No. 25-627

In the Supreme Court of the United States

MACY'S INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE COALITION FOR A DEMOCRATIC WORKPLACE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Coalition for a Democratic Workplace represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the National Labor Relations Board (NLRB) that threatens the wellbeing of employers, employees, and the national economy.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector.

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[1] In accordance with this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. In compliance with this Court's Rule 37.2, this brief is being filed earlier than 10 days before the due date.

Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Established in 1911, the National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its

members. To ensure that the retail community's position is heard, the NRF often files amicus curiae briefs expressing the views of the retail industry on a variety of topics.

Amici's members include many thousands of employers subject to the National Labor Relations Act (NLRA). These employers have a strong interest in the statute's interpretation and application. In this case, a divided Ninth Circuit panel created an acknowledged circuit split and erroneously upheld the NLRB's newly claimed authority to order employers "to compensate affected employees" for "all direct or foreseeable pecuniary harms" that flow from an unfair labor practice. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022). This stamp of approval on NLRB awards of compensatory or consequential damages openly split from *NLRB* v. *Starbucks Corp.*, 125 F.4th 78, 95-97 (3d Cir. 2024) (*Starbucks I*), which held that the *Thryv* damages remedy exceeds the Board's cabined authority to award equitable relief only. The Fifth and Sixth Circuits have recently aligned themselves with the Third Circuit.

Amici have a strong interest in this circuit split, which raises fundamental questions about the boundaries of the NLRB's statutory authority. Several amici participated through briefing and oral argument in *Starbucks I* and filed an amicus brief below in support of rehearing en banc.

Amici urge this Court to grant certiorari to review the Ninth Circuit's erroneous decision.[2] This circuit

[2] Although this amicus brief focuses on the NLRB's novel *Thryv* remedy, amici also support petitioner on the first question

split will wreak even more havoc than usual given the NLRA's rules for appellate venue and the NLRB's policies about following its precedents even in the face of adverse court of appeals authority. And on the merits, the Ninth Circuit's approval of *Thryv* not only contravenes statutory text and this Court's precedent, but also raises serious constitutional concerns. Certiorari is warranted to correct the Ninth Circuit and NLRB's misinterpretation of the NLRA and restore uniformity among the circuits.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the dissent of Judge Bumatay and the dissent of Judge Nelson, which was joined by Judge Bumatay plus four more judges, the Ninth Circuit became the first—and so far only—court to uphold the NLRB's novel determination that it has authority to award tort-like money damages "to compensate affected employees for all direct or foreseeable pecuniary harms" that result from an unfair labor practice. *Thryv*, 372 N.L.R.B. No. 22, slip op. at 1. The circuit split that the Ninth Circuit created quickly has grown lopsided—with the Third, Fifth, and Sixth Circuits all

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presented by the petition for a writ of certiorari. See Pet. App. 53-54 (Bumatay, J., dissenting in part) (concluding that "the Board wrongly concluded that Macy's needed to have a detailed proposal on the table within one working day of the Union's offer to return" and "ignored evidence that the lockout could have been justified as defensive given Macy's reasonable concerns of sabotage and misconduct"); see also *id.* at 82 ("Indeed, labor disputes often involve complex circumstances that can't be resolved on the short fuse that the Board requires here.").

recognizing that the Board's *Thryv* damages exceed the agency's carefully limited authority to award equitable relief only.

The Ninth Circuit's outlier approach destroys the uniformity that the NLRA was enacted to bring to federal labor law. Unless this Court resolves the circuit split, the NLRB will be able to award different remedies in different circuits. This disuniformity will exacerbate forum shopping and appellate venue fights, as employees and unions will have strong reason to file competing petitions for review in different circuits to gain access to more-favorable precedent on the types of relief available under this statute. And the resulting uncertainty over the governing law will chill employers' ability to exercise their own rights under the NLRA.

On top of these problems, the Ninth Circuit's approach is grievously wrong. When an employee is discharged or suspended in violation of the NLRA, the statute authorizes affirmative action (like reinstatement) "with or without back pay." 29 U.S.C. 160(c). The statutory text pointedly does not authorize additional forms of monetary relief, even if the NLRB believes full compensation would be desirable. Congress chose *not* to "establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *UAW* v. *Russell*, 356 U.S. 634, 643 (1958). For good reason: Allowing an administrative agency to adjudicate private rights involving compensatory or consequential damages outside an Article III court and without a jury would violate the Constitution. *Thryv*'s attempt to expand

NLRB remedies thus not only exceeds statutory limits but raises serious constitutional questions, too.

With the Ninth Circuit's denial of rehearing en banc, this new and harmful circuit split is sure to persist unless this Court weighs in. The Court should grant certiorari and reject the NLRB's claimed authority to award compensatory damages under *Thryv*.

ARGUMENT

I. The Ninth Circuit's decision to uphold *Thryv* creates an acknowledged circuit split.

As the six dissenting judges observed below, the Ninth Circuit's ruling on *Thryv* "conflicts with every other circuit court * * * to have considered this question." Pet. App. 89 (R. Nelson, J., dissenting from the denial of rehearing en banc).

The Third Circuit was first to rule on the *Thryv* remedy in *Starbucks I*. The court carefully construed 29 U.S.C. 160(c) and unanimously determined that, by its terms, it "limits the Board's remedial authority to equitable, not legal, relief." *Starbucks I*, 125 F.4th at 95. *Thryv*, on the other hand, "purports to grant broad compensatory relief." *Id.* at 96. Under the NLRB's articulation, the agency's standard "make-whole relief" will henceforth "expressly order that the [employer] compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the [employer's] unfair labor practice." *Thryv*, 372 N.L.R.B. No. 22, slip op. at 6 (emphasis omitted). This compensation focuses on the employee's loss, not the employer's gain, and thus "resembles an order to pay damages." *Starbucks I*, 125 F.4th at 96. Such a

remedy "exceeds [the NLRB's] authority under the NLRA." *Id.* at 97.

Here, the Ninth Circuit expressly "disagree[d]." Pet. App. 36 n.12. While purportedly agreeing that the NLRA authorizes the NLRB to award relief only if it is "equitable in nature," the Ninth Circuit nonetheless decided that a remedy's resemblance to compensatory (or indeed consequential) damages was not enough to fall outside the category of equitable remedies. *Ibid.* "Resemblance alone cannot be dispositive," according to the Ninth Circuit, because 29 U.S.C. 160(c) is an "express grant of broad authority to the NLRB to fashion appropriate remedies." Pet. App. 36 n.12.

In just the short time since the Ninth Circuit's denial of rehearing en banc, it already has reaffirmed the decision below in two cases. *NLRB* v. *N. Mountain Foothills Apartments*, 157 F.4th 1089, 1099 (9th Cir. 2025); *NLRB* v. *Los Robles Reg'l Med. Ctr.*, No. 23-1950, 2025 WL 3090744, at *3 (9th Cir. Nov. 5, 2025). In doing so, the Ninth Circuit doubled down on its view that "*Thryv* remedies are equitable in nature." *N. Mountain Foothills*, 157 F.4th at 1099.

Shortly after the Ninth Circuit denied rehearing en banc, however, two other courts of appeals issued rulings aligning with the Third Circuit. See *Hiran Mgmt., Inc.* v. *NLRB*, 157 F.4th 719, 725 (5th Cir. 2025); *NLRB* v. *Starbucks Corp.*, 159 F.4th 455, 470 (6th Cir. 2025) (*Starbucks II*). Recognizing that a "circuit split has developed" through the Ninth Circuit's decision, the Fifth Circuit felt compelled to "side with the Third Circuit." *Hiran Mgmt.*, 157 F.4th at 725. It concluded that *Thryv* purports to award employees

"full compensatory damages," even though compensatory damages are "a typical legal remedy." *Id.* at 725, 727. Because "the remedy the NLRB articulated in *Thryv* represents legal, not equitable, damages," it is beyond the scope of the NLRB's statutory authority. *Id.* at 729. The Sixth Circuit agrees: The language of 29 U.S.C. 160(c) shows that the Board's remedial authority is limited to "traditional equitable remedies." *Starbucks II*, 159 F.4th at 470. Yet the *Thryv* remedy "reflects legal relief amounting to money damages." *Id.* at 474; see also *3484, Inc.* v. *NLRB*, 137 F.4th 1093, 1125 (10th Cir. 2025) (Eid, J., concurring in part and dissenting in part) ("[T]he Board has no power to award compensatory or consequential damages. Instead, the Board's remedial authority is limited to equitable relief.").

II. This circuit split creates intolerable inconsistency and uncertainty.

With four circuits having weighed in, and the Ninth Circuit having denied rehearing, the circuit split is entrenched and can only grow deeper. While any circuit split over a federal statute is a strong candidate for certiorari, this split is especially worthy of the Court's attention.

Congress designed the NLRA to provide "a single, uniform, national rule" for labor law. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 241 (1959). The statute reflects a strong "federal interest in uniform regulation of labor relations." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 57 (1966). A circuit split is incompatible with this goal of uniformity. It guarantees that employees and employers will be sub-

ject to conflicting outcomes depending on which federal court of appeals decides the appeal from the NLRB's final order.

Although that is bad enough, the problem grows still worse because of the NLRA's permissive rules regarding appellate venue. Under the statute, "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order." 29 U.S.C. 160(f). And the petition for review properly may be filed "in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." *Ibid.*

As this very case illustrates, the "person aggrieved" standard is capacious. Here, the union that won before the NLRB could nonetheless petition for review as a person aggrieved because it requested "several extraordinary remedies" that the NLRB almost never awards. See Pet. App. 14-15. Then, when the NLRB predictably declined to award those remedies here, the union was "aggrieved" because it did not get all it asked for. *Ibid.* Naturally, the union petitioned for review in the circuit of its choosing: the Ninth. *Ibid.* That choice differed from petitioner's, so the Judicial Panel on Multidistrict Litigation had to make a random selection between the two chosen circuits in accordance with 28 U.S.C. 2112(a)(3). That random selection steered the appeal to the Ninth Circuit (which ruled against petitioner) rather than the Fifth Circuit (which, under the reasoning of *Hiran*

Management, likely would have ruled for petitioner). The outcome thus turned on the luck of the draw.

Such situations could become common if the Court does not grant certiorari and ensure that circuits apply the same ground rules. Unions and employees can, and will, understandably seek review in the Ninth Circuit or in circuits where *Thryv* remains an open question. Employers can, and will, seek review in the Third, Fifth, or Sixth Circuits—or at least anyplace other than the Ninth Circuit. The Judicial Panel on Multidistrict Litigation will be called upon with increasing frequency to make potentially outcome-determinative circuit selections.

And it is unlikely that this problem will go away any time soon. To be sure, *Thryv* was a controversial decision even among the NLRB members who issued it. Three members voted for the new remedy, while two others issued a spirited dissent. See *Thryv*, 372 N.L.R.B. No. 22, slip op. at 16-21 (opinion of Members Ring and Kaplan). Despite the controversy, however, two of the NLRB's institutional practices suggest that the agency will adhere to *Thryv*.

First, the Board maintains a "nonacquiescence" policy under which it adheres to its decisions even after circuit courts reject them. See, *e.g.*, *Heartland Plymouth Ct. MI, LLC* v. *NLRB*, 838 F.3d 16, 20-21 (D.C. Cir. 2016). The NLRB already has said that it will apply this nonacquiescence policy to *Thryv* and continue to treat *Thryv* as "controlling precedent." *Airgas USA, LLC*, 373 N.L.R.B. No. 102, slip op. at 1 n.2 (Sept. 18, 2024).

Second, although the makeup of the NLRB has shifted with the change in presidential administrations, it is unlikely that the newly constituted NLRB will have the votes needed to overrule *Thryv* anytime soon. For most of 2025, the NLRB lacked the three-member quorum it needs to operate. See 29 U.S.C. 153(b). But even beyond the minimum statutory quorum, the NLRB historically has insisted on having at least three votes in favor before it overturns one of its precedents. See, *e.g.*, Robert Iafolla, *NLRB Primed to Move Quickly When Quorum Restored, Ex-Chair Says*, Bloomberg Law News (Oct. 23, 2025), https://news.bloomberglaw.com/daily-labor-report/nlrb-primed-to-move-quickly-when-quorum-restored-ex-chair-says (describing "the agency's long tradition of needing three votes to overturn precedent"). Member Prouty, however, was in the *Thryv* majority and seems unlikely to provide the necessary third vote to overturn *Thryv* after the quorum's restoration. See *ibid.* And even if the NLRB eventually reverses *Thryv* because of the change in administration, that reversal is unlikely to be permanent without this Court's intervention. The NLRB has a notorious "flip-flop problem" and routinely reverses its doctrine after the presidency shifts from one party to the other, "seesawing back and forth between statutory interpretations depending on its political composition." *Valley Hosp. Med. Ctr., Inc.* v. *NLRB*, 100 F.4th 994, 1003-1004 (9th Cir. 2024) (O'Scannlain, J., specially concurring).

Unless this Court steps in, *Thryv* will remain part of the NLRB's "standard remedy," 372 N.L.R.B. No. 22, slip op. at 6, even though *Thryv* will remain unenforceable in three of the four circuits to have ad-

dressed it. That disparity destroys the labor-law uniformity that the NLRA seeks to establish and creates strong incentives for forum shopping.

The lack of predictability over the statutorily available remedies is particularly alarming in cases like this. Petitioner attempted to invoke its statutory right to use economic pressure (a lockout) in its negotiations with a union. Yet the NLRB ruled that petitioner was on the hook for significant compensation. As the Ninth Circuit majority noted, the NLRA generally leaves employers "free to settle their differences [with a union over contract proposals] by resort to such economic weapons as * * * lockouts." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336 (1981). But even so, the majority upheld the NLRB's large award of monetary relief—including both backpay and compensation for all direct or foreseeable pecuniary harm that resulted from the lockout—because of a two-day delay in Macy's contractual proposal after the union unexpectedly announced a return to work. See Pet. App. 80 (Bumatay, J., dissenting in part).

This remedial framework—which may or may not apply depending on which circuit happens to be randomly selected for the appeal—will have a significant chilling effect on employers' ability to use the lawful tools in their toolkit. Employers risk facing long-running monetary obligations not just for traditional backpay but now also for a broad range of other purportedly foreseeable harms as well—such as employees' "out-of-pocket medical expenses" and "interest and late fees on credit cards." *Thryv*, 372 N.L.R.B. No.

22, slip op. at 9 (citation omitted). This practical concern only underscores the importance of this Court's review.

III. The NLRB lacks authority to award compensatory or consequential damages.

Finally, the Ninth Circuit's decision below, like the *Thryv* decision it upholds, is incorrect for the reasons identified by the Third, Fifth, and Sixth Circuits. The NLRA does not permit awards of full compensatory or consequential damages.

A. The text of the statute identifies backpay as the only form of monetary relief that the NLRB may award to employees injured by an unfair labor practice. On finding that a person has committed an unfair labor practice, the agency "shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees *with or without back pay*." 29 U.S.C. 160(c) (emphasis added). This statutory language has remained unchanged from the beginning. See National Labor Relations Act, Pub. L. No. 74-198, § 10(c), 49 Stat. 449, 454 (1935).

Two legislative additions in 1947 reinforce the limits of this remedial authority. First, Congress added language underscoring that "where an order directs reinstatement of the employee, *back pay may be required* of the employer." Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 147 (emphasis added) (codified at 29 U.S.C. 160(c)). Second, Congress directed that "[n]o order of the Board shall require the reinstatement of any indi-

vidual as an employee who has been suspended or discharged, *or the payment to him of any back pay*, if such individual was suspended or discharged for cause." *Ibid.* (emphasis added). This limitation on backpay "makes little sense"—and has a huge loophole—if the NLRB had unstated statutory authority to order other monetary compensation for the employee's injuries. Pet. App. 63 (Bumatay, J., dissenting in part). That cannot have been Congress's understanding in 1947 when it adopted this amendment.

The statute thus identifies backpay as the single optional form of monetary relief that the NLRB may award to supplement its authority to prohibit certain conduct or require affirmative action, like reinstatement. Ordering parties to cease and desist from their unfair labor practices—or to take affirmative corrective action—is a quintessential exercise of equitable remedial power. *Starbucks I*, 125 F.4th at 95. By contrast, an award of "compensatory *damages*—monetary relief for all losses * * * sustained as a result of the alleged breach of [legal] duties"—is "the classic form of *legal* relief." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 255 (1993). As this Court has recognized, however, the NLRA "sets up no general compensatory procedure." *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 665 (1954). Nor does it "authoriz[e] the Board to award full compensatory damages." *Russell*, 356 U.S. at 643. Instead, it more modestly authorizes "back pay" as a "minor supplementary" form of relief. *Laburnum Constr.*, 347 U.S. at 665.

B. The circumscribed language of Section 10(c) contrasts sharply with other, more expansively written statutes. These contrasting enactments confirm that when Congress intends to authorize compensatory or consequential damages, it does so explicitly.

Consider Title VII of the Civil Rights Act of 1964. Its original "remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act." *United States* v. *Burke*, 504 U.S. 229, 240 n.10 (1992) (citing 29 U.S.C. 160(c)); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 & n.11 (1975). As originally enacted, Title VII provided:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay[.]

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. 2000e-5(g)(1)).

This language is "nearly identical" to the pivotal language in 29 U.S.C. 160(c). Pet. App. 64 (Bumatay, J., dissenting in part). And like 29 U.S.C. 160(c), Title VII's provision has a "make whole" purpose, *Albemarle Paper*, 422 U.S. at 419, which aims to "restor[e] victims * * * to the wage and employment positions they would have occupied absent the unlawful discrimination." *Burke*, 504 U.S. at 239. Yet despite this restorative, make-whole purpose, this Court has recognized that the provision "declined to recompense Title VII plaintiffs for anything beyond the wages

properly due them," including "any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (*e.g.*, a ruined credit rating)." *Id.* at 239, 241. The same conclusion follows for the substantively indistinguishable language of 29 U.S.C. 160(c).

Title VII is not the only other statute that drives home the point. Another instructive comparison is the Age Discrimination in Employment Act of 1967 (ADEA). It sweeps far more broadly than the NLRA and the original language of Title VII, by providing "for 'such *legal or equitable* relief as may be appropriate to effectuate the purposes of [the statute],'" plus recovery "of wages lost and an additional equal amount as liquidated damages." *Comm'r* v. *Schleier*, 515 U.S. 323, 325 (1995) (citations omitted; emphasis added). Yet despite this greater breadth, and the explicit authorization of "legal" relief, this Court still ruled that the ADEA provides no compensation for "consequential damages." *Id.* at 336 (quoting *Burke*, 504 U.S. at 239).

When Congress wishes for broader compensatory or consequential damages to be available, it says so. For example, the Family and Medical Leave Act of 1993 provides that when an employee has no lost wages, salary, benefits, or other compensation, he or she may recover "any actual monetary losses sustained * * * as a direct result of the violation, such as the cost of providing care." 29 U.S.C. 2617(a)(1)(A)(i)(II). And in the Civil Rights Act of 1991, Congress revisited Title VII and authorized a much broader range of "compensatory and punitive

damages," including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. 1981a(a)(1), (b)(3). But Congress has never authorized such damages under the NLRA.

C. The canon of constitutional avoidance provides further reason to grant certiorari and reject *Thryv*. The *Thryv* remedy raises grave constitutional concerns under Article III and the Seventh Amendment.

Congress may not bestow the federal "judicial Power" on adjudicatory bodies that are not Article III courts, see U.S. Const. art. III, § 1; it may authorize administrative adjudication of "public rights" only. See, *e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). Cases of "public rights" are those "arising 'between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,'" and they contrast with "matters 'of private right, that is, of liability of one individual to another under the law as defined.'" *Id.* at 489 (citation omitted). With matters of private right, "Congress may not avoid a jury trial by preventing [a] case" implicating the Seventh Amendment "from being heard before an Article III tribunal." *SEC* v. *Jarkesy*, 603 U.S. 109, 127 (2024). In *Jarkesy*, this Court made clear that Congress violates the Constitution if it purports to authorize a juryless agency adjudication of private rights that are legal in nature. See *id.* at 120-121, 126-127.

Thryv implicates the same constitutional concerns as the fraud penalty at issue in *Jarkesy*. See Pet. App. 67-76 (Bumatay, J., dissenting in part); *id.* at 104-109 (R. Nelson, J., dissenting from the denial of rehearing

en banc). *Jarkesy* itself recognized that "money damages are the prototypical common law remedy." 603 U.S. at 123 (citing *Mertens*, 508 U.S. at 255); see also *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 47-48 (1989) (collecting cases recognizing that awards of money damages fall on the legal, rather than equitable, side of the line). And "compensation," like "punishment," is a "purpose[] traditionally associated with legal relief." *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998). To be sure, courts of equity had authority to order equitable restitution to prevent unjust enrichment. But such an award, unlike *Thryv* relief, is measured by the defendant's gain, not the claimant's injury. See, *e.g.*, *Starbucks II*, 159 F.4th at 475.

Nor is *Thryv* saved by the public-rights exception to Article III adjudication. *Thryv* goes beyond vindicating public rights—such as "the public interest in effecting federal labor policy"—and instead self-consciously targets "the wrong done the individual employee." *Teamsters* v. *Terry*, 494 U.S. 558, 573 (1990) (citation omitted). The NLRB admits that *Thryv*'s purpose is "to rectify[] the harms actually incurred by the victims of unfair labor practices." 372 N.L.R.B. No. 22, slip op. at 11. This effort to adjudicate private rights poses a constitutional problem, and it makes no difference that the NLRB's adjudication of unfair labor practices "originate[d] in a newly fashioned regulatory scheme" giving the agency authority to adjudicate unfair labor practices. *Jarkesy*, 603 U.S. at 135 (citation omitted). *Thryv* improperly focuses on "the liability of one individual to another." *Stern*, 564 U.S. at 489 (citation omitted).

Aware of the constitutional pitfalls, Congress settled on carefully targeted language in 29 U.S.C. 160(c): "reinstatement with or without back pay." The Ninth Circuit erred in allowing *Thryv* to blow past this limit and invite constitutional controversy. If "legislation and the Constitution brush up against each other, [a court's] task is to seek harmony, not to manufacture conflict." *United States* v. *Hansen*, 599 U.S. 762, 781 (2023). And when a proposed "construction of [the NLRA] would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Because *Thryv* raises such problems, this Court should grant review and repudiate the NLRB's novel, broad, and constitutionally suspect assertion of remedial power.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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