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 REMEDIES SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici Caprice L. Roberts and Doug Rendleman are law professors who study and publish on the law of remedies, including equitable remedies.

Professor Roberts is Associate Dean of Faculty Development & Research and the J.Y. Sanders Professor of Law at Louisiana State University Paul M. Hebert Law Center. She revitalized the leading treatise on the law of remedies, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* (3d ed. 2018), and has published numerous articles on equitable remedies.

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Professors Roberts and Rendleman both have served in the role of Adviser to the American Law Institute project *Restatement (Third) of Torts: Remedies*, and they co-authored the casebook Doug Rendleman & Caprice L. Roberts, *Remedies: Cases and Materials* (9th ed. 2018).[1]

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[1] This brief was prepared and funded entirely by amici and their counsel. No other person contributed financially or otherwise. None of the universities where amici are employed takes any position on the issues in this case.

The American Law Institute speaks only through its *Restatements*, *Principles of the Law*, and similar projects. Each such project is carefully reviewed and formally approved by both its governing Council and its membership. This brief is not a statement of the American Law Institute.

Amici fear that multiple aspects of Petitioner's position, if adopted, would threaten the traditional flexibility of courts of equity in statutory injunction cases. Equity in statutory injunction cases has not prohibited consideration of statutory policy in determining whether temporary injunctive relief is appropriate. Nor, in cases where a public agency is itself one of the parties, has equity prohibited deference to the statutory role of the agency as representative of the public interest for purposes of weighing a potential injunction, let alone has equity required courts in such cases to treat governmental litigants on a par with self-interested private litigants. An overly strained view of equitable discretion in issuing injunctions under statutory authorizations is both ahistorical and unwise.

SUMMARY OF ARGUMENT

1. Traditional equity practice is not the rigid and rote exercise portrayed by Petitioner in which courts mechanically tick off numbered factors in a set list without regard to the role of a governmental party in the case as a representative of the public interest. To the contrary, this Court declared eight decades ago that "[f]lexibility rather than rigidity" distinguished courts of equity from courts of law, and that, in cases where the government is a party, district courts should follow equity courts' "traditional practices, *as conditioned by the necessities of the public interest which Congress has sought to protect*." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) (emphasis added).

Consistent with that tradition, both modern courts and their common-law predecessors have identified circumstances where a given structural feature of a

case guides how one or more of the commonly applied preliminary-injunction factors will resolve.

For example, in the leading preliminary-injunction case, *Winter v. Natural Resources Defense Council, Inc.*, the Government was the defendant, and this Court faulted the district court judge who had issued the preliminary injunction for failing, in weighing the "public interest" factor, to give "deference to the professional judgment of military authorities" as reflected in litigation declarations from Navy officers. 555 U.S. 7, 24 (2008) (internal citation omitted).

Similarly, in *Nken v. Holder*, the Court, after noting the functional overlap between the *Winter* preliminary-injunction factors and the familiar interim-stay factors, explained that the third factor (hardship to the party opposing interim relief) and the fourth factor (the public interest) "merge when the Government is the opposing party," because the Government's role is to advance the public interest. 556 U.S. 418, 435 (2009). In the wake of *Nken*, the courts of appeal, while remaining faithful to the principles animating the four-part inquiry, apply the functional equivalent of a three-part inquiry to preliminary-injunction motions where the government is the nonmoving party.

While in *Winter* and *Nken*, a public agency was the defendant and not, as here, the plaintiff, there is no basis, in equity or in reason, for an approach under which the public-interest factor weighs in the Government's favor when it is the defendant in a suit brought by a private litigant but not when it is the plaintiff in a suit brought against a private litigant.

2. The approach Petitioner advances for resolving cases brought by the National Labor Relations Board (NRLB) under Section 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(j), is inconsistent with equity principles as enunciated in this Court's precedents. Invoking *Winter*, Petitioner contends, for example, that, under equity practice, the "United States and private parties" must "operate[] on a level playing field." Pet. Br. 2. Yet *Winter* itself, as well as *Nken*, recognize that when the United States is a party, the "public interest" factor—quite appropriately—tilts in its favor and even "merges" with the third factor. Petitioner also misstates equity practice in other important ways.

In contrast to Petitioner's submission, the Government's submission in this case is fully consistent with the principles traditionally applied to equitable cases filed by public agencies, as it honors the role of the Government as a representative of the public interest. It also makes sense of the particular structure of the NLRA, under which Congress withheld jurisdiction from district courts to decide the underlying merits of unfair labor practice cases and left that jurisdiction with the NLRB itself.

ARGUMENT

Traditional Equity Practice in Statutory Injunction Cases Honors the Role of Public Agencies as Representatives of the Public Interest

This Court has decided numerous temporary injunction cases, but it has never addressed the criteria for evaluating whether to grant or withhold temporary relief in cases arising under a statutory

scheme bearing these features: (1) the statute divests the federal district courts of jurisdiction to adjudicate claims of violation of the statute; (2) the statute vests that jurisdiction instead in an administrative agency possessing expertise over the subject matter of the dispute; and (3) the statute empowers the agency to seek provisional relief from the district courts even while continuing to withhold from those courts, and vest solely with the agency, the jurisdiction to adjudicate claims on their merits.

These features of course describe the National Labor Relations Act, as amended in 1947 with the Taft-Hartley Act's addition of Sections 10(j) and 10(l), 29 U.S.C. §§ 160(j), (l). *See Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No 776*, 346 U.S. 485, 490 (1953) (Congress, in enacting and then amending the National Labor Relations Act, "confide[d] primary interpretation and application of its [unfair labor practice] rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.").

While this Court never has had occasion to spell out the criteria for evaluating temporary injunction requests in this context, it has a well-developed jurisprudence in the general area of statutory injunctions, which follows equity courts' "traditional practices, *as conditioned by the necessities of the public interest which Congress has sought to protect*." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (emphasis added). That jurisprudence is consistent with the position taken by Respondent in this case

and inconsistent with the position advanced by Petitioner.

As developed below, equity courts in statutory cases do not treat governmental litigants on a par with self-interested private litigants in evaluating whether a proposed injunction would comport with or conflict with the public interest. To the contrary, whether the Government is the defendant resisting an injunction or the plaintiff advocating for one, courts of equity have recognized and respected the role of public agencies as representatives of the public interest. Nor do equity courts fixate on how the considerations that inform whether to grant or deny a proposed injunction translate into a specific number of factors; they are focused on substance rather than form. Indeed, this Court itself has recognized classes of equity cases where it is appropriate to collapse two factors into one rather than mechanically tick off factors separately even in circumstances when they fully overlap.

A. The Court's leading preliminary injunction case, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), addressed the common fact pattern where the district court that was presented with the preliminary injunction application also would be the court to resolve the ultimate merits and determine if permanent injunctive relief were appropriate. In that circumstance, the plaintiff is required to persuade the district court "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." *Id.* at 20.

The four *Winter* factors are the same in substance as the factors that courts use to evaluate whether to grant a stay pending appeal. In *Nken v. Holder*, decided the same Term as *Winter*, the Court set out the four factors as follows: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. 418, 426 (2009). The *Nken* Court explained that, while a stay is not a preliminary injunction, the interim relief factors overlap in substance "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* at 434.

The *Winter* factors include common equitable considerations used in American courts beginning in the early 20th century. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 539 & n. 85 (1978) (citing *Barney v. City of New York,* 82 N.Y.S. 124 (App. Div. 1903), as introducing the "public interest" factor into the inquiry in American courts).[2] But variations in federal (and state) cases preceded *Winter*,[3] and

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[2] Petitioner claims (Br. 19) that "[t]his Court has required those four factors since *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792)—this Court's second decision." One reads *Brailsford* in vain, however, for any mention of the "public interest" factor.

[3] *See, e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc), affirmed without discussing the preliminary injunction standard, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

variations remain after *Winter*. *See* Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* 192-96 (3d ed. 2018).

For example, many federal courts of appeal continue to apply a sliding scale technique under which a quantum of strength for one factor may vary based on the quantum shown for another factor. *Id.* at 194-95 (discussing, *inter alia*, *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35-37 (2d Cir. 2010)). Thus, the court may allow a plaintiff with a very compelling showing of irreparable harm to prevail with a lesser showing of likelihood of success on the merits than would be necessary for a similar plaintiff with a less compelling irreparable harm showing.[4]

B. While the same basic factors have been part of equity jurisprudence for decades, both modern courts

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[4] *See, e.g.*, *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) ("[P]laintiff [must] demonstrate[] either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [plaintiff's] favor.") (internal quotations omitted); *Reilly v. City of Harrisburg*, 858 F.3d 173, 177, 179–80 (3d Cir. 2017) (sliding scale); *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (same); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009) (same); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (same). *See also Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting) ("[C]ourts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. *This Court has never rejected that formulation, and I do not believe it does so today*.") (emphasis added).

and their common-law predecessors alike have identified circumstances where a given structural feature of a case either guides how one or more of the factors will resolve or indicates that one factor will be redundant with another.

In *Winter* itself, for example, the Court faulted the district court judge who had issued the preliminary injunction for failing to give "deference to the professional judgment of military authorities"—as reflected in litigation declarations from Navy officers—regarding the question whether particular environmental restrictions on sonar training would impair the nation's defense readiness against hostile submarines. 555 U.S. at 24 (citation omitted). The Court added that, while "military interests do not always trump other considerations, and we have not held that they do," it was not merely permissible, but necessary, for the trial court to give substantial weight to the military officers' declarations in evaluating the "public interest" factor. *Id.* at 26. *See also Phx. Ry. Co. of Ariz. v. Geary*, 239 U.S. 277, 282 (1915) (applying a "presumption of reasonableness" in favor of a state administrative agency at the preliminary-injunction stage).

And in *Nken*, the Court explained that the third factor in the interim-stay analysis (hardship to the party opposing the injunction) and the fourth factor (the public interest) "merge when the Government is the opposing party," because the Government's role is to advance the public interest. 556 U.S. at 435. In the same vein, the Court faulted "some [lower] courts" for treating the Department of Justice and federal immigration authorities like self-interested private

litigants when assessing stay requests in immigration removal cases. *Id.*

The courts of appeal, taking a cue from *Nken*, have said the same thing about the third and fourth *Winter* factors in preliminary-injunction cases. *See Eggers v. Evnen*, 48 F.4th 561, 564-65 (8th Cir. 2022) ("The balance-of-harms and public-interest factors 'merge when the Government'—or, in this case, a state official in his official capacity—'is the [nonmoving] party'" (quoting *Nken*; brackets in original)); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 295 (2d Cir. 2021) (likewise applying the *Nken* merger of the third and fourth factors to preliminary-injunction cases involving the government); *Roman v. Wolf*, 977 F.3d 935, 940-41 (9th Cir. 2020) (same); *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020) (same); *Karem v. Trump*, 960 F.3d 656, 668 (D.C. Cir. 2020) (same).

The practical effect is that the courts, while remaining faithful to the principles animating the four-part inquiry, apply the functional equivalent of a three-part inquiry to preliminary injunction motions where the Government is the nonmoving party. And that adjustment is entirely faithful to traditions of equity, which never insisted on a mechanical processing of numbered factors and always permitted categories of similar cases to be treated similarly. *See* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution?—The Test for Permanent Injunctions*, 112 Colum. L. Rev. 203, 206, 242 (2012) ("traditional equitable practice" regularly made use of "structured sets of presumptions" to minimize idiosyncratic decisionmaking by individual judges and to provide

"meaningful guidance to both courts trying to decide cases and private parties trying to tune their expectations appropriately"); *see also eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (equity courts need not "[write] on an entirely clean slate" with each new case; "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike") (citation omitted).[5]

C. There is no reason why the public-interest factor should weigh in the Government's favor when it is the defendant in a suit brought by a private litigant but not when it is the plaintiff in a suit brought against a private litigant. The difference between public and private actors is at least as stark in that context. This Court has held that, "[a]s a class of plaintiffs," private parties "are different in kind than the Government," because "[t]hey are motivated primarily by prospects of monetary reward rather than the public good" and are "thus less likely than is

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[5] Just as courts sometimes merge two factors into one, they sometimes expand one factor into two. For example, this Court's leading *permanent* injunction case, *eBay*, *supra*, sets out four factors to guide the inquiry, two factors of which—"that [movant] has suffered an irreparable injury" and "that remedies available at law, such as monetary damages, are inadequate to compensate for that injury," 547 U.S. at 391—are an expansion of the single "irreparable harm" factor set forth in earlier cases. *See* David I. Levine, David J. Jung & Tracy A. Thomas, *Remedies: Public and Private* 100 (5th ed. 2009) ("[*eBay*] factor 2, no adequate remedy at law, and factor 1, irreparable injury, are two ways of saying the same thing"). In *Winter*, the Court "collapsed" those two *eBay* factors back into one. *See* Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* 186 (3d ed. 2018).

the Government to forgo an action arguably based on a mere technical noncompliance" with a statute. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

For similar reasons, a governmental agency that is statutorily authorized to initiate temporary (or permanent) injunction cases is more likely than an ordinary private-party litigant to take public, and not merely private, interests into account in deciding when to invoke the courts' equitable powers—and more likely to eschew bringing unimportant or technical noncompliance cases. It should thus come as no surprise that courts long have found the public-interest factor to be met in the ordinary course when the Government seeks injunctive relief to prevent ongoing violations of a federal statute. *See* Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 Mich. L. Rev. 939, 954 (2019) ("whether the government seeks the preliminary injunction or opposes it," the public-interest factor favors the government, at least when it is acting in its sovereign rather than proprietary capacity). *Cf. Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 789 (7th Cir. 2011) (because both sides were governmental bodies, the public-interest factor dropped out).

Indeed, one of the more emphatic expressions of the proposition that courts in statutory injunction cases should respect the views of a public-agency plaintiff came in *Hecht*, a leading case that Petitioner

mistakenly invokes in support of its position here. Pet. Br. 22, 26.[6]

In *Hecht,* this Court upheld the denial of an injunction sought by a federal agency empowered by statute to bring injunction actions, but only because the statutory violations at issue all had been the product of innocent mistakes that had ceased before the suit was filed. 321 U.S. at 329. While the Court held that an injunction under such circumstances was not in accord with traditional principles of equity, the Court did not in any way suggest that those principles inflexibly required courts to pretend that statutory injunction cases were to be evaluated as if both sides were private parties litigating a property dispute or to disregard the objectives of the statute or the status of public-agency plaintiffs as representatives of the public interest.

Quite the contrary. Observing that "[f]lexibility rather than rigidity" distinguished courts of equity from courts of law, *id.* at 329, the Court held that district courts should follow equity courts' "traditional practices, *as conditioned by the necessities of the public interest which Congress has sought to protect*," *id.* at 330 (emphasis added). So that its point could not be lost, the Court continued:

> We do not mean to imply that courts should administer [the injunctive-relief provision of

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[6] As Judge Friendly observed, *Hecht*, decided in 1944, was "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 §§ 10(j) and 10(l) originated." *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers Union,* 494 F. 2d 1230, 1240 (2d Cir. 1974) (footnote omitted).

> the statute] grudgingly…. [C]ourt and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute…. [The courts'] discretion under [the statute] must be exercised in light of the large objectives of the Act. For the standards of the public interest *not the requirements of private litigation* measure the propriety and need for injunctive relief in these cases.

Hecht, 321 U.S. at 330 (emphasis added).

These principles retain their vitality, for as the Court explained less than a decade ago: "When 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) (citation omitted).

The Seventh Circuit's § 10(j) decision in *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989) (Easterbrook, J.), another case that Petitioner invokes (Br. 35), is to the same effect. *Pioneer Press* holds that district courts should decide § 10(j) cases "under the approach traditionally applied to equitable cases *filed by public agencies*." *Id.* at 493 (emphasis added). That approach, as previously shown, does not require, or even permit, the district court to blind itself either to the status of the public agency as a representative of public or to the public policies expressed by the statute. Indeed, in *Pioneer Press*, the

Seventh Circuit faulted the district court for taking an approach that Petitioner here seems to invite (Br. 31), in that one ground the district court gave for denying the requested temporary injunction was that "'[s]ection 10(j) is reserved for more serious and extraordinary circumstances than presented here.'" *Id.* To deny the injunction on that ground, the court of appeals explained, was for the district court to "attempt to exercise the Board's prosecutorial discretion." *Id.*

D. The equity principles outlined above are inconsistent with Petitioner's submission in at least four respects.

First, those principles are contrary to Petitioner's assertion that the "the United States and private parties alike have thus operated on a level playing field." Pet. Br. 2. *Winter* itself, as well as *Nken*, recognize that when the United States is a party, the "public interest" factor—quite appropriately—tilts in its favor and even "merges" with the third factor. It was the lower courts in those cases that erred in treating the United States no differently than a private defendant.

Second, those principles are contrary to Petitioner's assertion that equity courts in statutory injunction cases brought by public agencies are supposed to serve as an "independent check" on the agency and to subject their injunction requests to "stringent" scrutiny. Pet. Br. 3.

The Court's decision in *Hecht* teaches a different lesson. As shown *supra* pp. 13-14, the *Hecht* Court, after ruling against the agency on the particular facts of that case, went out of its way to emphasize that the

interdependence, not *independence*, of court and agency should be the touchstone in statutory injunction cases. *Hecht*, 321 U.S. at 330 ("court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute"). *Hecht* likewise refutes Petitioner's suggestion that courts are to apply "stringent" criteria to injunctive relief requests sought by agencies. In *Hecht*, only the most lax criteria would have tolerated the requested injunction, a point the Court drove home by stating, "We do not mean to imply that courts should administer [the injunctive-relief provision of the statute] grudgingly." 321 U.S. at 330. *See also* Dobbs & Roberts, *Law of Remedies*, *supra*, at 184 ("the [*Hecht*] court did not deny an injunction because it balanced equities and hardships, but only because there was no threat of future misconduct to enjoin").

Third, contrary to Petitioner's assertion (Br. 4) that it requires harking back to "earlier, deference-friendly eras" to honor the role of public agencies as representatives of the public interest, both *Winter* and *Nken* are of recent vintage. And in both cases, the Court admonished trial courts for giving inadequate respect to the governmental litigant: in *Winter*, the Department of the Navy; and in *Nken*, the Department of Justice and federal immigration authorities. In neither case was *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even mentioned. Nor could *Chevron* have been an implicit basis for the Court's reasoning. In *Winter*, the Court faulted the trial court for failing to accord deference to the Government's expertise as

reflected in its litigation declarations, a type of deference not implicated by *Chevron*. In *Nken*, the Court considered standards for granting stays pending judicial review in a broad class of administrative review cases, including those involving the application to contested facts of an uncontested legal standard, another circumstance in which *Chevron* is not implicated.

Fourth, equity principles refute Petitioner's suggestion (Br. 6, 41) that a temporary injunction, once granted, never can be dissolved or modified based on undue delay by a government agency or other changed circumstances that occur before adjudication of the merits.

The "flexibility" that has long distinguished courts of equity, *see supra* p. 2, includes the flexibility to modify a temporary injunction to avoid hardship to the party awaiting a merits determination for an undue period, as well as the flexibility to set a specific time limit on the duration of the temporary injunction in the initial provisional order itself. *See Kaynard v. Mego Corp.*, 633 F.2d 1026, 1035 (2d Cir. 1980) (Friendly, J.) (modifying a 10(j) injunction such that it would expire if the administrative law judge failed to issue a decision within a stated time, and stating that district courts can, consistent with their equitable discretion, insert specific time limits in their initial temporary injunction orders where appropriate). *See also* Gergen et al., 112 Colum. L. Rev. at 206, 227 (equity practice includes "safety valves" to prevent opportunism by both sides in litigation). Regulations by the NLRB that ensure district courts are notified of adverse administrative law judge decisions during the pendency of temporary

§ 10(j) or § 10(l) injunctions, *see* Govt. Br. 43, facilitate courts' ability to exercise their equitable discretion in this regard.

E. The Government's submission in this case is fully consistent with the principles traditionally applied to equitable cases filed by public agencies. There is no need to restate the Government's own comprehensive explanation as to why this so, but two points merit particular attention.

First, there can be no doubt that a Regional Director of the National Labor Relations Board (NLRB), when seeking a temporary injunction after having secured the approval of the NLRB itself as § 10(j) contemplates, is a representative of the public interest, just as were the Department of the Navy in *Winter* and the Department of Justice and the immigration authorities in *Nken*. Indeed, on the same day as this Court decided *Hecht*, it also handed down its decision in *J.I. Case Co. v. NLRB*, where it reaffirmed the NLRB's role "as a public body, charged in the public interest with the duty of preventing unfair labor practices." 321 U.S. 332 (1944) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940)).

Second, the unique allocation of provisional and final decisionmaking authority that Congress adopted when it amended the NLRA to include § 10(j) and § 10(l) is a legislative policy decision of the kind that courts of equity are permitted, and, indeed under *Hecht* and its progeny, required to take account of in carrying out their responsibilities under the statute.

In the original NLRA, Congress vested the responsibility for adjudicating unfair labor practice

cases in the first instance with the NLRB, "subject to limited judicial review" in the federal courts of appeal. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In the statutory amendments that included §§ 10(j) and 10(l), Congress preserved the role of the Board as primary adjudicator and preserved as well a limited judicial-review role for the courts of appeal. Congress then assigned a carefully circumscribed and delineated role for the district courts, which is to evaluate claims for temporary relief without preempting the role of either the NLRB or the courts of appeal in adjudicating the actual merits. In the more typical equity case, if the district court judge pronounces too definitively on the merits at an interlocutory stage of the proceedings, there is no risk of invading the province reserved to other statutorily assigned actors because the judge is simply predicting her own decision. But in a § 10(j) case, the task of the district judge is more delicate.

As the Government persuasively explains, traditional equity, as practiced in cases filed by public agencies, is sufficiently flexible to allow district courts to perform that delicate task either through the two-part inquiry applied by the court below or through a four-part inquiry that—unlike the artificially cabined inquiry advocated by Petitioner—shows appropriate attentiveness to the underlying statutory policy in general and to the statutory role of the agency as representative of the public interest in particular. *See* Resp. Br. 34-39.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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