



NORTHEAST REGIONAL FIELD MEETING

October 10, 2024

**1199 SEIU
498 7th Avenue
New York, NY**

Attacks on the Administrative State

October 10, 2024

2:00 – 2:50 PM

Session Presenters:

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**Attacks on the Administrative State
ULA Northeast Regional Meeting
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Is Deference Dead After *Loper Bright*?

1. In *Loper Bright Enterprises v. Raimondo*, ___ U.S. ___, 144 S.Ct. 2244 (2024), the Supreme Court did not decide how much deference should be given to the NLRB's interpretation of the NLRA, and it implicitly held that the level of deference may depend upon which provision of the Act is at issue.

- The Court specifically reaffirmed the holding in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) that the NLRA had “assigned primarily to the Board the task of marking a definitive limitation around the term ‘employee.’” 144 S.Ct. at 2259.
- The Court further noted some statutes “empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, or “to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility.’” *Id.* at 2263. Accordingly, the Court majority conceded that the “best reading of a statute” may be that “it delegates discretionary authority to an agency.” *Id.*

2. Fallout from *Loper Bright*

So far, there have been only a handful of circuit court cases applying *Loper Bright* to petitions for review or enforcement of NLRB decisions:

Rieth-Riley Construction Co. Inc. v. NLRB, 114 F.4th 519 (6th Cir. 2024). Without any analysis, the court declares, “We do not defer to the NLRB’s interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority.” Nevertheless, the court enforced the Board order.

NLRB v. McLaren Macomb, No. 23-1335 (6th Cir. Sept. 19, 2024)(*per curiam*). Cites *Rieth-Riley* for the proposition that the court will apply de novo review to the Board’s interpretation of the NLRA, but enforces the Board’s order.

Hudson Institute of Process Research Inc. v. NLRB, No. 23-60175, ___ F.4th ___ (5th Cir. Sept. 18, 2024). “[W]e use traditional tools of statutory interpretation” when assessing the Board’s legal conclusions; “we do not simply defer to an agency’s interpretation of ‘ambiguous’ provisions of their enabling acts. Court refuses to enforce the Board’s finding that certain groups of workers were not supervisors.

Constitutional Attacks on the NLRA

1. ALJs are insulated from removal.

In *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) *aff'd on other grounds*, 144 S.Ct. 2117 (2024), the Fifth Circuit held that the SEC's structure was unconstitutional for three separate reasons. One of those reasons was that the SEC's ALJs may only be removed by the SEC Commissioners for good cause after a hearing before the Merit Systems Protection Board. The Supreme Court affirmed the Fifth Circuit's ruling on another ground, and did not address this holding.

Three separate district court judges have enjoined NLRB proceedings relying upon the Fifth Circuit's ruling in *Jarkesy*.

Space Exploration Technologies Corp. v. NLRB, 24-cv-00203, 2024 WL 3512082 (W.D. Tex. July 23, 2024).

Energy Transfer, L.P. v. NLRB, 24-cv-198, 2024 WL 3571494 (S.D. Tex. July 29, 2024).

Aunt Bertha v. NLRB, 24-cv-00798, 2024 WL 4202383 (N.D. Tex. Sept. 16, 2024).

But, outside the Fifth Circuit, district court judges have rejected these challenges:

YAPP USA Automotive Systems, Inc. v. NLRB, 24-cv-12173, 2024 WL 4119058 (E.D. Mich. Sept. 9, 2024)

Alivio Medical Center v. Abruzzo, 24-cv-7217, 2024 WL 4188068 (N.D. Ill. Sept. 13, 2024).

2. Other Constitutional Attacks

- Board Members insulated from removal
- Seventh Amendment

NLRB's
response
to *Loper* &
Separation
of Powers
Cases

It is nothing new for big companies to challenge the authority of the NLRB to enforce workers' rights so as not to be held accountable for their violations of the NLRA.

In 1937, the Supreme Court made it clear that the NLRA is constitutional, and, the NLRB will continue to do what Congress has mandated it to do, despite the continued challenges.

While the current challenges require the NLRB to expend scarce resources defending against them, we've seen that the results of these kinds of challenges is ultimately a delay in justice, but that ultimately justice does prevail.

The NLRB & *Loper*'s "independent judgment" standard of review does not apply

"Loper's independent judgment" standard of review does not apply to the NLRB

- Rather, while overruling *Chevron*, the SC in *Loper*- "reaffirmed that Congress may enact statutes granting discretionary authority to expert agencies tasked with "prescrib[ing] rules to 'fill up the details' of a statutory scheme." *Id.* at 2263.
- Development of national labor policy is a difficult and delicate responsibility that Congress committed primarily to the Board.
- The NLRB is an agency that "fills up the details of a statutory scheme".

The NLRB and *Loper's* "reasoned discretion" standard of review applies

- A clue that the "independent judgment" standard does not apply
 - *Loper* cites *Allentown Mack Sales* to distinguish those situations when the Court acknowledged that the reviewing court's role is properly limited to "**recognizing constitutional delegations, determining their boundaries, and ensuring the agency has engaged in 'reasoned decision-making' within those boundaries.**" (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).
- The NLRB, therefore, asks the Court to continue to apply its established standard of "discretion and deference to that discretion".
- The NLRB points to a long history of Supreme Court decisions issued before *Chevron*, where the Court affirmed the NLRB's reasoned discretion in applying the NLRA to the facts of specific cases.
- NLRB *Loper* arguments, therefore, proceed case by case, narrowly tailored to the facts, and the NLRB cites to longstanding Court precedent.
- See NLRB's arguments in *Cemex Construction Materials Pacific, LLC v. NLRB* and *Miller Plastic Products Inc. v. NLRB* for further details and analysis

NLRB *Loper* cases

Case Name	Court	Case #	Issues
Amazon.com Services, LLV v NLRB	7th Cir.	24-1548 & 24-1619	Off duty no access rule
Miller Plastic Products Inc. v. NLRB	3rd Cir.	23-2689 & 23-2857	Concerted activity
Quickway Transportation, Inc. v. NLRB	6th Cir.	23-1780 & 23-1820	Employer motive
Cemex Construction Materials Pacific, LLC v. NLRB	9th Cir.	23-2081, 23-2302, & 23-2377	Remedial authority
International Longshore and Warehouse Union, and International Longshore and Warehouse Union, Local 19 v. NLRB	9th Cir.	23-632, 23-658, 23-1108, & 23-793	Unlawful picketing / jurisdiction dispute
3484, INC. and 3486, INC v. NLRB	10th Cir.	24-9511 & 24-9525	Reinstate striking workers and remedial authority
United Natural Foods, Inc. v. NLRB	5th Cir.	21-60532	Board structure and GC's prosecutorial discretion
Troy Grove, a division of RiverStone Group, Inc., and Vermilion Quarry, a division of RiverStone Group, Inc., v. NLRB	DC	23-1164 (Consolidated with 23-1176, 23-1343)	unilateral changes, unlawful layoff, remedial authority

The NLRB & Separation of Powers Cases – split decisions

Two district courts apply *Humphrey's Executor* removal exception and reach different conclusions:

- *Yapp USA Auto*, 2024 WL 4119058, at *5 (finding that “the NLRB appears to fall comfortably within the *Humphrey's Executor* exception”) – 6th Circ.
- *Space Exploration Technologies Corp. v. National Labor Relations Board* (“SpaceX”), Civil No. W24- CV-00203-ADA, 2024 WL 3512082, at *4 (W.D.Tex. July 23, 2024) (“Finding that NLRB Member’s removal protection [is] constitutional would require this court to expand *Humphrey's Executor* where the Supreme Court has repeatedly declined to do so.”). - 5th Circ.

The NLRB & Separation of Powers Cases – *Alivio Medical Center*

NLRB members do not wield substantial executive power

- LMRA divided the authority and responsibility of the original Board and vested the General Counsel with the “extensive executive” and “prosecutorial functions” of the agency.
 - *Rieth-Riley*, 2024 WL 3811837, at *4 & at *5 (“The General Counsel’s purely executive function . . . Is detached from the Board’s adjudicatory function”).

Exercise of such power is not, in and of itself, sufficient to defeat application of *Humphrey’s* removal exception

- *Consumers’ Rsch.*, 91 F.4th at 346 (“Although the Commission wields what we would today regard as substantial executive power, in every other respect it is structurally identical to the agency that the Supreme Court deemed constitutional in *Humphrey’s*. Yet the district court concluded that the Commission’s structure is unconstitutional under *Seila Law*. We disagree.”).
- NLRB does not prosecute 10(j) cases

The Board’s stricter removal protections (“for neglect of duty or malfeasance in office”) insufficient to defeat application of *Humphrey’s*

- See *Consumers’ Rsch.*, 91 F.4th at 346, 355-56; *Leachco*, 103 F.4th at 761-64; *Yapp USA Auto*, 2024 WL 4119058, at *6 n.4. Furthermore, the Supreme Court has declined to broadly construe the “inefficiency, neglect of duty, or malfeasance of office” removal standard in the manner suggested by *SpaceX*. See *Seila L.*, 591 U.S. at 229.5

Separation of Powers Cases

Case Name	Court	Docket #	Appeal	Case #	Outcome	Outcome date	ALJ removability (Jarkesy 5th)	Member removability (Humphrey's)	7th Amendment (Jarkesy SCOTUS)	Separation of powers
SpaceX v. NLRB I	S.D. Tex.	1:24-cv-00001	5th Cir.	24-40315	Enjoined (Circuit Court)	5/2/2024	Yes	Yes	Yes	Yes
SpaceX v. NLRB II	W.D. Tex.	6:24-cv-00203	5th Cir.	24-50627	Enjoined (District Court)	7/23/2024	Yes	Yes	No	No
Energy Transfer v. NLRB	S.D. Tex.	3:24-cv-00198	5th Cir.	24-40533	Enjoined (District Court)	7/29/2024	Yes	Yes	Yes	Yes
Aunt Bertha v. NLRB	N.D. Tex.	4:24-cv-00798-P	5th Cir.	24-10855	Enjoined (District Court)	9/16/2024	Yes	Yes	Yes	No
Amazon.com Services v. NLRB	W.D. Tex.	5:24-CV-01000	5th Cir.	24-50761	Administrative stay granted (Circuit Court)	9/30/2024	No	Yes	Yes	Yes
Care One v. NLRB	D. Conn.	3:23-cv-00831	2nd Cir.	23-7475	PI denied (District Court)	10/4/2023	Yes	No	No	No
YAPP USA Automotive Systems v. NLRB	E.D. Mich.	2:24-cv-12173	6th Cir.	24-1754	PI denied (District Court)	9/9/2024	Yes	Yes	Yes	Yes
Alivio Medical Center v. Abruzzo	N.D. Ill.	1:24-cv-07217			PI denied (District Court)	9/13/2024	Yes	Yes	No	No
Nexstar Media Group v. NLRB	N.D. Ohio	4:24-cv-01415			PI denied (Closed)	8/26/2024	Yes	Yes	Yes	Yes
FCNB Bank v. NLRB	E.D. Mo.	4:24-cv-01081			Voluntarily dismissed (Closed)	9/4/2024	Yes	Yes	No	No
Avila v. NLRB	D.D.C.	1:24-cv-01688					No	Yes	No	No
Medina v. NLRB	D.D.C.	1:24-cv-02401					Yes	Yes	No	No
VHS Acquisition Subsidiary Number 7 v. NLRB	D.D.C.	1:24-cv-02577					Yes	Yes	Yes	Yes
Spring Creek Nursing & Rehabilitation Center v. NLRB	D.N.J.	2:24-cv-09016					Yes	Yes	No	Yes
Busler v. NLRB	N.D. Tex.	4:24-cv-00072					No	Yes	No	No
Ascension Seton v. NLRB	W.D. Tex.	6:24-cv-00485					Yes	Yes	Yes	Yes
North Mountain Foothill Apts LLC v. NLRB			9th Cir.	24-2223			Yes	Yes	Yes	Yes

* Note: Constitutionality arguments have also appeared in a couple 10(j) cases and about fifteen pending Circuit Court appeals of Board decisions. However, these do not carry the risk of preliminary injunction (PI) against NLRB proceedings and are often just thrown in after more traditional labor law arguments.