No. 23-367

IN THE

Supreme Court of the United States

STARBUCKS CORPORATION, *Petitioner*,

v.

M. KATHLEEN MCKINNEY, REGIONAL DIRECTOR OF REGION 15 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 60 national and international labor organizations with a total membership of over 12.5 million working men and women.[1] The AFL-CIO's affiliated unions in the private sector engage in collective bargaining that is regulated by the National Labor Relations Act ("NLRA" or "Act").

The NLRA assigns to the National Labor Relations Board ("NLRB" or "Board") the task of enforcing the rights created by the statute, and remedying violations of those rights. This case concerns the Board's ability to obtain preliminary injunctions to protect its ability to ultimately grant effective relief. The AFL-CIO has a vital interest in the correct resolution of this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

In fiscal year 2022, the NLRB received 18,002 unfair labor practice charges. Off. of the Gen. Counsel, NLRB, Mem. GC 23-06 at 1 (Apr. 12, 2023). The NLRB determined that about 7,500 of those had merit. *Id.* Of those, the NLRB's regional offices referred 91 to the Board's internal injunction litigation branch as potentially requiring preliminary relief under section 10(j) of the NLRA. *Id.* at 7. The Board authorized Regional Directors to seek section 10(j) relief in 21 of those cases. *Id.* Courts granted 12

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

of those requests, with the rest denied, settled, or still pending at the close of the fiscal year. *Id*. If a preliminary injunction is an "extraordinary remedy," then a section 10(j) injunction is truly that. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

According to Petitioner Starbucks, the district court and court of appeals below applied too lenient a standard in granting the Regional Director's request for one of those injunctions when they determined that there was reasonable cause to believe that an unfair labor practice had occurred and that injunctive relief was just and proper. Starbucks claims that section 10(j) requires the courts to instead recite and mechanically march through the four factors identified in *Winter*, as it asserts four circuits do.

But Starbucks fails to acknowledge that even those courts that apply the four-factor test "have made modifications to the four-part test to accommodate the purposes and goals of the NLRA." *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 97 (3d Cir. 2011). That is because all courts recognize that "the underlying purposes of [section] 10(j) are to protect the integrity of the collective bargaining process and to preserve the NLRB's remedial power while the Board resolves an unfair labor practice charge." *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 452 (9th Cir. 1994) (en banc). So courts focus their section 10(j) analysis on whether an injunction is necessary to preserve the Board's ultimate remedial authority. This focus on potential remedial failure means that each circuit's standard—whether it uses a two-part analysis, a four-part analysis, or something in-between—in substance resolves into making two key findings: 1) some likelihood of

success, and 2) the existence of an on-going harm of the type that suggests that the failure to grant injunctive relief would likely prevent the Board from ultimately exercising its remedial duty effectively.

As to likelihood of success, courts universally recognize that the NLRA assigns the Board, not the courts, the task of resolving in the first instance the merits of an allegation that the Act was violated. As such, courts look to see only if the Regional Director has some likelihood of success on the merits, regardless of whether they formulate their standard as "reasonable cause" or "likelihood of success." That approach is consistent with traditional equity principles.

As to the harms, courts again universally recognize that section 10(j) is designed to protect the public interest in preserving labor peace through the process designed by Congress, not to vindicate private rights. They look then to whether there is an on-going harm that, if allowed to continue, could not be fully remedied by any eventual remedial order from the Board. By its nature, such a harm would have no adequate remedy at law, and an injunction to stop it would be in the public interest. Courts also consider harm to others under this analysis.

At bottom then, Starbucks' complaint is one of semantics. Whichever articulated analysis a court applies, each considers the traditional equitable factors, while focusing on furthering the purposes of the Act. This is demonstrated by the lower courts' application of the two-part test in this case. The district court found that the Board presented compelling evidence that the seven baristas were fired for their union activity, and rejected Starbucks'

defense of a nondiscriminatory reason for the discharge because Starbucks failed to present any relevant evidence to support that claim. The courts found that the discharges would likely chill—and actually did chill—other employees in the exercise of their rights under the NLRA, constituting a harm that the Board could not remedy with an eventual reinstatement order and backpay. And the courts denied that harms to Starbucks or others outweighed the need for the injunction. The courts structuring their analysis using this two-step rather than four-step analysis was not an abuse of discretion.

Starbucks ignores the lower courts' application of the two-step test, and instead relies exclusively on its construction of this Court's clear-statement rule regarding the courts' equitable authority. Starbucks posits that rule requires a clear statement from Congress in order to deviate from naming and mechanically analyzing the four *Winter* factors. But Starbucks has it backwards; this Court's clear-statement rule is intended to preserve the courts' broad and flexible equitable authority—particularly in furtherance of the public interest—and rejects any wooden application of equitable authority without congressional clarity.

ARGUMENT

Starbucks claims that the lower courts erred in utilizing a two-part test that determined whether there was reasonable cause to believe that an unfair labor practice occurred and whether an injunction would be just and proper to issue a preliminary injunction pursuant to section 10(j). That claim is based on the purely linguistic argument that it was error for the courts to use section 10(j)'s "just and

proper" terminology rather than the four-factor test identified in *Winter*.[2] But nothing about section 10(j) would require finding the lower courts' structuring of their analysis into a two-step test, rather than four parts, to be an abuse of discretion.

1. Section 10(j) is one of two provisions—along with section 10(l)—added to the NLRA by the Taft-Hartley Act to allow the Board to seek injunctive relief in cases alleging unfair labor practices. *See* Pub. Law 80-101 §§ 10(j), (l), 61 Stat. 136, 149-50 (1947). That provision empowers the Board, "upon issuance of a complaint[,]" to petition district courts "for appropriate temporary relief or restraining order[.]" 29 U.S.C. § 160(j). Under both sections 10(j) and (l), district courts "shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. §§ 160(j), (l).[3]

Congress adopted sections 10(j) and (l) to provide the Board, "acting in the public interest and not in vindication of purely private rights," the ability to "seek injunctive relief" in unfair labor practices cases

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[2] *Compare Winter*, 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") *with Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies").

[3] Section 10(l) varies slightly by providing that the "district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper[.]" 29 U.S.C. § 160(l).

because "the relatively slow procedure of the Board hearing and order … falls short of achieving the desired objective of the free flow of commerce and encouragement of the practice and procedure of free private collective bargaining." S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947); *see Muniz v. Hoffman*, 422 U.S. 454, 466 (1975). Due to "lengthy hearing and litigation enforcing its order, the Board has not been able in some instances to correct unfair labor practices until after some substantial injury has been done" and so it was possible "for persons violating the act to accomplish their unlawful objective before being placed under a legal restraint and thereby making it impossible or not feasible to restore or preserve the status quo pending litigation." S. Rep. No. 105 at 27.

Thus, "the underlying purposes of [section] 10(j) are to protect the integrity of the collective bargaining process and to preserve the NLRB's remedial power while the Board resolves an unfair labor practice charge." *Miller*, 19 F.3d at 452.

In writing a provision that enlists district courts in aid of preserving the Board's ultimate remedial power, Congress used language it would have understood to confer broad equitable discretion on those courts. Section 10(j) empowers the district court to grant "such injunctive relief … as it deems just and proper. No other grant or limitation of power is found." *Douds v. Loc. 294, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 75 F.Supp. 414, 417 (N.D.N.Y. 1947). "Consideration of the provisions of Section 10[(j) and] (l) of the Act giving the court 'jurisdiction to grant such injunctive relief or temporary restraining order as it deems just

and proper,' clearly discloses the intention of Congress that the court was to exercise its discretion to fit the needs and circumstances of each particular case." *Douds v. Wine, Liquor & Distillery Workers Union, Loc. 1*, 75 F.Supp. 447, 451 (S.D.N.Y. 1948).

The wide discretion inherent in the phrase "deems just and proper" is consistent with this Court's recognition that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *see also* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 Geo. Wash. L. Rev. 382, 382 (1983) ("The point has been restated so often by federal courts that it has become an aphorism."). Accordingly, "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015), *quoting Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

Congress clearly did not intend for the phrase "deem just and proper" to limit a court's wide discretion to grant equitable relief in furtherance of the public interest, as "[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." *Porter*, 328 U.S. at 398; *Weinberger*, 456 U.S. at 313 ("we do not lightly assume that Congress has intended to depart from established principles" of equity).

2. This congressional grant of discretion does not mean that a "district court [is to] behav[e] as if it had general jurisdiction over the nation's labor laws[,]" *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083 (3d Cir. 1984), which would risk "a throwback to the era of the labor injunction, an era that Congress brought to an end by enacting the Norris-LaGuardia [Act] and [the NLRA,]" *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990). Instead, "an exercise of the equity power granted by [statute] must be in light of the public interest involved." *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 295 (1960) (similar). And "[b]ecause the 'just and proper' inquiry must recognize the public interest implicit in protecting the collective bargaining process," the circuit courts have uniformly agreed that in determining whether to grant section 10(j) relief, "the critical determination is whether, absent an injunction, *the Board*'s ability to facilitate peaceful management-labor negotiation will be impaired." *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 879 (3d Cir. 1990) (emphasis added).

Accordingly, in evaluating section 10(j) petitions, district courts are to apply traditional equity principles "in light of the underlying purpose of [section] 10(j): preserving *the Board*'s remedial power pending the outcome of its administrative proceedings." *Muffley v. Spartan Mining Co.*, 570

F.3d 534, 543 (4th Cir. 2009) (emphasis added); *see also Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989) ("Section 10(j) tells the district court to do what's 'just and proper', which we read as a statement that traditional rules govern—the approach emphasizing the public interest applied when the government is the plaintiff.").

In particular, courts consider it

> just and proper to issue a [section] 10(j) injunction when the nature of the alleged unfair labor practices are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation.

Vibra Screw Inc., 904 F.2d at 878.

While the circuits use different terminologies to describe the standards they apply to section 10(j) applications, in substance, they agree that the focus on preserving the Board's ultimate remedial power requires the district court to make two findings: 1) "some likelihood of success[,]" *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230, 1242 (2d Cir. 1974); and 2) the existence of an on-going harm of the type that suggests that the "failure to grant injunctive relief would be likely to prevent the Board … from effectively exercising its ultimate remedial powers" and thereby failing to "vindicate the public interest in the integrity of the collective bargaining process[,]" *Vibra Screw*, 904 F.2d at 879 (cleaned up). We take each of these in turn.

a. *The merits*. Unless the courts ensure that there is some likelihood of success, there is no cause to consider further the need to preserve the Board's remedial authority. "[I]t's a safe bet that injunctive relief is not 'just and proper'" without "at least a modest chance of success on the merits." *Pioneer Press*, 881 F.2d at 491. "But, in evaluating the likelihood of success," courts universally recognize that "it is not the district court's responsibility … to rule on the merits of the [] complaint; that is the Board's province." *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 287 (7th Cir. 2001). As such, courts require "the Board [to] make [only] a threshold showing of likelihood of success by producing some evidence to support the unfair labor practice charge, together with an arguable legal theory." *Miller*, 19 F.3d at 460.

That is so because, "[i]n assessing whether the Board has met its burden, it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices[.]" *Id*. The statute instead places jurisdiction over the merits of unfair labor practice allegations with the Board in the first instance, subject to appellate review. 29 U.S.C. §§ 160(a)-(f). Section 10(j) proceedings are then "ancillary to[,]" *Gottfried v. Frankel*, 818 F.2d 485, 492 (6th Cir. 1987), and "independent of[,]" *NLRB v. Denver Bldg. & Constr. Trade Council*, 341 U.S. 675, 682 (1951), proceedings on the merits, which "distinguishes [section] 10(j) injunctive relief from the generic context, where district courts determine whether to grant relief in cases over which they possess both the jurisdiction and competence to decide the merits." *Grane Healthcare*, 666 F.3d at 96.

In the very first case addressing section 10(j), the district court stated that "[s]ince this Court has jurisdiction to render only intermediate relief, it would seem logical that something less than a finding of the ultimate facts is contemplated in the Act." *Loc. 294*, 75 F.Supp. at 418. Instead,

> nothing in the statute [] would prompt the Court to depart from the recognized rule of equity that interlocutory relief may be granted upon a showing of reasonable probability that the moving party is entitled to final relief. A showing of a prima facie case for equitable relief satisfies the statute.

Id.

In another early section 10(j) decision, the district court read "just and proper" to not limit its ability to "avoid if possible determining in effect the actual merits of the issues which the statute requires the Board, and not the Court, to adjudicate." *Evans v. Int'l Typographical Union*, 76 F.Supp. 881, 886 (S.D. Ind. 1948).

Courts similarly emphasized the need to avoid determining the merits in section 10(l) cases. *See, e.g.*, *Shore v. Bldg. & Constr. Trades Council of Pittsburgh, Pa.*, 173 F.2d 678, 681 (3d Cir. 1949) ("Our function is, of course, not to find that the charges made are true or untrue, but to determine whether the court was clearly erroneous in finding reasonable cause to exist."); *Styles v. Loc. 760, Int'l Bhd. of Elec. Workers*, 80 F.Supp. 119, 122 (E.D. Tenn. 1948) ("A prima facie case has been made out by the petitioner, and that is all that is required as a condition precedent to the granting of an injunction.").

This approach for determining likelihood of success is entirely consistent with traditional equity principles, as "[a]ll courts agree that plaintiff must present a prima facie case but need not show a certainty of winning[.]" 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.3 (3d ed. 2013) (footnote omitted); *see also Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (per curium) (affirming injunction where petitioner raised "grave" question on the merits), *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940) (affirming injunction where petitioner raised "serious questions" on the merits). Indeed, in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Company*, this Court held that the district court acted within the "typical powers of a court of equity" by issuing an injunction to restore the status quo ante until the National Railroad Adjustment Board resolved an arbitral dispute, even though the court avoided addressing the merits of the dispute so as not to intrude on the Adjustment Board's jurisdiction. 363 U.S. 528, 531-34 (1960); *see also Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc) ("The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test. … The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case. Thus, an effort to apply the probability language to all cases with mathematical precision is misplaced.").

Starbucks complains that the lower courts looked only to whether there was reasonable cause to believe that the alleged unfair labor practice occurred rather than a likelihood of success. But regardless of

whether a court uses the "reasonable cause" or the "likelihood of success" rubric, essentially all circuits agree that, in substance, the likelihood of success inquiry for section 10(j) purposes considers whether the Board "has at least a modest chance of success on the merits." *Pioneer Press*, 881 F.2d at 491.[4]

Still, Starbucks suggests the district court below abused its discretion by relying on the "reasonable cause" formulation, because that formulation compels only a cursory inquiry into the Board's chances of success on the merits. But the two days of hearings and careful parsing by the district court of Starbucks'

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[4] *See, e.g.*, *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 959 (1st Cir. 1983); *Silverman v. Major League Baseball Player Rels. Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Vibra Screw*, 904 F.2d at 882 (3d Cir.); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 n. 8 and 11 (5th Cir. 2010); *Frankel*, 818 F.2d at 493 (6th Cir.); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996); *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1356 (9th Cir. 2011); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371-72 (11th Cir. 1992). The Fourth Circuit has not specifically addressed its application of the likelihood of success prong in the section 10(j) context since adopting it in *Spartan Mining Company*, *supra*, 570 F.3d 534. However, in that case, the court of appeals held that its preliminary injunction test from *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977) applied, and there, the court said that "grave or serious questions" may be "enough" "and plaintiff need not show a likelihood of success." *Id.* at 196; *see also Humphrey v. Int'l Longshoremen's Ass'n*, 548 F.2d 494, 498 (4th Cir. 1977) (instructing that the Board's presentation of facts and law "should be accorded considerable deference" in section 10(l) case). The D.C. Circuit has never addressed the applicable standard in a section 10(j) case.

merits defense in this case demonstrate that is not true. For instance, the district court found reasonable cause to believe that Starbucks discharged seven employees due to animus against their union activity based on the Board's evidence of the proximity in time of the discharges to the union activity; Starbucks' prior tolerance of policy violations that it now claimed was the basis for termination; and the discriminatory application of these policies to union-supporting employees in comparison with employees who had previously violated the same policies. Pet.App.104a-105a, 107a.

In reaching this finding, the district court found Starbucks' evidence that it fired other employees for similar policy violations unpersuasive for two reasons. *First*, the evidence was "inconsistent" with the Regional Director's proffered testimony that similar conduct at the store had previously been tolerated. Pet.App.108a. *Second*, the evidence was irrelevant; Starbucks offered no testimony that it relied on the comparator discharges in its investigation or in making its decision. *Id.*; *see also* Pet.App.54a.

Thus, the district court did not engage in a cursory review of the record evidence, or abuse the wide discretion conferred by the Act.

b. *The harm*. A showing that the Regional Director is likely to be able to establish the unfair labor practices alleged in the complaint is not sufficient in itself to "deem" preliminary relief "just and proper." Because a section 10(j) injunction is an extraordinary remedy, the district court must also find "the unusual likelihood of ultimate remedial

failure by the NLRB." *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998) (cleaned up).

"The theory is that the chilling effect of management retaliation" may not be erased by "the curative effects of any remedial action the Board might take including reinstating illegally discharged workers." *Vibra Screw*, 904 F.2d at 878-79 (cleaned up). Or, concretely, if an employer is allowed to "proceed in its quest to defeat the Union before it becomes established … then merely requiring the company to pay its employees damages after the fact will not remedy the adverse impact to the Union and the employees in the interim period." *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 501 (7th Cir. 2008).

Section 10(j) then is "not available to vindicate private rights," *Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207, 210 (7th Cir. 1989) (cleaned up), but instead relates to the harm to the "public interest in the integrity of the collective bargaining process[,]" *Vibra Screw*, 904 F.2d at 879 (cleaned up). For that reason, the relief granted "is only that reasonably necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of that power." *Suburban Lines*, 731 F.2d at 1091.

Essentially all the circuits agree that the requisite harm for section 10(j) relief is established where a suspected unfair labor practice creates "a present or impending deleterious effect … that would likely not be cured by later relief." *HTH Corp.*, 650 F.3d at 1362.[5] "[I]f a harm is of a routine character in the

[5] The D.C. Circuit has not addressed a section 10(j) petition; however, in addressing a request for temporary relief under

NLRA context, the parties usually can redress such wrongs under the NLRB administrative processes." *McKinney v. Creative Visions Res., L.L.C.*, 783 F.3d 293, 299 (5th Cir. 2015). To determine whether the requisite harm is present, courts look to record evidence of effect, as well as the harm that can reasonably be presumed to flow from the unfair labor practice at issue. "[I]nferences from the nature of the particular unfair labor practice at issue remain available." *HTH Corp.*, 650 F.3d at 1362.

By its nature, this harm inquiry subsumes other equitable considerations, such as whether there is an adequate remedy at law, and whether the injunction is in the public interest. *Grane Healthcare*, 666 F.3d at 99. If a district court deems an injunction necessary to preserve the Board's ultimate remedial authority, it must be that there is no adequate remedy at law and that it serves the public interest. And because the relief granted "is only that reasonably necessary to preserve the ultimate remedial power of the Board[,]" *Suburban Lines*, 731 F.2d at 1091, "[c]ourts do not only weigh the harms to the Board, but also the harms injunctive relief poses to the employer" in shaping relief. *Grane Healthcare*, 666 F.3d at 99. *See, e.g.*, *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981) (finding that harm to the employer from reinstatement order didn't outweigh the harm to the Board, as the employer would receive the benefit of

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section 10(e) pending circuit court litigation, the Circuit recognized that injunctive relief serves the remedial purposes of the Act. *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am., UAW v. NLRB*, 449 F.2d 1046, 1051-52 (D.C. Cir. 1971).

the employee's labor in the interim, and the employer could discharge the employee for any legitimate future problems with the employee's work performance).

Starbucks suggests that the lower courts here abused their discretion by their failure to name and walk through each of the four factors identified in *Winter*. But given that "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in [section 10(j)] cases[,]" *Silverman v. Major League Baseball Player Rels. Comm., Inc.*, 880 F.Supp. 246, 259 (S.D.N.Y. 1995) (Sotomayor, J.) (cleaned up), there is no requirement that the courts perform their analysis in a specific way. Instead, "flexibility rather than rigidity" defines equitable authority exercised in the public interest. *Hecht Co.*, 321 U.S. at 329; *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("Equity eschews mechanical rules; it depends on flexibility.").

And review of the lower court decisions shows that Starbucks' claim boils down to a semantic disagreement. As Judge Boggs' explained, there was a likelihood of irreparable harm due to ultimate remedial failure, because "Starbucks' termination of the Memphis [employees]—including six of the seven members of the organizing committee— … would almost certainly chill other partners' exercise of rights protected by the Act[,]" which "subsequent Board intervention would not be able to remedy." Pet.App.12a.[6] And that conclusion wasn't

[6] Because of this likelihood of remedial failure, the fact that the administrative law judge—even if ultimately affirmed by the Board—found that two of the discharges were not unlawful

speculation; Judge Boggs further noted that there was record evidence of actual chill. *Id.* [7]

And contrary to what Starbucks claims, Br. for Starbucks 48, the district court did balance the equities under its analysis. The district court found that the harm to employees displaced in order to accommodate the reinstated workers was "outweighed by the harm that will result if the union's organizational efforts are terminated." Pet.App.117a (cleaned up); *also* Pet.App.64a. It further dismissed the monetary harms to Starbucks of onboarding and employing the reinstated workers as insufficient to deny the injunction, and rejected Starbucks' claim of loss of customer goodwill as speculative. Pet.App.61a-62a.

Starbucks simply cannot show that the lower courts' structuring of their analysis of the traditional equitable considerations in this way falls outside the discretion conferred by the phrase "deems just and proper."

3. Starbucks ignores the lower courts' application of the two-step test, and instead argues that the

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doesn't affect the propriety of injunctive relief. *Starbucks Corp.*, 2023 WL 3254440 (May 4, 2023). The identified chill would still exist if only five of seven union supporters were unlawfully terminated.

[7] Starbucks' sole response to this evidence of chill was that the union won the election, but Judge Boggs dismissed this, *first*, because "Starbucks fails to cite any authority suggesting that a successful union election precludes injunctive relief[,]" and, *second*, because "a failure to reinstate the Memphis [employees] (who now lead the bargaining committee) would [] undermine the Union's bargaining strength as it seeks its first collective-bargaining agreement." Pet.App.13a-14a.

district court simply could not issue a section 10(j) injunction without first listing and then walking through each of the factors identified in *Winter*, in a manner so "stringent" as to be wholly divorced from the statutory purposes Congress intended to vindicate. Br. for Starbucks 2.

Starbucks' only course to that conclusion is to attempt to convert this Court's clear-statement rule regarding equitable authority—described above as intended to preserve the courts' broad and flexible equitable power to act in the public interest—into one of constraint. *See* Br. for Starbucks 3 ("That deeply engrained rule resolves this case."). Under Starbucks' theory of the clear-statement rule, unless Congress explicitly says otherwise, courts must apply only the *Winter* factors, and only a in fashion so cabined, they would likely be unrecognizable to any court with equitable authority. But Starbucks is wrong about the clear-statement rule. Indeed, in the cases it cites, this Court invoked the clear-statement rule to reject restrictions on equitable discretion and flexibility.

Take *Hecht Co.*, "a decision of such widely recognized significance that it is not unreasonable to attribute knowledge of it to at least some of the framers of the Taft-Hartley Act of 1947 in which [sections] 10(j) and [10](l) originated." *Danielson*, 494 F.2d at 1240 (footnote omitted). There, this Court rejected the Office of Price Administration's claim that it was entitled to an injunction as of right once a statutory violation was established. 321 U.S. at 326-30. The Court explained that nothing in the statute justified a "major departure from [the] long tradition"

of "[f]lexibility" in equitable jurisdiction. *Id*. at 329-30.[8]

Next take *Porter*, a case that issued just one year before Taft-Hartley. There, the Court—invoking the clear-statement rule—rejected the argument that district courts were prohibited by the Emergency Price Control Act of 1942 from exercising their equitable jurisdiction to order restitution. 328 U.S. at 398-403. Again, the Court indicated that the statutory protection of the "public interest" meant that the courts' "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake[,]" and so the "comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Id*. at 398. And "[i]n framing [equitable] remedies" under the act, "courts must act primarily to effectuate the policy" of that act. *Id*. at 400.

Accordingly, before Congress adopted Taft-Hartley, this Court had made clear that the flexibility inherent in the exercise of equity power—in particular when provided to effectuate a statutory policy that advances the public interest—could only be restricted by clear statutory language or implication. And this Court continues to require a

[8] That did not mean that courts were to issue injunctions "grudgingly." *Id*. at 330. Instead, courts should exercise their equitable "discretion" "in light of the large [statutory] objectives[.]" *Id*. at 330-31.

clear statement in order to restrict courts' authority to grant equitable relief.[9]

Starbucks' characterization of this Court's clear-statement rule is then plainly wrong. More than that, Starbucks misunderstands the very purpose of the clear-statement rule. That rule is intended to ensure that courts can exercise their equitable powers broadly and flexibly unless Congress has clearly stated otherwise. As shown above, nothing in section 10(j)'s text suggests Congress intended to deny that broad and flexible authority, or require courts to issue

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[9] *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 n. 9 (1961) (rejecting argument that, because agencies were required to order divesture upon finding of statutory violation, the district courts were similarly required to provide such equitable relief, as "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language"); *Hall v. Cole*, 412 U.S. 1, 11-13 (1973) (rejecting argument that statute restricted courts' equitable jurisdiction to award attorneys' fees where such an award would further the policies of the statute); *United States v. Rodgers*, 461 U.S. 677, 708-09 (1983) (holding that district courts retained equitable discretion to determine whether to order a forced sale of certain properties to satisfy a tax debt, in part due to the "important principle of statutory construction that Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion"); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006) (rejecting both the district court's categorical limits on its authority to issue injunctive relief in broad swath of cases, and the court of appeals' "general rule" that required issuance of injunctive relief upon a finding of a patent violation, as inconsistent with courts' traditional equitable discretion); *Nken v. Holder*, 556 U.S. 418, 432-33 (2009) (rejecting argument that statutory limits on district court's authority to issue preliminary injunction applied equally to a court of appeals' authority to issue a stay of that injunction).

or withhold injunctive relief based on any rigid formula.

CONCLUSION

The Court should affirm the order below.

Respectfully submitted,

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