve ‘industrial disputes arising out of differences as to wages, hours, or other working conditions.’”³⁸ One of the NLRB’s key functions is to adjudicate allegations of employers engaging in “unfair labor practices” (“ULPs”).³⁹

B. Board Membership

The NLRB consists of its General Counsel, Board Members, ALJs, and other staff⁴⁰ and is divided into two sides.⁴¹ On one side, the General Counsel leads the prosecutorial arm led. On the other side, there is an adjudicatory body consisting of a five-member Board led by a single chairman.⁴²

The Board members adjudicate allegations that an employer or union has committed a ULP.⁴³ The members serve five-year, staggered terms, and are appointed by the president by and

³⁷ *Id.* at 48–49 (“The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.”). That same year, 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In that case, the Court rejected a Fourteenth Amendment due process challenge to a state minimum wage law that established minimum wages for women workers. The Court found that states may exercise their “police power” to restrict the freedom of contract between employers and their employees. *Id.* at 389.

³⁸ *Yapp USA Auto. Sys., Inc. v. Nat’l Lab. Rels. Bd.*, 2024 WL 4119058 at 503 (E.D. Mich. Sept. 9, 2024), *appeal dismissed*, No. 24-1754, 2025 WL 2606098 (6th Cir. 2025) (quoting the NLRA, 29 U.S.C. § 151).

³⁹ 29 U.S.C. § 160.

⁴⁰ *Yapp*, 2024 WL 4119058 at 502.

⁴¹ *Space Expl. Techs. Corp. v. Nat’l Lab. Rels. Bd.*, 151 F.4th 761, 767 (5th Cir. 2025).

⁴² *Id.*; *Overstreet v. Lucid USA Inc.*, No. CV-24-01356-PHX-DJH, 2024 WL 5200484, at *2 (D. Ariz. Dec. 23, 2024) (citing *NLRB v. Ampersand Publ’g, LLC*, 43 F.4th 1233, 1235 (9th Cir. 2022)).

⁴³ *Yapp*, 2024 WL 4119058 at 502.

with the advice and consent of the United States Senate. The president may remove a member “for neglect of duty or malfeasance in office.”⁴⁴ At least three courts have held this “for-cause” removal provision is unconstitutional, as discussed below.

C. ALJ Appointment and Enforcement Authority

The Board employs ALJs, who are appointed by NLRB members in accordance with the Civil Service Reform Act and the NLRA.⁴⁵

The internal adjudication process is as follows. First, ALJs adjudicate ULP complaints internally.⁴⁶ Second, challengers may choose to appeal ALJ decisions directly to the Board for review.⁴⁷ Third, the Board determines whether the employer engaged in conduct prohibited by the NLRA.⁴⁸ Finally, the Board must “seek enforcement of its order[s] in a federal court of appeals.”⁴⁹ In other words, the NLRB has “[n]o power to enforce an order” on its own.⁵⁰

On appeal, a federal appellate court may examine all constitutional and statutory questions.⁵¹ In other words, there is no penalty for disobeying the Board’s order until a federal appellate court affirms it.⁵²

D. ALJ Removal

ALJs may be removed “only for good cause established and determined by the Merit Systems Protection Board [(“MSPB”)] on the record after an opportunity for hearing before the

⁴⁴ *Id.* (citing 29 U.S.C. § 153(a)).

⁴⁵ *Space Expl. Techs. Corp. v. Nat’l Lab. Rel. Bd.*, 741 F. Supp. 3d 630, 633 (W.D. Tex. 2024), *aff’d*, 151 F.4th 761 (5th Cir. 2025) (citing 5 U.S.C. § 3105; 29 U.S.C. § 160(c); 29 U.S.C. § 154(a); *WestRock Services, Inc.*, 366 N.L.R.B. No. 157, slip op. at 3 (2018)).

⁴⁶ *Alivio Med. Ctr. v. Abruzzo*, 2024 WL 4188068, at *3 (N.D. Ill. Sept. 13, 2024) (citing 29 C.F.R. § 102.35(a)(1)-(13)). NLRBs ALJs are afforded the power to: (1) “[a]dminister oaths and affirmations;” (2) grant applications for subpoenas and rule upon petitions to revoke subpoenas; (3) “[r]ule upon offers of proof and receive relevant evidence;” (4) “[t]ake or cause depositions to be taken;” (5) “regulate the course of the hearing,” including to “exclude persons or counsel from the hearing for contemptuous conduct;” (6) hold settlement conferences; and (7) resolve motions, including motions for default judgment, summary judgment, or to amend pleadings.

⁴⁷ *Overstreet*, 2024 WL 5200484, at *2.

⁴⁸ *Id.* (citing *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776 (2023) (citing 29 U.S.C. § 160(e)).

⁴⁹ *Id.* (citing 29 U.S.C. § 160(f) (“Any party aggrieved by a final order of the Board may petition for review of the Board’s action in their regional court of appeals or in the D.C. Circuit.”)).

⁵⁰ *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

⁵¹ *Id.* at 49.

⁵² *Id.*; *Red Rock Resorts, Inc. v. NLRB*, No. 2:24-cv-01966-ART-BNW, 2025 WL 2784607, at *1, *2 (D. Nev. Sept. 30, 2025) (quoting *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1159 (6th Cir. 1996) (“An NLRB remedial order is not self-executing and the respondent can violate it with impunity until a court of appeals issues an order enforcing it.”)).

[MSPB].”⁵³ A member of the MSPB may only “be removed by the [p]resident, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”⁵⁴

The courts refer to these provisions as “dual for-cause removal” protections for NLRB ALJs.

IV. CONSTITUTIONAL CHALLENGES TO THE NATIONAL LABOR RELATIONS BOARD

A. Recent Scrutiny

Several courts recently issued decisions about whether the structure of the NLRB violates the Constitution. The courts have split on the question, and the issue may percolate up to the Supreme Court.

This paper focuses on the most contested constitutional questions, including (1) whether the NLRB-appointed ALJs violate Article II’s Appointments Clause; (2) whether the ALJ adjudication process violates the Seventh Amendment’s right to a jury trial; and (3) whether the removal protections for NLRB members and dual-level removal protections for ALJs violate Article II’s Take Care Clause.

B. The Appointments Clause

A key question in these cases is whether the scheme complies with the Constitution’s Appointments Clause, which says:

[The President] shall have Power, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁵⁵

As of November 2025, the Supreme Court has not addressed whether the NLRA’s process for appointment of ALJs violate the Appointments Clause. However, the Court has decided several cases that consider analogous challenges to the appointment of officials and ALJs of other similarly-structured agencies.

This paper therefore discusses the Supreme Court’s analysis of the Securities and Exchange Commission (“SEC”) ALJs and FTC Commissioners. It also discusses a district court’s analysis of the Department of Justice (“DOJ”) Office of the Chief Administrative

⁵³ *Space Expl.*, 151 F.4th at 766. The MSPB itself is a quasi-judicial agency that adjudicates “[f]ederal employee appeals from agency personnel actions.”

⁵⁴ *Id.* (quoting 5 U.S.C. § 1202(d)).

⁵⁵ U.S. CONST., Art. II, § 2, cl. 2.

Hearing Officer (“OCAHO”) ALJs. These cases serve as a framework for future cases analyzing the constitutionality of NLRB ALJs under the Appointments Clause.

In a 2018 case, *Lucia v. Securities & Exchange Commission*, the Supreme Court considered whether the appointment of SEC ALJs complied with the Appointments Clause.⁵⁶

The process generally worked as follows. SEC staff members selected the SEC’s ALJs, who have “extensive powers,” comparable to those of a federal district judge conducting a bench trial in the cases in which they are assigned to hear.⁵⁷ ALJs conducted hearings, issued “initial decision[s]” setting out findings of fact and conclusions of and law, and awarded relief.⁵⁸ Finally, the SEC could review an ALJ’s decision, either upon request or *sua sponte*, but if the Commission elected against reviewing, it would issue an order that the ALJ’s decision is final.⁵⁹

The SEC instituted an administrative proceeding against Plaintiff Raymond Lucia and his investment company for allegedly using misleading slideshow presentations to deceive prospective clients.⁶⁰ An issued an initial decision finding that Plaintiff Lucia violated the Investment Advisors Act. The decision also imposed sanctions, “including civil penalties of \$300,000 and a lifetime bar from the investment industry.”⁶¹

Plaintiff appealed the ALJ decision to the Commission and argued that “the administrative procedure was invalid because ALJ Elliot had not been constitutionally appointed.”⁶² Plaintiff’s view was that the SEC’s ALJs are “Officers of the United States” and thus subject to the Appointments Clause, meaning they can only be appointed by the president, courts of law, or heads of departments, not SEC staff.⁶³ The Commission rejected plaintiff’s argument, and instead determined that its ALJs were “mere employees” that fall outside the ambit of the Appointments Clause.⁶⁴

The U.S. Court of Appeals for the D.C. Circuit initially agreed with the Commission and held that the SEC’s ALJs are employees rather than officers.⁶⁵ However, the en banc D.C.

⁵⁶ *Lucia v. Securities & Exchange Commission*, 585 U.S. 237, 241 (2018).

⁵⁷ *Id.* at 241–42.

⁵⁸ *Id.* at 242.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 243.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Circuit divided evenly, which “result[ed] in a *per curiam* order denying Plaintiff’s claim.”⁶⁶ The Supreme Court then took up the case.⁶⁷

The Court held that the SEC’s ALJs are officers subject to the Appointments Clause.⁶⁸

The Court relied on *Freytag v. Commissioner*⁶⁹ in which it applied the “‘significant authority’ test to adjudicative officials who are near-carbon copies of the Commission’s ALJs,” noting that its “analysis there (sans any more detailed legal criteria) necessarily decides this case.”⁷⁰ The issue in *Freytag* was whether United States Tax Court’s special trial judges (“STJs”) were officers or employees, and the Court found that STJs were officers.⁷¹ The STJs in *Freytag* and the SEC’s ALJs share many key qualities. For one, they “hold a continuing office established by law”—a career appointment to a position created by statute in the case of an SEC ALJ.⁷²

Further, STJs and ALJs both exercise significant discretion in carrying out their functions.⁷³ They are each afforded “nearly all the tools of federal trial judges,” including the ability to receive evidence, examine witnesses at hearings, and even take pre-hearing depositions.⁷⁴ Relatedly, they administer oaths, rule on motions, regulate hearings, regulate counsels’ conduct, and enforce compliance with discovery orders, including issuing punishment.⁷⁵ In short, they each “critically shape the administrative record.”⁷⁶ Further, similar to STJs, ALJs issue decisions with factual findings, legal conclusions, and appropriate remedies at the close of proceedings.⁷⁷ Lastly, as was problematic with STJs in *Freytag*, SEC ALJs’ decisions become final and constitute the action of the Commission if the Commission declines review.⁷⁸

The Court in *Lucia* held that ALJ Elliot decided Plaintiff Lucia’s case “without the kind of appointment the Clause requires” and found that “the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing before a properly appointed official.”⁷⁹

⁶⁶ *Id.*

⁶⁷ *Id.* at 244.

⁶⁸ *Id.* at 251.

⁶⁹ *Id.* at 246 (quoting *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 247–48.

⁷³ *Id.* at 248.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 249.

⁷⁸ *Id.*

⁷⁹ *Id.* at 251 (citation omitted).

The Court further determined that even if ALJ Elliot receives a constitutional appointment, he “cannot be expected to consider the matter as though he had not adjudicated it before” since he was not charged with doing anything wrong on the merits.⁸⁰ The Court held that another ALJ, or the Commission, must hold the new hearing to which Plaintiff was entitled.⁸¹

Five years later, in 2023, the Supreme Court again considered a challenge to an ALJ enforcement scheme. In *Axon Enterprise, Inc. v. Federal Trade Commission*, the question was whether district courts may hear challenges to administrative enforcement actions on grounds that ALJs are “insufficiently accountable to the President” and that a single agency should not have both prosecutorial and adjudicatory functions.⁸² This case concerned the SEC and FTC, both of which “address statutory violations either by bringing civil suits in federal district court or by instituting their own administrative proceedings.”⁸³ For both the SEC and FTC, when the agency chooses to institute its own action, it usually delegates initial adjudication authority to an ALJ.⁸⁴ After the ALJ has adjudicated a case, the losing party may appeal to the Commission, or the Commission can independently undertake review.⁸⁵ Each of the SEC’s and FTC’s authorizing statutes “provide for review of a final Commission decision in a court of appeals, rather than a district court.”⁸⁶

In *Axon*, respondents in administrative enforcement actions with the SEC and FTC, respectively, sued in district courts prior to ALJs issuing decisions, and respondents sought to enjoin the ALJ proceedings.⁸⁷ Each suit charged that a fundamental aspect of the Commission’s structure violates the Constitution, as described above,⁸⁸ and claimed that the district court had federal question jurisdiction to hear the case under 28 U.S.C. § 1331.⁸⁹ However, each suit was dismissed for lack of jurisdiction.⁹⁰

The U.S. Courts of Appeals for the Fifth and Ninth Circuits split on appeal. The Ninth Circuit affirmed the district court and found that the plaintiff’s constitutional challenges fell within the FTC authorizing statute’s scheme, which guaranteed “meaningful judicial review.”⁹¹

⁸⁰ *Id.*

⁸¹ *Id.* at 252.

⁸² *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175, 180 (2023).

⁸³ *Id.* at 180–81.

⁸⁴ *Id.* at 181.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 182–84.

⁸⁸ *Id.*

⁸⁹ *Id.* at 182.

⁹⁰ *Id.* at 184.

⁹¹ *Id.*

The Fifth Circuit disagreed on the “equivalent SEC question.”⁹² The Supreme Court granted certiorari.⁹³

The Supreme Court “conclude[d] that the review schemes set out” in the SEC’s and FTC’s authorizing statutes “do not displace district court jurisdiction over [Plaintiffs’] far-reaching constitutional claims.”⁹⁴

The Court utilized considerations identified in *Thunder Basin Coal Co. v. Reich*⁹⁵ to assist it in determining whether a court’s jurisdiction applies to a claim concerning agency action: “First, could precluding district court jurisdiction foreclose all meaningful judicial review of the claim?”; “[n]ext, is the claim wholly collateral to the statute’s review provisions?”; and finally, “is the claim outside the agency’s expertise?”⁹⁶ However, the “ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question . . . Congress rarely allows claims about agency action to escape effective judicial review.”⁹⁷

First, while the harm plaintiffs’ alleged may sound abstract – “being subjected to unconstitutional agency authority” – the Court “has made clear that it is a here-and-now injury.”⁹⁸ And, importantly, the harm is impossible to remedy once the agency proceeding ends, as the claim is about “subjection to an illegitimate proceeding, led by an illegitimate decisionmaker.” Even though courts of appeals may review the case after the fact, they “can do nothing” to remedy a “proceeding that has already happened,” rendering judicial review unmeaningful by the time it occurs.⁹⁹

Second, the Court reasoned, plaintiffs’ claims were not collateral to the statutes’ review provisions, and the plaintiffs’ challenges concerned the Commissions’ power to proceed at all, not the actions taken in the proceedings; in other words, plaintiffs would “lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over.”¹⁰⁰

Lastly, plaintiffs’ claims did not invoke the agencies’ expertise because they raised “standard questions of administrative and constitutional law, detached from considerations of agency policy.”¹⁰¹ The Commissions do not have expertise in separation-of-powers principles,

⁹² *Id.*

⁹³ *Id.* at 185.

⁹⁴ *Id.*

⁹⁵ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

⁹⁶ *Axon*, 598 U.S. at 186 (alterations adopted) (citations omitted).

⁹⁷ *Id.* (citation omitted).

⁹⁸ *Id.* at 191 (internal quotation marks omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 192.

¹⁰¹ *Id.* at 194 (citations omitted).

and plaintiffs' harms would remain regardless of how much agency expertise was "brought to bear" on the other issues in the case.¹⁰²

The Court found that plaintiffs' claims were not "of the type the statutory schemes reach" and, "[a] district court can therefore review them."¹⁰³ Accordingly, the plaintiffs in the case could seek relief in court immediately from the alleged unlawful ALJ scheme.

In another case, SpaceX sued the DOJ and successfully challenged the structure of a DOJ ALJ enforcement scheme under the Appointments Clause.¹⁰⁴

The statute, 8 U.S.C. § 1324b, is part of the Immigration and Nationality Act. DOJ's Civil Rights Division Immigrant and Employee Rights Section ("IER") enforces Section 1324b, and the statute authorizes IER to receive and investigate charges; initiate investigations on its own authority; subpoena information during investigations; and file lawsuits against employers that seek back pay, civil penalties, and nonmonetary relief before ALJs employed by a DOJ administrative tribunal called the Office of the Chief Administration Hearing Officer ("OCAHO").

The U.S. Attorney General appoints OCAHO ALJs, and each ALJ assigned to hear a Section 1324b action has "all appropriate powers necessary to conduct fair and impartial hearings."¹⁰⁵ After a hearing ends, the ALJ issues a "final" decision that may be appealed only to a U.S. court of appeals.¹⁰⁶

IER filed an administrative complaint against SpaceX in August 2023. The complaint alleged that SpaceX violated Section 1324b, and IER sought civil penalties, backpay, and the reinstatement of aggrieved SpaceX applicants. OCAHO assigned an ALJ to preside over the case.¹⁰⁷

In September 2023, SpaceX sued DOJ in a federal district court and alleged that Section 1324b's scheme for the appointment and supervision of the ALJs violated the Constitution's Appointments Clause. SpaceX then promptly moved for a preliminary injunction to stop the IER lawsuit from proceeding.¹⁰⁸

¹⁰³ *Id.* at 195–96 (citation omitted).

¹⁰⁴ *Space Expl.*, 741 F. Supp. 3d at 636.

¹⁰⁵ *Id.* (quoting 28 C.F.R. § 68.28).

¹⁰⁶ *Id.* (quoting 8 U.S.C. § 1324b(g)(1); 28 C.F.R. § 68.57).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 631 (citing *Axon*, 598 U.S. at 191 (2023)).

In October 2023, DOJ’s Executive Office of Immigration Review (“EOIR”) published an interim final rule (“IFR”) “to provide that the Attorney General may, in his discretion, review decisions and orders of ALJs in the OCAHO in cases arising under Section 1324b.”¹⁰⁹

The district court granted SpaceX’s motion for a preliminary injunction. The court determined that SpaceX had standing because it may be able to “show that OCAHO ALJs are unconstitutionally insulated from removal,” and therefore SpaceX “will be harmed by having to proceed before an unaccountable ALJ.”¹¹⁰ Likewise, SpaceX’s “injury-in-fact in its Appointments Clause claim is also facing unlawful agency authority because § 1324b does not provide for the Attorney General’s review of OCAHO ALJs’ decisions.”¹¹¹

The court explained that “OCAHO ALJs are appointed by the Attorney General (a principal officer), so they are ‘inferior officers’” for purposes of the Appointments Clause.¹¹² This means that they “must be ‘directed and supervised’ by the Attorney General.”¹¹³

Section 1324b, however, does not provide for any direction or supervision of OCAHO ALJs by the Attorney General. The court explained:

Section 1324b requires an OCAHO ALJ to issue “an order, which shall be final unless appealed as provided under subsection (i).” Subsection (i) provides that the forum for an aggrieved party to “seek a review of such order” lies exclusively “in the United States court of appeals” “60 days after the entry of such final order.” It does not affirmatively provide for the Attorney General to review OCAHO ALJ decisions.¹¹⁴

The district court also rejected as “unlawful” DOJ’s Interim Final Rule because it “conflicts with the plain language of § 1324b, which only provides for review in an Article III court.”¹¹⁵ Accordingly, Section 1324b “proceedings are unconstitutional because the Attorney General is not allowed to review OCAHO ALJs’ decisions.”¹¹⁶

The court explained that it could not rewrite the statute by severing the offending provision and that SpaceX demonstrated irreparable injury because it was “being subjected ‘to

¹⁰⁹ 88 Fed. Reg. 70,586-01 (Oct. 12, 2023) (to be codified at 28 C.F.R. pt. 68). The IFR became effective immediately. *Id.*

¹¹⁰ *Space Expl.*, 701 F. Supp. 3d at 631 (citing *Axon*, 598 U.S. at 191 (2023)).

¹¹¹ *Id.*

¹¹² *Id.* at 632.

¹¹³ *Id.* (citing *United States v. Arthrex, Inc.*, 594 U.S. 1, 13–16 (2021) (holding it violated the Appointments Clause for inferior adjudicative officials to render decisions that are not subject to review by a principal officer)).

¹¹⁴ *Id.* (citing 8 U.S.C. § 1324b(g)(1) & (i)) (internal citations omitted).

¹¹⁵ *Id.* at 633.

¹¹⁶ *Id.* at 633 (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (An agency cannot not “cure” an unlawful statute “by adopting in its discretion a limiting construction of the statute.”)).

unconstitutional agency authority,’ which ‘is impossible to remedy once the proceeding is over.’”¹¹⁷

The court also determined that SpaceX’s Appointments Clause claim satisfied the other elements for a preliminary injunction: SpaceX would “suffer” if it had to “participate in unconstitutional proceedings” while DOJ did not allege any harm that it would suffer if the court granted SpaceX’s motion; and the “public interest” favored SpaceX because “[t]here is generally no public interest in the perpetuation of unlawful agency action.”¹¹⁸

C. Seventh Amendment Right to a Jury Trial

Another key question in these cases is whether the NLRB’s ALJ scheme complies with the Seventh Amendment, which says:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.¹¹⁹

In 2024, the Supreme Court considered whether a similar ALJ enforcement scheme violated the Seventh Amendment right to a civil jury trial.

The case, *Securities & Exchange Commission v. Jarkesy*,¹²⁰ begins with the story of George Jarkesy. Mr. Jarkesy established two hedge funds and hired Patriot28 as the advisor for each.¹²¹ The funds brought in over 100 investors and held around \$24 million in assets.¹²²

In 2011, the SEC began investigating the funds’ investment activity, and two years later, the SEC brought an enforcement action before a SEC ALJ.¹²³ The SEC alleged that Mr. Jarkesy and others violated the Securities Act, the Securities Exchange Act, and the Advisers Act.¹²⁴

Mr. Jarkesy and Patriot28 sued in the U.S. District Court for the District of Columbia to enjoin the SEC proceedings on various constitutional grounds.¹²⁵ The district court and the U.S.

¹¹⁷ *Id.* at 634 (citing *Axon*, 598 U.S. at 191).

¹¹⁸ *Id.* at 634 (citing *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Burgess v. Fed. Deposit Ins. Corp.*, 639 F. Supp. 3d 732, 749 (N.D. Tex. Nov. 6, 2022) (quoting *U.S. Navy SEALs 1-26 v. Biden*, 578 F. Supp. 3d 822, 840 (N.D. Tex. Jan. 3, 2022)) (“An injunction does not disserve the public interest when it prevents constitutional deprivations.”) (internal quotations omitted)).

¹¹⁹ U.S. CONST., Amend. 7.

¹²⁰ *SEC v. Jarkesy*, 603 U.S. 109 (2024).

¹²¹ *Id.* at 115, 117-18.

¹²² *Id.* at 117-18.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022), *aff’d*, 603 U.S. 109 (2024).

Court of Appeals for the D.C. Circuit refused to issue an injunction; the district court concluded that that “[it] had no jurisdiction and that [Plaintiffs] had to continue with the agency proceedings and petition the court of appeals to review any adverse final order.”¹²⁶

SEC proceedings commenced, and, after an evidentiary hearing, an SEC ALJ found that plaintiffs committed securities fraud.¹²⁷

The Commission affirmed the ALJ’s decision and found that plaintiffs committed securities fraud.¹²⁸ The Commission also found that “the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners’ equal protection rights—when it decided to pursue the case within the agency instead of in an Article III court”; “the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles”; and “the proceedings did not violate Petitioners’ Seventh Amendment right to a jury trial.”¹²⁹ The Commission “ordered Petitioners to cease and desist from committing further violations and to pay a civil penalty of \$300,000,” ordered “Patriot28 to disgorge nearly \$685,000 in ill-gotten gains,” and “barred Jarquesy from various securities industry activities.”¹³⁰

Plaintiffs filed for review in the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit ruled for the plaintiffs.¹³¹

On the Seventh Amendment grounds, the court held plaintiffs “were deprived of their constitutional right to a jury trial.”¹³² The court considered the narrow “public rights” exception to the Seventh Amendment jury trial right and found that “the action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine.”¹³³

The Supreme Court took up only the Seventh Amendment issue and affirmed the Fifth Circuit’s decision that the SEC’s claims against petitioners were subject to the Seventh Amendment jury trial right.¹³⁴

The Court addressed whether the “public rights” exception to the right to a jury trial compelled a different outcome. The public rights exception applies to matters that “historically could have been determined exclusively by the executive and legislative branches, even when

¹²⁶ *Id.* at 450.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 465–66.

¹³² *Id.* at 451.

¹³³ *Id.* at 453, 455.

¹³⁴ *Jarquesy*, 603 U.S. 115-16, 139-40

they were presented in such form that the judicial power was capable of acting on them.”¹³⁵ Given the nature of public rights, as opposed to common law claims, “no involvement by an Article III court in the initial adjudication is necessary in such a case.”¹³⁶

The Court determined that the public rights exception to the Seventh Amendment did not apply. Instead, the Court found that the SEC’s actions implicated private rights because SEC actions “provide civil penalties, a punitive remedy that [the Court has] recognized ‘could only be enforced in courts of law,’” and “target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles.”¹³⁷

Importantly, the Court did not reach the remaining constitutional issues and instead left the Fifth Circuit holdings undisturbed.¹³⁸ Consequently, each of the Fifth Circuit’s holdings on constitutional issues remain binding precedent in the Fifth Circuit and persuasive authority outside of the Fifth Circuit.¹³⁹

In the NLRB-specific ALJ context, plaintiffs often argue they will suffer irreparable harm without a court’s intervention because they “will be forced to undergo an unconstitutional proceeding before an insufficiently accountable ALJ and NLRB without the jury trial to which [they are] entitled” under the Seventh Amendment.¹⁴⁰

However, several district courts rejected plaintiffs’ arguments on these grounds. Those courts determined that: (1) the plaintiffs failed to show how the ALJ’s adjudication caused actual irreparable harm; (2) the Seventh Amendment right to a jury trial does not attach to NLRB proceedings under the public rights exception; or (3) the court lacked jurisdiction to hear the plaintiffs’ Seventh Amendment claim.

For example, in *Ares Collective Group, LLC v. National Labor Relations Board*, an Arizona district court held that the scheduled proceeding before an NLRB ALJ did not violate Plaintiff’s Seventh Amendment right to a jury trial, because Plaintiff Ares Collective Group failed to show the alleged unconstitutional provision caused it *actual* harm (emphasis added).¹⁴¹

The court ruled that even if the alleged constitutional violations existed, plaintiff failed to demonstrate how denying temporary relief would cause irreparable harm. The court reasoned

¹³⁵ *Id.* at 126-27 (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)) (alterations adopted).

¹³⁶ *Id.* at 127-28.

¹³⁷ *Id.* at 134-35 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

¹³⁸ *Id.* at 139-40.

¹³⁹ *Id.* The Court explained that the Fifth Circuit “determined that Congress had violated the nondelegation doctrine by authorizing the SEC, without adequate guidance, to choose whether to litigate this action in an Article III court or to adjudicate the matter itself. The panel also found that the insulation of the SEC ALJs from executive supervision with two layers of for-cause removal protections violated the separation of powers. *Jarkesy*, 603 U.S. 109, 120.

¹⁴⁰ See e.g., *Ares Collective Grp. LLC v. Nat’l Lab. Rels. Bd.*, No. CV-24-00517-TUC-SHR, 2024 WL 4581436, at *2 (D. Ariz. Oct. 25, 2024) (citing *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

¹⁴¹ *Ares Collective Grp.*, 2024 WL 4581436, at *2.

NLRB proceedings did not deprive the plaintiff of its Seventh Amendment right to a jury trial, because the NLRA provides that a plaintiff can appeal the Board’s administrative decisions to a federal appellate court.¹⁴²

In *HonorHealth v. National Labor Relations Board*, an Arizona district court relied heavily on the reasoning in *Ares Collective Group*. The court noted that the facts were “nearly identical” to each other.¹⁴³ Therefore, the *HonorHealth* court held that the petitioner could not show injunctive relief was warranted because it failed to demonstrate a causal connection between its Seventh Amendment claims and the alleged irreparable harm.¹⁴⁴

In *Yapp USA Automotive Systems, Inc. v. National Labor Relations Board*, a Michigan district court held that even if it had jurisdiction to address Plaintiff YAPP’s Seventh Amendment claim, it was not likely to succeed on the merits.¹⁴⁵ The court rejected plaintiff’s attempt to analogize to *Jarkesy*, which held that the SEC’s administrative order of civil penalties for securities fraud violated the Seventh Amendment.¹⁴⁶ The court instead distinguished between the NLRB and the SEC and emphasized that the Supreme Court in *Jones & Laughlin* held the Seventh Amendment right to a jury trial does not attach to NLRB proceedings.¹⁴⁷

The court in *Yapp* reasoned plaintiff’s claim would likely fail on the merits because the Seventh Amendment is only implicated when a challenged proceeding involves a statutory claim that is “legal in nature.”¹⁴⁸ The court cited *Jones & Laughlin* and explained that ULP proceedings involve statutory rights that provide only equitable relief, making them “non-legal in nature.”¹⁴⁹ Therefore, such claims do not fall within the Seventh Amendment’s public-rights exception. It follows that the right to a jury trial does not attach.¹⁵⁰ Here, the plaintiff challenged the NLRB’s authorization to its regional directors to “seek make-whole relief for ‘direct or foreseeable pecuniary harm’ arising from an ULP” in *Thryv Inc.*¹⁵¹ The *Yapp* court concluded

¹⁴² *Id.*

¹⁴³ *HonorHealth v. Nat’l Lab. Rels. Bd.*, No. CV-24-03009-PHX-DJH, 2024 WL 4769772, at *4 (D. Ariz. Nov. 13, 2024).

¹⁴⁴ *Id.*, at *5 (citing *Winter*, 555 U.S. at 24 (“The key ... is demonstrating that the unconstitutional provision[s] actually caused the plaintiff harm.”)).

¹⁴⁵ *Yapp*, 2024 WL 4119058 at 514.

¹⁴⁶ *Id.* (citing to *Jarkesy*, 144 S. Ct 2117–28).

¹⁴⁷ *Id.* (citing *Jones & Laughlin*, 301 U.S. at 33, 57).

¹⁴⁸ *Id.* (citing *Jarkesy*, 144 S. Ct. at 2128).

¹⁴⁹ *Id.* (citing *Jones & Laughlin*, 301 U.S. at 48–49 (explaining that “[t]he [NLRB] proceeding is one unknown to the common law” and that the Seventh Amendment “has no application to cases where recovery of money damages is an incident to equitable relief” and concluding that the Amendment was thus inapplicable to remedies “imposed for violation of the [NLRA]”); *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 453–56 (1977) (discussing *Jones & Laughlin* as an example of Congress having created a public-rights scheme outside the reach of the Seventh Amendment); *Curtis v. Loether*, 415 U.S. 189, 194–95 (1974) (distinguishing the public-rights scheme at issue in *Jones & Laughlin* from other newly created statutory rights)).

¹⁵⁰ *Id.* at 515.

¹⁵¹ *Id.* at 512 (citing *Thryv, Inc. v Nat’l Lab. Rels. Bd.*, 372 N.L.R.B. No. 22, 2022 WL 17974951, at *1 (Dec. 13, 2022)).

the challenged *Thryv* remedies, which were equitable, were distinguishable from the SEC’s civil penalties at issue in *Jarkesy*.¹⁵²

In *Meharry Medical College v. National Labor Relations Board*, a Tennessee district court denied a preliminary injunction because Plaintiff Meharry did not establish the requisite irreparable harm.¹⁵³ More specifically, the court upheld the principle articulated in *Jones & Laughlin* that the Seventh Amendment right to a jury trial does not attach to NLRB proceedings.¹⁵⁴ The court noted, like in *Yapp*, “nothing about the NLRB proceedings will permanently deprive Plaintiffs of their Seventh Amendment right” because, “as detailed in the NLRA, Plaintiffs can seek review of the NLRB’s decision in the court of appeals.”¹⁵⁵

In *Import Motors II, Inc. v. Cowen*, a New Mexico district court similarly held Plaintiff Import failed to demonstrate how the NLRB ALJ would be acting beyond their constitutional authority to issue damages against it.¹⁵⁶ In other words, plaintiff failed to show how the ALJ’s adjudication caused actual irreparable harm, as required to grant a preliminary injunction.¹⁵⁷ The court reasoned that since the NLRB ALJ never sought tort-like damages against the plaintiff, the claim was merely speculative.¹⁵⁸ Further, even if the ALJ did so, monetary damages do not establish irreparable harm.¹⁵⁹

In *Red Rock Resorts, Inc. v. NLRB*, a Nevada district court similarly held it lacked jurisdiction to hear Plaintiff’s Seventh Amendment claim, because the NLRA’s review scheme “[did] not foreclose meaningful judicial review of [the] claim.”¹⁶⁰

As background, hundreds of Red Rock Resorts’ casino-resort workers elected their Union to negotiate employment terms on their behalf. The Union asserted Plaintiff Red Rock Resorts undertook anti-Union campaigns, constituting a ULP.¹⁶¹ The Union filed charges with the NLRB, and the NLRB General Counsel brought the charges to one of its ALJs.¹⁶² Plaintiff sought to enjoin the proceedings, claiming declaratory and preliminary injunctive relief against

¹⁵² *Id.* at 515.

¹⁵³ *Meharry Med. Coll. v. Nat’l Lab. Rels. Bd.*, No. 3:24-CV-01258, 2025 WL 1372842, at *5 (M.D. Tenn. May 12, 2025).

¹⁵⁴ *Id.* (citing *Yapp*, 748 F. Supp. 3d at 514 (citing *Jones & Laughlin*, 301 U.S. at 33, 57)).

¹⁵⁵ *Id.* (citing *HonorHealth*, 2024 WL 4769772, at *4; *Amazon.com Servs. LLC v. NLRB*, 2024 WL 4977179, at *6 (W.D. Tex. Sept. 29, 2024) (same)).

¹⁵⁶ *Imp. Motors II, Inc. v. Cowen*, No. 25-CV-07284-RFL, 2025 WL 2589046, at *3, *4 (N.D. Cal. Sept. 8, 2025).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (citing *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 735 (9th Cir. 2017) (“[M]ere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury.” (citation omitted))).

¹⁶⁰ *Red Rock Resorts*, 2025 WL 2784607, at *5 (D. Nev. Sept. 30, 2025).

¹⁶¹ *Id.*, at *2.

¹⁶² *Id.*

NLRB members, its General Counsel, and at least one ALJ based on an alleged violation of the Seventh Amendment.¹⁶³ More specifically, plaintiff alleged the NLRB General Counsel’s intention to seek consequential or compensatory damages violated their Seventh Amendment right to a jury trial under *Jarksey*, since the NLRA only authorizes injunctive relief.¹⁶⁴

The *Red Rocks Resorts* court rejected plaintiff’s claim and joined the list of courts that determined that they lack the jurisdiction to hear such a claim.¹⁶⁵ The court concluded that the NLRA grants jurisdiction to the NLRB.¹⁶⁶

First, the court reasoned that when a statute specifies that judicial review is in the court of appeals, it inherently strips the district courts of jurisdiction.¹⁶⁷

Second, the court pointed to the test articulated in *Axon* to determine when a district court has jurisdiction to hear a challenge to an agency’s action before the agency has made its final, appealable decision.¹⁶⁸ Under *Axon*, courts must weigh the three *Thunder Basin* factors: “[(1)] whether the statutory scheme forecloses all meaningful judicial review of the claim; [(2)] whether the claim is wholly collateral to the statute’s review provisions; and [(3)] whether the claim is outside the agency’s expertise.”¹⁶⁹

Third, the court pointed to previous district courts that found all three *Thunder Basin* factors pointed to a lack jurisdiction to review such claims.¹⁷⁰ The *Red Rock Resorts* court thus similarly found all three *Thunder Basin* factors weighed against district court jurisdiction.¹⁷¹

The court held the first factor weighed against jurisdiction because the NLRA grants plaintiffs the opportunity to challenge any NLRB order seeking damages at the federal appellate court before compliance is required.¹⁷² The court held the second factor also weighed against jurisdiction, because “Plaintiffs’ Seventh Amendment claim [was] not collateral to the

¹⁶³ *Id.*, at *1, *2, *3.

¹⁶⁴ *Id.*, at *4 (citing *Axon*, 598 U.S. 175).

¹⁶⁵ *Id.* (citing *VHS Acquisition Subsidiary No. 7 v. NLRB*, No. 1:24- CV-02577, 2024 WL 4817175 at *3, *4 (D.D.C. Nov. 17, 2024), *appeal dismissed sub nom.*, No. 24-5270, 2024 WL 5232662 (D.C. Cir. 2024); *Nexstar Media, Inc. Grp. v. NLRB*, 746 F.Supp.3d 464, 470–73 (N.D. Ohio 2024) (holding the NLRA barred exercise of district court jurisdiction over claims)).

¹⁶⁶ *Id.*, at *5.

¹⁶⁷ *Id.*, at *4 (citing *Axon*, 598 U.S. at 185; *Free Enter. Fund v. Pub. Company Accting Oversight Bd.*, 561 U.S. 477, 489 (2010)).

¹⁶⁸ *Id.*, at *5; *VHS Acquisition*, 2024 WL 4817175 at *3–4 (citing *Axon*, 598 U.S. at 180; *Bohon v. Fed. Energy Regul. Comm.*, 92 F.4th 1121, 1123 (D.C. Cir. 2024) (holding *Axon* test determines district court jurisdiction “before there [is] an agency order to challenge”)).

¹⁶⁹ *Id.* (citing *Axon*, 598 U.S. at 186 (citing *Thunder Basin*, 510 U.S. at 212–13)).

¹⁷⁰ *Id.* (citing *VHS Acquisition*, 2024 WL 4817175 at *3–4; *Nexstar Media, Inc. Grp.*, 746 F.Supp.3d at 470–73; *Millennia Hous. Mgmt. v. HUD*, No. 1:24-CV-02084, 2025 WL 1222589 (N.D. Ohio Apr. 28, 2025) at *6–8 (applying similar analysis to adjudication by HUD ALJ)).

¹⁷¹ *Id.*

¹⁷² *Id.* (citing *Thryv*, 102 F.4th 727 as an example).

adjudication.” A claim is “collateral” to an adjudication whenever it challenges the agency’s “power to proceed at all,” instead of “how that power was wielded.”¹⁷³ The court also held the third factor weighed against jurisdiction because plaintiffs’ claim was within the NLRB’s expertise. The court explained the NLRB has “broad discretionary power to devise remedies to effectuate the policies of the [NLRA].”¹⁷⁴

Lastly, the court held it lacked jurisdiction to issue an injunction under the Norris-LaGuardia Act (“NLGA”),¹⁷⁵ because the case at issue was a labor dispute.¹⁷⁶ The court reasoned that since the proceedings sought to resolve employee allegations of threatening and firing employees who favored the Union and rewarding those who opposed it, the “matrix of the controversy” was “the underlying employment relationship.”¹⁷⁷

Plaintiff Red Rock Resorts filed an appeal that is currently pending before the U.S. Court of Appeals for Ninth Circuit and the appeal is pending.¹⁷⁸

D. The Take Care Clause

Another key question is whether the NLRB adjudicatory scheme complies with Article II’s Take Care Clause, which says: “[The president] . . . shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.”¹⁷⁹

Although the Constitution enumerates the president’s appointment power, it is silent about the president’s power to remove Officers from office.¹⁸⁰ However, since no person could fulfill such a responsibility alone, the Framers expected the president to rely on subordinate officers’ assistance.¹⁸¹

¹⁷³ *Id.* (citing *Axon*, 598 U.S. at 193).

¹⁷⁴ *Id.* (citing *VHS Acquisition*, 2024 WL 4817175 at *4 (citing *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)) (internal formatting omitted)).

¹⁷⁵ *Id.*, at *6–9. The NLGA generally bars injunctive relief, stating, “[n]o court of the United States ... shall have jurisdiction to issue any ... temporary or permanent injunction in a case involving or growing out of a labor dispute ... nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.” 29 U.S.C. § 101.1.

¹⁷⁶ *Id.*, at *6–7. The NLGA defines a labor dispute to include “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” 29 U.S.C. § 113(c).

¹⁷⁷ *Id.*, at *7.

¹⁷⁸ On October 31, 2025, the U.S. Court of Appeals for the Fifth Circuit determined that “the NLRB lacks statutory authority to award full compensatory damages.” *Hiran Mgmt., Inc. v. Nat’l Lab. Rels. Bd.*, No. 24-60608, 2025 WL 3041862, at *1 (5th Cir. 2025).

¹⁷⁹ U.S. CONST., Art. II, § 3.

¹⁸⁰ *Overstreet*, 2024 WL 5200484, at *4 (citing *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1130 (9th Cir. 2021) (citing *Myers v. United States*, 272 U.S. 52 (1926))).

¹⁸¹ *Id.*, at *4.

In 2010, the Supreme Court decided *Free Enterprise Fund v. Public Co. Accounting Oversight Board*. The Court reiterated that the Constitution grants the president “the authority to remove those who assist him in carrying out his duties,” “as a general matter.”¹⁸² Further, the Court stated, “without such power, the “[p]resident could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”¹⁸³

1. The Precedents: President Roosevelt and the Federal Trade Commission

The NLRB faced constitutional scrutiny early on its history. In *Humphrey’s Executor v. United States*, discussed above, plaintiff, an executor, brought suit against the United States to recover money he alleged the government owed as salary to decedent William E. Humphrey for time served as an FTC.¹⁸⁴ The decedent, nominated by President Hoover, was duly commissioned to serve a term of seven years set to expire on September 25, 1938. However, on July 25, 1933, President Roosevelt addressed a letter to Humphrey that asked him to step down, since the two did not align on policy. Humphrey declined, and on October 7, 1933, President Roosevelt wrote him stating, “Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.”¹⁸⁵ Humphrey continued to insist he was still a member of the commission thereafter.¹⁸⁶

FTC Act section 1 states that “any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”¹⁸⁷

The Supreme Court therefore had to determine (1) whether the FTC Act could restrict or limit the presidential power to remove a commissioner except upon one or more of the causes named, and (2) whether such a restriction was valid under the Constitution.¹⁸⁸

The Court held Congress could create expert agencies led by a group of principal officers removable by the president only for the good cause prescribed by statute.¹⁸⁹ Therefore, the Court upheld the FTC Act that protected the FTC commissioners from removal by the president except for “inefficiency, neglect of duty, or malfeasance in office.”¹⁹⁰ It reasoned Congress intended to limit the executive power of removal to the causes enumerated in the FTC Act by creating an administrative body of experts “who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the

¹⁸² *Id.* (citing *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010)).

¹⁸³ *Id.* (citing *Free Enter. Fund*, 561 U.S. at 514).

¹⁸⁴ *Humphrey’s Executor*, 295 U.S. 602 at 618.

¹⁸⁵ *Id.* at 618–19.

¹⁸⁶ *Id.* at 619.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 620, 630–32.

¹⁹⁰ *Id.* at 631–32.

government.”¹⁹¹ The Court further reasoned that Congress clearly intended removal should be limited to ensure the commission’s nonpartisanship and impartiality necessary for fair and effective administration of the law.¹⁹²

The Court also held the president’s otherwise illimitable power of removal is not possessed in respect of officers who are not purely executive (i.e., are “quasi-judicial” or “quasi-legislative by nature”).¹⁹³ The Court reiterated that the FTC is an administrative body created to carry out Congress’s legislative policies embodied in its statutes and to perform other specific legislative or judicial duties. Therefore, “Such a body cannot in any proper sense be characterized as an arm or an eye of the executive... and [the officers] must perform their duties without executive leave and, in the contemplation of the statute, must be free from executive control.”¹⁹⁴ The Court reasoned keeping the three branches of government free from the control or coercive influence of the others was necessary to maintain the delicate balance of power.¹⁹⁵ It, therefore, concluded the president’s removal power threatened that balance.¹⁹⁶

Humphrey’s Executor hence established the first of two longstanding exceptions to the president’s otherwise illimitable removal power.

In *United States v. Perkins* and *Morrison v. Olson* the Supreme Court established the only other exception to the president’s removal power. It held Congress could provide tenure protections to certain inferior officers with narrowly defined duties.¹⁹⁷

Then, in *Seila Law, LLC v. Consumer Financial Protection Bureau*, the Court importantly determined the director of the Consumer Financial Protection Bureau (“CFPB”) “must be removable by the President at will,” even though the enabling statute stated the director may be removed for “inefficiency, neglect of duty, or malfeasance in office.”¹⁹⁸

Congress vested the CFPB with extensive rulemaking, enforcement, and adjudicatory powers, including the authority to initiate administrative adjudications. Unlike traditional independent agencies, a single director leads the CFPB. The director is appointed by the president, serves a five-year term, and is only removable by the president for “inefficiency, neglect of duty, or malfeasance in office.”¹⁹⁹

¹⁹¹ *Id.* at 624–26 (citing *Illinois Cent. R.R. Co. v. Interstate Com. Comm’n.*, 206 U.S. 441, 454; *Standard Oil Co. v. United States*, 283 U.S. 235, 238, 239).

¹⁹² *Id.* “[Its] duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative ... It is charged with the enforcement of no policy except the policy of the law.”

¹⁹³ *Id.* at 623–29.

¹⁹⁴ *Id.* at 628.

¹⁹⁵ *Id.* at 629–30.

¹⁹⁶ *Id.* at 630.

¹⁹⁷ *United States v. Perkins*, 116 U.S. 483 (1886); *United States v. Morrison*, 487 U.S. (1988).

¹⁹⁸ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 205 (2020).

¹⁹⁹ *Id.* at 197, 199, 202.

In 2017, the CFPB issued a civil investigative demand to Plaintiff Seila Law LLC, a California-based law firm.²⁰⁰ Plaintiff asked the CFPB to set aside the demand, arguing the agency’s single director removal protections violated the separation of powers. The CFPB refused and filed a petition to enforce its demand in a district court. Plaintiff renewed its claim, but the district court ordered Plaintiff’s compliance.²⁰¹ The Ninth Circuit affirmed the district court’s decision, concluding both *Humphrey’s Executor* and *Morrison* foreclosed Plaintiff’s challenge to the CFPB demand.²⁰²

The Supreme Court reversed. The court concluded that the New Deal era-FTC upheld in *Humphrey’s Executor* bore little resemblance to the CFPB at issue in *Seila Law*.²⁰³ Unlike the numerous FTC commissioners, who served staggered terms and were balanced along partisan lines, the CFPB director serves a five-year term.²⁰⁴ Additionally, the CFPB director cannot “be dismissed” as a mere legislative or judicial aid.²⁰⁵ Rather, Congress “vested [the director] with significant executive power.”²⁰⁶

The Court also reasoned that unlike in *Morrison*, where the Court approved statutory removal protections for an inferior officer who lacked policymaking or administrative authority, the CFPB director at issue was a principal officer with significant duties.²⁰⁷ The *Seila Law* court thus reaffirmed the principle that “the President has ‘unrestrictable power ... to remove purely executive officers.’”²⁰⁸

As of November 2025, there are still only two exceptions to the president’s otherwise unrestricted removal power under the Take Care Clause.²⁰⁹ However, *Seila Law* established the need for courts to analyze the nature and duties of agency officers and, in particular, whether such officials exercise executive power.

²⁰⁰ *Id.* at 197.

²⁰¹ *Id.*

²⁰² *Id.* at 198.

²⁰³ *Id.* 198–99 (citing *Humphrey’s Executor*, 295 U.S. 602; *Perkins*, 116 U.S. 483).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 199.

²⁰⁶ *Id.* at 206.

²⁰⁷ *Id.* at 199.

²⁰⁸ *Id.* at 216–17 (quoting *Humphrey’s Executor*, 295 U.S. at 632 (holding Congress can create for-cause removal protections only to “a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was not said to exercise any executive power.”)).

²⁰⁹ *Wilcox v. Trump*, 775 F. Supp. 3d 215, 226 (D.D.C. 2025), *hearing in banc denied sub nom.*, *Harris v. Bessent*, No. 25-5037, 2025 WL 1033740 (D.C. Cir. Apr. 7, 2025), *cert. denied before judgment*, No. 25-319, 2025 WL 2692047 (U.S. 2025) (citing *Humphrey’s Executor*, 295 U.S. 602; *Perkins*, 116 U.S. 483, 485; *Morrison*, 487 U.S. 654).

2. Administrative Law Judge Removal

The courts are split on the NLRB ALJ removal protection question. To understand the various courts' reasoning on the NLRB-specific ALJ removal issue, this paper first turns to the precedential Fifth Circuit decision in *Jarkesy*.

a. ALJ Precedent

The Supreme Court in *Jarkesy* decided only the Seventh Amendment issue, and so the Fifth Circuit's holding on removal protections under the Take Care Clause remain undisturbed.²¹⁰

In *Jarkesy*, the Fifth Circuit held SEC ALJs dual removal protections violate Article II's Take Care Clause.²¹¹ Like the NLRB, SEC ALJs could only be removed by the SEC Commissioners if the MSPB found good cause.²¹² The court stated since ALJs perform "substantial executive functions," and since the Take Care Clause instructs that the president must "take Care that the Laws be faithfully executed," the president must have "sufficient control over the performance of [ALJs] functions, and, by implication, he must be able to choose who holds the positions."²¹³

The court concluded that SEC ALJs have substantial executive enforcement authority, because they "exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding."²¹⁴ Since the ALJs wield such executive authority, the court held that they are inferior officers of the United States, and thus the president must be able to oversee and remove them without obstacles.²¹⁵

Further, the court reasoned that the SEC ALJ removal protections prevented the agency's principal officers from intervening in their inferior officer's (i.e., the ALJ's) actions except in rare cases. Therefore, the court declared that the president, by extension, "lack[ed] the control necessary to ensure that the laws [were] faithfully executed."²¹⁶

The court thus determined the multiple layers within the SEC insulating ALJs from removal were unconstitutional.²¹⁷ The Fifth Circuit vacated the SEC's decision and remanded the lower court's decision for further proceedings.²¹⁸

²¹⁰ *Jarkesy*, 144 S. Ct. at 2117, 2139.

²¹¹ *Jarkesy*, 34 F.4th at 449, 451, 463.

²¹² *Id.* at 464; *see also* 5 U.S.C. § 7521(a).

²¹³ *Id.* at 463.

²¹⁴ *Id.* at 464.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 465.

²¹⁸ *Id.*

Although *Jarkesy* discusses SEC ALJs, the case is critical to any assessment about whether NLRB ALJ removal protections are constitutional. Various courts, including the Fifth Circuit itself, later analogized to the reasoning in *Jarkesy* by comparing NLRB ALJs to SEC ALJs.²¹⁹ The courts determined whether NLRB ALJs fall within the two narrow removal power exceptions established by precedent. To do so, the courts first decided (1) whether NLRB ALJs “wield substantial executive power” and (2) whether NLRB ALJs lead multimember bodies of experts (i.e., are “balanced along partisan lines, appointed to staggered terms, perform only ‘quasi-legislative’ and ‘quasi-judicial functions,’ and were said not to exercise any executive power”).²²⁰

b. Cases Finding National Labor Relations Board ALJ Removal Protections Unconstitutional

At least two federal courts, including the Fifth Circuit, held that NLRB ALJs removal protections are unconstitutional. The courts reasoned (1) the two layers of removal restrictions prevent the president from exercising his removal power as necessary to faithfully execute the law; (2) since *Jarkesy* held SEC ALJs are inferior officers because they hold substantial enforcement authority, so too are the NLRB ALJs; and (3) plaintiffs were likely to succeed on the merits of their claim because they sufficiently demonstrated irreparable harm.

In *Space Exploration Technologies Corp. v. NLRB*, three employers, SpaceX, Energy Transfer, and Findhelp (together, “the Employers”) were facing ULP complaints.²²¹ During the NLRB’s adjudication process, each employer filed suit in separate federal district courts, challenging the dual for-cause removal protection shielding both the NLRB Members and ALJs. Each court granted a preliminary injunction, which halted the agency’s proceedings. The NLRB then filed a consolidated appeal against the employers to the Fifth Circuit.²²²

The Fifth Circuit affirmed the district courts’ decisions to issue preliminary injunctions against the Board.²²³

First, the court reasoned the district courts had proper jurisdiction to enjoin the Board proceedings because no federal law said otherwise.²²⁴ Second, when reviewing the district

²¹⁹ See e.g. *Space Expl.*, 151 F.4th 761.

²²⁰ See *Humphrey’s Executor*, 295 U.S. 602; *Perkins*, 116 U.S. 483; *Morrison*, 487 U.S. 654; *Jarkesy*, 144 S. Ct. 2117.

²²¹ *Space Expl.*, 151 F.4th at 766.

²²² *Id.*

²²³ *Id.* The Fifth circuit affirmed three separate district court decisions finding NLRB ALJ protections were unconstitutional in *Space Expl. Techs. Corp. v. Nat’l Lab. Rels. Bd.*, 741 F. Supp. 3d 630 (W.D. Tex. 2024), *Aunt Bertha v. Nat’l Lab. Rels. Bd.*, No. 4:24-CV-00798-P, 2024 WL 4202383 (N.D. Tex. Sept. 16, 2024), and *Energy Transfer, LP v. Nat’l Lab. Rels. Bd.*, 742 F. Supp. 3d 755 (S.D. Tex. 2024).

²²⁴ *Id.*

court's grant of preliminary injunction for abuse of discretion, the court applied the preliminary injunction test.²²⁵

The court reaffirmed the sentiment expressed in *Free Enterprise Fund v. Public Accounting Oversight Board*, that “since the executive power is solely vested in the president, those who exercise it on his behalf must remain subject to his oversight.”²²⁶ Importantly, the court needed to decide whether NLRB members and ALJs and were inferior or principal officers, and “whether the restrictions on their removal are sufficiently onerous, that the [p]resident has lost the ability to take care that the laws are faithfully executed.”²²⁷

The court emphasized that both the Supreme Court and the Fifth Circuit previously declined to extend the *Humphrey's Executor* exception to agencies that are not a “mirror image” of the FTC.²²⁸

Analogizing to the SEC ALJs in *Jarkesy*, the Fifth Circuit in *Space Exploration* held the NLRB's two-layer removal schemes “stand in the President's way” of removing ALJs as necessary to faithfully execute the law.²²⁹ Therefore, the court held since SEC ALJs are inferior officers because they hold substantial enforcement authority, so too are the NLRB ALJs.²³⁰

The court also reasoned the statutory protections for SEC ALJs were nearly identical to the NLRB ALJs.²³¹ The court pointed to the fact that NLRB ALJs (1) may “admonish or reprimand, after due notice, any person who engages in misconduct at a hearing;” (2) “may strike witness testimony for refusing to answer a question;”²³² and (3) that their decisions sometimes become final by regulation “if no timely or proper exceptions are filed.”²³³

The court, therefore held that since the SEC ALJ's removal protections are unconstitutional, so too are the NLRB ALJs' removal protections.²³⁴

²²⁵ *Id.* at 772. “A plaintiff seeking such relief must show four things: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm without an injunction; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. “The first factor—likelihood of success on the “ merits—is ‘the most important.’ Employers “must [also] establish... that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.”

²²⁶ *Id.* at 774 (citing *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010)).

²²⁷ *Id.* (citing *Jarkesy*, 34 F.4th at 463).

²²⁸ *Id.* at 767.

²²⁹ *Id.* at 775 (citing *Jarkesy*, 34 F.4th at 464).

²³⁰ *Id.* (citing *Lucia*, 585 U.S. at 248–49).

²³¹ *Id.* at 774.

²³² *Id.* (citing 29 C.F.R § 102.177(b)–(c)).

²³³ *Id.* (citing 29 C.F.R § 102.48(a); 29 U.S.C. § 160(c)).

²³⁴ *Id.* at 775.

In *Hudson Institute of Process Research Corporation v. National Labor Relations Board*, a Texas district court relied on and followed the Fifth Circuit’s decision in *Space Exploration*, because the *Hudson* Plaintiffs raised the exact same argument as the plaintiffs did there.²³⁵ Since the court in *Space Exploration* held the employers were likely to succeed on the merits of their challenge in proving the NLRB members and ALJs are unconstitutionally insulated from removal, the Texas court reached the same conclusion here.²³⁶

In *VHS Acquisition Subsidiary No. 7 v. National Labor Relations Board*, the U.S. District Court for the District of Columbia (“D.D.C.”) also held the NLRB ALJ removal protections violated the Take Care Clause.²³⁷ The court’s decision hinged on the fact that the NLRB ALJs were insulated from the president’s removal power by two or more decisionmakers, who themselves had job protection.²³⁸

The court reasoned that there are essentially three levels of protection. First, that the NLRB may remove its ALJs “only for good cause established and determined by the [MSPB] on the record after opportunity for hearing before the [MSPB],” which is then reviewable by the federal appellate courts.²³⁹ Second, the NLRB members can also be removed only “for neglect of duty or malfeasance in office, but for no other cause.”²⁴⁰ Third, MSPB officers can be removed only for “inefficiency, neglect of duty, or malfeasance in office.”²⁴¹ So, the court reasoned that for the president to remove an NLRB ALJ, (1) he must convince the NLRB, (2) the NLRB must petition the MSPB, (3) the MSPB must find good cause and then inform the NLRB, and (4) the NLRB must choose to act accordingly.²⁴² The court ruled that the multi-layered protection eliminated the president’s ability to decide whether good cause exists at all. Rather, other tenured officers make the decision ... “none of whom [are] subject to the President’s direct control.”²⁴³

The government changed its position earlier this year. In particular, the U.S. Department of Justice filed a Notice of Change in Position in another case where the constitutionality of ALJs was at issue. The notice stated that “the Acting Solicitor General has decided multiple layers of

²³⁵ *Hudson Inst. of Process Rsch. Corp., v. Nat’l Labor Rels. Bd.*, No. 4:24-cv-989, 2025 WL 2431645, at *3 (E.D. Tex. Aug. 22, 2025) (citing *Space Expl.*, 151 F.4th 761).

²³⁶ *Id.*

²³⁷ *VHS Acquisition Subsidiary No. 7 v. Nat’l Lab. Rels. Bd.*, 759 F. Supp. 3d 88, 92 (D.D.C. Dec. 10, 2024).

²³⁸ *Id.* at 109–10.

²³⁹ *Id.* at 95 (citing 5 U.S.C. § 7521(a); 28 U.S.C. § 1295(a)(9)).

²⁴⁰ *Id.* (citing 29 U.S.C. § 153(a)).

²⁴¹ *Id.* (citing 5 U.S.C. § 1202(d)).

²⁴² *Id.* (citing *Jarkesy*, 34 F.4th at 465).

²⁴³ *Id.* (citing *Free Enter. Fund*, 561 U.S. at 495).

removal restrictions for administrative law judges . . . do not comport with the separation of powers and Article II and that the United States will no longer defend them in litigation.”²⁴⁴

a. **Cases Finding National Labor Relations Board ALJ Removal Protections Constitutional**

At least six district courts have taken a different approach in similar cases. The courts consistently denied plaintiffs’ request for preliminary injunctions that would enjoin the NLRB from proceeding with its administrative hearings. The courts reasoned (1) plaintiffs failed to demonstrate the removal protections caused actual, irreparable harm; (2) NLRB ALJs perform “purely adjudicatory functions,” and are therefore inferior officers subject to constitutional for-cause removal protections; (3) *Humphrey’s Executor* is binding and applies to traditional independent agencies led by a multimember board, such as the NLRB; (4) NLRB ALJs are similar to the FTC ALJs upheld in *Seila Law*; and (5) plaintiffs’ claim did not satisfy the requirements for an injunction under the Norris-LaGuardia Act.²⁴⁵

For example, an Illinois district court in *Alivio Medical Center v. Abruzzo* held NLRB ALJs are constitutional because they “perform purely adjudicatory functions” and there was no evidence that they performed “executive functions.”²⁴⁶ The court expressed concern about what would happen if the employer’s position prevailed: “Alivio’s position—if accepted—would neuter the [NLRA] by blocking all proceedings before the [NLRB], the independent agency that has steadfastly and exclusively enforced the statute for the past eighty-nine years against entities accused of unfair labor practices.”²⁴⁷

In *Yapp USA Automotive Systems Inc.*, a Michigan district court similarly reasoned the NLRB ALJs fall neatly within the *Humphrey’s Executor* exception because they “perform purely adjudicatory functions.”²⁴⁸ The *Yapp* court cited to *Humphrey’s Executor* stating, “[t]o the extent that [the FTC] exercise[d] any executive function, as distinguished from executive power in the constitutional sense, it [did] so only in the discharge ... of its quasi-legislative or quasi-judicial powers.”²⁴⁹ In other words, the court reaffirmed *Humphrey’s Executor* as binding and applying to traditional independent agencies led by a multimember board, such as the NLRB.²⁵⁰

²⁴⁴ *Lemelson v. Securities and Exch. Comm’n*, No. 1:24-CV-02415-SLS, ECF No. 16 (D.D.C. Feb. 18, 2025).

²⁴⁵ In the Norris-LaGuardia Act, Congress mandated that “[n]o court of the United States ... shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute,” unless several requirements are met. § See 29 U.S.C. §§ 101, 107. The court first must determine if the case at issue “involve[s] or grow[s] out of a labor dispute[.]” 29 U.S.C.

²⁴⁶ *Alivio*, 2024 WL 4188068, at *10 (citing *Yapp*, 748 F. Supp. 3d at 509).

²⁴⁷ *Id.*, at *11.

²⁴⁸ *Yapp*, 748 F. Supp. 3d at 509.

²⁴⁹ *Id.* (citing *Humphrey’s Executor*, 295 U.S. at 628).

²⁵⁰ *Id.* at 508 (citing *United States v. SunSetter Prods. LP*, No. 23-10744, 2024 WL 1116062, at *4 (D. Mass. Mar. 14, 2024) (“*Humphrey’s Executor* remains binding and continues to apply to any traditional independent agency headed by a multimember board, ... like the CPSC.”) (internal quotation marks and citations omitted)).

The court in *Yapp* also pointed to the FTC ALJs *Seila Law* held as constitutional, noting the NLRB was modeled after the FTC, and the NLRA was modeled after the FTC Act.²⁵¹ Further, it noted the NLRB is a multi-member independent, expert agency like the FTC.²⁵²

Finally, the court in *Yapp* found that even if the removal protections were held unconstitutional, the plaintiff failed to demonstrate it suffered the harm required to grant a preliminary injunction.²⁵³

In *Kerwin v. Trinity Health Grand Haven Hospital*, a Michigan district court similarly denied preliminary injunction. It held that removal protections of the NLRB’s ALJs were constitutional.²⁵⁴ Citing to *Yapp*, the court agreed that “NLRB ALJs perform purely adjudicatory functions, issue non-final recommendations to the NLRB, and enjoy good-cause protections that are a ‘lesser impingement’ than the removal standard at issue in *Free Enterprise Fund*.”²⁵⁵

In *Import Motors II, Inc. v. Cowen*, a California district court similarly held Plaintiff Import failed to demonstrate how dual-layered ALJ for-cause removal protections caused actual irreparable harm.²⁵⁶ The court relied on *Collins v. Yellen*, which held an “unlawful removal provision does not automatically ‘inflict compensable harm,’ and cannot be the basis to seek relief, unless there is an additional showing that the inability to remove the officer actually caused some harm to the proceedings.”²⁵⁷ The court stated, as an example, a situation where the president actually tried to remove an officer, but could not, because he lacked the “cause” for removal would suffice.²⁵⁸ Here, the president had not yet tried to remove the NLRB ALJ at issue—meaning there was no such harm done.²⁵⁹

In *Hoffmann Brothers Heating & Air Conditioning, Inc. v. National Labor Relations Board*, a Missouri district court similarly held NLRB ALJs removal restrictions did not constitute the irreparable harm necessary to warrant preliminary injunctive relief.²⁶⁰ The district court held Plaintiff’s claim did not satisfy the requirements for an injunction under the Norris-LaGuardia Act.²⁶¹

²⁵¹ *Id.* at 506 (citing *Calcutt v. FDIC*, 37 F.4th 293, 314 (6th Cir. 2022) *rev’d on other grounds*, 598 U.S. 623 (2023) (citing *Seila Law*, 591 U.S. 197)).

²⁵² *Id.*

²⁵³ *Id.* at 509.

²⁵⁴ *Kerwin v. Trinity Health Grand Haven Hosp.*, No. 1:24-CV-445, 2024 WL 4594709, at *6 (W.D. Mich. Oct. 25, 2024).

²⁵⁵ *Id.*

²⁵⁶ *Imp. Motors II, Inc. v. Cowen*, No. 25-CV-07284-RFL, 2025 WL 2589046 at *1, *2, *3 (N.D. Cal. Sept. 8, 2025).

²⁵⁷ *Id.*, at *1–2 (citing *Collins v. Yellen*, 594 U.S. 220 (2021)).

²⁵⁸ *Id.*, at *1. (citing *Collins*, 594 U.S. at 259–60).

²⁵⁹ *Id.*, at *2.

²⁶⁰ *Hoffmann*, 2025 WL 2695565, at *4.

²⁶¹ *Id.*, at *2–3.

Further, the court found plaintiffs failed to allege that but for the removal restriction, the president would actually fire the NLRB ALJ at issue in the case. Therefore, plaintiffs could not show that the removal provisions “specifically impacted the agency actions of which they complain[.]” Without this showing, the court reasoned plaintiffs could not show a harm “certain and great and of such imminence that there is a clear and present need for equitable relief.”²⁶² As a result, the court held Plaintiff’s alleged injury was speculative at best.²⁶³

In *Meharry Medical College v. National Labor Relations Board*, a Tennessee district court also denied plaintiff’s request for a preliminary injunction for failure to demonstrate how removal protections would have specifically impacted (“or made a difference in”) the administrative proceeding.²⁶⁴ The court also rejected the plaintiff’s assertion it should apply *Jarkesy*’s reasoning to NLRB ALJs.²⁶⁵ Recall *Jarkesy* held SEC ALJs removal protections are unconstitutional because the ALJs “exercise considerable power over administrative case records.”²⁶⁶

Instead, the *Meharry* court emphasized the U.S. Court of Appeals for the Sixth Circuit’s ruling in *Calcutt v. FDIC*,²⁶⁷ which upheld double-layered removal protections for the Federal Deposit Insurance Corporation (“FDIC”) ALJs, governed. The court added that the inferior officer exception for ALJs “centers on their status as adjudicatory officials that issue non-final recommendations to an agency, and not on how many levels of removal protections they enjoy.”²⁶⁸ Analogizing to *Calcutt*, the *Meharry* court held the NLRB ALJs were purely adjudicatory officers and thus subject to removal protections.²⁶⁹

3. Board Member and Agency Head Removal

Courts are also split on whether NLRB members and agency heads are constitutionally insulated from at-will removal by the president under the Take Care Clause.

The Supreme Court recently granted two emergency stay applications of district court orders reinstating administrative agency board members, including both an NLRB and MSPB

²⁶² *Id.*, at *6.

²⁶³ *Id.* (citing *H&R Block Inc. v. Himes*, No. 24-00198-cv-w-BP, 2024 WL 3742310 (W.D. Mo. Aug. 1, 2024)).

²⁶⁴ *Meharry*, 2025 WL 1372842, at *5 (citing *Yapp*, 748 F. Supp. 3d 497 at 510).

²⁶⁵ *Id.*, at *4.

²⁶⁶ *See Jarkesy*, 34 F.4th at 463.

²⁶⁷ *Meharry*, 2025 WL 1372842, at *4 (citing *Yapp*, 748 F. Supp. 3d 497 (citing *Calcutt*, 37 F.4th 293 at 340)). (“But this Court is bound by the Sixth Circuit’s ruling in *Calcutt*, which it reads as not invalidating ALJ removal protections like those applicable to NLRB ALJs); *see also VHS Acquisition Subsidiary No. 7 v. NLRB*, 759 F. Supp. 3d 88, 99 (D.D.C. Dec. 10 2024) (recognizing Fifth and Sixth Circuits are split on this issue).

²⁶⁸ *Id.*, at *4 (citing *Calcutt*, F.4th 293).

²⁶⁹ *Id.* (citing *Yapp*, 748 F. Supp. 3d at 509 (quoting *Calcutt*, 37 F.4th at 320)).

agency head, after President Trump fired them without statutory cause.²⁷⁰ Although, the substantive issues in the two cases have not yet been briefed and argued before the Court.

The Fifth Circuit in *Space Exploration* also declined to find NLRB member removal protections constitutional under the narrow *Humphrey's Executor* exception, finding NLRB members “wield substantial executive power.”²⁷¹ Various district courts, on the other hand, held the *Humphrey's Executor* exception applies to NLRB members because they “closely resemble[] the FTC [c]ommissioners.”²⁷²

a. Supreme Court's Preliminary Judgment

In *Trump v. Wilcox*, the Supreme Court granted an emergency stay of a district court's order reinstating NLRB Chair Gwynne Wilcox (“Wilcox”) and MSPB Chair Cathy Harris (“Harris”) after President Trump fired them both without cause required by statute.²⁷³ The Court also granted an administrative stay pending the disposition of the appeal in the D.C. Circuit and the disposition of a petition for a writ of certiorari.²⁷⁴

In the first case, Wilcox, former Chair of the NLRB, brought a declaratory and injunctive relief action against President Trump and the current NLRB Chairman. She challenged her removal by President Trump as without cause (i.e., for reasons other than neglect of duty or malfeasance in office) and without the notice and hearing required by statute.²⁷⁵ On cross-motions for summary judgment, the U.S. District Court for the District of Columbia granted Wilcox's motion, denied the Government's motion, and issued a permanent injunction. The Government then appealed and filed an emergency motion for a stay pending appeal.²⁷⁶

In second case, Harris brought a declaratory and injunctive relief action against President Trump, the Secretary of the Treasury, and other federal officials, claiming her termination was without cause and thus unconstitutional. The same district court granted summary judgment to Harris and issued a permanent injunction. The Government again appealed and filed an emergency motion for stay pending appeal.²⁷⁷

The U.S. Court of Appeals for the D.C. Circuit consolidated the two cases and granted the Government's motions. However, the circuit court later granted Wilcox and Harris's motions

²⁷⁰ See *Trump v. Wilcox*, 145 S. Ct. 1415 (2025); See also *Trump v. Slaughter*, No. 25A264, 2025 WL 2582814, at *1 (2025).

²⁷¹ *Space Expl.*, 151 F.4th 761 at 776.

²⁷² See e.g. *Meharry*, 2025 WL 1372842, at *4; see also *Yapp*, 748 F. Supp. 3d at 508 (“*Humphrey's Executor* remains binding and continues to apply to traditional independent agencies led by a multimember board, including the NLRB.”)

²⁷³ *Trump v. Wilcox*, 145 S. Ct 1415.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

for en banc reconsideration and vacatur of stays and denied the Government’s motions for stay pending appeal.²⁷⁸

The Government then applied for a stay of permanent injunction to the Supreme Court.²⁷⁹ The Court granted the stay pending further order. It stated, “[s]hould certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.”²⁸⁰

In its stay application, the Government argued the president’s removal power is unrestricted, absent the “narrow” exceptions outlined in *Humphrey’s Executor* (holding the removal power exception extends only to “multimember expert agencies that do not wield substantial executive power”).²⁸¹ The Government additionally claimed both the NLRB and MSPB wield substantial executive power because their members implement and enforce federal labor and civil-service laws.²⁸²

Further, the Government argued the district court’s orders violated Article II, because federal courts lack the authority to reinstate agency heads the president has removed. The Government contended that such orders “force the [p]resident to rely on principal officers whom the [p]resident believes should not be exercising any executive power,” and “deeply wounds the [p]resident in his exercise of the executive power.”²⁸³ Finally, the Government argued allowing district courts to reinstate executive agency heads causes irreparable harm to both the president and the constitutional separation of powers.²⁸⁴

The Court ultimately held that the “(1) Government was likely to succeed on merits of its claim that [p]resident’s executive power allowed him to terminate the [m]embers without cause, and (2) [a] risk of harm to [the] Government favored stay pending [the] Government’s appeal.”²⁸⁵

The Court reasoned that since “the president has ‘unrestrictable power ... to remove purely executive officers,’” he can remove officers without cause, subject only to the precedents’ carved-out exceptions.²⁸⁶ The Court stated its granting of the stay “reflects [its] judgment that

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Pet’r’s Appl. to Stay the J. of the U.S. District Ct. for the District of Columbia and Req. for Administrative Stay. 3. Apr. 9, 2025.

²⁸² *Id.*

²⁸³ *Id.* (citing *Morrison*, 487 U.S. at 713 (Scalia, J., dissenting)).

²⁸⁴ *Id.* at 2–5.

²⁸⁵ *Trump v. Wilcox*, 145 S. Ct 1415.

²⁸⁶ *Id.*

the Government is likely to show that both the NLRB and MSPB exercise considerable executive power.”²⁸⁷

The Court emphasized that it did not make its decision based on whether the NLRB or MSPB falls within an exception. Rather, it declared that the question first required a full briefing and argument.²⁸⁸ However, the Court did emphasize that granting the stay reflected its judgment that the “Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty.”²⁸⁹

Then, in *Trump v. Slaughter*, the Supreme Court granted another application to stay the a district court’s order that reinstated two FTC members after President Trump fired them without statutorily required cause.²⁹⁰

The case began after President Trump fired two Democratic FTC commissioners, Rebecca Kelly Slaughter and Alvaro Bedoya, in March 2025. The commissioners brought a declaratory relief and permanent injunction action President Trump and FTC officials in the U.S. District Court for the District of Columbia. They challenged their removal as unconstitutional and therefore without legal effect.²⁹¹ In the alternative, they sought a writ of mandamus affording the same relief. The two moved for summary judgment, and defendants cross-moved for summary judgment.²⁹² In June 2025, Commissioner Bedoya notified the court of his resignation but continued to seek any legal relief appropriate.²⁹³

A three-judge D.C. Circuit panel refused to stay the district court’s injunction compelling the immediate reinstatement of the removed commissioners.²⁹⁴

In its stay application, the Government argued because the FTC exercises “considerable executive power” similar to the NLRB, MSPB, and CPSC at issue in *Trump v. Boyle* and *Trump v. Wilcox*, the Court’s previous orders “squarely control” this case as well.²⁹⁵ The Government pointed to the fact that the FTC “brings enforcement suits for injunctions and civil penalties,

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Trump v. Slaughter*, 2025 WL 2582814, at *1.

²⁹¹ *Slaughter v. Trump*, 791 F. Supp. 3d 1, 18 (D.D.C. Jul. 17, 2025), *cert. granted before judgment*, No. 25-332, 2025 WL 2692050 (U.S. 2025).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 16.

²⁹⁵ Pet’r’s Appl. to Stay the J. of the U.S. District Ct. for the District of Columbia and Req. for Administrative Stay. 2. Sept. 4, 2025 (citing *Trump v. Boyle*, 145 S. Ct. at 2654; *Trump v. Wilcox*, 145 S. Ct 1415).

promulgates binding rules, enters binding adjudicatory orders, conducts pre-enforcement investigations, and even exercises significant foreign-affairs authority.”²⁹⁶

The Government also argued the lower courts were not bound by *Humphrey’s Executor*, because those courts applied an overly expansive reading that the Court repudiated in *Selia Law*. In particular, the Government emphasized that *Seila Law* explained that the *Humphrey’s Executor* holding rested on the “New Deal-era FTC,”—“an agency that the Court understood to function solely as a ‘legislative or judicial aid’ that exercised ‘no part of the executive power.’”²⁹⁷ Therefore, it asserted that the modern FTC wields considerable executive power that equals or exceeds the NLRB, MSPB, and CPSC.²⁹⁸

Finally, the Government argued the lower courts’ “unduly expansive” reading of *Humphrey’s Executor* ignores the Supreme Court’s more recent precedents, constituting “the very same error that formed the basis of the orders [the] Court stayed in *Wilcox* and *Boyle*.” Therefore, the Government contended that since the present case at issue was indistinguishable from the prior two, the lower courts should have treated it such.²⁹⁹

The Court did not explain its reasoning when it granted the stay application.

b. The Fifth Circuit’s *SpaceX* Decision

In *Space Exploration*, the Fifth Circuit declined to find the NLRB member’s removal protections as constitutional under *Humphrey’s Executor*’s narrow exception, because the NLRB members “wield substantial executive power.”³⁰⁰ The court explained how the current NLRB’s member wield significantly more executive power than the FTC commissioners in 1935.³⁰¹ The court also reasoned that modern NLRB members wield such power because they “adjudicate unfair-labor-practice charges, [] seek enforcement of their orders in federal court ... [and] appoint inferior officers.”³⁰² The court also explained that unlike the FTC, the NLRB has no statutory party-balancing requirement.³⁰³ Since the NLRB is outside the narrow *Humphrey’s Executor* exception, the court concluded the Employers were likely to succeed on the merits of their challenge to the Board Member’s removal protections.³⁰⁴

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 3 (citing *Seila Law*, 591 U.S. at 218).

²⁹⁸ *Id.* at 3.

²⁹⁹ *Id.*

³⁰⁰ *Space Expl.*, 151 F.4th at 776.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 778.

³⁰⁴ *Id.*

c. **District Court Holdings**

In *Yapp*, a Michigan district court denied a preliminary injunction. It held the NLRB did not wield substantial executive power, even though it exercises some “executive” functions.³⁰⁵ Citing *Morrison*, the *Yapp* court concluded exercising executive functions does not undermine removal protections for officers of a non-partisan agency consisting of experts.³⁰⁶ In other words, the court held that *Humphrey’s Executor* was still binding and applied to traditional independent agencies led by a multimember board, including the NLRB.³⁰⁷

In *Kerwin*, a Michigan district court similarly denied a preliminary injunction. It held removal protections of both NLRB General Counsel and Board members were constitutional.³⁰⁸ Citing to *Yapp*, the court agreed *Humphrey’s Executor* “remains binding and continues to apply to traditional independent agencies led by a multimember board, including the NLRB.”³⁰⁹

In *Meharry*, a Tennessee district court also denied a preliminary injunction because plaintiff failed to demonstrate how removal protections would specifically impact the administrative proceeding.³¹⁰ The *Meharry* court held the *Humphrey’s Executor* exception applies to NLRB members because they “closely resemble[] the FTC [c]ommissioners.”³¹¹

³⁰⁵ *Yapp*, 748 F. Supp. 3d at 507–08 (citing *Leachco, Inc. v. Consumer Prod. Safety Comm’n*, 103 F.4th 748, 762 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1047 (2025) (citing *Morrison*, 487 U.S. 654); *Seila Law*, 591 U.S. at 216).

³⁰⁶ *Id.* at 507.

³⁰⁷ *Id.* at 508.

³⁰⁸ *Kerwin*, 2024 WL 4594709, at *6–7 (citing *Yapp*, 748 F. Supp. 3d 497).

³⁰⁹ *Id.*, at *7.

³¹⁰ *Meharry*, 2025 WL 1372842, at *5.

³¹¹ *Id.*, at *3 (citing *Seila Law*, 591 U.S. at 217; *Yapp*, 748 F. Supp. 3d at 508 (“*Humphrey’s Executor* remains binding and continues to apply to traditional independent agencies led by a multimember board, including the NLRB.”); *Kerwin*, 2024 WL 4594709, at *7 (finding “Respondent’s contention that the removal protections for NLRB Board members would be a significant expansion of the *Humphrey’s Executor* standard unfounded.”)).

V. **APPENDIX**

A. **Excerpts from the U.S. Constitution**

1. **Appointments Clause**: “[The President] shall have Power, . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST., Art. II, § 2, cl. 2.
2. **Take Care Clause**: “[The president] . . . shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.” U.S. CONST., Art. II, § 3.
3. **Seventh Amendment**: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.” U.S. CONST., Amend. 7.