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# scotus's curbing of federal agency actions – a tool to place guardrails on the nlrp's recent policies to expand its reach under the nlra

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Jonathan Turner & Eric Engelman

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On June 27 and 28, 2024, the Supreme Court of the United States issued two separate opinions that have placed judicial restraints on the scope of powers exercised by federal agencies to interpret and enforce statutes they are charged to administer. In its opinion in *Loper Bright Enterprises v. Raimondo*, the Court ended four decades of deference to federal agencies in interpreting the laws they administer, and in *SEC v. Jarkesy*, the Supreme Court limited the ability of the Securities Exchange Commission ("SEC") to impose civil penalties for alleged violations of the anti-fraud provisions of certain regulatory statutes over which the SEC has enforcement jurisdiction. While neither decision directly involved or discussed the National Labor Relations Board ("NLRB"), both are likely to be relied on by employers to curb the ongoing efforts of the NLRB and its General Counsel to expand the scope of that agency's enforcement activities under the National Labor Relations Act ("NLRA").

In *Loper Bright*, the Court overruled their 1984 decision in *Chevron v. Natural Resources Defense Council*, which gave rise to the doctrine known as "*Chevron* deference." *Chevron* deference applied a two-step framework for judicial review of federal agency action. Under the first step, the reviewing court was required to determine whether the statute at issue was clear or ambiguous using traditional statutory interpretation methods. If the statute was clear, courts need proceed no further in their review other than to determine whether the agency action conformed to the statute. If on the other hand the statute was ambiguous, or if the court determined that Congress left a gap in the statute or delegated an issue to an agency, the inquiry would proceed to the second step. Step-two of *Chevron* deference required the reviewing court to defer to the federal agency's interpretation as long as the interpretation was "reasonable."

## attorneys

Eric D. Engelman

Jonathan M. Turner

## practice areas

labor & employment

labor litigation & counseling

[msk.com](https://www.msk.com)

los angeles  
t 310.312.2000  
f 310.312.3100

new york  
t 212.509.3900  
f 212.509.7239

washington, dc  
t 202.355.7900  
f 202.355.7899



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In overruling *Chevron*, the Court held that the Administrative Procedure Act requires courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." Hence, courts should not defer to a federal agency's interpretation of a statute that is ambiguous or silent on the relevant issue. The Court rejected the argument that ambiguities in a statute are implicit delegations by Congress to federal agencies. The Court stated that an ambiguity or a gap in a statute could instead be the result of Congress's inability to answer a question or Congress's failure to even consider a question. As the Court explained, "a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with 'unexplained inconsistency' being 'at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious.'" Hence, instead of being a "reliable indicator of actual delegation of discretionary authority to agencies," *Chevron* deference "allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."

While the Supreme Court's decision in *Loper Bright* will have far-reaching effects in industries regulated by agencies such as the FDA or EPA, its impact on the NLRB remains to be seen. Still, because *Loper Bright* precludes reviewing courts from blindly deferring to agency action on matters involving statutory interpretation, that decision provides employers with a powerful tool to challenge some of the aggressive new policies from the NLRB's General Counsel and controversial NLRB decisions. As revealed in our prior blogs, many of these recent agency actions have reversed longstanding prior agency policies, rules and case precedents, and have left employers in a "fog of uncertainty" when attempting to evaluate whether their business activities are in compliance with the NLRA.

In *Jarkesy*, the Supreme Court held that the SEC's practice of imposing civil penalties in its administrative proceedings violates the Seventh Amendment right to a trial by jury because the agency's antifraud provisions replicate common law claims. Under the Court's holding, where a federal agency brings a claim that resembles a common law cause of action and seeks a remedy traditionally obtained in a court of law, the claim is subject to the Seventh Amendment's right to a trial by jury.

The right to a trial by jury does not apply to matters that were not cognizable at common law, or to equitable remedies imposed by an agency for purposes of restoring the status quo. There is also a further exception for matters implicating "public rights."

*Jarkesy* is unlikely to immediately alter the NLRB's traditional remedies when prosecuting unfair labor practice complaints under the NLRA (the remedies issued by the NLRB have historically been to return parties to the status quo, such as by ordering the reinstatement of workers or to provide back pay). However, *Jarkesy* will likely disrupt the NLRB's recent efforts to expand its available remedies. For example, the NLRB's 2022 decision in *Thryv, Inc.* ordered the employer to reimburse employees for all "direct or foreseeable harms" that resulted from its violation of the NLRA. On judicial review of *Thryv, Inc.* before the Fifth Circuit, the NLRB stated that it was not instituting a policy or practice of awarding consequential damages; even so, the Fifth Circuit expressed criticism of this remedy, characterizing it as "a novel, consequential-damages-like labor law remedy." The Fifth Circuit ultimately did not reach the issue of the propriety of consequential damages because it vacated the NLRB's



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underlying ruling on the merits.

The *Jarkesy* case is also going to play a crucial factor in an ongoing dispute concerning the structure of the NLRB. In 2022, eight former employees filed charges at the NLRB against SpaceX alleging that the employer committed unfair labor practices by terminating employees for engaging in activities protected by the NLRA. Immediately after the NLRB issued a formal complaint concerning the charges, SpaceX filed a suit in the Federal District Court for the Southern District of Texas claiming that the structure of the NLRB's administrative proceedings are unconstitutional. In support of this argument, SpaceX heavily relied on the Fifth Circuit's decision in *Jarkesy v. SEC*, 34 F.4<sup>th</sup> 446 (5th Cir. 2022) wherein the court held, among other things, that the SEC's administrative law judges ("ALJs") were "unconstitutionally insulated from removal." The Supreme Court later affirmed the Fifth Circuit's decision in the Court's June 27, 2024 *Jarkesy* opinion, *supra*. While the Supreme Court did not weigh in on the aspect of the Fifth Circuit's decision regarding unconstitutional protections given to the SEC's ALJs, it nevertheless affirmed the lower court's decision on other grounds, which included the argument that the SEC proceedings deprived the plaintiff of its constitutional right to a jury trial.

In reliance on the Fifth Circuit's decision in *Jarkesy*, SpaceX recently filed a brief with the Fifth Circuit in support of a preliminary injunction to advance the argument that, like the SEC's ALJs, the NLRB's ALJs are unconstitutionally protected from removal.

This ongoing dispute between SpaceX and the NLRB is certainly a case that employers may want to keep an eye on. If SpaceX is ultimately successful in its arguments, the NLRB will need to be completely overhauled, greatly diminishing the Board's power.