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 THE STATE OF TENNESSEE AND TWENTY OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The States of Tennessee, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia have a long-recognized interest in protecting the proper allocation of governmental power—both between the federal branches and between the federal government and the States. Policing these bounds helps *amici* States protect their citizens and sovereign prerogatives from federal agencies' unlawful arrogation of power. The National Labor Relations Board's (NLRB) self-serving reading of Section 10(j) harms the separation of powers (horizontal and vertical) by placing courts' coercive power at NLRB's beck and call. This Court should not allow further deviations from constitutional first principles in the name of "defer[ing]" to the supposed "expert judgments" of federal agencies. Br. in Opp. 7. Nor may NLRB countermand the States' traditional province over employment matters absent a clear Congressional command. The *amici* States urge the Court to adopt an interpretation of Section 10(j) that holds NLRB to the traditional preliminary injunction test other parties must follow, not a more lenient standard that perversely rewards NLRB's defective enforcement regime and hampers core state prerogatives.

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[1] No counsel for any party authored this brief in whole or in part and no counsel or party—other than amici—made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Those squaring off with agencies like NLRB face a deck stacked on the side of enforcement. NLRB claims power to resolve employment disputes historically reserved for courts. And it does so via lengthy in-house proceedings where the agency bats almost a thousand—serving as prosecutor, judge, jury, and sentencer. Most parties settle rather than endure long odds of success and soaring legal costs. The few who stick it out for their day in court face deferential review that favors NLRB's view of the facts and law. Nor are there ready ways to push back on NLRB policy, since Board members' removal protections leave them directly accountable to no one. States' policy prerogatives likewise stand sidelined by NLRB's enforcement excesses, even though many employer-employee disputes sound in state-law matters like contract, property, and tort.

Yet all this power is not enough for NLRB, which now seeks to further enmesh federal courts in its tilted enforcement regime. In NLRB's view, Section 10(j) of the National Labor Relations Act (NLRA) exempts it alone from the normal requirements for obtaining preliminary relief. Rather than show that it is likely to win an enforcement action, NLRB insists it need only show that its legal theory is "not frivolous." Pet. App. 28(a) (Readler J., concurring). And rather than demonstrate that the equities weigh in its favor, NLRB asserts per se harm from any enforcement delay. To justify this watered-down injunction analysis, NLRB recites its role as the "expert" arbiter of labor disputes. Br. in Opp. 7.

This Court should reject NLRB's request for most-favored-movant status under Section 10(j). For starters, permitting NLRB to co-opt courts' coercive power compounds existing defects with NLRB's in-house proceedings and structure. Requiring courts to rule for NLRB in all but the outlier injunction case impermissibly transfers Article III authority from the judicial branch to the executive. NLRB's reading of Section 10(j) also inflames due-process problems with in-house proceedings by rewarding NLRB with pre-ordained rulings in purportedly neutral forums. To top it off, allowing NLRB to commandeer preliminary injunction proceedings confounds public accountability over the agency's coercive regulation of businesses. The resulting regime would leave parties with even less reason to litigate agency enforcement rather than settle—shielding even dubious NLRB positions from legal scrutiny.

Were that not enough, NLRB's reading licenses a regulation-by-injunction regime that flouts federalism limits. Employment policy rests within States' traditional police-power oversight. Tennessee and other States have chosen to exercise this power by enacting pro-growth business policies. Yet under NLRB's view of Section 10(j), the agency can readily override those core state prerogatives by bootstrapping suspect legal theories into business-crushing injunctions. Nothing in Section 10(j) clearly licenses this NLRB invasion into States' domains—giving this Court an additional reason to reject the agency's sweeping conception of its Section 10(j) power.

ARGUMENT

I. A Lax Section 10(j) Reading Worsens NLRB's Unconstitutional Enforcement Regime.

As an independent agency wielding the power to simultaneously prosecute, judge, and punish citizens, NLRB's constitutionality is dubious as it stands. Accepting NLRB's Section 10(j) position would worsen the agency's pre-existing constitutional flaws and further harm the private parties NLRB targets. This Court should "seek harmony" with Section 10(j) and the Constitution by denying NLRB free rein to co-opt courts' coercive power. *United States v. Hansen*, 599 U.S. 762, 781 (2023).

A. To protect individual liberty, the Constitution divides power among three branches and reserves the resolution of cases and controversies to independent Article III courts subject to due-process limits. NLRB's existing enforcement regime upends these constitutional guarantees.

1. The Constitution allocates power among three branches—legislative, executive, and judicial—by vesting each with distinct roles. Article I gives Congress the power to make laws regulating national issues. But to "'promote deliberation and circumspection' and 'check excesses in the majority,'" the Constitution requires that any legislation survive bicameralism and presentment. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting The Federalist No. 70, at 475 (Alexander Hamilton) (Jacob Cooke ed. 1961)). Article II tasks executive officials, under the supervision of an elected President, with carrying out the

law's commands. To justify and check that "unique" authority, the Constitution makes the President "the most democratic and politically accountable official in Government." *Id.* And Article III charges independent judges with resolving cases and controversies that implicate parties' private rights. Judges' independence helps ensure courts reach decisions based on the law and the facts without an "eye toward currying favor with Congress or the Executive." *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

"To the Framers, the separation of powers and checks and balances were more than just theories." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring). "They were practical and real protection for individual liberty in the new Constitution." *Id.* Such "structural protections"—which predated the Bill of Rights—guarded "against abuse of power" and "were critical to preserving liberty. *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). Thus, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

2. Even apart from Section 10(j), NLRB's in-house enforcement regime violates the separation of powers and basic rules of fair play.

For starters, NLRB in-house enforcement proceedings commandeer core judicial power vested in federal courts. *See* U.S. Const. art. III, § 1. The disputes NLRB resolves often turn on employers' responses to alleged employee misconduct, the right to terminate

employment, and the employees' right to use employer property—as this case shows. But such matters typically sound in tort, contract, and property principles—the "stuff . . . of Westminster in 1789." *Stern*, 564 U.S. at 484 (quotations omitted); *see* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357, 1357 (1983) (explaining that, before the NLRA, "the area of labor relations was governed by a set of legal rules that spanned the law of property, contract, tort, and procedure"). By permitting resolution of these "private rights" by executive-branch officials who "mimic the methods of a common-law court," NLRB's in-house proceedings arrogate Article III power. Alexander MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, 24 Fed. Soc'y Rev. 304, 319–23 (2023).

Deference doctrines further impede courts' proper role in NLRB-related cases. Rather than independently determine case-critical facts, courts must apply light-touch "substantial evidence" review that largely binds them to the Board's version of key events. 29 U.S.C. § 160(e), (f); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). That is so even when Board members reverse fact and credibility determinations of agency trial judges "without hearing from any witnesses." *Cf. Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J. dissenting). The resulting regime systematically disadvantages enforcement targets. *See* MacDonald, *The Labor Law Enigma*, *supra*, at 319–24 (deference doctrines have "whittled judicial review" of NLRB decisions "down to a rump").

On questions of law, NLRB (for now) wields *Chevron* and *Auer* authority to saddle Article III judges with interpretations they'd otherwise reject if "exercising the[ir] judgment." *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring). So long as NLRB identifies ambiguity and advances a reasonable reading, it remains "the authoritative interpreter" of labor statutes and regulations. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005); *accord NLRB v. Hearst Pubs.*, 322 U.S. 111, 130 (1944). Unsurprisingly, courts citing *Chevron* uphold NLRB decisions at a far higher rate than courts who do not—83.9% versus 54.9%. Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. Irvine L. Rev. 621, 679 (2022). By sidelining Article III courts in a swath of cases, NLRB's deference framework allows the agency to "seesaw[] back and forth between statutory interpretations," leaving regulated parties "in the lurch." *Valley Hosp. Med. Ctr., Inc. v. NLRB*, No. 22-1804, 2024 WL 678727, at *5 (9th Cir. Feb. 20, 2024) (O'Scannlain, J. concurring); s*ee also* Br. of Coal. for a Democratic Workplace et al. as Amici Curiae supporting neither party at 12–17, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. July 24, 2023) (chronicling NLRB's history of position changes).

The due-process problems with NLRB's existing regime are glaring too. Five unelected Board members exercise significant, nationwide power to target employers for onerous enforcement. NLRB carries out its agenda not in neutral courts, but through in-house agency proceedings lacking basic procedural protections like a right to confront witnesses and obtain

relevant discovery. *See, e.g.*, *Leslie v. Starbucks Corp.*, 22-CV-478 (JLS), 2023 WL 5431800, at *2–3 (W.D.N.Y. Aug. 23, 2023) (agency charged Starbucks' issuance of court-approved subpoenas as unfair labor practice). NLRB simultaneously serves as prosecutor, judge, jury, and sentencer—the agency issues a complaint, then circles back to decide whether to affirm the complaint it authorized. NLRB's soaring in-house win rate—it "won, in whole or in part," more than 90% of the time in 2023 proceedings[2]—confirms the regime's stacked-deck setup and creates an "appearance of bias" due process does not tolerate. *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *cf. Capterton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009).

Finally, NLRB's independent structure flouts Article II by shielding Board members from presidential oversight. To ensure accountability for the exercise of the "executive Power," the Constitution demands that the President retain the ability "to remove those who assist him in carrying out his duties." *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010)). If "an agency does important work," its leaders must be accountable through removal—no matter the agency's "size or role." *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021); *cf. Seila Law*, 140 S. Ct. at 2199–200 (excepting from removal rule "multimember expert agencies that do not wield substantial executive power"). NLRB possesses immense authority to police employment practices nationwide, including "prosecutorial"

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[2] NLRB, *Performance and Accountability Report FY 2023*, at 18, https://bit.ly/3HZVfSu (last visited Feb. 26, 2024).

power to seek Section 10(j) injunctions. *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 852 (5th Cir. 2010). Yet the President can remove Board members only "for neglect of duty or malfeasance in office, but for no other cause"—including policy disagreements with the Board's approach. 29 U.S.C. § 153(a). This removal insulation "subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund*, 561 U.S. at 498.

B. NLRB's Section 10(j) position would add a preliminary injunction trump card to the agency's unconstitutional advantage. The resulting harm will flow from Starbucks down to local businesses who cannot endure years-long fights in NLRB proceedings all while frozen by business-altering injunctions.

1. In NLRB's view, securing a Section 10(j) injunction only takes a theory that is "substantial and not frivolous." *E.g.*, *Gottfried ex rel. NLRB v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). As Judge Readler explained and Starbucks' brief illustrates, NLRB's reading of Section 10(j) effectively outsources the decision whether to grant an injunction to NLRB. *See generally* Pet. App. 30a–34a. Allowing NLRB to commandeer Article III courts in this manner would compound the agency's constitutional flaws.

a. ***More Arrogation of Judicial Power.*** Interpreting Section 10(j) NLRB's way would further hamper courts' judicial power by siphoning off authority to consider equitable remedies. "An injunction" that dictates the action of private parties "is an exercise of a

court's equitable authority." *Salazar v. Buono*, 559 U.S. 700, 714 (2010). To justify this "extraordinary" coercive power, a movant must ordinarily clear a high bar. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). He 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, Inc.*, 555 U.S. 7, 20 (2008).

NLRB not only reads Section 10(j) to exempt the agency from these ordinary requirements. NLRB would effectively remove *any* meaningful role for neutral Article III courts in preliminary injunction proceedings. Section 10(j) injunctions, in NLRB's view, do not turn on courts' "independent judgment" of the law, facts, and matters of equity. *Perez*, 575 U.S. at 119 (Thomas, J., concurring). Instead, courts must accede to NLRB's colorable conjecture about what violations in-house proceedings might reveal, then issue NLRB's requested remedy no matter the countervailing equities. Article III does not permit practically "directing judgment for [NLRB]" in all preliminary injunction proceedings. *Bank Markazi v. Peterson*, 578 U.S. 212, 231 (2016).

To make Article III matters worse, NLRB's proposed 10(j) power would expand agency authority under existing deference doctrines. There are plenty of problems with courts deferring to agencies' fact and credibility findings on review of a final order. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 202–03 (2023) (Thomas, J., concurring). But at least such deference

has a longstanding justification: namely, that there are certain "class[es] of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell v. Benson*, 285 U.S. 22, 46 (1932). In the Section 10(j) context, though, courts are reviewing NLRB's *predictions* about what future facts *might* show—sometimes issued, as in Starbucks' case, based on one-sided and hearsay-riddled submissions. *See* Pet. App. 70a n.5. Binding courts to "untested" factual allegations neuters judicial power outside the norm for agency review. *King v. Amazon.com Servs. LLC*, 22-CV-1479, 2022 WL 17083273, at *3–4 (E.D.N.Y. Nov. 18, 2022).

NLRB's Section 10(j) position would likewise lessen the judiciary's power to interpret governing statutes and regulations. Already, *Chevron* and *Auer* allow NLRB to skate by in cases with second-best legal readings. A lax 10(j) rule would further stretch deference by permitting NLRB to prevail with any non-frivolous substantive theory. Even more than the default, this deference-on-deference approach would require a judge "to exercise his judicial authority to adjust private rights and obligations based on the agency's (mis)understanding of the law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2440 (2019) (Gorsuch, J., concurring in the judgment).

On top of all this, deferring to NLRB's pre-enforcement position would deny parties their traditional means to defeat deference. To take advantage of *Chevron* or *Auer* leeway, agencies typically must clear several procedural hurdles. Among other requirements,

agencies must address position changes and any harm to parties' reliance interests. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016). And they cannot pull "surprise switcharoo[s]" by retroactively punishing parties under new legal rules. *Wages & White Lion Invs., LLC v. FDA*, 90 F.4th 357, 386 (5th Cir. 2024) (en banc); *see, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156–57 (2012). At the outset of enforcement, however, NLRB often will not have grappled with such issues—let alone in a manner that is "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 417 (2021). By requiring courts to issue preliminary relief regardless, NLRB's reading of Section 10(j) risks subjecting parties to years of interference without core safeguards on agency power.

b. ***More Due-Process Fouls.*** To justify its preordained outcomes in Section 10(j) proceedings, NLRB insists it alone has the expertise needed to render the snap labor-law judgments such proceedings require. *See* Br. in Opp. 7. Courts faced with a 10(j) petition, the NLRB says, must "account[] for the deference owed to the Board's expert judgments" and the "Board's ultimate authority to resolve the unfair-labor-practice claim." *Id.*

Accepting NLRB's deference-laden rationale would perversely reward agency processes that hamstring targeted parties. NLRB's Section 10(j) "investigation" often rests exclusively on paper affidavits from aggrieved employees with no opportunity for employer response. *See, e.g.*, *King*, 2022 WL 17083273, at *3–4. On the merits, NLRB's in-house processes deprive

parties of the same confrontation, discovery, and evidentiary rights they would enjoy in court. *See supra* p. 10. If foregone in-house victory entitles NLRB to front-end injunctions, NLRB has even more reason to persist with procedures that "effectively deprive[] employers of their day in court."[3] Injunctions would ratchet up as procedural fairness ratchets down—in turn placing even more weight "on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else." *See Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari).

Reading Section 10(j) NLRB's way also spreads apparent procedural bias from in-house proceedings to Article III tribunals. Private parties, States, and even other arms of the federal government must justify their requests for injunctive relief the same way—by showing that the usual four factors weigh in favor of that extraordinary relief. *See Winter*, 555 U.S. at 20. Yet NLRB seeks preferential treatment under a relaxed standard with only "meek" scrutiny. *See* Pet. App. 19a (Readler, J., concurring). Treating NLRB better than the parties it faces explodes Article III's aim to ensure neutral forums for legal disputes. *Cf. Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring) ("Umpires in games at Wrigley Field do not defer to

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[3] Louis P. DiLorenzo, *The Management Perspective: A Management Practitioner's Observations Concerning the Latest General Counsel's Initiatives Regarding the Use of 10(j) Injunctions During Organizing Campaigns*, *in* Resolving Labor and Employment Disputes: A Practical Guide 17, 26 (Ross E. Davies ed., 2012).

the Cubs manager's in-game interpretation of Wrigley's ground rules.").

This disparate treatment is particularly glaring given regulated parties' higher burden in pre-enforcement challenges to agency proceedings. This Court's decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), opened a narrow avenue for parties to preempt invalid agency enforcement. But challengers still must satisfy the traditional equitable factors to enjoin unconstitutional conduct. *Cf. Free Enter. Fund*, 561 U.S. at 491 n.2 (collecting cases). NLRB, by contrast, need only find a non-frivolous theory to secure pre-enforcement relief on its view of Section 10(j). Due process principles counsel against a double standard that favors NLRB at every turn.

c. *More Muddying of Article II Accountability.* Adding at-will injunction power to NLRB's arsenal further impedes public accountability for key policies. NLRB members' insulation from the President's removal power already complicates the "clear and effective chain of command" Article II contemplates. *Id.* at 498. A lax Section 10(j) reading adds yet another complication by allowing NLRB to launder its controversial policies through court order. At best, deferring to NLRB's view in 10(j) proceedings would confuse where "[t]he buck stops" for the resulting business harm. *Id.* at 493. At worst, NLRB could deflect public blame to a judicial branch that is politically unaccountable by design. Such "diffusion of authority . . . 'greatly diminish[es] the intended and necessary responsibility of the chief magistrate himself.'" *Id.* (quoting The

Federalist No. 70, at 478 (Alexander Hamilton) (Jacob Cooke ed. 1961)).

2. Giving NLRB yet another enforcement edge would further harm regulated parties in ways they often cannot afford.

NLRB's near-sure success in enforcement proceedings leaves most targets with no choice but to cave. The Board, for its part "encourages parties to resolve cases by settlement" and boasts a "more than 90%" settlement success rate overall. NLRB, *Facilitate Settlements*, https://bit.ly/48yAWGR (last visited Feb. 26, 2024). Those parties who choose to fight on face years of expensive proceedings on a "notoriously glacial" timeline. *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (quotation omitted). Even if Starbucks can afford these long odds, many smaller businesses cannot.

Adding the prospect of lengthy preliminary injunctions lessens parties' already low incentives to contest NLRB. Rather than simply stomach the costs of in-house proceedings, businesses subject to Section 10(j) actions will undergo additional costs like rehiring employees, *see, e.g.*, *Overstreet v. El Paso Disposal, L.P.*, 668 F. Supp. 2d 988, 1009–11 (W.D. Tex. 2009), or even maintaining an unprofitable location, *see, e.g.*, *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247–48 (3d Cir. 1998). And these are not one-time expenses; they will continue until the administrative proceeding ends (almost certainly in a loss for the business) or the business buckles under the financial strain. It is no wonder that many businesses in NLRB's crosshairs

choose settlement. *See* NLRB, *10(j) Injunctions*, https://bit.ly/3SgqVrD (last visited Feb. 26, 2024). Examples abound. Local businesses like Oakland Grove Nursing Home, a Rhode Island long-term-care facility; Hercules Fire Protection and Plumbing, LLC, a northeast Ohio plumbing business; and Checklist Cleaning, LLC, a Pennsylvania-based cleaning company all faced NLRB's scrutiny. And all three settled after Section 10(j) petitions were filed. *See id.*

Adopting NLRB's 10(j) position nationwide would exacerbate this trend at a time when the agency's posture towards seeking preliminary relief is growing ever more aggressive. Starbucks Cert. Pet. 23. For many parties, holding NLRB to the traditional stringent showing for preliminary injunctions will be the difference between business as usual and buckling under NLRB's demands.

II. A Lax Section 10(j) Reading Worsens NLRB's Overreach into States' Domains.

Just as the federal separation of powers promotes individual liberty, the Constitution's "healthy balance of power between the States and the Federal Government" helps "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). To preserve this balance, this Court typically requires clear text before reading a statute to permit federal intrusion into States' traditional domains. That federalism canon further cuts against NLRB's interpretation of Section 10(j), which would aggravate NLRB meddling in areas of traditional state authority.

A. The Constitution's vertical separation of powers promotes liberty, accountability, and experimentation by preserving States' policy primacy. To protect the balance of federal and state power, this Court requires clear congressional direction before permitting federal interference in areas States traditionally regulate.

1. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty" that divides power "between the States and the Federal Government." *Id.* at 457. Under that system, the federal government wields only the "enumerated powers" surrendered by the States in the Constitution, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). The States, by contrast, retain "numerous and indefinite" powers that "extend to all the objects . . . concern[ing] the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity" of the country. *Gregory*, 501 U.S. at 458 (quoting The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed. 1961)); *see also* U.S. Const. amend. X. That "[t]he States exist" and exercise broad residual power "refut[es]" any notion that the federal government acts as the "ultimate, preferred mechanism for expressing the people's will." *Alden v. Maine*, 527 U.S. 706, 759 (1999).

This system of joint sovereignty has "numerous advantages." *Gregory*, 501 U.S. at 458. It "preserves the integrity, dignity, and . . . sovereignty of the States," and thereby "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States* (*Bond I*), 564 U.S. 211, 221

(2011) (quotations omitted). Such diffusion of power in turn "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," "makes government more responsive by putting the States in competition for a mobile citizenry," and "allows for more innovation and experimentation in government." *Gregory*, 501 U.S. at 458. In short, reserving States' significant lawmaking powers reflects that citizens are often best served by "governments more local and more accountable than a distant federal authority." *West Virginia v. EPA*, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (cleaned up).

2. This Court's approach to statutory interpretation heeds these federalism principles. The Court has long presumed that Congress legislates with an eye toward "preserv[ing] the constitutional balance between the National Government and the States." *Bond v. United States* (*Bond II*), 572 U.S. 844, 862 (2014) (quotations omitted). To displace traditional spheres of state authority, Congress must "make its intention to do so 'unmistakably clear in the language of [a] statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotations omitted). And that is no low hurdle: The text itself must contain "*exceedingly clear language* . . . to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020) (emphasis added); *see also Sackett v. EPA*, 598 U.S. 651, 679 (2023).

This Court routinely invokes a federalism-based interpretive principle when construing acts of

Congress. Such cases have arisen in areas ranging from property rights, to criminal punishment, to local transportation services, to labor relations.[4] Federalism also sheds light on the permissible scope of administrative authority: An agency position that "intrudes into an area that is the particular domain of state law" likewise must reflect "exceedingly clear" statutory language. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *see also United States v. Five Gambling Devices Labeled in Part "Mills," & Bearing Serial Nos. 593-221*, 346 U.S. 441, 449–50 (1953); *FTC v. Bunte Bros.*, 312 U.S. 349, 351 (1941).

The punchline: Before upsetting "the usual constitutional balance of federal and state powers," it is "incumbent upon the . . . courts to be certain of Congress'[s] intent." *Bond II*, 572 U.S. at 858 (quoting *Gregory*, 501 U.S. at 460) (cleaned up).

B. Relevant here, States have traditionally enjoyed power to regulate workplace matters, including by adopting pro-growth policies that benefit businesses and employees alike.

"States possess broad authority under their police powers to regulate the employment relationship"

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[4] *See Cowpasture*, 140 S. Ct. at 1849–50; *Bond II*, 572 U.S. at 857–860; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Jones v. United States*, 529 U.S. 848, 858 (2000); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994); *Will*, 491 U.S. at 65; *United States v. Bass*, 404 U.S. 336, 349–50 (1971); *United Auto., Aircraft & Agric. Implement Workers of Am. v. Wisc. Emp. Rels. Bd.*, 351 U.S. 266, 274–75 (1956); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940); *Palmer v. Massachusetts*, 308 U.S. 79, 84 (1939).

within their borders. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). And they have historically exercised that authority by enacting reticulated structures governing the employment relationship—within which "[f]ederal labor law . . . is [merely] interstitial." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). States, for example, have passed "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws." *DeCanas*, 424 U.S. at 356. The list goes on. And, without a clear contrary command from Congress, States maintain power to regulate the employment relationship by advancing any number of different policies.

For example, the NLRA imposes certain restrictions on employers related to the unionization of employees and the collective-bargaining process. But the Act did not "completely extinguish[] state power" in this area. *Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963); *see also Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn*, 375 U.S. 96, 101 (1963) (stating that Congress did not "preempt the field"). Just the opposite, the NLRA expressly preserved the States' ability to prohibit union-membership requirements, for example. *See* 29 U.S.C. § 164(b).

And many States have done just that. *Amicus* Tennessee—where the events underlying this case took place—has long counted itself as a "right-to-work" State. Tenn. Code Ann. § 50-1-201. As such, state law guarantees employees the "right to work" in unionized workplaces without being forced to

financially support the union. Just recently, the citizens of Tennessee enshrined right-to-work protections in the State Constitution. *See* Tenn. Const. art. 11, § 19 (approved Nov. 8, 2022). And Tennessee is not alone. As of today, a host of other States—twenty-six in total—have similar laws on the books. Nat'l Rt. to Work Legal Def. Found., *Right to Work States*, https://bit.ly/3Oof6OQ (last visited Feb. 26, 2024).

This experimentation with right-to-work protections has paid dividends for business growth in Tennessee and beyond. *E.g.*, Tenn. Sec'y of State, *Tennessee Marks 10 Years of New Business Growth*, https://bit.ly/3SYL0El (last visited Feb. 26, 2024) (noting Tennessee's "10 years of uninterrupted year-over-year growth in quarterly new business filings"). Between 2001 and 2016, private-sector employment increased by 27% in right-to-work States generally, while States without those protections experienced growth at around half that rate. Jeffrey A. Eisenach, *Right-to-Work Laws: The Economic Evidence* 12 (2018). Right-to-work States also performed better than their non-right-to-work counterparts when it came to manufacturing (19.2% decline in right-to-work States versus a 24.5% decline elsewhere) and construction jobs (6.3% growth versus 0.2%). *Id.* at 13–14. They similarly beat out other States in GDP, personal-income growth, and business development. *Id.* at 15–17. These results are not outliers; scholars continue to find positive correlations between right-to-work laws and economic growth. *See, e.g.*, Michael D. LaFaive & Todd Nesbit, *The Impact of Right-to-Work Laws; A Spatial Analysis of Border Counties* 9–10 (2022).

Other States can and do enact different policies. And businesses can and do assess these choices and respond accordingly. *Cf.* Joseph Vranich & Lee E. Ohanian, *Why Company Headquarters Are Leaving California in Unprecedented Numbers* (Hoover Inst. Econ., Working Paper No. 21117, 2022). Such "experimentation in government" is a liberty-promoting feature of our constitutional system, not a bug. *Gregory*, 501 U.S. at 458; *see* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 11 (2018).

C. NLRB's preferred Section 10(j) standard would subjugate States' policy positions by saddling swaths of employers with harmful injunctions that extend beyond the NLRA's scope. Nothing in Section 10(j) permits NLRB's preliminary injunction power grab—let alone in clear federalism-canon terms.

1. NLRB's preferred interpretation of Section 10(j) facilitates federal intrusion into traditional state affairs. Pre-proceeding injunctions allow NLRB to dictate business practices for "months, if not years." Pet App. 38a (Readler, J., concurring); *see also Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989). And they often control core components of a business's operations. NLRB can tell businesses who they have to employ, *see, e.g.*, *Muffley v. Jewish Hosp. & St. Mary's Healthcare, Inc.*, No. 3:12-MC-00006-R, 2012 WL 1576143, at *1, *6–8 (W.D. Ky. May 3, 2012); *Overstreet*, 668 F. Supp. 2d at 1009–11, what facilities they have to maintain, *see, e.g.*, *Hirsch*, 147 F.3d at 248, and even when certain meetings have to occur, Memorandum GC 22-04 from NLRB General Counsel

Jennifer A. Abruzzo, to All Regional Directors, et al., at 1 (Apr. 7, 2022), https://bit.ly/48Uj1er.

Under the traditional test for injunctive relief, that intrusion can occur only upon a showing that the NLRA likely applies and preempts state law. But under a lax Section 10(j) standard, the NLRB "need not prove a violation of the NLRA nor even convince the district court of the validity of [its] theory of liability" to obtain intrusive injunctive relief. *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). Instead, NLRB need only carry the "relatively insubstantial" burden, Pet. App. 27a (Readler J., concurring), of showing that its theory is "not frivolous," *Gottfried*, 818 F.2d at 493. NLRB, in other words, may "secure relief by saying little more than 'trust me.'" Pet. App. 32a (Readler, J., concurring).

"But 'trust us' is ordinarily not good enough." *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016) (citing *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). And here, trust in NLRB would be particularly misplaced. NLRB routinely advances legal theories that go well beyond the text of the NLRA. Take its recent final rule providing that businesses will be treated as "joint employers" when they have control, even if indirect and unexercised, over a single essential term of employment. *See* 29 C.F.R. § 103.40 (2023). By blurring the longstanding line between employees and independent contractors, NLRB seeks to subject untold numbers of new workers and businesses to the agency's regulatory regime. NLRB also has sought to expand its remedial rights beyond

traditional bounds by claiming power to recover "for *all direct or foreseeable pecuniary harms*" to employees, including everything from credit-card debt to out-of-pocket medical expenses. *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951, at *9, *15 (Dec. 13, 2022); *but see UAW v. Russell*, 356 U.S. 634, 643 (1958) ("Congress did not . . . authoriz[e] the Board to award full compensatory damages for injuries caused by wrongful conduct."). And NLRB has exercised its ever-growing powers in a one-sided way: Out of forty-one Section 10(j) petitions authorized by NLRB since its current General Counsel took office on July 21, 2021, not one was filed against a union. *See* NLRB, *10(j) Injunctions*, https://bit.ly/3SgqVrD (last visited Feb. 26, 2024).

NLRB's interference is made worse by the agency's failure to heed Commerce Clause constraints. Under this Court's precedents, Congress may "regulate purely local activities" only when they are "part of an economic 'class of activities' that have a *substantial* effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added). This check ensures that federal regulators cannot "obliterate the distinction between what is national and what is local." *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

Yet NLRB ignores even this minimal constraint. The agency's self-determined jurisdiction "is very broad," covering nearly all "non-government employers with a workplace in the United States." NLRB, *Jurisdictional Standards*, https://bit.ly/3HHmx00 (last visited Feb. 26, 2024). Retailers, for example, fall

under NLRB's jurisdiction "if they have a gross annual volume of business of $500,000 or more," while "[s]hopping centers and office buildings have a lower threshold" of only "$100,000 per year." *Id.* And to meet these thresholds, these businesses *need not do any business across state lines*. Non-retailers must do some interstate business, but their monetary thresholds are even lower. Those businesses need only have an annual "inflow" (the amount of goods purchased from out of state) or "outflow" (the amount of goods sold or services rendered out of state) of $50,000. *Id.* These thresholds are easily met and, as a result, in no way guarantee that the targeted businesses' activities "substantial[ly] affect" *interstate* commerce. *Contra Gonzales*, 545 U.S. at 17.

Worse still, the Board has made clear that these thresholds are "discretionary" and disregards them at will. *See, e.g.*, Br. of NLRB at 10, *NLRB v. Valentine Painting & Wallcovering, Inc.*, 8 F. App'x 116 (2d Cir. 2001) (Nos. 00-4226, 00-4236), 2001 WL 34094388, at *10. NLRB claims power to exercise jurisdiction over "essentially local enterprises which only indirectly affect interstate commerce so long as that effect is more than de minimis." *Id.* at *9. And an effect is more than de minimis, NLRB asserts, when it is "more than [a] trifle or matter of a few dollars." *Marty Levitt*, 171 NLRB 739, 739 (1968). NLRB was apparently speaking literally. *See, e.g.*, *NLRB v. Maxwell*, 637 F.2d 698, 703–04 (9th Cir. 1981) (concluding that an employer's purchase of $6,000 worth of out-of-state goods was not de minimis); *NLRB v. Aurora City Lines*, 299 F.2d 229, 231 (7th Cir. 1962) (determining that a mere $2,000 of indirect inflow was not de minimis); *V & J Cleaners*

Co., 301 NLRB 1152, 1153 n.2 (1991) (reasoning that "$5,000 out-of-state business volume is not de minimis"), *enforced*, No. 91-3373 (7th Cir. 1991).

The upshot is that virtually no business can escape NLRB's regulation-by-injunction ambit. A local, twenty-nine-employee cleaning business? In. *See NLRB v. Le Fort Enters., Inc.*, 791 F.3d 207, 209 (1st Cir. 2015). A small ophthalmology business operating only in Maine? In too. *See Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212 (D.C. Cir. 1996). Plainly, a swath of employers far smaller than Starbucks will suffer the "weight of a federal district court's order" if NLRB's Section 10(j) view prevails. Memorandum GC 22-02 from NLRB General Counsel Jennifer A. Abruzzo to All Regional Directors, et al. at 1 (Feb. 1, 2022), https://bit.ly/48Uj1er.

2. As the above illustrates, a lenient Section 10(j) standard facilitates the displacement of traditional state regulation *beyond the scope of the NLRA*—and the Commerce Clause, for that matter. To justify such an intrusion, the federalism canon requires "unmistakably clear" language. *Gregory*, 501 U.S. at 460 (quoting *Will*, 491 U.S. at 65). The NLRB can point to no such language.

The text of Section 10(j) permits entry of "such temporary relief" as a court "deems just and proper." 29 U.S.C. § 160(j). Best read, this language "invok[es] the discretion [courts] traditionally exercise when faced with requests for equitable relief." Pet. App. 22a (Readler, J., concurring); *see also Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 542 (4th Cir.

2009) ("'[J]ust and proper' is another way of saying 'appropriate' or 'equitable.'" (citation omitted)). But if doubt remained, the federalism canon would require rejecting NLRB's reading, which upsets the federal-state balance in the area of employment regulation. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

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