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# The National Labor Relations Board: Legal Background and Recent Constitutional Challenges

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## The National Labor Relations Board: Legal Background and Recent Constitutional Challenges

The National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151–169, regulates labor-management relations between most private-sector employees and employers in the United States. The NLRA created the National Labor Relations Board (NLRB), a federal agency that administers and enforces the Act. The NLRB adjudicates labor representation disputes, complaints of unfair labor practices (ULPs), and contract disputes. The NLRB is led by a five-member board (NLRB Board or Board), whose members are appointed by the President, confirmed by the Senate, and generally serve five-year terms as laid out by the Act.

In legal developments this decade, litigants have challenged the constitutionality of the NLRB in federal court on several fronts, including claims that statutory provisions that prohibit presidents from removing Board members and administrative law judges without cause are unconstitutional. The NLRA restricts the President from removing any member of the Board except, “upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” 29 U.S.C. § 153(a). Similar protections exist for the NLRB’s administrative law judges, as laid out in the Administrative Procedure Act. 5 U.S.C. §§ 551–559. Such requirements under law are known as “for cause” removal provisions, in contrast to provisions that allow an employee to be removed “at will.” The government in *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), has contended that the NLRB’s longstanding removal protections unconstitutionally curtail the President’s Article II authority and violate the separation-of-powers doctrine.

Plaintiffs have also argued that the NLRB’s combined investigatory and adjudicatory powers are inconsistent with separation-of-powers principles and violate the Fifth Amendment right to due process. For example, plaintiffs have contended that the NLRB unlawfully exercises the powers of all three branches of government by performing executive functions when it investigates and prosecutes ULPs, exercising judicial functions when it resolves ULP legal disputes and issues binding orders, and acting in a legislative capacity by establishing labor-management standards. *See, e.g., NLRB v. North Mountain Foothills Apartments*, 157 F.4th 1089, 1095 (9th Cir. 2025).

Additionally, some plaintiffs have argued that the NLRB’s adjudication scheme violates the Seventh Amendment by depriving them of their right to a jury trial. The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Under the NLRA, unfair labor practice complaints are adjudicated before administrative law judges and the Board, which may order “such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The plaintiffs contend that these cases are suits at common law that should be decided by a jury and not by an agency.

This report discusses the various legal challenges to the NLRB’s structure, procedures, and authorities. The report concludes with considerations for Congress, including federal proposals to amend the NLRA, state proposals to exercise jurisdiction alongside or in lieu of federal regulation, and potential constitutional obstacles to reform.

## Contents

Legal Background .....	1
Constitutional Challenges.....	5
NLRB and For-Cause Removal .....	5
<i>Trump v. Wilcox</i> and Board Member For-Cause Removal.....	5
Other Challenges to For-Cause Removal Provisions.....	7
NLRB and Due Process .....	9
NLRB and the Seventh Amendment .....	10
Considerations for Congress.....	12

## Contacts

Author Information.....	14
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The National Labor Relations Act (NLRA or Act) recognizes the right of most private-sector employees to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>1</sup> The National Labor Relations Board (NLRB) is a federal agency that enforces and administers the NLRA by adjudicating grievance and representation disputes and promulgating regulations that govern the labor-management relationship.<sup>2</sup> The NLRB is led by a five-member board (NLRB Board or Board), whose members are appointed by the President and confirmed by the Senate.<sup>3</sup> Although the NLRB was established more than ninety years ago and its practices are longstanding, some have recently challenged the agency’s structure and actions, arguing violations of various provisions of the U.S. Constitution. In *Space Exploration Technologies Corporation (SpaceX) v. NLRB*, for example, an aerospace and space transportation company contended that the NLRB’s structure violates Article II, the Fifth Amendment, and the Seventh Amendment.<sup>4</sup>

This report examines some of the litigation involving constitutional challenges to the NLRB, including claims that the NLRA’s prohibition on presidents removing Board members without cause violates Article II and the separation-of-powers principle,<sup>5</sup> that the Board’s combined investigatory and adjudicatory powers are inconsistent with the separation of powers and violate the Fifth Amendment’s right to due process,<sup>6</sup> and that the Board’s adjudication scheme violates the Seventh Amendment right to a jury trial.<sup>7</sup> A determination that the Board or its adjudication scheme is unconstitutional would affect labor-management relations and raise questions about the NLRA’s future application. The report provides considerations for Congress in light of the various legal challenges.

## Legal Background

The NLRA<sup>8</sup> regulates labor-management relations between most private-sector employees and their employers in the United States.<sup>9</sup> First enacted in 1935, the NLRA’s stated purpose is to prevent labor-management disputes that could burden or obstruct commerce and harm the

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<sup>1</sup> 29 U.S.C. § 157.

<sup>2</sup> *Id.* §§ 153, 156.

<sup>3</sup> *Id.* § 153(a).

<sup>4</sup> Complaint for Declaratory and Injunctive Relief, *SpaceX v. NLRB*, No. 24-cv-00001 (S.D. Tex. Jan. 4, 2024).

<sup>5</sup> U.S. CONST. art. II, § 2, cl. 1 (“[H]e shall nominate, 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.”).

<sup>6</sup> U.S. CONST. amend. V. (“No person shall . . . be deprived of life, liberty, or property, without due process of law”).

<sup>7</sup> U.S. CONST. amend. VII (“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 re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>8</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935). The NLRA is also referred to as the “Wagner Act,” after its Senate sponsor, Senator Robert Wagner.

<sup>9</sup> The three major federal labor-relations statutes are the NLRA, the Railway Labor Act (RLA), and the Federal Service Labor-Management Relations Statute (FSLMRS). While the NLRA covers most of the private sector, the RLA regulates labor-management relations in the railway and airline carrier industries. The FSLMRS regulates labor relations between most federal government employees and employers. See CRS Report R42526, *Federal Labor Relations Statutes: An Overview*, by Jon O. Shimabukuro and Julie M. Whittaker (2014).

nation's economy.<sup>10</sup> To achieve its purposes, the Act provides collective bargaining rights to covered employees, prevents practices that could frustrate peaceful worker-employer relationships, and creates mechanisms for workers and employers to resolve labor disputes.

The NLRB Board adjudicates labor representation disputes, complaints of unfair labor practices (ULPs), and contract disputes.<sup>11</sup> The Board members generally serve five-year terms as laid out by the Act.<sup>12</sup> For the Board to have a quorum, or the minimum number of members to exercise its full authority, there must be at least three of five member seats filled.<sup>13</sup> The Board has been traditionally composed of two Democrats, two Republicans, and a fifth member belonging to the same party as the President.<sup>14</sup> The NLRA restricts the President from removing any member of the Board except, "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."<sup>15</sup> Such requirements under law, while they may vary in wording and scope, are generally known as "for cause" removal protections, in contrast to provisions that allow an employee to be removed "at will."<sup>16</sup>

While there is no removal clause in the Constitution, historical practice and Supreme Court precedent have established a "general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties.'"<sup>17</sup> In *Myers v. United States*, the Court considered a statute requiring the Senate's "advice and consent" to remove certain Senate-confirmed officers.<sup>18</sup> The Court found that the President, as the person authorized under Article II to appoint such officers, has the power to remove them,<sup>19</sup> and that ceding to Congress control over their removal would violate the separation of powers and the Take Care Clause, which requires the President "to take care that the laws be faithfully executed."<sup>20</sup>

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<sup>10</sup> As stated in the opening section of the NLRA, "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce[.]" 29 U.S.C. § 151.

<sup>11</sup> See generally *The NLRB Process*, NLRB, <https://www.nlr.gov/resources/nlr-process> [<https://perma.cc/899Q-Y2QB>] (last visited Mar. 12, 2026) (describing the duties of the NLRB).

<sup>12</sup> 29 U.S.C. § 153(a).

<sup>13</sup> *Id.* § 153(b).

<sup>14</sup> See CRS Report R46317, *Presidential Appointments to Full-Time Positions on Regulatory and Other Collegial Boards and Commissions, 115th Congress*, by Kathleen E. Marchsteiner (2020) ("The National Labor Relations Board consists of five members who serve five-year terms. Political balance is not required, but, by tradition, no more than three members are from the same political party.").

<sup>15</sup> 29 U.S.C. § 153(a).

<sup>16</sup> See Lib. Cong., *Overview of Removal of Executive Branch Officers*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-1/ALDE\\_00013107/](https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-1/ALDE_00013107/) (last visited Mar. 12, 2026) ("Historical practice and judicial decisions acknowledge that the President is empowered to remove those officers he appoints without assent from Congress. Congress has, however, historically enacted legislation that shields certain Executive Branch officials from removal except for cause, although exactly which types of officials may be protected is not settled definitively." (footnote omitted)). See also CRS Insight IN12673, *Fixed Term and "For Cause" Removal Provisions*, by Henry B. Hogue and Todd Garvey (2026).

<sup>17</sup> *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 215 (2020) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010)). For further discussion of the governing constitutional principles in the context of independent board member removals see also CRS Legal Sidebar LSB11292, *Supreme Court Grants Emergency Motion on President's Removal Power*, by Benjamin M. Barczewski and Todd Garvey (2025).

<sup>18</sup> See *Myers v. United States*, 272 U.S. 52, 107 (1926).

<sup>19</sup> See *id.* at 164. The Court thus tied the implied power of removal in Article II to the explicit power of appointment: "[A]s his selection of administrative officers is essential to the execution of the laws by him," the Court reasoned, "so must be his power of removing those for whom he cannot continue to be responsible." See *id.* at 117.

<sup>20</sup> See *id.* at 164.

Since *Myers*, the Court has established exceptions to the general rule permitting the President to remove executive officers: specifically, exceptions for inferior officers<sup>21</sup> and certain multimember bodies.<sup>22</sup> In the 1935 case *Humphrey's Executor v. United States*, the Court held that Congress acted within its authority in restricting the removal of members of the Federal Trade Commission (FTC).<sup>23</sup> In so doing, the Court recognized limits on the President's removal power and upheld the use of for-cause protections as applied to a multimember commission like the FTC whose "predominantly quasi-judicial and quasi-legislative" functions Congress had identified as needing some degree of political independence from the executive.<sup>24</sup>

In legal developments this decade, there has been speculation about the Court's future adherence to *Humphrey's Executor*, including, and as discussed herein, in the context of removal protections for NLRB Board members. First, in the 2020 decision *Seila Law v. Consumer Financial Protection Bureau (CFPB)*, the Court invalidated statutory for-cause removal protections for the CFPB Director.<sup>25</sup> Then, in 2021, in *Collins v. Yellen*, the Court invalidated the statutory for-cause removal protections for the Federal Housing Finance Agency Director.<sup>26</sup> While the Court in both cases reiterated Congress's authority to enact removal protections in some circumstances, the Court declined to extend coverage to these single-agency heads whom the Court found to wield significant executive power in comparison to the 1935 FTC in *Humphrey's Executor*.<sup>27</sup> In a case currently before the Supreme Court, *Trump v. Slaughter*, the Court is considering whether the statutory removal protections for the commissioners of the FTC are unconstitutional and, if so, whether *Humphrey's Executor* should be overruled entirely.<sup>28</sup>

With regard to the NLRB's functions, the Board reviews cases brought by the NLRB General Counsel, a presidentially appointed and Senate-confirmed official who has authority over investigations and the issuance of complaints.<sup>29</sup> For example, an employee may file a charge with the NLRB, such as an allegation that an employer committed a ULP by interfering with employees who are attempting to organize or refusing to bargain in good faith.<sup>30</sup> The General Counsel of the NLRB has delegated its authority to investigate charges to regional offices around the country.<sup>31</sup> If a regional officer finds sufficient evidence of a violation, the General Counsel

<sup>21</sup> See *Seila Law*, 591 U.S. at 217 ("We have recognized a second exception for inferior officers in two cases, *United States v. Perkins* and *Morrison v. Olson*. In *Perkins*, we upheld tenure protections for a naval cadet-engineer. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials." (footnote and citations omitted)); *Edmond v. United States*, 520 U.S. 651, 663 (1997) (stating that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate").

<sup>22</sup> See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>23</sup> See *id.* at 628–29; see also *Wiener v. United States*, 357 U.S. 349, 356 (1958).

<sup>24</sup> See *Humphrey's Ex'r*, 295 U.S. at 628–29.

<sup>25</sup> *Seila Law*, 591 U.S. at 204.

<sup>26</sup> *Collins v. Yellen*, 594 U.S. 220 (2021).

<sup>27</sup> See *Seila Law*, 591 U.S. at 204; *Collins*, 594 U.S. at 256.

<sup>28</sup> *Trump v. Slaughter*, 146 S. Ct. 18 (2025) (mem.).

<sup>29</sup> See *SpaceX v. NLRB*, 151 F.4th 761, 767–68 (5th Cir. 2025) ("The NLRB is divided into: (1) an investigative and prosecutorial arm, led by a presidentially appointed General Counsel, and (2) an adjudicatory body—a five-member Board, also appointed by the President—that reviews [administrative law judge] decisions.").

<sup>30</sup> See 29 U.S.C. § 158(a). Labor organizations may also commit ULPs, such as punishing employees for not joining a labor union or engaging in misconduct when exercising self-help. See *id.* § 158(b).

<sup>31</sup> See A.B.A., *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, ch. 31 (Jayme L. Sophir et al. eds., BL 2024) [hereinafter *THE DEVELOPING LABOR LAW*].

files a formal complaint against the employer.<sup>32</sup> The complaint is then assigned to an administrative law judge (ALJ), who builds the administrative record and conducts a hearing with the parties.<sup>33</sup> ALJs have statutory removal protections in the Administrative Procedure Act (APA), which governs administrative adjudications, and may only be removed “for good cause established and determined by the Merit Systems Protection Board [(MSPB)] on the record after opportunity for hearing before the Board.”<sup>34</sup> The MSPB is a separate agency in the executive branch charged with protecting federal employees against improper employment-related actions.<sup>35</sup>

Once an ALJ issues a decision and recommends an order, either party may seek review with the Board.<sup>36</sup> If no party seeks review, the Board adopts the ALJ’s ruling as the final Board decision. If appealed, the Board may either adopt the ALJ’s recommendation or issue its own decision.<sup>37</sup> In determining remedies, the Board may take “such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].”<sup>38</sup> While the Board may issue orders to prevent and remedy violations of the NLRA, also known as “make-whole” remedies, courts have said the function of these remedies is to restore the status quo, rather than to punish NLRA violators with punitive remedies.<sup>39</sup> The Board can also issue informational remedies, such as requiring the employer to post a notice promising to not violate the law.<sup>40</sup>

Because the Board’s orders are not independently enforceable, the Board may petition a federal court for “appropriate temporary relief or restraining order” if necessary to enforce compliance on a party.<sup>41</sup> A party aggrieved by a final order of the Board may also seek review in the U.S. Court of Appeals for the circuit where the alleged violation occurred, the circuit where the party resides or transacts business, or in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).<sup>42</sup>

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<sup>32</sup> 29 U.S.C. § 153(d). The NLRB General Counsel generally serves a four-year term as laid out in the NLRA. Unlike the Board authorities, the Act does not contain for-cause removal language with respect to the General Counsel. *See id.*

<sup>33</sup> *See* THE DEVELOPING LABOR LAW, *supra* note 31, at ch. 31.I.D. (“The ALJs function much like trial court judges in nonjury trials hearing witnesses, ruling on admissibility of evidence, and making initial decisions and findings of fact in unfair labor practice cases. Their decisions are final unless excepted to by a party”).

<sup>34</sup> 5 U.S.C. § 7521(a).

<sup>35</sup> *See* CRS Report R45630, *Merit Systems Protection Board (MSPB): A Legal Overview*, by Jon O. Shimabukuro and Jennifer A. Staman (2019).

<sup>36</sup> *See* THE DEVELOPING LABOR LAW, *supra* note 31.

<sup>37</sup> 29 U.S.C. § 160(c) (“[S]uch recommended order shall become the order of the Board and become effective as therein prescribed”).

<sup>38</sup> *Id.*

<sup>39</sup> *See* *Kallmann v. NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981) (“The function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation.” (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941))). *See also* THE DEVELOPING LABOR LAW, *supra* note 31, at ch. 32.I (“[T]he Board does not have the authority to compel a party to make a bargaining concession or to agree to a proposal. Similarly, the Board lacks the authority to punish; its remedy must not be punitive in nature.”).

<sup>40</sup> Recent NLRB guidance states that the Act’s “nonmonetary remedies . . . should not automatically be sought but typically limited to cases involving widespread, egregious, or severe misconduct.” *See* NLRB Gen. Couns. Mem. GC 25-06 (May 16, 2025).

<sup>41</sup> 29 U.S.C. § 160(e); *In re NLRB*, 304 U.S. 486, 495 (1938) (noting compliance with a Board order is not obligatory until entered as a decree by a court).

<sup>42</sup> 29 U.S.C. § 160(f).

## Constitutional Challenges

Litigants have challenged the constitutionality of the NLRB on several fronts, including claims that the NLRA's prohibition on presidents removing members of the Board without cause violates Article II of the Constitution and the separation of powers, that the Board's combined investigatory and adjudicatory powers are inconsistent with the separation of powers and violate the Fifth Amendment's right to due process, and that the Board's adjudication scheme violates the Seventh Amendment's right to a jury trial. The discussion below summarizes and analyzes each of these issues in turn.

### NLRB and For-Cause Removal

#### *Trump v. Wilcox* and Board Member For-Cause Removal

President Biden nominated and the U.S. Senate confirmed Gwynne Wilcox to a second five-year term as a member of the Board in September 2023,<sup>43</sup> and President Trump removed her on January 27, 2025.<sup>44</sup> Since the NLRB's founding and before Wilcox's removal, no President had ever removed a member of the Board.<sup>45</sup>

As described above, the NLRA restricts the President from removing any member of the Board unless "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."<sup>46</sup> When President Trump removed Wilcox from the Board, the Administration did not argue that the removal criteria in the statute had been met.<sup>47</sup> Instead, the Administration largely asserted that statutory for-cause restrictions that limit the President's authority to remove agency leaders, such as those in the NLRA, unconstitutionally infringe on the President's authority to remove executive officials.<sup>48</sup>

Wilcox, along with a member of the MSPB who had been similarly removed by President Trump, challenged her removal in the U.S. District Court for the District of Columbia.<sup>49</sup> On March 6, 2025, the district court granted summary judgment in favor of Wilcox and held that the President lacked authority to remove a member of the NLRB without complying with the NLRA.<sup>50</sup> The

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<sup>43</sup> Press Release, NLRB, Gwynne A. Wilcox Sworn in for Second Term as Board Member (Sep. 11, 2023), <https://www.nlr.gov/news-outreach/news-story/gwynne-a-wilcox-sworn-in-for-second-term-as-board-member> [<https://perma.cc/LA6M-NHZQ>] (last visited Mar. 12, 2026).

<sup>44</sup> See *Wilcox v. Trump*, 775 F. Supp. 3d 215, 222 (D.D.C. 2025) *rev'd sub nom.*, *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025). President Trump also dismissed members of other multimember boards with for-cause protections, such as the MSPB, Federal Labor Relations Authority, and FTC.

<sup>45</sup> See *Wilcox*, 775 F. Supp. 3d at 223.

<sup>46</sup> 29 U.S.C. § 153(a).

<sup>47</sup> See *Wilcox*, 775 F. Supp. 3d at 222 ("The email instead cited only political motivations—that plaintiff does not share the objectives of the President's administration—and asserted, in a footnote, that the restriction on the President's removal authority is unconstitutional as 'inconsistent with the vesting of the executive Power in the President.'" (quoting Attachment 4 to Plaintiff's Motion for Summary Judgment 3, *Wilcox*, 775 F. Supp. 3d 215, Dkt. No. 10-4).

<sup>48</sup> See *e.g.*, Letter from Sarah M. Harris, Acting Solic. Gen. to Hon. Richard J. Durbin, U.S. Senate (Feb. 12, 2025), <https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf> [<https://perma.cc/BL7U-43KR>].

<sup>49</sup> Plaintiff's Motion for Preliminary Injunction and Judgment on the Merits, *Harris v. Bessent*, No. 25-cv-00412 (D.D.C. Feb 23, 2025), Dkt. No. 22.

<sup>50</sup> See *Wilcox*, 775 F. Supp. 3d at 223. The district court explained that the Supreme Court's precedent upholding the constitutionality of multimember boards with removal protections bound it to hold that the removals at issue were unlawful. See *id.* at 240 ("*Humphrey's Executor* and its progeny control the outcome of this case and require that (continued...)

court concluded that Wilcox's removal from the Board was unlawful and ordered her reinstatement. On March 28, 2025, a divided panel of the D.C. Circuit granted the government's emergency motions to stay the reinstatement of the board members pending appeal of the District Court's decision.<sup>51</sup> In April 2025, the full D.C. Circuit reconsidered *en banc* the stay pending appeal, and by a vote of seven to four, reversed and vacated the stay of the district court's order reinstating the board members.<sup>52</sup> The Trump Administration subsequently applied to the Supreme Court for relief.<sup>53</sup>

On May 22, 2025, the Supreme Court granted the Trump Administration's motion, staying the reinstatements of Wilcox and the MSPB official.<sup>54</sup> In a two-page order, the Court, citing Article II, Section 1, Clause 1 of the Constitution,<sup>55</sup> explained that "[b]ecause the Constitution vests the executive power in the President, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions . . . ."<sup>56</sup> The Court went on to explain, without ultimately deciding whether the NLRB or MSPB falls within an exception, that "the Government is likely to show that both the NLRB and MSPB exercise considerable executive power," suggesting a likelihood that the Trump Administration would succeed on the merits of showing the for-cause removal provisions protecting the board members are unconstitutional.<sup>57</sup> Further, in balancing the equities of whether to grant interim equitable relief, the Court favored the Trump Administration's position, as "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."<sup>58</sup>

As previously discussed, there has been speculation about the Court's future adherence to *Humphrey's Executor*.<sup>59</sup> The Supreme Court's order in *Trump v. Wilcox* reversed the district court's order that had relied on *Humphrey's Executor*, while not explicitly overturning *Humphrey's Executor*.<sup>60</sup> However, Justice Kagan's dissenting opinion in *Trump v. Wilcox*, joined by Justices Sotomayor and Jackson, argued that the order effectively overruled *Humphrey's*

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plaintiff be permitted to continue her role as Board member of the NLRB and her termination declared unlawful and void. The Constitution and caselaw are clear in allowing Congress to limit the President's removal power and in allowing the courts to enjoin the executive branch from unlawful action.") (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)).

<sup>51</sup> *Harris v. Bessent*, No. 25-5037, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025), *vacated*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025) (*en banc*). Two of the three judges on the panel expressed their view that the government was likely to succeed on its claim that the statutory Board removal protections were unconstitutional.

<sup>52</sup> *Harris*, 2025 WL 1021435. In a brief *per curiam* order, a majority of the *en banc* court denied the government's motions for a stay pending appeal "[i]n light of the precedent in *Humphrey's Executor* and *Wiener* concerning multimember adjudicatory bodies." *See id.* at \*2.

<sup>53</sup> *See Application to Stay the Judgments of the U.S. District Court for the District of Columbia and Request for Administrative Stay, Trump v. Wilcox*, 2025 WL 1101716 (U.S. Apr. 1, 2025). Chief Justice Roberts first issued an administrative stay of the reinstatement orders to give the Supreme Court time to evaluate whether to issue a stay pending the resolution of the government's appeal. *See id.*

<sup>54</sup> *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

<sup>55</sup> U.S. CONST. art. I, § 2, cl. 1 ("The executive Power shall be vested in a President of the United States of America.")

<sup>56</sup> *Wilcox*, 145 S. Ct. at 1415.

<sup>57</sup> *See id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See e.g., Trump v. Slaughter*, 145 S. Ct. 18 (2025) (mem.).

<sup>60</sup> *See Wilcox*, 145 S. Ct. at 1415.

*Executor* while the case is still in an interim posture,<sup>61</sup> without the benefit of full briefing and oral argument, and despite the majority never citing *Humphrey's Executor* in its order.<sup>62</sup>

On December 5, 2025, subsequent to the Supreme Court's decision granting the government's emergency stay pending appeal in the cases, a divided D.C. Circuit panel issued a decision on the underlying appeal of the district court's summary judgment decision.<sup>63</sup> The panel majority held that the NLRB has substantial executive powers such that the NLRA's for-cause removal protections for Board members are unconstitutional.<sup>64</sup> Following the Supreme Court's order in *Wilcox* that the NLRB "likely" exercises "considerable executive power,"<sup>65</sup> the panel majority held that the NLRB "substantially exceed[s] the circumscribed administrative powers that *Humphrey's Executor* deemed to be quasi-legislative or quasi-judicial."<sup>66</sup> Accordingly, the D.C. Circuit reversed the district court's underlying decision that had upheld the for-cause provision.

In *Trump v. Slaughter*, the Supreme Court is separately considering whether the statutory removal protections for members of the FTC are unconstitutional, and, if so, whether *Humphrey's Executor* should be overruled. Depending on whether it explicitly overrules *Humphrey's Executor* and how broadly the Court might extend its reasoning, *Slaughter* could effectively decide the constitutionality of the NLRA's for-cause removal protections.<sup>67</sup> During the *Slaughter* oral arguments in December 2025, the government stated that the NLRB is "clearly exercising executive power,"<sup>68</sup> and advocated for "the political discipline of [the NLRB and other entities] being accountable to the President."<sup>69</sup>

## Other Challenges to For-Cause Removal Provisions

In addition to challenges at the Supreme Court, several recent cases before the lower courts have examined the constitutionality of for-cause removal protections at the NLRB. For example, in a 2025 case before the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), *SpaceX v. NLRB*, SpaceX and other consolidated plaintiffs challenged both the NLRB Board members' for-cause removal protections *and* similar removal protections for ALJs.<sup>70</sup>

As discussed above, complaints before the NLRB are first assigned to an ALJ who conducts a hearing and issues a recommended decision and order, which the Board may adopt.<sup>71</sup> While NLRB's Board members may only be removed "for neglect of duty or malfeasance in office,"

<sup>61</sup> The interim docket is also known as the "emergency docket" or "shadow docket." See CRS Legal Sidebar LSB10637, *The "Shadow Docket": The Supreme Court's Non-Merits Orders*, by Joanna R. Lampe (2021).

<sup>62</sup> *Wilcox*, 145 S. Ct. at 1418 (Kagan, J., dissenting). The dissent also took issue with the majority's distinguishing of the Federal Reserve—an agency without officers at issue in *Wilcox*. The dissent described the discussion of the Federal Reserve as "out of the blue," and further expressed that "the Federal Reserve's independence rests on the same constitutional and analytic foundations as that of the NLRB, MSPB, FTC, FCC, and so on—which is to say it rests largely on *Humphrey's*." See *id.* at 1421.

<sup>63</sup> *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025).

<sup>64</sup> *Id.* The panel similarly ruled that the for-cause removal protections for MSPB members are unconstitutional. See *id.*

<sup>65</sup> *Wilcox*, 145 S. Ct. at 1415.

<sup>66</sup> *Harris*, 160 F.4th at 1251. The panel majority highlighted the NLRB's administrative adjudications as a "mode of law-making and policymaking," as well as its "broad" rulemaking authority, remedial authority, and litigating authority, among others, as evidence that it is "not solely quasi-legislative or quasi-judicial." See *id.* at 1251–54.

<sup>67</sup> *Trump v. Slaughter*, 146 S. Ct. 18 (2025) (mem.).

<sup>68</sup> Transcript of Oral Argument at 22, *Trump v. Slaughter*, No. 25-332 (U.S. Dec. 8, 2025).

<sup>69</sup> *Id.* at 34.

<sup>70</sup> *SpaceX v. NLRB*, 151 F.4th 761 (5th Cir. 2025).

<sup>71</sup> See THE DEVELOPING LABOR LAW, *supra* note 31, at ch. 31.

ALJs may be removed only “for good cause established and determined by the MSPB on the record after opportunity for hearing before the Board.”<sup>72</sup> The MSPB Board members who decide good cause in ALJ removal cases also enjoy for-cause removal protection, and may be removed “by the President only for inefficiency, neglect of duty, or malfeasance in office.”<sup>73</sup>

In a 2010 decision, *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*, the Supreme Court held that members of the PCAOB, who are appointed by the Securities and Exchange Commission (SEC), were unconstitutionally insulated from executive control because of “dual for-cause limitations” on their removal.<sup>74</sup> In various contexts, entities subject to administrative adjudications have cited the reasoning in *Free Enterprise Fund* in challenging ALJs’ removal protections, with mixed success to date.<sup>75</sup>

In *SpaceX*, the plaintiffs likewise argued that the removal protections for ALJs and MSPB members created a “multi-layered removal provision” that violated Article II.<sup>76</sup> As a threshold matter, the Fifth Circuit addressed its jurisdiction over the plaintiffs’ claims in light of the Norris-LaGuardia Act, which states 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, except in a strict conformity with the [statute]. . . .”<sup>77</sup> The Fifth Circuit found that it had jurisdiction to hear the plaintiffs’ claims, holding that constitutional challenges to the structure of the NLRB are distinct from labor disputes that are outside of federal court jurisdiction.<sup>78</sup> Since the *SpaceX* decision, the U.S. Courts of Appeals for the Third Circuit and the Ninth Circuit (Ninth Circuit) have issued decisions splitting from the Fifth Circuit on this jurisdictional issue.<sup>79</sup> Those circuits have held that under the Norris-LaGuardia Act, federal courts lack jurisdiction to enjoin ongoing NLRB proceedings arising from labor disputes with current or former employers that involve constitutional challenges to the removal provisions protecting NLRB members and ALJs.<sup>80</sup>

After finding jurisdiction over the case, the Fifth Circuit agreed with the plaintiffs, holding that the ALJ and MSPB removal provisions were comparable to the two-layer removal scheme for SEC ALJs that the Fifth Circuit had found to be unconstitutional three years earlier in *SEC v. Jarkesy*.<sup>81</sup> Accordingly, the *SpaceX* panel held that because NLRB ALJs are inferior officers

<sup>72</sup> Compare 29 U.S.C. § 153(a), with 5 U.S.C. § 7521(a).

<sup>73</sup> 5 U.S.C. § 1202(d).

<sup>74</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010).

<sup>75</sup> Compare *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446, 463 (5th Cir. 2022) (holding that statutory removal protections for SEC ALJs violated Article II), *aff’d and remanded on other grounds*, 603 U.S. 109 (2024), and *adhered to*, 132 F.4th 745 (5th Cir. 2024); with *Walmart, Inc. v. Chief Admin. L. Judge of Off. of Chief Admin. Hearing Officer*, 144 F.4th 1315, 1319, 1345 (11th Cir. 2025) (holding that the APA’s removal protection for ALJs is constitutional as applied to an ALJ position within the Department of Justice’s Executive Office for Immigration Review, distinguishing that ALJ’s role from PCAOB members); *Axalta Coating Sys. LLC v. Fed. Aviation Admin.*, No. 23-2376, 2025 WL 1934352, at \*7 (3d Cir. July 15, 2025) (declining to vacate an FAA ALJ’s decision on removal grounds because the plaintiff had failed to show actual harm).

<sup>76</sup> *SpaceX*, 151 F.4th at 766.

<sup>77</sup> 29 U.S.C. § 101.

<sup>78</sup> *See id.* at 151 F.4th at 770.

<sup>79</sup> *See Spring Creek Rehab. & Nursing Ctr. LLC v. NLRB*, 160 F.4th 380, 389 (3d Cir. 2025); *Amazon.com Servs., LLC v. Teamsters Amazon Nat’l Negotiating Comm.*, 163 F.4th 624 (9th Cir. 2025).

<sup>80</sup> *See id.*

<sup>81</sup> *See Jarkesy v. SEC* 34 F.4th 446 (5th Cir. 2022). The Supreme Court affirmed the Fifth Circuit’s decision in *Jarkesy* vacating the SEC order imposing civil penalties on Seventh Amendment grounds, but the decision did not reach the portion of the Fifth Circuit’s decision on SEC ALJ removal protections. *See SEC v. Jarkesy*, 603 U.S. 109 (2024).

insulated by two layers of for-cause protection, the removal restrictions are unconstitutional.<sup>82</sup> The Fifth Circuit addressed the for-cause removal protections for the Board, finding them also unconstitutional and pointing to the Supreme Court’s emergency stay order in *Wilcox* to support the court’s conclusion that the NLRB exercises considerable executive power and therefore “insulation from presidential removal likely violates Article II.”<sup>83</sup>

Comparatively, in the October 2025 decision *NLRB v. North Mountain Foothills Apartments*, the Ninth Circuit rejected challenges to the statutory removal provisions for NLRB Board members and ALJs.<sup>84</sup> The Ninth Circuit acknowledged the Supreme Court’s recent activity in *Wilcox*, but dismissed the employer’s constitutional challenge to statutory removal protections for NLRB ALJs based on an insufficient showing of actual harm to receive retroactive relief.<sup>85</sup>

## NLRB and Due Process

Plaintiffs challenging the NLRB’s constitutionality have contended that the agency’s combined investigatory and adjudicatory powers are inconsistent with separation-of-powers principles and therefore violate the Fifth Amendment right to due process.<sup>86</sup> In *North Mountain Foothills Apartments*, for example, the plaintiff argued that the NLRB unlawfully exercises the powers of all three branches of government when presented with an unfair labor practice charge.<sup>87</sup> It asserted that the NLRB performs executive functions when it investigates and prosecutes unfair labor practices, exercises judicial functions when it resolves legal disputes and issues binding orders, and acts in a legislative capacity by establishing labor-management standards that bind private parties.<sup>88</sup> The plaintiff argued that the NLRB’s exercise of legislative and judicial powers that are not vested in the executive branch violates the Fifth Amendment.<sup>89</sup>

As recognized by the Ninth Circuit, while the NLRA vests both investigatory and adjudicatory functions in the NLRB, the Supreme Court has indicated that the combination of such functions “does not, without more, constitute a due process violation.”<sup>90</sup> In *Withrow v. Larkin*, the Court upheld a Wisconsin law that authorized a state medical examining board to investigate, prosecute, and reprimand physicians who engaged in practices inimical to public health.<sup>91</sup> Acknowledging that a combination of investigative and adjudicative functions could create a risk of bias and deny a “fair trial in a fair tribunal,” the Court observed that a due process challenge “must overcome a presumption of honesty and integrity in those serving as adjudicators; and . . . must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring

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<sup>82</sup> *SpaceX*, 151 F.4th at 77.

<sup>83</sup> *See id.* at 776–77.

<sup>84</sup> *NLRB v. N. Mountain Foothills Apartments*, 157 F.4th 1089 (9th Cir. 2025); *see also* *Care One, LLC v. Nat’l Lab. Rels. Bd.*, 166 F.4th 335, 343 (2d Cir. 2026) (holding plaintiffs failed to show a likelihood of irreparable harm from the continuance of NLRB proceedings as required for preliminary injunctive relief on claims including challenge to two-layer statutory removal protections of NLRB ALJs).

<sup>85</sup> *See id.* at 1098.

<sup>86</sup> *See, e.g.*, Opening Brief at 20, *NLRB v. N. Mountain Foothills Apartments*, No. 24-2223 (9th Cir. Aug. 30, 2024). *See also* U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

<sup>87</sup> Opening Brief, *supra* note 86, at 20–21.

<sup>88</sup> *Id.* at 22–23.

<sup>89</sup> *See N. Mountain Foothills Apartments*, 157 F.4th at 1100.

<sup>90</sup> *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

<sup>91</sup> *Id.* at 58–59.

investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden.”<sup>92</sup>

Bias concerns that may exist because the same individuals perform investigatory and adjudicative functions may be lessened in light of the procedures used by the Board to resolve unfair labor practices. In *NLRB v. United Food and Commercial Workers Union, Local 23*, the Supreme Court recognized the “dichotomy” between the activities of the NLRB’s General Counsel and the Board.<sup>93</sup> The Court observed that the history and structure of the NLRA demonstrate Congress’s intent to differentiate between the General Counsel’s and the Board’s authority along prosecutorial and adjudicatory lines: “[T]he NLRA provides that the General Counsel has ‘final authority’ regarding the filing, investigation, and ‘prosecution’ of unfair labor practice complaints. Conversely, when the authority of the Board is discussed (with regard to unfair labor practice complaints), it is in the context of the *adjudication* of complaints.”<sup>94</sup> Based on these observations, the bias risk identified by the *Larkin* Court would appear lessened in the NLRA context because the agency’s investigatory and adjudicative functions are conducted by different individuals.

In *North Mountain Foothills Apartments*, the Ninth Circuit rejected the employer’s due process claim, recognizing that the Board’s investigatory and adjudicatory functions are not performed by a single individual, and that there is no indication that the Board or its ALJs had a potential for bias.<sup>95</sup> The court contended that the Board and its ALJs are entitled to a presumption of honesty and integrity given the employer’s failure to demonstrate any potential for bias.<sup>96</sup>

## NLRB and the Seventh Amendment

Plaintiffs challenging the NLRB’s constitutionality have also argued that the agency’s adjudication scheme violates the Seventh Amendment by denying them of their right to a jury trial.<sup>97</sup> The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>98</sup> Under the NLRA, unfair labor practice complaints are adjudicated before ALJs and the Board, which may order “such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].”<sup>99</sup> The plaintiffs contend that these cases are suits at common law that should be decided by a jury.

To determine whether an action is a “suit at common law,” courts have examined whether the action has traditionally been brought before a court of law or court of equity, and whether the remedies sought are legal or equitable in nature.<sup>100</sup> The Supreme Court has acknowledged that

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<sup>92</sup> *Id.* at 47. See also *id.* at 56 (“It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.”).

<sup>93</sup> *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 124 (1987).

<sup>94</sup> *Id.*

<sup>95</sup> *N. Mountain Foothills Apartments*, 157 F.4th at 1100.

<sup>96</sup> *Id.* at 1100–01.

<sup>97</sup> See, e.g., Complaint for Declaratory and Injunctive Relief, *supra* note 4 at 15; Opening Brief, *supra* note 86, at 18.

<sup>98</sup> U.S. Const. amend. VII.

<sup>99</sup> 29 U.S.C. § 160(c).

<sup>100</sup> *Jarkesy*, 603 U.S. at 122–23 (noting the Seventh Amendment’s application to suits that are “legal in nature” and that courts are “to consider the cause of action and the remedy it provides.”); *N. Mountain Foothills Apartments*, 157 F.4th (continued...)

some causes of action sound in both law and equity, and has indicated that the most important consideration for determining whether an action is a suit at common law is the remedy.<sup>101</sup> The Court has observed that money damages, in particular, are the “prototypical common law remedy.”<sup>102</sup>

In 1937, the Supreme Court considered whether the NLRA’s adjudication scheme violates the Seventh Amendment. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court found no violation despite a Board order that directed the steel company to provide back pay to employees who were wrongfully terminated.<sup>103</sup> The company argued that the back pay was “equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury.”<sup>104</sup> The Court determined, however, that the Seventh Amendment does not apply where the recovery of money damages is incident to equitable relief.<sup>105</sup> Here, the Board’s order directed the company to cease and desist from engaging in unfair labor practices, reinstate ten terminated employees, and provide back pay to the employees. The Court also emphasized that an unfair labor practice case is a statutory proceeding and “one unknown to the common law.”<sup>106</sup> The Court observed that reinstatement and “payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.”<sup>107</sup>

While the Court’s decision in *Jones & Laughlin Steel Corp.* would seem to foreclose further consideration of whether the NLRA’s adjudication scheme violates the Seventh Amendment, plaintiffs challenging the NLRB’s constitutionality contend that the agency is now asserting broader authority to award monetary damages and that these damages are legal rather than equitable.<sup>108</sup> In 2022, the Board revisited its authority to order make-whole relief for employees who are subject to unfair labor practices. In *Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269*, the Board indicated it would order employers that commit unfair labor practices to compensate affected employees “for all direct or foreseeable pecuniary harms” suffered as a result of such practices.<sup>109</sup> The Board explained that requiring compensation for all direct or foreseeable pecuniary harms better effectuates the NLRA’s purpose and “restore[s] the employee to the situation they would have been in but for that unlawful conduct.”<sup>110</sup> The Board indicated that this relief could address various financial costs incurred as a result of an unfair labor practice, including “out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet.”<sup>111</sup>

The Board in *Thryv* addressed concerns that a remedy that includes compensation for all direct or foreseeable pecuniary harms would implicate the Seventh Amendment. Citing *Jones & Laughlin*

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at 1098 (“To determine whether an action is one ‘at common law,’ or otherwise, courts consider whether the action is akin to an action that would have traditionally been brought before a court of law or a court of equity and whether the remedies sought are legal or equitable in nature.”).

<sup>101</sup> *Jarkesy*, 603 U.S. at 123.

<sup>102</sup> *Id.* at 123. See also *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (“Money damages are, of course, the classic form of legal relief.”).

<sup>103</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 48–49.

<sup>108</sup> See Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 15.

<sup>109</sup> *Thryv, Inc. & IBEW, Loc. 1269*, 372 NLRB No. 22 (2022), *vacated in part and review granted sub nom.*, *Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024).

<sup>110</sup> *Id.* at 9.

<sup>111</sup> *Id.*

*Steel Corporation*, the Board emphasized that the NLRA provides the agency with broad remedial authority, and ordering compensation for all direct or foreseeable pecuniary harms is restorative rather than punitive.<sup>112</sup> Acknowledging that make-whole relief may resemble damages in a common law tort proceeding, the Board maintained that “the relief we issue is nevertheless purely statutory in nature and specifically designed to effectuate the purposes of the [NLRA].”<sup>113</sup>

Since the Board’s decision in *Thryv*, three federal appellate courts have vacated awards of all direct or foreseeable pecuniary harms, concluding that the awards exceeded the agency’s remedial authority under the NLRA.<sup>114</sup> These courts did not address, however, whether the Seventh Amendment entitled the employers subject to such awards to jury trials.<sup>115</sup>

In *North Mountain Foothills Apartments*, the Ninth Circuit rejected the employer’s assertion that the Board’s adjudication scheme violates the Seventh Amendment because the agency’s so-called “*Thryv* remedies” are legal damages that should be awarded in a jury trial.<sup>116</sup> The court determined that the *Thryv* remedies are not legal, but equitable in nature and designed to restore the status quo.<sup>117</sup> The court maintained that the Seventh Amendment is not implicated because the Board “specifically explained that this remedy ‘do[es] not punish bad actors, but rather implement[s] the statutory principles of rectifying the harms actually incurred by the victims of unfair labor practices and restoring them to where they would have been but for the unlawful conduct.’”<sup>118</sup>

If the Board were to revisit its decision permitting the award of foreseeable costs in *Thryv*, it could be more difficult for employers to contend that NLRB proceedings are legal in nature rather than equitable, triggering the Seventh Amendment. Some legal observers contend that a newly constituted Board with a majority of Republican-appointed members could reverse *Thryv* and other decisions that have been viewed as less favorable to employers.<sup>119</sup>

## Considerations for Congress

Due to the removal and term expiration of sitting NLRB Board members, the NLRB lacked a quorum from roughly January to December 2025, when the Senate confirmed two of President Trump’s nominees.<sup>120</sup> During that time, the Board could not hear any appeals or issue

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<sup>112</sup> *Id.* at 10–11.

<sup>113</sup> *Id.* at 11.

<sup>114</sup> *NLRB v. Starbucks Corp.*, 159 F.4th 455 (6th Cir. 2025); *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719 (5th Cir. 2025); *NLRB v. Starbucks Corp.*, 125 F.4th 78 (3d Cir. 2024).

<sup>115</sup> *See, e.g., Starbucks Corp.*, 125 F.4th at 97 (“Starbucks, making a constitutional avoidance argument, contends that the Board’s interpretation of the NLRA would require a jury trial under the Seventh Amendment and an adjudication in federal court under Article III. Because we agree that the Board’s order is inconsistent with the NLRA, we need not reach these constitutional questions.”).

<sup>116</sup> *N. Mountain Foothills Apartments*, 157 F.4th at 1099.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1100 (alterations in original) (quoting 372 NLRB No. 22 (2022)). *See also* Int’l Union of Operating Eng’rs, Stationary Eng’rs, Loc. 39 v. NLRB, 155 F.4th 1023, 1052 (9th Cir. 2025) (compensation for direct or foreseeable pecuniary harms incurred as a result of an unfair labor practice is within the Board’s broad discretion to effectuate the NLRA’s policies), *petition for cert. docketed sub nom., Macy’s Inc. v. NLRB*, No. 25-627 (U.S. Dec. 2, 2025).

<sup>119</sup> Robert Iafolla, *NLRB Faces Hefty Case Backlog as New Members Formally Join Board*, DAILY LAB. REP. (BL) (Jan. 7, 2026, at 11:16 ET), <https://news.bloomberglaw.com/daily-labor-report/nlr-b-faces-hefty-case-backlog-as-new-members-formally-join-board> [<https://perma.cc/TLK2-9HKZ>].

<sup>120</sup> *See* Daniel Wiessner, *US Senate Confirms Trump Nominees for Labor Board Paralyzed After Member’s Firing*, REUTERS (Dec. 18, 2025, at 20:36 ET), <https://www.reuters.com/world/us/us-senate-confirms-trump-nominees-labor-board-paralyzed-after-members-firing-2025-12-19/> [<https://perma.cc/NH25-KPYL>].

decisions.<sup>121</sup> In response, several states introduced legislation to address labor enforcement and adjudication that they argued had lapsed during the quorum-less period. For example, California and New York each passed laws creating state-level labor boards.<sup>122</sup> However, attempts by state boards to assert jurisdiction over issues covered by the NLRA have been held to violate the Supremacy Clause<sup>123</sup> of the Constitution.<sup>124</sup> For example, in December 2025, the U.S. District Court for the Eastern District of California largely enjoined A.B. 288, the California law that would allow California private-sector workers covered by the NLRA to bring labor disputes to a state board when the NLRB suffers a loss of quorum, loss of independence, enjoinder, or processing delays.<sup>125</sup> If Congress wished, it could allow the states to exercise jurisdiction alongside of or in lieu of federal jurisdiction under the NLRA.

If Congress perceived the NLRB quorum lapse to create a gap unfillable by states for preemption reasons, Congress could enact its own legislative reforms. For example, the Protecting American Jobs Act would alter the Board's adjudication scheme to allow aggrieved parties to seek judicial relief in the courts rather than before the Board, while maintaining some investigative functions.<sup>126</sup> The National Labor Relations Board Reform Act would have allowed judicial review of complaints issued by the NLRB General Counsel and would have permitted parties to appeal to federal court if the NLRB does not issue a final order within one year, among other reforms.<sup>127</sup> Congress could also seek to expand the NLRB's authorities, such as in the Richard L. Trumka Protecting the Right to Organize (PRO) Act.<sup>128</sup> Among its reforms, the PRO Act would make NLRB's orders self-enforcing and create civil monetary penalties for NLRA violations.<sup>129</sup> Congress could also consider requiring nominees to the Board to meet certain qualifications, such as experience working for the NLRB or practicing labor law in some other capacity.

Congress could face constitutional obstacles in some types of reforms to the NLRB. As discussed above, the Supreme Court has not explicitly overturned *Humphrey's Executor*, but such a decision could potentially allow the President to remove NLRB Board members "at will" in the manner of removal for presidential appointees at "non-independent agencies," such as Cabinet members and other agency heads. A decision based in the President's Article II powers overruling *Humphrey's Executor* may cast doubt on Congress's ability to create for-cause removal protections for positions in future legislation, as well as Congress's ability to address presidential control over executive branch agencies more broadly. Similarly, Congress could be limited in how it may

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<sup>121</sup> See 29 C.F.R. § 102.178 (2026) (clarifying that "during any period when the Board lacks a quorum normal Agency operation should continue to the greatest extent permitted by law" but that appeals may not be made to the Board).

<sup>122</sup> See Assemb. B. 288, 2025–2026 Reg. Sess. (Cal. 2025); S. 8034A, 2025–2026 Leg., Reg. Sess. (N.Y. 2025).

<sup>123</sup> U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). See also Lib. Cong., *Modern Doctrine on Supremacy Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/art\\_VI-C2-3-4/ALDE\\_00013402/](https://constitution.congress.gov/browse/essay/art_VI-C2-3-4/ALDE_00013402/) (last visited Mar. 12, 2026) ("Since the mid-twentieth century, the Supreme Court has channeled its Supremacy Clause jurisprudence into the language of federal preemption.").

<sup>124</sup> See Order Granting in Part and Denying in Part Plaintiff's Motion for a Preliminary Injunction, *NLRB v. California*, No. 25-cv-02979 (E.D. Cal. Dec. 26, 2025), Dkt. No. 30; Order Granting Motion for Preliminary Injunction, *Amazon.com Servs. LLC v. N.Y. State Pub. Emp. Rels. Bd.*, No. 25-CV-5311 (E.D.N.Y. Nov. 26, 2025), Dkt. No. 49.

<sup>125</sup> See Order Granting in Part and Denying in Part Plaintiff's Motion for a Preliminary Injunction, *NLRB*, No. 25-cv-02979 (E.D. Cal. Dec. 26, 2025).

<sup>126</sup> Protecting American Jobs Act, S. 2568, 119th Cong. (2025).

<sup>127</sup> The National Labor Relations Board Reform Act, S. 991, 118th Cong. (2023).

<sup>128</sup> Richard L. Trumka Protecting the Right to Organize Act of 2023, S. 852/H.R. 20, 119th Cong. (2025).

<sup>129</sup> See *id.*

choose to reform the NLRB by court decisions restricting the NLRB's investigatory and adjudicatory processes or the available remedies under the NLRA under the Fifth or Seventh Amendments. If Congress wished to reduce these potential constitutional conflicts, it could amend the remedies available under the NLRA or the adjudicative process or it could leave the courts to decide.

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