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, Sixth Circuit

BRIEF OF *AMICI CURIAE* LABOR AND EMPLOYMENT LAW PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici law professors (listed in Appendix A) teach and research American labor and employment law, and thus have a professional interest in accurate and valid inferences about the text, purpose, history, and interpretation of the National Labor Relations Act.[1]

SUMMARY OF ARGUMENT

After the National Labor Relations Board's General Counsel files an unfair labor practice complaint, she may petition a federal district court for "appropriate temporary relief," which the court has "jurisdiction to grant to the Board. . . as it deems just and proper." 29 U.S.C. § 160(j). Although Starbucks argues otherwise, when in 1947 the 80th Congress added this provision to the National Labor Relations Act, it did not intend "as it deems just and proper" to require federal district courts to apply the traditional equitable requirements for preliminary injunctions in federal suits between private parties.

Ballast for this conclusion comes, as it must, from the statutory text and historical context of the National Labor Relations Act of 1935 and the Taft-Hartley Act of 1947.

First, "as it deems just and proper" first appeared in section 10 of the NLRA in 1935, when it authorized federal appellate courts to grant temporary injunctive relief in proceedings to enforce, modify, or set aside Board orders. §§ 10(e) and (f). Then, Congress also expressly removed for such injunctions the limits on

[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

injunctions in labor disputes imposed by the Norris-LaGuardia Act of 1932 – itself a response only three years earlier to a long history of federal court abuse of its power to grant injunctions in labor disputes under the guise of applying traditional equitable principles. Given that context, Congress cannot have intended "as it deems just and proper" in NLRA § 10 to cause federal courts to return to those very traditional equitable principles for NLRB cases.

To the contrary, Congresses prior to 1935 had used the phrase "just and proper" in a variety of statutes to refer not to temporary injunctive relief, but to the broad discretion of government officers in carrying out statutory duties. And by 1947 when the 80th Congress borrowed "just and proper" for NLRA section 10(j), a body of federal case law indicated that where Congress authorized injunctive relief as part of a statutory scheme enforced primarily by an agency, proving irreparable injury and an inadequate remedy at law was unnecessary. Congress would have been aware of these cases when it enacted Taft-Hartley, and therefore would not have expected courts to treat § 10(j) petitions for injunctive relief like those filed by individual plaintiffs.

Second, further support comes from the text and context of other NLRA and Taft-Hartley provisions authorizing injunctive relief. In NLRA § 10, neither the parallel provision for "just and proper" injunctions authorized under § 10(l), nor routine federal court decrees enforcing Board cease-and-desist orders under § 10(e), accord with importing traditional equitable requirements that apply to private litigation. Similarly, other provisions of Taft-Hartley authorizing injunctive relief that do *not* use "just and proper" further indicate by comparison that the 80th Congress

deliberately used that phrase not simply to refer to traditional equitable requirements.

Third, text and context also confirm that Congress intended "as it deems just and proper" in section 10(j) to direct a federal district court to grant temporary injunctive relief if needed to restore or preserve the status quo pending litigation before the Board, provided the General Counsel has a reasonable basis to believe that she will likely prove before the Board the unfair labor practice violations alleged in the complaint—considerations that are consistent with the Board's power to prevent the unfair labor practices of any person.

This reading of "just and proper" respects key features of the overall statutory scheme: the Board's role as the NLRA's primary factfinder and interpreter; and the General Counsel's independent role in prosecuting unfair labor practice violations before the Board. At the same time, it leaves space for a federal district court to decide whether the complaint's legal premises accord with Board precedent and other applicable law and whether a temporary injunction is needed to minimize harm to the Board's ultimate ability to prevent or remedy the unfair labor practices alleged in the complaint.

ARGUMENT

I. Historical Context Indicates that Congress Did Not Intend "As it Deems Just and Proper" in NLRA § 10 to Incorporate Federal Equitable Requirements for Injunctions

Section 10(j) of the NLRA states that when the NLRB issues an unfair labor practice complaint, it may then petition a federal district court for "appropriate temporary relief," which that court has "jurisdiction to grant to the Board. . . as it deems just and proper." 29 U.S.C. § 160(j). With the phrase "as it deems just and proper," Congress denoted the scope of the district court's § 10(j) discretion to grant temporary injunctive relief, just as it did in NLRA § 10(l) for a district court's discretion to grant such relief in certain kinds of unfair labor practice cases, see *id.* § 160(l) ("as it deems just and proper"), as well as a federal court's discretion under NLRA §§ 10(e)-(f) to grant such relief pending its decision on whether to enforce a final Board order, see *id.* § 160(e)-(f).

To discern how Congress intended "as it deems just and proper" to affect court discretion under NLRA § 10(j), it is "fundamental" that courts read these words to take their ordinary meaning "at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up). That requires reading those words "in their context, not in isolation," *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (cleaned up), particularly as those words function "in the overall statutory scheme," *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

Here, although the 80th Congress added NLRA section 10(j) in 1947, see Labor Management Relations Act, Pub. L. No. 80-101, § 101, 61 Stat. 136, 149 (1947) (Taft-Hartley); see S. Rep. No. 80-105, at 8, 27 (1947), it was the 74th Congress that originally used the phrase "as it deems just and proper" in the NLRA, to refer to court discretion to grant "temporary relief" to the NLRB when [1] it seeks to enforce its final orders, see National Labor Relations Act, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454-55 (1935), codified as amended, 29 U.S.C. § 160(e), or [2] when a person challenges a final NLRB order, see *id.* § 10(f), 49 Stat. at 455, codified as amended 29 U.S.C. § 160(f). Thereafter, the 80th Congress borrowed the same "as it deems just and proper" phrase to denote the scope of the federal district court authority it added in 1947 to grant temporary injunctive relief in NLRA sections 10(j) and 10(l). See Pub. L. No. 80-101, § 101, 61 Stat. at 149.

Because of the inference that "identical words used in different parts of the same act are intended to have the same meaning," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995), this Court should take what the 74th Congress intended "as it deems just and proper" to mean in NLRA § 10(e)-(f) as sufficient basis to reject reading "just and proper" in NLRA § 10(j) as bound by federal equity practice.

The historical context of the NLRA from 1935 up through 1947 indicates that, in doing so, that Congress intended "just and proper" in NLRA section 10 to mean that such court discretion turns *not* on the traditional federal equity requirements for temporary injunctive relief in suits between private parties, but on the purposes behind the grants of "just and proper" temporary injunctions under NLRA section 10.

In particular, three features of the NLRA's historical context confirm that the 74th Congress and the 80th Congress used "as it deems just and proper" in the NLRA to afford a federal court more discretion to provide temporary injunctive relief thereunder than that court had under its general jurisdiction over "suits . . . in equity," Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, codified as amended, 28 U.S.C. § 41 (1934).

First, by 1935, the 74th Congress' use of "as it deems just and proper" can only be properly understood in light of past efforts by Congress to shape federal jurisdiction in labor disputes. The 74th Congress expressly intended NLRA sections 10(e)-(f) to be read together with NLRA section 10(h), which provides that the Norris-LaGuardia Act of 1932, see Act of March 23, 1932, ch. 90, 47 Stat. 70, did not limit "the jurisdiction of courts sitting in equity" when granting "appropriate temporary relief . . . as provided *in this section*," § 10(h), 49 Stat. at 455 (1935) (emphasis added).

Congress had enacted the Norris-LaGuardia Act of 1932 to tackle the problem of federal judges regularly and improperly granting employer requests for preliminary injunctions or temporary restraining orders (TROs) against labor unions and workers to stop them from striking or engaging in boycotts, typically "under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction." *Bhd. of R. R. Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 40 (1957). See Edwin Witte, The Government in Labor Disputes p. 85-86 (1932); Felix Frankfurter and Nathan Greene, Labor Injunction (1930). By one estimate, courts issued over 2,100 labor injunctions just in the 1920s – about

half of an estimated 4,224 labor injunctions issued between 1880 and 1930. See William Forbath, Law and the Shaping of the American Labor Movement 193 (1991).

Congress had tried to stop such federal court abuse of their injunctive powers once before. Among other things, section 20 of the Clayton Antitrust Act of 1914, Pub. L. No. 63–212, 38 Stat. 730, expressly barred any federal court from issuing a "restraining order or injunction" in a dispute involving employers and employees "unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law." § 20, 38 Stat. at 738.

But that effort failed when this Court read section 20's text as "merely put[ting] into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 470 (1921); accord *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 203 (1921); *Texas & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930). Tracing the history of section 20 of the Clayton Act up through *Duplex*, Frankfurter and Greene concluded that it justified "a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially." Frankfurter and Greene, supra at 176 (footnote omitted).

Nevertheless, Congress persisted. To "obviate the results" of this "judicial construction" of the Clayton Act, *New Negro All. v. Sanitary Grocery Co.*, 303 U.S.

552, 562 (1938), the 72nd Congress enacted the Norris-LaGuardia Act in 1932 in order to "drastically . . . curtail the equity jurisdiction of federal courts in the field of labor disputes," *Milk Wagon Drivers' Union, Loc. No. 753, Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am. v. Lake Valley Farm Prod.*, 311 U.S. 91, 101 (1940).

In particular, in section 7 of Norris-LaGuardia, that Congress provided that no federal court has "jurisdiction to issue a temporary or permanent injunction" involving or growing out of a "labor dispute" unless it finds that (a) unlawful acts "threatened and will be committed unless restrained" or "have been committed and will be continued unless restrained"; (b) such acts, if not enjoined, would cause "substantial and irreparable injury to complainant's property"; (c) denying such injunction would inflict "greater injury" on the complainant than granting it would inflict upon defendants; (d) the "complainant has no adequate remedy at law"; and (e) public officers obliged to protect "complainant's property are unable or unwilling to furnish adequate protection." ch. 90, 47 Stat. at 71, codified at 29 U.S.C. § 107 (1934); *E.g.*, *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (affirming denial of injunction on this basis). While section 7(b)-(d) resembled what federal equity practice typically required in suits between private parties,[2] the others required more. Frankfurter and Greene, *supra* at 221 n.45, 222.

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[2] E.g. 28 U.S.C. § 384 (1934) (barring "[s]uits in equity . . . in any case where a plain, adequate, and complete remedy may be had at law"); *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (describing this section as "declaratory of the rule in equity, established long before its adoption").

About three years later, the 74th Congress enacted the NLRA, section 10(h) of which removed Norris-LaGuardia's limits on federal court discretion to grant "appropriate temporary relief" under NLRA section 10. Pub. L. No. 74-198, § 10(h), 49 Stat. at 455. Had the 74th Congress stopped there, it still would have been hard to infer that Congress wanted to restore for NLRA section 10 the pre-Norris-LaGuardia world of labor injunctions issued under the imprimatur of federal court equity principles. After all, NLRA sections 10(e)-(f) granted federal court jurisdiction to issue temporary injunctive relief only after the NLRB issued a final order, not for all labor disputes between private parties, and as part of a statutory scheme in which the NLRB, not the federal court, is the fact-finder for NLRA unfair labor practice violations.

But the 74th Congress did not stop there. It also added "as it deems just and proper" to denote the scope of court discretion to grant such temporary relief under NLRA § 10(e)-(f). As a result, the strongest inference is that the 74th Congress intended such court discretion to go beyond what federal equity practice typically required for temporary injunctive relief in suits between private parties.

In contrast, by reading "as it deems just and proper" to constrain such court discretion only to traditional equity practice, Starbucks effectively reads that phrase away. Respect for Congress requires more. See *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 144 S. Ct. 457, 468 (2024)("Proper respect for Congress cautions courts against lightly assuming that any of the statutory terms it has chosen to employ are 'superfluous' or 'void' of significance.")(citation omitted).

The NLRA's legislative history further confirms that "just and proper" was not a superfluous add-on. In February 1935, when Senator Wagner introduced the bill that became the NLRA, that bill's text expressly referred to a federal court's "power to grant such temporary relief or restraining order as it deems just and proper" upon petition of the Board or a person aggrieved by Board order. S. 1958, 74th Cong. § 10(f)-(g) (1935). And in the same section, that bill expressly exempted such grant of temporary injunctive relief from the constraints of Norris-LaGuardia. Id. at § 10(i).

In contrast, Senator Wagner's proposal a year earlier (in 1934) did not use "as it deems just and proper." Rather, that bill tracked section 15 of the Clayton Act by simply authorizing a federal district court to exercise its "equity" jurisdiction to prevent or restrain violations of the Act, upon petition from a U.S. district attorney made at the NLRB's request. See S. 2926, 73rd Cong. § 6 (1934). That bill also exempted court discretion under it from the Norris-LaGuardia Act. *Id.* at § 304(a). When it came out of the Senate Committee on Education and Labor, that bill had been amended to authorize federal courts to enforce Board orders, but it still did not expressly refer to temporary injunctive relief. S. 2926 amended, 73rd Cong. § 8 (1934); S. Rep. No. 73-1184, at 8 (1934) (discussing this section but not referring to temporary injunctive relief).

Second, contemporaneous uses of "just and proper" in 1935 buttress the inference that the 74th Congress intended "as it deems just and proper" in the NLRA to broaden court discretion beyond traditional federal equity practice.

By 1935, the United States Code was replete with Congress' uses of the phrase "just and proper" to denote broad discretion by government officers in a variety of statutory contexts, none involving temporary injunctive relief. See 18 U.S.C. § 1302 (1934) ("as may seem to the Secretary of War just and proper under the circumstances of the case" to take affidavit as evidence in settling accounts for military supplies); 25 U.S.C. § 261 (1934) (Commissioner of Indian Affairs authority "to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians"); 25 U.S.C. § 294 (1934) (authorizing Secretary of Interior to sell abandoned school plant on Indian tribal lands, with title passing to the purchaser "with such reservations or conditions as the said Secretary may deem just and proper"); 26 U.S.C. § 1227 (1934) ("just and proper expense" of transfer of merchandise from discontinued distillery warehouse "as ascertained and determined by the Commissioner of Internal Revenue"); 26 U.S.C. § 1305 (1934) (Commissioner of Internal Revenue may "make such allowances for unavoidable loss of wines while on storage or during cellar treatment as in his judgment may be just and proper"); 28 U.S.C. § 567 (1934) (Attorney General "shall approve . . . as he may deem just and proper" the quarterly accounts by certain federal district court clerks of "all fees and emoluments earned"); 31 U.S.C. § 543 (1934) (removal or restoration to office of federal "disbursing officer or agent" of federal government "as the President may deem just and proper"); 33 U.S.C. § 745 (1934) (Secretary of Commerce authority to regulate "salaries of the respective keepers of lighthouses in such manner as he deems just and proper"); 49 U.S.C. § 20a(6) (1934)

(right of "appropriate State authorities" to make before the Interstate Commerce Commission "such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings" arising from railroad carrier's application for approval to issue securities); see also 7 U.S.C. § 194(f) (1934) (court discretion to determine that "just and proper disposition of the case requires the taking of additional evidence").

Given this context, it seems highly unlikely that the 74th Congress deliberately used this particular term of art ("as it deems just and proper") for the first time to denote a court's discretion to grant temporary injunctive relief, but really intended to refer only to traditional federal equity practice. Had Congress so intended, it would have been easier to borrow from the text of Clayton Act § 20, given this Court's reading of it in *Duplex*, or otherwise expressly refer to traditional equitable factors such as "irreparable injury" or "inadequacy of any remedy at law." It did not.

Third, the 80th Congress amended NLRA § 10 in 1947 against the background of case law in which federal courts refused to import traditional equitable requirements into various statutory provisions for injunctive relief. By 1947, Congress had adopted or amended other statutory schemes authorizing federal courts to issue injunctive relief, including temporary injunctive relief, in support of an agency's enforcement of that scheme. *E.g.*, Packers and Stockyards Act, 1921, ch. 64, § 204(c), 42 Stat. 159, 162; Securities Act of 1933, ch. 38, § 20(b), 48 Stat. 74, 86; Securities Exchange Act of 1934, ch. 404, § 21(e), 48 Stat. 881, 900; Act of May 9, 1934, ch. 263, § 4, 48 Stat. 672, 675

(§ 8a(6) of the Agricultural Adjustment Act); Motor Carrier Act, 1935, ch. 498, 49 Stat. 543, 564 (§ 222(b)).

In reading these provisions, the lower federal courts up through 1947 had regularly opined that because Congress authorized federal courts to issue injunctive relief as part of agency enforcement of their statutory schemes, proof of irreparable injury or the inadequacy of any remedy at law was not required in the particular case. *E.g.*, *Sec. & Exch. Comm'n v. Jones*, 85 F.2d 17 (2d Cir. 1936) ("immaterial" that bill of complaint does not allege "absence of an adequate remedy at law . . . since the injunctive relief is provided for by the statute. Section 20(b), Securities Act of 1933, 15 U.S.C.A. § 77t(b)."); *Sec. & Exch. Comm'n v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937) ("As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear."); *Interstate Com. Comm'n v. All Am. Bus Lines*, 22 F. Supp. 525, 526-27 (S.D.N.Y. 1937) ("The right to an injunction being covered by specific statute [section 222(b) of the Motor Carrier Act of 1935], the [Interstate Commerce] Commission is not required to prove irreparable injury or other matters ordinarily prerequisite to issuance of injunctive relief."); accord *Interstate Com. Comm'n v. Consol. Freightways*, 41 F. Supp. 651, 656 (D.N.D. 1941) (same for preliminary injunction); *Am. Fruit Growers v. United States*, 105 F.2d 722, 725 (9th Cir. 1939) (allegations of irreparable injury and no adequate remedy at law "were unnecessary, because of 7 U.S.C.A. § 608a(6). Congress apparently concluded that a violation of a valid order would cause irreparable injury, in that the theory expressed by the act

required restriction on shipments and unless the fixed restrictions were complied with, the act would serve no purpose.").

Indeed, in *United States v. San Francisco*, 310 U.S. 16, 31 (1940), this Court affirmed the grant of an injunction sought by the Attorney General, at the Secretary of the Interior's request, to enjoin San Francisco from continuing to violate section 6 of the Raker Act, see Act of Dec. 19, 1913, ch. 4, § 6, 38 Stat. 242, under which the federal government had granted the city use of certain public lands to create a water supply and generate electric power. The Act authorized the Attorney General to "commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." § 9, 38 Stat. at 250. As a result, this Court reasoned that "this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine *whether* an injunction should have issued. . . . The equitable doctrines relied on do not militate against the *capacity* of a court of equity as a proper forum in which to make a declared policy of Congress effective." *San Francisco*, 310 U.S. at 30-31 (footnote omitted, emphasis added).

This Court's opinion in *Hecht Co. v. Bowles*, 321 U.S. 321, 332 (1944), does not suggest otherwise. There, this Court read section 205(a) of the Emergency Price Control Act of 1942, which provided that a court "shall" grant "permanent or temporary injunction, restraining order, or other order" when violation of it is shown, to still give the court *some* discretion to grant or deny an injunction. In so doing, the Court relied upon the text and history of the Act, including legislative history. See *id.* at 328-30.

Importantly, even the petitioners in *Hecht* took as given the background case law that, in some other regulatory statutes, Congress can and had removed "irreparable injury" or "inadequate remedy at law" as required for courts to grant injunctive relief. See Brief for Petitioner, *Hecht Co. v. Brown*, 1944 WL 42803, at *22-23. And this Court in *Hecht* similarly stressed that a court's section 205(a) discretion "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 331 (emphasis added).

Against this background of courts construing statutory grants of authority for federal injunctive relief, the 80th Congress amended the NLRA to add section 10(j) to authorize a federal district court to grant temporary injunctive relief "as it deems just and proper." It is reasonable to infer that, in doing so, the 80th Congress knew the state of the law governing similar provisions in other statutory schemes and chose to use "as it deems just and proper" in section 10(j) with those court opinions in mind. *E.g.*, *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, I.L.G.W.U., 494 F.2d 1230, 1240 (2d Cir. 1974) (attributing knowledge of *Hecht* "to at least some of" Taft-Hartley's "framers").

For this reason, even if the 80th Congress had intended "just and proper" in section 10(j) to refer in part to traditional equitable principles, Starbucks would still be wrong about how federal district courts should *apply* those factors. The correct approach would be to apply § 10(j) "as conditioned by the necessities of the public interest which Congress has sought

to protect," *Hecht*, 321 U.S. at 330. See *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975) (applying this approach to § 10(j)); accord Resp. Br. at 9-11.

II. Other NLRA and Taft-Hartley Provisions Authorizing Injunctive Relief Show That the 80th Congress Did Not Intend to Require Traditional Equitable Factors for NLRA § 10(j) Injunctions.

To support the NLRB's power "to *prevent* any person from engaging in any unfair labor practice," 29 U.S.C. § 160(a) (emphasis added), four subsections of NLRA § 10 authorize federal courts to grant injunctive relief to the Board in unfair labor practice cases, each using the phrase "as it deems just and proper." As discussed above, sections 10(e)-(f) do not direct federal courts to refer back to traditional federal equitable principles for suits between private parties. Nor does section 10(l). That these provisions do not incorporate traditional equitable principles is also consistent with section 10's approval of cease-and-desist orders, which federal appellate courts routinely enforce without considering traditional equitable principles.

By comparison, the 80th Congress added provisions authorizing injunctive relief sought by parties *other than* the NRLB: national-emergency injunctions for strikes and lockouts, § 208(a), 61 Stat. at 155, federal court jurisdiction to hear suits "for violation of contracts" between an employer and a labor organization, or between labor organizations, § 301(a), 61 Stat. at 156; and federal court jurisdiction to "restrain" violation of provisions barring certain kinds of payments from employers to unions. § 302(e), 61 Stat. at 157. None of these provisions use "just and proper." The contrast shows that the 80th Congress did not intend

"just and proper" in NLRA § 10(j) to refer to traditional federal equitable requirements.

A. NLRA Section 10(l)

By 1947, prior Board experience had revealed that due to "lengthy hearings and litigation enforcing its orders," the Board had found it hard to remedy unfair labor practices: "[I]t has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation." S. Rep. No. 80-105, at 27 (1947). In response, the 80th Congress added statutory authority for the Board to seek temporary injunctions under sections 10(j) and 10(l).

Like section 10(j), section 10(l) uses the phrase "just and proper." For unfair labor practices under NLRA §§ 8(b)(4)(A)-(C), 8(b)(7), and 8(e), it authorizes a federal district court receiving a petition "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter" to grant "such injunctive relief or temporary restraining order *as it deems just and proper*." 29 U.S.C. § 160(l) (emphasis added).

Unlike § 10(j), NLRA § 10(l) also contains a proviso that "no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable." *Id.* This "substantial and irreparable injury" requirement for *ex parte* TROs closely resembles what Norris-LaGuardia required for *ex parte* TROs, see § 7, 47 Stat. at 72, codified at 29 U.S.C. § 107 (1934) ("substantial and irreparable injury to

complainant's property"); what *ex parte* TROs typically required, see Fed. R. Civ. P. 65(b) (1939);[3] and what such TROs typically required beforehand in federal suits in equity, see Federal Equity Rule 73 (1912) ("immediate and irreparable loss or damage"). This underscores that the 80th Congress did not intend "just and proper" simply to refer back to traditional federal equitable practice. Otherwise, this "irreparable injury" proviso for *ex parte* TROs in NLRA § 10(l) would have been superfluous.

B. NLRA § 10(e) Enforcement of Cease-And-Desist Orders

Once the Board decides that an employer or union "has engaged in or is engaging in" an unfair labor practice (ULP), it "*shall* issue . . . an order requiring such person to cease and desist from such unfair labor practice." 29 U.S.C. § 160(c) (emphasis added). As a result, cease-and-desist orders are routine in unfair labor practice cases, even if no other remedy is available. See *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 152 (2002) (NLRB may order "traditional remedies" – cease-and-desist and notice-posting orders – even absent another permissible remedy for employer's retaliatory termination of undocumented worker).

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[3] As originally adopted, Rule 65 provided that "[t]hese rules do not modify" the Norris-LaGuardia Act and sections 1 or 20 of the Clayton Act of 1914 "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." Fed. R. Civ. P. 65(e) (1939). It was amended in 1948, after Taft-Hartley, to replace those references with "a more general and inclusive reference" to "any" federal statute to keep Rule 65(e)'s "continuing applicability without the need of subsequent readjustment to labor legislation." Fed. R. Civ. P. 65, Advisory Committee Note, 1948 Amendment.

In turn, when a federal court of appeals exercises its "power . . . to make and enter a decree enforcing" the Board's cease-and-desist order, 29 U.S.C. § 160(e), the order as enforced has the force and effect of a permanent injunction. See *N.L.R.B. v. Gimrock Const. Inc.*, 695 F.3d 1188, 1193 (11th Cir. 2012) (referring to prior decision granting NLRB enforcement petition as "injunctive order").

But the federal courts of appeals, in deciding whether to "decree" the "enforcing" of such orders, do *not* apply the traditional equitable requirements for permanent injunctions, see *eBay Inc. v. MercExchange,* 547 U.S. 388, 391 (2006). Instead, they enforce Board cease-and-desist orders to the extent they conclude that substantive challenges to those orders lack merit and the order's scope is tailored to the specific NLRA violation. See *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 433 (1941) ("It is obvious that the [cease-and-desist] order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing.").

After all, the 80th Congress rejected a proposed change to NLRA § 10(e) that would have made Board discretion to seek enforcement of its orders depend on the offending employer or union's "fail[ure] to comply" or upon a post-order violation. H.R. Rep. No. 80-245, at 43 (1947); *see* H.R. Rep. No. 80-510, at 55 (Conf. Rep.). This suggests that this Congress also would not have wanted a federal court of appeals to refuse to enforce a Board order because it, unlike the Board, believed that that a permanent injunction would not serve "the public interest." *Ebay*, 547 U.S. at 391. If

so, it is even more unlikely that this same Congress would have nonetheless used "just and proper" to wed the district court the traditional equitable factors for temporary injunctions in private litigation.

C. Other Taft-Hartley Injunctions

This reading of "just and proper" also comports with the 80th Congress' addition of provisions outside NLRA section 10 that authorized injunctive relief, *i.e.*, [1] the national-emergency injunction for strikes and lockouts; [2] so-called *Boys Market* injunctions arising under federal court jurisdiction to hear contract suits between an employer and a labor organization, or between labor organizations; and [3] federal court jurisdiction to enjoin violation of provisions barring certain payments from employers to employer representatives. These provisions – none of which use "just and proper" – show that Congress distinguished between injunctions sought by the NLRB and those sought by others, confirming that the 80th Congress did not intend "just and proper" to simply refer to the traditional federal equity requirements in suits between private parties.

First, section 208(a) of Taft-Hartley authorizes the Attorney General to petition a federal court for injunctive relief against a strike or lock-out constituting a national emergency. § 208(a), 61 Stat. at 155, codified at 29 U.S.C. § 178(a). If a court finds that a "threatened or actual strike or lock-out" affects at least a "substantial part" of a relevant industry and would "imperil the national health or safety," that court has "jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate." 29 U.S.C. § 178(a)(i)-(ii). Once the injunction issues, if the parties to the underlying

"labor dispute" do not settle within sixty days, the NLRB, within the next fifteen days, must take a secret ballot of the involved employees on their employer's "final offer of settlement," and then certify the results to the Attorney General within five days thereafter. *Id.* § 179(b). After such certification or settlement, whichever comes first, the injunction *must* be discharged. *See id.* § 180.

The purpose of the § 208(a) injunction is to have "vital production . . . resumed or continued for a time while further efforts were made to settle the dispute," *United Steelworkers of Am. v. United States,* 361 U.S. 39, 41 (1959), after which the injunction must end. Section 208(a)'s purpose is *not* to restore or maintain the status quo pending litigation to determine a person's legal rights—the typical function of temporary injunctive relief. Thus, it is nonsense to describe the predicates for a § 208(a) injunction as Congress setting a "higher bar" for injunctive relief than the "normal equitable rules." Pet. Br. at 27. To the contrary, section 208(a) does not even require an allegation that anyone has violated the NLRA. Cf. *United Steelworkers of Am.*, 361 U.S. at 43 (rejecting argument that section 208 is "constitutionally invalid because it does not set up any standard of lawful or unlawful conduct on the part of labor or management").

Second, section 301(a) of Taft-Hartley authorizes federal court jurisdiction over lawsuits by and against labor unions arising out of alleged violations of collective bargaining agreements. § 301(a), 61 Stat. at 156, codified at 29 U.S.C. § 185(a). Such suits under 301 are pursued not by the NLRB, but by employers and

labor unions attempting to vindicate their own interests, rather than carry out the public interest reflected in the statutory scheme.

Although section 301's text does not expressly refer to injunctive relief, this Court has read section 301(a) to authorize injunctive relief for certain disputes arbitrable under collectively bargained grievance and arbitration procedures, with injunctive relief in such cases guided by "ordinary principles of equity," the Norris-LaGuardia Act notwithstanding. *Boys Markets, Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 254 (1970). Once it concluded that injunctive relief was available, the *Boys Market* Court defaulted to federal equity principles, because no statutory text in section 301 directs any other outcome. For NLRA section 10(j), "as it deems just and proper" indicates otherwise.

Third, section 302(e) of Taft-Hartley grants federal court jurisdiction "for cause shown" to "restrain violations of" section 302 "without regard to" the limits on federal court injunctive relief that the Norris-LaGuardia Act and sections 6 and 20 of the Clayton Act of 1914 would otherwise impose. § 302(e), 61 Stat. at 158, codified at 29 U.S.C. § 186(e). Section 302 bars certain payments from employers to employer representatives, *see id.* § 302(a)-(c); *Loc. 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 588 (1993).

At minimum, section 302(e) confers federal court jurisdiction to enjoin violations of § 302(a)-(b) in suits by the Attorney General. See *Salant & Salant, Inc.*, 88 NLRB 816, 818 (1950). Courts have also recognized such authority to enjoin violations of § 302 in suits filed by private parties under an express private right

of action.[4] *See Ohlendorf v. United Food & Com. Workers Int'l Union*, Loc. 876, 883 F.3d 636, 642-43 (6th Cir. 2018) (supposing that, in union's § 301 lawsuit "seeking to enforce a provision of a collective bargaining agreement that violates § 302, . . . § 302(e) gives the court the power to enjoin the union from enforcing the collective bargaining agreement").

In such private suits, it is unsurprising that some courts might be guided by traditional equitable factors in deciding whether to grant the requested injunctive relief. *E.g.*, *Cutler v. Am. Fed. of Musicians of U.S. & Canada*, 211 F. Supp. 433, 446 (S.D.N.Y. 1962) (considering equitable "unclean hands" defense). But see *Employing Plasterers' Ass'n of Chicago v. Journeymen Plasterers' Protective & Benev. Soc. of Chicago, Loc. No. 5,* 279 F.2d 92, 99 (7th Cir. 1960) ("defense of unclean hands does not here avail against a statutory right to challenge violations of Section 302").

In any case, what matters is that Congress used different words to define federal court discretion to enjoin under § 302(e) ("for cause shown") as compared to "just and proper" in NLRA section 10. It is unlikely that Congress would have copied "just and proper" from NLRA sections 10(e)-(f) when drafting NLRA

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[4] This Court has not settled whether section 302(e) itself authorizes a private right of action. Compare *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 205 n.19 (1962) (dicta that section 302(e) permits "suits for injunctions . . . by private litigants") with *Unite Here Loc. 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting from dismissal of writ of certiorari) ("legal status of *Sinclair Refining*'s dictum is uncertain"); see also *Ohlendorf v. United Food & Com. Workers Int'l Union, Loc. 876*, 883 F.3d 636, 641-42 (6th Cir. 2018) (§ 302(e) does not create private right of action).

sections 10(j) and 10(l), but used "for cause shown" for Taft-Hartley section 302(e), unless it understood the two phrases to mean different things.

III. Court Discretion Under NLRA 10(j) Should Preserve the Board's Remedial Power in Light of the General Counsel's Reasonable Beliefs About the Merits.

Given the text and context in NLRA section 10(j), the 80th Congress likely intended "as it deems just and proper" to require the district court to consider whether [1] a temporary injunction is needed to "restore or preserve the status quo pending litigation," S. Rep. No. 80-105, at 27 (1947), consistent with Board's power to "prevent" the unfair labor practices of "any person," 29 U.S.C. § 160(a); and [2] the General Counsel has a reasonable basis to believe that she will likely prove before the Board the violations alleged in the complaint.

This reading of "just and proper" accords with the 80th Congress' aim for section 10(j) in the overall NLRA statutory scheme, for five reasons.

First, this approach calibrates a federal district court's section 10(j) jurisdiction with the Board's role as primary factfinder for NLRA unfair labor practice violations, its role as "primary interpret[er]" of the NLRA, *Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776 (A. F. L.)*, 346 U.S. 485, 490 (1953), and the federal courts of appeals' limited role of reviewing Board final orders for "substantial evidence." 29 U.S.C. § 160(e).

For deciding unfair labor practices on the merits, federal district courts barely have any role at all, save stepping in when the proper courts of appeal to review

final Board orders are all "in vacation." *Id.* Thus, unlike in a suit between private parties, if a district court holds a hearing to decide whether to grant a section 10(j) preliminary injunction, that court *cannot* "advance the trial on the merits" or make admissible evidence "received . . . part of the trial record," Fed R. Civ. P. 65(a)(2), because the Board, not the court, decides disputed issues of fact and law in NLRA unfair labor practice cases. Grafting traditional equitable inquiries onto NLRA section 10(j) would cut against that primary role for the Board in the overall statutory scheme.

Second, this approach respects the 80th Congress' decision to predicate section 10(j) federal court jurisdiction on the "issuance of the complaint" by a newly independent NLRB General Counsel. In 1947, the 80th Congress circumscribed the Board's authority since 1935 to "prosecute any inquiry," § 5, 49 Stat. at 452, by creating a separately-appointed and independent "General Counsel of the Board" with "final authority, on behalf of the Board" over investigating charges and "issu[ing] complaints" under NLRA § 10, as well as over the "prosecution of such complaints before the Board," § 101, 61 Stat. at 139 (adding NLRA § 3(d)), codified at 29 U.S.C. § 153(d).

With this change, the 80th Congress "separate[d] the prosecuting from the adjudicating function" of the Board and made the General Counsel "indispensable to the prosecution of the case. He vindicates *the public interest . . . .*" *Lewis v. N.L.R.B.*, 357 U.S. 10, 16 (1958) (emphasis added). When the General Counsel refuses to issue an unfair-labor-practice complaint, that decision is "unreviewable." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); see *N.L.R.B. v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 130 (1987)

(same for other "prosecutorial" decisions by General Counsel). When the General Counsel issues a complaint, she has thereby decided, after investigating the facts and applicable law within six months, *see* 29 U.S.C. § 160(b), that any unfair labor practice charge in that complaint "appears to have merit," 29 C.F.R. § 101.8; see *NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings* (March 2024), at 10050-10070 (describing investigation process). No such vetting occurs when private parties file suits in federal district court.

The "reasonable basis to believe" inquiry respects the 80th Congress' decision to assign the General Counsel independent prosecutorial discretion. That standard denotes a minimum probability that the General Counsel will prevail in her unfair labor practice prosecution based on [1] what *she* can reasonably believe about the merits based on her investigation thus far; and [2] what her prosecution "before the Board" will likely reveal, 29 U.S.C. § 153(d). Under that standard, the federal district court can refuse § 10(j) temporary relief if the General Counsel could not reasonably believe to be provably true those complaint allegations material to her request for that relief. Similarly, the district court can also refuse 10(j) relief where the complaint turns on legal conclusions precluded by Board precedent or other applicable law. That includes any federal constitutional defenses to injunctions, Pet. Br. at 17, 37, that unions or employers might raise.

Third, because section 10(j)'s clear aim is to provide a temporary injunction when needed to "restore or preserve the status quo pending litigation," S. Rep. No. 80-105, at 27 (1947), a section 10(j) injunction is

accordingly "just and proper" "in light of the large objectives of" the NLRB's power, *Hecht*, 321 U.S. at 331, *i.e.*, the power to "prevent" the unfair labor practices of "any person," 29 U.S.C. § 160(a). Thus, courts should deny 10(j) injunctions that would not advance that statutory purpose. This includes, for example, cases where the charged conduct has no continuing adverse effect, such as when an employer has credibly pledged to discontinue the charged conduct while the Board proceeding is pending.

Fourth, by arguing otherwise based on the phrase "reasonable cause" in NLRA § 10(l), see Pet. Br. at 34, Starbucks elides the difference between *seeking* injunctive relief under NLRA §§ 10(j) and 10(l) with a federal district court's discretion to *grant* such relief. While the General Counsel may petition a federal district court for section 10(j) injunctive relief only "upon issuance of a complaint" pursuant to § 10(b), 29 U.S.C. § 160(j), section 10(l) *requires* a petition for injunctive relief if "the officer or regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue," *id.* § 160(l). Congress wanted to require the General Counsel to move fast to seek temporary relief once such "reasonable cause" exists. Thus, for section 10(l) cases, the General Counsel may not decline to seek such relief or even delay until, for example, it issues a complaint.

Once a federal district court has received a petition for temporary injunctive relief, however, sections 10(j) and 10(l) both use the same phrase ("as it deems just and proper") to denote the federal district court's discretion to *grant* such relief. That the 80th Congress used "reasonable cause" as a trigger for the duty to *seek* a section 10(l) injunction does not preclude *granting* a "just and proper" injunction because the General

Counsel has a reasonable basis to believe that the alleged NLRA violation it is likely provably true. Similarly, it does not matter how often the General Counsel sought section 10(j) injunctions in the years shortly *after* 1947, Pet. Br. at 31-32, just as sporadic post-1947 Board statements about when it should *seek* such relief have negligible probative value for how the 80th Congress intended district courts to decide how to *grant* such relief.

Finally, although Starbucks worries about a "Trojan horse[]" effect on "countless other statutory contexts," Pet. Br. at 42, this is sadly misleading. Despite other provisions in other statutory schemes enacted by other Congresses at other times, see Pet. Br. at 44-47, this Court's task is to discern what specific statutory text ("as it deems just and proper") meant "at the time" the 80th Congress added section 10(j) to the NLRA in 1947, *New Prime*, 139 S. Ct. at 539, in light of how those words function in the NLRA's "overall statutory scheme," *Turkiye*, 598 U.S. at 275.

At best, Starbucks relies on the premise that where Congress uses the "same language" in two separately enacted statutes with "similar purposes, particularly when one is enacted shortly after the other," one may infer that Congress intended the shared text to "have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality). Pet. Br. at 42 (quoting *Smith*). But that premise just does not apply here. Of current federal statutes that Starbucks identifies as using the phrase "just and proper." Pet. Br. at 42, only two of them arguably concern labor policy – both enacted

about thirty years after, not shortly after, the 80th Congress added section 10(j) to the NLRA.[5]

CONCLUSION

This Court should affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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March 29, 2024

[5] Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1213 (5 U.S.C. § 7123(d)); Foreign Service Act of 1980, Pub. L. No. 96-465, § 1009, 94 Stat. 2071, 2133 (22 U.S.C. § 4109(d)).

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Appendix

The *Amici* professors teach or write about labor or employment law, and their expertise relates to the issues before the Court. *Amici* are listed in alphabetical order below, and their institutional affiliations are provided for identification purposes only.

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