No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the National Labor Relations Act, the National Labor Relations Board (NLRB) issues, prosecutes, and adjudicates complaints alleging that employers committed unfair labor practices. 29 U.S.C. § 160(b). Section 10(j) of the Act authorizes federal district courts, while the NLRB adjudication remains pending, to grant preliminary injunctive relief at the NLRB's request "as [the court] deems just and proper." *Id.* § 160(j).

The question presented, on which the courts of appeals are openly and squarely divided, is:

Whether 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.

CORPORATE DISCLOSURE STATEMENT

Petitioner Starbucks Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *McKinney, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board v. Starbucks Corp.*, No. 22-5730 (6th Cir. Aug. 8, 2023) (affirming grant of preliminary injunction)
- *McKinney, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board v. Starbucks Corp.*, No. 2:22-cv-2292-SHL-cgc (W.D. Tenn. Aug. 18, 2022) (granting preliminary injunction)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Starbucks Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 77 F.4th 391. Pet.App.1a-39a. The district court's opinion is unreported but available at 2022 WL 5434206. Pet.App.67a-121a.

JURISDICTION

The court of appeals entered judgment on August 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

29 U.S.C. § 160(j) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

STATEMENT

This case is the ideal vehicle for resolving an entrenched, frequently recurring, and squarely presented circuit split over what standard the National Labor Relations Board (NLRB) must satisfy for federal courts to preliminarily enjoin alleged unfair labor practices during the pendency of Board administrative proceedings. That split carries enormous consequences for employers nationwide and unacceptably threatens the uniformity of federal labor law.

The National Labor Relations Act (NLRA) authorizes the NLRB to bring administrative complaints against employers for alleged unfair labor practices. 29 U.S.C. § 160(b). Administrative complaints trigger in-house proceedings within the NLRB, first before an administrative

law judge (ALJ), and then the full Board. *See* 29 C.F.R. §§ 101.10, 101.12, 102.35, 102.46. That process often takes years. Then proceedings move to court, either because aggrieved parties seek judicial review or because the NLRB seeks enforcement of its orders. *Id.* § 101.14.

Critically, under section 10(j) of the NLRA, after the NLRB issues an administrative complaint, the NLRB can ask federal district courts to preliminarily enjoin alleged unfair labor practices against employers or unions for the duration of agency proceedings. 29 U.S.C. § 160(j). But the NLRA lets district courts grant such injunctions only if the court "deems" relief "just and proper." *Id.*

The circuits are irrevocably split over the standard to impose such injunctions. Four circuits—the Fourth, Seventh, Eighth, and Ninth—require the NLRB to satisfy the same familiar standard applied in myriad other contexts: the four-factor test for preliminary injunctions laid out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under that traditional test, preliminary injunctions are "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.

In direct conflict, five circuits—the Third, Fifth, Sixth, Tenth, and Eleventh—apply a dramatically lower, two-factor "reasonable cause" test that is "no real obstacle" to obtaining injunctions. Pet.App.31a (Readler, J., concurring). The NLRB must merely show "reasonable cause" to believe that employers engaged in unfair labor practices and that an injunction protects the Board's remedial power. Pet.App.10a. Thus, the NLRB's "burden" is "relatively insubstantial." *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017) (citation omitted). As the NLRB's internal manual on section 10(j) injunctions puts it: The "threshold of proof … is low"

in circuits applying this test. NLRB Office of the General Counsel, Section 10(j) Manual app. L, at 5 (Feb. 2014). The NLRB need not show a likelihood of success, nor does the test require "strict adherence to equitable principles"—and courts "[d]efer to the [NLRB's] version of the facts if [it is] within the range of rationality." *Id.* Finally, the First and Second Circuits use a hybrid test combining elements of the *Winter* and reasonable-cause standards.

Courts and commentators widely acknowledge this split. The NLRB's section 10(j) manual features a 45-page appendix detailing the split. *Id.* app. D. Only this Court can resolve the conflict and provide much-needed national uniformity.

This Court's intervention is imperative because the standard that governs the NLRB's preliminary injunction requests is routinely outcome-determinative—as this case underscores. Over the last eighteen months, the NLRB has sought *ten* section 10(j) injunctions against Starbucks—over a third of all section 10(j) petitions the NLRB filed. So far, the Board has sought injunctions against Starbucks in courts in the Second, Sixth, Ninth, Tenth, and Eleventh Circuits, often asserting similar types of charges as those here. Starbucks has defeated injunction requests in circuits applying the traditional preliminary-injunction test. But the NLRB has prevailed in circuits that apply the watered-down reasonable-cause standard. As Judge Readler observed, the result in this case might have "been drastically different had the Board been asked to satisfy the *Winter* standard." Pet.App.34a.

The NLRB's own manual underscores the daylight between the tests, instructing agency lawyers to file different pleadings and answer district courts' questions differently depending on the circuit. Section 10(j) Manual, *supra*, apps. H, L. Nationwide businesses like Starbucks

should not have to contest the same relief against the same agency under three different tests, depending on where the employer resides or the alleged unfair labor practice occurred.

This circuit split is particularly intolerable because section 10(j) injunctions are immensely consequential for businesses. The NLRB has used injunctions to force employers to reinstate employees terminated for severe workplace disruptions, keep open loss-making facilities, and bar changes to company policy. And, because section 10(j) injunctions remain in place until the NLRB finishes its administrative proceedings, the Board controls how long the injunction lasts, and has no incentive to move expeditiously. On average, the NLRB takes two-plus years to issue final orders, meaning employers must operate under coercive injunctions the whole time—even if employers ultimately prevail before the Board or in court.

Moreover, the NLRB's "§ 10(j) activity is on the rise." Pet.App.21a (Readler, J., concurring). Recently, the NLRB's General Counsel promised to bring the "weight of a federal district court's order" down on employers at the "earliest" stage of proceedings. Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to Regional Directors 1 (Feb. 1, 2022), https://tinyurl.com/bdnjvs44 (Feb. 2022 Abruzzo Memo). And the NLRB has started seeking "nationwide" injunctions within favorable circuits that employ the lesser reasonable-cause standard. *E.g.*, *Kerwin v. Starbucks Corp.*, 2023 WL 2186563, at *6 (E.D. Mich. Feb. 23, 2023). This Court should grant certiorari to resolve the acknowledged, increasingly important, and entrenched circuit split, which this case cleanly and squarely presents.

A. Statutory Background

The National Labor Relations Act of 1935 established the National Labor Relations Board, an independent agency tasked with "prevent[ing] any person from engaging in any unfair labor practice." 29 U.S.C. §§ 153, 160(a). The NLRB's "authority kicks in when a person files a charge with the agency alleging that an unfair labor practice is afoot." *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters*, 598 U.S. 771, 775 (2023).

Every year, the NLRB receives tens of thousands of charges, each triggering the Board's power to investigate. 29 U.S.C. §§ 160(b), 161; NLRB, *Disposition of Unfair Labor Practice Charges Per FY*, https://tinyurl.com/2p88cuvm. During an investigation, the NLRB can demand access to "any evidence" the employer has "relat[ing] to any matter under investigation" and may issue subpoenas "requiring the attendance and testimony of witnesses or the production of any evidence." 29 U.S.C. § 161(1). If the NLRB moves forward—which happens to 41% of charges—the Board issues a complaint, launching administrative proceedings against the employer. *Id.* § 160(b); NLRB, *Performance and Accountability Report FY 2022*, at 26, https://tinyurl.com/37fcv6ms.

By issuing a complaint, the NLRB also triggers its statutory authority to ask federal courts for a preliminary injunction to award the Board interim relief. Section 10(j) of the NLRA provides that, "upon issuance of a complaint," the NLRB may "petition any United States district court … for appropriate temporary relief or [a] restraining order." 29 U.S.C. § 160(j). While section 10(j) lets the NLRB seek injunctions against both employers and unions, *id.* §§ 158(a)-(b), 160(j), the NLRB does not

appear to have sought relief against a union in over a decade. *See* NLRB, *10(j) Injunctions*, https://tinyurl.com/yr6tywnd.

Under section 10(j), a federal district court has discretion to grant such relief "as it deems just and proper." 29 U.S.C. § 160(j). If granted, the injunction remains in place for the duration of NLRB proceedings. *See Hadsall v. Sunbelt Rentals, Inc.*, 993 F.3d 992, 994 (7th Cir. 2021). Section 10(j) injunctions thus create powerful incentives for employers to settle, especially since the NLRB controls how long administrative proceedings last—and thus how long preliminary injunctions endure. *See* Section 10(j) Manual, *supra*, at 15.

B. Factual Background

1. Starbucks operates coffeehouses around the globe. Starbucks and its licensees have 34,000 locations that serve 60 million people every week. To make all those Pumpkin Spice Lattes and Frappuccinos, Starbucks in the United States employs some 235,000 people, who are "partners," reflecting the company's longtime view that its people—along with its coffee—are what prompt customers to return. Starbucks, *Culture and Values*, https://tinyurl.com/2trtbaam; *see* Starbucks, *Our Long-Standing Efforts to Put Our Partners First* (Mar. 13, 2023), https://tinyurl.com/m8yfj48d.

Starbucks imposes few threshold requirements for baristas, instead opening the job to a wide array of applicants and prioritizing on-the-job learning. "[P]unctuality," coupled with the "[a]bility to learn quickly" and "understand" customers, are key. Starbucks, *Barista Job Listing* (Aug. 7, 2023), https://tinyurl.com/mwve6fe4. But baristas can go far within Starbucks—rising to manage stores or entire regions. Starbucks, *Forging a Career*

Path at Starbucks (Aug. 12, 2015), https://tinyurl.com/2c3n9bxz. Starbucks thus prides itself on its reputation for "listening" to its partners, "understand[ing] their educational and career aspirations," and ensuring "access to programs," so that they can grow with the company. Simon Mainwaring, *Purpose at Work*, Forbes (July 7, 2021), https://tinyurl.com/vsh3jbc3.

In keeping with that focus, Starbucks has long offered "industry-leading benefits" to its partners. Howard Schultz, *Statement Before the Senate Committee on Health, Education, Labor, and Pensions* 2 (Mar. 29, 2023), https://tinyurl.com/ydh7phk7. Starbucks was "among the first companies to provide comprehensive health care." *Id.* Today, Starbucks offers partners stock ownership, student loan assistance, paid sick leave, and backup child care. *Id.* at 2-3; *see Our Long-Standing Efforts*, *supra*.

Since 2021, the union Workers United has campaigned to unionize U.S. Starbucks stores. Workers United has "paid nearly $2.5 million" to consultants and organizers involved in the Starbucks campaign. *Workers United Paid Nearly $2.5m to Organizers, "Salts," and Activists at Starbucks*, Lab. Union News (Apr. 25, 2023), https://tinyurl.com/53bxuwp5. "Undercover organizers" funded by Workers United have been "key" to union drives at Starbucks stores. Josh Eidelson, *The Undercover Organizers Behind America's Union Wins*, Bloomberg (Apr. 3, 2023), https://tinyurl.com/2mcwyut2. But by January 2023, 63 stores had voted against unionization as the "union drive … face[d] resistance from Starbucks' own workers." Dee-Ann Durbin, *As Starbucks Unionizing Slows, Some Strike, Others Skeptical*, Associated Press (Jan. 10, 2023), https://tinyurl.com/sdh2bdw5.

2. This case involves a Starbucks store in Memphis, Tennessee where some two dozen Starbucks partners work. Pet.App.71a. In January 2022, six partners working with Workers United announced plans to unionize the store and formed an organizing committee to lead the effort. Pet.App.72a-77a.

On Tuesday, January 18, 2022, partners invited a news crew to visit the Memphis store after hours to promote the unionization drive. Pet.App.77a-78a. After the store closed for the day, off-duty partners returned to the store, let the news crew in, and locked the door behind them—all without authorization. Pet.App.77a-78a. The news crew spent nearly an hour interviewing the partners within the closed store. Pet.App.78a. Meanwhile, off-duty partners entered staff-only areas of the store; one of them even accessed the safe. Pet.App.78a.

Starbucks learned of the event the next day and reviewed security-camera footage and interviewed the partners involved. Pet.App.79a. Company policy bars much of what the partners did—for example, off-duty partners cannot enter stores or let in unauthorized people. Pet.App.82a-83a. Starbucks thus terminated seven of the partners in the store without authorization; five belonged to the union organizing committee. Pet.App.82a-83a. Starbucks did not terminate the one organizing-committee member not present in the closed store. Pet.App.5a-6a, 77a. And Starbucks did not terminate two partners who committed more minor policy violations, like not ringing up a free beverage. Pet.App.83a-84a.

Shortly after the terminations, Workers United launched disruptive protests. Asked to describe "union activity" at the Memphis store, one manager detailed how

protesters "circl[ed] the property" and drove cars "backwards through the drive-thru lane honking their horns." 6/16/22 Tr. 1152:24, 1153:1-16, D. Ct. Dkt. 75. Protestors "cursed at" the manager who "had to be escorted" to his car when he left. *Id.* As the manager testified, the scene was "terrifying, frightening," and "chaotic." *Id.*

In June 2022, partners at the Memphis store voted 11-3 to unionize under Workers United. Pet.App.7a. The Memphis store remains unionized today. Starbucks Workers United, *All Unionized Stores*, https://tinyurl.com/y6fpb67w.

C. Administrative and Judicial Proceedings

1. In February and April 2022, Workers United filed charges with the NLRB, alleging that Starbucks committed unfair labor practices in violation of the NLRA by, *inter alia*, terminating partners who broke company policies by entering the store after hours and giving the news crew unauthorized store access. Pet.App.68a-69a; *see* 29 U.S.C. § 158(a)(1), (3).

On April 22, 2022—just ten days after receiving the last of Workers United's charges—the NLRB issued an administrative complaint alleging that Starbucks had committed unfair labor practices, including by firing partners who violated company policy. Pet.App.69a. Less than three weeks later, on May 10, 2022, the NLRB, through its regional director, respondent M. Kathleen McKinney, petitioned the district court under section 10(j) for an injunction pending resolution of those proceedings. Pet.App.69a. The NLRB asked the district court, among other things, to order Starbucks to reinstate the fired partners within five days. Pet.App.120a.

That petition marked the NLRB's tenth request for a section 10(j) injunction against Starbucks in the last eighteen months. *10(j) Injunctions*, *supra*. The NLRB has publicly stated its intent to "seek nationwide relief before circuit court judges, district court judges, administrative law judges, and the Board to remedy" perceived "violations of federal labor law by Starbucks." NLRB Office of Public Affairs, *NLRB Region 7-Detroit Wins Injunction Requiring Starbucks to Rehire Unlawfully Fired Worker* (Feb. 28, 2023), https://tinyurl.com/y9d3bnzv. Starbucks currently accounts for more than a third of all section 10(j) injunction requests the NLRB has made in the last eighteen months. *10(j) Injunctions*, *supra*.

2. In August 2022, the district court granted the NLRB's requested injunction, applying the Sixth Circuit's relaxed standard for section 10(j) petitions. Pet.App.119a. The court required the NLRB to show merely (1) "'reasonable cause' to believe that an unfair labor practice has occurred," and (2) that "injunctive relief is 'just and proper.'" Pet.App.88a (citing *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 234 (6th Cir. 2003)).

The district court held that the NLRB met its "relatively insubstantial burden to establish reasonable cause." Pet.App.89a. The court considered it sufficient that the NLRB offered "some evidence" that supported a "not frivolous" legal theory. Pet.App.89a (citation omitted). Here, the Board offered testimony that Starbucks did not always fire partners for similar policy violations to suggest that Starbucks actually fired Memphis partners for their union activity. Pet.App.103a-104a. Though Starbucks countered with evidence refuting the NLRB's account, the district court "disregard[ed]" it because the reasonable cause standard left "conflicts in the evidence"

and "issues of witness credibility" to the Board, not the court. Pet.App.105a, 108a.

The court then held that the NLRB had satisfied the "just and proper" prong of the Sixth Circuit's test because injunctive relief was "necessary to return the parties to status quo … to protect the Board's remedial powers." Pet.App.108a-109a (quoting *Ozburn-Hessey*, 875 F.3d at 339). Again applying Sixth Circuit's relaxed standard, the court explained that the NLRB needed to show only a "reasonable apprehension that the efficacy of the Board's final order may be nullified" during administrative proceedings. Pet.App.109a (quoting *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982)). Here, the court held, the NLRB's proffered testimony that the terminations left "lingering impacts" on union efforts at the Memphis store—though not "wholly conclusive"—sufficed, even though the partners had already voted to unionize that store. Pet.App.113a, 116a (citation omitted).

3. The Sixth Circuit affirmed. Pet.App.3a. Starbucks argued that the "district court should have applied the traditional four-factor test for preliminary injunctions" under *Winter*, 555 U.S. 7. Pet.App.17a. After noting that "some circuits use the four-factor framework," the Sixth Circuit hewed to its precedent. Pet.App.10a (citation omitted). The court thus required the Board to show merely "that (1) there is 'reasonable cause to believe that unfair labor practices have occurred' and (2) injunctive relief is 'just and proper.'" Pet.App.10a (quoting *Ozburn-Hessey*, 875 F.3d at 339).

Starbucks did not challenge the district court's reasonable-cause conclusion, so the Sixth Circuit focused on whether the district court had abused its discretion by deciding that an injunction was "just and proper."

Pet.App.11a. The Sixth Circuit asked whether an injunction was "necessary to return the parties to the status quo … to protect the Board's remedial powers" and, if so, "whether achieving the status quo [was] possible." Pet.App.10a (cleaned up). That test was satisfied here, the court held, based on potential chilling effects on unionization were the partners not reinstated. Pet.App.12a.

Judge Readler "reluctantly concur[red]" in the majority's decision as a faithful application of Sixth Circuit precedent. Pet.App.19a. But he expressed concern that the Sixth Circuit's "misguided" two-prong test for section 10(j) injunctions has "no particularly good" justification and "is directly contrary" to other circuits' decisions. Pet.App.19a.

In Judge Readler's view, section 10(j)'s requirement that an injunction be "just and proper" undercuts the "reasonable cause" test, because the statutory phrase "just and proper" instructs courts to use the "discretion" they "traditionally exercise when faced with requests for equitable relief." Pet.App.22a. The Sixth Circuit's "reasonable cause" test is also "in tension with intervening Supreme Court precedent," which requires application of the traditional equitable factors "[a]bsent the 'clearest' congressional instruction" otherwise. Pet.App.19a, 24a (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)).

Judge Readler also underscored that the reasonable-cause standard is a "dramatically lower[]" bar for the NLRB. Pet.App.37a. As he explained at length, applying the ordinary four-factor injunction test, the NLRB's "victory would have been far less certain." Pet.App.30a. Under the normal standard, the NLRB would have had to show a likelihood of success on the merits, not merely "reasonable cause." Pet.App.30a. The district court

would have "settle[d] … disputes of material fact, at least on a preliminary basis," instead of deferring to the NLRB's version of events under a test "resembl[ing] [the] civil pleading requirements." Pet.App.31a-32a. The NLRB might also have struggled to demonstrate "irreparable harm," which would have required the Board to show permanent injury was "highly probable." Pet.App.35a. By contrast, the Board met the "just and proper" prong of the relaxed test simply by asserting a "possibility" that the NLRB's remedial power would be thwarted. Pet.App.35a (citation omitted).

4. Currently, the NLRB's unfair-labor-practice proceedings against Starbucks continue in-house, with the NLRB in control of how much longer they last—and thus how long the section 10(j) injunction will remain in place. ALJ proceedings took a year, culminating in a May 2023 decision. The ALJ described the unauthorized event as an "audacious intrusion on [Starbucks'] prerogative to control usage of the store," and found that Starbucks lawfully terminated two partners for "serious" policy violations. *Starbucks Corp.*, 2023 WL 3254440 (NLRB May 4, 2023). But the ALJ found against Starbucks on other unfair-labor-practices allegations—including five of the unfair-termination charges. *Id.* The case remains pending before the Board.

REASONS FOR GRANTING THE PETITION

This petition is the optimal vehicle for resolving an important, entrenched circuit split over the standard the NLRB must satisfy to obtain preliminary injunctions. Four circuits apply the ordinary test for preliminary injunctions. Five circuits use a reasonable-cause test that vastly lowers the NLRB's burden to obtain an injunction. Two other circuits adopt a hybrid approach that splits the

difference. Only this Court can resolve this frequently recurring and widely acknowledged split and restore uniformity with a nationwide rule.

This Court's intervention is urgently needed. National employers like Starbucks must defend themselves against years-long injunctions under materially different tests depending on where alleged unfair labor practices occur or where employers reside. And the test is routinely outcome-determinative. As Judge Readler underscored below, the result in this case might have "been drastically different had the Board been asked to satisfy the *Winter* standard" that traditionally governs preliminary injunctions. Pet.App.34a. Starbucks' experience elsewhere illustrates the difference the standards make. Starbucks has prevailed in circuits applying the ordinary preliminary-injunction test, while the NLRB routinely wins in circuits that apply the undemanding reasonable-cause test. Whether national employers must operate under lengthy, disruptive injunctions should not depend on geographic happenstance.

I. The Circuits Are Squarely Divided Over the Standard for Section 10(j) Injunctions

The circuits are intractably divided over what standard applies when the NLRB seeks a preliminary injunction under section 10(j).

1. The Fourth, Seventh, Eighth, and Ninth Circuits analyze section 10(j) injunctions using the ordinary four-factor test that treats preliminary injunctions as "an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

The Fourth Circuit applies "the traditional four-factor equitable test in determining whether it is 'just and proper' to grant or deny § 10(j) injunctions." *Muffley v.*

Spartan Mining Co., 570 F.3d 534, 543 (4th Cir. 2009). Thus, "a district court determines whether to grant § 10(j) relief by weighing the following four factors: (1) the possibility of irreparable injury to the moving party if relief is not granted; (2) the possible harm to the nonmoving party if relief is granted; (3) the likelihood of the moving party's success on the merits; and (4) the public interest." *Id.* at 541. Under that test, section 10(j) injunctions remain "an 'extraordinary' remedy appropriate only to 'preserv[e] the Board's remedial power pending the outcome of its administrative proceedings.'" *Henderson v. Bluefield Hosp. Co.*, 902 F.3d 432, 441 (4th Cir. 2018) (quoting *Spartan Mining*, 570 F.3d at 543).

Similarly, in the Seventh Circuit, "[t]he familiar factors that courts reference in weighing the propriety of preliminary injunctive relief in other contexts … apply to requests for relief pursuant to section 10(j) as well." *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001). As the Seventh Circuit has held, the statutory text compels that approach: "Section 10(j) tells the district court to do what's 'just and proper,' which we read as a statement that traditional rules govern." *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989). In the Seventh Circuit, section 10(j) therefore remains "an 'extraordinary remedy.'" *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (citation omitted).

The Eighth Circuit also applies "the traditional four-factor preliminary injunction inquiry in deciding whether to issue a § 10(j) injunction." *McKinney v. S. Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015). That "analysis proceeds from the principle that § 10(j) 'is a limited exception to the federal policy against labor injunctions' and 'is reserved for serious and extraordinary cases.'" *Id.* (quoting *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034,

1037 (8th Cir. 1999)). To get an injunction, the NLRB must "clear[] the 'relatively high hurdle' of establishing irreparable injury"—an inquiry that courts in the Eighth Circuit conduct with "disciplined focus." *Id.* at 1123 & n.4 (quoting *Parents in Cmty. Action*, 172 F.3d at 1039).

The Ninth Circuit too has held that "a district court must evaluate the propriety of [section 10(j)] relief … under the traditional four-factor test." *Hooks v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022). The en banc Ninth Circuit rejected the reasonable-cause test because it "conflict[s] with the plain meaning" of section 10(j). *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 457 (9th Cir. 1994) (en banc).

2. In direct conflict, the Third, Fifth, Sixth, Tenth, and Eleventh Circuits evaluate section 10(j) injunctions under a vastly different, easily satisfied two-prong test.

The Third Circuit applies a "two-prong approach to § 10(j) petitions," under which a "district court must merely find 'reasonable cause' to believe an unfair labor practice has occurred" and that "the relief sought is 'just and proper.'" *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 89 (3d Cir. 2011) (quoting *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984)). Under the first prong, the NLRB must show that its "legal theory" is "'substantial and not frivolous' and that the facts, when taken in a favorable light to [the NLRB], are sufficient to support that theory." *Id.* at 100 (quoting *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 882 (3d Cir. 1990)). Under the second prong, the NLRB must show that "the failure to grant interim injunctive relief would be likely to prevent the Board … from effectively exercising its ultimate remedial powers." *Id.* at 102 (quoting *Suburban Lines*, 731 F.2d at 1091-92).

Despite acknowledging that "the Fourth, Seventh, Eighth, and Ninth [Circuits] have rejected the two-part approach," the Third Circuit has stood firm. *Id.* at 93-94. While the Third Circuit considers "equitable factors" in the court's analysis, the inquiry is "informed by the policies underlying § 10(j)," and the NLRB receives a "measure of deference." *Id.* at 98-99 (citation omitted).

In the Fifth Circuit too, "injunctive relief under Section 10(j) is evaluated using a two-part test: (1) whether the Board … has reasonable cause to believe that unfair labor practices have occurred, and (2) whether injunctive relief is equitably necessary." *Kinard v. Dish Network Corp.*, 890 F.3d 608, 612 (5th Cir. 2018) (citation omitted). To meet the first prong, "the district court need only decide that the Board's theories of law and fact are not insubstantial or frivolous." *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975). And relief is "equitably necessary" if the alleged harm is "exceptional" and "injunctive relief could meaningfully preserve the status quo." *McKinney v. Creative Vision Res., LLC*, 783 F.3d 293, 297-98 (5th Cir. 2015).

The Sixth Circuit applies the same "relatively insubstantial" burden. *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987) (citation omitted). That court will grant section 10(j) injunctions if the NLRB shows "reasonable cause" to believe an unfair labor practice occurred and that an injunction would be "just and proper," which the court takes to mean that the injunction would aid the Board's remedial powers. *Id.*; Pet.App.10a; *Ozburn-Hessey*, 875 F.3d at 339; *Jackson Hosp.*, 351 F.3d at 237. The NLRB need only show that "some evidence" supports its "not frivolous" legal theory and that an injunction is "rea-

sonably necessary" to preserve the Board's remedial authority. *Gottfried*, 818 F.2d at 493-94 (citation omitted). The Sixth Circuit emphasizes that district courts "may not resolve conflicting evidence or make credibility determinations." Pet.App.10a. Thus, the NLRB may "secure relief by saying little more than 'trust me.'" Pet.App.32a (Readler, J., concurring).

Likewise, in the Tenth Circuit, the NLRB need show only "reasonable cause to believe that the [NLRA] has been violated" and that "the remedial purposes of the Act would be frustrated" without relief. *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000) (quoting *NLRB v. Acker Indus., Inc.*, 460 F.2d 649, 652 (10th Cir. 1972)). The Tenth Circuit gives "deference to the Board" and "consider[s] the evidence in the light most favorable to the Board." *Id.* at 1134, 1136 (citation omitted).

Finally, the Eleventh Circuit grants section 10(j) injunctions if "(1) there is reasonable cause to believe that the alleged unfair labor practices have occurred, and (2) the requested injunctive relief is 'just and proper.'" *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). The NLRB shows reasonable cause if it gives a "coherent legal theory and provide[s] evidence showing that a rational factfinder could find for the Board on that theory." *Id.* at 372. An injunction is "just and proper" if "the facts demonstrate that, without such relief, any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the NLRA will be frustrated." *NLRB v. Hartman & Tyner, Inc.*, 714 F.3d 1244, 1250 (11th Cir. 2013) (quoting *Arlook*, 952 F.2d at 372).

3. The First and Second Circuits take a hybrid approach to section 10(j) injunctions.

The First Circuit considers section 10(j) petitions using a two-part analysis combining elements of the reasonable-cause and ordinary four-factor tests. The first step in the hybrid test is whether "the Board has shown reasonable cause to believe that the defendant has committed the unlawful labor practices alleged." *Pye v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994). The second step asks "whether injunctive relief is … just and proper"—an inquiry which requires "the district court to apply the familiar, four-part test for granting preliminary relief." *Id.* District courts applying that test "accept the Board's characterization of the facts so long as [it] fall[s] 'within the range of rationality.'" *Murphy v. NSL Country Gardens, LLC*, 2019 WL 2075590, at *3 (D. Mass. May 10, 2019) (quoting *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995)).

The Second Circuit also applies a "two-prong test" for § 10(j) injunctive relief. *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364 (2d Cir. 2001). "First, the court must find reasonable cause to believe that unfair labor practices have been committed. Second, the court must find that the requested relief is just and proper." *Id.* at 364-65. The second prong of the test "incorporates elements of the four-part standard for preliminary injunctions that applies in other contexts." *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013).

The Second Circuit has recognized that its test is "slightly different" from the normal preliminary-injunction test because it "defer[s] to the NLRB, which resolves the underlying unfair labor practice complaint on the merits." *Id.* The Second Circuit instructs district courts to give the NLRB the "benefit of the doubt" on "issues of fact" and to sustain the Board's view "on questions of

law … unless the court is convinced that [the NLRB] is wrong." *Inn Credible,* 247 F.3d at 365 (citation omitted).

4. This stark split is widely acknowledged by courts, commentators, and the NLRB. The Second Circuit has recognized a "circuit split with respect to the proper standard for granting a § 10(j) petition." *HealthBridge*, 732 F.3d at 141. The Third Circuit has noted that it is "joined by the Fifth, Sixth, Tenth, and Eleventh Circuits in applying [a] two-part test," while "the Fourth, Seventh, Eighth, and Ninth" Circuits apply "the traditional four-factor equitable framework," and the "First and Second Circuits apply a hybrid standard." *Grane Healthcare*, 666 F.3d at 93-94. The Sixth Circuit below likewise noted that other "circuits use the four-factor framework that is generally used for preliminary injunctions." Pet.App.10a; *accord* Pet.App.19a (Readler, J., concurring) ("The standard we apply for § 10(j) proceedings" is "directly contrary" to the test in other circuits.).[1]

Commentators have recognized the "basic split in standards governing section 10(j) injunctions." Richard B. Lapp, *A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard*, 3 U. Pa. J. Lab. & Emp. L. 251, 266 (2001). The "dizzying diversity of formulations" has produced "a conflict among the circuits." Leslie A. Fahrenkopf, Note, *Striking the 'Just and Proper' Balance*, 80 Va. L. Rev. 1159, 1160 (1994) (citation omitted); *see* William K. Briggs, Note, *Deconstructing 'Just and Proper,'* 110 Mich. L. Rev. 127, 129 (2011) (noting "circuit

[1] *Accord Pioneer Press*, 881 F.2d at 491 (noting "conflict among the circuits"); *Spartan Mining*, 570 F.3d at 541-42 ("standard in § 10(j) cases" has "divided our sister circuits"); *Glasser v. ADT Sec. Servs.*, 379 F. App'x 483, 485 n.2 (6th Cir. 2010) ("Circuits differ over the proper standard to be applied to a § 10(j) petition.").

split … over the proper interpretation" of section 10(j)). As leading treatises note, "courts of appeal are split on the issue." 1 *Labor and Employment Law* § 15.13 (Sept. 2023 update); *accord* 13 *Moore's Federal Practice* § 65.22 (Sept. 2023 update) (similar).

The NLRB, in its briefing below, admitted the "split of authority." C.A. NLRB Br. 57. And the NLRB's section 10(j) manual includes a 45-page appendix detailing the conflict in the circuits. Section 10(j) Manual, *supra*, app. D. As the manual explains, "most circuits" use the "reasonable cause" test, but the "First, Seventh, Eighth, and Ninth Circuits" apply "traditional equitable principles." *Id.* at 2. Underscoring the significance of that difference, the NLRB instructs its attorneys to answer questions differently at section 10(j) hearings depending on the legal standard. *Id.* app. L, at 5.

Only this Court can resolve this clear, entrenched conflict. Circuits employing the traditional four-factor test have expressly rejected the reasonable-cause test, with one—the Ninth Circuit—doing so en banc. *Pioneer Press*, 881 F.2d at 488; *Spartan Mining*, 570 F.3d at 542-43; *Cal. Pac. Med.*, 19 F.3d at 456-57. On the other side, the Third, Fifth, and Sixth Circuits have refused calls to abandon the reasonable-cause test and adopt the traditional equitable factors after this Court's decision in *Winter*. *See Grane Healthcare*, 666 F.3d at 94-95; *Creative Vision*, 783 F.3d at 297; Pet.App.17a. This Court's intervention is needed to resolve this intractable disagreement over a critical federal statute.

II. The Question Presented Is Recurring, Important, and Squarely Presented

1. The standard for section 10(j) injunctions is critically significant and oft-recurring. Each year, the NLRB

issues hundreds of complaints against employers. *Performance and Accountability Report*, *supra*, at 15. In prosecuting those cases, section 10(j) injunctions are, in the words of the NLRB's General Counsel, "one of the most important tools available." Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to Regional Directors 1 (Aug. 19, 2021), https://tinyurl.com/bdnjvs44 (Aug. 2021 Abruzzo Memo).

Moreover, "the Board's § 10(j) activity is on the rise." Pet.App.21a (Readler, J., concurring). The NLRB's General Counsel recently pledged to take a more "aggressive[]" approach to section 10(j) relief. Aug. 2021 Abruzzo Memo, *supra*, at 1. The NLRB now aims to bring the "weight of a federal district court's order" down on employers at the "earliest" stage of proceedings. Feb. 2022 Abruzzo Memo, *supra*, at 1. The NLRB even instructs attorneys to call the relevant district judge's law clerk if the court has not issued a decision within 30 days of a hearing on the NLRB's request for injunctive relief. Section 10(j) Manual, *supra*, app. P-1, at 2. If repeated letters fail to yield a decision within 3-4 months, NLRB policy requires attorneys to consult leadership about seeking a writ of mandamus. *Id.*

Getting an injunction is often the whole ballgame. The NLRB's "[e]xperience demonstrates" that employers face "a strong catalyst for settlement" once their operations are enjoined. *Id.* at 15. Some 47% of all section 10(j) cases since 2010 have settled. *10(j) Injunctions*, *supra*. Settlement pressures are acute because, as the NLRB acknowledges, "the Board's administrative proceedings are often protracted" and employers have "only a slight chance" of prevailing. Section 10(j) Manual, *supra*, app. D, at 4; *id.* app. L, at 3. At the end of the day, the Board

prevails in-house in 84% of cases. *Performance and Accountability Report*, *supra*, at 16.

Moreover, "notoriously glacial" in-house administrative proceedings take years—meaning that section 10(j) injunctions often last years. *See Irving Ready-Mix*, 653 F.3d at 570 (quoting *Pioneer Press*, 881 F.2d at 491). The NLRB even tells attorneys arguing 10(j) motions not to "make any promises or predictions" about the agency's timetable or "promise that there will be no delays." Section 10(j) Manual, *supra*, at 22. Indeed, because section 10(j) relief lasts until the NLRB issues a final order, the Board has no incentive to expedite proceedings. Keeping those preliminary injunctions in place for as long as possible is particularly advantageous to the NLRB because its final orders are not self-executing, so the Board must go back to court to obtain permanent relief. 29 U.S.C. § 160(e).

Upping the pressure, section 10(j) injunctions can impose onerous burdens on employers. As in this case, injunctions can force employers to rehire previously fired staff and to keep them on the payroll for years. Pet.App.120a. Employers must do so even if that means "displacing … any employee who may have been hired, contracted for, or reassigned to replace" the fired staff members. Pet.App.120a. Other injunctions stop employers from making "changes to the terms and conditions of employment," updating an "employee handbook," or altering "work schedules." *Overstreet v. Apex Linen Holdings, LLC*, 618 F. Supp. 3d 1014, 1037 (D. Nev. 2022). In one case, a court even stopped an employer from selling a facility that was operating at a loss. *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998). And recently, the NLRB has used section 10(j) proceedings in circuits that apply its preferred "reasonable cause" test to

pursue "nationwide" injunctions against all of an employer's stores. *Kerwin*, 2023 WL 2186563, at *6.

2. The question presented is routinely outcome-determinative and squarely presented here.

The traditional four-factor test ensures that preliminary injunctions are a "drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The Eighth Circuit, for example, reserves section 10(j) relief for "rare situations" in which the NLRB "clears the relatively high hurdle of establishing irreparable injury." *S. Bakeries*, 786 F.3d at 1123 (citation omitted). Even then, the NLRB must show "likelihood of success on the merits," which requires a court to assess the "validity" of the NLRB's claims. *Parents in Cmty. Action*, 172 F.3d at 1039 (citation omitted).

Courts applying the traditional test thus regularly reject NLRB injunction requests. One district court held that the NLRB could not show likelihood of success on the merits where, despite offering "credible" witnesses, the Board had "failed to provide sufficient evidence" to prove "anti-union animus." *Osthus v. RELCO Locomotives, Inc.*, 2012 WL 12884897, at *3 & n.1 (S.D. Iowa Oct. 4, 2012). Another district court refused the NLRB's request because it had not made "allegations of … egregious behavior" sufficient to show "extraordinary circumstances" justifying an injunction. *Osthus v. Ingredion, Inc.*, 2016 WL 4098541, at *5 (N.D. Iowa July 28, 2016). Similar examples abound. *E.g.*, *Ohr v. Nexeo Sols., LLC*, 871 F. Supp. 2d 794, 801 (N.D. Ill. 2012).

Courts applying the traditional test also insist on a strong irreparable-harm showing. One court held that the NLRB's "expansive … authority to identify and then rec-

tify" unfair labor practices mitigated the risk of irreparable harm. *Henderson v. Bluefield Hosp. Co.*, 208 F. Supp. 3d 763, 773 (S.D.W. Va. 2016), *aff'd*, 902 F.3d 432. Another refused an injunction where the Board waited 15 months to request relief, showing that any injury was "neither urgent nor irreparable." *Ohr v. Arlington Metals Corp.*, 148 F. Supp. 3d 659, 674 (N.D. Ill. 2015). And the Ninth Circuit has reversed a district court for granting an injunction by "improperly appl[ying] a presumption" in favor of the NLRB "in making its irreparable harm determination." *Nexstar*, 54 F.4th at 1119-20.

Further, courts applying the traditional four-factor test reject injunctions if the balance of equities cuts against the NLRB. For instance, district courts have rejected injunctions where "significant economic harm" from "[r]einstating dozens of employee[s]" would unduly burden an employer. *Cowen v. Mason-Dixon Int'l*, 2021 WL 3852184, at *7 (C.D. Cal. Aug. 27, 2021).

By contrast, in the five circuits that embrace the undemanding reasonable-cause test, injunctions are commonplace. As Judge Readler noted below, the NLRB's burden in showing "reasonable cause" "is not a heavy one." Pet.App.28a. Because district courts are "prohibit[ed] … from any manner of fact finding," the NLRB prevails "'[s]o long as facts exist which could support the Board's theory of liability.'" Pet.App.32a (quoting *Ozburn-Hessey*, 875 F.3d at 339). And the "just and proper" step of the test is "no more demanding." Pet.App.29a (Readler, J., concurring). The NLRB must merely show that denying relief could inflict "*potential* injury … on the Board's remedial power," for instance that it is "possible" that the NLRB's power "might be curtailed." Pet.App.34a-35a.

Thus, courts within the five reasonable-cause circuits routinely award injunctions while recognizing that the burden on the NLRB "is not an onerous or heavy one." *Diaz v. Hartman & Tyner, Inc.*, 2012 WL 2513485, at *3 (S.D. Fla. June 29, 2012), *aff'd*, 714 F.3d 1244 (11th Cir. 2013). District courts have found "reasonable cause" where the evidence in favor of the NLRB's position is "marginal[]." *Id.* Another court granted an injunction when "many of the facts" were "disputed." *Hooks v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp. 2d 1029, 1035 n.1 (W.D. Tenn. 2011). So long as the court could "identify evidence" supporting the NLRB's position, "conflicting evidence or … factual disputes" were irrelevant. *Id.* And the Tenth Circuit has granted injunctive relief where "the evidence was contradictory." *Angle v. Sacks*, 382 F.2d 655, 658 (10th Cir. 1967).

The "just and proper" prong is equally forgiving. The Third Circuit approved an injunction to protect the NLRB's remedial power even when the NLRB could fully remedy the employees' harm by ordering "reinstatement with back pay." *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981). Likewise, a district court found an injunction necessary when employees might "lose confidence in the Union's ability to come to their aid." *Pascarell v. Gitano Grp., Inc.*, 730 F. Supp. 616, 624 (D.N.J. 1990). The Fifth Circuit granted an injunction where it was "necessary to avoid severely diminishing Union support." *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 856 (5th Cir. 2010). And the Tenth Circuit approved an injunction that the NLRB waited seven months to seek, treating the NLRB's "lumbering" process with "leniency." *Webco Indus.*, 225 F.3d at 1136.

3. The question is squarely presented here. As Judge Readler put it below, though the NLRB prevailed under the Sixth Circuit's relaxed test, the result might have "been drastically different had the Board been asked to satisfy the *Winter* standard." Pet.App.34a. That standard would have barred the district court from merely accepting the Board's version of events to decide whether the NLRB was likely to win on the merits—instead, the court would "have been obligated to settle these disputes of material fact, at least on a preliminary basis." Pet.App.31a.

Moreover, had the district court analyzed irreparable injury, "it would have faced a difficult inquiry." Pet.App.35a (Readler, J., concurring). The court could not "have *presumed* that termination of union supporters necessarily produces an insurmountable chill on organizing"—as it did under the relaxed test—and would have instead had to decide "if those terminations did indeed produce a chill." Pet.App.35a-36a. The NLRB also would have had to explain "why the Board could not ultimately remedy" the situation in a final order, Pet.App.36—a tough hurdle here because the unionization campaign succeeded *before* the injunction, refuting any chill, Pet.App.13a.

Starbucks' experience in other cases reinforces that the circuit split matters tremendously. In the last eighteen months, the NLRB has filed ten injunction petitions against Starbucks under 10(j)—over a third of the NLRB's 10(j) petitions against all employers. *See 10(j) Injunctions*, *supra*. To date, the NLRB has filed petitions against Starbucks in district courts in the Second,

Sixth, Ninth, Tenth, and Eleventh Circuits, raising similar types of allegations.[2]

The circuit split has forced Starbucks to contest those petitions under three different tests, with divergent results. The Western District of New York, for example, followed Second Circuit precedent and analyzed "traditional equitable principles" in rejecting the NLRB's request for an "extraordinary" section 10(j) injunction against Starbucks. *Leslie v. Starbucks Corp.*, 2023 WL 5431800, at *1 (W.D.N.Y. Aug. 23, 2023) (citation omitted). Likewise, the District of Arizona denied the NLRB's request for an injunction under the Ninth Circuit's four-factor test because the NLRB was unlikely to succeed on the merits. Hearing Tr. 160:1-6, *Overstreet*, No. 22-cv-676 (June 8, 2022), D. Ct. Dkt. 46. Though "both sides ha[d] colorable arguments," the NLRB had not carried its burden given Starbucks' evidence that it fired an employee for "violating company policy," not for union activity. *Id.* at 159:19-23; 160:1-4.

By contrast, district courts in the Sixth Circuit have granted the NLRB's petitions against Starbucks whenever "facts exist which could support the Board's theory of liability." *Kerwin*, 2023 WL 2186563, at *3 (quoting *Ozburn-Hessey*, 875 F.3d at 339); Pet.App.115a. One

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[2] Pet.App.67a; *Overstreet v. Starbucks Corp.*, No. 22-cv-676 (D. Ariz. filed Apr. 22, 2022); *Leslie v. Starbucks Corp.*, No. 22-cv-478 (W.D.N.Y. filed June 21, 2022); *Kerwin v. Starbucks Corp.*, No. 22-cv-12761 (E.D. Mich. filed Nov. 15, 2022); *Poor v. Starbucks Corp.*, No. 22-cv-7255 (E.D.N.Y. filed Nov. 30, 2022); *Henderson v. Starbucks Corp.*, No. 23-cv-52 (S.D. Ga. filed Apr. 26, 2023); *Lomax v. Starbucks Corp.*, No. 23-cv-1426 (D. Colo. filed June 6, 2023); *Hooks v. Starbucks Corp.*, No. 23-cv-1000 (W.D. Wash. filed July 6, 2023).

company should not face such disparate outcomes across different circuits.

III. The Decision Below Is Wrong

1. The Sixth Circuit's reasonable-cause standard is incorrect. Section 10(j) instructs courts to issue injunctions when "just and proper." 29 U.S.C. § 160(j). That classic, discretionary language tells courts to use their ordinary equitable powers. "'[J]ust and proper' is another way of saying 'appropriate' or 'equitable.'" *Spartan Mining*, 570 F.3d at 542-43 (citation omitted). The "term 'just' … is a synonym for 'equitable,'" and "'proper' means 'appropriate,' 'suitable,' or 'correct.'" Pet.App.23a (Readler, J., concurring). Section 10(j) thus instructs "that traditional rules govern"—not that courts should "depart" from those rules and afford the NLRB unusual deference. *Pioneer Press*, 881 F.2d at 491 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

This Court has directed that the traditional four-factor test for preliminary injunctions *always* applies unless Congress "clear[ly]" says otherwise—something courts should not "lightly assume." *Romero-Barcelo*, 456 U.S. at 313. Thus, this Court has repeatedly held that the traditional four-factor test guides courts' equitable discretion to issue a preliminary injunction under a wide range of statutes. *Winter*, 555 U.S. at 20 (collecting cases).

For instance, in *Romero-Barcelo,* the Court applied the traditional four-factor test because "the language and structure" of the Federal Water Pollution Control Act did "not suggest that Congress intended to deny courts their traditional equitable discretion." 456 U.S. at 319. Similarly, in *eBay Inc. v. MercExchange, LLC*, the Court held that the four-factor test applied because the Patent Act did not instruct courts to "depart[] from the long tradition

of equity practice." 547 U.S. 388, 391 (2006) (citation omitted). Just like those statutes, section 10(j) contains no language mandating that courts depart from the traditional test for preliminary injunctions. "As the statute gives no indication that the traditional equitable factors governing an injunction ought to be disregarded," those factors apply "in § 10(j) proceedings." Pet.App.25a (Readler, J., concurring).

2. The reasonable-cause test lacks any basis in the NLRA's text. Most tellingly, section 10(j) never employs the words "reasonable cause." By contrast, a neighboring provision, section 10(*l*), *does* employ "reasonable cause," requiring the NLRB to seek an injunction if it has "reasonable cause" to believe a union is committing specific, serious unfair employment practices like picketing an employer. 29 U.S.C. § 160(*l*); *see id.* § 158(b)(7). "Reasonable cause" is thus "the trigger of the Board's duty" to seek an injunction "under § 10(*l*)"—not a judicial standard for when to issue an injunction under section 10(j). *Pioneer Press*, 881 F.2d at 489. The fact that Congress used the words "reasonable cause" in section 10(*l*) but not section 10(j) confirms that Congress did *not* want a reasonable cause standard for section 10(j). *See Polselli v. IRS*, 598 U.S. 432, 439 (2023).

Section 10(j)'s text also does not support the just-and-proper element of the relaxed test, under which the Sixth Circuit and its brethren on the NLRB-deferential side of the split ask only whether "the remedial purposes of the Act would be frustrated" without relief. *Webco Indus.*, 225 F.3d at 1133 (citation omitted). As Judge Readler explained, that "atextual" reading of "just and proper" "depart[s] from the straightforward meaning of that statutory phrase." Pet.App.28a. "Just and proper … [i]nvok[es] the discretion [courts] traditionally exercise

when faced with requests for equitable relief." Pet.App.22a (Readler, J., concurring). Nothing in section 10(j)'s text supports a "whittled down" version of the traditional irreparable-harm inquiry. *See* Pet.App.29a.

CONCLUSION

The petition for a writ of certiorari should be granted.

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