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 SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Service Employees International Union ("SEIU") is a labor organization of approximately two million working people in the United States and Canada. Its mission is three-fold: to preserve the dignity and worth of workers and the services they provide, to improve the lives of workers and their families, and to create a more just and humane society. The SEIU has significant familiarity with the content of United States labor law and a strong interest in ensuring that this law is interpreted correctly.

INTRODUCTION AND SUMMARY OF ARGUMENT

When the National Labor Relations Board files a petition for temporary injunctive relief under Section 10(j) of the National Labor Relations Act, the district court should adopt a deferential posture in assessing the merits and the equities underlying that request. *See* 29 U.S.C. § 160(j). This conclusion is supported by statutory history and structure, by the overarching statutory design, and by early judicial interpretations that reflect a sound understanding of Section 10(j).

Section 10(j) provides that the Board—while adjudicating a complaint of unfair labor practices—may petition a federal district court for interim injunctive relief. In turn, Section 10(j) authorizes district courts to grant any such petitions deemed "just and proper."

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

Here, the parties broadly agree that *Winter* analysis captures the set of considerations relevant to analyzing a petition under Section 10(j). *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008); *see also* Petr. Br. 2-3; Resp. Br. 9-12. Their disagreement centers on the guidance that this Court should provide concerning the application of the *Winter* factors in this setting.

In faulting the decision below, Petitioner contends that courts must conduct a searching, undeferential, and intrusive review before entering relief under Section 10(j). As Respondents explain, however, that position is mistaken. In assessing the factors relevant to interim relief—namely, the merits and the equities—judicial analysis must be informed by relevant context. Here, that context includes the statutory structure and design within which Section 10(j) is embedded. Attention to that context clarifies how this Court should structure the exercise of equitable authority by district courts evaluating Section 10(j) petitions.

First, the Court should hold that the merits analysis is properly deferential to the Board. This is confirmed by three considerations: (a) Congress's exquisitely careful calibration of the judicial role in labor injunctions, as evidenced by the history of enactments that led to the adoption of Section 10(j); (b) The statutory structure of the NLRA and the Taft-Hartley Act, pursuant to which courts evaluating Section 10(j) petitions will not ultimately resolve the merits of the underlying dispute and should not usurp the very administrative remedial authority that Section 10(j) exists to protect; and (c) The history of early judicial opinions interpreting Section 10(j), which reflect its original public meaning and support a deferential analysis.

Second, the Court should hold that the equities analysis is focused (with due deference to the Board)

on preservation of the Board's own remedial authority during the pendency of administrative proceedings. Here, too, there are three core considerations: (a) The statutory text and structure make clear that avoiding frustration of remedial authority is Section 10(j)'s core purpose and that the Board is vested with discretion and expertise in identifying cases where that concern is implicated; (b) The Board has been parsimonious in exercising its discretion under Section 10(j) and has adopted robust internal procedures that merit judicial respect; and (c) Early judicial interpretations of Section 10(j) reflected a widely shared understanding that the equities analysis is focused directly on frustration of remedies, rather than a more freewheeling inquiry.

Providing this guidance will helpfully clarify the law for lower courts and uphold the careful balance of responsibility struck by Congress in Section 10(j).

ARGUMENT

I. THE MERITS STANDARD SHOULD BE PROPERLY DEFERENTIAL IN LIGHT OF STATUTORY STRUCTURE AND DESIGN

There are two fundamental reasons why the merits analysis in a Section 10(j) case should be less searching than in ordinary preliminary injunction proceedings. *First*, the statutory structure—and the history of associated statutory enactments—demonstrates that labor injunctions have been meticulously calibrated to strike a balance that assigns only a limited role to the courts. *Second*, unlike in an ordinary preliminary injunction proceeding, the district court evaluating a request under Section 10(j) will not ultimately resolve the merits of the underlying dispute (which is statutorily entrusted to the Board, subject to deferential judicial review of the Board's final determination). Con-

sistent with these considerations, courts in the years following the enactment of Section 10(j) broadly recognized it to require a less searching merits review.

Whether understood as considerations bearing on the proper application of the traditional preliminary injunction standard—or instead as a reason to require the Board to show only "some likelihood of success" on the merits, *see Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union*, 494 F.2d 1230, 1242 (2d Cir. 1974)—these principles support a more deferential approach to merits analysis in this setting.

A. History and Statutory Context Confirm That Congress Assigned Courts a Very Limited Role in Labor Injunctions

To hear Petitioner tell it, judicial injunctions in the labor context are no different than any others, and so there is no reason for courts to adopt a more deferential posture. *See* Petr. Br. 40 ("[L]ack of deference is central to Section 10(j)'s design."). That contention is deeply mistaken. The authority of federal courts to issue labor injunctions ranked among the great political and legal disputes of the early twentieth century, producing four landmark statutes through which Congress sought to cautiously define the judicial role in this field. Section 10(j) appears in the final statute enacted in that sequence and cannot fairly be understood without reference to Congress's statutory design.

Throughout the late 19th and early 20th centuries, the growth of organized labor—provoked partly by the abuses of Robber Barons and the perils of Gilded Age industry—created substantial conflict. Courts presiding over the ensuing legal disputes exercised their full array of equitable powers. The result was not pretty. Time and again, courts enjoined legiti-

mate labor activity based on their flagrantly pro-industrialist conception "of policy and of social advantage." *Vegelahn v. Guntner*, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting from the approval of an anti-picketing injunction); *see also* Archibald Cox et al., *Labor Law: Cases and Materials* 14, 51 (12th ed. 1996). Courts frequently treated unions as if they were unlawful impediments to an employer's contractual rights, *see Vegelahn*, 44 N.E. at 1077, and property rights, *see Barr v. Essex Trades Council*, 30 A. 881, 885 (N.J. Ch. 1894); as a continuing trespass or nuisance, *see Murdock v. Walker*, 25 A. 492, 493 (Pa. 1893); and even imposed criminal sanctions against union activity, *see Crump v. Commonwealth*, 6 S.E. 620, 627 (Va. 1888).

Encouraged by this view, employers in the early 20th century increasingly turned to the judiciary to crush and suppress labor activity. By 1931, federal and state courts had issued over 1,800 labor-related injunctions. *See* Benjamin K. Taylor & Fred Witney, *Labor Relations Law* 7 (6th ed. 1992). The vast majority of these orders—issued in reliance on traditional equitable authority—benefited employers at the expense of workers and unions. *See Boys Markets, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 250 (1970) ("In the early part of this century, the federal courts generally were regarded as allies of management.").

In short order, the courts' abuse of their equitable powers to issue profligate labor injunctions created a public policy crisis. As two preeminent scholars (one a future Justice) wrote: "In the administration of justice between employer and employee, [the injunction] has become the central lever. Organized labor views all law with resentment because of the injunction, and the hostility which it has engendered has created a

political problem of proportions." Felix Frankfurter & Nathan Greene, *The Labor Injunction* 52-53 (1930).

Congress initially responded through Section 20 of the Clayton Act, which expressly provided that no labor injunctions should issue absent "irreparable injury" for which there was "no adequate remedy at law." Clayton Act, Pub. L. No. 63-212, § 20, 38 Stat. 730, 738 (1914). But directing courts to apply that standard—which broadly overlaps with modern *Winter* analysis—proved insufficient. Courts read Section 20 in a manner that defeated Congress's goal of limiting judicial authority over labor activity. *See Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472 (1921); *see also Milk Wagon Drivers' Union, Loc. No. 753 v. Lake Valley Farm Prods.*, 311 U.S. 91, 102 (1940).

Faced with judicial unwillingness to acknowledge limits on labor injunctions, Congress resorted to more extreme measures. In 1932, it enacted the landmark Norris-La Guardia Act, Section 1 of which imposed a broad prohibition on injunctive relief in labor disputes. *See* Pub. L. No. 72-654, § 1, 47 Stat. 70, 70 (1932). To eliminate any doubt about its purposes, Congress also spelled out commonplace union activities that courts could no longer enjoin, *see id.* §§ 4, 5, leaving only narrow exceptions for cases involving "fraud or violence," *id.* § 4(e), and the rare case (covered in Section 7) where "public officers" were "unable or unwilling" to protect property at risk in a labor dispute, *id.* § 7(e).

In these respects, the Norris-La Guardia Act represented a repudiation of the way in which courts had exercised their traditional equitable authority in the labor setting. *See Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, P. & W. R. R.*, 321 U.S. 50, 58 (1944) (noting that the "prime purpose" of the Norris–La Guardia Act "was to restrict the federal equity power

in such matters within greatly narrower limits than it had come to occupy"). Congress so strongly disagreed with the courts' handling of labor disputes—which had created social and political tumult—that it almost entirely ousted courts' equitable prerogatives.

Three years later, continuing its efforts to stabilize labor relations and sustain labor peace, Congress enacted the National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935). Adopted to correct the inequality in bargaining power between employees and employers, *id.* § 1, the NLRA created the Board and charged it with responsibility for developing and operationalizing national labor policy. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 24 (1937).

Here, too, by designing and empowering an agency to address an issue that courts had so badly mangled through injunctions, Congress made clear its dissatisfaction with judicial management of labor affairs—and its view that courts are ill-suited to independently assess matters of labor policy and administration. *See, e.g.*, *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978) ("It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy.").

More specifically, the NLRA authorized the Board (not the courts) to adjudicate unfair labor practices through an administrative process, and to petition for judicial enforcement of final Board orders. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 476 (1964). Sections 10(e) and (f) further entrusted the Board with the discretionary power to seek "just and proper" injunctive relief pending judicial enforcement of a final Board or-

der. *See* Pub. L. No., 74-198 § 10(e), (f); *see also id.* § 10(h) (clarifying that the Norris-La Guardia Act would not bar Section 10(e) and (f) injunctions). Under the Act, as set forth below, *infra* at 11-12, the Board's final decisions are subject to judicial review, though (in line with Congress's core policy judgment) courts are required to defer to the Board in key respects.

During the decade following the enactment of the NLRA, as the Nation experienced a wave of post-war labor unrest, Congress perceived two especially significant developments. The first was an emerging concern that the Board's proceedings could take quite some time—creating a risk that labor rights would be destroyed by unlawful activity during the pendency of the Board's review.[2] The second was a concern that some forms of union activity, including boycotts and work stoppages, were unduly disrupting the economy.

To account for both these trends, Congress enacted its fourth and final major legislation concerning labor injunctions: namely, the Taft-Hartley Act, Pub. L. No. 80-101, § 10(j), (l), 61 Stat. 136, 149-50 (1947).

Section 10(j) addressed the first trend by vesting the Board (but not private parties) with discretion to seek "just and proper" temporary injunctive relief pending the outcome of a Board proceeding. *See Kinney v. Pioneer Press*, 881 F.2d 485, 487 (7th Cir. 1989) (explaining Congress's concern that "the Board's order might come too late to do any good"); *Muniz v. Hoffman*, 422

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[2] *See* Thomas P. Marinis, Jr., *Labor Law Labor-Management Relations Act—A Temporary Injunction of an Unfair Labor Practice Shall Issue Only on A Showing That It Is Necessary to Preserve the Status Quo or to Prevent Irreparable Harm. Mcleod v. General*, 45 Tex. L. Rev. 358, 359 n.8 (1966) (noting an average of 393 days) (internal citation omitted); *Douds v. Wine, Liquor & Distillery Workers Union, Loc. 1*, 75 F. Supp. 447, 450 (S.D.N.Y. 1948).

U.S. 454, 466 (1975) (similar); *Johnston v. J. P. Stevens & Co.*, 341 F.2d 891, 892 (4th Cir. 1965) (similar). Section 10(l), in turn, addressed both trends by requiring the Board to seek temporary injunctive relief against specified unlawful union practices, *e.g.*, secondary boycotts. *See Loc. 1976, United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 98 (1958).

Petitioner describes these developments as merely a partial restoration of the pre-Norris-La Guardia status quo, where courts wielded their equitable powers on traditional terms. *See* Petr. Br. 30. Petitioner also implies that this was all done to prevent the Board from exerting settlement pressure. *See id.* at 32.

That gets things precisely backward. Through the Clayton Act, the Norris-La Guardia Act, the NLRA, and finally the Taft-Hartley Act, Congress aimed to meticulously calibrate the role that courts would play in the development and administration of national labor policy. Congress embarked on this endeavor based mainly on a perception that courts were *not* proper actors to make most of these policy judgments—as confirmed by decades of national experience with the judicial exercise of traditional equitable power. *See, e.g.*, *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083 (3d Cir. 1984) (correctly observing that Section 10(j) "bars the district court from behaving as if it had general jurisdiction over the nation's labor laws").

In combination, Congress's statutes substantially departed from the *status quo ante*. These laws created new federal protections for both employers and employees. They sharply circumscribed the role that private parties wielding civil lawsuits would play in resolving labor disputes. They placed the Board at the very heart of national labor policy, empowering it not only to investigate and adjudicate alleged violations of

labor law, but also to decide when to seek temporary injunctive relief during the pendency of its own proceedings. And they defined a deliberately narrow and secondary role for courts, who were granted only cabined authority to issue injunctions in limited circumstances—and who manifestly were not intended to serve as star players in adjudicating labor disputes at *any* stage of the process established by Congress.

That choice merits respect. Indeed, Congress could have vested courts with robust independent authority to act where the Board does not move fast enough. *See, e.g.*, 5 U.S.C. § 7702(e)(1)(B) (vesting courts with jurisdiction over civil service claims where the Merit Systems Protection Board does not decide the matter within 120 days); *Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 425 n.2 (2017). But Congress instead empowered the Board alone to decide when to seek temporary injunctive relief—and made clear that the Board remains the principal decisionmaker on the underlying labor dispute even when it does seek interim judicial intervention pursuant to Section 10(j).

Pulling this all together: Section 10(j) must be read in light of the series of congressional enactments that led to Taft-Hartley. *See, e.g.*, *United States v. Hansen*, 599 U.S. 762, 775-76 (2023) (treating "statutory history" as "an important part of th[e] context"). That history—and the overarching statutory plan that it illuminates—confirms that Congress generally aimed to *limit* the judicial role in labor injunctions (subject to narrow exceptions necessary to preserve the Board's own remedial authority). *See King v. Burwell*, 576 U.S. 473, 492 (2015); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) (holding that statutory context and the "large objectives of the Act" are relevant considerations in equity analysis). It would be decidedly inconsistent

with that understanding to read Section 10(j) as authorizing courts to engage in searching and robust independent merits review of labor disputes while assessing the Board's petitions for temporary injunctions. Any such ruling would be at odds with Congress's overarching design—and would invoke "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

B. The Statutory Structure Is Inconsistent with Unduly Searching Merits Review

Consistent with the distinct historical context from which it arose, Section 10(j) puts courts in a unique position: it contemplates that they will assess a petition for temporary injunctive relief in a labor case where they will not resolve (and statutorily lack jurisdiction to decide) the underlying merits. That feature of the Taft-Hartley Act framework sharply separates this context from typical cases where courts are asked to grant interim equitable relief. Because the Board is vested with ultimate authority to resolve unfair labor practice claims—and to determine what relief is warranted if it finds a violation—courts are properly more deferential in pronouncing on the merits, so as not to effectively usurp the Board's own adjudicatory role. To hold otherwise would turn Section 10(j) on its head. A provision that exists to preserve the Board's remedial authority should not be treated as a vehicle through which district courts usurp that very same authority.

As explained above, Congress has vested principal authority to resolve labor cases in the Board, not the federal courts. *See* 29 U.S.C. § 160(a); *NLRB v. Truck Drivers Loc. Union No. 449*, 353 U.S. 87, 96 (1957) ("The function of striking [the] balance to effectuate

national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review."). Pursuant to that scheme, alleged unfair labor practices are investigated and prosecuted (if appropriate) by a Regional Director and adjudicated before an Administrative Law Judge. *See* 29 U.S.C. § 160(a)-(c); 29 C.F.R. §§ 101.4, 101.8, 101.10, 101.11. The Board may review the ALJ's decision, and the Board's order is, in turn, reviewable by the federal courts of appeals. *See* 29 U.S.C. § 160(e), (f); 29 C.F.R. §§ 101.11, 101.12, 101.14. However, appellate courts review the Board's findings of fact only for "substantial evidence," 29 U.S.C. § 160(e), (f), and are mindful that their "role in reviewing a Board decision is limited," *J.G. Kern Enters., Inc. v. NLRB*, 94 F.4th 18, 26 (D.C. Cir. 2024).

Conspicuously absent from this adjudicative process: district courts. They ordinarily have a role in assessing the merits of a labor dispute only when the courts of appeals "are in vacation." 29 U.S.C. § 160(e).

Sections 10(j) and (l) created a limited exception to that general rule. By virtue of authorizing district courts to grant temporary injunctive relief upon a request from the Board—where necessary to preserve the *status quo ante* during ongoing Board adjudicatory proceedings—these statutory provisions afford district courts a bounded opportunity to assess the merits.

But it would distort the statutory scheme to treat this opportunity as one that "expand[s] the scope of the district court's role in labor disputes as to permit it to intrude upon the Board's exclusive authority to decide the merits of the cases." *Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 96 (3d Cir. 2011). The statute contemplates a judicial role that remains ancillary to the Board on these matters. *See, e.g.*, *Bloe-*

dorn v. Francisco Foods, Inc., 276 F.3d 270, 287 (7th Cir. 2001) ("In view of our limited role, and given the Board's expertise in matters of labor relations, we must be 'hospitable' to the General Counsel's view of the law."); *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28 (6th Cir. 1988) ("[S]ection 10(j) proceedings are merely ancillary to unfair labor practice proceedings to be conducted before the Board.").

Indeed, allowing district courts to engage in full-blown merits review of cases under Sections 10(j) and (l) would create awkward and unnatural results. The Board—which is statutorily authorized to decide the merits—is necessarily mid-adjudication when it asks a district court to enter temporary injunctive relief. If a district court were to aggressively evaluate the merits in that posture, it would invade the Board's core function and exclusive jurisdiction—and could potentially bias or distort the Board's own adjudicatory process. *See Bloedorn*, 276 F.3d at 288 ("Assessing the Director's likelihood of success calls for a predictive judgment about what the Board is likely to do with the case."). That would be especially inappropriate within this statutory framework, since any eventual judicial review of the Board's merits determination will be deferential in vital respects. *See* 29 U.S.C. § 160(e), (f). It would also be improper for a distinct reason: Congress designed this entire framework to protect the Board's remedial authority, not to authorize district courts to seize part of that authority for themselves as a price of the Board's decision to seek interim remedies.

Simply put, it is hard to imagine that Congress—which otherwise gave district courts virtually no role in reviewing Board decisions (and which commanded appellate courts to review them deferentially)—meant to empower district courts to engage in undeferential

and full-blown merits review of the Board's complaints while the Board is still mid-adjudication and seeks relief to protect its own ultimate remedial power. Section 10(j) contemplates that the Board can in some cases obtain interim relief, and authorizes the Board alone to decide when such relief should be sought. It does not follow from this limited grant of authority to the Board that an exercise of that option eliminates every normal principle of judicial review in the labor law setting and requires the Board to subject itself to *de novo*, midstream merits review before a federal district judge.

Thus, as the Third Circuit has explained:

> This specialized scheme distinguishes § 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. Congress' clear purpose in creating § 10(j) was not to limit the scope of the Board's authority to decide violations, but to preserve its powers to do so by giving the NLRB an opportunity to seek an injunction of alleged violations before an injury becomes permanent or the Board's remedial purpose becomes meaningless.

Chester, 666 F.3d at 95-96.

Many other courts have recognized as much, including courts that otherwise profess to apply a more traditional equitable analysis to Section 10(j) petitions. For instance, the Ninth Circuit has held that in assessing the likelihood of success, "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc). Under that standard, likelihood of success can be established "by producing

some evidence to support the unfair labor practice charge, together with an arguable legal theory." *Id.*

Similarly, the Second Circuit has held that "[t]here are good reasons to employ a slightly different standard for labor disputes"—namely, that "§ 10(j) petitions come from a unique statutory scheme that requires [] deference to the NLRB, which resolves the underlying unfair labor practice complaint on the merits and makes an initial determination, prior to the filing of a petition, to file such a complaint." *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013) (citing *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980) (Friendly, J.)); *accord Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 237 (6th Cir. 2003); *Pye v. Teamsters Loc. Union No. 122*, 61 F.3d 1013, 1019 (1st Cir. 1995) (similar point in the § 10(l) context).

These considerations powerfully support the conclusion that district court review of the merits in the Section 10(j) context should be properly deferential.

C. Early Federal Judicial Interpretations of Section 10(j) Support This View

Following the enactment of Section 10(j), federal courts overwhelmingly understood it to impose a less searching standard of review on the merits when the Board sought temporary injunctive relief. These interpretations, reasonably contemporaneous with the passage of Section 10(j), provide additional evidence that Congress did not contemplate plenary merits review.

As summarized by one commentator, courts from the late 1940s through the early 1960s largely viewed Section 10(j) to require only "reasonable cause to believe an unfair labor practice ha[d] been committed"—a standard ordinarily understood as less than a "preponderance of the evidence." Marinis, *supra* note 2, at

360 & n.12; *see also Recent Developments, The 10(j) Labor Injunction: An Exercise in Statutory Construction*, 42 Wash. L. Rev. 1117, 1121 (1967) (emphasizing that courts of this era were deferential to the Board). This approach to the merits analysis is reflected throughout older Section 10(j) and (l) cases. *See, e.g.*, *Brown for & on Behalf of NLRB v. Pac. Tel. & Tel. Co.*, 218 F.2d 542, 543 (9th Cir. 1954) (explaining that district courts must defer to the Board under Section 10(j) because "the determination of a charge of violation of the [NLRA] is for the Board itself to decide").[3]

Evidence of that understanding can also be found in *McLeod v. Gen. Elec. Co.*, 385 U.S. 533 (1967) (per curiam). There, the Board's regional director filed an unfair labor practices complaint against General Electric—and subsequently commenced a Section 10(j) proceeding in the Southern District of New York (after General Electric refused to bargain with the pertinent negotiating team). The district court enjoined General Electric from refusing to bargain. *See McLeod ex rel. NLRB v. Gen. Elec. Co.*, 257 F. Supp. 690, 710 (S.D.N.Y. 1966). On appeal, though, the Second Circuit reversed that decision. *See McLeod ex rel. NLRB v. Gen. Elec. Co.*, 366 F.2d 847, 850 (2d Cir. 1966).

This Court granted *certiorari* but ultimately declined to address "the proper construction of §10(j)," since General Electric and the union reached a three-

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[3] *See also Retail Union v. Rains ex rel. NLRB*, 266 F.2d 503, 505 (5th Cir. 1959) (similar, in Section 10(l) case); *McLeod ex rel. NLRB v. Compressed Air, Found., Tunnel, Caisson, Subway, Cofferdam, Sewer Const. Workers, Loc. No. 147*, 292 F.2d 358, 359 (2d Cir. 1961) (similar, in Section 10(j) case); *Schauffler ex rel. NLRB v. Loc. 1291, Int'l Longshoremen's Ass'n*, 292 F.2d 182, 187 (3d Cir. 1961) (similar, in Section 10(l) case); *Angle v. Sacks ex rel. NLRB*, 382 F.2d 655, 658 (10th Cir. 1967) (similar, in Section 10(j) case).

year collective bargaining agreement during the pendency of the case. *See* 385 U.S. at 535 ("We think that the District Court should determine in the first instance the effect of this supervening event upon the appropriateness of injunctive relief."). Nevertheless, the Court's *per curiam* decision described how each of the lower courts had articulated the standard:

> "The District Court applied a dual test: (1) whether 'the impact upon the public interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement,' and (2) 'whether the Board has 'reasonable cause to believe' that the accused party has been guilty of unfair labor practices.'" *Id.* (quoting *McLeod*, 257 F. Supp. at 708-09).
>
> "The Court of Appeals on the other hand considered the proper standard to be whether the Board had 'demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm.'" *Id.* (quoting *McLeod*, 366 F.2d at 850).

Notably, neither of these two standards involved any intrusive or probing assessment of the merits of the Board's underlying allegation of unfair labor practices. Under both standards, the courts deferred to the Board on that question. And while this Court did not reach the merits of the issue, it nowhere indicated that a radically different approach (*de novo* judicial review of the merits of the Board's position) was on the table.

Decisions that were made "roughly contemporaneously with" an "enactment and stably maintained and practiced since that time" are evidence of that enactment's original meaning. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment); *see also New Prime Inc. v. Oliveira*, 139 S.

Ct. 532, 539 (2019). Here, courts engaged in Section 10(j) analysis in the years following the enactment of that provision overwhelmingly understood it to evoke deference in the merits analysis. Resp. Br. 23.

For this reason—and for the additional reasons given in Parts I.A and I.B—the Court should hold that courts must show some deference to the Board's merits analysis in assessing petitions under Section 10(j).

II. THE EQUITIES STANDARD SHOULD BE FOCUSED ON PRESERVATION OF THE BOARD'S OWN REMEDIAL AUTHORITY

Accounting for statutory structure and administrative process, there are two core reasons why the equities analysis in a Section 10(j) case should focus—with due deference—on the preservation of the Board's remedial authority. *First*, both statutory text and legislative history make clear that avoiding frustration of remedial authority is Section 10(j)'s core purpose. And Congress's choice to vest the Board with discretion in seeking relief under Section 10(j) reflects an expectation that the Board is best situated to ascertain when the facts of a case, broader considerations of labor policy, the predictive judgments inherent to these issues, and the public interest necessitate such relief. *Second*, the Board has exercised this discretion responsibly, seeking Section 10(j) relief only rarely and only after multi-level consideration of the merits and equities of doing so. Thus, by the time a court receives a Section 10(j) petition, the Board (which is expert on these issues and statutorily charged with identifying the public interest in labor law) has engaged in a thorough assessment that warrants judicial respect. Consistent with all these considerations, courts in the years following the enactment of Section 10(j) broadly understood it to require a deferential equities review.

A. The Board's Discretion Under Section 10(j) Merits Judicial Deference

In adopting Sections 10(j) and (l), Congress principally sought to address cases where ongoing unfair labor practices threatened the Board's ability to award meaningful relief at the conclusion of its adjudicatory process. *See Kinney*, 881 F.2d at 487; *Muniz*, 422 U.S. at 466; *J. P. Stevens & Co.*, 341 F.2d at 892. But in Section 10(j), unlike in Section 10(l), Congress chose to vest the Board with discretion: whereas Section 10(l) requires the Board to seek interim injunctive relief in certain cases, Section 10(j) always leaves these decisions to the Board's good judgment. This approach reflects a congressional determination that the Board is best positioned to ascertain when the absence of interim injunctive relief is most likely to frustrate its remedial function in a genuinely important respect. Courts uphold that statutory plan by showing deference to the Board in its identification of such cases.

Congress enacted Section 10(j) for a simple reason: in some circumstances, allowing an unfair labor practice to continue unimpeded during the Board's administrative process could irreparably destroy substantial legal rights. *See Kinney*, 881 F.2d at 487. This view was stated clearly in the accompanying Senate Report:

> Time is usually of the essence [in labor disputes], and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.

S. Rep. No. 105, at 8 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 414 (1985). As the Senate Report separately recognized, "[B]y reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done." S. Rep. No. 105, at 27, *reprinted in* NLRB 433.

However, Congress channeled these underlying concerns differently in two parts of the Taft-Hartley Act. In Section 10(l), which addressed interim relief where unions engage in certain prohibited behavior, Congress required the Board to seek temporary injunctions during pending administrative proceedings. *See* 29 U.S.C. § 160(l). In contrast, Section 10(j) was written with discretionary rather than mandatory language, and thus constituted a delegation of decision-making by Congress to the Board. *See id.* § 160(j).

This decision reflects Congress's overarching expectation that the Board would be best positioned to administer national labor policy. *See supra* Part I.A. It also evinces an understanding that the Board—which would be closer to the facts of any given case, and more sensitive to both the case-specific and global repercussions of seeking interim relief—was best positioned to identify the subset of cases where temporary injunctive relief is needed to preserve the Board's remedial authority. In practice, assessing when interim relief is necessary to achieve Section 10(j)'s purpose requires "difficult predictive judgments" about what may happen on the ground during ongoing Board proceedings. Resp. Br. 31. And the Board itself is "especially experienced and suited to make those kinds of judgments" given its "expertise in the actualities of industrial relations and in balancing the conflicting legitimate interests of employers and employees." *Id.* (cleaned up).

Those considerations explain why Section 10(j)—and the statutory structure in which it is embedded—is rightly understood as requiring courts to afford the Board a measure of deference in ascertaining whether interim relief is necessary to ensure the maintenance of the Board's remedial authority. They also explain why that inquiry should rest at the core of the equities analysis. *See Miller*, 19 F.3d at 452 ("[T]he 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."); *see also Silverman v. Major League Baseball Player Rels. Comm., Inc.*, 880 F. Supp. 246, 259 (S.D.N.Y. 1995) (Sotomayor, J.) ("It is critical, therefore, that the Board ensure that the spirit and letter of federal labor law be scrupulously followed. If the Board is unable to enforce the NLRA, public confidence in the collective bargaining process will be permanently and severely undermined.").

B. The Board's Section 10(j) Procedures Further Support Deferential Review

Practically speaking, deference is further justified by the fact that the Board maintains rigorous internal procedures for deciding when interim injunctive relief is truly necessary to preserve its remedial authority. Because the Board is both expert on labor issues and statutorily empowered to ascertain the public interest in this field, its considered determinations about when Section 10(j) relief is necessary merit judicial respect.

As a historical matter, the Board has exercised its Section 10(j) discretion responsibly. Moreover, it is decidedly not the case that Section 10(j) activity "is on the rise" in any meaningful respect. *McKinney ex rel. NLRB v. Starbucks Corp.*, 77 F.4th 391, 402 (6th Cir.

2023) (Readler, J., concurring).[4] Section 10(j) activity has broadly declined over the past 50 years. *Compare* Off. of the Gen. Counsel, NLRB, Memorandum GC 24-03, at 10 (Mar. 4, 2024) (reflecting that, in 2023, the Board approved 14 Section 10(j) petitions), *with* Randal L. Gainer, Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor Management Relations Act in Discriminatory Discharge Cases*, 56 Ind. L.J. 515, 515 n.4 (1981) (reflecting that, between 1975 and 1979, the Board approved approximately 48 Section 10(j) petitions each year). Indeed, Section 10(j) activity has declined even as measured over the past ten years alone. *See* NLRB, *10 Year Record of 10(j) Activity*.[5]

Simply put, the Board has not been a promiscuous filer of Section 10(j) petitions, but rather a parsimonious one. *See* Memorandum GC 24-03, at 10 (reflecting that, in 2023, the Board acted on only 17.3% of Section 10(j) requests submitted by Regional Directors).

This modest approach reflects the Board's internal procedures. The Board will pursue Section 10(j) relief only after examining the merits of a claim, the evidence available, and the "threat of 'remedial failure'"—*i.e.*, the risk that a Board order will be a nullity without interim injunctive relief. Off. of the Gen.

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[4] The concurrence below emphasized that the Board now brings more Section 10(j) cases than it did in the first 15 years of the statute. This observation misses a key fact: roughly 15 years after Taft-Hartley was enacted, a congressional subcommittee conducted a hearing about the effectiveness of the NLRA, where the Board was heavily criticized for failing to seek Section 10(j) relief where necessary. *See Administration of the Labor-Management Relations Act by the NLRB Before the Subcomm. on NLRB of the H. Comm. on Educ. & Lab.*, 87th Cong. 50–52 (1961).

[5] https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/injunction-litigation/10-year-record

Counsel, NLRB, Section 10(j) Manual, § 1.1, at 2 (Mar. 2020) (hereinafter, "10(j) Manual"). That assessment is guided by the knowledge that the Board will need to "demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order," *id.*, and involves several steps and decisions from three layers of officials.

First, because Section 10(j) relief is available only after a complaint has issued, *see* 29 U.S.C. § 160(j) ("The Board shall have power, *upon issuance of a complaint* . . . ." (emphasis added)), the Board's Regional Office investigates whether a charge of unfair labor practices has sufficient merit to warrant the filing of a complaint. That process includes interviewing the parties, as well as others with knowledge of the issue, and seeking statements from the charged party addressing the allegations. *See* 29 C.F.R. § 101.4. Only "[i]f the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful" will the region issue a complaint. *Id.* § 101.8. In some cases, that requires "submit[ting] the case for advice from the General Counsel before issuing a complaint." *Id.*

Second, the Regional Office in the first instance examines whether Section 10(j) relief is necessary. In conducting that analysis, the Regional Office may invite parties to submit evidence and argument relevant to its Section 10(j) consideration; it may also "conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights," and "routinely question witnesses about the impact of the alleged violations on statutory rights." 10(j) Manual, §§ 3.0-4.0, at 11-12. In determining whether to recommend a Section 10(j) proceeding, the Regional Office is directed to "consider the strength of the violations as well as the

threat of remedial failure," and to "consider the case in light of the 'just and proper' theories set forth in established 10(j) case law" and the evidence gathered during the investigation. *Id.* § 4.1, at 13. If the Regional Office concludes that relief is warranted, it prepares a recommendation to the General Counsel of the Board so stating. *Id.* § 5.2, at 15. The Regional Office is authorized to conclude that Section 10(j) proceedings should *not* be instituted. *Id.* § 4.2, at 13.

Finally, the Board's General Counsel considers whether Section 10(j) relief is warranted, using the Regional Office's memorandum as the foundation for that evaluation. *Id.* § 5.2, at 13. If the General Counsel agrees that it is appropriate to seek interim injunctive relief under Section 10(j), they request authorization from the Board. *Id.* The Board has the final say, and only with its authorization may the Regional Office file a Section 10(j) petition in court. *Id.* § 5.5, at 17.

The Board's final decision—and the internal assessments that lead to it—are undertaken with the understanding that Congress intended the Board to request Section 10(j) injunctions "acting in the public interest and not in vindication of purely private rights." S. Rep. No. 105, at 8, *reprinted in* NLRB 414. "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern . . . ." *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). Since the Board was entrusted by Congress to strike the balance between conflicting interests in labor law, *see Truck Drivers*, 353 U.S. at 96, its assessment that injunctive relief is in the public interest is not taken lightly.

Thus, by the time a district court reviews a Section 10(j) petition, an independent government body—the body entrusted with primary authority to resolve la-

bor cases and ascertain the public interest, no less—has assessed that a claim of unfair labor practices has merit, that interim injunctive relief is necessary to avoid defeating the Board's remedial authority, and that an injunction promotes the public interest. This substantial pre-filing process separates Section 10(j) petitions from most circumstances where a party may seek a temporary injunction: ordinarily, the plaintiff need only avoid running afoul of Federal Rule of Civil Procedure 11 before seeking interim judicial relief.

Accounting for the Board's unique role and for the substantial internal procedures that it employs before deciding to file a Section 10(j) petition—as well as the Board's historically cautious outlook on filing such petitions—it is justified for district courts to approach these matters with a presumption that the Board has properly considered the relevant equities and has fairly assessed whether the absence of interim injunctive relief could thwart its own remedial authority.

C. Early Federal Judicial Interpretations of Section 10(j) Support This View

In the years following passage of the Taft-Hartley Act, some federal courts did not require the Board to show irreparable harm as an element of Section 10(j) relief—and those that did overwhelmingly focused on the risk of frustration of remedies, rather than a more open-ended inquiry into equitable considerations.

One of the earliest cases on Section 10(j) illustrates the view that the Board had no independent obligation to establish irreparable harm. In late 1947, the Board filed a joint proceeding under Sections 10(j) and (l) against a union in New York. Granting the Board's request for relief, the district court rejected the union's contention that the Board had failed to show irrepa-

rable harm. It held that this test did "not apply" because Sections 10(j) and (l), as creatures of statute, did not incorporate the "common law" standard for preliminary injunctive relief. *Douds v. Loc. 294, Int'l Bhd. of Teamsters*, 75 F. Supp. 414, 418 (N.D.N.Y. 1947).

Not all courts went so far. But of the courts that required a showing of irreparable harm, the decisive majority focused on frustration of remedies. *See Angle v. Sacks ex rel. NLRB*, 382 F.2d 655, 660 (10th Cir. 1967) ("The circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted."); *Minn. Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265, 270 (8th Cir. 1967) (similar); *NLRB v. Aerovox Corp. of Myrtle Beach, S.C.*, 389 F.2d 475, 477 (4th Cir. 1967) (similar); *Firestone Synthetic Rubber & Latex Co., Div. of Firestone Tire & Rubber Co. v. Potter*, 400 F.2d 897, 897 (5th Cir. 1968).

These early cases reflect a widely shared initial understanding that Congress contemplated an equities analysis centered on frustration of remedies—as well as an appreciation that the Board would often be best positioned to ascertain whether the absence of interim relief would likely thwart its ability to grant relief at the end of its own adjudicatory proceedings.

Of course, that approach also had another virtue: it avoided entangling courts in the very disputes over public policy that had provoked Congress decades earlier to strip courts of most power to issue labor injunctions. Where the Board carries its burden with respect to the merits, and where it also shows that interim injunctive relief is necessary to preserve its remedial authority, it follows *a fortiori* that the public interest (as determined by Congress in Section 10(j) itself) supports granting equitable relief. *See NLRB v. Electro-*

Voice, Inc., 83 F.3d 1559, 1574 (7th Cir. 1996); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1365 (9th Cir. 2011).

For this reason—and for the additional reasons given in Parts II.A and II.B—the Court should hold that federal courts properly focus on preservation of the Board's remedial authority in assessing petitions for temporary injunctive relief under Section 10(j).

CONCLUSION

The Court should affirm the order below.

Respectfully submitted,

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