No. 23-367

In the Supreme Court of the United States

STARBUCKS CORPORATION,

Petitioner,

v.

M. KATHLEEN MCKINNEY, REGIONAL DIRECTOR OF REGION 15 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, HR POLICY ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the National Labor Relations Act, the National Labor Relations Board (NLRB) issues, prosecutes, and adjudicates complaints alleging that employers committed unfair labor practices. 29 U.S.C. § 160(b). Section 10(j) of the Act authorizes federal district courts, while the NLRB adjudication remains pending, to grant preliminary injunctive relief at the NLRB's request "as [the court] deems just and proper." 29 U.S.C. § 160(j).

The question presented, on which the courts of appeals are openly and squarely divided, is:

Whether courts must evaluate the NLRB's requests for Section 10(j) injunctions under the traditional, stringent four-factor test for preliminary injunctions or under some other more lenient standard.

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INTEREST OF *AMICI CURIAE*[1]

Amici respectfully ask the Court to reverse the Sixth Circuit's erroneous decision and clarify that, to receive an injunction under Section 10(j) of the National Labor Relations Act (NLRA), the NLRB must satisfy the traditional, stringent four-factor test for preliminary injunctive relief.

The Coalition for a Democratic Workplace (CDW) is composed of hundreds of organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW's members are joined by their mutual concern over regulatory overreach by the NLRB that threatens employees, employers, and economic growth.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 23,000 member companies. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors.

The HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of nearly 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more

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[1] Counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

than 10 million employees in the United States—nearly 9 percent of the private sector workforce.

National Association of Wholesaler-Distributors (NAW) is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers, as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of national, regional, state, and local associations, which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. The wholesale distribution industry generates more than $8.2 trillion in annual sales volume and provides stable and well-paying jobs to more than 6 million workers.

The National Retail Federation (NRF) represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers. It is the world's largest retail trade association, and retail is the nation's largest private-sector employer. The retail industry supports one in four U.S. jobs, or 52 million American workers, and contributes $3.9 trillion per year to the national Gross Domestic Product.

The Sixth Circuit's decision to allow the extraordinary remedy of Section 10(j) injunctive relief to issue without requiring the NLRB to demonstrate a likelihood of success on the merits of the underlying

dispute or otherwise satisfy the traditional, equitable criteria for preliminary relief, encourages overreach by the NLRB. *Amici* are uniquely situated to highlight, as they do in this brief, how the Sixth Circuit's deferential standard enables the NLRB to seek and obtain broad, long-lasting "temporary" injunctions that can have significant adverse impacts on employers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The four-factor test a plaintiff must satisfy to obtain a preliminary injunction is well-established. Chief among those four factors is that the plaintiff must demonstrate a likelihood of success on the merits. This likelihood-of-success requirement is critical. The preliminary injunction is a drastic remedy that affords relief to one party before it ever proves its case and before its adversary has the opportunity to mount and present its defense that basic principles of due process demand. Requiring a plaintiff to demonstrate a likelihood of ultimate success on the merits ensures that such extraordinary relief is preserved for extraordinary cases.

Preliminary injunctions are extraordinary even in the typical civil action. This case is about an especially extraordinary type of preliminary injunction—one issued pursuant to Section 10(j) of the NLRA. Section 10(j) exists to provide preliminary relief before the merits of the case are litigated through the NLRB's administrative process. Only the NLRB can seek a Section 10(j) injunction.

When evaluating the NLRB's requests for Section 10(j) injunctions, four courts of appeals (the Fourth, Seventh, Eighth, and Ninth Circuits) rightly apply the same four-factor test that applies to every other request for preliminary equitable relief. But other courts of appeals (the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits) apply a too-lenient standard that does not evaluate the NLRB's likelihood of success on the merits or the other traditional equitable factors. These courts of appeals demand

only that the NLRB's legal theories be "coherent" and "substantial" in the sense that they are "not frivolous." If these minimal hurdles are cleared, these courts defer to the NLRB's legal theory based on a limited evidentiary presentation. As a result, the strength (or lack thereof) of the NLRB's case on the merits rarely impedes the agency's ability to obtain Section 10(j) injunctions in the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits.

The deferential standard applied by these courts has significant impacts on employers across industries. The resulting injunctions can affect a range of business activity—from employment of particular workers, to closing or relocating facilities, to selling financially draining assets. *Amici* therefore respectfully request that the Court reverse the Sixth Circuit's decision and clarify that the four-factor test for preliminary injunctive relief applies to Section 10(j) injunctions.

ARGUMENT

I. The standards applied by the majority of the courts of appeals are not the correct standard for the NLRB to obtain a Section 10(j) injunction.

A. The traditional, four-factor test—and in particular, the likelihood-of-success factor—reserves preliminary relief for extraordinary cases.

"It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course, or to restrain an act the injurious consequences of which are merely trifling." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (cleaned up). Preliminary injunctions, in particular, are "extraordinary and drastic" and are "never awarded as of right." *Munaf* v. *Geren*, 553 U.S. 674, 689–90 (2008) (cleaned up).

Courts may exercise their discretion to issue such extraordinary and drastic relief only when a plaintiff satisfies the well-established four-factor test: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). These same, generally applicable principles of equity govern requests for other forms of preliminary or temporary relief. See, *e.g.*, *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (stay pending appeal). For, as this Court has explained, "a major departure from the long tradition of equity practice should not be lightly

implied." *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006) (cleaned up).

The four-factor test ensures that preliminary injunctions do not become ordinary. All four factors must be considered and, on balance, found to favor the plaintiff before a preliminary injunction may issue. See *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1943–44 (2018) ("As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits."); *Munaf*, 553 U.S. at 690 (preliminary injunction improper where the opinions below lacked "any mention of a likelihood of success as to the merits"). This Court has described the first two factors—likelihood of success and irreparable harm—as "the most critical." *Nken*, 556 U.S. at 434.

The likelihood-of-success factor is especially important "because the need for the court to act is, at least in part, a function of the validity of the applicant's claim." 11A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 2948.3 (3d ed.). "It is not enough that the chance of success on the merits be better than negligible" or "a mere possibility." *Nken*, 556 U.S. at 434 (cleaned up). The party seeking a preliminary injunction—relief *before* the party has proved its claim and *before* its adversary has been given a full and fair opportunity to present its defense—must at least make out a convincing prima facie case based on compelling facts and well-established legal principles. See *Gonzales* v. *O Central Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). Otherwise, "preliminary injunctions

would be the rule, not the exception." *Munaf*, 553 U.S. at 690.

B. Congress intended Section 10(j) injunctions to be at least as—if not more—extraordinary than other preliminary injunctions.

The injunctions contemplated by Section 10(j) of the NLRA are a form of preliminary or temporary injunction. Indeed, the evolution of U.S. labor law shows that Congress intended the Section 10(j) injunction to be a super-extraordinary remedy—an extraordinary form of the already extraordinary remedy of a preliminary or temporary injunction.

Courts issued injunctions in labor disputes long before Congress enacted Section 10(j) or the NLRA itself. The equitable remedy was first granted in labor suits by the English Court of Chancery and, by the 1880s, was adopted in American courts of equity. See *Truax* v. *Corrigan*, 257 U.S. 312, 366 (1921) (Brandeis, J., dissenting) (citing *Springhead Spinning Co.* v. *Riley*, L. R. Eq. 551 (1868); *Sherry* v. *Perkins*, 17 N.E. 307 (Mass. 1888); JOHN R. COMMON, ET AL., HISTORY OF LABOUR IN THE UNITED STATES, Vol. 2, pp. 504–05 (1918) (collecting cases)).

For decades before the establishment of a federal labor law, courts' ability to issue injunctions in labor disputes was contentious. Injunction opponents introduced bills to legally limit the courts' equitable power. *Id.* at 369. Some focused on rights, and others on remedy. "[S]ome undertook practically to abolish the use of the injunction in labor disputes, while some merely limited its use either by prohibiting its issue

under certain conditions or by denying power to restrain certain acts." *Ibid.*

After limiting courts' ability to issue injunctions in a subset of labor disputes through the Clayton Antitrust Act of 1914, 29 U.S.C. § 52, Congress enacted the Norris-La Guardia Act of 1932, which, except under specific circumstances, stripped district courts of jurisdiction to "issue *any* restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute," 29 U.S.C. § 101 (emphasis added). See *United States* v. *Hutcheson*, 312 U.S. 219, 229–31 (1941). This Court has interpreted the Norris-La Guardia Act's anti-injunction provision broadly, "recognizing exceptions only in limited situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Jacksonville Bulk Terminals, Inc.* v. *Int'l Longshoremen's Ass'n*, 457 U.S. 702, 708 (1982).

Congress carved out a specific and limited exception to the Norris-La Guardia Act when courts grant injunctive relief pursuant to Section 10 of the NLRA. See 29 U.S.C. § 160(h). But this exception must be understood in the context of the jurisprudence which predated the Norris-La Guardia Act.

Section 10(j) provides that, when the NLRB seeks injunctive relief related to an alleged unfair labor practice, a district court "shall have jurisdiction to grant to the Board such relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j). By instructing courts to apply the equitable "just and proper" standard, Congress indicated its return to the

traditional principles that preceded the Norris-La Guardia Act. See Pet'r's Br. 23 ("'Just' means 'righteous' and 'equitable.' And 'proper' means 'appropriate,' 'suitable,' or 'right.'" In sum, 'just and proper' is another way of saying 'appropriate' or 'equitable.'" (cleaned up)).

Through Section 10(j), courts are intended to play an important, but limited, role in labor litigation today. The NLRB adjudicates unfair labor practice charges through its own administrative procedures. See 29 U.S.C. § 160(a)–(d). However, even when those administrative procedures yield a final decision, the NLRB's order is without effect unless and until the NLRB successfully petitions to enforce it. 29 U.S.C. § 160(e). Because the administrative process can take months or years to complete, Congress created a special proceeding to permit the NLRB to petition for "appropriate temporary relief or restraining order," 29 U.S.C. § 160(j), just as parties to a civil action may seek appropriate temporary relief or restraining order, see Fed. R. Civ. P. 65. By invoking traditional equitable principles through the "just and proper" standard, Congress indicated that this "temporary relief or restraining order" is a form of preliminary or temporary injunctive relief. Cf. *Silverman* v. *MLB Players Rels. Comm.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) (Sotomayor, J.) ("Provision 10(j) of the Act authorizes district courts to grant temporary injunctions pending the outcome of unfair labor practice proceedings before the Board."). The Section 10(j) injunction therefore should be subject to the same standard as any other preliminary injunction.

C. The two-prong standard makes Section 10(j) injunctions easier to obtain than other preliminary injunctions.

Whereas the Fourth, Seventh, Eighth, and Ninth Circuits correctly evaluate Section 10(j) preliminary injunctions under the same four-factor test that governs other preliminary injunctions—requiring the NLRB to show (among other things) a likelihood of success on the merits[2]—several circuits apply a more lenient, two-prong standard that is patently inconsistent with congressional intent.

The Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits permit Section 10(j) injunctions to be issued without evaluating the NLRB's likelihood of success on the merits. These courts of appeals instead require a minimal showing of "reasonable cause" to believe that the alleged unfair labor practice occurred—a low standard that often can and will be satisfied by excessive deference to the NLRB's allegations and legal theories alone.

- The Second Circuit holds that district courts "must give considerable deference to the Board or Regional Director when making a determination of

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[2] See, *e.g.*, *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009); *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001); *McKinney* v. *S. Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015); *Hooks* v. *Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022). The First Circuit also applies the traditional four-factor test, requiring the NLRB to satisfy that test in addition to showing there is reasonable cause to believe an unfair labor practice occurred. *Rivera-Vega* v. *ConAgra, Inc.*, 70 F.3d 153, 158, 164 (1st Cir. 1995).

reasonable cause." *Hoffman* v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360, 370 (2d Cir. 2001).

- The Third Circuit requires that the agency's legal theory be merely "substantial and not frivolous." *Chester* v. *Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011) (cleaned up).
- The Fifth Circuit instructs district courts that they "need only decide that the Board's theories of law and fact are not insubstantial or frivolous." *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975).
- The Sixth Circuit demands only that the Board have a "not frivolous" legal theory. *Gottfried* v. *Frankel*, 818 F.2d 485, 493 (6th Cir. 1987).
- The Tenth Circuit requires "deference to the Board" and that the evidence be viewed "in the light most favorable to the Board." *Sharp* v. *Webco Indus., Inc.*, 225 F.3d 1130, 1134–36 (10th Cir. 2000) (cleaned up).
- The Eleventh Circuit requires only that the NLRB's legal theory be "coherent." *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992).

Contrast that with the likelihood-of-success burden imposed on any other litigant seeking extraordinary, preliminary relief. Demonstrating "a mere possibility" of success would not suffice for any other litigant. *Nken*, 556 U.S. at 434. Yet, the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits *defer* to the NLRB's legal theories, so long as they pass the exceedingly low bars of "coherent" and "not frivolous."

These courts also lower the bar for injunctive relief under the "just and proper" prong of the Section 10(j) standard. They do not adhere to the traditional equitable factors of irreparable harm, balance of the equities, and the public interest. Instead, these courts focus on the effectiveness of the NLRB's remedial authority. See, *e.g.*, *Arlook*, 952 F.2d at 374 (reversing district court's denial of injunctive relief, finding that Section 10(j) relief "would have been much more effective than waiting for a final Board order").

The less-demanding burden these courts of appeals afford the NLRB is irreconcilable with the fact that preliminary injunctions, like Section 10(j) injunctions, are supposed to be extraordinary, see, *e.g.*, *Winter*, 555 U.S. at 24, and with Congress's manifest reluctance to vest the courts with jurisdiction to issue injunctive relief in labor disputes.

II. Requests for Section 10(j) injunctions should be governed by a standard at least as demanding as the four-factor test that applies to all other requests for preliminary relief.

A. Section 10(j)'s unique context makes a district court's searching review even more necessary.

The deferential two-prong standard is an inappropriately low hurdle. The NLRB can clear it without establishing the normal requirements for preliminary injunctive relief, which makes it easier for the NLRB to obtain a Section 10(j) injunction than

for another litigant to obtain analogous injunctive relief. For at least two reasons, it should be as difficult—if not more difficult—for the NLRB to receive a Section 10(j) injunction.

First, once a Section 10(j) injunction is issued, a district court relinquishes control over the litigation on the merits. The NLRB's administrative litigation process determines the pace and the outcome of the litigation on the merits, while the Section 10(j) injunction remains in place.

Section 10(j) permits the NLRB to seek a preliminary injunction early in the administrative litigation process, after a complaint has been issued. 29 U.S.C. § 160(j) ("The Board shall have the power, upon issuance of a complaint…."). Issuance of a complaint signifies only that the NLRB's prosecuting attorneys believe they have sufficient evidence and a viable legal theory to prosecute the employer. There is no hearing to determine whether the evidence is credible or sufficient to support the allegations of the complaint. Witnesses are not identified to the employer; their testimony is treated as a closely guarded secret. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

After the complaint is issued, the case is litigated before an administrative law judge (ALJ) employed by the NLRB, who issues a recommended decision and order. 29 U.S.C. § 160(c). But the NLRB can, and typically does, seek a Section 10(j) injunction before the evidence is heard by an ALJ. Thus, when the NLRB petitions a district court for a Section 10(j) injunction, there typically has been no opportunity for the employer to engage in any discovery or even know

the identity of the witnesses that the NLRB is relying upon to prosecute the complaint.

If the district court grants the Section 10(j) injunction, it remains in place while the case is heard on the merits by the ALJ. But the ALJ's decision is not a final agency action; it is subject to review by a panel of NLRB members if any party files exceptions to the ALJ's decision. 29 U.S.C. § 160(c). The NLRB may then petition a circuit court to enforce its decision under a deferential "substantial evidence" review. 29 U.S.C. § 160(e).

The district court never has jurisdiction to hear the case on the merits. The district court's role is limited to determining whether Section 10(j) relief should be granted while the case is litigated before the NLRB. This is significantly different than the role of a district court in ordinary litigation. When a plaintiff in a typical civil action seeks a preliminary injunction, the relief sought is just that—preliminary. A preliminary injunction is not the district court's final say on the matter. Rather, the court retains control over the litigation on the merits. See *eBay*, 547 U.S. at 391–92.

Because the NLRB, not the district court, controls the litigation on the merits after a Section 10(j) injunction is issued, courts should apply at least the same standard of review before issuing a Section 10(j) injunction. It is the district court's *only* opportunity to assess the merits of the case.

Second, because Section 10(j) injunctions last for the duration of the NLRB's administrative proceedings, they are only as "temporary" as the NLRB wants them to be. The NLRB's adjudicative

process is notoriously slow. See *Miller* v. *Cal. Pac. Med. Ctr.*, 991 F.2d 536, 543 (9th Cir. 1993) ("Such delay is a recurrent problem in section 10(j) suits, as Board proceedings are notorious for their glacial speed in adjudicating unfair labor practices." (cleaned up)); *Kobell* v. *Suburban Lines, Inc.*, 731 F.2d 1076, 1102 (3d Cir. 1984) (Aldisert, J., concurring) (stating that a "case unquestionably reek[ed] of delay" where "the NLRB ha[d] decelerated from its usual snail's pace").

"Complaints often take a year for the Board to resolve, and months more to bring the matter to completion." Pet. App. 21a (Readler, J., concurring) (citing Performance and Accountability Report FY 2022, at 149 (showing FY 2021 averages of 286 days between issuance of a complaint and an ALJ's decision, 305 days between issuance of that decision and the Board's order, and 869 days between the issuance of a Board order and the case's closing)). If a Section 10(j) injunction is in place, the NLRB has no incentive to pick up the pace.

The NLRB's recent efforts to seek Section 10(j) injunctions more aggressively, and with greater frequency, are further cause for alarm. See Pet. App. 21a (Readler, J., concurring) ("The Board's § 10(j) activity is on the rise."); Memorandum 21-05 from NLRB General Counsel Jennifer A. Abruzzo to All Regional Directors, et al., at 1 (Aug. 19, 2021).

District courts must not rubber stamp Section 10(j) petitions, else these supposedly temporary injunctions will drag out to the detriment of employers who have yet to be heard—much less fully heard—on the merits. See, *e.g.*, *King* v. *Amazon.com*

Servs. LLC, 2022 WL 17083273 (E.D.N.Y. Nov. 18, 2022) (issuing a Section 10(j) injunction that is still in place 16 months later), *appeal filed*, No. 22-3182 (2d Cir.)

B. Even greater scrutiny is required when the NLRB's Section 10(j) petition is based on novel or shifting interpretations of the NLRA.

The NLRB is an agency that makes, and changes, policy through the prosecution of individual cases. Even if an employer's conduct is lawful under existing NLRB precedent, the employer may still face prosecution because the NLRB's General Counsel (the agency's prosecutor) is seeking to advance a new or different interpretation of the NLRA.[3]

When a petition for Section 10(j) relief involves an effort to change the law or make new law, courts should engage in even greater scrutiny of the merits of the case. By deferring to the NLRB's position on the

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[3] In the last year alone, the NLRB has issued multiple decisions overturning decades of precedent and adopting radically different interpretations of the NLRA. See, *e.g.*, *Cemex Constr. Materials Pac. LLC*, 372 N.L.R.B. No. 130 (Aug. 25, 2023); *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (Aug. 2, 2023); *Lion Elastomers*, 372 N.L.R.B. No. 83 (May 1, 2023); *McLaren Macomb*, 372 N.L.R.B. No. 58 (Feb. 21, 2023); *Bexar Cnty. Performing Arts Ctr. II*, 372 N.L.R.B. No. 28 (Dec. 16, 2022); *Am. Steel Constr.*, 372 N.L.R.B. No. 23 (Dec. 14, 2022); see also G. Roger King, *The Biden Administration "All of Government" Approach to Increasing Union Density in the Country and the NLRB's Cemex Decision*, FEDSOC BLOG (Nov. 21, 2023), https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-all-of-government-approach-to-increasing-union-density-in-the-country-and-the-nlrb-s-cemex-decision.

merits of its underlying complaint, the "reasonable cause" standard enables the NLRB to obtain preliminary injunctive relief even when the case involves novel interpretations of the NLRA or specious ones that have been rejected by other courts.

The NLRB stubbornly adheres to a policy of "non-acquiescence" to federal court rulings that disagree with the NLRB's interpretation of the statute. *D. L. Baker Inc.*, 351 N.L.R.B. 515, 529 n.42 (2007) ("The Board generally applies its 'nonacquiescence policy' … and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court.").

For example, in *FedEx Home Delivery* v. *NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*"), the D.C. Circuit rejected the NLRB's standard for determining whether a worker is an independent contractor, rather than an employee covered by the NLRA. In a materially indistinguishable case involving the same parties, the NLRB applied the very standard the D.C. Circuit rejected. The D.C. Circuit invalidated the test a second time and admonished the agency. See *FedEx Home Delivery* v. *NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) ("Having chosen not to seek Supreme Court review in *FedEx I,* the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer."). Undeterred, the NLRB again reinstated the independent-contractor standard last year—applying the same standard the D.C. Circuit has twice rejected.

Atlanta Opera, Inc., 372 N.L.R.B. No. 95 (June 13, 2023).

Additionally, the NLRB's shifting interpretations of the NLRA sometimes come at the expense of other statutes. For example, in *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497 (2018), this Court rejected the NLRB's interpretation of the NLRA "in a way that limits the work of a second statute, the [Federal] Arbitration Act." *Id.* at 520. See also *Consol. Commc'ns, Inc.* v. *NLRB*, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring) (criticizing the NLRB's decisions that "have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace").

And it's not only the courts that have recognized this issue. Board members have acknowledged the NLRB's failure to respect other statutes as well. See *In Lion Elastomers*, 372 N.L.R.B. No. 83, slip op. at 26 (May 1, 2023) (Member Kaplan, dissenting) (critiquing the majority for "brush[ing] aside the legitimate concern that there is a conflict between the Board's … standards and employers' efforts to comply with antidiscrimination laws").

By failing to meaningfully consider the merits of the NLRB's claims, lower courts open the door to injunctions based on dubious interpretations of the NLRA that conflict with precedent or other federal statutes. A robust review of the NLRB's likelihood of success on the merits is necessary to avoid these flawed, unjust outcomes.

C. The deferential two-prong standard has serious ramifications for employers.

Deferring to the NLRB's legal theories under the "less rigorous" two-prong standard has "serious ramifications" for private employers, as Judge Readler correctly observed in his concurring opinion below. Pet. App. 21a. Section 10(j) injunctions can compel or constrain a broad range of business activity, not just the reinstatement of discharged employees. Courts that apply the deferential two-prong standard have issued Section 10(j) injunctions against the sale, closure, or relocation of business facilities.

For example, in *Hirsch* v. *Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998), the district court denied the NLRB's request for a Section 10(j) injunction because, in part, maintenance of the closed plant was a "cash drain and financial burden" on the employer and because "sale of the plant would bring new jobs to the region." *Id.* at 247–48. Applying its lenient standard, the Third Circuit reversed and directed the district court to enjoin the sale. *Id.* at 249.

Likewise, in *Dunbar* v. *Carrier Corp.*, 66 F. Supp. 2d 346 (N.D.N.Y. 1999), the court granted a Section 10(j) injunction, preventing a manufacturer from taking any action to relocate its facility from New York to North Carolina. *Id.* at 355. When the court issued the injunction, the manufacturer had already purchased a new facility and "contracted for the purchase of a substantial amount of new equipment and services." *Id.* at 353.

In *Denholm* v. *Smyrna Ready Mix Concrete, LLC*, 2021 WL 297571 (E.D. Ky. 2021), the district court

enjoined an employer from converting its plant to an on-demand facility—something it had already done as a cost-saving measure. *Id.* at *8–9, 12. The district court found the Board had met "its insubstantial burden" of demonstrating "reasonable cause" to believe redesignation of the plant violated the NLRA, despite the employer's assertions that the plant was "running below its desired efficiency." *Id.* at *9.

These cases are merely illustrative of the substantial impact Section 10(j) injunctions can have on an employer's business operations. Section 10(j) injunctions also are used to enjoin broad and ill-defined categories of conduct. For example, one court recently ordered an employer "to cease and desist from discharging employees because they engaged in protected concerted activity and from, *in any like or related manner* interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the NLRA"—only there was no specific activity enjoined and thus nothing to give meaning to the words "in any like or related manner." *King*, 2022 WL 17083273, at *9 (emphasis added). The result was a broad injunction to comply with the NLRA.

* * *

Section 10(j) injunctions are no less drastic a remedy than other preliminary injunctions. The NLRB should be held to the same burden as other litigants seeking such relief, including by satisfying the court that the NLRB is likely to succeed on the merits of the underlying dispute. Without such a searching review, the circuits applying the two-prong standard defy Congress's intent in enacting Section

10(j) and permit onerous remedies to be imposed on employers before any hearing—judicial or administrative—on the merits of the NLRB's case or the employer's defenses.

This Court should reverse the Sixth Circuit's decision and make clear that Section 10(j) injunctions—like other preliminary injunctions—are extraordinary remedies reserved for extraordinary cases. All Section 10(j) injunctions should be required to meet the traditional four-factor test.

CONCLUSION

The Court should reverse the Sixth Circuit's erroneous decision and clarify that the traditional four-factor test that governs requests for preliminary injunctions must be applied to requests for injunctive relief under Section 10(j) of the NLRA.

Respectfully submitted,

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