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 AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF PETITIONER

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS CURIAE[1]

Since 1968, the National Right to Work Legal Defense Foundation, Inc. has been the nation's leading advocate for employee freedom to choose whether to associate with unions. To this end, Foundation staff attorneys have represented individuals before the Supreme Court in several major cases involving individuals' rights to refrain from supporting unions. *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Foundation has an interest in this case because the NLRB often tries use its authority under section 10(j) of the NLRA, 29 U.S.C. § 160(j), to foist union representation on employees who oppose it. *See, e.g. McKinney ex rel. NLRB v. S. Bakeries, LLC*, 786 F.3d 1119, 1123-25 (8th Cir. 2015). The NLRB also frequently claims that employees choosing not to support a union is a harm that courts should arrest with section 10(j) injunctions. *See infra* 3.

The Foundation submits this brief to urge the Court to make clear that employees choosing to oppose a union is not a wrong for the government to correct with coercive injunctions. The NLRA grants employees a right to refrain from supporting unions. 29 U.S.C. § 157. Unless the NLRB can prove employees were coerced to oppose a union against their will, employees exercising their right to oppose a union cannot be grounds for a section 10(j) injunction.

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[1] Rule 37 statement: No party's counsel authored any part of the brief and no one other than the Foundation funded its preparation or submission.

SUMMARY OF ARGUMENT

An employee's decision not to support a union is not a "harm" that can justify a preliminary injunction. It is not a harm of any sort, but a legitimate choice employees have a right to make under both the NLRA and the First Amendment. Indeed, the vast majority of private sector employees choose to work without union representation.

If anything, employee opposition to a union weighs against the issuance of any section 10(j) injunction that may compel employees to accept or support union representation. This especially is true when a majority of employees oppose a union. "There could be no clearer abridgement of § 7 of the Act" than conferring "exclusive bargaining status to an agency selected by a minority of its employees." *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

The NLRB, however, often presumes that evidence of employee opposition to a union does not reflect the employees' true wishes, but rather proves an employer must have harmed those employees and caused them to act against their interests. *See infra* 9–10. The NLRB's "false consciousness" theory of workers' desires is untenable and should be repudiated by this Court. There is no reason to believe that NLRB officials know what workers want better than those workers themselves. American workers are competent adults. If they choose not to support a union, courts should honor and respect their choice.

Only if the NLRB can prove an employee was coerced by an employer to oppose a union against his or her will can that employee's lack of support for the union be considered any sort of a harm to be redressed.

If the NLRB cannot muster such evidence, then the fact that employees are exercising their statutory and constitutional rights not to support a union provides no basis for a section 10(j) injunction.

ARGUMENT

I. The Court Should Resolve the Conflict Over Whether the NLRB Must Prove That Employee Opposition to a Union Is the Product of Employer Coercion.

The NLRB's Section 10(j) Manual claims that preventing employees from choosing not to support a union is a reason for the agency to seek a section 10(j) injunction in various circumstances. This includes when the agency believes an employer wrongfully interfered with an organizing campaign, withdrew recognition from a union, undermined a union, or did not bargain in good faith. NLRB Off. of the Gen. Couns., Section 10(j) Manual 3, 5-8 (Mar. 2020).[2] For example, the Manual asserts that, if employer unfair labor practices may undermine a union, "[t]he need for Section l0(j) relief is to prevent the predictable, irreparable erosion of employee support for the incumbent union." *Id*. at 6.

As a conceptual matter, the NLRB seeking injunctions for this purpose is odd, if not unseemly. The federal agency wants a court to coerce the conduct of one party (an employer) to induce a second party (employees) to associate with a third party (a union). It is hard

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[2] https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/redacted10jmanual50reduced2020.pdf

to think of any other instance where the federal government tries to prevent individuals from choosing not to support a special interest group.

Lower courts are divided on whether, to obtain a preliminary injunction for this purpose, the NLRB must prove employees were actually coerced not to support a union. According to the NLRB's Section 10(j) Manual, "Courts differ as to whether the Board must introduce direct evidence of 'chill' [of employee willingness to engage in union activities] to establish that such injury, or chill, is threatened." NLRB Section 10(j) Manual, *supra*, at 2. "Some courts have been willing to examine the very nature and extent of the particular unfair labor practices to determine, by inference, whether the violation will, over time, tend to chill or undermine remaining unit employee support for a union." *Id*. "Other courts are less likely to infer a chilling effect on employee statutory rights; instead, they insist upon evidence that the violation is actually having a chilling effect." *Id*.

The Court should resolve this conflict because it stems from whether the two-part test or the traditional four-part test is used to evaluate NLRB demands for section 10(j) injunctions. Judge Readler recognized as much when discussing whether, in this case, the union's organizing "movement was actually chilled following the Memphis Seven's termination." Pet.App.35a (Readler, J., concurring). Using the two-part test "[t]he district court seems to have presumed that termination of union supporters necessarily produces an insurmountable chill on organizing." *Id*. at 35a–36a. This is because, under that test, "the district court asked only whether any *potential* injury could be inflicted on the Board's remedial power." *Id*. at 34a.

Judge Readler explained that "[n]o such supposition would be allowed, however, under the irreparable injury inquiry." *Id.* at 36a. Under the four-part test, the district court "would have faced a difficult inquiry: did Starbucks's purported unfair labor practices so thoroughly douse the nascent unionization movement's fire that the Board would have been powerless to reignite it going forward?" *Id.* at 35a.

The Court should adopt the latter view, and not only because the four-part test should be used. As discussed below, the Court must require the NLRB to prove employees were unlawfully coerced not to support a union because, absent such proof, employees have every right to make that choice.

II. Employee Opposition to a Union Cannot Justify a Section 10(j) Injunction Unless the NLRB Can Prove Employees Were Coerced to Make That Choice.

A. Employees Have A Right Not To Support Unions.

Section 7 of the NLRA grants employees a "right" to "refrain" from "form[ing], join[ing], or assist[ing] labor organizations." 29 U.S.C. § 157. The NLRA thus "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). Consequently, an employee's decision to oppose union representation cannot be considered a harm or an injury under the statute, except where an employee was coerced to make that choice against his or her will. The NLRA protects employees' right not to support a union.

And so does the First Amendment. The First Amendment guarantees a "right to eschew association for expressive purposes" because "'[f]reedom of association . . . plainly presupposes a freedom not to associate.'" *Janus*, 138 S. Ct. at 2463 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) The First Amendment also guarantees to individuals a right to speak against causes they oppose. These fundamental rights naturally extend to not associating with and speaking against unions. *See id.* at 2486 (holding it violates the First Amendment for the government to compel employees to support a union financially). The federal government has no legitimate interest in using its coercive power to interfere with individuals' right to oppose unions and their agendas.

In addition to being incompatible with precepts of individual free choice, the NLRB's oft-taken position that employee opposition to a union is a harm to be rectified is out of step with the desires of the vast majority of American workers. In 2023, only 6% of private sector workers chose to be union members.[3] Of course, that means that 94% of private sector workers chose *not* to be in a union.

And most of these nonunion workers have no interest in joining a union. An August 2022 Gallup Poll found that 58% of nonunion workers were "not inter-

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[3] News Release, Bureau of Labor Statistic, U.S. Dep't of Labor (Jan. 23, 2024), https://www.bls.gov/news.release/archives/union2_01232024.pdf.

ested at all" in joining a union and only 11% were "extremely interested."[4] The employee choice that current NLRB leadership deems a harm that the agency and courts should correct—that employees are not joining unions—is they very choice being made by roughly 9 out of 10 private-sector American workers.

B. Employee Opposition to a Union Weighs Against Any Injunction That May Frustrate That Choice.

Far from being a harm that supports a section 10(j) injunction, evidence that employees do not want be represented by a union militates against any injunction that may impede their choice. Under the four part test, the balance of equities must take into account employees' statutory and constitutional right to oppose a union. There is no public interest in the federal government interfering with individuals' right not to associate with this special interest group.

In some instances, the NLRB seeks a bargaining order in section 10(j) proceedings that will compel employees to accept, or remain subject to, a union's exclusive representation.[5] In those instances, employee opposition to that union is especially pertinent. The NLRA authorizes exclusive representation only if supported by a majority of employees. 29 U.S.C. § 159(a).

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[4] https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

[5] The NLRB seeks bargaining orders under section 10(j) in several circumstances, such as when the NLRB claims an employer wrongfully interfered with the organizing campaign of a union that had the support of a majority of employees, withdrew recognition from an incumbent union, or refused to recognize a successor union. NLRB Section 10(j) Manual, *supra*, at 4-5, 7.

If a majority of employees oppose a union's representation, imposing it on them violates their rights under the NLRA. *See Int'l Ladies' Garment Workers*, 366 U.S. at 737 ("[t]here could be no clearer abridgement of § 7 of the Act" than conferring "exclusive bargaining status to an agency selected by a minority of its employees."); *Timmins ex rel. NLRB v. Narricot Indus.,* 567 F. Supp. 2d 835, 844 (E.D. Va. 2008), *appeal dismissed and remanded sub nom. Timmins v. Narricot Indus.,* 360 F. App'x 419 (4th Cir. 2010) (rejecting an NLRB demand for a bargaining order under section 10(j) because, among other reasons, "employees who do not want to be represented by the Union, including those who worked in earnest to remove it, will suffer irreparable harm if this court orders reinstatement of a Union which a majority of Narricot's employees do not wish to represent them.").

The government forcing dissenting employees to accept unwanted union representation also infringes on their associational rights. "Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Janus*, 138 S. Ct. at 2460. "Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Id*. Individual employees must accept a mandatory agent vested with the "exclusive right to speak for all the employees in collective bargaining," *Id*. at 2467. Consequently, designating a union to be dissenting employees' exclusive bargaining agent inflicts "a significant impingement on associational freedoms that would not be tolerated in other contexts." *Id*. at 2478.

This injury is magnified when those employees also are compelled to financially support a union representative, which can occur in states that lack Right to Work laws. When this compulsion results from state action, as it will be if a section 10(j) order compels dissenting employees to remain subject to a union contract with a compulsory fee requirement, this federal compulsion will violate the employees' First Amendment rights. *See Janus*, 138 S. Ct. at 2486. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. Courts Should Not Defer to NLRB Assertions That Employee Expressions of Opposition to a Union Do Not Reflect the Employees' True Sentiments.

1. While a rational observer would interpret evidence of employee opposition to a union to mean those employees must not want to support that union, the NLRB takes the opposite tack when pursuing section 10(j) relief. According to the NLRB, evidence of employee opposition to a union does not reflect the employees' choice, but proves the employees were harmed by their employer's conduct. The NLRB's Section 10(j) Manual posits that "[o]bjective evidence" that an employer's conduct harmed employees "would include such things as a drop in the number of union authorization cards obtained after the onset of the unfair labor practices or a decrease in attendance at union organizing meetings." NLRB Section 10(j) Manual, *supra*, at 12. The Manual's "Checklist for Investigation of Requests for the 10(j) Relief" similarly claims that employees choosing to resign their union membership, revoke union authorization cards, and sign

antiunion petitions are objective evidence the employees' are being harmed by their employer's alleged misconduct. *Id*. at App'x B, 2-3.

The likelihood that employees took these actions of their own volition, and truly oppose union representation, is disregarded by the NLRB. In the NLRB's eyes, employee opposition to a union is, in and of itself, objective proof an employer's unfair labor practices must have harmed those employees.

In taking this position, the NLRB has created a self-satisfying "heads I win, tails you lose" dynamic for itself. Evidence that employees support a union is taken to mean they want to support the union. Evidence that employees oppose a union is taken to mean their employer must have wrongfully caused the employees not to support the union. All evidence conveniently leads to the conclusion desired by current NLRB leadership: employees should support unions.

An ongoing case in which the NLRB seeks another section 10(j) injunction against Starbucks is illustrative. In *Leslie v. Starbucks Corp.*, No. 23-1194 (2d Cir.), the NLRB asserts a nationwide injunction is needed because Starbucks's conduct supposedly "risk[s] a 'serious adverse impact on employee interest in unionization." NLRB Br. at 68, *Leslie, supra* (No. 23-1194) (citation omitted). According to the NLRB, "proof that Starbucks's violations are having their predictable chilling effect on employee organizing rights" is that "some employees at the Delaware & Chippewa Starbucks in Buffalo filed a petition seeking to decertify the Union." *Id*. at 69. In making that assertion, the NLRB simply presumed the employees'

decertification effort stemmed from Starbucks's alleged misconduct and does not reflect the employees' voluntary wishes.

The NLRB's presumption is baseless. In response to the NLRB's assertion, the employee leader of the decertification effort—Ariana Cortes—filed an amicus brief informing the Second Circuit that she and a majority of her co-workers signed the decertification petitions of their own free will. She wrote:

> Cortes, Karam, and their colleagues are free-thinking adults motivated by their own personal opposition to Workers United's representation. Their desire to decertify has nothing to do with Starbucks' alleged unfair labor practices. Rather, their efforts flow from Workers United's own miscues, misrepresentations, and employee turnover.

Amicus Br. of Ariana Cortes and Logan Karam at 3, *Leslie, supra* (No. 23-1194).

2. This example gives credence to D.C. Circuit Judge Sentelle's observation that "the Board apparently has reasoned that the working class is composed of individuals not competent to determine their own best interest or even to know their own minds." *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1464 (D.C. Cir. 1997) (Sentelle, J., concurring) (criticizing the NLRB for finding that minor employer misconduct invalidated a decertification petition signed by over 85% of unit employees). Judge Sentelle wrote that he "cannot in good conscience nor in obedience to my understanding of the role of a reviewing court support such administrative arrogance." *Id.* "To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts

of their employer, bespeaks . . . [an] elitist Big Brotherism." *Id*. at 1463.

Judge Sentelle continued this line of reasoning in a subsequent case, writing that:

> In no other area of our enlightened democratic society would we permit an elitist bureaucracy to deprive citizens of their rights as free actors on the theory that they might have been so deceived by others of differing interests that they cannot by their free choice determine their best interests, but must be subjugated to the decision of an administrative agency.

Exxel/Atmos, Inc. v. NLRB, 147 F.3d 972, 978–79 (D.C. Cir. 1998) (Sentelle, J., concurring).[6]

Judge Sentelle was right. Courts should not defer to high-handed NLRB claims that employees who express opposition to a union don't really mean it. As the Petitioner explains, courts should not defer to any assertions NLRB officials make when seeking a preliminary injunction. Pet. Br. 42–47. Deference is especially inappropriate when NLRB officials implausibly claim they know better than employees themselves whether they want to oppose a union.

Courts should treat employees as competent members of society whose decisions presumptively reflect

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[6] The NLRB's approach is reminiscent of the false consciousness theory that Marxists latched onto to explain away why workers opposed their designs—that workers were so deluded by capitalists to not know their own best interests, which were known to the leftist intelligentsia. NLRB officials claiming that worker expressions of opposition to unionization do not reflect the workers' actual desires, but show the employees must have been improperly misled by employers, is of the same ilk.

their voluntary choice. If employees express opposition to a union by resigning their union membership, or by signing decertification petitions, courts should consider that proof those employees do not want to support that union.

D. To Prove Employee Opposition to a Union Is a Harm, the NLRB Must Prove Employees Were Coerced Not To Support the Union.

Given that employees have a right to oppose unions, employee opposition to a union can only be considered a harm that may support a preliminary injunction under the four-part test if that opposition was involuntary and the product of coercion. To make such a showing, the NLRB must prove with evidence that an employer's misconduct actually caused employees who otherwise would support a union to not support it.

To establish this causal connection, it is not enough for the NLRB to show employer misconduct likely occurred and then argue this harm tends to flow from it. Under the four-part test, courts cannot presume that an irreparable harm necessarily follows from a finding of a likelihood of success on the merits. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–58 (2010); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006). In *eBay*, the Court remarked that it "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed." 547 U.S. at 392-93. In *Monsanto*, the Court held that presuming irreparable harm will occur if a certain statute has likely been violated "invert[s] the

proper mode of analysis." 561 U.S. at 157. The Court found that "[n]o such thumb on the scales is warranted" and reiterated that "[a]n injunction should issue only if the traditional four-factor test is satisfied." *Id*. The same rule should apply equally to NLRB demands for section 10(j) injunctions. *See Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1118–20 (9th Cir. 2022) (finding a lower court erred by presuming dwindling employee support for a union resulted from alleged employer unfair labor practices).

To establish a causal connection between employer unfair labor practices and employees not supporting a union, it also is not enough for the NLRB to show that both things occurred. The NLRB must prove the former wrongfully *caused* the latter to occur. As earlier discussed, courts cannot speculate that employees chose not to support a union because of their employers alleged misconduct. Employees may have a number of unrelated reasons for opposing a union.

Since nearly all employees subject to the NLRA are adult citizens, courts should honor and respect their decisions not to support a union. The employees' decisions should not be second guessed unless the NLRB can prove the employees were coerced to act against their own wishes. If the NLRB cannot make that evidentiary showing, then employees' decision to not support a union is not a harm that can justify a preliminary injunction. It is a valid choice the employees have every right to make.

CONCLUSION

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

Respectfully submitted,

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