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 THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified Petitioner of NCLA's intention to file this brief on January 17, 2024, and notified Respondent of its intention to file this brief on January 29, 2024.

was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the Sixth Circuit's use of an atextual, judge-made deference doctrine that enables an administrative agency to obtain preliminary injunctions against private parties without having to demonstrate the merits of its legal allegations or satisfy other traditional elements of equitable relief. Such easy access to injunctive relief allows the agency to deprive a party of property rights without the due process of law and to coerce parties it subjects to administrative prosecutions to settle on unfavorable terms.

BACKGROUND

Section 10(j) of the National Labor Relations Act ("NLRA") authorizes the National Labor Relations Board ("NLRB" or "Board") to "petition any United States district court … for appropriate temporary relief or [a] restraining order[]" against an employer while the Board pursues an administrative enforcement action against that employer. 29 U.S.C. § 160(j). The district court may grant a preliminary injunction "as it deems just and proper[,]" and such injunction remains in place for the remainder of NLRB's administrative proceeding against the employer. *Id.*

"A preliminary injunction is an 'extraordinary and drastic remedy[.]'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). Consistent with long-standing principles of equity, to meet this test a party seeking a preliminary

injunction "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 v. NRDC*, 555 U.S. 7, 20 (2008). Yet, in deciding whether to award a preliminary injunction under § 10(j), only four circuit courts apply this well-established, four-factor test. *See 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); and *Hooks v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022).

By contrast, five other circuit courts, including the Sixth Circuit below, evaluate § 10(j) injunctions under a far more lax, two-factor test that merely requires the district court to find "reasonable cause" to believe the employer violated the NLRA and that a preliminary injunction is "just and proper." *See Chester v. Grane Healthcare Co.*, 666 F.3d 87, 89 (3d Cir. 2011); *Kinard v. Dish Network Corp.*, 890 F.3d 608, 612 (5th Cir. 2018); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). Finally, two circuit courts apply a hybrid approach. *See Pye v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994); *Kreisberg v. Healthbridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013).

The Sixth Circuit below affirmed a § 10(j) injunction granted under the "reasonable cause" test, which is "relatively insubstantial" as compared to the traditional four-factor test. Pet.App.27a (Readler, J.,

concurring) (quoting *Levine v. C & W Mining Co.*, 610 F.2d 432, 435 (6th Cir. 1979)). Under that test, NLRB may obtain a preliminary injunction against an employer based on legal and factual allegations that fall well short of being likely to succeed on the merits. Rather, as Judge Readler's concurrence explained, an injunction may be granted "as long as the [legal] theory is substantial and not frivolous[,]" Pet.App.28(a) (quoting *Gottfried*, 818 F.2d at 493), and "'facts exist which *could* support' its theory of liability." *Id.* (alteration in original) (quoting *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017)). Additionally, the Board need not demonstrate irreparable harm. Nor is the injunction's burden on the employer given any weight in the analysis. Rather, the "mere potential for future impairment of the Board's remedial power is enough to justify injunctive relief[]" as "just and proper." Pet.App.29(a) (second quotation citing *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988)). Put another way, so long as NLRB has a "not frivolous" argument, the sole consideration for the court is "whether, under the circumstances of the case, judicial action is in the public interest." *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982) (citation omitted).

The Sixth Circuit's approach allows NLRB to obtain a preliminary injunction that imposes ruinous and irreparable costs on the target of an enforcement action based on allegations that the district court determines to be likely meritless and on the mere hypothetical impairment of the Board's enforcement powers. Such an injunction lasts for as long as NLRB

wants, which allows the Board to coerce enforcement targets into unfavorable settlements.

SUMMARY OF ARGUMENT

The "reasonable cause" test is wrong, so this Court should vacate the Sixth Circuit's decision below that relied on that test. It departs, without warrant, from long-standing principles of equity that favor district courts' using the familiar four-factor test when deciding whether to enter a preliminary injunction. Nothing in the NLRA authorizes such a departure.

The "reasonable cause" test results in improper and egregious judicial deference to the government. It requires the judge to grant NLRB injunctive relief against a private employer based on any "not frivolous" argument, even if the judge firmly believes that argument is wrong. The "reasonable cause" test thus abdicates "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Further, the test is incompatible with the Constitution's guarantee that no person shall be deprived of property without due process of law. *See* U.S. CONST. amend. V. By loosening the preliminary-injunction standard for the Board alone, the atextual "reasonable cause" test effectively requires the district court to place a thumb on the scale that is incompatible with the tribunal's due-process duty of impartiality. The "reasonable cause" test thereby allows NLRB to obtain an injunction that deprives an employer of property—here by forcing Starbucks to retain and pay unwanted employees—without establishing that the employer likely violated the law.

Finally, the grant of a § 10(j) injunction under the "reasonable cause" standard creates undue economic pressure to settle the Board's administrative enforcement claims, even when they are meritless.

The Court should vacate the decision below and clarify for lower courts that NLRB must satisfy the same four-factor equity standard as any other litigant, when seeking an injunction under § 10(j).

ARGUMENT

I. THE SIXTH CIRCUIT'S 'REASONABLE CAUSE' TEST IMPROPERLY DEPARTS FROM LONG-STANDING PRINCIPLES OF EQUITY

A. SECTION 10(j) INJUNCTIONS ARE SUBJECT TO TRADITIONAL PRINCIPLES OF EQUITY

Section 10(j) authorizes district courts, on petition from the Board, to grant "appropriate temporary relief or restraining order[]" when they deem such relief "just and proper." 29 U.S.C. § 160(j). Neither that section nor the rest of the statute specifies which standard courts should apply in evaluating NLRB's petitions. But that is unsurprising because traditional principles of equity have always bound district courts' equitable powers. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citations omitted) ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."). Thus, "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). *See also Salazar v. Buono*, 559

U.S. 700, 714 (2010) ("An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief."). This Court has instructed lower courts time and again that the injunctive relief standard simply does not change depending on the statute authorizing the issuance of an injunction.

For example, *Romero-Barcelo* reversed a grant of an injunction against the U.S. Navy which was issued pursuant to the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 *et seq*. Although it was not disputed (at least in this Court) that the Navy was violating provisions of the FWPCA, the Court explained that "[a]n injunction [was] not the only means of ensuring compliance[,]" because, *inter alia*, the FWPCA "provide[d] for fines and criminal penalties." 456 U.S. at 314. Thus, while injunctive relief was not foreclosed, the Court concluded that district courts retained traditional equitable powers "to arrive at a nice adjustment and reconciliation between the competing claims," so as to "balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Id.* at 312 (citations omitted) (cleaned up).

Provisions of the FWPCA that authorized injunctive relief are nearly identical to § 10(j). *Compare* 33 U.S.C. § 1319(b) (authorizing the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction[]" and empowering district courts "to restrain such violation and to require compliance[]") *with* 29 U.S.C. § 160(j). It

stands to reason that the injunction standard under the NLRA is no different than that under the FWPCA.

Traditional principles of equity guide the issuance of injunctive relief even where the legal rights are fully settled and consist of more than merely plausible allegations. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). That is so because "the creation of a right is distinct from the provision of remedies for violations of that right[,]" *id.* at 392, and equity requires district courts, after applying the traditional four-factor test, to "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

There is no reason to believe that district courts' equitable powers should apply differently in NLRA cases than in nearly every other case that comes before them. To the contrary, "a major departure from the long tradition of equity practice should not be lightly implied." *Romero-Barcelo*, 456 U.S. at 320. Congress legislates under the background presumption that principles of equity govern statutes providing for injunctive relief. *See eBay*, 547 U.S. at 391-92.

Congress knows full well how to displace those principles and authorize injunctive relief without any inquiry into the merits of a claim or balancing harms. For example, under the Hatch-Waxman Act, FDA's approval of a generic drug is automatically stayed for 30 months if a patent holder files suit alleging that such a drug would infringe one or more of its patents. *See* 21 U.S.C. § 355(j)(5)(B)(iii); 35 U.S.C. § 271. As another example, to facilitate orderly administration and distribution of the estate, the Bankruptcy Code automatically stays debt-collection proceedings

against debtors who file for bankruptcy. 11 U.S.C. § 362.

Section 10(j) contains no similar provision that would indicate any congressional intent to depart from the traditional principles of equity. It merely authorizes "just and proper" injunctive relief. But relief is only proper if it complies with traditional equitable principles. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) ("An injunction should issue *only* if the traditional four-factor test is satisfied.") (emphasis added). An approach that "presume[s] that an injunction is the proper remedy for a [statutory] violation except in unusual circumstances[]" does not meet that standard, and instead "invert[s] the proper mode of analysis." *Id.*

The fact the government is the one seeking an injunction does not change the calculus. This Court has long (and correctly) insisted that "the Government should turn square corners in dealing with the people [just as] the people should turn square corners in dealing with their government[.]" *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61, n.13 (1984) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). There is no reason to permit a near-automatic grant of a preliminary injunction when the Board seeks it, given that the NLRA permits assessment of penalties and other remedies for violations, *see* 29 U.S.C. § 162, while rejecting near-automatic grants for private petitioners. *See Romero-Barcelo*, 456 U.S. at 314 (rejecting appropriateness of a near-automatic injunction because, *inter alia*, the statute "provide[d] for fines and criminal penalties.").

An employer's ability to challenge directly in district court the legitimacy of NLRB's proceedings on constitutional grounds reinforces this conclusion. *See Axon Enters. v. FTC*, 598 U.S. 175 (2023) ("*Axon*/*Cochran*"). To obtain a preliminary injunction to halt the "'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process[,]" the employer must satisfy the four-factor test under traditional principles of equity. *Id.* at 192. It would be quite anomalous if NLRB could enjoin the employer under a more relaxed standard—and not just because the standards applying to each side would then be unequal. There could also be an incompatibility. Imagine that NLRB seeks a § 10(j) injunction, and the enforcement target counters by seeking its own injunction against the Board's proceedings under *Axon*/*Cochran*. *See, e.g.*, Complaint, *Space Explorations Techs. Corp. v. NLRB*, 1:24-cv-00001 (Jan. 4, 2024, S.D. Tex.) (requesting preliminary injunction against NLRB proceeding after agency communicated intent to seek § 10(j) injunction) Imagine further that NLRB barely shows reasonable cause but that the court concludes, when looking at the merits of the countersuit, that the target is more likely than not to prevail on the merits, would suffer irreparable harm, and comes out ahead in balancing the equities. Does the court enter an injunction for NLRB? For the target? For both? Congress could not have intended such incoherence in authorizing "just and proper" injunctions under § 10(j).

B. TRADITIONAL PRINCIPLES OF EQUITY PRECLUDE A PRELIMINARY INJUNCTION GRANT WITHOUT INDEPENDENTLY ASSESSING THE MERITS

For almost two centuries this Court has consistently held that "the remedies in equity are to be administered … according to the practice of courts of equity in" England prior to American Independence. *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832). *See also Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) ("The 'jurisdiction' … to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."); *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).") (quoting Armistead M. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)).

The Framers relied on these principles to safeguard against the judiciary's usurpation of power. At the time of ratification, the Anti-Federalists expressed concern that equity power of federal courts would result in the "entire subversion of the legislative, executive and judicial powers of the individual states." *Missouri v. Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (internal quotation marks omitted) (quoting Brutus No. 11,

Jan. 31, 1788, in 2 The Complete Anti–Federalist 420 (H. Storing ed. 1981)). Alexander Hamilton responded by assuring "that the defined nature of the English and colonial equity system—with its specified claims and remedies—would continue to exist under the federal judiciary." *Id.* at 130 (Thomas, J., concurring) (citing The Federalist No. 80, p. 540 (J. Cooke ed. 1961)). *See also* 1 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America § 57, at 54 (Boston, Little, Brown & Co. 13th ed. 1886) (explaining that federal equity power "is founded upon, co-extensive with, and in most respects conformable to, that of England.").

By the time of the American Revolution, the English Chancery's preliminary injunction standards were well-established. Under those standards, at the very least, courts could issue an injunction only after an assessment of the merits—a practice that is absent from the Sixth Circuit's "reasonable cause" test. Eighteenth-century English courts routinely inquired into the strength of an applicant's case before granting injunctive relief, and they denied it when the claimed right was not clear. As Professor John Leubsdorf explained in his seminal article, "Injunctions [p]ending [f]inal [d]ecisions in [e]quity" issued only upon an inquiry into "the merits of the underlying legal claim.[]" John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 529 (1978) (footnote omitted). And even when the underlying right was ultimately enforceable at law rather than at equity, but a preliminary injunction was sought to protect that right *pendente lite*, "Chancellors became accustomed to assessing the probable strength of the plaintiff's underlying claim." *Id.* at 530. In

essence, prior to issuing an injunction, Chancellors had to adjudicate the plaintiff's claim, even where the injunction sought was of interlocutory nature. *See id.* at 529 n.32 (citation omitted) ("[C]ounsel deliberately framed injunction motions so as to extract the Chancellor's views on the merits.").

By contrast, the Sixth Circuit's approach dispenses with this inquiry into the merits of NLRB's case. It permits injunctions upon finding of "reasonable cause to believe" that NLRB may have a valid claim. Pet.App.10a (quoting *Ozburn-Hessey Logistics*, 875 F.3d at 339). Since NLRB, like every other litigant, is subject to the strictures of Federal Rule of Civil Procedure 11, which in turn requires an attorney to certify that "the claims, defenses, and other legal contentions are warranted by existing law" and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[,]" *id.*, it necessarily follows that every non-sanctionable submission will meet the Sixth Circuit's standard. *See* Pet.App.28(a) (Readler, J., concurring). In other words, the Sixth Circuit's standard is no standard at all and transforms the grant of a preliminary injunction from the extraordinary remedy that it was in the Court of Chancery, and remains in our courts, into a relief that is granted as a matter of course upon mere application. This is precisely the type of "arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate," Federal Farmer No. 15, Jan. 18, 1788, in Anti–Federalist, *supra* at 323, that Anti-Federalists were worried about. The Federalist Papers assured the citizens the

Constitution did not grant such power to the courts. *See* The Federalist No. 83, at 569.

Contrary to the Framers' assurances, the Sixth Circuit's approach empowers judges to issue injunctions without examining the merits, thereby opening the door to decisions based on caprice or politics. Indeed, once NLRB presents a non-frivolous legal argument, a district court has discretion to issue § 10(j) injunctions based on "whether, under the circumstances of the case, judicial action is in the public interest." *Sheeran*, 683 F.2d at 979 (citations omitted). *See also* Pet.App.28(a) (Readler, J., concurring). An injunction standard that rests solely on a judge's belief about the public interest does not comport with the rule of law.

In many ways, this case is merely a replay of this Court's decision in *Grupo Mexicano*. There, in an action for money damages, the district court granted a preliminary injunction preventing the defendant (and the alleged debtor) "from transferring assets in which no lien or equitable interest [was] claimed." 527 U.S. at 310. The United States, appearing as *amicus curiae*, argued that such an injunction was permissible because it was "analogous to the relief obtained in the equitable action known as a 'creditor's bill[,]' [which] … permit[ted] a judgment creditor to discover the debtor's assets, to reach equitable interests not subject to execution at law, and to set aside fraudulent conveyances." *Id.* at 319. The Court disagreed, explaining that under pre-Revolutionary English practice "a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt[,]" *i.e.*, someone who already succeeded on the merits of the underlying

dispute. *Id*. The reason for such a rule in England, the Court explained, was more than a mere "procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued, but also [served as a] substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not *interfere with the debtor's use of that property*." *Id.* at 319-20 (emphasis added).

This case is no different. It is undisputed that the injunction against Starbucks interferes with its property rights, including by forcing Starbucks to employ and to pay unwanted employees. Absent any positive statutory strictures, the right to hire and fire is absolute. *See NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 219 (1940) ("[F]actory workers are customarily employed at will, without obligation of employer or employed to continue the relationship when the day's work is done[.]"). Without question, in order to protect employees' rights to organize, Congress has constitutional power to limit employers' ability to terminate an otherwise "at will" employee, including by forbidding "an employer [to] terminate his employees' 'tenure of employment or any term or condition of employment'[] because of union activity or affiliation.'" *Id.* at 218 (footnote omitted) (quoting 29 U.S.C. § 158(a)(3)). Prior to such an interference with an employer's otherwise unqualified right to terminate employees, the government (or employees themselves) must establish that it has a "cognizable interest" in the property of the employer. Mere "reasonable basis to believe" that they may have such an interest is insufficient just like in *Grupo Mexicano*.

It may well be that new economic realities call for a rebalancing of considerations that a court sitting in equity should take into account when faced with an employer-organized labor dispute. But "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than [federal courts] both to perceive them and to design the appropriate remedy." *Grupo Mexicano*, 527 U.S. at 322. And as explained above, *see* Section I.A., *supra* at pp. 8–9, Congress knows full well how to authorize alternative frameworks. Its choice not to do so in the NLRA context indicates loudly and clearly that Congress did not intend for the courts to depart from the well-settled principles of equity as practiced in the Court of Chancery when faced with a § 10(j) petition.

II. THE 'REASONABLE CAUSE' TEST CAUSES IMPROPER JUDICIAL DEFERENCE TO NLRB'S LEGAL AND FACTUAL THEORIES

Injunctions contemplated by § 10(j) are a form of preliminary injunction. Ordinarily, a court must exercise its independent judgment to determine, *inter alia*, that a party seeking an injunction is likely to succeed on the merits before granting such relief. *Winter*, 555 U.S. at 20. The "reasonable cause" test, however, requires the court to subordinate its judgment regarding a dispute's merits to the NLRB's self-serving claim that a violation of labor law occurred. That amounts to improper deference that requires federal courts to abdicate their duty "to say what the law is[]" when resolving cases or controversies. *Marbury*, 5 U.S. (1 Cranch) at 177.

This term, the Court is already considering whether to overrule judicial deference to agencies' legal interpretations under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See Loper Bright Enters. v. Raimondo*, No. 22-451, *cert. granted on Question 2 of Pet.* (May 1, 2023) and *Relentless v. Dep't of Com.*, No. 22-1291, *cert. granted on Question 1 of Pet.* (Oct. 13, 2023). Because the "reasonable cause" test is *even more* deferential to agencies, and not based in this Court's precedents, the case to reject it is stronger.

Like *Chevron*, the "reasonable cause" test was created through "judicial fiat" and is untethered to statutory text. *See* Pet.App.27a (Readler, J., concurring); *see also* Section I.B., *supra* at pp. 10–15. It likewise "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of *certiorari*). Lower courts applying the "reasonable cause" test recognize they are granting "deference to the Board" when evaluating the Board's request for § 10(j) injunctions. *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1134–36 (10th Cir. 2000) (citation omitted) (cleaned up); *accord Chester v. Grane Healthcare Co.*, 666 F.3d 87, 99 (3d Cir. 2011) ("granting a sufficient measure of deference to the Board"); *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 370 (2d Cir. 2001) ("giv[ing] considerable deference to the Board or Regional Director when making a determination of reasonable cause.").

Judicial deference under the "reasonable cause" test is far stronger than under *Chevron* and other judicial deference precedents. To start, *Chevron*

deference is available only to an agency's final legal position arrived at through formal deliberative procedures, such as notice and comment. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). By contrast, the "reasonable cause" test demands deference to an untested "theory of liability" that NLRB advances in litigation. *Gottfried*, 818 F.2d at 493 (citations omitted). "Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). *Chevron* deference is also at least limited to an agency's "reasonable" interpretations of ambiguous statutes. 467 U.S. at 844. By contrast, the "reasonable cause" test requires a court to credit NLRB's legal arguments as long as they are "not frivolous." *Gottfried*, 818 F.2d at 493 (citations omitted); *see also Chester*, 666 F.3d at 100 (3d Cir. 2011) (quoting *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 882 (3d Cir. 1990)) (NLRB's legal theory must merely be "substantial and not frivolous").[2]

Justice Thomas recently opined that "eventual review" of an agency's "factual findings under a deferential standard" is incompatible with Article III's vesting of judicial power in federal courts. *Axon/Cochran*, 598 U.S. at 202–03 (2023) (Thomas, J., concurring). The "reasonable cause" test is much worse because it requires deference to NLRB's factual

[2] Because of the requirements of Fed. R. Civ. P. 11, all (or nearly all) of NLRB's court filings will meet the "non-frivolous" standard. To put it another way, under the deferential review employed by six circuits for obtaining a § 10(j) injunction, NLRB need not meet any standard above and beyond the standard for initiating the action in the first place.

theories, as § 10(j) injunctions are sought before the agency makes reviewable factual *findings* through its internal proceedings. *See Ozburn-Hessey Logistic*s, 875 F.3d at 339 (affirming § 10(j) injunction "[s]o long as facts exist which *could* support the Board's theory of liability[]") (emphasis added).

Thus, a judge applying the "reasonable cause" test "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) (citations omitted). This "not frivolous" standard is an extremely low bar. A claim "is frivolous if it is 'obviously without merit' under existing law and unsupported by a good-faith argument to change or extend the law." *King v. Whitmer*, 71 F.4th 511, 528 (6th Cir. 2023) (quoting Fed. R. Civ. P. 11(b)(2)). NLRB may obtain a § 10(j) injunction even if the court believes the Board's arguments are meritless, so long as those defects are not patently obvious enough to warrant sanctions.

Therein lies a recipe for complete abdication of judges' duty under Article III of the Constitution to form an independent judgment as to the merits of NLRB's legal theories purporting to support a § 10(j) injunction. *See Marbury*, 5 U.S. (1 Cranch) at 177. Such independent judgment has long been considered one of "the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). The judicial power was "originally understood" to require judges "to exercise [their] independent judgment in interpreting and expounding upon the laws." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155

(10th Cir. 2016) (Gorsuch, J., concurring). As Justice Story explained, "however disagreeable that duty may be," the judiciary is "not at liberty to surrender, or to waive it." *United States v. Dickson*, 40 U.S. 141, 162 (1841). But such unconstitutional waiver is precisely what the "reasonable cause" test calls for. It allows judges to shirk their duty to evaluate the Board's likelihood of success on the merits and thereby grant injunctions based on "not frivolous" arguments.

Deference to NLRB is especially problematic because the Board is constantly shifting its legal interpretations when its composition changes. For example, *Am. Steel Construction, Inc.*, 372 NLRB No. 23 (2022) overruled *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), which in turn overruled *In re Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 NLRB No. 934 (2011). *See also, e.g.*, *Stericycle, Inc.*, 372 NLRB No. 113 (2023) (overruling *Boeing Co.*, 365 NLRB No. 154 (2017) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019)); *Lion Elastomers*, 372 NLRB No. 83 (2023) (overruling *General Motors LLC*, 369 NLRB No. 127 (2020)); *McLaren Macomb*, 372 NLRB No. 58 (2023) (overruling *Baylor Univ. Medical Ctr.*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020)). It also practices a "nonacquiescence policy" that directly defies federal appellate courts by "instruct[ing] its administrative law judges to follow Board precedent, not [conflicting] court of appeals precedent, unless overruled by the United States Supreme Court." *D. L. Baker, Inc.*, 351 NLRB 515, 529 n.42 (2007) (citations omitted). Strong deference to the Board's legal theories under such circumstances exacerbates an already unpredictable regulatory environment.

III. THE 'REASONABLE CAUSE' TEST IS INCOMPATIBLE WITH DUE PROCESS OF LAW

The Fifth Amendment prohibits the federal government from depriving a person of life, liberty or property without due process of law. U.S. CONST. amend. V. By departing from traditional principles of equity, the "reasonable cause" test violates the due process of law by allowing NLRB to deprive an employer of property in a biased § 10(j) proceeding without having to establish a legal violation likely occurred. It compounds that injury because a § 10(j) injunction under the "reasonable cause" test transforms the Board's administrative adjudications into coercive proceedings.

A. THE 'REASONABLE CAUSE' TEST DEPRIVES ENFORCEMENT TARGETS OF PROPERTY WITHOUT DUE PROCESS

Section 10(j) preliminary injunctions indisputably deprive an employer of its property interests—here by forcing Starbucks to retain and pay unwanted employees. Such deprivation may occur only after due process of law, which the "reasonable cause" test fails.

Under that test, the Board may obtain a preliminary injunction from the district court even when the underlying enforcement action is unlikely to succeed on the merits. Rather, as Judge Readler's concurrence explained, all that is needed is the "[a]bsen[ce of] legal frivolity on the Board's part[]" and "'facts [that] exist which *could* support' its theory of liability." Pet.App.28a (Readler, J., concurring) (emphasis in original) (*quoting Ozburn-Hessey Logistics*, 875 F.3d at 339).

This deferential standard violates the due process of law by "introduc[ing] into judicial proceedings a 'systematic bias toward one of the parties.'" *Buffington*, 143 S. Ct. at 19 (2022) (Gorsuch, J., dissenting from denial of *certiorari*) (quoting Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016)). By requiring courts to accept any "not frivolous" legal theory from the Board, the test mandates a "precommitment" to favor the Board's "judgments about the law." Hamburger, 84 Geo. Wash. L. Rev. at 1212. As this Court has long explained, "[a] fair trial in a fair tribunal is a basic requirement of due process." *Id.* at n.79 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). But "[h]ow is it fair in a court of justice for judges to defer to one of the litigants?" *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *abrogated on reh'g en banc*, 927 F.3d 382 (per curiam).

The "reasonable cause" test further allows the Board to deprive an employer of its property even where the district court concludes that the employer most likely complied with the law. A proceeding in which the government may deprive an accused of private property based on "not frivolous" but nonetheless meritless allegations flunks any plausible definition of due process of law.

The "reasonable cause" test fails even the flexible framework under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under *Mathews*, the adequacy of pre-deprivation procedure is determined by weighing: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of [that] interest"; and (3) "the Government's interest[.]" *Id.*

To start, the "reasonable cause" test entirely fails to consider private interests affected by a § 10(j) injunction. The traditional four-factor test requires balancing equities between the government's interest and the injunction's burden on the employer. *See Winter*, 555 U.S. at 20. By contrast, the "reasonable cause" test completely omits the balance of equities, giving no consideration to the burden on the employer's property rights. In one case, for instance, a court applying the "reasonable cause" test enjoined an employer from selling a facility that was operating at a loss. *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998). This complete evisceration of property rights was not accompanied by any analysis of the burden on the employer and instead considered only the Board's interest in "facilitat[ing] peaceful management-labor negotiation[.]" *Id.* (quoting *Vibra Screw, Inc.*, 904 F.2d at 879).

Next, the "reasonable cause" test carries an extremely high "risk of an erroneous deprivation of [that] interest[,]" *Mathews*, 424 U.S. at 335, because the Board can obtain a § 10(j) injunction based on threadbare allegations. By evading the traditional requirement of showing a "likelihood of success on the merits," the "reasonable cause" test allows the Board to obtain injunctions that deprive employers of property even when the Board's allegations are more likely than not meritless. Such erroneous deprivation of property rights is not just an unfortunate byproduct of the test's departure from traditional injunction analysis; rather, it is the point of such a departure.

Finally, NLRB's interest in enforcing labor-relations laws does not provide adequate justification for maintaining the "reasonable cause" test. There is

no reason why the Board cannot adequately perform its duties under the traditional injunction test, which would require the Board to establish, *inter alia*, a likelihood of success on the merits and a favorable balance of equities. Indeed, countless federal agencies are perfectly capable of performing their regulatory duties while satisfying the four-factor test when obtaining injunctions against private parties. *See, e.g.*, *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066 (11th Cir. 2021). There is simply no legitimate government interest in obtaining meritless and inequitable injunctions.

B. THE 'REASONABLE CAUSE' TEST COERCES EMPLOYERS INTO UNFAIR SETTLEMENTS IN NLRB PROCEEDINGS

The grant of a § 10(j) preliminary injunction spells certain defeat to employers in the Board's enforcement proceedings. Such an injunction lasts for the duration of the underlying proceeding, which can be "notoriously glacial," *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011). Moreover, the Board controls the pace of internal agency proceedings and thus the duration of § 10(j). This is in sharp contrast to ordinary preliminary injunctions, where the *court* controls the pace of proceedings to protect parties' interests. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204 (2d Cir. 1970) (upholding injunction on view that case must "proceed speedily to trial[]").

Once it obtains a § 10(j) injunction, the Board has no incentive to resolve an administrative enforcement action quickly. Rather, it has every incentive to drag out proceedings because it has already obtained the

result sought. Meanwhile, the employer faces ever-mounting economic costs from the injunction, which will continue for as long as the Board desires. At that point, surrender regardless of the merits is often the only viable option. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 621–22 (1966) (Fortas, J., dissenting) (footnote omitted) ("A 'preliminary' injunction, in effect during the years required to complete the Commission's proceedings, often—probably usually—means that the plans to merge will be abandoned. … 'Preliminary' here usually means final.").

The "reasonable cause" test allows the Board to obtain a § 10(j) preliminary injunction without having to make any showing of success on the merits, which leaves the accused employer little choice but to surrender. Such undue pressure amounts to coercion that violates due process of law. *See Perez v. Pan-Am. Berry Growers, LLC*, No. 13-CV-1439, 2014 WL 198781 (D. Or. Jan. 15, 2014), *report and recommendation adopted*, No. 13-CV-1439, 2014 WL 1668254 (D. Or. Apr. 24, 2014). In *Perez*, the Department of Labor brought an enforcement action against a blueberry producer for alleged labor violations and entered a "hot goods" objection, which prevents goods allegedly produced in violation of labor laws from entering commerce. *Id.* at *1, *1 n.2. Because the blueberries at issue were perishable, the producer was faced with irreparable economic loss unless it settled with the agency, even though the agency had made no showing as to the merits of its allegations. *Id.* at *4. The court held that such a settlement was invalid because it was obtained through improper economic duress and thus violated due process of law. *Id.* at *5.

The "reasonable cause" test generates the same type of improper economic duress. NLRB can obtain a preliminary injunction against an employer based on threadbare allegations that are unlikely to succeed on the merits. The injunction imposes upon the employer continued economic costs—here paying unwanted employees—for as long as the Board wishes or until the employer cries uncle. Such extreme economic duress violates the employer's right to due process of law in the underlying administrative proceeding.

The "reasonable cause" test is incompatible with the Constitution's guarantee of due process of law. Section 10(j) cannot authorize the grant of preliminary injunctions based on that test. Rather, the traditional four-factor test should apply,

CONCLUSION

The Court should vacate the decision below.

Respectfully submitted,

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February 28, 2024