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COMMENTARY

*Corporate Copy-Cats: A Recent Trend of Corporate Challenges
Against the Constitutionality of the National Labor Relations Board*

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Imagine a world where massive corporations have the power to destroy the same federal agencies that investigate their contentious behavior. Or at the very least, imagine a world where corporations can delay oversight proceedings by threatening to do the same. The National Labor Relations Board (“Board”) is facing these potential realities in a stunning, rapid frequency. The Board has acted since 1935, but now faces allegations of structural unconstitutionality from Amazon, SpaceX, and Trader Joe’s, among other complaints about the unconstitutionality of some specific Board practices. Nevertheless, amidst a popular, but thus far unsuccessful, corporate movement of challenging federal agencies, the Board’s fate is not yet sealed.

The Board operates to enforce the National Labor Relations Act of 1935 to protect fair labor practices in the United States.¹ The Board operates within three segmented functions. Administrative judges oversee alleged labor right violations, the prosecutorial board acts once violations have been identified, and another board hears appeals on the administrative judges’ determinations.² Corporations are now challenging that structure, in addition to litigation practices of the Board.

After eighty-eight years of investigations, the Board is facing multiple allegations of structural unconstitutionality in quick succession.³ Skeptics are unconvinced that these allegations are anything more than a litigation strategy, but recent events suggest that they will only become more common until a determination is made.

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¹ *Introduction to the NLRB*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> (last visited Feb. 21, 2024).

² Noam Scheiber, *Amazon Argues Labor Board Is Unconstitutional*, N.Y. TIMES (Feb. 15, 2024), <https://www.nytimes.com/2024/02/15/business/economy/amazon-labor-nlr.html>.

³ *Id.*

In January of 2024, SpaceX was the first of three major corporations to allege the unconstitutionality of the Board.⁴ Notably, the chief executive of SpaceX, Elon Musk, has faced the Board in many instances for labor claims arising from both his own actions and the actions of multiple companies under his ownership.⁵ In this instance, eight SpaceX employees were fired after an internal letter criticizing Musk was circulated, in what the Board describes as retaliatory action.⁶ After the Board sought prosecution of this act, SpaceX returned suit, alleging that the Board's claim should be dismissed due to the Board's unconstitutional structure.⁷ Currently, the Board trial regarding the eight employees who were fired by SpaceX is still set for March despite the subsequent lawsuit.⁸

Mere weeks after the SpaceX filing, Trader Joe's made arguments against the constitutionality of the Board at a hearing.⁹ In its defense against union busting allegations, the company introduced a new argument that the structure of the Board is unconstitutional.¹⁰ This argument closely followed the arguments made by SpaceX on January 4, signaling a potential wave of copy-cat defenses.¹¹

Following SpaceX and Trader Joe's, Amazon was the third large company to make these allegations publicly in two months.¹² Amazon's labor practices have been called into question many times in the three decades following its founding. A search of the Board's index indicates that 593 cases have been opened against Amazon, in its many forms, although many have been withdrawn or dismissed.¹³ Thirty-three of the Board's cases against Amazon are from the first seven weeks of 2024.¹⁴ In one recent filing, Amazon's attorneys decided to change their defense strategy. The Board's prosecutors alleged that Amazon retaliated by firing employees of a Staten Island warehouse as a retaliatory measure.¹⁵ Amazon's response filing not only denied any legal wrongdoing, but also argued that "the structure of the [Board] violates the separation of powers."¹⁶ In addition to the structural argument relating to Article II of the United States Constitution, Amazon's

⁴ *Id.*

⁵ Loren Grush & Josh Eidelson, *SpaceX Sues US Labor Board over Fired Employees Case*, BLOOMBERG (Jan. 4, 2024), <https://www.bloomberg.com/news/articles/2024-01-04/spacex-sues-us-labor-board-over-fired-employees-case>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Scheiber, *supra* note 2.

¹⁰ Josh Eidelson, *Trader Joe's Follows SpaceX in Arguing US Labor Board Is Unconstitutional*, BLOOMBERG (Jan. 26, 2024), <https://www.bloomberg.com/news/articles/2024-01-26/trader-joe-s-follows-spacex-in-arguing-nlrb-is-unconstitutional>.

¹¹ *Id.*

¹² Scheiber, *supra* note 2.

¹³ *Case Search*, NAT'L LAB. RELS. BD., <https://www.nlrb.gov/search/case/Amazon> (last visited Feb. 21, 2024).

¹⁴ *Id.*

¹⁵ Scheiber, *supra* note 2.

¹⁶ *Id.*

filing also alleged that the Board violates Article I and III of the United States Constitution and the Fifth and Seventh Amendments.¹⁷

Due to the recent nature of these filings, there has not been a new determination regarding the constitutionality of the Board's structure. Similarly, none of the proceedings in which these allegations were put forth have been delayed or stopped until such a determination is made.

Still, the Board's attorneys must be exhausted, because in addition to defending the agency as a whole, they are also facing legal challenges regarding the constitutionality of certain litigation practices. The prosecutors had asked a judge to require that Starbucks reinstate employees who had been fired in 2022, allegedly as retaliation to union formation, as temporary relief during the course of litigation.¹⁸ That request was granted.¹⁹ Now, Starbucks is challenging the injunctive relief requested by the Board claiming abuse of the process, despite a statistical decrease in similar requests in recent years.²⁰

In the same month as the SpaceX and Trader Joe's allegations, the Supreme Court agreed to hear Starbucks' challenge on the rights of the Board to request an injunctive remedy to reinstate fired employees.²¹ The outcome of this Supreme Court case is expected to have significant impacts on union organization.²² However, where the other companies are challenging a broader sense of the constitutionality of the Board, Starbucks is only challenging one tool of temporary relief that the prosecutors use during litigation.²³

The Board is hardly the first agency to have its constitutionality challenged. In recent years, there have been various claims that federal agencies or their practices are unconstitutional. Simultaneously, the Supreme Court is revisiting the landmark federal agency case, *Chevron*, after years of slowly limiting the doctrine's reach.²⁴ If the *Chevron* doctrine is abandoned by the Supreme Court, a massive influx of agency-challenging cases will enter the justice system.²⁵ Already, some agencies will face the Supreme Court this season, just as the Board will.

In fact, some of the same key players challenging the Board are also challenging other agencies' actions. There are claims that Elon Musk is funding the pursuits of a hedge-fund manager, George Jarksey, to challenge the litigation practices of the Securities and

¹⁷ *Id.*

¹⁸ Noam Scheiber, *Supreme Court to Hear Starbucks Bid to Overturn Labor Ruling*, N.Y. TIMES (Jan. 12, 2024), <https://www.nytimes.com/2024/01/12/business/economy/supreme-court-starbucks-labor-nlr.html>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Suzanne Monyak, *Judiciary Braces for Case Spike if Supreme Court Guts Chevron*, BLOOMBERG L. (Feb. 13, 2024), <https://news.bloomberglaw.com/us-law-week/judiciary-braces-for-case-spike-if-supreme-court-guts-chevron>.

²⁵ *Id.*

Exchange Commission (“SEC”).²⁶ Jarksey takes issue with the evidentiary and procedural practices of SEC hearings and lower federal courts were unable to make consistent findings. As a result, the Supreme Court will determine if SEC defendants have the right to a federal jury this season in *Securities and Exchange Commission v. George R. Jarksey, Jr. and Patriot28, LLC*, 22-859.²⁷

Other agencies face more significant legal challenges this season, with some claims being so serious that the Supreme Court decisions will determine the agency’s continuation. The Consumer Financial Protection Bureau is currently facing constitutional challenges based on its funding structure.²⁸ If five members of the Supreme Court agree with the Fifth Circuit this season, the Consumer Financial Protection Bureau will be shut down.²⁹ However, due to fairly clear precedent and evident court politics, such a result is unlikely.³⁰

The challenges against the constitutionality of the Securities Exchange Commission and the Consumer Financial Protection Bureau provide context to the challenges against the Board, because they are proof that such challenges are more interesting and dramatic than they are rare. Moreover, the Consumer Financial Protection Bureau case provides a procedural preview as to what will happen if the challenges against the Board make it to the Supreme Court.

Looking toward the assertions of unconstitutionality made by Amazon, SpaceX, and Trader Joe’s against the Board, there is no clear ending in sight. Proponents of the Board maintain that its “constitutionality ... was settled nearly 90 years ago by the Supreme Court.”³¹ However, it appears that corporate defenders believe they have enough of a case to present it to court, and they have not yet been laughed out. The root of these corporate complaints largely stems from concerns that the Board operates by accusing, investigating, judging, and punishing corporations without proper checks or balances, thus violating principles of separation and infringing on executive powers. The full merits of these claims have yet to be explored.

Ultimately, the determinations made in these next few years may significantly change the practices of the National Labor Relations Board and other agencies. Even if these corporate allegations of unconstitutionality hold little weight, they may become more popular as copy-cat corporations realize the utility of threatening the existence of their

²⁶ Greg Stohr, *Elon Musk and Mark Cuban Are Backing the Crusade by an ‘Evasive’ Hedge-Fund Manager to Strip the SEC of Its In-House Judges*, FORTUNE (Nov. 28, 2023), <https://fortune.com/2023/11/28/elon-musk-mark-cuban-sec-judges-hedge-fund-manager-george-jarksey-lawsuit/>.

²⁷ *Id.*

²⁸ Ian Millhiser, *The Supreme Court Will Decide if a Whole Federal Agency Is Unconstitutional*, VOX (Feb. 27, 2023), <https://www.vox.com/politics/2023/2/27/23613506/supreme-court-federal-agency-unconstitutional-cfpb-consumer-protection>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Scheiber, *supra* note 2.

overseers until the first arguments fail. Given the lengthy process of litigation in the United States, such copy-cat behavior could burden the courts for a while.