24-50761

In The

United States Court Of Appeals For The Fifth Circuit

AMAZON.COM SERVICES LLC,

Plaintiff - Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, A FEDERAL ADMINISTRATIVE AGENCY; JENNIFER ABRUZZO, IN HER OFFICIAL CAPACITY AS THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD; LAUREN MCFERRAN, IN HER OFFICIAL CAPACITY AS THE CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD; MARVIN E. KAPLAN, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD; GWYNNE A. WILCOX, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD; DAVID M. PROUTY, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD; MERRICK GARLAND,

Defendants - Appellees.

TEAMSTERS AMAZON NATIONAL NEGOTIATING COMMITTEE.

ON APPEAL FROM WESTERN DISTRICT OF TEXAS, SAN ANTONIO

BRIEF OF *AMICI CURIAE* THE COALITION FOR A DEMOCRATIC WORKPLACE, THE PELICAN INSTITUTE FOR PUBLIC POLICY, THE MACKINAC CENTER FOR PUBLIC POLICY AND THE INSTITUTE FOR THE AMERICAN WORKER IN SUPPORT OF APPELLANT

Alex T. MacDonald
LITTLER MENDELSON, P.C.
Workplace Policy Institute
815 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20006-4046
(202) 772-2505
amacdonald@littler.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE

In accordance with Federal Rule of Appellate Procedure 29(a)(4), Amici Coalition for a Democratic Workplace, Mackinac Center for Public Policy, Institute for the American Worker, and Pelican Institute for Public Policy certify that they each have no parent corporation and that no publicly held corporation owns ten percent or more of either of their stock.

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INTEREST OF AMICI

The Coalition for a Democratic Workplace (CDW) represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the National Labor Relations Board, which through expansive interpretation of its own authority, has threatened the wellbeing of employers, employees, and the national economy.

The Pelican Institute for Public Policy is a non-partisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

The Mackinac Center for Public Policy is a Michigan based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws, and its

work in that area has been cited by the United States Supreme Court. *See Janus v. AFSCME*, 585 U.S. 878, 898 n.3 (2018).

The Institute for the American Worker is devoted to informing policymakers and stakeholders about current developments in labor policy. Its leadership consists of experts in labor law, labor policy, and the inner workings of congressional labor committees. It is regarded as one of the leading experts in the field.

Amici submit this amicus brief to help deepen the Court's knowledge of the constitutional issues raised by the Board's regulatory overreach. In particular, the brief explains that the Board members are unconstitutionally insulated from presidential supervision. The Board has defended its insulation using a 1930s-era exception for independent "expert" agencies. But the Board members do not qualify for that exception because they are expert in nothing but their own policies.

The brief also details an equally troubling feature of the Board's structure. The Board prosecutes private businesses through an in-house administrative process offering no access to a jury. That process allows it to collect monetary "legal" remedies, for which a business has a right to demand a jury under the Seventh Amendment. The Board defends its

process under an exception for so-called public rights cases. But in fact, that exception is inapplicable because Board proceedings involve core private rights.

Amici file this brief under Federal Rule of Appellate Procedure 29(a). Counsel for all parties have been notified. Appellant's counsel has consented to the filing; the Board's counsel declined to express a position. In accordance with Federal Rule of Appellate Procedure 29(a), Amici state that no party's counsel authored this brief, no party or its counsel contributed money to prepare the brief, and no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

This case asks whether the National Labor Relations Board, as currently constituted, violates the U.S. Constitution. The answer is yes. Appellant Amazon Services, LLC, identifies multiple constitutional deficiencies in the Board's current structure. This brief expands on only two of them: (1) the Board's members are unconstitutionally insulated from the president's supervision; and (2) the Board's enforcement process violates the Seventh Amendment.

Protection from removal. The Board consists of five presidentially appointed members. 29 U.S.C. § 153(a). Today, those members can be removed only for "neglect of duty or malfeasance in office." *Id.* That removal protection contradicts the default constitutional rule, which is that principal officers like the Board members can be removed at will. *Seila Law LLC v. CFPB*, 591 U.S. 197, 200 (2020); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513–14 (2010). To avoid that default rule, the Board relies on an exception established in the 1930s for multi-member "expert" agencies. *See* Opp'n to Plaintiff-Appellant's Mot. for Injunction Pending Appeal & Admin. Stay, *Amazon.com Servs. LLC v. NLRB*, Case No. 24-50761, at 7 (5th Cir.

Sept. 29, 2024), ECF No. 25 [hereinafter NLRB Opp'n] (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935)). But the Board cannot use that exception because it is not an expert in any technical, scientific, or statistical field. It is an expert only in its own rules, which are themselves simply a mix of policy judgments and legal interpretations. *See* Bd. Opp'n, *supra*, at 14 (citing Board's "expertise" in fashioning remedies under the NLRA); Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 Wis. L. Rev. 1115, 1128–29, 1132 (2017) (explaining that because of statutory ban on hiring economists or statisticians, Board has no institutional expertise outside its own doctrine) ("Where other agencies are expected to improve based on their social scientific expertise, the Board lacks the capacity to even determine if its remedies produce their desired regulatory effects."). And under the Supreme Court's decision in *Loper Bright Industries v. Raimondo*, 144 S. Ct. 2244 (2024), no agency is an expert in interpreting statutes. The job of interpreting statutes belongs not to agencies, but to Article III judges. *Id.* at 2258 (explaining that the "interpretation of the meaning of statutes" is "exclusively a judicial function" (quoting *United States v. Am. Trucking Ass'n*, 310 U.S. 534,

544 (1940))). Agencies therefore cannot claim special expertise simply because they are familiar with their own enabling statutes. *See id.* at 2267. And likewise, the Board cannot claim an exception from the default constitutional rule. *See id.* (explaining that courts have never owed deference to agencies "in cases having little to do with an agency's technical subject matter expertise").

The Seventh Amendment. The Seventh Amendment gives every citizen the right to demand a jury trial on all "suits at common law." U.S. Const. amend. VII. Suits at common law include both actions that existed in 1791 and statutory claims paralleling those actions. *See SEC v. Jarkesy* (*Jarkesy II*), 144 S. Ct. 2117, 2128–29 (2024); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 51 (1989); *Tull v. United States*, 481 U.S. 412, 417 (1987). *See also Jarkesy v. SEC* (*Jarkesy I*), 34 F.4th 446, 453 (5th Cir. 2022). The Board enforces claims paralleling common-law actions such as breach of contract, wrongful discharge, and restraint of trade. *See* 29 U.S.C. § 160(a) (giving Board authority to prosecute "unfair labor practices"); *Thryv, Inc.*, 372 N.L.R.B. No. 22, 2022 WL 17974951 (Dec. 13, 2022) (authorizing Board to recover financial remedies equivalent to common-law consequential damages). *See also*

Alexander T. MacDonald, *Secondary Picketing, Trade Restraints, and the First Amendment: A Historical and Practical Case for Legal Stability*, 40 Hofstra Lab. & Emp. L.J. 1, 23 (2022) [hereinafter Secondary Picketing & Trade Restraints] (tracing source of Board's enforcement of certain unfair labor practices to common-law doctrines, including conspiracy and restraint of trade). Yet it offers no access to a jury. *See* 29 U.S.C. § 160(a). The Board's enforcement process therefore violates the Seventh Amendment. *See Jarkesy II*, 144 S. Ct. at 2139 (finding unconstitutional a similar in-house enforcement procedure overseen by SEC).

To resist that conclusion, the Board relies on an exception for so-called public rights—i.e., rights a person has vis-à-vis the public at large. *See* NLRB Opp'n, *supra*, at 14–15. But as the Supreme Court recently clarified, the public-rights exception is narrow: it does not cover disputes over core life, liberty, or property rights. *See Jarkesy II*, 144 S. Ct. at 2136–2139. *See also id.* at 2146 (Gorsuch, J., concurring) ("[P]ublic rights are a narrow class defined and limited by history."). The Board's process affects just those kinds of private rights, especially property rights. *See, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539

(1992) ("[T]he NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property."); *Bexar Cnty. Performing Arts Ctr. Found.*, 372 N.L.R.B. No. 28, 2022 WL 18107715, at *1 (Dec. 16, 2022) (expanding property-access rights to employees of other businesses). So it cannot claim the public-rights exception and cannot deny people access to a jury. *See Jarkesy II*, 144 S. Ct. at 2136–2139. *See also Axon Enter., Inc. v. FTC*, 598 U.S. 175, 198 (2023) (Thomas, J., concurring) (discussing historical development and context of the concept); Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 567–69 (2007) (same); Alexander T. MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, 24 Fed. Soc'y Rev. 304, 308–16 (2023) (same).

In short, the Board's structure is irredeemably flawed. It contradicts well-established constitutional norms. This Court should grant Appellant's request for an injunction and halt the proceedings below. No other remedy will respect Appellant's constitutional rights.

ARGUMENT

1. The Board's members cannot be insulated from removal because they are experts in nothing but the Board's own internal rules.

Article II of the US. Constitution directs the president to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. Yet the laws of the United States are legion,[1] and the president is only one man. He must therefore carry out his duties by directing others—including the "officers of the United States." *See Seila Law*, 591 U.S. at 203–04.

These officers are nominated by the president and, by and large, serve at his pleasure. *See* U.S. Const. art. II, § 2. As a constitutional default, they may be removed at will. *Seila Law*, 591 U.S. at 203–04. The threat of removal ensures that they remain accountable to the president and carry out his policies as directed. *See id.* at 213.

[1] *See* Neil Gorsuch, Over Ruled: The Human Toll of Too Much Law 15 (2024) ("Less than a hundred years ago, all of the federal government's statutes fit into a single volume. By 2018, the U.S. Code encompassed 54 volumes and approximately 60,000 pages. Over the past decade, Congress has adopted an average of 344 pieces of legislation each session. That amounts to 2 to 3 million words of new federal law each year.").

Of course, the removal power is not unlimited. Courts have recognized two narrow exceptions,[2] only one of which is relevant here. In *Humphrey's Executor*, the Supreme Court held that Congress may restrict the president's power to remove the heads of certain multi-member "expert" bodies. 295 U.S. at 624. These bodies, the Court reasoned, are supposed to perform technical, complex tasks, mostly in aid of the judicial and legislative branches. *See id.* To do that, they must operate independently, removed from politics. *Id.* They must base their actions not on political calculus, but technical expertise. *Id.* So it is appropriate to insulate them from direct presidential oversight and control. *Id.* No other mechanism would give them the space to do their technical work. *See id.* (noting the "exacting and difficult character" of the FTC's duties and the need for "expertness in dealing with these special questions concerning industry").

That analysis, however, has not stood the test of time. *See Seila Law*, 591 U.S. at 216 n.2. In the decades since *Humphrey's Executor*,

[2] The other exception governs certain "inferior" officers appointed and supervised by principal officers. *See Morrison v. Olson*, 487 U.S. 654, 677 (1988) (upholding removal protections for independent counsel). *See also Seila Law*, 591 U.S. at 215 (discussing two exceptions).

the Court has suggested that the decision went awry in several ways. *See id.* For one, it described the FTC's functions as "quasi-legislative" and "quasi-judicial." *Humphrey's Executor*, 295 U.S. at 628. It also suggested that the FTC exercised "no part of the executive power." *Id.* But in more recent years, the Court has explained that *all* agencies in the executive branch exercise executive power. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 17 (2021). Whatever outward form they take, their duties are inherently executive; in fact, they must be, as no other duty can be properly housed in the executive branch. *See id.* ("The activities of executive officers may take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power,' for which the President is ultimately responsible." (internal quotations omitted)). *See also* Gorsuch, *supra*, at 84 (questioning *Humphrey's Executor*'s premises) ("If the FTC wasn't within the executive branch, in which of the Constitution's three branches did it reside?").

Likely for that reason, the Court has refused to extend *Humphrey's Executor* to new scenarios. For example, in *Free Enterprise*, the Court refused to extend the decision to the members of the Public

Company Accountability and Oversight Board (PCAOB). *See* 561 U.S. at 494. Likewise, in *Seila Law*, the Court refused to extend the decision to the head of the Consumer Financial Protection Bureau (CFPB). *Seila Law*, 591 U.S. at 204. In both cases, the Court characterized *Humphrey's Executor* as an aberration—one that should not be spread into new fields. *See Seila Law*, 591 U.S. at 204; *Free Enter.*, 561 U.S. at 494. *See also Consumers' Res. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 352 (5th Cir. 2024) (observing that the Supreme Court has left *Humphrey's Executor* "in stasis").

Yet here, the Board asks this Court to carry *Humphrey's Executor* into new territory. The Board presents that extension as a straightforward application of precedent: *Humphrey's Executor*, the Board says, covers multi-member, non-partisan, quasi-judicial agencies; and the Board itself is such an agency. *See* NLRB Opp'n, *supra*, at 7–8. But in fact, the Board's position would spread *Humphrey's Executor* far from its original ground. *Humphrey's Executor* has always applied only to multi-member bodies of "experts"; and the Board is an expert in nothing but its own rules.

The Board began life as an enforcement agency. In 1935, Congress was facing a depressed economy and a wave of industrial strife. *See* 1 Statutes and Congressional Reports Pertaining to National Labor Relations Board 69 (1945) [hereinafter Statutes & Cong. Reports] (reprinting S. Rep. 573 (May 1, 1935)). Strikes and other work stoppages were proliferating at alarming rates. *Id.* Between 1932 and 1934, the number of workers on strike rose from 275,000 to 1,27,344,000—a jump of nearly 365%. *Id.* To calm the crisis, Congress adopted a national policy favoring collective bargaining. *See* 29 U.S.C. § 151. Through collective bargaining, it thought, workers and businesses could address their differences through peaceful negotiation. *See id. See also* Statutes & Cong. Reports, *supra*, at 69 (noting that 75% of caseload of Board's predecessor agency stemmed from refusals to bargain). And to ensure they followed peaceful procedures, Congress created the Board—an "independent executive agency" charged with enforcing the new national policy. 29 U.S.C. § 153(a). *See also* James Gross, *The NLRB: Then and Now*, 26 ABA J. of Lab. & Emp. L. 213, 214 (2011) [hereinafter NLRB Then & Now] (explaining that creation of NLRB marked a turn from private adjustment of labor disputes toward "law

and litigation" resolved by "NLRB case precedent" and "the application of administrative law").

In the early years, the Board carried out that mission armed with economic data. It established the Division of Economic Research, an in-house think tank devoted to labor economics. *See* James A. Gross, *Economics, Politics, and the Law: the NLRB's Division of Economic Research*, 55 Cornell L. Rev. 321, 321–323 (1970). The Division collected data on work stoppages, investigated their causes, and studied possible solutions. *See* Hafiz, *supra*, at 1120–22 (describing Division's early activities); James A. Gross, The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law 1933–37, at 176–79 (1974) [hereinafter Making of the NLRB] (same). It also leveraged that research to inform the Board's enforcement policies. Hafiz, *supra*, at 1121. It helped the Board identify problematic practices and prioritize risk-prone industries. *See id.* at 1122. By most accounts, its activities were successful: it helped the Board make data-driven enforcement decisions in a diverse range of labor markets. *See id.* at 1120–22 (praising Division's early work as helping reinforce Board policy with empirical basis). And in fact, it was key to defending the

Board from constitutional attack. Its analysis on the interstate effects of work stoppages was instrumental to the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, where the Court found that the NLRA was a valid exercise of Congress's interstate-commerce powers. 301 U.S. 1, 41–42 (1937). *See also* Making of the NLRB, *supra*, at 179–80, 191–94 (describing Division's role in building constitutional basis for Board's existence).

Even so, the Division was short lived. In 1940, a mere five years after the NLRA passed, Congress banned the Board from employing any person for "economic analysis." *See* Pub. L. 76-812, 54 Stat. 1037 (1940) (banning the use of appropriations to fund the Division). Then, in 1947, Congress embedded that ban directly in the NLRA, where it remains today. *See* 29 U.S.C. § 154(a) (forbidding Board from employing any person to perform "economic analysis").

While the reasons for the ban are still debated, its effects are clear. The Board now operates not as an expert in any technical or scientific field, but as a miniature court. The Board enforces the NLRA through an in-house adjudicatory process: its General Counsel brings cases before the Board members, and the members decide those cases

based on their own prior decisions. *See, e.g.*, 29 U.S.C. §§ 153, 160(a); *In Re Bell-Atl. Pennsylvania, Inc.*, 339 N.L.R.B. 1084, 1085 (2003) (extracting applicable legal rules from "Board precedent"); *Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95, slip op. at 1 (June 13, 2023) (same). *See also* Statutes & Reports, *supra*, at 105 (reprinting S. Rep. 1147 (June 10, 1935)) (explaining that Board was designed to perform a "quasi-judicial function); NLRB Then and Now, *supra*, at 214 (explaining that Board was deliberately designed to operate like a court). As these decisions pile up, they establish their own sets of sub-rules, or "caselaw." *See In re Comcast Cablevision-Taylor*, 338 N.L.R.B. 1089, 1089 (2002) (Acosta, concurring) (describing prior Board orders as "case law"). But that caselaw is informed by no statistics or data: it relies on no bargaining studies, no wage statistics, no social-science research. *See* Hafiz, *supra*, at 1132–35. Instead, it stems solely on the Board's own judgments, which themselves rely only on "ideological arguments or purely abstract, common-law based arguments about rights untethered to how employer or employee conduct impact [sic] those rights." *Id.* at 1138. *See also* James A. Gross, Reshaping of the National Labor Relations Board, National Labor Policy in Transition

1937–1947, at 266–67 (1982) [hereinafter Reshaping the NLRB] (offering similar criticisms).

That problem has been exacerbated by trends in the Board's membership. For much of its early history, the Board was staffed by officials versed in industrial and labor relations. *See* William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Process*, 64 Emory L.J. 1501, 1507 (2015). Its founding members included John Carmody, a longtime government administrator and expert in industrial relations; J. Warren Madden, a former law professor and dean; and Edwin Smith, a former commissioner of the Massachusetts Department of Labor and Industries. *See* Making of the NLRB, *supra*, at 149–56 (describing initial appointments).[3] But over time, the Board's membership shifted toward partisan labor lawyers. *See* Gould, *supra*, at 1507–09. While these lawyers brought with them knowledge of the Board's existing rules, they had no special economic or technical training. *See id.*

[3] For a complete historical list, see *Members of the NLRB since 1935*, Nat'l Labor Relations Board, https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 (last visited October 11, 2024).

at 1509–23 (describing increasing politicization of appointments). So as a result, the Board's internal expertise now focuses solely on labor law. By its own description, it knows nothing except the rules and caveats that thread through its own internal doctrine.[4] *See* Amicus Br. of the NLRB, *FTC v. Kroger Co. et al.*, No. 3:24-cv-00347-AN, at 8–9 (D. Or. Aug. 21, 2024), ECF No. 333-1 (describing Board's role as purely legal as a result of its statutory restrictions on economic analysis) ("[T]he Board is not well positioned to engage in such economic analysis."). *See also* NLRB Then & Now, *supra*, at 215 (explaining that "counter-staffing" in the 1980s led to appointments driven primarily by ideological alignment with current administration instead of any expertise in labor relations).

Of course, familiarity with an agency's own rules is not the kind of "expertise" that animated *Humphrey's Executor*. *Humphrey's Executor*

[4] The briefing in this case illustrates how thin then Board's "expertise" is. On appeal, the Board defends its extraordinary financial remedies by citing its supposed expertise in developing remedies. NLRB Opp'n, *supra*, at 14. But as scholars have pointed out, the Board's remedial analysis is barren of statistical, economic, or scientific content. Hafiz, *supra*, at 1134–38. The Board has never studied the economic or social effects of its remedies, including its most dramatic ones (e.g., reinstatement). *Id.* Instead, it simply appeals to its own view of desirable policy and its own interpretation of the NLRA. *Id.*

involved the FTC, an agency versed in economic analysis. One of the FTC's main missions is to promote free competition, and no area of law is as economically dense as competition law. *See* 15 U.S.C. § 45(a)(2) (charging FTC with preventing "unfair methods of competition"); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition & Its Practice 91 (6th ed. 2020) ("Antitrust has always been closely tied to prevailing economic doctrine."). Other agencies falling under *Humphrey's Executor* have had similar expertise in discrete bodies of knowledge. For example, in *Consumer Research*, this Court applied *Humphrey's Executor* to the Consumer Product Safety Commission (CPSC)—a multimember body charged with regulating unsafe products. 91 F.4th at 352–56. To perform that mission, the CPSC gathers statistical risk data, compiles reports, and educates the public through regular reports.[5] That is, it backs up its enforcement efforts with research and expertise independent of its familiarity with its own statute. *See* 15 U.S.C. § 2051(b)(4) (declaring it a goal of the CPSC's

[5] *See About Us*, CPSC.gov, https://www.cpsc.gov/About-CPSC (last visited October 11, 2024); *Research & Reports*, CPSC.gov, https://www.cpsc.gov/research-and-reports-overview (last visited Oct. 11, 2024).

organic statute "to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries"), 2054 (directing Commission to conduct studies, research, and investigations of risks to consumers as well as product tests to inform its safety standards).

The Board, by contrast, has no such expertise. The Board's specialty—its own doctrine—is merely an agglomeration of policy judgments and legal interpretations. *See* Hafiz, *supra*, at 1138 (describing Board's lack of empirical expertise); Reshaping the NLRB, *supra*, at 266–67 (same). It represents nothing more than the Board's view of the law. *See, e.g.*, Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37 Berkley J. Emp. & Lab. L. L. 223, 226 (2016) (quoting then-Senator John F. Kennedy as stating that the Board's "primary function" was "to interpret and apply the basic labor relations law of the land"); Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 711 (2006) (concluding that "ideology has been a persistent and, in many cases, vote predictive

factor when the Board decides certain legal issues"). But no agency has special expertise in legal interpretation. Under *Loper Bright*, legal interpretation is not province of agencies, but of courts: agencies enjoy no special competence in the law not possessed in at least equal measure by Article III courts. 144 S. Ct. at 2258, 2267. It follows, then, that an agency cannot claim "expert" status merely because it is familiar with its own statute. *See Hudson Inst. of Process Rsch. Inc. v. NLRB*, No. 23-60175, 2024 WL 4222177, at *4 (5th Cir. Sept. 18, 2024) ("[W]e do not simply defer to an agency's interpretation of 'ambiguous' provisions of their enabling acts."). Were that true, every agency would be an expert, and the expert requirement in *Humphrey's Executor* would do no work. *See Humphrey's Ex'r*, 295 U.S. at 624 (emphasizing FTC's expertise as an important element of exception). *See also Calcutt v. FDIC*, 37 F.4th 293, 313–14 (6th Cir. 2022) (treating expertise as an independent element of *Humphrey's Executor* analysis), *rev'd on other grounds,* 598 U.S. 623 (2023); *Alivio Med. Ctr. v. Abruzzo*, No. 24-CV-7217, 2024 WL 4188068, at *7 (N.D. Ill. Sept. 13, 2024) (same).

That cannot be right. It cannot be that expertise plays no role in the *Humphrey's Executor* analysis. To say otherwise would effectively

extend the exception to agencies expert in nothing but their own enabling statutes. That is, the exception would swallow the rule. The Supreme Court has repeatedly declined to extend the exception in such a dramatic fashion. *See Seila Law*, 591 U.S. at 204; *Free Enter.*, 561 U.S. at 494. *See also Consumers' Res.*, 91 F.4th at 352. This Court should as well. *See* Bryan A. Garner et al., The Law of Judicial Precedent 239 (2016) ("The value of a decision as precedent diminishes when the court issuing it expresses doubt and hesitation . . . ."); Gorsuch, *supra*, at 80–84, 95–98 (suggesting that *Humphrey's Executor* may be inconsistent with founders' design).

2. The Board's enforcement process violates the Seventh Amendment because it imposes common-law remedies in disputes involving private rights.

The Seventh Amendment guarantees the right to a jury trial in all "suits at common law." Though the Amendment refers to the common law, it covers more than just claims that existed in 1791. *See Tull v. United States*, 481 U.S. 412, 417 (1987). It also covers more recent claims with common-law parallels, including claims under federal statutes. *Id.* at 417, 421. *See also Jarkesy I*, 34 F.4th at 453.

Appellant argues—correctly—that the Board adjudicates common-law claims. The Board responds—incorrectly—by arguing that it can do so without offering access to a jury because it adjudicates only "public rights." *See* NLRB Opp'n, *supra*, at 14–15. In fact, the Board adjudicates core private rights—exactly the kind of rights that must be presented to juries and adjudicated by Article III courts.

Under the "public rights" doctrine, Congress may assign a traditional common-law claim to an administrative factfinder if the claim involves public, rather than private, rights. *See Jarkesy II*, 114 S. Ct. at 2132; *Granfinanciera*, 492 U.S. at 51; *Jarkesy I*, 34 F.4th at 453. The distinction between public and private rights comes from the historical role courts played in protecting "core private rights"—life, liberty, and property. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 198–200 (2023) (Thomas, J., concurring) (surveying historical understanding). *See also* John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 Geo. L. J. 2513, 2516–17 (1998) ("Private right was at the center of the system."). Core private rights were tied up in the founders' ideas about civil government and social contract. *Axon*, 598 U.S. at 198–200 (Thomas, J., concurring); Nelson,

supra, at 565–67. The founders thought some rights preexisted the state. *See* Nelson, *supra*, at 567; Philip Hamburger, Is Administrative Law Unlawful? 330 (2014) (describing how natural-law theory influenced founders' understanding of separation of powers). People held certain rights as individuals and did not give them up by entering civil society. *Axon*, 598 U.S. at 198–200; Locke, *supra*, § 11.135. These rights were sometimes called individual rights, sometimes fundamental rights, sometimes natural rights. *See Axon*, 598 U.S. at 198–200 (Thomas, J., concurring) (explaining that private rights doctrine developed from Lockean social-contract theory of natural rights). But whatever the label, they could be taken away only by due process of law. *See id. See also* Alexander T. MacDonald, *Originalism, Social Contract, and Labor Rights*, 99 N. Dakota L. Rev. 27, 27–29, 39–44 (2024) (collecting and surveying recent literature on the effect social contract theory had on the founding generation).

Starting in the early twentieth century, the Supreme Court started translating those concepts onto the modern administrative state. *See Crowell*, 285 U.S. at 50–51; Nelson, *supra*, at 60–02. It explained that public rights may include more than just traditional

licenses and privileges. *See Crowell*, 285 U.S. at 50; *Atlas Roofing*, 430 U.S. 442, 450 (1977). They may include new rights created by statute. *Atlas Roofing*, 430 U.S. at 460. *But see Jarkesy II*, 144 S. Ct. at 2137 (explaining that statutory basis of a claim is not enough alone; the claim itself did not carry with it "common law soil"). When a statute created brand-new rights to advance a public purpose, those rights could qualify as public rights. *Id. Cf. also Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943). And as a result, they might be properly assigned to an administrative factfinder. *See Atlas Roofing*, 430 U.S. at 460; *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 582–86 (1985).

Under that framework, courts once saw the Board as enforcing public rights. *See Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362–63 (1940); *Jones & Laughlin*, 301 U.S. at 48; *Agwilines, Inc. v. NLRB*, 87 F.2d 146, 150–51 (5th Cir. 1936). Congress adopted the NLRA for a broad public purpose: to reduce industrial strife, promote labor peace, and thus ensure the free flow of interstate commerce. 29 U.S.C. § 151; *Agwilines*, 87 F.2d at 150. Again, that purpose was grounded in contemporary concerns. The early twentieth century had been marred

by massive strikes. *See In re Debbs*, 158 U.S. 564, 597–98 (1895) (discussing multi-state "Pullman strike"). Congress adopted the NLRA to stabilize labor markets, and the Board's mission was to ensure that the statute played that stabilizing role. *See* 29 U.S.C. § 153. *See also Nat'l Licorice Co.*, 309 U.S. at 362.

That mission was important, but limited: the Board was charged with promoting labor peace. *Nat'l Licorice Co.*, 309 U.S. at 362–63. Labor peace was a public purpose: it was a way to ensure the free flow of commerce. *See id.* And by the same token, the Board was supposed to be unconcerned with private injuries. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192–93 (1941) (explaining that the Board was not created to remedy "private injuries"). Any remedies the Board awarded were supposed to be merely incidental to its commerce-and-peace-promoting mission. *See Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 235–36 (1938). In short, the Board was supposed to safeguard "public, not private, rights." *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943).

Whether the Board ever served that limited mission is debatable. But today, there is no debate. The modern Board focuses less on

protecting interstate commerce and more on redressing private wrongs. And through steady administrative accretion, it has aggrandized its power over core private rights.

The examples could fill volumes. For one, the Board has recently expanded union access to private property, even when the property owner is someone other than the primary employer. *Bexar Cnty.*, 372 N.L.R.B. No. 28, 2022 WL 18107715, at *1. The Board has also expanded access to an employer's equipment and information technology. *See Purple Commc'ns, Inc.*, 361 N.L.R.B. 1050, 1050 (2014) (expanding employee access to employer systems), *overruled by Rio All-Suites Hotel and Casino*, 368 N.L.R.B. No. 143, slip op. at 1 (2019). *See also* NLRB Gen. Counsel Memo. No. 21-04 (Aug. 12, 2021) (identifying *Rio All-Suites* as a target for reconsideration to return to standard in *Purple Commc'ns*). It has even regulated the terms of employee handbooks—traditionally, a matter of state contract law. *See Stericycle, Inc.*, 372 N.L.R.B. No. 113, slip op. at 1 (2023); Richard Harrison Winters, *Employee Handbooks and Employment-at-Will Contracts*, 1985 Duke L.J. 196, 198 (1985) (discussing status of employee handbooks under common-law contract rules).

And even more radical changes are afoot. For example, the NLRB General Counsel recently wrote that the Board should treat noncompete agreements and "stay or pay" provisions as unfair labor practices. *See* NLRB Gen. Counsel Memo. No. 25-01 (Oct. 7, 2024); NLRB Gen. Counsel Memo. No. 23-09 (May 30, 2023). Yet those same covenants have been regulated under the common law for centuries. *See, e.g.*, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898) (Taft, J.) ("From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract."); *Mitchel v. Reynolds* [1711] 24 Eng. Rep. 347, 350 (explaining that voluntary restraints on trade were unlawful under the common law when they deprived another person "of his livelihood" and deprived the public of a "useful member"). The General Counsel also recently wrote that the Board should regulate the use of productivity and monitoring tools—tools, she argues, that chill protected activity by their very presence. *See* NLRB Gen. Counsel Memo. No. 23-02 (Oct. 31, 2022). But of course, any restriction on those tools would affect otherwise valid property rights. *See, e.g.*, *Tesla, Inc. v. NLRB*, 86 F.4th

640, 649 (5th Cir. 2023) (explaining that Section 7 of the NLRA requires courts and the Board to balance between statutory and property rights); *Cap. Med. Ctr. v. NLRB*, 909 F.3d 427, 434 (D.C. Cir. 2018) (same).

This kind of regulation wanders far afield from the Board's original mission. It has little connection to the free flow of commerce. Instead, it implicates disputes over core property and contract rights—the kind historically reserved to courts and juries. *See, e.g.*, *Jarkesy II*, No. 22-451, slip op. at 1–2 (Gorsuch, J., concurring); *Axon*, 598 U.S. at 198–200 (Thomas, J., concurring) (describing historical practice of requiring judicial determination for matters affecting core life, liberty, or property rights); Nelson, *supra*, at 605 (same).

But property and contract rights are far from the only rights affected. The Board's recent activity also affects fundamental constitutional rights. For example, the General Counsel has asserted that so-called captive audience meetings, in which an employer expresses its views about labor issues, are unfair labor practices. *See* NLRB Gen. Counsel Memo. No. 22-04 (April 7, 2022). And she has stated her intent to prosecute employers for that kind of speech. *See id.* *Cf. Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 67 (2008)

(recognizing that Section 8(c) and the First Amendment protect employer speech about labor matters). Similarly, the Board has expanded the rights of workers to access private property without permission. *See Bexar Cnty.*, 372 N.L.R.B. No. 28, 2022 WL 18107715, at *1. That kind of expansion limits the owner's right to exclude and thus implicates the Fifth Amendment's Takings Clause. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (holding that uncompensated mandatory access for union organizers under California law violated the Takings Clause).

In short, the modern Board no longer simply promotes bargaining to ensure labor peace. It also regularly wades into disputes affecting core contract, property, and constitutional rights. The Board tries to justify these incursions as side effects of its broader statutory mission. *See Thryv*, 372 N.L.R.B. No. 22, 2022 WL 17974951, at *13. But if merely pointing to a statute were enough to dispense with the Seventh Amendment, the Amendment would mean nothing. It would offer no check on Congress, no limit on agencies, and no protection for individual liberty. *See Granfinanciera*, 492 U.S. at 52; *Jarkesy I*, 34 F.4th at 457 ("Congress cannot change the nature of a right, thereby

circumventing the Seventh Amendment, by simply giving the keys to the [agency] to do the vindicating.").

That problem would be enough on its own. But it is aggravated by the Board's politically driven policy gyrations. From administration to administration, the Board has increasingly shifted the "law" to suit partisan preferences. To cite only a few examples, the Board recently changed its "joint employer" standard four times in ten years. *See Chamber of Com. of U.S. v. NLRB*, No. 6:23-CV-00553, 2024 WL 1203056, at *4 (E.D. Tex. Mar. 18, 2024) (describing shifts and setting aside latest attempt as arbitrary, capricious, and contrary to law). It did the same with its worker-classification standards. *Compare Atlanta Opera*, 372 N.L.R.B. No. 95, slip op at 1, *with SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019), *and FedEx Home Delivery*, 361 N.L.R.B. 610 (2014). And it likewise swung the rules governing employee handbooks, changing policy four times over four presidential administrations. *Compare Stericycle, Inc.*, 372 N.L.R.B. No. 113, slip op. at 1 (2023), *with Boeing Co.*, 365 N.L.R.B. No. 154 (2017), *Whole Foods Market, Inc.*, 363 N.L.R.B. 800, 803 n. 11 (2015), *and Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).

These shifts have become increasingly volatile. According to one study, during the Obama Administration, the Board overturned precedents that had been on the books for more than a collective 4,000 years. *See* Coalition for a Democratic Workforce, *supra*, at 1, 3. *Cf. also* Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 Geo. Wash. L. Rev. 262, 299 (1987) (observing that while it is hard for a single president to shift the outlook of the judiciary through appointments, it is easy to do so through appointments to the Board).

The result is that today, core private rights are subject to the outcomes of political elections. Property, contract, and constitutional rights have come to depend on the policy preferences of politicians and agency personnel. *See, e.g.*, Brudney, *supra*, at 227 (observing that partisan pressure has combined with Board's "ability and willingness to depart so readily from its own precedent" to undermine its original mission); Hafiz, *supra*, at 1138 (observing that Board's policy gyrations have given it a reputation as the "most political agency"). Yet that is exactly what the Seventh Amendment is supposed to prevent. *See Hodges v. Easton*, 106 U.S. 408, 412 (1882) (describing the jury-trial right as a "fundamental" guarantor of individual liberty).

The Seventh Amendment was designed to guarantee that core private rights would not be denied without the intervention of a jury. And that guarantee still stands today. No less than it did in 1791, the Seventh Amendment still protects a person's access to a jury of his or her peers in all cases arising at common law. The modern Board stands as an obstacle to that guarantee. It is unconstitutional and should be so declared.

CONCLUSION

For the reasons set out here, the Court should grant Appellant's requested relief.

Respectfully submitted,

s/ Alex T. MacDonald
Alex T. MacDonald
LITTLER MENDELSON, P.C.
Workplace Policy Institute
815 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20006-4046
(202) 772-2505
amacdonald@littler.com

Counsel for Amici Curiae the Coalition for a Democratic Workplace, the Pelican Institute for Public Policy, the Mackinac Center for Public Policy & the Institute for the American Worker

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 15, 2024, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Respectfully submitted,

s/ Alex T. MacDonald
Alex T. MacDonald
LITTLER MENDELSON, P.C.
Workplace Policy Institute
815 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20006-4046
(202) 772-2505
amacdonald@littler.com

Counsel for Amici Curiae the Coalition for a Democratic Workplace, the Pelican Institute for Public Policy, the Mackinac Center for Public Policy & the Institute for the American Worker

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitation set forth in set forth in FRAP 32(a)(7)(A).

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because

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Respectfully submitted,

s/ Alex T. MacDonald
Alex T. MacDonald
LITTLER MENDELSON, P.C.
Workplace Policy Institute
815 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20006-4046
(202) 772-2505
amacdonald@littler.com

Counsel for Amici Curiae the Coalition for a Democratic Workplace, the Pelican Institute for Public Policy, the Mackinac Center for Public Policy & the Institute for the American Worker