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 FOR PETITIONER

ARTHUR T. CARTER
LITTLER MENDELSON
2001 Ross Avenue
Suite 1500
Dallas, TX 75201

ALFRED JOHN HARPER, III
LITTLER MENDELSON
1301 McKinney Street
Suite 1900
Houston, TX 77010

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
TYLER J. BECKER
NOAH C. MCCULLOUGH*
EDWARD L. PICKUP
JOSHUA A. HANLEY†
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

* Admitted in the District of Columbia under an emergency examination waiver and practicing law under the supervision of D.C. Bar members pursuant to D.C. Court of Appeals Rule 46-A.

† Admitted in Pennsylvania and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

QUESTION PRESENTED

Under the National Labor Relations Act (NLRA), 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." *Id.* § 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.

CORPORATE DISCLOSURE STATEMENT

Petitioner Starbucks Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The court of appeals' opinion (Pet.App.1a-39a) is reported at 77 F.4th 391. The district court's opinion (Pet.App.67a-121a) is unreported but is available at 2022 WL 5434206.

JURISDICTION

The court of appeals entered judgment on August 8, 2023. Pet.App.1a. The petition for a writ of certiorari was filed on October 3, 2023 and granted on January 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 160(j) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

STATEMENT

When Congress authorizes federal courts to grant preliminary injunctions, courts must apply the traditional, stringent four-factor test that harks back to ancient rules of equity. Under that test, the party seeking a preliminary injunction must show "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*, 555 U.S. 7, 20 (2008).

Since the earliest days of the Republic, this Court has held that the traditional four-factor test applies unless Congress clearly and unambiguously provides otherwise. For centuries, the United States and private parties alike have thus operated on a level playing field, each having to satisfy a heavy burden when seeking extraordinary injunctive relief.

That deeply engrained rule resolves this case. In section 10(j) of the National Labor Relations Act (NLRA), Congress authorized the National Labor Relations Board (NLRB) to seek preliminary injunctions to enjoin employers' or unions' alleged unfair labor practices while the NLRB adjudicates the merits of those allegations in-house. 29 U.S.C. § 160(j). But section 10(j) allows only district courts to grant such injunctions, and only if district courts "deem[]" preliminary relief "just and proper." *Id.* That language invokes all the hallmarks of equity, charging district courts with deciding whether preliminary injunctions are appropriate. And, as this Court has repeatedly held, equity means the traditional, four-factor preliminary injunction test. Section 10(j) enshrined that test for good reason. Congress installed district courts as an independent check to hold the NLRB to stringent criteria before obtaining preliminary injunctions that can last years and significantly disrupt employers' and unions' operations.

Here, the Sixth Circuit and the district court instead applied a two-factor test for section 10(j) injunctions that tilts the scales in the NLRB's favor by merely asking whether "(1) there is reasonable cause to believe that unfair labor practices have occurred and (2) injunctive relief is just and proper." Pet.App.10a (cleaned-up); *see* Pet.App.88a. Nothing in the NLRA justifies that two-factor test, which bypasses every element of the traditional four injunctive criteria and "dramatically lower[s]" the agency's burden to obtain injunctions. Pet.App.37a (Readler, J., concurring).

At this juncture, the government has conspicuously avoided defending the two-part test. Indeed, the government seemingly considers it irrelevant whether two, four, or six factors govern section 10(j) injunctions. BIO 6, 8-10. All that matters, in the government's view, is that

when evaluating the merits and the equities, courts should "account[] for the deference owed to the [NLRB's] expert judgments." BIO 7. But the government's version of deference amounts to writing the NLRB a blank check for injunctions on demand. District courts, in the government's telling, should accept the NLRB's version of the facts and law simply because the NLRB has labor-law expertise and its in-house attorneys devoted time and effort to investigating the charges. BIO 6-7.

Even in earlier, deference-friendly eras, this Court steadfastly rejected the notion that agencies should receive deference for their preliminary takes on the law and facts. Nor has this Court deferred to an agency's view on how courts should exercise their equitable powers. Now would be a strange time to start down that path, especially when the government's pleas for deference lack any logical limit. Dozens of agencies operate under the normal, stringent four-factor test when seeking preliminary injunctions to prevent everything from the denial of voting rights to disclosure of how to make a hydrogen bomb. If deference is the order of the day, those agencies, too, might claim an anvil on the scale when seeking preliminary relief. Rather than opening the Pandora's box to novel deference across countless contexts, this Court should follow its longstanding precedent and hold that, in section 10(j) as elsewhere, district courts should apply the same, strict four-factor test that has served the country well throughout history.

A. Statutory Background

The National Labor Relations Act of 1935 created the NLRB, an independent agency tasked with "prevent[ing] any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a). The NLRB's "authority kicks in when a person files a charge with the agency alleging that an

unfair labor practice is afoot." *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters*, 598 U.S. 771, 775 (2023).

Every year, the NLRB receives more than ten thousand charges, each triggering the NLRB General Counsel's power to investigate, which she may delegate to regional officers. 29 U.S.C. §§ 153(d), 160(b), 161; 29 C.F.R. § 101.4; NLRB, *Disposition of Unfair Labor Practice Charges Per FY*, https://tinyurl.com/2p88cuvm. During these investigations, there is no evidentiary hearing and no right to cross-examination. *See* 29 C.F.R. § 101.4. If the General Counsel or a regional director decides that further administrative proceedings are appropriate, the General Counsel or regional director issues a complaint. 29 U.S.C. § 160(b); 29 C.F.R. § 101.8.

Administrative complaints launch agency proceedings, first before an administrative law judge (ALJ), then the Board. *See* 29 U.S.C. § 160(b)-(c); 29 C.F.R. §§ 101.10, 101.12, 102.35, 102.46. That process often takes years. Then proceedings move to court, either because aggrieved parties seek judicial review or because the NLRB seeks enforcement of its orders. 29 U.S.C. § 160(e)-(f).

After a complaint issues, the NLRA permits the NLRB to ask federal courts for a preliminary injunction pending resolution of the merits in administrative proceedings. Section 10(j) of the NLRA provides that, "upon issuance of a complaint," the NLRB may "petition any United States district court … for appropriate temporary relief or restraining order." 29 U.S.C. § 160(j). While section 10(j) authorizes the NLRB to seek injunctions against both employers and unions, *id.* §§ 158(a)-(b), 160(j), the NLRB does not appear to have sought relief against a union in over a decade. *See* NLRB, *10(j) Injunctions*, https://tinyurl.com/yr6tywnd.

Under section 10(j), a federal district court has discretion to grant such relief "as it deems just and proper." 29 U.S.C. § 160(j). If granted, the injunction remains in place for the duration of NLRB proceedings. *See Hadsall v. Sunbelt Rentals, Inc.*, 993 F.3d 992, 994 (7th Cir. 2021). Section 10(j) injunctions thus put powerful pressure on employers to settle, especially since the NLRB controls how long administrative proceedings last—and thus how long preliminary injunctions endure. *See* NLRB Off. of the Gen. Couns., Section 10(j) Manual 15 (Feb. 2014).

Today, the NLRB's "§ 10(j) activity is on the rise" compared with previous administrations. Pet.App.21a (Readler, J., concurring). Recently, the NLRB's General Counsel promised to bring the "weight of a federal district court's order" down on employers at the "earliest" stage of proceedings. Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to Regional Directors 1 (Feb. 1, 2022), https://tinyurl.com/bdnjvs44. And the NLRB has started asking district courts for "nationwide" injunctions preventing employers from engaging in particular practices anywhere they operate. *E.g.*, *Kerwin v. Starbucks Corp.*, 657 F. Supp. 3d 1002, 1012-13 (E.D. Mich. 2023); ECF 1-2 at 3-4, *Leslie v. Starbucks Corp.*, No. 22-cv-00478 (W.D.N.Y. June 21, 2022).

B. Factual Background

1. Starbucks is the world's largest coffee purveyor, operating locations everywhere from Austin to Zurich. Starbucks and its licensees have 34,000 locations that serve 60 million people every week. To make all those Pumpkin Spice Lattes and cold brews, Starbucks employs some 235,000 people in the United States alone. Starbucks calls its employees "partners," recognizing that their friendliness, efficiency, and customer-service skills—not just the coffee—prompt customers to return.

Starbucks, *Culture and Values*, https://tinyurl.com/2trt-baam; *see* Starbucks, *Our Long-Standing Efforts to Put Our Partners First* (Mar. 13, 2023), https://tinyurl.com/m8yfj48d.

Starbucks imposes few threshold requirements for baristas, instead opening the job to a wide array of applicants and prioritizing on-the-job learning. "[P]unctuality," coupled with the "[a]bility to learn quickly" and "understand" customers, are key. Starbucks, *Barista Job Listing* (Feb. 15, 2024), http://tinyurl.com/mhehbu9r. But baristas can go far within Starbucks—rising to manage stores or entire regions. Starbucks, *Forging a Career Path at Starbucks* (Aug. 12, 2015), https://tinyurl.com/2c3n9bxz. Starbucks thus prides itself on its reputation for "listening" to its partners, "understand[ing] their educational and career aspirations," and ensuring "access to programs." Simon Mainwaring, *Purpose at Work*, Forbes (July 7, 2021), https://tinyurl.com/vsh3jbc3.

In keeping with that focus, Starbucks has long offered partners "industry-leading benefits." Howard Schultz, *Statement Before the Senate Committee on Health, Education, Labor, and Pensions* 2 (Mar. 29, 2023), https://tinyurl.com/ydh7phk7. Starbucks was "among the first companies to provide comprehensive health care." *Id.* Today, Starbucks offers partners stock ownership, student-loan assistance, paid sick leave, and backup child care. *Id.* at 2-3; *see Our Long-Standing Efforts*, *supra*.

Since 2021, the union Workers United has campaigned to unionize U.S. Starbucks stores. Workers United has "paid nearly $2.5 million" to consultants and organizers involved in the Starbucks campaign. *Workers United Paid Nearly $2.5m to Organizers, "Salts," and Activists at Starbucks*, Lab. Union News (Apr. 25, 2023),

https://tinyurl.com/53bxuwp5. "Undercover [o]rganizers" funded by Workers United have been "key" to union drives at Starbucks stores. Josh Eidelson, *The Undercover Organizers Behind America's Union Wins*, Bloomberg (Apr. 25, 2023), https://tinyurl.com/2mcwyut2.

But by January 2023, the "union drive" had "slowed" and "face[d] resistance from Starbucks' own workers." Dee-Ann Durbin, *As Starbucks Unionizing Slows, Some Strike, Others Skeptical*, Associated Press (Jan. 10, 2023), https://tinyurl.com/sdh2bdw5. Starbucks partners at over 25 unionized stores have petitioned to decertify the union, but have been rebuffed by the NLRB. Starbucks, *Partners at More Than 25 Stores Have Filed for Decertification: What Does It Mean?* (Feb. 13, 2024), http://tinyurl.com/3cc9spdy.

2. This case involves a Starbucks store in Memphis, Tennessee. Pet.App.71a. In January 2022, six partners coordinating with Workers United announced plans to unionize the store and formed an organizing committee. Pet.App.72a-77a.

On Tuesday, January 18, 2022, partners invited a news crew to visit the Memphis store after hours to promote the unionization drive. Pet.App.77a-78a. After the store closed and was locked for the day, off-duty partners returned to the store and unlocked the door to let the news crew in—all without authorization. Pet.App.77a-78a. The news crew spent nearly an hour interviewing the partners within the closed store. Pet.App.78a. Meanwhile, off-duty partners entered staff-only areas of the store; one of them even accessed the safe. Pet.App.78a.

Upon learning of the event the next day, Starbucks reviewed security-camera footage and interviewed the partners involved. Pet.App.79a. Company policy bars

much of what the partners did—for example, off-duty partners cannot enter closed stores or let in unauthorized people. Pet.App.82a-83a. Starbucks thus terminated seven of the partners who entered the store without authorization; five belonged to the union organizing committee. Pet.App.82a-83a. Starbucks did not terminate the one organizing-committee member not present in the closed store. Pet.App.5a-6a, 77a. And Starbucks did not terminate two partners present who committed more minor policy violations, like not ringing up a free beverage. Pet.App.83a-84a.

Shortly after the terminations, Workers United launched disruptive protests. Asked to describe "union activity" at the Memphis store, one manager detailed how protesters "circl[ed] the property" and drove cars "backwards through the drive-thru lane honking their horns." 6/16/22 Tr. 1152:24, 1153:1-16, D. Ct. Dkt. 75. Protestors "cursed at" a manager, who "had to be escorted" to his car when he left. *Id.* As the manager testified, the scene was "terrifying, frightening," and "chaotic." *Id.*

In June 2022, partners at the Memphis store voted 11-3 to unionize under Workers United. Pet.App.7a. The Memphis store remains unionized today. More Perfect Union, *Map: Where Are Starbucks Workers Unionizing?* (Feb. 14, 2024), http://tinyurl.com/ycxax6v2.

C. Administrative and Judicial Proceedings

1. In February and April 2022, Workers United filed charges with the NLRB, alleging that Starbucks committed unfair labor practices in violation of the NLRA by, *inter alia*, terminating partners who broke company policies by entering the store after hours and giving the news crew unauthorized store access. Pet.App.68a-69a; *see* 29 U.S.C. § 158(a)(1), (3).

On April 22, 2022—ten days after receiving the last of Workers United's charges—the NLRB issued an administrative complaint alleging that Starbucks had committed unfair labor practices, including by firing partners who violated company policy. Pet.App.69a. Less than three weeks later, on May 10, 2022, the NLRB's regional director, respondent M. Kathleen McKinney, petitioned the U.S. District Court for the Western District of Tennessee for a section 10(j) injunction pending resolution of administrative proceedings. Pet.App.69a. The NLRB asked for an injunction compelling Starbucks to:

- reinstate fired partners within five days;
- expunge other discipline issued to one of the discharged partners;
- keep the store's lobby and café areas open despite a rise in COVID-19 infections;
- leave all pro-union materials on the store's community bulletin board notwithstanding Starbucks policy disallowing political materials on the board;
- post the court's order in the store breakroom;
- read aloud the court's order at a mandatory meeting for partners at the Memphis store; and
- produce and distribute to partners nationwide a "video" of a "high-level [Starbucks] official" reading the court's order, or listening to an NLRB official reading the order.

10(j) Pet. 8-10, D. Ct. Dkt. 1.

In the last two years, the NLRB has requested twelve such section 10(j) injunctions against Starbucks alone—amounting to nearly 40% of all section 10(j) requests the

NLRB has made during that time. *10(j) Injunctions*, *supra*. The NLRB has announced its intent to "seek nationwide relief before circuit court judges, district court judges, administrative law judges, and the Board to remedy" perceived "violations of federal labor law by Starbucks." NLRB Off. of Pub. Affs., *NLRB Region 7-Detroit Wins Injunction Requiring Starbucks to Rehire Unlawfully Fired Worker* (Feb. 28, 2023), https://tinyurl.com/y9d3bnzv. The NLRB has begun to seek nationwide "cease-and-desist order[s]"—punishable by contempt—prohibiting Starbucks "at any of its stores" across the country "from engaging in" conduct "like or related" to anything alleged in a section 10(j) petition. *E.g.*, 10(j) Petition at 6, 30-31, *Kerwin v. Starbucks Corp.*, No. 22-cv-12761 (E.D. Mich. Nov. 15, 2022).

2. In August 2022, the district court granted the NLRB an injunction, applying the Sixth Circuit's relaxed two-part section 10(j) test. Pet.App.119a. The court required the NLRB to show merely (1) "'reasonable cause' to believe that an unfair labor practice has occurred," and (2) that "injunctive relief is 'just and proper.'" Pet.App.88a (citations omitted).

The district court held that the NLRB met its "relatively insubstantial burden to establish reasonable cause." Pet.App.89a. The court considered it sufficient that the NLRB offered "some evidence" that supported a "not frivolous" legal theory. Pet.App.89a (citation omitted). Here, the NLRB offered testimony that Starbucks did not always fire partners for purportedly similar policy violations to suggest that Starbucks fired Memphis partners for their union activity. Pet.App.103a-104a. The court "disregard[ed]" evidence Starbucks offered refuting the NLRB's account, not because the court found the evidence unpersuasive, but rather because the two-part test

left "conflicts in the evidence" and "issues of witness credibility" to the NLRB. Pet.App.105a, 108a.

The court then held that the NLRB satisfied the "just and proper" prong of the Sixth Circuit's test because injunctive relief was "necessary to return the parties to status quo … to protect the [NLRB's] remedial powers." Pet.App.108a-109a (quoting *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017)). Under the Sixth Circuit's relaxed standard, the court explained, the NLRB needed to show only a "reasonable apprehension that the efficacy of the [NLRB's] final order may be nullified." Pet.App.109a (quoting *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982)). Here, the court held, the NLRB's proffered testimony that the terminations left "lingering impacts" on union efforts at the Memphis store—though not "wholly conclusive"—sufficed, even though the partners had already voted to unionize that store by a substantial margin. Pet.App.113a, 116a (citation omitted).

The court ordered Starbucks to reinstate the seven terminated partners, expunge one partner's unrelated discipline, keep the store's lobby and café areas open, leave pro-union materials on the community bulletin board, and post the district court's order. Pet.App.119a-121a.

3. The Sixth Circuit affirmed. Pet.App.3a. Starbucks argued that the "district court should have applied the traditional four-factor test for preliminary injunctions" under *Winter*, 555 U.S. 7. Pet.App.17a. After noting that "some circuits use the four-factor framework," the Sixth Circuit hewed to its precedent requiring the NLRB to show merely (1) "'reasonable cause to believe that unfair

labor practices have occurred'" and (2) that "injunctive relief is 'just and proper.'" Pet.App.10a (quoting *Ozburn-Hessey*, 875 F.3d at 339).

Starbucks did not challenge the district court's conclusion that, under Sixth Circuit precedent, the NLRB satisfied the reasonable-cause prong by advancing a nonfrivolous legal theory. Pet.App.11a. The Sixth Circuit thus focused on whether the district court abused its discretion by deeming an injunction "just and proper." Pet.App.11a. The Sixth Circuit asked whether an injunction was "necessary to return the parties to the status quo … to protect the [NLRB's] remedial powers" and "whether achieving the status quo [was] possible." Pet.App.10a (cleaned up). That test was satisfied here, the court held, based on potential chilling effects on unionization efforts were partners not reinstated. Pet.App.12a.

Judge Readler "reluctantly concur[red]" in the majority's decision as a faithful application of Sixth Circuit precedent. Pet.App.19a. But he expressed concern that the "misguided" two-part test has "no particularly good" justification in the NLRA's text and "is in tension with intervening Supreme Court precedent" requiring courts to apply the four traditional equitable factors "[a]bsent the 'clearest' congressional instruction." Pet.App.19a, 24a (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)). Judge Readler then detailed how the relaxed standard the district court applied materially affected whether any preliminary injunction should issue. Pet.App.30a-37a.

4. The NLRB's unfair-labor-practice proceedings against Starbucks remain pending, with the NLRB in control of how much longer they last—and thus how long the section 10(j) injunction endures. ALJ proceedings took a year, culminating in a May 2023 decision. The ALJ

described the unauthorized media event as an "audacious intrusion on [Starbucks'] prerogative to control usage of the store," and found that Starbucks lawfully terminated two participating partners for "serious" policy violations. *Starbucks Corp.*, 2023 WL 3254440 (ALJ May 4, 2023). But the ALJ ruled against Starbucks on other unfair-labor-practice allegations, including five termination charges. *Id.* Both Starbucks and the NLRB's General Counsel have filed exceptions to the ALJ's findings before the Board, where the case remains pending.

SUMMARY OF ARGUMENT

I. Section 10(j) requires district courts to apply the traditional four-factor test when evaluating the NLRB's preliminary-injunction requests.

A. Section 10(j)'s text does not clearly depart from the traditional four-factor test, which imposes a high bar to obtain preliminary injunctions. Plaintiffs must show they are *likely* to prevail on the merits. Merely raising a non-frivolous legal theory or pointing to disputed facts is insufficient. Plaintiffs must show that they will suffer irreparable harm without an injunction, meaning serious injuries that would be near impossible to reverse or compensate with damages. And even then, courts must deny injunctions if countervailing equities or the public interest disfavor relief.

Since the 1830s, this Court has required a clear statement from Congress to supplant ancient rules governing equitable remedies—including the four-factor preliminary-injunction test. This Court has applied that clear-statement rule in many preliminary- and permanent-injunction cases. That rule ensures that decisions about whether to expand equitable remedies rest with Congress.

B. Section 10(j) comes nowhere close to providing a clear statement. Quite the contrary, section 10(j)'s text evokes the four-factor test. The words "just and proper" prescribe that the traditional rules govern. "Just" means "righteous" or "equitable," and "proper" means "appropriate" or "suitable." Section 10(j) thus instructs courts to grant "appropriate" or "equitable" relief. Congress' directive to district courts to issue relief they "*deem*[] just and proper" further invokes courts' classic equitable discretion. Section 10(j) thus requires courts to analyze preliminary injunctions under the traditional standard.

This Court and lower courts have interpreted comparable statutory language as invoking the four-factor test. Lower courts have interpreted other statutes authorizing "just and proper" injunctions to incorporate traditional equitable principles. This Court has interpreted statutes authorizing "appropriate relief" to reference the traditional rules governing injunctions. And this Court has deemed comparable statutory text insufficiently clear to displace the traditional factors governing injunctions. By those metrics, section 10(j) plainly falls on the side of preserving the traditional four-factor test.

Conversely, section 10(j) looks nothing like the statutory language Congress employs to alter normal equitable rules. Congress clearly displaced the four-factor test in another provision of the Taft-Hartley Act, setting an extra-high bar for injunctions of widespread strikes and lockouts—but eschewed similar language in section 10(j). *See* 29 U.S.C. § 178(a). Other statutes plainly deviate from the traditional test by relieving the moving party from showing one of the four factors, mandating relief for statutory violations, or requiring a showing that additional considerations favor an injunction. But Congress omitted any such special rules in section 10(j).

C. Section 10(j)'s history, as well as strong practical considerations, confirm that the four-factor test applies. Congress enacted section 10(j) as a limited exception to an earlier near-blanket ban on labor injunctions. Given that context, it defies credulity that Congress in section 10(j) empowered district courts to issue injunctions against unions or employers more freely than before. Confirming that understanding, the NLRB initially understood section 10(j) to be reserved for extraordinary cases in which the merits were clear and irreparable harm favored an injunction. Strong practical considerations confirm that district courts must apply stringent criteria before granting section 10(j) injunctions. Those injunctions are often case-ending because they are so onerous and long-lasting that employers face enormous pressure to settle.

II. The Sixth Circuit's two-part test—which the district court applied here—lacks any basis in section 10(j)'s text and defies traditional equitable principles.

The two-part test significantly lowers the NLRB's burden in securing an injunction as compared to the traditional four-part test. The two-part test first asks the NLRB to establish mere "reasonable cause" to believe that unfair labor practices have occurred—which the NLRB can do by pointing to a non-frivolous legal theory supported even by conflicting evidence. That inquiry dramatically departs from the traditional showing of a likelihood of success on the merits, yet lacks any textual basis. The words "reasonable cause" appear nowhere in section 10(j)—but do appear in a neighboring provision, section 10(*l*), suggesting Congress did not want any reasonable-cause standard in section 10(j).

The two-part test next asks whether an injunction would be "just and proper"—defined as whether relief would serve the NLRB's remedial power. That interpretation defies the ordinary meaning of "just and proper."

And that interpretation wrongly centers on the NLRB's asserted policy and remedial concerns, at the expense of irreparable harm, the equities, and the public interest—indispensable considerations under the four-part test.

The relaxed two-part test also creates implausible anomalies. District courts in section 10(j) proceedings would reject constitutional defenses to injunctions whenever the NLRB presents a "not frivolous" countervailing theory. And it is altogether unclear what standard would apply when a party seeks to stay a section 10(j) injunction.

III. The government's brief in opposition did not defend the two-part test on its own terms. Instead, the government (at BIO 6-7) argued that under any inquiry, district courts evaluating section 10(j) requests must defer to the NLRB's "expert judgments," power to interpret labor law, and "significant pre-filing consideration."

Extending the NLRB that novel, extreme form of deference would violate bedrock administrative-law principles. Ordinarily, only final agency action receives limited deference. Here, the NLRB asks courts to defer to the preliminary legal and factual views of NLRB attorneys—views that the agency will revisit throughout its in-house administrative proceedings.

Section 10(j) itself undermines the NLRB's call for deference. Congress entrusted district courts alone with deciding when section 10(j) injunctions are appropriate. That choice would be meaningless if courts must rubber-stamp the NLRB in-house attorneys' preliminary views. Nor does it matter that the NLRB adjudicates unfair-labor-practice charges in the first instance. Even the agency's final decisions are reviewed by the courts of appeals under a less-deferential standard than the one the NLRB (at BIO 7) presses here.

The government's deference theory threatens to upend countless other statutes authorizing agencies to seek injunctions. Other agencies presumably have expertise over matters within their jurisdiction. Yet those agencies routinely seek injunctions under the traditional four-factor test. That test applies when the Equal Employment Opportunity Commission (EEOC) seeks to enjoin serious discrimination, the Secretary of Labor requests injunctions preventing child labor, and the Attorney General asks courts to block disclosure of how to build an atomic bomb. If all those agencies must satisfy the stringent four-part test, then so must the NLRB.

IV. Vacatur and remand is warranted. The Sixth Circuit and the district court did not require the NLRB to satisfy the traditional four-factor test. And proceedings below would have vastly differed under that test. This Court should follow its normal course and vacate and remand for the district court to apply the proper rules.

ARGUMENT

I. Section 10(j) Incorporates the Four-Part Test

Section 10(j) authorizes federal district courts "to grant … such temporary relief or restraining order as [the court] deems just and proper" during the pendency of in-house NLRB adjudications. 29 U.S.C. § 160(j). Nothing in section 10(j)'s text evinces any intent, much less any clear intent, to depart from the ordinary rule that the party seeking a preliminary injunction must show "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*, 555 U.S. at 20. To the contrary, the phrase "just and proper" invokes those traditional equitable criteria.

A. The Four-Part Test Applies Absent a Clear Statement

1. When Congress empowers federal district courts to grant preliminary injunctions, the strong "presumption" is that courts must apply "long-established and familiar principles" of equity that pre-date the Republic. *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted); *accord United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). The First Judiciary Act of 1789 granted federal courts jurisdiction over "all suits … in equity," thereby vesting the same "jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citations omitted). Traditional equitable principles thus govern "remedies in equity" unless new "acts of Congress" say otherwise. *Boyle v. Zacharie*, 31 U.S. 648, 658 (1832) (Story, J.).

For preliminary injunctions, the "frequently reiterated standard" in equity is that a plaintiff "must establish 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*, 555 U.S. at 20, 22.

This Court has required those four factors since *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792)—this Court's second decision. *See id.* at 406 (Iredell, J.); *id.* at 407 (Blair, J.). And this Court has always applied the same equitable rules—including for preliminary injunctions—when the "United States [is] plaintiff[], or petitioner[]" seeking injunctive relief. First Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1345); *see, e.g., In re Debs*, 158 U.S. 564, 592 (1895) (applying equity "jurisdiction of the court of chancery" and requiring

United States to show elements such as "irreparable damage" to obtain injunction against striking workers).

Those four factors impose a high bar for a preliminary injunction, which is "an extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation omitted); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (same). Injunctive relief "may only be awarded upon a clear showing the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

Start with the "likelihood of success on the merits," which requires "plaintiffs [to] demonstrate[] that they are *likely* to prevail on the merits." *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004) (emphasis added); *accord Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 662 (2003) (plurality op.) (requiring "clear showing [of] a probability of success."). This Court has thus denied preliminary injunctions where the "facts and the inferences [are] much in dispute." *Phx. Ry. Co. of Ariz. v. Geary*, 239 U.S. 277, 281 (1915). Accounting for whether the "legal right is doubtful" ensures that the injunction itself does not "result in material injury to either party … for which there is no redress." *Russell v. Farley*, 105 U.S. 433, 438 (1881).

The irreparable-harm factor is also demanding. Irreparable harms are injuries that "would be difficult—if not impossible—to reverse." *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010). Only serious injuries that cannot be remedied later with damages count as "irreparable"—like "the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of … property." *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. 545, 552 (1862). The mere "possibility" of harm is not enough—"plaintiffs seeking preliminary relief must demonstrate that irreparable injury is likely." *Winter*,

555 U.S. at 22. And the "possibility that adequate compensatory or other corrective relief will be available at a later date … weighs heavily against" an injunction. *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *accord Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (denying stay on that basis).

Finally, the balance of the equities and the public interest are stringent elements. This Court has always "balanc[ed]" "the comparative injury which would be sustained by the defendant … and by the complainant." *Russell*, 105 U.S. at 438-39 (citation omitted). The balance of equites can cut against issuing an injunction even where the moving party is likely to succeed on the merits—for instance, if the moving party does not act with "reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018).

Likewise, "[t]he history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). This Court has, for instance, refused to enjoin naval training exercises because "even if plaintiffs ha[d] shown irreparable injury … any such injury is outweighed by the public interest … in effective, realistic training of … sailors." *Winter*, 555 U.S. at 23.

2. Since at least the 1830s, this Court has required clear statements from Congress—not "light inferences, or doubtful construction"—before allowing district courts to depart from "[t]he great principles of equity." *Brown v. Swann*, 35 U.S. 497, 503 (1836). Like other clear-statement rules, the presumption that normal equitable rules apply furthers "both separation of powers principles and a practical understanding of legislative intent." *See West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Congress, not

federal courts, must undertake "any substantial expansion of past [equitable] practice." *Grupo Mexicano*, 527 U.S. at 329. And changing centuries-old rules governing equitable remedies is a "drastic" step that Congress would be unlikely to take "equivocal[ly]." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

Over the ensuing two centuries, this Court has invoked that clear-statement rule over a dozen times in cases involving all kinds of equitable remedies, insisting that "a major departure from the long tradition of equity practice should not be lightly implied." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citation omitted).[1] And this Court has repeatedly applied the presumption when interpreting preliminary-injunction and permanent-injunction statutes. *Infra* pp. 26-27.

B. Section 10(j)'s Text Evokes Classic Equity Language

Section 10(j) comes nowhere close to displacing that presumption. Section 10(j)'s instruction to district courts to "deem[]" whether preliminary injunctions are "just and proper" is classic equity-invoking language that *a fortiori* lacks any clear statement. The words "just and proper" prescribe "that traditional rules govern." Pet.App.23a (Readler, J., concurring) (quoting *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989)).

Congress enacted section 10(j) in 1947 as part of the Taft-Hartley Amendments to the NLRA, but did not define the terms "just and proper." Pub. L. No. 80-101, 61 Stat. 136, 149 (1947). Where Congress does not "furnish a definition" of a "statutory term," this Court "generally

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[1] *See also, e.g.*, *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 n.9 (1961); *Hall v. Cole*, 412 U.S. 1, 12 (1973); *United States v. Rodgers*, 461 U.S. 677, 708 (1983); *Nken*, 556 U.S. at 433.

seek[s] to afford a term its ordinary or natural meaning." *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021) (citation omitted).

Contemporary dictionaries illuminate "ordinary meaning." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Here, contemporaneous dictionaries confirm that "just and proper" invokes equitable principles. "[J]ust" means "righteous" and "equitable." *Webster's New International Dictionary* 1348 (2d ed. 1945); *see Funk & Wagnalls Practical Standard Dictionary of the English Language* 628 (1943) ("equitable" and "fair"). And "proper" means "appropriate," "suitable," or "right." *Webster's New International* 1983; *see also Funk & Wagnalls* 910 (similar). In sum, "'just and proper' is another way of saying 'appropriate' or 'equitable.'" *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 542-43 (4th Cir. 2009) (citation omitted); *see* Pet.App.22a-23a (Readler, J., concurring).

Congress' directive to district courts to issue relief they "*deem*[] just and proper" further invokes traditional equitable discretion. 29 U.S.C. § 160(j) (emphasis added). Courts' discretion to "mould each decree to the necessities of the particular case" is a hallmark of equity. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). By authorizing district courts to issue injunctions as they "deem[] just and proper," Congress provided courts a discretionary remedy that would have been well known to courts of equity.

Moreover, six other statutory provisions authorize agencies or private parties challenging agency action to obtain preliminary injunctions if courts deem such relief "just and proper," and those provisions likewise call up the traditional four factors. Most significantly, circuit courts have interpreted 47 U.S.C. § 402(c)—authorizing courts of appeals to issue "just and proper" relief when

private parties challenge Federal Communications Commission (FCC) licensing decisions—to give courts "the ability to consider equitable factors." *United States v. Szoka*, 260 F.3d 516, 524-25 (6th Cir. 2001).

Courts have likewise interpreted 22 U.S.C. § 4109(d)—authorizing the Foreign Service Labor Relations Board (FSLRB) to seek "any temporary relief" that the U.S. District Court for the District of Columbia "considers just and proper"—to mean courts can consider "all appropriate interim relief," and "appropriate" is another equity hallmark. *Am. Foreign Serv. Ass'n v. Baker*, 895 F.2d 1460, 1463 (D.C. Cir. 1990) (Ginsburg, J.); *see Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("appropriate" invokes equitable principles). And a district court has interpreted 5 U.S.C. § 7123(d)—authorizing the Federal Labor Relations Authority (FLRA) to petition district courts "to grant any temporary relief … [the court] considers just and proper"—to "incorporate[] standards similar to those which are traditional to courts of equity." *United States v. Prof. Air Traffic Controllers Org.*, 524 F. Supp. 160, 163 n.3 (D.D.C. 1981).[2] If the words "just and proper" altered the normal four injunctive factors, it is passing strange that no judicial consensus to that effect exists in these contexts.[3]

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[2] *But see Reuben v. FDIC*, 760 F. Supp. 934, 942 (D.D.C. 1991) (NLRB section 10(j) precedent "makes it easier for the [FLRA] to satisfy one major element [irreparable harm] in the traditional equitable equation"); *contra eBay*, 547 U.S. at 393-94 (refusing to allow automatic relaxation of irreparable harm absent clear statement).

[3] The other three provisions authorizing agencies or private parties challenging agencies to obtain preliminary injunctions that courts deem "just and proper" include 29 U.S.C. § 660(a), authorizing circuit courts to grant "such temporary relief … as [they] deem[] just and

Reinforcing the point, this Court has held that comparable language to "just and proper" invokes the traditional four-factor test. When Congress authorizes courts to issue "necessary or appropriate" relief, including orders that "operate as … injunction[s]," Congress "incorporate[s] the traditional standards in equity practice." *Taggart*, 139 S. Ct. at 1801 (citations omitted). Similarly, by authorizing the Environmental Protection Agency (EPA) "to commence a civil action for appropriate relief, including a permanent or temporary injunction," Congress "contemplated" that district courts would exercise "equitable discretion" under established principles. *Romero-Barcelo*, 456 U.S. at 317-18 (citation omitted). By invoking traditional equitable concepts, Congress brought "with [it] the 'old soil' that has long governed … injunctions," confirming that the traditional rules apply. *Taggart*, 139 S. Ct. at 1801. So too here, the equity-invoking terms "just and proper" instruct district courts to apply the usual four injunction factors.

2. This Court has repeatedly deemed similar statutory language—and even language expressing statute-specific considerations—as insufficiently clear to displace the traditional factors governing preliminary or permanent

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proper" in appeals of Occupational Safety and Health Review Commission (OSHRC) decisions, and 42 U.S.C. § 3612(k), authorizing circuit courts to grant "such temporary relief … as the court deems just and proper" in appeals from certain Housing and Urban Development orders. And 5 U.S.C. § 7123(c) authorizes circuit courts to grant "any temporary relief . . . [they] consider[] just and proper," including injunctions against the FLRA or other agencies, in appeals of FLRA administrative decisions.

injunctions.[4] Conversely, section 10(j) bears no resemblance to the type of clear statutory language this Court has required to depart from usual equitable criteria.

a. Start with the Court's repeated recognition of statutes that cannot be read to jettison the traditional four injunctive factors. This Court has held that the Controlled Substances Act's grant of "jurisdiction … to enjoin [statutory] violations," 21 U.S.C. § 882(a), did not, "by clear and valid legislative command," impose "an absolute duty" to enjoin violations "under any and all circumstances" as the government contended, *Oakland Cannabis*, 532 U.S. at 496 (citation omitted). The Court thus held that the traditional four-factor test governs the "advantages and disadvantages of 'employing the extraordinary remedy of injunction.'" *Id.* at 498 (citation omitted).

Likewise, the Emergency Price Control Act's instruction that courts "shall … grant[]" "permanent or temporary injunction[s]" "upon a showing … that [a] person … is about to [violate the Act]," 50 U.S.C. § 925 (1944), does not "plain[ly]" supplant district courts' discretion under the four-factor test, *Hecht*, 321 U.S. at 330. As this Court explained, that language lacked "an unequivocal statement" of Congress' intent to "drastic[ally] depart[] from the traditions of equity practice." *Id.* at 329. And, perhaps self-evidently, by authorizing district courts to "grant injunctions in accordance with the principles of equity … as the court deems reasonable," 35 U.S.C. § 283, the Patent Act did not evince any "major departure" from

[4] "The standard for a preliminary injunction is essentially the same as for a permanent injunction … except[] that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

the four-factor test, *eBay*, 547 U.S. at 391-92 (citation omitted).

This Court has refused to interpret even important, statute-specific commands as clearly altering the traditional injunctive test. The Federal Water Pollution Control Act prohibits discharging pollutants without a permit. 33 U.S.C. §§ 1311(a), 1323(a). But that command does not require district courts to automatically enjoin unlawful pollutant discharges; courts still apply the four-factor test. *Romero-Barcelo*, 456 U.S. at 312-13.

Or take the Alaska National Interest Lands Conservation Act, which requires agencies to consider Native "subsistence uses and needs" when "leas[ing] … public lands." 16 U.S.C. § 3120(a). That requirement did not enact a special "presumption" in favor of "irreparable damage" or otherwise depart from traditional injunctive criteria because Congress failed to use clear "words" or "a necessary and inescapable inference." *Amoco Prod.*, 480 U.S. at 541-42, 544-45 (citations omitted). If statutory commands or special, textually explicit considerations are insufficiently clear to displace traditional injunctive criteria, it is hard to fathom how section 10(j)'s directive to grant injunctive relief as district courts "deem just and proper" would suffice.

b. Section 10(j) is miles apart from the statutory language Congress employs when altering normal equitable rules. Most tellingly, Congress knew exactly how to displace the traditional four factors for other labor injunctions. Congress did so in the Taft-Hartley Act itself, but for a different type of injunction, not section 10(j). Congress set a higher bar for the U.S. Attorney General to obtain district-court injunctions against union strikes and lock-outs. The government must show that the strike or lock-out "affects an entire industry or a substantial part

thereof" and "imperil[s] the national health or safety." 29 U.S.C. § 178(a). By contrast, section 10(j) omits specific instructions that would make it easier or harder for the NLRB to obtain preliminary injunctions.

Other statutory contexts show that Congress knows how to depart from the traditional equitable default and did no such thing in section 10(j). Some statutes relieve the party moving for an injunction from showing one of the four factors. Congress conferred on plaintiffs alleging trademark violations "a rebuttable presumption of irreparable harm … upon a finding of likelihood of success on the merits." 15 U.S.C. § 1116(a). Courts enjoining the improper "disclosure of any confidential information" belonging to applicants for licenses to sell "biological product[s]" must "deem[]" the disclosure to have "cause[d] … irreparable harm for which there is no adequate remedy." 42 U.S.C. § 262(*l*). And when considering whether to grant preliminary injunctions involving certain infrastructure projects, courts may "not presume" that harm to "public health, safety, [or] the environment" are "reparable." 42 U.S.C. § 4370m-6(b).

Congress can also lower the bar for injunctions by *mandating* relief for statutory violations. For example, by demanding that federal agencies "not … jeopardize the continued existence of any endangered species," 16 U.S.C. § 1536(a)(2), Congress made "abundantly clear" that the "balance ha[d] been struck in favor of" enjoining actions that jeopardize endangered species, *TVA v. Hill*, 437 U.S. 153, 193-94 (1978).

Conversely, Congress knows how to heighten plaintiffs' burden to obtain injunctions. Courts considering preliminary injunctions against certain infrastructure projects must "[i]n addition to … any other applicable equitable factors … consider the potential effects on public

health, safety, and the environment" and "negative effects on jobs." 42 U.S.C. § 4370m-6(b). Courts evaluating preliminarily enjoining "hazardous fuel reduction project[s]" must "balance" the "impact to the ecosystem." 16 U.S.C. § 6516(c)(3). And courts assessing preliminary injunctions under the Prison Litigation Reform Act must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system." 18 U.S.C. § 3626(a)(2); *accord French*, 530 U.S. at 336-37 (PLRA automatic stay provision displaces courts' "equitable authority"). Yet section 10(j) notably lacks any mandatory presumptions or special additional factors, showing that Congress did not "intend[] to depart from established principles." *Romero-Barcelo*, 456 U.S. at 313.

C. History and Strong Practical Considerations Confirm the Four-Part Test Applies

1. "[H]istorical context" sheds further light on statutory meaning. *See Biden v. Texas*, 597 U.S. 785, 804-05 (2022). Here, section 10(j)'s history reinforces that "just and proper" refers to the traditional four-factor test for preliminary injunctions, so that section 10(j) injunctions are rare and reserved for extraordinary cases.

When Congress enacted the Taft-Hartley Act in 1947, section 10(j) represented a "limited exception to the federal policy against labor injunctions." *McKinney v. S. Bakeries, LLC*, 786 F.3d 1119, 1123 (8th Cir. 2015) (citation omitted). Since the Norris-LaGuardia Act of 1932, Congress has barred federal courts from issuing injunctions against employers or unions in most labor disputes. *See* Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 *et seq.*) ("[N]o court … shall have jurisdiction to issue any restraining order or temporary … injunction in a case involving … a labor dispute, except in a strict conformity with the provisions of this Act."). That bar on

labor injunctions was Congress' reaction to the pre-1932 landscape, where federal courts issued labor injunctions against unions so often that "the extraordinary remedy of injunction ha[d] become the ordinary legal remedy" and "the central lever" in labor disputes. Felix Frankfurter & Nathan Greene, *The Labor Injunction* 52 (1930).

Norris-LaGuardia drastically curtailed federal courts' issuance of labor injunctions. Frank McCulloch, *New Problems in the Administration of the Labor-Management Relations Act*, 16 Sw. L.J. 82, 90 (1962). But after World War II, "widespread work stoppages" caused by multiplying strikes—some involving blatantly illegal conduct—threatened the economy. Leslie Fahrenkopf, Note, *Striking the Just and Proper Balance*, 80 Va. L. Rev. 1159, 1162-63 (1994). Because Norris-LaGuardia's anti-injunction rules blocked federal courts from enjoining such conduct, Congress rolled back the bar for specific types of injunctions, including by promulgating section 10(j) to allow district courts to enjoin unfair labor practices. *Id.* at 1163; *see* 29 U.S.C. § 160(h) (Norris-LaGuardia does not apply "[w]hen granting appropriate temporary relief" under section 10); *id.* § 160(*l*) (requiring the NLRB to seek preliminary injunctions of unions' particularly serious unfair labor practices); *id.* § 178(a) (authorizing special process for injunctions involving widespread strikes).

Section 10(j) thus partially *restored* federal courts' equity jurisdiction as it stood before 1932. *See* Fahrenkopf, *supra*, at 1163-65. And before Norris-LaGuardia, courts applied the traditional equitable criteria when deciding whether to issue preliminary injunctions. *See* Frankfurter & Greene, *supra*, at 54-55 (collecting cases). Given that context, it defies credulity that Congress in section 10(j) empowered district courts to issue injunctions against unions or employers more easily than ever before.

2. The NLRB's own initial understandings of section 10(j) support that section 10(j) incorporates the traditional, stringent four-part test. Shortly after section 10(j)'s enactment in 1947, NLRB General Counsel Robert Denham explained that "the history of labor injunctions is too long and reveals too much the national desire to reduce government by injunction to a minimum to justify any theory other than that [section 10(j)] is placed in the Act for *emergency purposes*." I. Herbert Rothenberg, *Rothenberg On Labor Relations* 632 n.4 (1949) (emphasis added); *accord NLRB General Counsel Reviews Taft Act Problems—Boycotts, Injunctions*, 24 L.R.R.M. 44, 45 (1949). The NLRB thus deemed section 10(j) relief appropriate "only where loss or damage or jeopardy to the safety and welfare of a large segment of the public would result if injunctive action were not taken." Rothenberg, *supra*, at 632 n.4. Tracking that view, the NLRB authorized, on average, just three section 10(j) injunctions per year in the first fifteen years after section 10(j)'s enactment. *See* NLRB Ann. Reps. (1948-1961), http://tinyurl.com/5cu64fp4.

Further, in 1962, when NLRB Chairman Frank McCulloch revealed the NLRB's own criteria for seeking section 10(j) injunctions, those criteria tracked the traditional four-part test. *See* McCulloch, *supra*, at 96-98.[5] The NLRB considered its likelihood of success on the merits—*i.e.*, whether a case involved "the application of well-defined doctrine to easily ascertained fact[s]" or, conversely, "conflicting legal principles." *Id.* at 97. The NLRB assessed the risk of "irreparable harm to the parties." *Id.* And the NLRB asked if an injunction furthered

[5] *Accord Hearings on the Administration of the Labor-Management Relations Act Before the Subcomm. on the NLRB of the H. Comm. on Educ. & Lab.*, 87th Cong. pt. 2, app. J, 1234-39 (1961).

the public interest by, for example, safeguarding the "flow of interstate commerce." *Id.* at 98.

Significantly, the NLRB expected that district courts would *not* defer to the agency's views in assessing section 10(j) injunctions, and thus warned against seeking section 10(j) injunctions too often, lest district courts—not the agency—develop the NLRA's contours. *Id.* at 97. The NLRB's own early views reflect the obvious intuition that section 10(j) preserves traditional equitable criteria.

3. Strong practical considerations confirm that district courts are supposed to apply stringent criteria before granting section 10(j) injunctions. Because these injunctions are often onerous, the NLRB's success in obtaining injunctions is often the whole ballgame. The NLRB's own "[e]xperience demonstrates" that employers face "a strong catalyst for settlement" if the NLRB "authoriz[es]" section 10(j) injunctions. NLRB's Section 10(j) Manual, *supra*, at 15.

Settlement pressures are acute because, as the NLRB acknowledges, "administrative proceedings often are protracted" and employers have "only a slight chance" of prevailing. *Id.* app. D, at 1; *id.* app. L, at 3. The NLRB ultimately prevails in-house in 84% of cases. NLRB, *Performance and Accountability Report FY 2022*, at 16, https://tinyurl.com/37fcv6ms. As here, injunctions can force employers to rehire previously fired staff and to keep them on the payroll for years. Pet.App.120a. Unsurprisingly, some 47% of section 10(j) cases since 2010 have settled. *10(j) Injunctions*, *supra*. The consequences of section 10(j) relief show that district courts are supposed to impose a high bar before granting case-ending relief.

II. The Sixth Circuit's Two-Part Test Is Indefensible

Rather than applying the traditional four-factor test, both courts below applied a two-part test that is atextual and radically departs from the four traditional equitable factors.

1. Again, "just and proper" invokes the usual four-factor preliminary-injunction test. *Supra* pp. 18-32. The relaxed two-part test applied below tracks *none* of those four factors. Instead, the two-part test asks only (1) whether the NLRB has "reasonable cause to believe that unfair labor practices have occurred" and (2) whether an injunction is needed to "protect the [NLRB's] remedial powers under the NLRA." Pet.App.10a (citations omitted). That test "dramatically lower[s] the bar for the [NLRB] in securing an injunction." Pet.App.37a (Readler, J., concurring). The NLRB itself acknowledges the "threshold of proof … is low" under this test. NLRB's Section 10(j) Manual, *supra*, at 5. And the NLRB has repeatedly urged lower courts to adopt that test.[6]

a. Start with the two-part test's first factor, *i.e.*, whether there is "reasonable cause" on the merits. Instead of showing likelihood of success on the merits, the NLRB need only satisfy the "relatively insubstantial" burden of "show[ing] that its legal theory is substantial and not frivolous." *Ozburn-Hessey*, 875 F.3d at 339 (cleaned up); *see Chester v. Grane Healthcare Co.*, 666 F.3d 87, 101 (3d Cir. 2011); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133-34 (10th Cir. 2000); *Arlook v. S.*

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[6] *E.g.*, *Muffley*, 570 F.3d at 541; *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1037-38 (8th Cir. 1999); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994) (en banc); NLRB Br. 62-63, *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131 (2d Cir. 2013) (No. 12-4890), 2013 WL 1558073; NLRB Br. 31, *Chester*, 666 F.3d 87 (3d Cir.) (Nos. 11-2573, 11-2978), 2011 WL 9692325.

Lichtenberg & Co., 952 F.2d 367, 371 (11th Cir. 1992). District courts are "prohibit[ed] … from any manner of 'fact-finding.'" Pet.App.32a (Readler, J., concurring). The NLRB can establish "reasonable cause" simply by pairing a "coherent legal theory" with "evidence showing that a rational factfinder could find for the [NLRB] on that theory." *Arlook*, 952 F.2d at 372. The "threshold" for reasonable cause is thus "significantly lower than a requirement to show … 'likelihood of success'" under the traditional four-factor test. *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 n.10 (5th Cir. 2010). The NLRB itself acknowledges it need not show a likelihood of success under this test, and that courts "[d]efer to the [NLRB's] version of the facts if [it is] within the range of rationality." NLRB's Section 10(j) Manual, *supra*, app. L, at 5.

Yet section 10(j)'s text provides no basis for substituting "reasonable cause" for "likelihood of success." Congress used the words "reasonable cause" in a neighboring provision: section 10(*l*), 29 U.S.C. § 160(*l*). Under section 10*(l)*, if, after investigating a charge involving specifically enumerated, particularly serious unfair labor practices, the NLRB "has *reasonable cause* to believe such charge is true," the agency "shall … petition" the district court "for appropriate injunctive relief pending the final adjudication," and the court must decide whether interim injunctive relief is "just and proper." *Id.* (emphasis added) (cross-referencing specific unfair labor practices detailed in 29 U.S.C. § 158(b)(4)(A)-(C), (b)(7), (e)).

By including "reasonable cause" in a neighboring provision, Congress presumably acted intentionally in excluding the phrase "reasonable cause" from section 10(j). *See Polselli v. IRS*, 598 U.S. 432, 439 (2023); *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Reading in "reasonable cause" as the standard for

district courts to apply for section 10(j) injunctions would be particularly bizarre because "reasonable cause" is the standard for when *the NLRB* must *seek* an injunction under section 10(*l*), not the standard for *courts* to *grant* one. *See* 29 U.S.C. § 160(*l*).

Tellingly, courts adopting the two-part test have never explained *why* section 10(j) warrants a special rule. Many circuits relieved the NLRB of making any real merits showing based largely on a "rumor chain, [with] each case making slight variations in the last without anyone checking back on the source." *Pioneer Press*, 881 F.2d at 492. District courts began applying the two-part test in the 1950s with virtually no reasoning. *E.g., Douds v. Int'l Longshoremen's Ass'n*, 147 F. Supp. 103, 106 (S.D.N.Y. 1956), *aff'd*, 241 F.2d 278 (2d Cir. 1957). By the "late 1960s and early 1970s, the 'reasonable cause' criteria" had secured "a foothold in the section 10(j) analysis." Richard Lapp, *A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard*, 3 U. Pa. J. Lab. & Emp. L. 251, 267 (2001) (canvassing cases). But courts never explained "why § 10(j) should (or shouldn't) be treated as containing a requirement of 'reasonable cause.'" *Pioneer Press*, 881 F.2d at 493.

b. Under the two-part test's second prong, courts ask only whether the relief sought would "protect the [NLRB's] remedial powers under the NLRA." Pet.App.10a (citations omitted). As the NLRB acknowledges, this prong does not require "strict adherence to equitable principles." NLRB's Section 10(j) Manual, *supra*, app. L, at 5. The NLRB asserts that "the mere potential for future impairment of the [NLRB's] remedial power" or frustration of the NLRA's statutory purposes suffices. Pet.App.29a (Readler, J., concurring); *accord Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 239 (6th Cir. 2003). And under the relaxed test, courts are supposed to

give "deference to the [NLRB]" on this question. *Webco*, 225 F.3d at 1136.

That inquiry thus zeroes in on the NLRB's explanation of policy and remedial considerations, without regard to the three equitable considerations underlying the traditional test. Take the "more stringent requirement … [of] irreparable harm" under the traditional four-factor test. *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 n.3 (6th Cir. 1988). Courts applying the relaxed test have recognized that requiring irreparable harm would "overhaul[]" their more lenient standard, where irreparable harm is not a categorical requirement. *Ahearn*, 351 F.3d at 236. This "whittled[-]down" standard also does not require the district court to assess whether "the equities and public interest favor relief." Pet.App.28a (Readler, J., concurring); *contra* BIO 9. Instead, the two-part test "slight[s]" these factors that the "traditional four-factor standard expressly requires courts to weigh." *Muffley*, 570 F.3d at 543.

Nothing in section 10(j)'s text supports this "feeble test" that "stacks the deck in the [NLRB's] favor" by focusing on whether the NLRB believes an injunction serves its policy prerogatives. *See* Pet.App.37a (Readler, J., concurring). Courts' misconstruction of the words "just and proper" and erroneous presumptions in the NLRB's favor derive from a "general" sense that section 10(j) was "designed to enable the [NLRB] to vindicate its ultimate remedial power"—not from "reasoned elaboration relying on dictionary definition[s]." *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1090 (3d Cir. 1984).

2. The relaxed two-part test also creates implausible anomalies—and this Court ordinarily interprets statutes to avoid bizarre results. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 200 (2000). Indeed, this Court relied on statutory anomalies in holding that

the same four injunction factors apply no matter which party seeks to enjoin violations of the Federal Water Pollution Control Act. Congress expressly authorized only the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction." 33 U.S.C. § 1319(b). But this Court considered it untenable that Congress would have applied *different* criteria to different parties seeking injunctions for the same types of statutory violations. *Romero-Barcelo*, 456 U.S. at 317-19.

Applying a relaxed two-part test to the NLRB's requests for injunctions, but not related requests, would be similarly nonsensical. Consider employers or unions who want to defend against section 10(j) injunctions by raising structural constitutional challenges to the NLRB. *See, e.g.*, *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 137-38 (2d Cir. 2013) (raising Appointments Clause challenge in section 10(j) proceeding). If the NLRB must merely present a non-frivolous legal theory of its own, courts might effectively give the NLRB a pass.

Yet, the same employer or union could bring a district-court suit to preliminarily enjoin the NLRB from proceeding in-house based on the same structural constitutional challenges. And in that scenario, the plaintiff must satisfy the ordinary four-factor preliminary-injunction test. *See Axon Enter. v. FTC*, 598 U.S. 175 (2023); *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (per curiam). Congress cannot possibly have erected a glaring loophole whereby the NLRB could short-circuit separation-of-powers challenges and obtain an easier standard for itself just by winning the race to the courthouse.

Other anomalies arise if an employer or union seeks an emergency stay of a section 10(j) injunction. Courts presumably would apply the traditional four-factor test to

assess stays. *See Nken*, 556 U.S. at 425-26. But it is anyone's guess how that stay standard might mutate if district courts started off by applying the relaxed two-part test to grant the injunction. Should the reviewing court ask whether the movant is "likely to succeed on the merits," *id.* at 426, or somehow bake in the relaxed "reasonable cause" standard? *See* Pet.App.44a (merging the reasonable-cause and stay tests). Should the court look for "irreparable harm" to the moving party, when the relaxed standard excludes the moving party's harms from consideration? This Court should not invite needless complexity by assuming that Congress wordlessly abandoned the traditional four factors for an atextual two-part test.

* * *

The Sixth Circuit and district court's decisions below rest exclusively on the two-part test. Pet.App.9a-11a, 17a-18a, 88a & n.8. Despite the NLRB's longstanding advocacy for that test, the government's brief in opposition avoids embracing that test. If the government does not defend that test now, vacatur is obviously in order.

III. Deferring to the NLRB Is Highly Inappropriate

The government (at BIO 6-7) argues that district courts evaluating section 10(j) injunctions must defer to the NLRB's initial time spent investigating the case, the NLRB in-house attorneys' preliminary views of the facts, and the NLRB's labor-law expertise. Even in the bygone heyday of agency deference, those grounds would never have warranted weighting the scales in the agency's favor with years-long injunctions on the line.

1. The government (at BIO 7) proclaims that section 10(j) requires district courts to "account[] for the deference owed to the [NLRB's] expert judgments." By that, the government demands far more than deference to

agency statutory interpretations, which would be problematic enough. Pet'r Br. 2-4, *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (argued Jan. 17, 2024); Pet'r Br. 15-18, *Loper Bright Enters., Inc. v. Raimondo*, No. 22-451 (argued Jan. 17, 2024). The government remarkably seeks deference to the NLRB attorneys' *initial* decision to pursue injunctive relief and an administrative complaint. As the government puts it, district courts owe special solicitude to the "significant consideration" agency attorneys devoted to "investigat[ing]" and litigating the case by filing the administrative complaint. BIO 7. Below, the NLRB thus obtained deference for its "not frivolous" legal theories and for its "version of events as long as facts exist which could support the [NLRB's] theory of liability." Mem. in Support of 10(j) Pet. 14-15, D. Ct. Dkt. 1-3; *see* Pet.App.89a.

This Court has never before endorsed such deference, which would explode existing limits on agency deference. Ordinarily, deference attaches only to final agency action—and an agency's statutory interpretations also must reflect formal, high-level decision-making, if such deference is ever appropriate. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). But here, the NLRB demands deference to the preliminary legal and factual views of its in-house attorneys who investigated and initiated the complaint. Yet one necessary assumption for courts' deference to final agency action (if they defer at all) is that agencies are expected to keep an open mind in the course of deliberating, and not rubber-stamp their in-house attorneys' initial takes. *See* 29 C.F.R. § 101.10(b) (requiring administrative law judges to remain "impartial"); *id.* § 101.12(a) (Board can conduct de novo factfinding and freely reverse administrative law judges).

This Court has always refused to defer to an agency's "litigating position," and should not start now. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

This case exposes the folly of going down that path. After the NLRB obtained a section 10(j) injunction, the NLRB ALJ conducted a full administrative proceeding and concluded that based on "serious" misconduct, Starbucks had lawfully terminated two partners whom the injunction required Starbucks to reinstate. *Starbucks*, 2023 WL 3254440; *see* Pet.App.8a. Deferring to the NLRB staff attorneys' initial take, only for agency ALJs or the Board to reverse course, underscores why this Court has never deferred to agencies' threshold submissions.

The government justifies its calls for deference by asserting that "Congress entrusted the [NLRB], not courts, with the 'authority to develop and apply fundamental national labor policy.'" BIO 6 (citation omitted). But Congress entrusted district courts alone with deciding whether section 10(j) injunctions are appropriate. Agencies receive no deference when the "scope of the judicial power vested by the statute" is at stake. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). "[I]t is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019) (cleaned up).

And here, the lack of deference is central to section 10(j)'s design. Congress interposed district courts as an independent check on section 10(j) relief because such injunctions impose extraordinary burdens on the NLRB's adversaries, whether employers or unions. Injunctions are such a potent weapon that, regardless of the merits, many employers settle once an injunction issues, making the injunction proceeding the whole ballgame. *Supra* p. 32; Chamber Cert. Br. 11-16; CDW Cert. Br. 11-14;

NCLA Cert. Br. 14-16. Even for employers who have the resolve and resources to keep litigating, the NLRB controls how long those injunctions last because they endure through administrative proceedings. Making district courts defer to the preliminary views of NLRB attorneys would subvert Congress' clear allocation of power to the judiciary.

The government (at BIO 7) argues that because the NLRB ultimately adjudicates the merits of unfair labor practices, district courts must defer at the front end. That argument is doubly nonsensical. Congress' deliberate choice to give district courts exclusive jurisdiction over section 10(j) injunctions would be meaningless if district courts must rubber-stamp the preliminary views of NLRB attorneys pursuing disputed claims. Further, because NLRB orders are not self-executing, courts of appeals—not the NLRB—ultimately resolve the merits of unfair labor practices, reviewing the agency's legal conclusions de novo and the NLRB's *final* factual findings for "substantial evidence" because Congress expressly required that factual deference. *See* 29 U.S.C. § 160(c); *Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 500-01 (1978) (deferring to NLRB application of law to facts in final decisions). Congress prescribed no such deference in section 10(j).

If courts must defer to the NLRB's policy, legal, factual, and remedial views simply because the agency seeks an injunction, nothing would stop the NLRB from usurping all aspects of district courts' section 10(j) decision-making powers. Indeed, the NLRB already demands that district courts defer to the NLRB's judgments about whether employers—the agency's adversary—should get discovery in section 10(j) proceedings. Then, if district courts disagree with the agency's wishes and grant discovery, the NLRB turns around and charges employers with unfair labor practices for seeking to enforce court-

approved discovery orders. *See, e.g.*, *Leslie v. Starbucks Corp.*, No. 23-1194 (2d Cir. argued Jan. 19, 2024); *Poor v. Starbucks Corp.*, No. 22-cv-7255 (E.D.N.Y filed Nov. 30, 2022). And nothing would stop the NLRB from claiming deference when it asks courts to exercise other aspects of their equity powers, such as to questions of laches, equitable tolling, or sanctions. This Court should not countenance such unprecedented deference.

2. The government's baked-in deference theory could distort countless other statutory contexts too. As noted, six other provisions employ the same language authorizing courts to award preliminary injunctions if "just and proper." *Supra* pp. 23-24 & n.3. Four of the six authorize agencies to seek such injunctions. 5 U.S.C. § 7123(c) (FLRA); *id.* § 7123(d) (FLRA); 22 U.S.C. § 4109(d) (FSLRB); 42 U.S.C. § 3612(k)(1)(A) (HUD). And four of the six authorize private parties to seek injunctions against agencies. 5 U.S.C. § 7123(c) (FLRA); 29 U.S.C. § 660(a) (OSHRC); 42 U.S.C. § 3612(k)(1)(A) (HUD); 47 U.S.C. § 402(c) (FCC). It cannot be the case that "just and proper" incorporates extreme deference to the agency when it seeks injunctions, but not when a private party seeks to enjoin the agency. The "same language" should have the "same meaning" across these contexts. *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005).

The government's unprecedented view of deference also risks transforming dozens of other statutes authorizing agencies to seek injunctions into Trojan horses smuggling in novel, extra-potent deference. Other agencies presumably can claim expertise over matters within their jurisdiction. Other agencies presumably investigate before requesting inunctions. And other agencies often seek injunctions from a court that is not guaranteed to ultimately review the agency's final decision later. Yet this

Court has never recognized a phantom fifth equitable factor giving extra credit to agencies for thinking hard about their staff attorneys' initial take on a case before requesting extraordinary relief from the judiciary.

Under the NLRB's theory, the sheer breadth of statutory regimes that might yield to agency deference is mind-boggling. The government routinely seeks injunctions and must satisfy the traditional four-factor test when doing so. If unstated appeals to agency expertise are enough to modify that traditional framework to include a new, pro-agency thumb on the scale, the government's position (BIO at 6-7) could rewrite the four-part test across the U.S. Code.

Start with other agencies that seek preliminary injunctions pending administrative proceedings or as part of a court-enforcement action. The EEOC may seek "appropriate temporary or preliminary relief pending final disposition of [a discrimination] charge" if the EEOC "concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of [the Equal Employment Opportunity] Act." 42 U.S.C. § 2000e-5(f)(2). The EEOC uses this authority to seek injunctions against employers engaged in odious race and sex discrimination. *E.g.*, *EEOC v. BNSF Ry. Co.*, 2022 WL 1265938, at *11-12 (D. Neb. Apr. 28, 2022). But the EEOC must satisfy the traditional four-factor test to obtain an injunction. *E.g.*, *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 742-43 (1st Cir. 1996); *EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037, 1043 (6th Cir. 1981). Likewise, the Department of Labor has statutory authority to seek "injunctive relief or [a] temporary restraining order pending the outcome of an enforcement proceeding" involving allegedly dangerous workplaces. 29 U.S.C. § 662(b). If those agencies litigate comparable injunctions under the traditional four-part test, the NLRB should too.

Beyond labor, the Federal Trade Commission can seek injunctions "pending" agency proceedings and judicial review, and district courts may grant such injunctions upon a "proper showing." 15 U.S.C. § 53(a)-(b). The Securities and Exchange Commission (SEC), too, "may" obtain preliminary injunctions from district courts "[u]pon a proper showing" after alleging that someone "is engaged or about to engage in" a violation of the securities laws. 15 U.S.C. §§ 77t(b), 78u(d)(1)-(e). Another provision authorizes the SEC to obtain "equitable relief that may be appropriate or necessary for the benefit of investors." *Id.* § 78u(d)(5). Similarly, the Commodity Futures Trading Commission (CFTC) may obtain a preliminary injunction "upon a proper showing" that someone "has engaged, is engaging, or is about to engage" in a violation of the Commodity Exchange Act or CFTC regulations. 7 U.S.C. § 13a-1(a)-(b). Under the government's view, all these agencies could bypass strict compliance with the four-part test.[7]

Other agencies seek injunctions to enforce extraordinarily weighty interests in other statutes. But none of

[7] Some older cases proposed relieving the EEOC from the traditional four-factor test. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987); *EEOC v. Pac. Press Pub. Ass'n*, 535 F.2d 1182, 1187 (9th Cir. 1976). Similarly, some cases suggest other agencies could obtain preliminary injunctions for the duration of in-house proceedings without showing irreparable harm. *See FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *SEC v. Blatt*, 583 F.2d 1325, 1335 & n.29 (5th Cir. 1978); *CFTC v. Walsh*, 618 F.3d 218, 225 (2d Cir. 2010); *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998). Those decisions contravene this Court's clear-statement precedents and further improperly rely on legislative history to jettison the traditional four-factor test. Those decisions are particularly untenable after *eBay* reiterated that courts may not apply categorical irreparable-harm rules absent clear statutory language otherwise. 547 U.S. at 393.

those statutes appear to give other agencies special deference skewing the normal four factors.

For example, the Attorney General apparently enjoys no special treatment when seeking to enjoin:

- Violations of the Atomic Energy Act, 42 U.S.C. § 2280, including disclosing how to build a thermonuclear weapon, *see United States v. Progressive, Inc.*, 467 F. Supp. 990, 991 (W.D. Wis. 1979);
- Violations of the Voting Rights Act, 52 U.S.C. § 10308(d);
- Cruelty to animals, 7 U.S.C. §§ 2159, 3807(a);
- Negligent operation of ships, 46 U.S.C. § 2305(a);
- Obscene communications, 47 U.S.C. § 223(b)(6);
- Poll taxes, 52 U.S.C. § 10306(b);
- Powerplants burning petroleum, 15 U.S.C. § 797(b)(4);
- Fair Housing Act violations, 42 U.S.C. §§ 3612(*o*), 3614(d); or
- Transportation of hazardous substances, 49 U.S.C. § 5122(a).

Likewise, the Department of Health and Human Services seemingly receives no unusual deference rules, even when seeking to enjoin:

- Laboratories that "would constitute a significant hazard to the public health," 42 U.S.C. § 263a(j); or
- Violations of infectious-disease reporting requirements, 42 U.S.C. § 300ff-139(a).

Nor does the EPA appear to receive special rules when seeking to enjoin:

- School boards that do not fix schools with asbestos, 15 U.S.C. § 2648(b);
- Improper pesticide storage, 7 U.S.C. § 136q(d)(4); or
- Threats to underground water sources, 42 U.S.C. § 300h-3(c).

The Department of Labor receives the same treatment when moving to enjoin:

- Violations of the Fair Labor Standards Act, like child labor and refusal to pay overtime or minimum wage, 29 U.S.C. § 217;
- Dissipation of pension funds, 5 U.S.C. § 8477(e)(3)(A); or
- Employers' violations of the terms and conditions of aliens' employment, 8 U.S.C. § 1188(g)(2).

The same goes for myriad other agencies, including:

- When the Consumer Financial Protection Board seeks to enjoin consumer-finance offenses, 12 U.S.C. § 5564(a), or kickbacks in federal mortgage transactions, 12 U.S.C. § 2607(d)(4);
- When the Consumer Product Safety Commission seeks to enjoin sales of unmarked or mismarked flammable products, 15 U.S.C. § 1195(a); and
- When the Federal Election Commission seeks to enjoin violations of campaign finance disclosure requirements, 52 U.S.C. §§ 30107(a)(6), 30109(a)(6)(A).

Across these contexts, courts can account for relevant considerations under the traditional four-part test. The NLRB does not need special deference to accommodate labor-specific concerns. And giving the NLRB special

treatment would make all these statutes fair game for agencies to point to their purported expertise, consideration, and statutory powers as enough to obtain injunctions on demand. The government cannot have it both ways, cherry-picking deference for the NLRB but eschewing it for nuclear safety. Rather than turbo-charging already-shaky calls for deference, this Court should follow the ordinary rules and apply the stringent, traditional four-part test unless Congress clearly mandates otherwise.

IV. Vacatur and Remand Is Warranted

The district court and the Sixth Circuit's failure to apply the traditional four-factor test below necessitates vacatur and remand for the district court to apply the proper test, in keeping with this Court's usual practice. *E.g.*, *Dupree v. Younger*, 598 U.S. 729, 738 (2023).

The district court entered and the Sixth Circuit affirmed an injunction against Starbucks after finding the NLRB satisfied the Sixth Circuit's relaxed, two-part test—not the dramatically different, traditional four-factor test. Pet.App.10a, 88a; *see* Pet.App.18a-19a (Readler, J., concurring). "[H]ad the [NLRB] been asked to satisfy the *Winter* standard," proceedings below "would have been drastically different" and the NLRB's "victory would have been far less certain." Pet.App.30a, 34a (Readler, J., concurring).

For instance, the district court accepted that the NLRB established "reasonable cause"—not likelihood of success—by deferring to the NLRB's resolution of "conflicts in the evidence" and "issues of witness credibility." Pet.App.105a, 108a. The court then held that injunctive relief was warranted merely by asking whether an injunction was "necessary … to protect the [NLRB's] remedial powers," not whether irreparable harm would result. Pet.App.108a.

Further, the district court never balanced the equities nor considered the countervailing reasons why an injunction would not favor the public interest, such as employers' need to freely operate businesses. *See* Pet.App.116a-118a. Those factors disappear under the two-part test, preventing the district court from weighing "countervailing harms" to Starbucks. *See Muffley*, 570 F.3d at 543.

From start to finish, the decision below held the NLRB to a minimal standard at odds with section 10(j)'s text and a mountain of precedent requiring the stringent, usual four equitable factors to apply absent clear statements otherwise. Rather than allowing the NLRB to refashion the test in its own deference-seeking image, this Court should hold the NLRB to the four-factor test that has governed agencies and private parties alike since the early days of the Republic.

CONCLUSION

The court of appeals' judgment should be vacated and the case remanded.

Respectfully submitted,

ARTHUR T. CARTER
LITTLER MENDELSON
2001 Ross Avenue
Suite 1500
Dallas, TX 75201

ALFRED JOHN HARPER, III
LITTLER MENDELSON
1301 McKinney Street
Suite 1900
Houston, TX 77010

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
TYLER J. BECKER
NOAH C. MCCULLOUGH*
EDWARD L. PICKUP
JOSHUA A. HANLEY†
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

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* Admitted in the District of Columbia under an emergency examination waiver and practicing law under the supervision of D.C. Bar members pursuant to D.C. Court of Appeals Rule 46-A.

† Admitted in Pennsylvania and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).