

No. _____

In the Supreme Court of the United States

PG PUBLISHING CO., INC. D/B/A PITTSBURGH POST-GAZETTE,
Applicant,

v.

NATIONAL LABOR RELATIONS BOARD AND NEWSPAPER GUILD OF
PITTSBURGH/CWA LOCAL 38061,
Respondents.

TO THE HONORABLE SAMUEL A. ALITO, JR.,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

**EMERGENCY APPLICATION FOR STAY OF INJUNCTION PENDING
DISPOSITION OF THE APPEAL IN THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT AND CONSIDERATION AND
DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI AND
REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY**

Brian M. Hentosz
Morgan Dull
LITTLER MENDELSON, P.C.
One PPG Place, Suite 2400
Pittsburgh, PA 15222

Michael D. Oesterle
Mason C. Rush
KING & BALLOW
26 Century Boulevard, Suite TN 700
Nashville, TN 37214

Christopher J. Paoella
Counsel of Record
REICH & PAOLELLA LLP
111 Broadway, Suite 2002
New York, NY 10006
(212) 804-7097
cpaoella@reichpaoella.com

Fritz Byers
414 North Erie Street, Second Floor
Toledo, OH 43604

Counsel for Applicant PG Publishing Co., Inc., d/b/a/ Pittsburgh Post-Gazette

**IDENTITY OF PARTIES, CORPORATE DISCLOSURE STATEMENT,
AND RELATED PROCEEDINGS**

Applicant is PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette. Pursuant to Rule 29.6, Applicant states that its parent company is Block Communications, Inc.

Respondents are the National Labor Relations Board and Newspaper Guild of Pittsburgh/CWA Local 38061.

The related proceedings are:

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Dec. 8, 2025) (order denying motion for rehearing and rehearing en banc of order denying motion to stay injunction), appended at App. 1a.

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Nov. 24, 2025) (order denying motion to stay injunction), appended at App. 2a.

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Nov. 10, 2025) (order denying motion for civil contempt and clarifying Section 10(e) injunction), appended at App. 3a.

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Nov. 10, 2025) (panel decision on the merits), appended at App. 5a.

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Apr. 29, 2025) (order denying motion for rehearing and rehearing en banc of injunction order and denying motion for clarification), appended at App. 19a.

PG Publishing Co., Inc. v. NLRB, Nos. 24-2788, 24-3057 (3d Cir. Mar. 24, 2025) (order granting temporary injunctive relief under Section 10(e) of the National Labor Relations Act), appended at App. 21a.

PG Publishing Company d/b/a Pittsburgh Post-Gazette, Cases 06-CA-248017, 06-CA-263791, 06-CA-269346, 373 NLRB No. 93 (Sept. 20, 2024) (NLRB decision on the merits), appended at App. 24a.

PG Publishing Company d/b/a Pittsburgh Post-Gazette, Cases 06-CA-248017, 06-CA-263791, 06-CA-269346 (N.L.R.B. Div. Judges Jan. 26, 2023) (administrative law judge's decision on the merits), appended at App. 52a.

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to Rules 20, 22, and 23 of this Court and 28 U.S.C. §§ 1651 and 2101, Applicant PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette (the Post-Gazette), respectfully applies for a stay, pending the disposition of its pending appeal in the U.S. Court of Appeals for the Third Circuit and the consideration and disposition of its anticipated petition for a writ of certiorari, of the temporary injunctive relief granted pursuant to Section 10(e) of the National Labor Relations Act (NLRA), by the United States Court of Appeals for the Third Circuit in its Order of March 24, 2025. App. 19a–21a.

INTRODUCTION

This emergency application asks the Court to stay a “temporary” injunction, meant to preserve the status quo and prevent continued legal violations during a pending appeal, that has morphed into a permanent obstacle to appellate review. The Third Circuit’s merits judgment presents important questions of labor law on which the Post-Gazette intends to seek certiorari. But the court of appeals, through a rare appellate-level preliminary injunction entered under the putative authority of Section 10(e) of the NLRA, has ordered the Post-Gazette to make immediate, significant, and irremediable changes to its employee health insurance plan—even before that judgment becomes final. While the statute requires such injunctions to be “temporary,” this one is anything but. If not permanent, it is at least indefinite: To comply, the newspaper will have to enter into a contractually- and statutorily-regulated health care arrangement that will far outlive this case. And its effects will be catastrophic, both economically (because it imposes crippling nonrecoverable costs) and legally (because it effectively forecloses review of cert-worthy issues).

The case arises from an order of the National Labor Relations Board (NLRB) finding that the Post-Gazette engaged in unfair labor practices in bargaining with Respondent Newspaper Guild of Pittsburgh/CWA Local 38061 (the Guild), which represents employees in the editorial department of the Post-Gazette’s newsroom.

An NLRB order is not independently enforceable; rather, Section 10(e) of the NLRA authorizes the Board to petition a federal court of appeals for enforcement. That section also empowers the court of appeals to grant “temporary relief,” analogous to a trial court’s preliminary injunction, to maintain the status quo and prevent continued violation of the Act while it reviews the petition. 29 U.S.C. § 160(e).

The Post-Gazette sought appellate review of the Board’s order in the Third Circuit; the NLRB cross-filed a petition to enforce the order. In March 2025, a divided motions panel of the court, over the dissent of Judge Phipps, issued a Section 10(e) injunction (the Injunction). App. 21a–23a. Among other things, the Injunction directed the Post-Gazette to “rescind” changes in health insurance coverage for Guild-represented employees and “revert” back to the coverage that had been provided for in Guild’s prior, expired, collective bargaining agreement (CBA). App. 3a–4a, 23a.

On November 10, 2025, the Third Circuit merits panel denied the Post-Gazette’s petition for review and granted enforcement of the Board’s order. App. 5a–18a. The panel’s decision raised two certiorari-worth questions that have split the courts of appeals: *First*, does the NLRB have the statutory and constitutional authority to award consequential damages, or is the Board limited to granting equitable relief? And *second*, does the NLRA

permit a finding that a party bargained in bad faith based solely on the substance of its bargaining proposals on mandatory subjects of bargaining?

In the normal course, the Post-Gazette would seek en banc review of the ruling and, if necessary, file a petition for certiorari so this Court could consider the circuit splits implicated by the panel's opinion. And in the normal course, there would be no need to seek the Supreme Court's intervention while the ordinary appellate process played out.

But the Third Circuit has disrupted the normal course by refusing to stay its "temporary" Section 10(e) Injunction while the Post-Gazette seeks appellate relief. That Injunction is irregular in multiple ways. It was entered based on a bare administrative record and lacks any independent assessment of the traditional equitable factors for a preliminary injunction, in contravention of this Court's recent decision in *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024). Worse, it went far beyond the statutory authority to temporarily protect the status quo during the pendency of the appeal, and instead disposed of an ultimate question in the case—ordering, among other things, that the Post-Gazette "rescind the changes" it made to the Guild employees' health insurance plans, "revert" their health insurance coverage back to its last effective collective bargaining agreement with the Guild (which expired in 2017), and engage in additional collective bargaining before implementing any further changes in its terms of employment. App. 3a–4a, 23a. Because the Injunction originated in the court of appeals, the Post-Gazette had no way to seek interlocutory appellate review of those irregularities.

Most significantly for this application, the Third Circuit panel inexplicably refused to stay the Injunction while the Post-Gazette pursues en banc and, if necessary, certiorari

review of its decision on the merits. App. 2a. And when the Post-Gazette sought en banc review of the Injunction and, later, the stay denial, the panel refused to refer either matter to the entire court of appeals, effectively insulating the Injunction from *any* possibility of review until after the merits decision becomes final and the court issues its mandate. App 1a, 19a–20a.

As a result, the Post-Gazette faces a live Injunction ordering it to revert its affected employees’ health insurance plans to the terms of the prior collective bargaining agreement. Compliance would bind the Post-Gazette to those terms not just until the Injunction expires in a few weeks, but for its whole next round of collective bargaining with the Guild—a process that will likely take years. This course of action will impose significant financial burdens and moot any relief that the Post-Gazette might otherwise hope to obtain from en banc or Supreme Court review of the panel’s merits decision. Even if the newspaper prevails on its claims, it will be locked into a long-term health insurance arrangement that relinquishes to an outside administrator all control over healthcare costs and benefits. Though Section 10(e) authorizes only “temporary” injunctive relief, complying with the injunction would bind the Post-Gazette long after the end of this case, a long-term consequence not contemplated or permitted by the statute.

The Post-Gazette brings this emergency application because it does not have the luxury of waiting for the ordinary appellate process to play out. Last Thursday, December 11, the NLRB’s regional director informed the Post-Gazette’s counsel that she had “recommended that contempt proceedings be instituted in this matter,” unless the Post-Gazette indicates that it will “comply with the 10(e) Injunction Order.” App. 102a–104a.

Without the Court's intervention, we expect those proceedings to begin before the Third Circuit's judgment becomes final.

In short, a temporary equitable remedy intended to protect the status quo and prevent further violations while the court of appeals considers a petition has become an enduring obstacle that could permanently foreclose full appellate review of the Post-Gazette's arguments—under pain of contempt. That would be egregious in any case; it is especially so here, where the review it threatens to short-circuit involves significant circuit splits worthy of this Court's substantive attention.

These extraordinary circumstances require the Court's intervention, both to prevent irreparable harm to the Post-Gazette and to protect the Court's own certiorari jurisdiction. The relief that the Post-Gazette seeks is modest and straightforward: This Court should stay enforcement of the Injunction pending the filing and disposition of its petition for en banc review of the panel's merits decision and its petition for writ of certiorari. In addition, given the imminent threat of contempt proceedings, it should enter a temporary administrative stay while the Court considers the application.

OPINIONS BELOW

The Third Circuit's panel opinion on the merits is available at 2025 WL 3142083 and appended at App. 5a. The court's order granting temporary relief under Section 10(e) is appended at App. 21a. The court's order denying the Post-Gazette's motion for rehearing and rehearing en banc of the Section 10(e) injunction order and denying its motion for clarification is appended at App. 19a. The court's order denying, without prejudice, the NLRB's motion for civil contempt and clarifying the Section 10(e) injunction

is appended at App. 3a. The court’s order denying the Post-Gazette’s motion to stay the Section 10(e) injunction is appended at App. 2a. The court’s order denying the Post-Gazette’s motion for rehearing and rehearing en banc of its motion to stay is appended at App. 1a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1651 and 2101(f).

STATUTORY PROVISIONS INVOLVED

Section 10 of the NRLA, codified at 29 U.S.C. § 160, is appended at App. 105a.

STATEMENT OF THE CASE

A. Legal Background.

The NLRA prohibits employers and unions from engaging in certain “unfair labor practices”; the NLRB is charged with enforcing that prohibition. 29 U.S.C. §§ 158(a), (b); 160(a). If the agency receives a credible complaint, it can initiate “adjudicatory proceedings within the agency, first before an administrative law judge, and then before the Board itself.” *McKinney*, 602 U.S. at 343. The Board cannot independently enforce its own orders. Rather, “[a] federal court of appeals may review the Board’s final order, if an aggrieved party seeks judicial review or if the Board seeks enforcement of its order.” *McKinney*, 602 U.S. at 343 (citing 29 U.S.C. §§ 160(e)–(f)).

“Because the Board’s administrative proceedings take years,” the Act also permits the Board to seek temporary injunctions in federal court while a case is being litigated. *McKinney*, 602 U.S. at 343. Section 10(j) of the NLRA authorizes the Board to “petition any United States district court . . . for appropriate temporary relief or restraining order”

while the administrative adjudication is proceeding. 29 U.S.C. § 160(j). Section 10(e)—the rarely invoked parallel provision at issue in this case—similarly provides that a court of appeals, while considering a petition for enforcement, “shall have power to grant such temporary relief or restraining order as it deems just and proper.” 29 U.S.C. § 160(e). The statute expressly provides that a Section 10(e) injunction is only “temporary.” Its purpose is not to resolve the ultimate questions in the case but to “maintain the status quo” and “prevent continued violation of the Act during the pendency of an appeal.” *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. NLRB*, 449 F.2d 1046, 1050–51 (D.C. Cir. 1971) (footnote omitted).

B. The Labor Dispute and the NLRB Proceedings.

The Post-Gazette publishes the *Pittsburgh Post-Gazette*, a venerable Pittsburgh institution with roots that reach back to our nation’s founding. Its predecessor, the *Pittsburgh Gazette*, printed its first issue on July 29, 1786—America’s first newspaper published west of the Alleghanies. The newspaper has won multiple Pulitzer Prizes and has served its community with exemplary journalism. But labor unrest has roiled the paper, and the current media climate—including a nationwide shift to digital platforms—has placed its continued viability profoundly at risk.

The Guild represents employees in the editorial department of the Post-Gazette’s newsroom. The Post-Gazette and the Guild were parties to a collective bargaining agreement that expired on March 31, 2017. Under that CBA, covered employees received health insurance through the Western Pennsylvania Teamster and Employees Welfare

Fund (the Fund), a multiemployer health care benefit trust fund administered by its own board of trustees.

After the CBA expired in 2017, the Post-Gazette and the Guild began bargaining for a successor agreement. Those negotiations spanned three-and-a-half years and 24 bargaining sessions. From the outset, the Post-Gazette made clear that the newspaper had been operating at a substantial loss and that it needed flexibility to transition to an all-digital format. Given the sharp decline in demand for print media—from 2005 to 2021, about 2,200 American local print newspapers were shuttered¹—the Post-Gazette believed that this transformation was the only way it could viably continue to provide journalism to the community. Health insurance was a major point of contention throughout the negotiations. The Post-Gazette believed that continued participation in the Fund was not sustainable due to high and escalating costs and the lack of plan options offered by the Fund.

By the summer of 2020, bargaining was deadlocked. That March, the Guild had cancelled a scheduled bargaining session and indicated that it would not schedule any future meetings until the coronavirus pandemic had been completely arrested. In July 2020, the Post-Gazette concluded that the parties were at a lawful impasse and, on July 27, implemented portions of its last, best, and final bargaining proposal. This included moving the Guild-represented employees from the Fund to the company's own self-insured health insurance plan, which already covered the Post-Gazette's non-union employees and newspaper employees represented by unions in other bargaining units.

¹ See Margaret Sullivan, *What Happens to Democracy When Local Journalism Dries Up?* Wash. Post Magazine (Nov. 30, 2021), <https://www.washingtonpost.com/magazine/2021/11/30/margaret-sullivan-the-local-news-crisis/>.

In April 2022, the NLRB filed an administrative complaint alleging, among other things, that the Post-Gazette bargained in bad faith by “insisting upon proposals that are predictably unacceptable to the Union,” prematurely declaring impasse, and unilaterally implementing some of its bargaining proposals. Dkt. 33-1 at JA0166–81.² The administrative law judge (ALJ) concluded that the Post-Gazette had engaged in bad faith bargaining because it had “prematurely declared impasse and made a combination of contract proposals in its final offer that demonstrate an intent to frustrate arriving at an agreement.” App. 80a. The ALJ ordered the Post-Gazette to restore the terms and conditions of employment that had been set forth in the Guild’s expired CBA and to provide backpay (including withheld contractual benefits) to the Guild employees. App. 88a. Citing the Board’s holding in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the ALJ also ordered the newspaper to “compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes.” *Ibid.*

The Board affirmed the ALJ’s decision in a two-page opinion, concluding that the Post-Gazette had engaged in unfair labor practices because its bargaining position “insisted on provisions . . . that left the Union with fewer rights and less protection than provided by law without a contract.” App. 25a.

C. The Third Circuit’s Section 10(e) Injunction and Merits Decision.

In September 2024, the Post-Gazette petitioned the Third Circuit for review of the Board’s order. The NLRB cross-petitioned for enforcement. That December, the Board

² “Dkt.” refers to documents filed on the electronic docket in the proceedings before the Third Circuit, Nos. 24-2788, 24-3057.

moved the court of appeals for interim injunctive relief under Section 10(e) requiring the Post-Gazette comply with the Board's order, including by restoring the healthcare insurance available under the old CBA, pending a decision on the merits.

On March 24, 2025, a Third Circuit motions panel issued an order granting in part, and denying in part, the Board's request for injunctive relief. App. 21a–23a. The Injunction it issued ordered the Post-Gazette to “rescind the changes in the terms and conditions of employment related to health insurance for its unit employees that were unilaterally implemented” and to bargain with the Guild “[b]efore implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.” App. 23a.

In response, the Post-Gazette filed a petition for en banc review of the Section 10(e) order, along with a motion seeking clarification as to what the company was required to do to comply with the Injunction. The motions panel denied both requests without explanation and declined to refer the en banc petition to the full court. App. 19a–20a.

On June 17, 2025, the Board moved that the Post-Gazette be held in contempt for failing to comply with the Section 10(e) Injunction. On November 10, 2025—the same day it handed down its merits decision—the court denied the contempt motion without prejudice and, in a tacit acknowledgment of the confusion referenced in the Post-Gazette's earlier motion for clarification, clarified the scope of its Injunction:

We clarify that this Court's March 24, 2025 order, No. 24-2788, ECF No. 57, paragraph (c), requires that PG Publishing revert health insurance coverage for unit employees to the coverage provided prior to the unilateral implementation of terms; specifically, reversion to health insurance coverage and pricing as set forth in Exhibit B to the *2014–2017 Agreement Between Pittsburgh Post-Gazette and the Newspaper Guild of Pittsburgh*, JA596–99.

App. 3a–4a. Based on this “clarification,” it became apparent that the Injunction would require the Post-Gazette to transition all Guild-represented employees back to the Fund-administered health insurance program they were enrolled in under the expired CBA, a move that would impose crippling long-term costs on the newspaper.

With respect to the merits, the Third Circuit panel, applying a “highly deferential” standard of review to the Board’s order, concluded that the Post-Gazette violated the NLRA by failing to bargain in “good faith.” App. 11a. Specifically, the panel determined the Post-Gazette violated the Act because the Company’s bargaining proposals “as a whole” left the Guild employees with “fewer rights than the law would provide them without a contract.” App. 12a–13a (emphasis omitted). The Third Circuit did not identify any bad faith conduct by the Post Gazette apart from the substance of its bargaining proposals. The panel also rejected the Post-Gazette’s argument that recent binding Third Circuit precedent precluded the *Thryv* consequential damages remedy, concluding the Post-Gazette had failed to raise that argument sufficiently before the Board. App. 17a–18a.

The Post-Gazette believes that the panel’s decision contains multiple reversible errors, both as discussed later in this application and under Third Circuit precedent. Accordingly, it planned to seek rehearing of the decision en banc and, if necessary, petition this Court for certiorari. However, given the eleventh-hour “clarification” of the scope of the Section 11(e) Injunction, it feared that the Board would file a renewed motion for contempt before it could do so. Accordingly, it moved the panel to stay the Injunction—which, again, was always meant to be “temporary” according to the plain language of Section 10(e)—pending its petition for en banc review. On November 24, the panel denied

the motion to stay without explanation. App. 2a. The Post-Gazette promptly moved for panel rehearing and rehearing en banc of that denial. On December 8, the panel summarily denied that motion as well, again refusing to refer the request to the full court. App. 1a.

The Post-Gazette still intends to file a petition for review en banc (which is due by December 26) and to seek certiorari if necessary. However, it faces the imminent threat of contempt proceedings unless it immediately reverts the Guild employees' health care coverage to the Fund plan. A week ago, on December 11, the NLRB's regional director informed the newspaper that she has "recommended that contempt proceedings be instituted in this matter" unless the Post-Gazette complies with the Injunction. App. 103a.

As explained below, reverting to the Fund plan this would lock the newspaper in through the end of its next round of collective bargaining, a process that will extend long beyond the end of this litigation. It would also effectively relinquish all decisions about healthcare benefits and employer contributions to the unilateral discretion of the Fund—a situation that was not present even under the now-expired CBA. And it would frustrate appellate review by mooting most of the relief that the Post-Gazette could hope to obtain. All this from a "temporary" Injunction intended just to protect the status quo and prevent continued violation during the pendency of an appeal. Because every other avenue of review has been frustrated, the Post-Gazette now seeks this Court's emergency intervention.

REASONS FOR GRANTING THE APPLICATION

Under 28 U.S.C. § 2101(f), this Court may stay the execution of a final judgment pending the filing and disposition of a petition for a writ of certiorari. And under 28 U.S.C. § 1651(a), the Court may stay a lower court’s proceedings even before final judgment if a stay “is necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law.” *See, e.g., Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (granting stay “pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought”).

To obtain a stay, an applicant must show “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). “In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.” *Hollingsworth*, 558 U.S. at 190. The Post-Gazette satisfies those requirements.

First, there is a reasonable probability that the Court will grant certiorari on at least one of two issues raised by the Third Circuit’s ruling: (1) whether the NLRB may award consequential damages for “foreseeable pecuniary harms” traceable to an unfair labor practice; and (2) whether the NLRA permits a finding of bad faith based solely on the substance of a party’s bargaining proposals, absent any bad faith conduct away from the

bargaining table. These are important and recurring questions of labor law and each implicates a significant split among the courts of appeals.

Second, there is at least a fair prospect that the Court will conclude that the Third Circuit's decision was erroneous. With respect to the first question, three courts of appeals have squarely held, *contra* the decision here, that the NRLA does not authorize the award of consequential damages. *See, e.g., NLRB v. Starbucks Corp.*, 159 F.4th 455, 482 (6th Cir. 2025) (holding that "the Board's efforts both lack statutory authority and raise serious constitutional questions" under the Seventh Amendment's jury trial guarantee). The Ninth Circuit is the only court of appeals to uphold the consequential damages remedy, over the vigorous dissents of Judge Bumatay on the panel and of six judges at the en banc stage. *Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 155 F.4th 1023 (9th Cir. 2025). There is at least a fair prospect that this Court will side with the majority of the courts of appeals that have considered the issue and strike down the consequential damages remedy.

As to the second question, the Third Circuit's finding of bad faith based solely on the substance of the Post-Gazette's bargaining position conflicts squarely with the D.C. Circuit's long-standing rule that an "employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence." *Cincinnati Newspaper Guild, Loc. 9 v. NLRB*, 938 F.2d 284, 289 (D.C. Cir. 1991). While the D.C. Circuit has stated the principle most clearly, its position is firmly in line with the great weight of nationwide authority, which holds that bargaining position is simply one factor to be considered in weighing the totality of the evidence. The

rule also accords with this Court’s admonition that “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 404 (1952). Because the Third Circuit’s position is contrary to this weight of authority, there is a fair prospect that the Court will conclude that the lower court’s decision was erroneous.

Third, the Post-Gazette will face significant and irreparable harm if the Injunction is not stayed. Section 10(e) authorizes only “temporary” injunctive relief that terminates at the end of the proceeding. The Third Circuit, however, has ordered the Post-Gazette to “rescind” its transfer of covered employees to the newspaper’s health insurance plan and to “revert” their coverage back to that provided in its last (and long-expired) CBA. That will require it to enter into an arrangement with a third-party Fund that will cede to the Fund control of healthcare costs and benefits and bind the newspaper through the whole next round of continued collective bargaining—a process that will likely take years. In addition to the significant financial burdens, compliance with the Injunction will effectively moot the relief that the Post-Gazette could otherwise seek through en banc and certiorari review. It will also frustrate this Court’s ability to consider the cert-worthy issues presented by this case. Especially given the procedural irregularities surrounding the issuance of the 10(e) Injunction, these harms amply justify the grant of a stay.

Finally, the balance of relative harms tips decisively in the Post-Gazette’s favor. A temporary stay of the Injunction will impose no irreparable harm on the Guild or its members. Guild-represented employees will not be deprived of health care; they are already covered under the newspaper’s own insurance plan, along with its non-union

employees. If the Board ultimately prevails on the merits, it can award restitution to remedy any difference in premiums.

I. The Post-Gazette Has a Reasonable Likelihood of Success on the Merits.

A. There is a reasonable likelihood that this Court will grant certiorari to resolve the circuit split on the NLRB’s ability to award consequential damages.

1. The viability of the *Thryv* remedy presents a clear and pressing circuit split that is likely to be resolved against the Board.

The Board’s order, which the Third Circuit affirmed, ordered the Post-Gazette to “compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes” in their terms of employment. App. 46a. The award followed the Board’s announcement in *Thryv, Inc.*, that “that in all cases in which our standard remedy would include an order for makewhole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent’s unfair labor practice” 372 NLRB No. 22, at 6 (2022), *review granted and vacated in part*, 102 F.4th 727 (5th Cir. 2024) (emphasis in original). That relief, the Board held, included such things as “interest and late fees on credit cards,” “penalties if [an employee] must make early withdrawals from [a] retirement account,” “increased . . . childcare costs,” and “other costs [incurred] to make ends meet.” *Id.* at 9, 15.

The announcement of the so-called *Thryv* remedy broke with 90 years of the agency’s practice. Before *Thryv*, it had always been understood that the Board’s remedies were limited to equitable relief, not legal damages. And for good reason: The NLRA authorizes the Board, on finding a violation, to “issue . . . an order requiring [the employer]

to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]”—all classical equitable remedies. 29 U.S.C. §160(c). Consequential damages, in contrast, are a legal remedy, and therefore outside of the Board’s statutory authority.

The *Thryv* remedy also raises serious constitutional questions. As this Court recently confirmed, the Seventh Amendment requires a jury trial before an agency may award money damages for statutory claims that are “legal in nature.” *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024) (holding that SEC’s claim for civil monetary penalties triggered Seventh Amendment right to jury trial). And consequential damages—as opposed to restitution or backpay—are legal, not equitable, in nature. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (“Money damages are, of course, the classic form of *legal* relief.”) (emphasis in original).

Impelled by these concerns, courts of appeals in three circuits have struck down the *Thryv* remedy. Each of those cases involved the same formulation of damages for “direct or foreseeable pecuniary harms” at issue here. In *Hiran Management, Inc. v. NLRB*, 157 F.4th 719 (5th Cir. 2025), the Fifth Circuit reasoned that the NLRA “limits the NLRB to ordering certain equitable remedies,” while the “[t]he articulation of ‘foreseeable pecuniary harms’ in *Thryv* is a form of legal damages.” *Id.* at 725, 728. The court therefore concluded that “the *Thryv* remedy goes beyond the text of the NLRA” and “exceeds the NLRB’s authority.” *Id.* at 728, 729.

The Sixth Circuit, in a lengthy and well-reasoned opinion, likewise concluded that the plain language of the Act “limit[s] the realm of possible remedies to those primarily equitable in nature.” *NLRB v. Starbucks Corp.*, 159 F.4th 455, 469 (6th Cir. 2025). The *Thryv* remedy, in contrast, “reflects legal relief amounting to money damages, to which a jury trial right attaches.” *Id.* at 474. Because the *Thryv* remedy “lack[ed] statutory authority and raise[d] serious constitutional questions,” the court of appeals vacated the Board’s award of consequential money damages. *Id.* at 482.

Finally, the Third Circuit—in a decision handed down after this appeal was filed but before the panel issued its merits decision—agreed that “[t]he NLRA . . . limits the Board’s remedial authority to equitable, not legal, relief.” *NLRB v. Starbucks Corp.*, 125 F.4th 78, 95 (3d Cir. 2024).³ And it held that the Board’s grant of “broad compensatory relief” pursuant to the *Thryv* remedy “exceeds its authority under the NLRA.” *Id.* at 97.

The Ninth Circuit stands alone on the other side of the split. In *International Union of Operating Engineers, Stationary Engineers, Local 39 v. NLRB*, 155 F.4th 1023 (9th Cir. 2025), a divided panel concluded that “*Thryv*’s make-whole framework is valid when the remedies are equitable and ‘only actual losses [are] made good.’” *Id.* at 1046 (alteration in original). It therefore upheld the Board’s award of consequential damages, at least insofar as it was “sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices.” *Ibid.* (emphasis in original; citation omitted).

³ The panel below declined to follow *Starbucks* based on its finding that the Post-Gazette waived its remedial argument by not properly raising it before the Board. App. 17a–18a. As discussed below in Section I.A.2, that finding was plainly incorrect and, in any case, is no barrier to the relief sought here.

In a sharp dissent, Judge Bumatay argued that “foreseeable or consequential damages are fundamentally at odds with ‘equitable relief.’” *Id.* at 1056 (Bumatay, J., dissenting) (citation omitted). And he charged that the majority opinion, by “slapping [on] the label that . . . foreseeable damages [must] be ‘equitable,’” had “le[ft] the Board with a wide array of costs it may impose under *Thryv*” that would violate the NLRA and implicate the Seventh Amendment. *Ibid.* Six judges dissented from the Ninth Circuit’s denial of en banc review. The dissenters, noting that the panel’s decision “conflicts with every other circuit court and judge to have considered this question,” would have held that the *Thryv* remedy was “unauthorized by statute and forbidden by the Seventh Amendment.” *Id.* at 1072 (Nelson, J., dissenting from denial of rehearing en banc).

The availability of the *Thryv* remedy thus presents a clear and well-developed—if lopsided—circuit split that deserves resolution by this Court. A prompt resolution is especially necessary given that the Board has stated its intention to continue to apply *Thryv* even in the face of adverse rulings from the courts of appeals.⁴ Indeed, the Ninth Circuit’s decision is itself the subject of a pending petition for certiorari. *Macy’s, Inc. v. NLRB*, No. 25-627 (filed Nov. 26, 2025). Moreover, considering the plain language of the NLRA, the constitutional concern that the *Thryv* remedy violates the Seventh Amendment’s jury-trial guarantee, and the weight and persuasiveness of the circuit court authority, there is a fair prospect that the Court will resolve this question against the Board on the merits.

⁴ See, e.g., *Airgas, USA, LLC*, 373 NLRB No. 102, at 1 n.2 (2024) (noting that the “the Board’s decision [in *Thryv*] would remain valid Board precedent under the Board’s long-established policy of nonacquiescence in adverse appellate court decisions”).

As it is likely that the Court will soon grant certiorari to resolve this issue, a stay of the Injunction is appropriate to allow the Post-Gazette to present the issue for review. This is true regardless of whether the Court ultimately uses this case as its vehicle to resolve the split, or simply holds the petition for a potential GVR after granting certiorari in *Macy's*.

2. The Third Circuit's finding that the Post-Gazette waived its *Thryv* argument is incorrect and, in any case, no barrier to relief.

The Post-Gazette acknowledges that the Third Circuit panel declined to reach the merits of its argument on the *Thryv* remedy—despite recent, binding circuit precedent foreclosing that remedy—and instead held that the paper had forfeited the argument by not raising it before the Board. App. 17a–18a. The panel concluded that it “lack[ed] jurisdiction under Section 10(e) of the Act to disturb this part of the Order.” App. 18a.⁵ That finding, which was plainly incorrect, should not weigh against granting the relief sought here.

⁵ More than four decades ago, this Court described Section 10(e)'s administrative exhaustion requirement as jurisdictional. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). Because *Woelke* is binding precedent, no circuit split has developed regarding its continued vitality. But a growing “chorus of courts” has recently commented on “the doubt surrounding [Section 10(e)'s] jurisdictional effect in light of recent Supreme Court precedent.” *NLRB v. AllService Plumbing & Maint., Inc.*, 138 F.4th 889, 898–99 n.3 (5th Cir. 2025). See *ibid.* (“The Supreme Court has instructed us . . . to read some of its older jurisdictional precedents to instead embrace claims-processing rules.”); *Sysco Grand Rapids, LLC v. NLRB*, 825 F. App'x 348, 356–57 (6th Cir. 2020) (“The Supreme Court . . . has repeatedly warned us to disregard drive-by jurisdictional rulings that use the label without discussion. . . . *Woelke* appears to be such a drive-by.”) (cleaned up; citation omitted); *Quickway Transp., Inc. v. NLRB*, 117 F.4th 789, 825 (6th Cir. 2024) (Murphy, J., concurring in the judgment) (“I would not read the exhaustion mandate as jurisdictional.”); *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 299 (3d Cir. 2024) (Krause, J., concurring) (“it is not clear that Section 10(e)'s exhaustion requirement is properly considered jurisdictional at all”). If the Court is inclined to reconsider *Woelke*, this case offers that opportunity.

The Board entered its order directing the payment of consequential damages on September 20, 2024. App. 24a, 46a. Three months later, as discussed above, the Third Circuit issued its decision in *Starbucks*, holding that such a remedy was outside the Board’s statutory authority. 125 F.4th at 95. That decision was binding on the Third Circuit panel in this case, which was pending when *Starbucks* was handed down. In its opening brief before the merits panel, the Post-Gazette, relying on *Starbucks*, argued that the Board lacked the authority to issue a *Thryv* remedy. Dkt. 32, at 41–42. The panel, however, refused to apply *Starbucks*. Rather, it found that the Post Gazette had waived the argument because it had “failed to place the Board on adequate notice of the basis for its objection to the so-called *Thryv* remedy.” App. 17a.

That finding was incorrect. As the panel acknowledged, App. 17a, the Post-Gazette did object to the application of the *Thryv* remedy in its statement of exceptions to the ALJ’s decision, which it filed with the Board on March 23, 2023:

Exception 293. To the ALJ’s remedy consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), that Respondent shall also compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. (ALJD p. 37, lines 43-47).

Dkt. 34, at APPX0213. That was enough to put the Board on notice of the Post-Gazette’s objection under NLRB regulations, which require only that a party “[c]oncisely state the grounds for the exception.” 29 C.F.R. § 102.46(a)(1)(i)(D); *see also New Concepts*, 94 F.4th at 280 (“A matter which is ‘included in exceptions . . .’ is thereby preserved.”) (citing 29 C.F.R. § 102.46(f)).

As the Fifth Circuit explained—in the very decision that denied (on other grounds) the Board’s petition to enforce its original *Thryv* order—Section 10(e) “does not require employers to put an issue before the Board with pristine clarity” in order to preserve it for appellate review. *Thryv, Inc. v. NLRB*, 102 F.4th 727, 746 (5th Cir. 2024); *see also AllService Plumbing*, 138 F.4th at 897–98 (“Appellants need not conjure any ‘magic words’ to raise an issue, but simply need to launch the appropriate argument.”) (citation omitted). Thus, a general objection to “the ALJ’s Remedy” has been held sufficient to preserve an argument that specific remedial relief was improper. *Sysco*, 825 F. App’x at 357–58.

Finally, even if the Post-Gazette provided failed to provide sufficient notice of its *Thryv* objection, that should not preclude appellate review. The NLRA expressly allows such a failure to “be excused because of extraordinary circumstances.” 29 U.S.C. § 10(e). The Post-Gazette filed its exceptions with the Board more than a year-and-a-half before the Third Circuit decided *Starbucks* and, indeed, before *any* court had invalidated the *Thryv* remedy. If the subsequent issuance of binding, first-impression circuit precedent holding that a particular remedy exceeds the Board’s statutory authority is not an extraordinary circumstance, then it is difficult to imagine what would be. *See, e.g., 3484, Inc. v. NLRB*, 137 F.4th 1093, 1116 (10th Cir. 2025) (Eid, J., concurring in part and dissenting in part) (“Section 10(e) of the NLRA generally bars our jurisdiction to consider an issue that a party failed to first raise before the Board. But even in such a circumstance, we may still exercise jurisdiction where the Board acts outside the scope of its authority.”).

- B. There is a reasonable likelihood that this Court will grant certiorari to resolve the circuit split on whether the NLRA permits a court to find bad faith based solely on the substance of a party’s bargaining proposals.**
- 1. The Third Circuit’s decision below conflicts with long-standing precedent from the D.C. Circuit on this issue.**

The Third Circuit’s decision, like the Board’s opinion before it, concluded that the Post-Gazette bargained in bad faith based solely on the substance of the company’s bargaining proposals. That holding is inconsistent with this Court’s precedent, with decades of general labor law practice, and with the D.C. Circuit’s rule that an “employer’s bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence.” *Cincinnati Newspaper Guild*, 938 F.2d at 289. This conflict provides a second issue that deserves this Court’s review—especially in light of the Board’s apparent resuscitation of its “fewer rights” theory, which would find a virtually per se NLRA violation whenever the Board decides that an employer’s proposal on a mandatory subject of bargaining,⁶ would leave employees with fewer rights and less protection than they would enjoy without a collective bargaining agreement.

On an extensive evidentiary record, the ALJ found that the Post-Gazette had fully explained the reasons for its proposals. App. 40a. And he failed to identify *any* behavior by

⁶ In collective bargaining under the NLRA, there are three categories of bargaining subjects: mandatory, nonmandatory, and illegal. The collective bargaining obligations that the NLRA imposes on employers and unions—including the duty to bargain in “good faith”—apply only to mandatory subjects of bargaining. *See* 29 U.S.C. § 158(a)(5), (b)(3), (d). The bargaining proposals at issue in this case all concerned the mandatory subjects of “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). *See generally NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348–49 (1958).

the Post-Gazette away from the bargaining table that would evidence bad faith. Rather, he expressly based his finding of bad faith entirely on the *substance* of the Post-Gazette’s bargaining proposals on mandatory subjects, concluding that “[a]n inference of bad faith is appropriate where the employer’s proposals, taken [as] a whole, would leave the union . . . with substantially fewer rights than provided by law without a contract.” App. 79a. The Board’s opinion affirming the ALJ similarly relied solely on the newspaper’s bargaining proposals, holding that the Post-Gazette violated the NRLA because it “insisted on provisions that left the Union with fewer rights and less protection than provided by law without a contract.” App. 25a.

The Third Circuit panel essentially adopted the agency’s analysis, concluding that “[w]here the employer’s proposals leave the union members with substantially fewer rights than the law would provide them without a contract, an inference of bad faith may be appropriate.” App. 12a. And it found bad faith in this case based solely on the fact that the Post-Gazette’s “proposals *as a whole* would have required the Guild to cede to [the Post-Gazette] the most fundamental of employment terms.” App. 13a (emphasis in original). Like the Board, the panel identified no conduct away from the bargaining table that suggested bad faith.⁷

⁷ This faulty reasoning also infected the Third Circuit’s holding that the Post-Gazette improperly declared impasse. App. 13a–16a. As the panel acknowledged, the Board “leaned heavily on [the Post-Gazette’s] bad faith” in bargaining in “finding impasse was prematurely declared”—even though “other factors (such as the length of negotiations and the fact that the parties’ disagreement concerned the most important issues)” weighed against the Board’s finding of improper impasse. App. 14a–15a. The Third Circuit compounded this problem by itself “according special weight” to the Post-Gazette’s purported bad faith. App. 15a.

This holding is inconsistent with this Court’s guidance and with the general practice of the courts of appeals, and specifically conflicts with the rule adopted by the D.C. Circuit that “an employer’s bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence.” *Cincinnati Newspaper Guild*, 938 F.2d at 289; *see also, e.g., NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1164 (D.C. Cir. 1992) (“the Board may not find a bad-faith refusal to agree solely by looking to the employer’s bargaining position”); *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990) (“Adamant insistence on a bargaining position . . . is not itself a refusal to bargain in good faith.”).

The split is clear: The Third Circuit held that the Board may infer bad faith solely from the substance of an employer’s bargaining positions, at least when in the Board’s view those positions would leave union members with fewer rights than they would have by law without a contract or when the proposals would cede to it the “most fundamental” bargaining terms. App. 12a–13a. The D.C. Circuit, in contrast, recognizes that bargaining position may be *relevant* to the question of bad faith, but cannot establish bad faith *by itself*; something more is needed.

This question is of increasing relevance in light of the Board’s growing propensity to infer bad faith from the substance of bargaining proposals, particularly when (as it found here) the proposal leaves union members with “fewer rights and less protection than provided by law without a contract.” *See, e.g., District Hospital Partners, L.P.*, 373 NLRB

No. 55, at 7 (2024);⁸ *Altura Communs. Sols., LLC*, 369 NLRB No. 85, at 7 (2020). But even in those cases, the Board did not rely *solely* on the substance of the employer’s bargaining proposals, as the Third Circuit did here. Because the bad faith finding here involved no allegations of misconduct away from the bargaining table, and rests solely on the substance of the bargaining proposals, this case provides an attractive vehicle for the Court to resolve this significant circuit split.

2. If the Court grants certiorari, this question will likely be resolved against the Board.

There is also more than a fair possibility that this issue will be resolved in the Post-Gazette’s favor on the merits. Section 8(d) of the NLRA makes clear that the duty to bargain “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). Congress added this language to the NLRA by the Taft-Hartley Act in “an attempt . . . to prevent the Board from controlling the settling of the

⁸ The Third Circuit cited the D.C. Circuit’s opinion in the *District Hospital* enforcement action to support its conclusion that “[w]here the employer’s proposals leave the union members with substantially fewer rights than the law would provide them without a contract, an inference of bad faith may be appropriate.” App. 12a–13a (citing *District Hospital Partners, L.P. v. NLRB*, 141 F.4th 1279 (D.C. Cir. 2025)). Its reliance was misplaced. *District Hospital*, in keeping with the D.C. Circuit’s rule, did not find bad faith *solely* based on the content of the employer’s bargaining proposals. It also found (1) that there was evidence of bad faith away from the bargaining table, and (2) that the proposals at issue were designed to undermine the union’s representational capacity. Specifically, the employer withdrew recognition from the union, canceled all bargaining sessions, and “informed employees that they would now be part of a ‘non-union team.’” *District Hospital*, 141 F.4th at 1287. Further, the employer proposed eliminating grievance arbitration. *Id.* at 1288. In contrast, there are *no* allegations that the Post-Gazette engaged in bad faith behavior away from the bargaining table and its proposals only concerned operational needs.

terms of collective bargaining agreements.” *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477, 487 (1960). As this Court explained:

The object of [the] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . [A]greement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own view of a desirable settlement.

H. K. Porter Co. v. NLRB, 397 U.S. 99, 103–04 (1970); *see also NLRB v. Am. Nat. Ins. Co.*, 343 U.S. at 404 (“the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements”).

The purpose of Section 8(d) will be frustrated if the Board could find a violation of the Act based solely on the substance of a party’s bargaining position. That would be regulating the terms and conditions of employment. As one court of appeals put it: “In finding a violation of the obligation to bargain in good faith based exclusively on contract proposals the Board is in effect doing that which it is prohibited from doing: sitting in judgment upon the substantive terms of a proposed collective bargaining agreement.” *Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1227 (9th Cir. 1981).

That is precisely what the Board—and the Third Circuit—did here. They looked solely at the substance of the Post-Gazette’s proposals on mandatory subjects of bargaining and judged them insufficiently protective of the Guild-represented employees. The NLRA properly assigns that power to the participants in collective bargaining, not the

government. Reversing the Third Circuit’s overreach and adopting the bright-line rule applied by the D.C. Circuit would protect against this danger.⁹

II. The Post-Gazette Will Suffer Irreparable Harm Unless the Section 10(e) Injunction Is Stayed.

A. The Injunction is procedurally and substantively irregular.

Before analyzing the irreparable harm that the Post-Gazette will suffer if the Third Circuit’s Injunction is not stayed, it is worth briefly examining two serious procedural and substantive irregularities surrounding its issuance. *First*, the Third Circuit ordered the Injunction without heeding this Court’s recent guidance in *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), calling into question whether there was even a reasonable basis for its issuance. And *second*, the relief it orders is not “temporary,” as required by the text of Section 10(e). Rather, it reaches one of the ultimate questions in the case and imposes long-term obligations that will continue far after this proceeding ends.

In the ordinary case, the Post-Gazette could challenge those deficiencies by seeking interlocutory appellate review. *See* 28 U.S.C. § 1292(a)(1) (granting the courts of appeals

⁹ Contrary to the Third Circuit’s suggestion, the Post-Gazette does not seek “to create a rule that the substance of the employer’s proposals can never evince bad faith bargaining.” App. 11a. Quite the opposite: We agree that a party’s proposals can be *relevant evidence* of bad faith when considered as one piece of the totality of the circumstances, as most courts recognize. But they cannot, contra the panel’s holding, be *sufficient evidence* of bad faith with nothing more. *See, e.g., Altura Commc’n Sols., LLC v. NLRB*, 848 F. App’x 344, 345 (9th Cir. 2021) (“The NLRB properly considered the totality of the parties’ conduct, including, but not limited to, the contract proposals.”); *Carey Salt Co. v. NLRB*, 736 F.3d 405, 412 (5th Cir. 2013) (“To assess the Board’s finding of a lack of good faith, we must ‘examine the totality of the employer’s conduct, both at and away from the bargaining table.’”); *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003) (“in determining good faith, the Board should examine the totality of the circumstances, including the substantive terms of proposals”).

“jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts . . . granting . . . injunctions”). But because this is the rare preliminary injunction that *originated* in a court of appeals, the Post-Gazette has no realistic avenue of interlocutory appellate review. The Third Circuit panel has also foreclosed the possibility of oversight *within* the court of appeals by declining to stay enforcement, App. 2a, and inexplicably refusing to refer to the full court either of the Post-Gazette’s petitions for en banc rehearing of the Injunction order and the stay denial. App. 1a, 19a–20a.¹⁰ Now the Board has threatened to initiate contempt proceedings before the Third Circuit can consider whether to rehear the merits decision en banc. App. 102a–103a. And there is no guarantee that the Post-Gazette will be able to seek review of the Injunction even after the merits judgment becomes final.¹¹

The Kafkaesque procedural posture of the case has given rise to a rare beast: a preliminary Injunction that is itself unreviewable and that also threatens to make the merits decision unreviewable. Hence the emergency application to this Court.

Given the procedural roadblocks, the Post-Gazette is not asking this Court to review the substance of the Injunction today; it seeks only a stay of enforcement while the appellate

¹⁰ In each case, the panel’s only explanation for its refusal to refer the en banc petition to the full court for a vote was its citation of Third Circuit I.O.P. 10.3.3. App. 1a, 20a. That rule provides, in relevant part: “A motion for reconsideration or rehearing of any standing motions panel or merits panel decision on a motion, other than a case-dispositive ruling, is referred only to that standing motions panel or merits panel and not to the court en banc. . . . Non-case-dispositive rulings by either the merits panel or standing motion panel are referred to the court en banc only if the panel so orders.” Thus, under I.O.P. 10.3.3., the panel had the authority to refer the petitions to the full court, but simply chose not to.

¹¹ “Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter.” *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999).

process plays out. But in weighing the equities of that request, the Court should keep in mind the troubling irregularities discussed below.

1. In issuing the Injunction, the Third Circuit ignored this Court’s teaching in *McKinney*.

Just last year, in *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), this Court clarified the standard that applies when the Board seeks temporary injunctive relief from a court. It held that “because nothing in § 10(j)’s test overcomes the presumption that traditional equitable principles govern, district courts considering the Board’s request for a preliminary injunction must apply the *Winter* framework, which embodies those principles.” *Id.* at 348. The Board must therefore show: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *See id.* at 345 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Court also rejected the argument that the court should defer to the Board. *See McKinney*, 602 U.S. at 350. Instead, it emphasized that a court, when considering an injunction application, must “evaluate any factual conflicts or difficult questions of law,” “conduct[] an independent assessment of the merits and equitable factors,” and decide “what evidence [to] consider[] or credit[].” *Id.* at 349–51.

While *McKinney* involved a district court injunction issued under Section 10(j) of the NLRA, 20 U.S.C. § 160(j), its reasoning applies equally to Section 10(e), which contains “nearly identical statutory language.” *NLRB v. Bannum, Inc.*, No. 21-2664, 2023 WL

4842837, at *2 (6th Cir. July 27, 2023).¹² “Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.” *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009).

Although the Third Circuit motions panel entered its Injunction less than a year after this Court handed down *McKinney*, App. 21a–23a, it entirely ignored its teachings:

- It failed to provide an “independent assessment of the merits” or of the *Winter* equitable factors. Indeed, the panel’s summary order contained *no* analysis, apart from Judge Phipps’ footnote in dissent. (The dissent, citing *McKinney* and *Winter*, concluded that it was “improper to issue a Section 10(e) injunction as a means of remedying irreparable harms that occurred before the Board issued its order”; that “none of the harms associated with the non-enforcement of the Board’s order are irreparable”; and that “the harms addressed by [the] Court’s injunction were not proximately caused by [the Post-Gazette]; rather, their immediate cause is the strike that the Union voted for by a narrow margin.” App. 22a.)
- It failed to “evaluate any factual conflicts.” It conducted no evidentiary hearing and made no factual findings. Its summary order (apart from Judge Phipp’s dissent) cited no facts or evidence.
- Although it is difficult to evaluate given its lack of reasoned analysis, it appeared simply to defer to the Board’s “convenient litigating position”—an approach *McKinney* condemned as “entirely inappropriate.” 602 U.S. at 341.

Had the panel heeded *McKinney*, there is a good chance that the Injunction would never have issued. In fact, that’s exactly what happened in a parallel action. While the Third Circuit was considering whether to grant a Section 10(e) injunction, the District Court for the Western District of Pennsylvania was simultaneously considering the Board’s request

¹² Compare 29 U.S.C. § 160(e) (authorizing Board to petition court of appeals “for appropriate temporary relief or restraining order” and giving court “power to grant such temporary relief or restraining order as it deems just and proper”) with *id.* § 106(j) (authorizing Board to petition district court “for appropriate temporary relief or restraining order” and giving court “jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper”).

for Section 10(j) relief involving the same facts in a proceeding involving the Guild’s sister unions. *See Wilson v. PG Publ’g Co., Inc.*, No. 2:24-CV-01166-CB, 2025 WL 509305 (W.D. Pa. Feb. 13, 2025). In that case, District Judge Bissoon looked beyond the bare administrative record, took three days of live testimony, made credibility findings, and issued a thorough, reasoned opinion analyzing the *McKinney/Winter* factors. *Id.* at *2–*3. On the very first element—likelihood of success on the merits—she concluded that it was “game over” for the Board and denied injunctive relief:

[T]he Court finds that [the Post-Gazette] consistently made overtures to bargain regarding the terms and conditions of employment. . . . In contrast, the Court finds that the bargaining units thwarted bargaining efforts again and again. . . . In sum, Petitioner has failed to show, by a preponderance of the evidence, a likelihood of success on the merits.

Id. at *1, *3–*4. Taking heed of this Court’s guidance, she stressed that “[u]nder *McKinney* . . . this Court is charged with an independent duty to assess the requirements before injunctive relief will issue. . . . Of one thing the Court is certain, however: it cannot be a ‘rubber stamp.’” *Id.* at *4. We fear that the Third Circuit took a different, and erroneous, approach.

2. The Injunction’s relief is not “temporary.”

By its terms, Section 10(e) authorizes only “temporary relief.” 29 U.S.C. § 160(e). Such relief is not meant to resolve the ultimate questions in the case but merely to “maintain the status quo” and “prevent continued violation of the Act during the pendency of an appeal.” *UAW*, 449 F.2d at 1050–51 (footnote omitted). Section 10(e) injunctions are rare, but when they do issue, they typically regulate discrete conduct that might occur while the

appeal or enforcement petition is being litigated.¹³ And when the litigation ends, the temporary injunction ends with it.

This Injunction is much different—and, as far as the Post-Gazette can tell, unique in the history of Section 10(e). It orders the Post-Gazette to undertake commitments that will last long after this litigation is over. Specifically, it orders the newspaper to:

- “On request by the [Guild], rescind the changes in the terms and conditions of employment related to health insurance for its unit employees that were unilaterally implemented on about July 27, 2020,” App. 23a;
- “[R]everte health insurance coverage for unit employees to the coverage provided prior to the unilateral implementation of terms; specifically, reversion to health insurance coverage and pricing as set forth in Exhibit B to the *2014–2017 Agreement Between Pittsburgh Post-Gazette and the Newspaper Guild of Pittsburgh*,” App. 3a–4a;¹⁴ and
- “Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the [Guild] as the exclusive collective-bargaining representative of employees in the bargaining unit described above.” App. 23a.

¹³ See, e.g., *NLRB v. U.S. Serv. Indus., Inc.*, No. 96-1042, 1996 WL 472998, at *1 (D.C. Cir. July 22, 1996) (per curiam) (enjoining employer from coercing or retaliating against employees based on union activity pendente lite); *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Nat’l Mediation Bd.*, 425 F.2d 527 (D.C. Cir. 1970) (requiring parties to continue participating in mediation pendente lite); *NLRB v. Beverage-Air Co.*, 391 F.2d 255, 256 (4th Cir. 1968) (enjoining employer from enforcing no-solicitation rule pendente lite); *NLRB v. Int’l Ladies’ Garment Workers’ Union, AFL-CIO*, 274 F.2d 376, 377 (3d Cir. 1960) (requiring union to participate in collective bargaining pendente lite).

¹⁴ Remarkably, the Third Circuit panel did not issue the reversion requirement, which it framed as a sua sponte “clarification” of the March 24, 2025, Injunction order, until November 10, 2025—the same day that it handed down its ruling on the merits. App. 3a–4a. It defies belief that the court would impose this kind of long-term, forward-looking relief through a “temporary” Section 10(e) Injunction directive issued in the eleventh hour of the litigation.

There is nothing “temporary” about these commands. If, as ordered, the Post-Gazette “revert[s]” the Guild employees’ coverage back to the Fund’s health insurance plan, that coverage will become a “term and condition of employment.” The Fund’s plan will become the new status quo, and the Post-Gazette will be locked in unless and until it reaches a new collective bargaining agreement with the Guild or reaches a lawful impasse. *See, e.g., Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 373–74 (D.C. Cir. 2017) (“To avoid running afoul of the unilateral change doctrine, an employer must maintain the status quo as to terms and conditions of employment after the expiration of a collective bargaining agreement.”). That process could take years, and will extend long past the end of this litigation. This is surely not the kind of “temporary” relief that the drafters of Section 10(e) envisioned.

B. Absent a stay, the Injunction will impose severe and irreparable harm on the Post-Gazette.

As discussed above, the Injunction would lock the newspaper into the Fund’s health care plan at least through its next round of collective bargaining with the Guild. More than that, it would become subject to the Fund’s *unilateral* ability to raise employer contribution rates and change benefits—a power the Fund lacked under the prior CBA. During the term of the 2014–2017 CBA, the Post-Gazette had never signed a participation agreement or other document which had the contractual effect of binding the Post-Gazette to the Fund’s trust agreement. Such agreements are used near-universally by Taft-Hartley benefit funds to contractually bind a contributing employer to the fund’s trust agreement and other operative fund documents, such as the summary plan description and delinquent collection procedures. However, in January 2022, after the Post-Gazette had ceased contributing to

the Fund, the Fund amended its trust agreement to eliminate the need for a separate document executed by the contributing employer in order to bind the employer to the terms of the trust agreement. The Fund’s trust agreement now provides that an employer who simply “by course of conduct has caused this benefit fund to provide coverage to employees, is deemed to accept and be bound by this Agreement” and “shall be deemed a party to this Agreement.” Dkt. 108, Decl. of Richard C. Lowe, ¶¶ 14–15 & Ex. B at 2.

If the Post-Gazette carries out any administrative act to process its employees’ healthcare through the Fund, that will have the same legal effect as signing the participation and trust agreement. And once subject to the trust agreement, the Post-Gazette would relinquish its control over healthcare costs and benefits to the trustees. The Fund would have the unlimited and unilateral right to raise the company’s contribution costs and change benefits. *See id.*, ¶ 13 & Ex. B at 32 (authorizing the Fund’s trustees “[t]o do all acts, whether or not expressly authorized herein, which the Trustees, in their sole discretion, may deem necessary or proper for the protection of the property held hereunder”), 34 (“the Trustees shall have full and exclusive discretionary authority to determine all questions or controversies . . . in connection with the EPB Fund” including “the plan benefits”); *see also id.*, Ex. B at 2 (delegating to the Fund’s trustees “full authority for administration of the benefit fund”); *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 434–35 (2015) (noting that “plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans”) (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). And given the Post-Gazette’s statutory

bargaining obligations, that state of affairs would last at least until the end of its next round of collective bargaining.

The costs that this would impose on Post-Gazette would not only be significant, they would be unrecoverable. By the terms of the Fund's trust agreement, the Post-Gazette would be bound by the agreement as a "party" even if it ultimately prevailed on the merits in this litigation. There is no obvious mechanism by which a court could nullify or relieve the company of its statutory or contractual obligations to the Fund incurred as a result of its compliance with the Injunction. Because the Fund is not a party to this litigation, it would not be bound by any later ruling in favor of the Post-Gazette.

C. Absent a stay, the Injunction will frustrate this Court's appellate review.

It would be one thing if the harms detailed above resulted from a final judgment. In that case, the Post-Gazette would at least be able to exhaust its avenues of appellate review, including seeking en banc review before the Third Circuit and petitioning this Court for certiorari. And it could seek a routine stay of the mandate while it pursued those remedies. *See* Fed. R. App. P. 41(b), (d) (permitting stay of mandate pending petition for rehearing en banc and petition for certiorari). By requiring compliance with a preliminary Injunction before the merits decision has become final, the panel below has short-circuited this orderly procedure. And because the Injunction originated in the court of appeals, the Post-Gazette cannot mitigate the damage by seeking interlocutory review under 28 U.S.C. § 1292(a)(1).

Moreover, compliance with the Injunction will moot most of the appellate relief that the Post-Gazette could obtain. If, for example, the newspaper reverts its Guild-represented employees to the Fund healthcare plan, it will be bound as a party to the Fund's trust

agreement indefinitely, regardless of whether it ultimately succeeds on the merits of the underlying claims.

“The ability to grant interim relief is . . . not simply an historic procedure for preserving rights during the pendency of an appeal, but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.” *Nken v. Holder*, 556 U.S. 418, 427 (2009). By granting the requested stay, this Court would protect both the Post-Gazette’s rights and its own certiorari jurisdiction.

D. The Board and the Guild will not be prejudiced by a stay.

Finally, the balance of the equities weighs strongly in the Post-Gazette’s favor. In granting the stay, the Court will cause no harm to the Guild or the employees it represents that cannot be remedied through monetary restitution. As Judge Phipps aptly noted in his dissent from the Injunction order, “none of the harms associated with the non-enforcement of the Board’s order are irreparable.” App. 22a. That is because the conduct the Injunction sought to remedy—moving the Guild-represented employees from the Fund to the company’s health insurance plan—did not impose “irreparable harm.” *See, e.g., Adams v. Freedom Forge Corp.*, 204 F.3d 475, 488 (3d Cir. 2000) (holding that employees had not shown they were irreparably harmed by being required to switch ERISA health plans). All of the Guild-represented employees are currently receiving healthcare insurance through the company plan—just like their non-union and other union colleagues. Even if those employees face somewhat higher premiums or out-of-pocket costs than they would under the Fund plan, that is a harm that can be easily remedied by restitution of those costs. Indeed, the ALJ’s order specifically directed the Post-Gazette to “reimburs[e] unit

employees for any expenses resulting from [its] unlawful changes to their contractual benefits (including changes to health insurance benefits),” App. 86a—an equitable remedy that everyone agrees is in the Board’s power to grant.

CONCLUSION

This Court should immediately grant the Post-Gazette temporary administrative relief from enforcement of the Third Circuit’s Section 10(e) Injunction pending consideration of this Application, and stay enforcement of the Injunction pending the disposition of the pending appeal in the Third Circuit and the consideration and disposition of the Post-Gazette’s anticipated petition for a writ of certiorari.

Respectfully submitted,

Brian M. Hentosz
Morgan Dull
LITTLER MENDELSON, P.C.
One PPG Place, Suite 2400
Pittsburgh, PA 15222

Michael D. Oesterle
Mason C. Rush
KING & BALLOW
26 Century Boulevard, Suite NT 700
Nashville, TN 37214

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/s/ Christopher J. Paolella
Christopher J. Paolella
Counsel of Record
REICH & PAOLELLA LLP
111 Broadway, Suite 2002
New York, NY 10006
(212) 804-7097
cpaolella@reichpaolella.com

Fritz Byers
414 North Erie Street, Second Floor
Toledo, OH 43604