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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs. As it relates to this case, The Buckeye Institute's Legal Center frequently advocates for the proper interpretation of statutory law and the limiting of executive agencies to their proper constitutional role. Several federal circuit courts have used a test not grounded in the language of the National Labor Relations Act, whereby they abdicate their equitable

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief.

responsibilities and essentially defer to the National Labor Relations Board's interpretation of the facts.

SUMMARY OF ARGUMENT

The principle of equitable remedies predates this Nation's founding. The early English courts infused equity into the common law to avoid the injustices which common law sometimes dictated.

As equity and the common law evolved, courts began granting preliminary injunctions where it was necessary to prevent irreparable harm. This Court—borrowing from its English ancestors—solidified the idea of equity into the traditional four-factor test for preliminary injunctions. And, when lower courts have improperly strayed from these traditional four factors, this Court reeled them back in.

When evaluating preliminary injunction petitions from the National Labor Relations Board (NLRB), some circuit courts stray from the traditional four-factor test and the notion of equity. These courts, including the Sixth Circuit below, have interpreted their duty to grant relief they deem "just and proper" under Section 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(j), to use a reasonable cause test to evaluate the NLRB's request for a preliminary injunction. This test substantially reduces the NLRB's burden of proof to obtain preliminary injunctive relief compared to the four-factor test repeatedly espoused by this Court. Even more problematic is the reasonable cause test's examination of harm to the NLRA—the statute—

rather than irreparable harm to the party is allegedly harmed by an apparent unfair labor practice.

The reasonable cause test is contrary to the text of the NLRA, the idea of equity, and the Court's jurisprudence. Just like *Chevron* deference, the reasonable cause test gives the government special privileges—its burden of proof is drastically lower than that imposed upon any other litigants. And just as *Chevron* deference resulted in sweeping government wins, the NLRB's special deference also results in—according to the NLRB—a nearly 100% win rate. This flies in the face of this Court's admonition that a preliminary injunction is a drastic remedy that should never be granted as a matter of right.

The Court should reverse the Court of Appeals for the Sixth Circuit and hold that lower courts must continue to apply the traditional four-factor test and to do equity.

ARGUMENT

I. Equity's Introduction

Long before this Nation's founding, the notion of equity emerged in the English justice system.

> According to legend, when an English landowner went off to fight in the Crusades, he might convey his lands to a trusted person, who would manage the estate during his absence with the agreement that the trusted person would return the lands when the Crusader returned. Unfortunately, when the

> Crusader returned, the trusted person might not return the lands. The law had no remedy for the Crusader's misfortune. Nevertheless, the king chose to refer such complaints to his lord chancellor, who would decide the cases according to his conscience. Thus, equity was born.

Raighne Delaney & Juanita Ferguson, T*he Equitable Maxims A Primer*, 48 Sum Brief 44, 45 (2019). Although the legend is but a summary of the history of equity, it exemplifies the purpose of equity, for the judicial official to determine, on a case-by-case basis, matters according to fairness.

While most view equity jurisdiction in England as a product of the Chancellor's court and the split between the legal and equitable courts, the notion of equity began in the early common law courts and was not foreign to them as the Chancellor's court began to exercise more equitable jurisdiction. In 1309, Chief Justice of the King's Court William Bereford commented that equity, in the philosophical not jurisdictional sense, should prevent a claimant from recovering a penalty, disguised as a debt, which he was not rightfully owed. Theodore F. T. Plucknett, *Concise History of the Common Law* 606 (2nd ed. 1936) (citing *Umfraville v. Lonstede*, Y.B. Edw. 2, *reprinted in* 2 Selden Society xiii, 59). Chief Justice Bereford rejected a claimant's argument that a late payment entitled him to receive the owed debt twice over. This double recovery "is not properly a debt but a penalty," Bereford rhetorically asked, "and with what equity

(look you) can you demand this penalty." *Id.* (citation omitted).

As the common law courts' rules became too strict, as the legend above alludes, equity *jurisdiction* vested in the lord chancellor and the Chancery Court was born. It is well known that in England, the "Chancellor's court, exercising very wide discretionary powers, gradually developed the elaborate and effective system of rules and principles which we . . . know as English Equity." *Id.* at 608 (quoting H. D. Hazeltine, *The Early History of English Equity, in* Essays in Legal History, 261, 282 (Vinogradoff ed. 1913). As the Chancery Court's number of cases expanded, so too did its jurisprudence. The court would eventually develop the remedy we know now as the injunction.

"It does not appear that the term injunction was used to describe a judicial remedy until after the Chancery became a judicial body, in the later part of the fourteenth century." David Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 540 (1986). However, even before the formation of the Chancery Court, the common law courts issued writs of prohibition to prevent a defendant from causing or continuing to cause an injury. *Id.* at 545–547. Similar to modern day preliminary injunctions, courts would often issue writs of prohibition to prevent a party from taking an action until the issuing court could decide the matter. See *id.* at 562 (discussing injunctions to stay suits in other courts during the pendency of an action in the issuing court).

As English courts began evolving preliminary injunctions "from a tool for staying litigation in law

courts, to a device used to restrain conduct during the pendency of the case so that its legality could be adjudicated before its harmful effects were felt," certain themes began to emerge. Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 Gonz. L. Rev. 51, 63 (2012) (discussing "William Kerr's influential 1867 treatise on injunctions"). While there were no set rules for every case, equity looked to certain indicators that would warrant a preliminary injunction. *Id.* at 63–64. These indicators included the claimant's likelihood of success on the merits and irreparable injury. *Id.* at 63–64. Over 150 years ago, William Kerr explained the comparative injury theory of injunctions:

> "[I]f the right at law . . . is not clear, or is not fairly made out, or the breach of it is doubtful and no irreparable injury can arise to the plaintiff, pending the trial of the right, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted or the plaintiff by its being withheld."

Id. at 64 n. 77 (quoting William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions in Equity* 493 (1867)). Thus, if the court could not decide whether to issue a preliminary injunction based on (1) the plaintiff's likelihood of success on the merits and (2) claimed irreparable harm absent an

injunction, the court would balance the harms to each party and decide if equity favored the injunction.

These early principles of whether to grant a preliminary injunction are reflected in three of the four traditional factors federal courts eventually adopted.

II. Preliminary Injunctions in American Law

The similarities between the English courts' notions of equity and preliminary injunctions are not a coincidence. As Justice Story noted, "the federal law of equity 'is founded upon, co-extensive with, and in most respects conformable to, that of England.'" *Id.* at 62 (quoting 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 54 (13th ed. 1886)). See also *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (same).

> In Justice Story's eyes, the law, as developed in England and transported to the United States via the Judiciary Act, was quite definitive on the issue of interlocutory injunctions and the essential need to establish a likelihood of success (if not a greater showing) and irreparable injury. Citing English cases, Story's treatise declares that equity courts exercise "extreme caution" when considering temporary injunctions, given their "summary nature" and "liability to abuse," and that they should be issued "only in very clear cases . . . ."

DiSarro, *supra*, at 65 (quoting Story, *supra*, at 264). See also *id.* at 66–67 (citing 1 James L. High, *A Treatise on the Law of Injunctions* (4th ed. 1905)) (discussing "that most state courts insisted upon a showing of a probability of success on the merits and irreparable injury before issuing preliminary injunctive relief"). And even then, American courts recognized the need for judicial restraint in granting preliminary injunctions.

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles . . . .

Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (Baldwin, Circuit Justice).

While the eighteenth-century preliminary injunction jurisprudence had some ambiguities, early American federal courts "viewed likelihood of success and irreparable injury as essential elements under English equity practice and promptly incorporated

them into federal equity jurisprudence." DiSarro, *supra*, at 65. For example, in 1824, this Court utilized at least the first two principles, irreparable harm and success on the merits. See *Osborn v. Bank of U.S.*, 22 U.S. 738 (1824). In upholding an injunction preventing Ohio's auditor from continuing to take exuberant amounts of money from local banks, Chief Justice Marshall emphasized the irreparable injury that would have ensued absent the injunction. *Id.* at 839–842. Chief Justice Marshall also looked to the "true character and substantial merits" of the irreparable injury claim. *Id.* at 840. In 1919, the Court continued this standard, explaining that injunctions "'ought [not] to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury." *Cavanaugh v. Looney,* 248 U.S. 453, 456 (1919).

In *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933), the Court once again looked to its English ancestors' notions of equity and balanced the hardships of the parties when deciding if an injunction should be granted. The Court found that an injunction should not be issued when it "would subject the defendant to grossly disproportionate hardship." *Id.;* accord *Yakus v. United States*, 321 U.S. 414, 440 (1944) (applying balancing factor to interlocutory injunction); see also *id.* at 440–441 (discussing public interest factor).

By the 1970s, the federal courts had coalesced around a four-part test. "Factors traditionally examined include: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) whether the public interest would be better

served by issuing than by denying the injunction; and (4) the comparable hardship inflicted upon the parties." *Massachusetts Coal. of Citizens with Disabilities v. Civ. Def. Agency & Off. of Emergency Preparedness of Com. of Massachusetts*, 649 F.2d 71, 74 (1st Cir. 1981) (citing *Grimard v. Carlston*, 567 F.2d 1171, 1173 (1st Cir. 1978); 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2948 (1973)).

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Court emphasized that it "has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury . . . ." *Id.* at 311. There, the Court was addressing the Federal Water Pollution Control Act (FWPCA)—a statute strikingly similar to the one at issue here—which dealt with the discharge of pollutants into navigable waters. Similar to the NLRA, the FWPCA sets up a two-tier system for *seeking* injunctions, one mandatory on the agency and one discretionary. First, under the FWPCA, the EPA is required "to seek an injunction to restrain immediately discharges of pollutants [the Administrator] finds to be presenting 'an imminent and substantial endangerment to the health of persons or to the welfare of persons.'" *Id.* at 317 (quoting 33 U.S.C. § 1364(a)). But, "[f]or other kinds of violations, the FWPCA authorizes the Administrator of the EPA 'to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order . . . .'" *Id.* (quoting 33 U.S.C. § 1319(b)). The Court noted that this "provision makes clear that Congress did not

anticipate that all discharges would be immediately enjoined." *Id.* at 317–318.

Even though the FWPCA granted the EPA the authority to seek an injunction, the Court affirmed that the traditional four factors for obtaining injunctive relief still apply even where a federal statute expressly allows enforcement through injunctive relief. The Court noted that "the statutory scheme contemplates equitable considerations," *id.* at 317–318, but the lower courts must not apply a lower standard than traditionally required, see *id.* at 311–313. And, a "court's equitable discretion overr[i]des that of the [agency]." *Id.* at 318 n.12 (citing *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)). In *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 544 (1987), the Court reaffirmed the holding of *Weinberger* to apply to requests for preliminary injunctive relief.

Recently this Court confirmed this four-factor test and "reiterated" that "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). And the Court "has emphasized that each of the four benchmarks deserves consideration before relief may be granted." Pet. App. at 20a (Readler, J., concurring). Further, "[c]onsistent with [the Court's] admonitions, federal courts apply the four *Winter* factors in the early stages of a wide range

of constitutional and statutory disputes." *Id.* (Readler, J., concurring) (gathering cases).

III. Injunctive Relief and the NLRA

Section 10(j) of the NLRA empowers the NLRB to "petition" a federal district court "for appropriate temporary relief or restraining order" when the NLRB believes that a "person[2] has engaged in or is engaging in an unfair labor practice." 29 U.S.C. § 160(j). "Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board *such temporary relief or restraining order as it deems just and proper*." *Id.* (emphasis added). When deciding whether to grant a 10(j) injunction under the NLRA, the federal circuit courts have split into two primary groups. The first group determines that temporary relief or a restraining order is just and proper when the NLRB has made a sufficient showing under the traditional four-factor test. See *Maram v. Universidad Interamericana De Puerto Rico, Inc.*, 722 F.2d 953, 958 (1st Cir. 1983); *Muffley ex rel. N.L.R.B. v. Spartan Mining Co.*, 570 F.3d 534, 542 (4th Cir. 2009); *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989); *Sharp v. Parents in Community Action*, 172 F.3d 1034 (8th Cir. 1999); *Miller v. California Pacific Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994).

The circuit courts in the second camp—including the Sixth Circuit below—follow a much

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[2] "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers." 29 U.S.C. § 152.

weaker, two-part test. First, they ask whether there is "reasonable cause" to believe that the respondent has engaged in unfair labor practices, and second, whether temporary relief is just and proper. Pet. App. at 10a. These "reasonable-cause courts" determine that relief is just and proper when absent such relief, the NLRB would be deprived of its remedial powers. *Id.* Not only do these courts stray from the traditional factors and consider possible harm to the statutory authority of the NLRB rather than the likelihood of harm to the affected parties resulting from the alleged unfair labor practice, but they utilize a reasonable cause factor that is unsupported by either the language of the NLRA or the Court's preliminary injunction jurisprudence.

The reasonable-cause courts' departure from the traditional factors is particularly concerning considering the NLRB's early interpretation of the statute. From the 1940s until the early 1970s, the NLRB's general counsel and board members expressed concern that 10(j) injunctions should be used sparingly, considering that injunctions are extraordinary remedies. Leslie A. Fahrenkopf, *Striking the "Just and Proper Balance": A Call for Traditional Equitable Criteria for Section 10(j) Injunctions*, 80 Va. L. Rev. 1159, 1167–1170 (1994). Indeed, "[i]n the first 15 years of § 10(j)'s life, it was deployed on average "only three times per year."' Pet. App. at 21a (Readler, J., concurring). The NLRB's early criteria for seeking 10(j) preliminary injunctions—as outlined by Board Chairman Frank

W. McCulloch—resembled the equitable principles outlined in the traditional factors.

McCulloch first noted that "[e]ach individual petition for a 10(j) injunction must, of course, be decided on its own facts and on its own merits." Frank W. McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 97 (1962). "[T]he extraordinary remedy of injunction *should not and cannot become the ordinary remedy* in unfair labor practice cases." *Id.* (emphasis added). Further, "[i]n addition to the traditional public interest factor, the [NLRB] would consider a number of factors including the doctrine of clean hands, the potential for irreparable injury, the necessity of the injunction for collective bargaining, and the appropriateness of the case for judicial relief." Fahrenkopf, *supra*, at 1169 (citing McCulloch, *supra*, at 96–98).

Unfortunately, the NLRB has made an abrupt about-face approach to 10(j) injunctions. In 2021 NLRB's General Counsel declared: "During my tenure as General Counsel, *I intend to aggressively seek Section 10(j) relief* where necessary to preserve the status quo and the efficacy of final Board orders." Jennifer A. Abruzzo, Office of the Gen. Counsel, Memorandum GC 21-05, *Utilization of Section 10(j) Proceedings* 1 (Aug. 19, 2021) (emphasis added).[3] Indeed, the NLRB "now puts § 10(j) to work more than six times as often as it did before." Pet. App. at 21a (Readler, J., concurring). And the NLRB's

[3] Available at https://apps.nlrb.gov/link/document.aspx/09031d458351637c.

aggressiveness is facilitated by the deferential reasonable cause test.

A. The reasonable cause standard is contrary to traditional notions of equity.

"[T]he propriety of injunctive relief . . . must be evaluated on a case-by-case basis in accord with traditional equitable principles and without the aid of presumptions or a 'thumb on the scale' in favor of issuing such relief." *Hooks for & on Behalf of Nat'l Lab. Rels. Bd. v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1114 (9th Cir. 2022) (quoting *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 980–81 (9th Cir. 2011)). One of the maxims of equity is that equality is equity. The traditional preliminary injunction factors implement this equality—they consider the potential irreparable harm to the movant, the movant's likelihood of success, the potential harm to the non-movant if an injunction is issued, and the public interest. By contrast, the courts that have jettisoned the traditional four-part test ignore the potential harm to one party and tip the scales in favor of the NLRB.

Under the lax reasonable cause standard, as articulated by most circuits using it, the first factor is if the NLRB has reasonable cause to believe that the defendant has violated the NLRA. See Pet. App. at 10a. The reasonable-cause courts have admitted that this portion of the test is an easy win for the NLRB. *Id.* at 27a–28a (Readler, J., concurring).

The reasonable-cause courts have formulated the second factor—the just and proper factor—in different ways. However, one common theme can be found: "Relief 'is just and proper where it is necessary

to return the parties to status quo pending the Board's proceedings *in order to protect the Board's remedial powers* under the NLRA.'" Pet. App. at 10a (emphasis added) (citing *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017)). See also *Arlook for & on Behalf of N.L.R.B. v. S. Lichtenberg & Co.*, 952 F.2d 367, 372 (11th Cir. 1992) (quoting *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192 (5th Cir. 1975)) ("Injunctive relief under § 10(j) is 'just and proper' whenever the facts demonstrate that, without such relief, 'any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the [NLRA] will be frustrated.'"). Thus, rather than equally balance the harms to the injured party and the accused party, these courts look to the supposed harm to the government's remedial powers. Further, they do so regardless of whether the government has a substantial likelihood of success on the merits.

"Arguably, under a broad interpretation of this standard, every unfair labor practice frustrates the purpose of the NLRA." Fahrenkopf, *supra*, at 1174. Thus, any reasonable belief by the NRLB that an unfair labor practice has occurred would result in the granting of a 10(j) injunction. "This cannot be a proper interpretation of congressional intent, considering the understanding in 1947 that section 10(j) relief was to be extraordinary." *Id.* (citing Frank W. McCulloch, Chairman of the NLRB, Address at the Eighth Annual Joint Industrial Relations Conference (Apr. 19, 1962), *in* 49 L.R.R.M. (BNA) 74, 84 (1962).

And, once again, this version of the just and proper test is inconsistent with the traditional factors

as, traditionally, the court must determine whether injunctive relief is necessary to avoid irreparable injury to the allegedly injured person and must consider the harm to others. Looking at the possible harm to the NLRB's remedial powers places the focus in the wrong place. It does not even look at harm to a person but instead at harm to a statutory remedy. This makes no sense in the context of an equitable remedy. Instead, the courts—as NLRB will do during its administrative hearings—should examine the irreparable harm to the party allegedly injured by the alleged unfair labor practice. If that party would not suffer any irreparable injury absent the injunction, it cannot be "just and proper" for the courts to grant the NLRB such injunction. Injunctions are extraordinary remedies and should not be granted simply because the government's ability to function is impaired—where the allegedly injured party is not irreparably harmed.

Further, Congress implicitly rejected the notion that courts' adjudicatory authority in deciding what constitutes "just and proper" is restricted to the NLRB's ability to retain its remedial powers. The only limitations in the NLRA on the courts adjudicating authority are the public policies set out in 29 U.S.C. § 102. See 29 U.S.C. § 103 (prohibiting any "undertakings . . . in conflict with the public policy declared in section 102" as affording "any basis for the granting of legal or equitable relief"). However, Congress specifically exempted courts from these limitations when granting "appropriate temporary relief or restraining order[s]" under Section 10. 29 U.S.C. § 160(h). By exempting the court's from having to consider the purpose of the NLRA—and thus

allowing them to grant equitable relief even if it conflicts with this purpose—Congress rejected the just and proper tests that apply "in order to protect the Board's remedial powers under the NLRA."

B. The reasonable cause standard is contrary to the language of the NLRA.

While the NLRA directs the NLRB to use the reasonable cause standard for determining whether to file a complaint and seek an injunction, it gives no such direction to the courts when deciding whether to grant the NLRB's request.

Under 10(l), when the NLRB has reasonable cause to believe an offense relating to striking, boycotting, or picketing "is true and that a complaint should issue," the NLRB "shall" petition a federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." 29 U.S.C. § 160(l). The reasonable cause language of 10(l) is not directed at the courts. Unless the NLRB's reasonable cause determination has been challenged as an abuse of discretion, the question for the district court to answer is what the just and proper remedy in regard to an injunction should be.

"Ordinarily, one would read the broad command 'just and proper' as invoking the discretion we traditionally exercise when faced with requests for equitable relief. Pet. App. at 22a (Readler, J., concurring) (citing *Spartan Mining Co.*, 570 F.3d at 542 ("'[J]ust and proper' is another way of saying 'appropriate' or 'equitable.'" (citation omitted)). "Putting 'just' and 'proper' together, then, leads us to the same conclusion the esteemed Judge Friendly

reached years ago: the NLRA incorporated traditional equitable principles. *Id.* at 23a (Readler, J., concurring). Thus, even under 10(l), the statutory language does not impute a reasonable cause determination into the just and proper determination.

In any event, the circuit courts' imputation of reasonable cause into 10(j) is counter to accepted statutory interpretation. Section 10(j) does not contain the words "reasonable cause." The reasonable-cause courts impute Section 10(l)'s "reasonable cause" language into the 10(j) analysis because both statutes give the district courts the power to issue injunctions they deem just and proper. However, courts should not impute language from one section into another where Congress has omitted such language from the other section.

In statutory interpretation, "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 270 (2012) (quoting *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (per Scalia, J.)). However, the courts that have embraced the reasonable cause standard for 10(j) have ignored what Congress enacted and rewrote the statute to what—they believe—Congress would have wanted. "[L]ower courts should not lightly assume that Congress intended to depart from established principles unless the relevant statute expressly or impliedly restricts the court's equity jurisdiction." Frank J. Gallo, T*raditional Injunction Practice and Precedent Prevail: The Ninth Circuit Adopts Traditional Equitable Criteria as the Standard Under S 10(j) of the National Labor Relations Act in*

Miller Ex Rel. National Labor Relations Board v. California Pacific Medical Center, 1995 Det. C.L. Mich. St. U. L. Rev. 999, 1011 (1995) (citing *Weinberger*, 456 U.S. at 313). As the Court said in *Porter v. Warner Holding Co.*,

> [u]nless a statute *in so many words*, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

328 U.S. 395, 398 (1946) (emphasis added) (quoting *Brown v. Swann*, 35 U.S. 497 (1836)). And, as the Court has long held, in exercising the full scope of the courts' jurisdiction to grant a preliminary injunction, the courts are required to weigh the traditional four factors. See *Weinberger*, 456 U.S. at 311–313.

Not only did Congress not define "just and proper" in 10(j), but it expressly left the discretion to decide with the federal district courts, not the NLRB. Thus, anything less than the traditional four factors—such as the reasonable cause standard—is inconsistent with the language of the NLRA and the court's equitable jurisdiction.

IV. The reasonable cause standard grants unreasonable deference to the NLRB.

Judicial deference to the NLRB in matters of whether the court should engage in a judicial function presents similar separation of powers problems as *Chevron* deference. Pursuant to 10(j), once the NLRB

"reasonably believes" that there has been a violation of the NLRA, the reasonable-cause courts essentially defer to that decision.

This unique level of deference for this specific government agency is antithetical to our American concept of justice—it undermines the concept of equity and the Constitution's system of checks and balances. The reasonable cause two-step is a stratagem that the courts have given to the NLRB and which the NLRB utilizes to avoid the obstacles other litigants must overcome to obtain relief which—for any other litigant—is an "extraordinary and drastic remedy." *Yakus*, 321 U.S. at 440.

But just like *Chevron* deference, NLRB deference seems to nearly guarantee governmental victory. When the courts reach *Chevron* step two, they adopt the agency interpretation at a rate of nearly ninety-four percent Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 32–33 (2017). Similarly, according to the NLRB, "Section 10(j) initiatives have led to extremely positive results. For instance, [the NLRB's] success rate in authorized Section 10(j) cases, including settlements, is 91.7% to date in Fiscal Year 2021 and was 100% in Fiscal Year 2020." Abruzzo, *supra*.[4] This 100 percent success rate seems to fly in the face of this Court's admonition that a preliminary injunction "is

[4] Not all of these successes were based on the reasonable cause standard, but the nearly 100% success rate suggests an underlying deference, even with the traditional four factor approach.

never awarded as of right . . . ." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citing *Yakus*, 546 U.S. at 428).

Moreover, the reasonable cause analysis asks about harm to the NLRB's process, not the harm to the parties allegedly harmed by the averred unfair labor practice. This "represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). The Constitution does not allow the judiciary to defer to another branch simply because the co-equal branch reasonably believes that a violation of the law has occurred. Instead, it contemplates that each branch of government will jealously guard its own prerogatives, thereby protecting individual liberty. Congress recognized this in 10(j) by leaving the discretion to decide with the district courts. The reasonable cause standard removes the judiciary from the field, resulting in the loss of an indispensable check on federal agency activities.

The rise of the administrative state may have tested the limits of the Constitution's separation of powers, but it does not change the judiciary's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nor does it change the judiciary's duty to apply the law—as written by Congress—when an agency attempts to carry it out through the courts. Accordingly, the NLRA directs the district courts—not the NLRB—to decide when relief is just and proper. "[T]he basic principles of our Constitution's separation of powers are incompatible with the system of bureaucratic rule" that now

prevails. Charles J. Cooper, *Confronting the Administrative State*, 25 Nat'l Affairs 96, 96 (2015). Rather than allow the NLRB to be the plaintiff, prosecutor, and decision maker in a 10(j) determination, the courts should apply the traditional equitable factors in evaluating what relief, if any, is "just and proper."

CONCLUSION

The reasonable cause standard bypasses equity and leverages government power. Ever since Chief Justice Bereford's explanation in 1309 of equitable principles, injunctions are "the strong arm of equity, that never ought to be extended unless to cases of great injury . . . ." *Bonaparte*, 3 F. Cas. at 827 (Baldwin, Circuit Justice). The NLRB should not get a free pass to ignore this centuries old admonition.

The Court should reverse the decision of the Court of Appeals for the Sixth Circuit and hold that equity—and the language of the NLRA—require courts to consider the traditional four factors when deciding if an injunction is just and proper under Section 10(j).

Respectfully submitted,

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