No. 24-50761

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMAZON.COM SERVICES LLC,
Plaintiff-Appellant,

vs.

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, GWYNNE A. WILCOX, and DAVID M. PROUTY, in their official capacities as Board Members of the National Labor Relations Board; MERRICK GARLAND,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas, No. 5:24-cv-01000, Hon. Xavier Rodriguez

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

No. 24-50761, Amazon.com v. NLRB

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 also have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. **The Chamber of Commerce of the United States of America** ("Chamber"), *Amicus Curiae*, represented by:

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2. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: October 16, 2024

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members are frequent respondents in administrative enforcement actions brought by the National Labor Relations Board ("NLRB" or the "Board"). The Chamber thus has a significant interest in ensuring that those proceedings respect the Constitution's structural limitations and submits this brief to explain why compelled adjudication in the NLRB's juryless tribunals violates the Seventh Amendment and would cause irreparable harm.

The Chamber has recently submitted numerous *amicus* briefs on matters at issue in this appeal. It submitted a brief explaining the original understanding of the

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Seventh Amendment and its application to administrative proceedings in *Jarkesy v. SEC*. *See Amici Curiae* Br. of Chamber of Com. of U.S. et al., No. 22-859 (U.S. Oct. 18, 2023), bit.ly/4d02CXE. It has submitted multiple briefs challenging the NLRB's overreach in making compensatory damages a standard remedy in unfair-labor-practice proceedings. *See Amici Curiae* Br. of Chamber of Com. of U.S. et al., *NLRB v. Starbucks Corp.*, Nos. 23-1953, 23-2241 (3d Cir. Dec. 8, 2023), bit.ly/4daEOQM ("Chamber *Starbucks* Br."); *Amicus Curiae* Br. of Chamber of Com. of U.S., *Thryv, Inc.*, Nos. 20-CA-250250, 20-CA-251105 (NLRB Jan. 10, 2022), bit.ly/3YcJeT4. And it has recently filed a brief in this Court challenging the NLRB's attempt to avoid the Seventh Amendment's protections. *See Amicus Curiae* Br. of Chamber of Com. of U.S., No. 24-40315, *Space Expl. Techs., Corp. v. NLRB* (5th Cir. July 24, 2024), bit.ly/487qg3h.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents yet another case of an administrative agency exceeding constitutional limits. The Framers recognized that "structural protections against abuse of power [are] critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). And key among those structural protections was the right to trial by jury. That "most excellent method of decision" had long been hailed as "the glory of the English law." 3 William Blackstone, *Commentaries on the Laws of England* *391 (1768). And, as the Supreme Court emphasized this past Term, the jury trial right "was prized by the American colonists" in both criminal and civil cases alike. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024).

The Seventh Amendment arose out of the English effort to "siphon[]" civil cases that had traditionally been tried before juries to "juryless admiralty" tribunals. *Id.* "[A]s tensions grew between the British Empire and its American Colonies, imperial authorities responded by stripping away that ancient right" on this side of the Atlantic. *Erlinger v. United States*, 144 S. Ct. 1840, 1848 (2024). In particular, the Crown expanded admiralty jurisdiction in the 1760s to enforce unpopular Acts of Parliament without the involvement of juries. And those juryless tribunals fueled the fires of revolution. The Declaration of Independence identified the deprivation of the jury right among its grievances against the Crown, and the Constitution secured that right in criminal cases. But the American people demanded more. They

were well-aware of British abuses of the common law right and so refused to tolerate the risk that the new federal government might similarly enforce its laws before juryless tribunals.

The founding generation thus quickly adopted the Seventh Amendment to "preserve[]" the civil jury trial right in "Suits at common law." U.S. Const. amend. VII. The people understood this language to "embrace[] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Jarkesy*, 144 S. Ct. at 2128 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830)). And, for centuries, the Seventh Amendment was lauded as a crucial bulwark against governmental abuses of power.

The growth of the administrative state has eroded that fundamental safeguard. And the recent practice of the NLRB provides a particularly egregious case in point. Without congressional authorization, and without juries to check its overreach, the NLRB has seized for itself the authority to issue "[m]ake-whole relief" that "compensates affected employees for all direct or foreseeable pecuniary harms that result" from allegedly unfair labor practices. *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951, at *14 (Dec. 13, 2022).

That contortion of the National Labor Relations Act ("NLRA") has constitutional consequences. The "compensatory damages" the NLRB seeks through in-house adjudication are "the classic form of *legal* relief." *Mertens v.*

Hewitt Assocs., 508 U.S. 248, 255 (1993) (some emphasis omitted); *see Jarkesy*, 144 S. Ct. at 2129. And its pursuit of such legal relief against Amazon is "all but dispositive" in finding a violation of the company's Seventh Amendment right here. *Jarkesy*, 144 S. Ct. at 2129. The "close relationship" between the claim in this case and traditional common law tort actions "confirms that conclusion." *Id.* at 2130.

At the same time, the Board cannot justify its constitutional deprivation by proclaiming that it is vindicating "public rights." As *Jarkesy* made clear, the "public rights" exception to the Seventh Amendment is narrow and inapplicable absent a specific showing that "'withdraw[al] from judicial cognizance'" has firm roots in "background legal principles." *Id.* at 2134 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)). The Board cannot point to any historical understanding that would support removing this garden-variety legal claim from the Article III courts—and the jury review that the Constitution requires.

Nor can the Board seriously argue that the district court lacks jurisdiction to hear Amazon's Seventh Amendment claim. Amazon will suffer a here-and-now injury if forced to endure an adjudication before a constitutionally illegitimate decisionmaker. The Seventh Amendment issue is wholly collateral to the subject of the NLRB's proceedings. And the Board has no special expertise in deciding this

constitutional question. Review is therefore warranted, and a preliminary injunction is necessary to prevent irreparable harm.

Accordingly, this Court should enjoin the NLRB's administrative proceeding against Amazon.

ARGUMENT

I. Compelled Adjudication in the NLRB's Juryless Administrative Tribunals Violates the Seventh Amendment.

"The right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Jarkesy*, 144 S. Ct. at 2128 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The NLRB's attempt to subject Amazon to a juryless, in-house adjudication is foreclosed by that history and precedent, and this Court should reject it.

A. The Right to a Civil Jury at Common Law Has Long Served as an Essential Check on Government Overreach.

The "modern model of trial by jury" developed in the English common law courts by the sixteenth century, where it was widely recognized as a crucial check against government abuses. James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* 3 (2006). As William Blackstone explained, the right to a jury trial ranked sacrosanct because a person's rights and property hinged

on "the unanimous consent of twelve of his neighbours and equals," not just the will of bureaucratic functionaries. 3 Blackstone, *Commentaries* at *379.

Like their British brethren, the American colonists viewed civil juries as essential to safeguard their fundamental rights. *See Jarkesy*, 144 S. at 2128. But as the Thirteen Colonies approached independence, Parliament responded to adverse verdicts by expanding the jurisdiction of the juryless admiralty courts to a range of cases traditionally tried in common law courts. *See* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 12–13, 63, 145–46, 206–08 (1960). Most notably, the Stamp Act of 1765 authorized the Crown to prosecute violations in juryless admiralty tribunals. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 150 (2014). And, "[j]ust as authorities hoped, the tactic proved 'most effective' at securing the verdicts they wished." *Erlinger*, 144 S. Ct. at 1848 (citation omitted); *see* 11 William Holdsworth, *A History of English Law* 110 (1938).

In response, the voters of Boston ranked "the Jurisdiction of the Admiralty"—along with taxation without representation—as their "greatest Grievance." 1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 177 (1986) (citation omitted); *see also Letter from John Adams to Ebenezer Thayer* (Sept. 24, 1765), bit.ly/3zl0Ezn. The Stamp Act Congress of 1765 similarly protested that, "by extending the jurisdiction of the courts of Admiralty beyond its ancient limits," the Stamp Act and similar acts "ha[d] a manifest tendency to subvert

the rights and liberties of the colonists." *Resolutions of the Stamp Act Congress* (Oct. 19, 1765), bit.ly/3YdhAFo. Both the First and Second Continental Congresses continued those protests, most famously in the Declaration of Independence, which identified "depriving [the colonists] in many cases, of the benefits of Trial by Jury," among its list of grievances against the King. *The Declaration of Independence* para. 20 (U.S. 1776); *see* 1 *Journals of the Continental Congress 1774–1789*, at 69 (Oct. 14, 1774); 2 *Journals of the Continental Congress 1774–1789*, at 145 (July 6, 1775).

"After securing their independence, the founding generation sought to ensure what happened before would not happen again." *Erlinger*, 144 S. Ct. at 1848. They quickly enshrined the jury trial right in criminal cases. *See* U.S. Const. art. III, § 2, cl. 3. But the Constitution's omission of the civil jury right proved a stumbling block for ratification. As Alexander Hamilton admitted, "[t]he objection to the plan of the convention" that was "met with [the] most success" was "that relative to the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).[2]

[2] Concern over the lack of civil jury protections rang loud in the Anti-Federalist charge. For instance, Luther Martin explained that jury trials had "long been considered the surest barrier against arbitrary power, and the palladium of liberty." Luther Martin, *Genuine Information* (1787), reprinted in 3 *The Records of the Federal Convention of 1787*, at 172, 221 (Max Farrand ed., 1911) (italics omitted). He thus faulted the proposed Constitution for stripping the citizenry of that right in cases "arising under the laws of the United States, or the execution of those laws," which were the "very cases, where, of all others, [the jury trial] is most essential for

To quell those concerns, the Framers "promptly adopted the Seventh Amendment" to secure the civil jury right for future generations "against the passing demands of expediency or convenience." *Jarkesy*, 144 S. Ct. at 2128 (quotation marks omitted). The Amendment prescribes 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." U.S. Const. amend. VII. And since its ratification, "every encroachment upon [the civil jury right] has been watched with great jealousy." *Jarkesy*, 144 S. Ct. at 2128 (quoting *Parsons*, 28 U.S. (3 Pet.) at 446).

B. *Jarkesy* Confirmed the Seventh Amendment's Reach.

Consistent with the Constitution's text and longstanding history, the Supreme Court and this Court recently reaffirmed the limits that the Seventh Amendment places on juryless administrative tribunals. In *Jarkesy v. SEC*, "[t]he SEC brought an enforcement action within the agency against [Jarkesy and his firm] for securities

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[the people's] liberty." *Id.* at 222 (italics omitted); *see also Cincinnatus II: To James Wilson, Esquire* (Nov. 8, 1787), bit.ly/3Glv74b (lamenting that "the trial by jury" had ostensibly been "taken away in civil cases"); *Essays by a Farmer, No. 4* (Mar. 21, 1788), reprinted in 5 *The Complete Anti-Federalist* 36, 38 (Herbert J. Storing ed., 1981) (describing "trial by jury" as "the democratic branch of the judiciary power—more necessary than representatives in the legislature" (emphasis omitted)); *A Democratic Federalist*, Pennsylvania Herald, Oct. 17, 1787, bit.ly/46idnBc (recognizing that the jury trial helped "shelter [the people] from the iron hand of arbitrary power"); *Letter from the Federal Farmer, No. 4* (Oct. 12, 1787), bit.ly/40rtjP0 (explaining that trial by jury helped ensure "that common people should have a part and share of influence, in the judicial as well as in the legislative department").

fraud" and ordered them to "pay a civil penalty of $300,000." 34 F.4th 446, 449–50 (5th Cir. 2022). The petitioners argued that this in-house proceeding deprived them of their civil jury rights, and this Court agreed. *See id.* at 449.

After recounting the history that led to the Seventh Amendment's ratification, this Court emphasized that the phrase "Suits at common law" "include[s] all actions akin to those brought at common law," as those actions were understood at the time of the Founding. *Id.* at 452. That is, the civil jury right extends to "suits brought under a statute as long as the suit seeks common-law-like legal remedies." *Id.*

This Court thus held that "[t]he Seventh Amendment guarantee[d] Petitioners a jury trial because the SEC's enforcement action [was] akin to traditional actions at law to which the jury-trial right attaches." *Id.* at 451. After all, "[f]raud prosecutions were regularly brought in English courts at common law." *Id.* at 453 (citing 3 Blackstone, *Commentaries* at *42). And, even more importantly, "actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims." *Id.* at 454 (citing *Tull v. United States*, 481 U.S. 412, 418–19 (1987)). Together, these historical considerations demonstrated that the petitioners "had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties." *Id.* at 457.

The Supreme Court affirmed, holding that the Seventh Amendment "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may

be the peculiar form which they may assume." *Jarkesy*, 144 S. Ct. at 2128 (alteration in original) (quoting *Parsons*, 28 U.S. (3 Pet.) at 447). The Court stressed that "whether [a] claim is statutory is immaterial" to the Seventh Amendment analysis. *Id.* Rather, "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" *Id.* (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). That squarely encompassed the SEC's securities fraud claim for civil penalties, and so the petitioners' Seventh Amendment rights barred the SEC's in-house adjudication. *See id.* at 2129–31.

C. The Seventh Amendment Prohibits the NLRB from Conducting this Proceeding in a Juryless Administrative Tribunal.

Just as the Seventh Amendment prohibited the SEC from imposing civil penalties on George Jarkesy and his firm in a juryless administrative tribunal, it prohibits the NLRB from ordering Amazon to pay compensatory damages in its in-house proceeding. That claim, too, is distinctly "legal in nature." *Jarkesy*, 144 S. Ct. at 2131 (citation omitted).

In determining whether a claim is legal in nature, courts must consider (1) the nature of the cause of action and (2) the nature of the remedy. *See id.* at 2129; *Granfinanciera*, 492 U.S. at 42; *Tull*, 481 U.S. at 417–418. Of these two, "the remedy [is] the 'more important' consideration." *Jarkesy*, 144 S. Ct. at 2129 (citation omitted). And, in this case, both factors point decidedly in favor of a jury trial right.

1. The Remedy Sought by the NLRB Is "All But Dispositive" of Amazon's Right to a Jury Trial.

As in *Jarkesy*, "the remedy is all but dispositive" of the Seventh Amendment inquiry here. 144 S. Ct. at 2129. As Amazon observes, the NLRB "seeks a broad array of compensatory damages." ECF 11-1 at 3. And such damages constitute the most "classic form of *legal* relief." *Mertens*, 508 U.S. at 255.

Indeed, the Board announced in *Thryv* that it will seek full compensatory damages "in all cases in which [its] standard remedy would include an order for make-whole relief." 2022 WL 17974951, at * 9. That is, the Board "shall expressly order that the respondent *compensate* affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice." *Id.* at *21 (emphasis added). The Board further specified that it was "standardizing this remedy in *all* cases . . . to provide meaningful, make-whole relief for losses incurred" from an employer's unlawful conduct and "to more fully effectuate the make-whole purposes of the [NLRA]." *Id.* at *10 (emphasis added; quotation marks omitted). The NLRB's complaint seeks precisely that sort of relief here again. *See* ECF 11-2 at 95–96.[3]

[3] The Board disclaims any "policy or practice of awarding consequential damages," *Thryv*, 2022 WL 17974951, at *14, but the compensatory damages it has made part of its standard remedy are indistinguishable in substance from consequential damages, *see Thryv, Inc. v. NLRB*, 102 F.4th 727, 737 (5th Cir. 2024) (noting that

As the Court noted in *Jarkesy*, however, such "money damages are the prototypical common law remedy." 144 S. Ct. at 2129. The Supreme Court has long "recognized the general rule that monetary relief is legal, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) (internal citation and quotation marks omitted).

For instance, in *Mertens*, a group of retirees sought lost pension benefits because the retirement plan's actuary had botched the calculations necessary for the plan's maintenance. *See* 508 U.S. at 250. The Court rejected the group's claim that the recovery of lost pension benefits was an equitable remedy, because "what petitioners in fact [sought was] nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of [an] alleged breach." *Id.* at 255 (emphasis omitted).

Similarly, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Court explained that "[j]ust compensation . . . differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, 'the question is what has the *owner lost*, not what has the taker gained.'" 526 U.S. 687, 710 (1999) (emphasis added) (citation omitted). Thus, when a developer sought

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the Board ordered "a novel, consequential-damages-like labor law remedy"); *see also* Chamber *Starbucks* Br., *supra*, at 23–30.

compensation for a regulatory taking, the Court reasoned that "just compensation is, like ordinary money damages, a compensatory remedy." *Id.* "The Court has recognized that compensation is a purpose traditionally associated with legal relief," which made clear that the suit "was an action at law" that required a jury. *Id.* at 710–11 (quotation marks omitted).

The Board's effort to award compensation for "losses," which were a "consequence of a respondent's unfair labor practice," thus clearly sounds in the common law. *Thryv*, 2022 WL 17974951, at *11. That policy of ordering compensation for losses incurred goes well beyond requiring "a defendant to return unjustly obtained funds," as might be available in equity. *Jarkesy*, 144 S. Ct. at 2129. It amounts to "[m]oney damages," which "are, of course, the classic form of *legal* relief." *Mertens*, 508 U.S. at 250.[4] Amazon is thus entitled to a jury trial for that claim.

[4] For this reason, the NLRB would be quite mistaken to suggest that it seeks to impose damages only that merely "restore the status quo." *See* NLRB Br. at 50, *Space Expl. Techs. Corp. v. NLRB*, No. 24-40315 (5th Cir. Sept. 16, 2024) (quoting *Jarkesy*, 144 S. Ct. at 2129). The NLRB seeks here an order that goes well beyond the return of property wrongfully withheld, and instead seeks to make employees "whole" for any and all losses, *i.e.*, compensatory damages. ECF 11-2 at 95. Moreover, to the extent the NLRB seeks additional, equitable remedies beyond compensatory damages, that does not deprive Amazon of its right to a jury trial with respect to facts relevant to the claims against it for legal relief. *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970). "[A] jury trial is required on the overlapping issues to preserve the Seventh Amendment right." *United States v. ERR, LLC*, 35 F.4th 405, 414 (5th Cir. 2022); *see Jarkesy*, 34 F.4th at 454–55.

2. The Nature of the Cause of Action Only Confirms that the Seventh Amendment Applies.

Although in this case, like *Jarkesy*, the Board's pursuit of a common law remedy is "all but dispositive," the "relationship between the causes of action in this case and common law [actions]" further supports the applicability of the Seventh Amendment, as "[b]oth target the same basic conduct." 144 S. Ct. at 2129–30. The Seventh Amendment "applies not only to common-law causes of action but also to statutory causes of action '*analogous* to common-law causes of action.'" *City of Monterey*, 526 U.S. at 708–09 (emphasis added) (quoting *Feltner*, 523 U.S. at 348); *see Tull*, 481 U.S. at 421.

Here, the NLRB's unfair labor practice claim is akin to a traditional tort cause of action. In *City of Monterey*, the claim at issue was a § 1983 action for just compensation following a regulatory taking. *See* 526 U.S. at 709–10. The Court explained that, "[j]ust as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law." *Id.* at 710; *see also id.* at 727 (Scalia, J., concurring in part) ("Like other tort causes of action, [§ 1983] is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations." (internal citation omitted)). That "compel[led] the conclusion that a suit for legal relief brought under the statute [was] an action at law." *Id.* at 710 (majority op.).

So too here. The NLRA creates an analogous scheme: "the statute merely defines a new legal duty, and," in the Board's view, authorizes the adjudicator "to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Specifically, the NLRA creates a duty for employers to refrain from interfering with or coercing employees exercising rights related to self-organizing, collective bargaining, or other concerted activities for mutual aid or protection. *See* 29 U.S.C. §§ 157, 158(a)(1). The Board may then order relief when the employer breaches that duty. *See id.* § 160(c). As such, "[a] damages action under the statute sounds basically in tort." *Curtis*, 415 U.S. at 195.

Applying this analysis, this Court recently held that the jury trial right attached to a statutory framework that provided a cause of action to recoup costs for pollution cleanup from the entity causing the pollution. *See* 33 U.S.C. § 2702(a). The Court determined that the government's action for recoupment was, "at its foundation, one for tort," because "[t]he statute first creates a legal duty and then provides a right of action to compensate the injured party for a breach of that duty." *United States v. ERR, LLC*, 35 F.4th 405, 411–12 (5th Cir. 2022). "And historically, tort claimants had two routes to sue a tortfeasor for monetary compensation"—through either a writ of trespass or quasi-contract. *Id.* "Both involved actions at law that were triable to juries." *Id.* at 411; *see also, e.g.*, *Lebow v. Am. Trans Air, Inc.*, 86 F.3d 661, 669 (7th Cir. 1996) (applying this analysis in the labor-relations context).

As a result, the "close relationship between" the NLRB's claim and traditional common law tort actions "confirms that this action is 'legal in nature.'" *Jarkesy*, 144 S. Ct. at 2131 (citation omitted). It follows that the Seventh Amendment applies.

II. The NLRB Cannot Rely on the Public Rights Exception Where Amazon's Private Rights Are at Stake.

The Board also attempts to avoid the Seventh Amendment by invoking the "public rights" exception, arguing that it "acts in the public interest" when it brings a statutory enforcement action. ECF 25 at 15 (citation omitted). Such reliance on the public rights exception is sorely misplaced.

Jarkesy once again removes any doubt. There, the Court held that the government "cannot 'conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal.'" *Jarkesy*, 144 S. Ct. at 2136 (alteration in original) (quoting *Granfinanciera*, 492 U.S. at 52). And that is true "[e]ven when an action 'originates in a newly fashioned regulatory scheme.'" *Id.* at 2135 (citation and brackets omitted). What matters "is the substance of the suit, not where it is brought, who brings it, or how it is labeled." *Id.* at 2136. Indeed, "[i]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory." *Id.* at 2132. The government can rebut that presumption only by pointing to firmly rooted "background legal principles" that justify a departure from the text of Article III and the Seventh Amendment. *Id.* at 2134; *see also id.* at 2147

(Gorsuch, J., concurring) ("[T]raditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree.").

The NLRB can point to no such history on its side. This case does not involve traditionally recognized public rights, such as the collection and disbursement of tax revenues from a customs agent, the granting of land patents, or immigration matters. *See id.* at 2132–33 (majority op.); *Murray's Lessee*, 59 U.S. (18 How.) at 281–85. Rather, the NLRB seeks to force Amazon to pay compensatory damages to other private parties. That "implicate[s] the core private right to property." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 204 (2023) (Thomas, J., concurring). And allowing the NLRB to adjudicate that classically private right in-house would be akin to reviving "the prerogative exercise of judicial power—the imposition of binding adjudication outside the courts"—which the Constitution's ratifying public viewed as a great affront to fundamental liberties. *See* Hamburger, *supra*, at 228. Amazon need not suffer the sort of juryless inquisitions of government bureaucrats that our forebearers fought a revolution to abolish. It instead "has the right to be tried by a jury of [its] peers before a neutral adjudicator" in federal court. *Jarkesy*, 144 S. Ct. at 2139.

The Board's reliance on *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), does not help it either. *See* ECF 25 at 15. For one thing, *Jones & Laughlin* held that an NLRB action was "not a suit at common law or in the nature of such a suit" simply because it was "a statutory proceeding." 301 U.S. at 48. The Supreme

Court has since "clarified," however, "that the Seventh Amendment *does* apply to novel statutory regimes, so long as the claims are akin to common law claims." *Jarkesy*, 144 S. Ct. at 2139 (emphasis added). As explained above, that is precisely the case here.

Moreover, the Board in *Jones & Laughlin* sought the limited remedies of reinstatement and associated backpay. *See* 301 U.S. at 47–48. But that is not what the Board is doing here. Under *Thryv*, the Board's "updated" approach imposes broader "[m]ake-whole relief" that "consistently compensates affected employees for all direct or foreseeable pecuniary harms that result from a respondent's unfair labor practice." 2022 WL 17974951, at *14. As the *Thryv* dissenters recognized, by "stray[ing] into [these] areas more akin to tort remedies," the majority ran "headlong into the Seventh Amendment's guarantee of the right to have such claims tried before a jury." *Id.* at *25, 27 (Kaplan and Ring, concurring in part and dissenting in part).

The Board's decision to adopt this novel remedy and impose it on employers in administrative proceedings, without the protections of an Article III court and an impartial jury, is especially concerning given the novel and aggressive positions it has taken in many recent adjudications. *See, e.g.*, U.S. Chamber of Commerce, *The Biden Administration's "Whole of Government" Approach to Promoting Labor Unions* 27–30 (2023), bit.ly/4d3RuZK. For example, the Board recently held that

facially neutral rules that an employee "could" reasonably interpret to restrict union activity—even if the rules do not restrict such activity—are "presumptively unlawful." *Stericycle, Inc.*, 372 NLRB No. 113, 2023 WL 4947792, at *15 (Aug. 2, 2023). In another case, the Board overruled precedent to broadly assert that offering routine confidentiality and non-disparagement provisions in a voluntary severance agreement inherently interferes with rights protected by the NLRA. *See McLaren Macomb*, 372 NLRB No. 58, 2023 WL 2158775, at *1 (Feb. 21, 2023); *cf. NLRB v. McLaren Macomb*, 2024 WL 4240545, at *7 (6th Cir. Sept. 19, 2024) (per curiam) (enforcing Board's finding as supported by substantial evidence even under prior precedent's view of the NLRA, without addressing Board's broader legal position). And in yet another case, the Board "exceeded the scope of [this Court's] remand" and "violated . . . due-process rights" by reaching out to overrule precedent that had better protected employers' rights to maintain harassment-free workplaces—without even "providing the company an opportunity to be heard on the issue." *Lion Elastomers, L.L.C. v. NLRB*, 108 F.4th 252, 260 (5th Cir. 2024); *see Lion Elastomers LLC*, 372 NLRB No. 83, 2023 WL 3173759, at *1, 11 (May 1, 2023). The Board's playbook of asserting new and unlawful interpretations of the NLRA in in-house adjudications, followed by an order requiring the employer to pay the employee compensatory damages for a violation, should be met with close constitutional scrutiny. The Seventh Amendment entitles Amazon to a jury trial in this case.

III. The District Court Has Jurisdiction to Address Amazon's Seventh Amendment Claim.

In an effort to avoid this Court's review of a patent constitutional violation, the Board argues that the district court lacks jurisdiction to address Amazon's Seventh Amendment claim prior to imposing damages. ECF 25 at 12. But Amazon's claim is clearly proper in the district court because the Board has determined to seek compensatory damages at the juryless hearing, and the Seventh Amendment claim is not "of the type Congress intended to be reviewed" first by the agency. *Axon*, 598 U.S. at 186 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)). Indeed, this case easily satisfies all "three *Thunder Basin* factors," which collectively demonstrate the propriety of immediate judicial review. *Id.* at 195.

First, there is no "meaningful judicial review" on the back end after the NLRB proceedings have concluded. *Id.* at 186 (citation omitted). After all, Amazon "protest[s] the 'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process." *Id.* at 192. That injury exists "irrespective of [the] outcome" in the NLRB's juryless tribunal. *Id.*

Second, Amazon's "constitutional challenge [is] 'collateral' to the subject of [the NLRB's] proceeding." *Id.* at 188. The Board contends otherwise, submitting that it is unknown whether it actually "will order the make-whole remedy requested" in its in-house proceeding. ECF 25 at 12. But even if that were true, it is irrelevant.

The second *Thunder Basin* factor is satisfied because nothing in the NLRB's review scheme "is intended to provide the sort of relief sought by the plaintiff" here—to receive a jury trial and avoid the Board's unconstitutionally structured proceeding. *Cochran v. SEC*, 20 F.4th 194, 207 (5th Cir. 2021) (en banc), *aff'd sub nom. Axon*, 598 U.S. 175.

At any rate, the Board's feigned agnosticism over damages is beside the point because the Board has committed itself to imposing make-whole relief in "all" cases. *Thryv*, 2022 WL 17974951, at * 9. And it has remained true to its word, consistently imposing *Thryv*-like compensatory damages in the cases before it.[5] It has also

[5] *See, e.g.*, *Atwell Hospitality, LLC*, 373 NLRB No. 127 (Sept. 30, 2024); *Harvard Maintenance, Inc.*, 373 NLRB No. 117 (Sept. 30, 2024); *Atomic Fire Protection, LLC*, 373 NLRB No. 109 (Sept. 30, 2024); *Falcon Trucking LLC*, 373 NLRB No. 124 (Sept. 30, 2024); *IAG Constr. Inc.*, 373 NLRB No. 116 (Sept. 27, 2024); *Adamas Bldg. Servs.*, 373 NLRB No. 119 (Sept. 27, 2024); *Hothead Grabba LLC*, 373 NLRB No. 118 (Sept. 27, 2024); *Ark Fabricators, Inc.*, 373 NLRB No. 103 (Sept. 26, 2024); *Valmar Masonry LLC*, 373 NLRB No. 112 (Sept. 25, 2024); *JMC Elec. Contractor, LLC*, 373 NLRB No. 113 (Sept. 25, 2024); *PG Pub. Co.*, 373 NLRB No. 93 (Sept. 20, 2024); *Airgas USA, LLC*, 373 NLRB No. 102 (Sept. 18, 2024); *Longmont United Hosp. & Centura Health*, 373 NLRB No. 97 (Sept. 18, 2024); *South Nassau Cmtys. Hosp.*, 373 NLRB No. 91 (Sept. 6, 2024); *Cal. Truck Driving Acad., LLC*, 373 NLRB No. 95 (Sept. 4, 2024); *Starbucks Corp.*, 373 NLRB No. 83 (Aug. 14, 2024); *Int'l Longshoremen's Ass'n, Local 1413 (Ports Am. Terminals, Inc.)*, 373 NLRB No. 79 (July 24, 2024); *Maverick Fulfillment, LLC*, 373 NLRB No. 57 (June 20, 2024); *Intertape Polymer Corp.*, 373 NLRB No. 68 (June 17, 2024); *RFO808, LLC*, 373 NLRB No. 60 (May 16, 2024); *Regional Ready Mix, LLC*, 373 NLRB No. 56 (May 14, 2024); *Radnet Mgmt. Inc.*, 373 NLRB No. 58 (May 10, 2024); *Dist. Hosp. Partners, L.P.*, 373 NLRB No. 55 (May 8, 2024); *Compañia Cervecera de P.R., Inc.*, 373 NLRB No. 47 (Apr. 30, 2024); *HSA Cleaning Inc.*, 373 NLRB No. 46 (Apr. 19, 2024); *Spike Enter., Inc.*, 373 NLRB No.

repeatedly overruled ALJ decisions to the extent that they failed to do the same. *See, e.g.*, *Trader Joe's*, 373 NLRB No. 73, 2024 WL 3358073, at *1 n.2 (July 9, 2024); *NP Red Rock LLC*, 373 NLRB No. 67, 2024 WL 3063775, at *11 (June 17, 2024). The Board therefore invariably seeks legal relief.

Finally, Amazon's Seventh Amendment claim "fall[s] outside the [NLRB's] sphere of expertise." *Axon*, 598 U.S. at 196. The Supreme Court has repeatedly observed that agencies "are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 593 U.S. 83, 92 (2021). And this case is no exception. Amazon's

41 (Apr. 10, 2024); *MPStar Pros., LLC*, 373 NLRB No. 42 (Apr. 2, 2024); *Flatline Constr., LLC*, 373 NLRB No. 35 (Mar. 13, 2024); *3484, Inc.*, 373 NLRB No. 28 (Mar. 7, 2024); *Atl. Veal & Lamb, LLC*, 373 NLRB No. 19 (Feb. 22, 2024); *North Mtn. Foothills Apts., LLC*, 373 NLRB No. 26 (Feb. 21, 2024); *Home Depot USA, Inc.*, 373 NLRB No. 25 (Feb. 21, 2024); *Int'l Longshoremen's Ass'n, Local 1526 (Fla. Int'l Terminal, LLC*), 373 NLRB No. 22 (Feb. 14, 2024); *Vesta VFO, LLC*, 373 NLRB No. 10 (Jan. 10, 2024); *Twinbrook OpCo, LLC*, 373 NLRB No. 6 (Dec. 28, 2023); *East Freight Logistics, LLC*, 373 NLRB No. 7 (Dec. 22, 2023); *Phillips 66 Co.*, 373 NLRB No. 1 (Dec. 6, 2023); *Int'l Longshoremen's Ass'n, Local 1294 (Fed. Marine Terminals, Inc.)*, 372 NLRB No. 160 (Dec. 6, 2023); *United Parcel Serv., Inc.*, 372 NLRB No. 158 (Nov. 21, 2023); *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 157 (Nov. 13, 2023); *Maywood SNF Operations LLC*, 372 NLRB No. 152 (Oct. 13, 2023); *Integrity Def. Servs., Inc.*, 372 NLRB No. 151 (Sept. 30, 2023); *Metrohealth, Inc.*, 372 NLRB No. 149 (Sept. 30, 2023); *Instituto de Educacion Popular del Sur de Cal.*, 372 NLRB No. 146 (Sept. 28, 2023); *Solution One Indus., Inc.*, 372 NLRB No. 141 (Sept. 22, 2023); *Success Village Apts, Inc.*, 372 NLRB No. 140 (Sept. 19, 2023); *Wendt Corp.*, 372 NLRB No. 135 (Aug. 26, 2023); *Tecnocap LLC*, 372 NLRB No. 136 (Aug. 26, 2023).

claim raises questions of "constitutional law" that are "detached from considerations of agency policy." *Axon*, 598 U.S. at 194 (quotation marks omitted).

"All three *Thunder Basin* factors thus point in the same direction—toward allowing district court review" of Amazon's claim that the NLRB's juryless adjudication "violates the Constitution." *Id.* at 195.

IV. The Deprivation of Seventh Amendment Rights Constitutes Irreparable Harm.

The district court also concluded that there was no "substantial threat of irreparable harm" because Amazon could challenge the Board's imposition of legal relief in the court of appeals. Dist. Ct. Dkt. 34 at 13. But the irreparable harm at issue here is not the imposition of legal relief; it is the imposition of legal relief *without a jury*. In other words, Amazon challenges its subjection to an unconstitutional adjudication in the first instance. This Court has made clear that "subjecting [a party] to costly and dubiously authorized administrative adjudications amounts to irreparable harm." *Career Colls. & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 238 (5th Cir. 2024). And that is because such an injury "is impossible to remedy once the proceeding is over, which is when appellate review kicks in." *Axon*, 598 U.S. at 191.

That is particularly true for Seventh Amendment violations. Indeed, courts have a "responsibility" to grant the drastic remedy of "mandamus where necessary to protect the constitutional right to trial by jury." *Dairy Queen, Inc. v. Wood*, 369

U.S. 469, 472 (1962). And, to issue such a writ, "there must be no other adequate means to obtain the relief desired." *In re Jefferson Parish*, 81 F.4th 403, 416 (5th Cir. 2023). In that way, the "mandamus analysis" is "similar to an irreparable-injury analysis." *Id.* This confirms that the deprivation of a jury trial right constitutes irreparable harm. And there is no basis in equity to require Amazon to proceed through a juryless administrative tribunal before affording it a chance to vindicate its Seventh Amendment rights. Regardless of the result, a juryless "proceeding that has already happened cannot be undone." *Axon*, 598 U.S. at 191. Nor is there any mechanism to compensate Amazon for having to endure such an unconstitutional process after it concludes. An injunction is therefore necessary to provide Amazon meaningful relief.

CONCLUSION

"Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Int'l Union, United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 643 (1958). *See generally* Chamber *Starbucks* Br., *supra*. Yet by trying to expand its statutory authority to impose such relief, the Board has ventured straight into a constitutional trap. Amazon has a Seventh Amendment right to a jury trial, and this Court should enjoin the NLRB's unconstitutional in-house proceeding.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2024, I caused the foregoing *amicus curiae* brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit. The Court's CM/ECF system was used to file the brief, and service will therefore be accomplished by the CM/ECF system on all CM/ECF-registered counsel.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,417 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-pt font.

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