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

REPLY BRIEF OF PETITIONER

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This Court granted certiorari to resolve "[w]hether courts must evaluate the NLRB's requests for section 10(j) injunctions under the traditional, stringent four-factor test for preliminary injunctions or under some other more lenient standard." Pet. i. The government (at 15) agrees that courts cannot "*disregard* traditional equitable principles," *i.e.*, likelihood of success on the merits, likelihood of irreparable harm, the balance of equities, and the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 15 (2008). As a government amicus puts it: "[T]he parties broadly agree that [the] *Winter* analysis captures

the set of considerations relevant to analyzing a petition under Section 10(j)," and merely dispute "the guidance that this Court should provide concerning the[ir] application." SEIU Br. 2.

That broad agreement requires vacatur. Here, both courts below applied a two-part test that blatantly disregards the traditional four *Winter* criteria. This Court should vacate the judgment below and remand for the district court to apply the right test. The government's assertions (at 34) that the courts below "largely" addressed the *Winter* factors just relitigate its opposition to certiorari.

As to *how* those traditional four criteria apply, the government criticizes Starbucks for ignoring "statutory context." Of course, the particular statutes under which injunctions are sought inform the *Winter* analysis. Here, the NLRB's likelihood of success on the merits depends on whether the NLRB correctly interprets and applies the NLRA to prohibit particular conduct. Showing likely irreparable harm encompasses whether the NLRB's back-end remedial powers could rectify harms from alleged unfair labor practices. The balance of the equities weighs the substantial countervailing costs of enjoining employers that remain under compulsion until the NLRB completes its adjudication. And the public interest includes Congress' prohibition on unfair labor practices and the need to avoid unwarranted interference in employer operations. Courts apply *Winter*'s traditional criteria to other statutory contexts every day. Section 10(j) should be no different.

No cases—let alone "over a century of caselaw," U.S. Br. 13—use "statutory context" to dilute the traditional preliminary-injunction criteria to mandate deference to an agency's views of the law, facts, and equities. Congress

charged district courts alone with deciding whether section 10(j) injunctions are "just and proper." 29 U.S.C. § 160(j). Section 10(j)'s text lacks a clear statement overriding the four traditional criteria. "Statutory context" cannot circumvent that requirement. Regardless, section 10(j)'s "statutory context" nowhere authorizes deference to the NLRB. This Court has long rejected deference to agencies' litigating positions and on matters that Congress committed to courts' discretion.

The consequences of outsourcing district courts' preliminary-injunction determinations to the agency seeking those injunctions are alarming. If "statutory context" permits the NLRB to demand near-total fealty to its injunctive requests, countless statutory schemes could equally require capitulation. Preliminary injunctions are "drastic and extraordinary remed[ies], which should not be granted as a matter of course," let alone by agency *ipse dixit*. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

I. The Sixth Circuit's Test Defies the Traditional Factors

The government (at 15) agrees that section 10(j)'s text directing district courts to issue injunctions only if "just and proper" "invokes equitable principles," *i.e.*, the four *Winter* factors. Far from "largely map[ping] onto" those factors, U.S. Br. 34, the Sixth Circuit's two-part test veers way off-course, Br. 33-38; Chamber Br. 5-15; Tenn. Br. 9-14.

A. The Sixth Circuit Applied None of the Four Factors

1. ***Likelihood of Success.*** Moving parties must show they are "*likely* to succeed on the merits." *Winter*, 555 U.S. at 20 (emphasis added). Thus, the NLRB must show a "probability that the Board will … determin[e] that the unfair labor practices … occurred and that [a] Court w[ill] … enforc[e] that order." *Frankl v. HTH Corp.*, 650 F.3d

1334, 1355 (9th Cir. 2011); Br. 20. And "the existence of a factual conflict, or of difficult questions of law" can "create sufficient doubt about the probability of [a] plaintiff's success." 11 Charles Allen Wright et al., *Federal Practice and Procedure* § 2948.3 (3d ed. updated Apr. 2023).

As the government (at 35) acknowledges, the reasonable-cause standard requires the NLRB to posit a "substantial and not frivolous" legal theory—not a likelihood that courts will affirm that theory and find that the NLRA was violated. Br. 47; Pet.App.10a, 89a. That standard is all gums and no "teeth." *Contra* U.S. Br. 35 (citation omitted). As the Sixth Circuit here explained: "The Board does not have to prove a violation of the Act or even a valid liability theory." Pet.App.44a.

Courts describe the reasonable-cause "threshold" as "significantly lower than a requirement to show … 'likelihood of success.'" *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 n.10 (5th Cir. 2010). The NLRB portrays reasonable-cause circuits' standard as "whether we have presented enough evidence that [the] Board could find [a] violation." NLRB Off. of the Gen. Couns., Section 10(j) Manual, app. L, at 5 (Feb. 2014), https://tinyurl.com/5fnhsvpk; *accord* Pet.App.89a.[1] Courts disregard evidence conflicting with the NLRB's submissions, NLRB witnesses' credibility, and employers' defenses, treating "[f]act-finding [a]s inappropriate in the context of a district court's consideration of a 10(j) petition." Pet.App.10a-11a (quoting *Ahearn v. Jackson Hosp.*

[1] The NLRB apparently removed its unredacted 2014 Section 10(j) Manual from its website sometime after Starbucks petitioned for review. Starbucks provides a link via the Wayback Machine. *See New York v. Meta Platforms, Inc.*, 66 F.4th 288, 303-04 (D.C. Cir. 2023) (relying on since-removed webpages via Wayback Machine).

Corp., 351 F.3d 226, 237 (6th Cir. 2003)). Starbucks accordingly did not challenge this prong on appeal. Br. 13.

The likelihood-of-success standard, however, would require the NLRB to show a likelihood of establishing that anti-union animus underlay the terminations and that Starbucks would not have terminated the employees for neutral reasons, like breaking company rules. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983). Here, the district court merely "note[d] the conflicts within the evidence presented" but refused "to resolve" multiple, critical issues. Pet.App.71a. For instance, the NLRB and Starbucks disputed (1) whether Starbucks terminated other partners for similar misbehavior, Pet.App.108a; (2) whether a COVID-induced staffing shortage, not anti-union animus, prompted closure of the store's café area during a union sit-in, Pet.App.99a; and (3) whether a Starbucks manager knew about one partner's union involvement before disciplining her, Pet.App.94a-95a. Instead of resolving conflicting evidence, the district court accepted the NLRB's view on each point because the NLRB "satisfied its 'relatively insubstantial' burden to provide facts supportive of [its] theory." Pet.App.95a; *accord* Pet.App.99a, 107a.

The government (at 35-36) defends the reasonable-cause standard as what the likelihood-of-success inquiry should entail under section 10(j). *Contra* pp. 19-21. But Congress did not dictate a "reasonable cause" standard by using those exact words in section 10(*l*) but omitting them from section 10(j). Br. 34-35. The government does not respond.

2. The government (at 34) asserts that the Sixth Circuit's standard "incorporates" irreparable harm, balancing the equities, and the public interest. But, as the NLRB previously stated: "[S]trict adherence to equitable

principles is not the test." NLRB, Section 10(j) Manual, *supra*, app. L, at 5.

Irreparable Harm. Moving parties must show "irreparable injury is *likely* to occur," not a mere "possibility." *Winter*, 555 U.S. at 22. Such harm must be "difficult—if not impossible—to reverse." *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010). The government at times (at 36-37) agrees those criteria govern section 10(j).

But the Sixth Circuit merely asked whether the NLRB identified *potential* harm to its "remedial powers," Pet.App.10a, and agrees that irreparable harm is "more stringent" than its standard, *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 n.3 (6th Cir. 1988). The courts below thus credited NLRB contentions that failing to reinstate terminated partners "could lead to injury to the union movement that subsequent Board intervention would not be able to remedy." Pet.App.12a.

But accepting an agency's "reasonable apprehension" that the "efficacy of [its] final order may be nullified," Pet.App.109a (citation omitted), does not scrutinize whether harms are likely and irremediable. Here, the district court acknowledged "contrary testimony about the chilling impact of the terminations" and that the evidence was "not wholly conclusive as to the overall chill." Pet.App.115a-116a. Starbucks presented evidence that, after the terminations, Memphis store partners continued publicly supporting unionization—including through "Union protests in front of the … [s]tore"—without "any disciplinary action." Starbucks Post-10(j) Hearing Br. 17, Dist. Ct. Dkt. 81. NLRB witnesses confirmed that partners continued "picket[ing] outside of the store" after the terminations and that new hires wore "pro-union pins at work after speaking with" an organizer. *Id.* at 13-16. Critically, *after* the terminations and the NLRB's section 10(j) petition, the union won a representation election at

the Memphis store by a large 11-3 margin, refuting any claim of chill to union organizing. Pet.App.7a.

Rather than weighing Starbucks' evidence, the district court deferred to the NLRB's "sufficient foundation" for harm based on evidence of "an enduring chill" in "union support," even "following the successful vote." Pet.App.60a. The Sixth Circuit similarly credited NLRB speculation that the absence of reinstatement "would … undermine" the union's strength in collective-bargaining negotiations. Pet.App.14a. Under that reasoning, every alleged retaliatory termination inflicts irreparable harm.

Balance of Equities and Public Interest. The traditional test "requires courts to weigh" "the countervailing harms to the nonmoving party and the public interest." *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009). The balance of equities demands "serious consideration [for the employer's] equities" and "fairly weigh[ing]" relative burdens. *Overstreet v. Gunderson Rail Servs., LLC*, 587 F. App'x 379, 381 (9th Cir. 2014).

The government (at 37) suggests that the Sixth Circuit does not "foreclose" considering such factors. But courts *must* consider them. *Winter*, 555 U.S. at 24-26, 32-33. And the courts below never assessed the hardships to Starbucks of a years-long injunction that reinstates partners discharged for serious misconduct. Pet.App.119a-121a; Br. 12. The government (at 38) responds that the Sixth Circuit rejected Starbucks' argument that the union's conduct undercut some of its success in unionizing. The district court, however, refused to "entertain[] this defense," Pet.App.36a-37 (Readler, J., concurring), and the Sixth Circuit refused to consider the defense without specific evidence of union misconduct, Pet.App.16a. Regardless, this defense had nothing to do with the injunction's burdens on Starbucks.

Nor, for the public interest, did the courts below "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *See Winter*, 555 U.S. at 24 (citation omitted). The government deems the district court's assertion that an injunction would "effectuate the policies of the NLRA and … protect the NLRB's remedial powers" sufficient. U.S. Br. 37 (quoting Pet.App.118a). But summary references to statutory policies do not adequately assess the public interest, and the Sixth Circuit never mentioned the public interest. Neither court considered public interests like allowing businesses to freely operate and enforce workplace rules. Br. 48; Tenn. Br. 19-26.

B. Courts Applying the Four Factors Conduct a Materially Different Inquiry

1. The government (at 22) maintains that circuits applying the traditional four criteria do so in a way that "largely parallels" the Sixth Circuit's approach. Courts' and the NLRB's acknowledgement of a split show otherwise. Pet. 21-22.

The Fourth Circuit requires the NLRB to satisfy "each" factor of the "traditional four-part test for equitable relief" without lowering the bar. *Henderson v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 438-39 (4th Cir. 2018) (cleaned up). The NLRB cannot show irreparable harm using theories of "inherent" harm, and must "demonstrate why [its] own relief given at the conclusion of the agency process cannot address the violations." *Id.* at 439. The Seventh Circuit agrees and rejects applying a more permissive standard just because public officials request relief. *Kinney v. IUOE, Loc. 150*, 994 F.2d 1271, 1277-78 (7th Cir. 1993); Pet. 16; *contra* U.S. Br. 22-23.

The Eighth Circuit applies "the traditional four[]factor[s]," but scrutinizes "irreparable injury" first.

McKinney v. S. Bakeries, LLC, 786 F.3d 1119, 1122-23 (8th Cir. 2015). The NLRB must show "the case presents one of those rare situations in which the delay inherent in completing the adjudicatory process will frustrate the Board's ability to remedy the alleged unfair labor practices." *Id.* at 1123 (citation omitted). The court rejects "deference to the [NLRB's] interpretation of the facts and the inferences." *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999).

The Ninth Circuit too applies the "traditional four-factor test," and thus rejects "presumptions or a 'thumb on the scale' in favor of issuing [section 10(j)] relief." *Hooks v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106, 1114 (9th Cir. 2022) (citation omitted); *contra Frankl*, 650 F.3d at 1356 ("[D]istrict court[s] should be hospitable to the views of the General Counsel." (citation omitted)). District courts cannot "presume irreparable harm," *Hooks*, 54 F.4th at 1118, fail to "give serious consideration to [the employer's] equities," or "improperly weigh[] the [relative] burden[s]." *Gunderson*, 587 F. App'x at 381.

2. The government further relitigates the grant of certiorari with statistics from a just-created NLRB webpage that reports its 68%-win rate in reasonable-cause circuits and a 74%-win rate in traditional four-factor circuits since 2012. U.S. Br. 38-39 (citing NLRB, *Section 10(j) Injunctions - Litigation Success Rate Report*, https://tinyurl.com/3swtdc57 (created Mar. 2024)).

Those numbers omit a critical variable: settlement rates. In reasonable-cause circuits, employers settled nearly *half* (49%) of section 10(j) cases after the NLRB filed petitions. In traditional-criteria circuits, only 30% of

filed cases settled.[2] Those numbers illustrate the greater pressures on employers facing the reasonable-cause test. Given the NLRB's self-touted success in deliberately wielding injunctions to extract settlements, Br. 32, it is a little rich for the government to invoke cases that do not settle—where employers presumably believe they could win even under the reasonable-cause standard—as evidencing a level playing field.

II. "Statutory Context" Does Not Compel Agency Deference

The government (at 15, 34) portrays the real "dispute" as the role "statutory context" plays in "courts' application of [equitable] principles" to section 10(j). To the government (at 25-34), "statutory context" includes policy aims, legislative history, and the NLRB's internal practices and regulations. The government (at 27-38) says this "statutory context" requires district courts to yield to the NLRB's preliminary views of the law, facts, and equities without resolving conflicting evidence or legal arguments. Inferring such deference from "statutory context" would open the floodgates to deference to agencies' injunctive requests in myriad other contexts.

A. The Traditional Factors Translate Across Statutes

Obviously, "statutory context is relevant to the consideration of equitable relief." U.S. Br. 15; *accord* Br. 46-47. But statutory context means Congress' "judgment … deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (citation omitted). Section 10(j)'s direction to district courts to grant preliminary injunctions only if "just

[2] Starbucks calculated the settlement rate using the NLRB's data on filed injunction requests since 2012. NLRB, *10(j) Injunctions*, https://tinyurl.com/yu3s5s3f.

and proper" during ongoing NLRB proceedings incorporates traditional equitable principles. Br. 22-25; U.S. Br. 15.

"Statutory context" cannot lower substantive injunction standards for the NLRB's benefit. For that to happen, Congress must speak clearly, for instance, by relieving the party moving for an injunction from showing one of the four factors or by mandating relief for certain statutory violations. Br. 28 (collecting examples). For example, the Endangered Species Act includes mandatory language prohibiting the government from taking actions to impair critical habitats, which this Court interpreted as a clear statement departing from the traditional equitable criteria. *TVA v. Hill*, 437 U.S. 153, 193-95 (1978) (cited at U.S. Br. 34); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (discussing *Hill*). The government rightly never argues that the NLRA contains similarly clear language.[3]

No case supports using "statutory context" to downgrade likelihood of success on the merits to a substantial, non-frivolous legal theory, or to water down the other criteria. And the government's "statutory context" theory proves too much. Whenever the government seeks preliminary injunctions, the government presumably has non-frivolous arguments and claims to effectuate a broader statutory framework that advances worthy aims. If agencies could divine special treatment from "statutory

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[3] *Accord United Steelworkers v. United States*, 361 U.S. 39, 41 (1959) (cited at U.S. Br. 17) (by stipulating specific injunctive criteria, Labor Management Relations Act precluded "judicial inquir[y]" into traditional factors like "availability of other remedies"); *United States v. City & County of San Francisco*, 310 U.S. 16, 30-31 (1940) (cited at U.S. Br. 18) (statutory prohibition on San Francisco transferring property rights showed automatic injunctive relief was "appropriate and necessary").

context," the traditional four criteria would no longer be uniform standards. Courts could unpredictably raise or lower the stringency of different criteria for different statutes.

The government's (at 26, 28) reliance on the NLRB's internal practices and regulations as "statutory context" heightens that danger. Congress did not mandate those procedures. If agencies could create their own "statutory context" via internal memoranda or regulations, agencies could always create grounds for a weaker burden for obtaining preliminary injunctions.

The federal government also receives no special preference when seeking injunctions to enforce federal statutes. *Contra* U.S. Br. 20-21, 33-34. True, courts "go much farther both to give and withhold relief in furtherance of the public interest than … when only private interests are involved." U.S. Br. 18-19 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552-53 (1937), a case involving two private parties). That just means *public* interests can matter more than private ones, not that the government is special. The government has operated under traditional equitable criteria without special deference in countless other contexts. Br. 45-46. So should the NLRB.

The *Winter* factors, by design, adapt to statutory context without adding a thumb on the scale. Take the Controlled Substances Act, which authorizes the Attorney General to seek injunctions against statutory violations, 21 U.S.C. § 843(f), under the traditional test. *See Oakland Cannabis*, 532 U.S. at 496. The Act informs how courts apply the traditional criteria, but the substantive standards remain the same. The government must show "likelihood of success on the merits"—*i.e.*, a probable violation of the Act. *E.g.*, *United States v. Bacaner*,

2021 WL 3508135, at *9 (M.D. Fla. Aug. 3, 2021). The government "must demonstrate" likely "actual and imminent" "irreparable harm," *e.g.*, by showing likely overdoses on illegal drugs. *Id.* (citation omitted). When "consider[ing] the public interest" and balancing equities, courts must respect Congress' "policy choice … as to what behavior should be prohibited," and cannot redefine the public interest to favor access to prohibited substances. *Oakland Cannabis*, 532 U.S. at 497-98.

Similarly, injunctions to prevent dissipation of tax debts must account for the "public interest involved"—*i.e.*, the risk that money owed to the IRS will evaporate before "any final decree." *United States v. First Nat'l City Bank*, 379 U.S. 378, 383-85 (1965) (cited at U.S. Br. 18). But the government must still satisfy "the traditional factors," including that an "injunction would not be adverse to the public interest." *E.g.*, *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1354 (11th Cir. 2019).

Likewise, courts considering enjoining National Environmental Policy Act violations must consider the environmental harms that Congress targeted, but "[a]n injunction should issue only if the traditional four-factor test is satisfied." *Monsanto*, 561 U.S. at 157. Courts considering "injunctive relief" under the Emergency Price Control Act consider the "public interest" factor to include Congress' "objectives" in legislating against "inflation"—and cannot redefine the public interest to disregard inflationary dangers. *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1943) (cited at U.S. Br. 15-16). Courts apply the traditional test with an eye to Congress' statute-specific commands. Just because Congress identifies particular ills and tasks agencies with ameliorating them does not mean agencies get preliminary injunctions more easily.

Section 10(j) is no different. Likelihood of success on the merits depends on whether the NLRB correctly interprets and applies the NLRA to prohibit particular conduct. *See* 29 U.S.C. § 158(a)-(b); *e.g.*, *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 503 (7th Cir. 2008). Likelihood of irreparable harm encompasses labor-related harms like disruptions to "collective bargaining process[es]." *Sharp*, 172 F.3d at 1038. And the NLRB's "broad discretionary" authority to order "affirmative [remedial] action" at the end of the administrative process must be insufficient. *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 215-16 (1964) (citing 29 U.S.C. § 160(c)); *see S. Bakeries*, 786 F.3d at 1123. The balance of the equities assesses labor-specific countervailing harms from enjoining employers or unions. *Muffley*, 570 F.3d at 542. And the public interest includes protecting employees' rights to "organize and bargain collectively," 29 U.S.C. § 151, plus employers' rights to operate and enforce workplace rules. Br. 48; Tenn. Br. 22-23.

B. Section 10(j)'s Statutory Context Does Not Authorize Deference to the NLRB

Section 10(j)'s "statutory context" does not support transforming each injunctive factor into deference to NLRB litigation positions. This Court has rejected "[d]eference to what appears to be nothing more than an agency's convenient litigating position" as "entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); Br. 39-40. Deference is inappropriate where, as here, the "scope of the judicial power vested by the statute" is at issue. *Adams Fruit Co. v. Barnett*, 494 U.S. 638, 650 (1990).

1. The NLRA's Text and Section 10(j)'s Function

The government (at 25-27, 29) observes that section 10(j) preserves the NLRB's ultimate ability to adjudicate

unfair-labor-practice claims and to remedy otherwise-irreparable harms. That observation just describes the function of preliminary injunctions writ large, and section 10(j) accomplishes that function by requiring district courts to independently assess whether the NLRB's requested injunction is "just and proper." 29 U.S.C. § 160(j); Br. 3, 23. By scrutinizing whether the NLRB needs an injunction to avert irreparable harm, district courts ensure the NLRB's ability to remedy unfair labor practices while avoiding unjustifiably upending businesses' operations. None of this requires deference.

The government (at 27-28, 35) argues that the NLRB's ultimate adjudication of unfair-labor-practice claims precludes district courts from conducting a searching inquiry into whether the NLRA prohibits particular conduct or considering whether other evidence refutes assertions of wrongdoing. *Accord, e.g.*, *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 96 (3d Cir. 2011) (courts "infring[e] on the province of the Board" by "exercis[ing] their own discretion"); *supra* pp. 4-5. But courts of appeals, not the NLRB, ultimately decide whether the NLRB's orders are enforceable. Br. 41. It does not follow that district courts are incompetent to review the merits now because they do not review final NLRB orders. After all, Congress vested district courts—not the NLRB—with the exclusive authority to deem preliminary injunctions "just and proper." 29 U.S.C. § 160(j); Br. 3, 23.

Nor do district courts "supplant" the NLRB's adjudicatory power by independently assessing the merits and equitable factors. *Contra* U.S. Br. 10. The NLRB's later merits adjudication never addresses irreparable harm or other equitable factors, so there is nothing for the district court to supplant. As for the merits, no matter how searching the district court's inquiry or what evidence the court considers or credits, the NLRB remains free to

reach its own conclusions and amass its own record. *Loc. 74, Carpenters Union v. NLRB*, 341 U.S. 707, 714 n.9 (1951); *NLRB v. Acker Indus.*, 460 F.2d 649, 652 (10th Cir. 1972).

The government (at 26) reasons that because courts give *final* NLRB decisions deference, district courts must defer to the NLRB's preliminary litigation views now. But the NLRA nowhere prescribes deference to the NLRB's legal conclusions, which cannot survive if *Chevron* falls. Chamber Br. 7-8; NCLA Br. 17-19; Tenn. Br. 10-11. And courts defer to the NLRB's factfinding in final decisions only because Congress expressly prescribed substantial-evidence review. 29 U.S.C. § 160(e)-(f); Br. 41. Congress knew how to compel deference, required limited factual deference to final NLRB decisions, and declined to mandate deference to the NLRB's threshold litigation positions.

Moreover, the government perversely demands *more* deference for the NLRB's section 10(j) requests than NLRB final orders receive. In reviewing final NLRB decisions, courts must vacate orders that overlook countervailing facts or press faulty legal interpretations. 29 U.S.C. §§ 160(e)-(f); *e.g.*, *Everport Terminal Servs., Inc. v. NLRB*, 47 F.4th 782, 793 (D.C. Cir. 2022). Yet the government would prevent district courts here from undertaking anything close to such scrutiny. Letting the NLRB obtain onerous, years-long injunctions at the front end based on a non-frivolous, one-sided case is lawless, irrational, and unfair.

2. The NLRA's Purpose and Legislative History

The government (at 11, 25-28) notes that the NLRA reflects Congress' "express judgment that unfair labor practices undermine the purposes of the Act," that certain labor-organizing activities are protected, and that the

NLRB is charged with implementing those aims. But federal statutes routinely identify particular evils and charge particular agencies with enforcing statutes. By prohibiting pollution, discrimination, and securities fraud and charging the EPA, EEOC, and SEC with enforcement, Congress did not compel courts to rubber-stamp those agencies' preliminary injunction requests.

The government (at 20-21) argues that section 10(j)'s legislative history supports accounting for "statutory context." But the legislative history never champions deference. All agree that Congress enacted section 10(j) as a limited exception to a previous ban on labor injunctions, reserved for preventing extraordinary conduct that would be impossible to reverse later. Br. 31-32; U.S. Br. 20-21, 25. If anything, Congress' general antipathy toward labor injunctions—plus the NLRB's initial understanding of section 10(j)—suggests district courts should issue section 10(j) injunctions sparingly. Br. 29-32; CDW Br. 8-10.

The government (at 21-23) argues that lower-court cases interpreting section 10(j) consider the NLRA's aims. True but irrelevant. The circuits applying traditional equitable criteria do not lessen their stringency based on the NLRA's policy aims. *Supra* pp. 8-9. And early district court cases incorrectly adopted a reasonable-cause standard for section 10(j) that appears only in section 10(*l*). Br. 34-35. Even those cases recognized courts' duty to weigh countervailing "evidence" before "granting" the NLRB's "requested relief," unlike the courts below. *Douds v. Loc. 294*, 75 F. Supp. 414, 418 (N.D.N.Y. 1947); *see supra* p. 5. Especially given the longstanding split over what criteria govern section 10(j) injunctions, the government's suggestion (at 24) that Congress ratified some district courts' conception of their

deferential role is meritless. *Cf. Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005).

3. The NLRB's Administrative Processes

The government (at 26, 28) justifies deference based on the NLRB's "substantial administrative process." But "a court may defer to only an agency's authoritative and considered judgments." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019); Br. 39-40. Section 10(j) petitions reflect the agency's preliminary views, and are often filed before any administrative hearing occurs. Br. 38-39. This Court should be particularly skeptical of deferring to the NLRB's strategic decision to seek an injunction that the NLRB uses to "cataly[ze] … settlement[s]." NLRB, Section 10(j) Manual, *supra*, at 15. Employers and unions have not yet presented their side of the story—and when they do, agency adjudicators or circuit courts may reject the NLRB's preliminary views.

Here, for instance, the NLRB obtained an injunction requiring Starbucks to reinstate seven terminated partners who engaged in serious misconduct. Then an NLRB ALJ determined that Starbucks lawfully terminated two partners whom the section 10(j) injunction required Starbucks to reinstate. Br. 40. Starbucks has thus had to employ two partners who egregiously violated company rules. Yet the NLRB says there is "only a slight chance" that an erroneously granted injunction might "significantly harm[] the Respondent." NLRB, Section 10(j) Manual, *supra*, app. L, at 3. In the NLRB's telling, because "the Board itself authorized the General Counsel to seek this injunction," the "Board will likely find Respondent to be a wrongdoer, and the wrongdoer should bear the burden of ambiguity," *id.*—even if it turns out there was no employer wrongdoing.

C. The Government's Position Creates Untenable and Unequal Results

The government's description of *how* "statutory context" should permeate the section 10(j) inquiry is disturbingly one-sided: for all four factors, district courts must defer to the NLRB. Installing the NLRB as the de facto judge of its own injunctive requests should be unfathomable and invites the agency to cut corners, secure in the knowledge that courts cannot plumb the Board's assertions. If the NLRB's ask-and-ye-shall-receive-injunctions gambit succeeds, other agencies could follow. This Court should preserve district courts' traditional role in independently evaluating preliminary injunctions against the threat of deference run amok.

1. ***Likelihood of Success.*** The government (at 36) all but concedes its approach bears no resemblance to *Winter* by asserting that requiring a "likelihood of success" under section 10(j) might wrongly "imply that a court should proceed in the same manner in which it adjudicates a motion for a preliminary injunction" in cases courts "ultimately decide." The government would require only a "substantial," "nonfrivolous legal theory"—and would prohibit district courts from undertaking "a probing inquiry into the merits" or making "an intensive effort to resolve factual issues, … credibility determinations," or "conflicting evidence." U.S. Br. 27-28, 35, 40 (citation omitted); *see supra* pp. 4-5. The government suggests district courts should assess "what the *Board* is likely to do," not what *courts of appeals* would likely do, *i.e.*, whether courts of appeals would likely uphold any final Board order finding that unfair labor practices occurred. U.S. Br. 28-29 (emphasis added) (citation omitted).

It is hard to imagine how the NLRB could lose if courts deferentially ask whether the NLRB offered a

minimally plausible legal theory, while ignoring conflicting law or facts. WLF Br. 12-16. Moreover, basic separation-of-powers principles prohibit district courts from outsourcing Article III adjudicatory powers to an agency unaccountable even to the Executive Branch. Chamber Br. 6-10; Tenn. Br. 5-12. Congress did not plausibly compel so fundamental a power transfer from courts to the NLRB by putting district courts in sole charge of deciding whether injunctions are "just and proper."

The practical costs of this hear-no-counterarguments approach are equally stunning. Courts would be hard-pressed to reject novel theories of unfair labor practices, even if the NLRB repudiates previous positions (as often occurs). CDW Br. 17-19 & n.3. Mere allegations of retaliatory terminations would seemingly suffice, even if employers present abundant evidence that terminations reflected egregious employee misconduct like racial harassment, endangering coworkers, or (as here) unlocking a closed store to "usher in a reporter and … camera operator" so the store was "converted into a film set" for a "television news segment." *Starbucks Corp.*, 2023 WL 3254440 (ALJ May 4, 2023); Chamber Br. 8-9, 16-17. And district courts apparently could never order discovery—which in some section 10(j) cases has exposed blatant falsehoods in the NLRB's supporting affidavits. TRO Hearing Tr. 157-159, *Overstreet v. Starbucks Corp.*, No. 22-cv-00676 (D. Ariz. June 8, 2022).

The government (at 40) also inadequately grapples with the anomalies from this approach. District courts apparently should not consider countervailing merits arguments, like constitutional challenges to the NLRB's structure. Br. 37; NCLA Br. 10; Tenn. Br. 8-9. The government's rejoinder (at 40) that the NLRB gets no deference on constitutional views is nonresponsive if district courts cannot assess constitutional defenses to start.

Employers or unions would have to race to preliminarily enjoin the NLRB in separate district-court suits, where the ordinary four-factor test would govern.

Similarly, the government (at 41) sidesteps the oddities of different standards for granting versus staying section 10(j) injunctions. The government states that employers and unions must meet all four traditional criteria to obtain a stay, forcing employers to show a "likelihood of success on the merits" that the NLRB failed to present "a substantial legal theory." Indeed, both courts below approved the NLRB's requested injunction under the relaxed two-part test, but denied Starbucks' requests to stay that injunction under the traditional four-factor test. Pet.App.44a, 51a-65a.

2. ***Irreparable Harm.*** Despite paying lip service to the requirement of likely irreparable harm (at 20-21, 30-31), the government (at 31) would require district courts to defer to the NLRB's "predictive judgments" about harms because the NLRB "is especially experienced and suited to make those kinds of judgments." Such deference facilitates agency delay. Since 2020, the NLRB has waited an average of 335 days after charges are filed to request section 10(j) injunctions. NLRB, *10(j) Injunctions*, https://tinyurl.com/yu3s5s3f. If injunctions are imperative to prevent irreversible harm, that delay is inexplicable. If relief can wait nearly a year without impairing the NLRB's ultimate remedial prospects, one wonders why the NLRB cannot forswear injunctions and just expedite its adjudicatory machinery. Yet, if district courts must simply defer, the NLRB would never have to address the effects of these delays.

Further, the NLRB apparently considers *every* instance of allegedly retaliatory terminations as irreparable harm. Such terminations could always be said to deter

other employees from supporting unions or to dampen organizing campaigns or collective-bargaining power. U.S. Br. 30-32, 36; Pet.App.12a-15a. Indeed, the NLRB recently directed litigators to seek section 10(j) injunctions *before* employers retaliate, on the theory that any retaliation inflicts irremediable harms and must be deterred. Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to Regional Directors 1 (Feb. 1, 2022), https://tinyurl.com/bdnjvs44. And the NLRB now demands *nationwide* injunctions to remedy alleged retaliation, hypothesizing that employees nationwide are chilled from unionizing if retaliation occurs anywhere. Br. 6; NRW Br. 10. Requiring likely irreparable harm is meaningless if the NLRB can relabel categories of unfair labor practices as *per se* irreparable harm nationwide and bar legal or evidentiary rebuttals.

3. ***Balance of Equities and Public Interest.*** To the government (at 33-34), these factors always favor injunctions. The government envisions few equities to balance; the severity of countervailing harms from injunctions never counts. Disruptions from reinstating long-ago-terminated employees who assaulted colleagues, stole employers' property, or terrorized customers: irrelevant. Costs from reopening plants closed for unprofitability: immaterial. Chamber Br. 16-17. All that matters is Congress' purported equation of the "public interest" with the NLRB's pursuit of the NLRA's policy objectives.

D. Deferring to the NLRB Imposes Unjustifiable Costs and Risks Skewing Other Statutory Schemes

Granting section 10(j) injunctions based on the NLRB's say-so immensely burdens employers and undermines, rather than furthers, the NLRA's statutory scheme. The more readily the NLRB can obtain injunctions, the less likely the NLRB's decisions are to face judicial scrutiny. The threat of years-long injunctions

whose duration the NLRB controls pressures employers to settle. And these injunctions—which the NLRB now seeks to impose nationwide—inflict obvious, far-reaching burdens on businesses' operations. Chamber Br. 16-22.

The NLRB (at 43) dismisses concerns about injunctions' duration by claiming section 10(j) cases receive "priority." But, since 2020, the section 10(j) cases apparently receiving priority are those where courts *denied* injunctions. Those took the NLRB a year to adjudicate. *10(j) Injunctions*, *supra* (370 days). By contrast, the NLRB averaged nearly 16 months to decide cases where courts *granted* section 10(j) injunctions—some stretched past two years. *Id.*; *accord, e.g.*, *Murphy v. NCRNC, LLC*, 474 F. Supp. 3d 542, 546 (N.D.N.Y. 2020); *NCRNC, LLC*, 372 NLRB No. 35 (2022) (800+ days).

Worry not, the government (at 43) proclaims: Employers can petition to modify section 10(j) injunctions if circumstances change, like an ALJ finding against the NLRB on certain claims. But if ALJs independently assess the merits, disagreement with agency litigators should be commonplace. Imposing abnormal burdens on employers to seek relief for normal adjudicatory outcomes reinforces the perils of deferring to NLRB litigation positions.

The government (at 42) does not dispute that its justifications for deference would extend to *all* agencies that seek preliminary injunctions pending administrative proceedings, including the EEOC, Department of Labor, FTC, SEC, and CFTC. Br. 43-44. The government (at 42) cites cases from within the Ninth Circuit that presume irreparable harm if agencies' governing statutes authorize preliminary injunctions. Those cases do not apply across-the-board deference and rely on pre-*Winter* precedent. Moreover, the Ninth Circuit concedes its approach

creates "tension" with *Winter*. *FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019).

Absent reversal, countless other agencies could divine deference to their injunctive requests from amorphous "statutory context." Br. 45-46. Preliminary injunctions are extraordinary remedies, not remedies that federal agencies alone can obtain by right.

CONCLUSION

The court of appeals' judgment should be vacated and the case remanded.

Respectfully submitted,

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