No. 25A725

In the Supreme Court of the United States

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

Applicant,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

AND

NEWSPAPER GUILD OF PITTSBURGH/CWA LOCAL 38061,

Intervenor/Respondent.

INTERVENOR/RESPONDENT'S RESPONSE IN OPPOSITION TO APPLICANT'S EMERGENCY APPLICATION FOR STAY OF INJUNCTION

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INTRODUCTION

On March 24, 2025, the Third Circuit issued temporary injunctive relief requiring Applicant PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette ("Post-Gazette") to, among other things, rescind certain healthcare benefits imposed on employees represented by the Newspaper Guild of Pittsburgh/CWA Local 38061 ("Union") and to reinstate the healthcare plan that existed under the Post-Gazette's and Union's last collective bargaining agreement. To date, the Post-Gazette has refused to comply, giving one excuse after another, despite the fact that its own filings—and its own newspaper—make clear that it understood the Third Circuit's order to require it to reinstate the prior agreed-to healthcare benefits. Having exhausted every avenue at the court of appeals to continue to delay compliance, the Post-Gazette now asks this Court to permanently defeat the court below's injunction, and to do so through expedited review on an emergency application filed *nine months* after the injunction order.

There is no need for this Court to jump in to relieve the Post-Gazette of the injunction. None of the stay factors supports a stay here.

Start with the showing of a strong likelihood of success. This Court is not likely to grant certiorari on either question the Post-Gazette plans to present. The first question—whether the National Labor Relations Board's equitable remedial authority extends to reimbursing all direct and foreseeable losses caused by violation of the National Labor Relations Act—is one the court below didn't even reach because it determined it lacked jurisdiction. Yet the Post-Gazette doesn't

claim that this Court would grant certiorari on the jurisdictional question, but instead asserts that this Court would grant certiorari to serve as court of first review on the underlying issue. That is not likely. But even if it were, it would have nothing to do with the injunction. Even if this Court were to determine that the Board could not order the company—as a remedy for its unfair labor practices—to reimburse certain costs to the Union employees, that is no reason to stay an injunction that requires the Post-Gazette to rescind its imposed healthcare plan and reinstate the prior agreed-to plan, an equitable remedy no one disputes is within the Board's authority.

And the Company's second question—whether an employer's bargaining proposals, when taken as a whole and in context, can evince an intent to avoid reaching an agreement with the Union—is equally unlikely to be taken up by this Court. The courts of appeal are in harmony that bargaining proposals, taken as a whole, can evince such an intent. The Post-Gazette conjures a circuit-split by pointing to a D.C. Circuit decision that holds that a bargaining proposal on a subject over which an employer has a right to bargain cannot be per se unlawful. But the Board and the court below didn't find the company's proposals to be per se unlawful; they found that the proposals, taken as a whole and in context, evinced an intent to avoid an agreement. Every court of appeals to address that issue—including the D.C. Circuit—says that the NLRA allows for such a finding. And even if that were wrong, no stay is warranted, as the Board—affirmed by the court below—separately found that the Post-Gazette engaged in bad-faith bargaining by

prematurely declaring a bargaining impasse and unilaterally changing terms and conditions of employment. That finding alone would support the court below's injunction.

The Post-Gazette also cannot show that it'll suffer such significant irreparable harm from complying with the court below's injunction that a stay is warranted. Contrary to its claims, the company would not be stuck providing the prior agreed-to healthcare plan for years if it were to comply with the injunction; if the Post-Gazette ultimately prevails before an en banc court of appeals or this Court, it can freely drop the reinstated plan and revert to its imposed benefit plan. The court-imposed benefits would not become a term of employment subject to change only through bargaining if the court imposed those benefits improperly.

The Post-Gazette further claims it would be harmed by reinstating the prior agreed-to benefit plan because that plan now requires that participants be bound to any changes made to the healthcare plan. This claim of harm is entirely speculative; indeed, consistent with its policies, the plan will maintain the costs without change for at least one year. Nor is the requirement new. Under the prevailing view of the lower courts, the Post-Gazette was similarly bound to the terms of the plan under the prior iteration of the plan agreement as long as it contributed to the plan's trust fund.

At most, then, the Post-Gazette can point to the irreparable harm of the cost of paying for the reinstated benefit plan, but even that is offset by the fact that the company would simultaneously stop paying for the current health benefits it

provides Union employees. Besides, the company has repeatedly denied that it is unable to pay for the prior agreed-to benefits.

Weighed against this slight irreparable harm is the serious harm the Post-Gazette's noncompliance is causing the Union, the workers it represents, and the public interest in faithful compliance with court orders. The court below granted the injunction after the NLRB and the Union submitted evidence that the Post-Gazette's unfair labor practices caused and threatened to further cause irreparable harm to the Union's support among the employees it represents. That support was bolstered by the court below's injunction order and merits decision. Indeed, after the Third Circuit's decision, the Union employees triumphantly agreed to end their strike protesting the Post-Gazette's unfair labor practices. But all that would be lost if this Court were to stay the court below's injunction order. Union employees would entirely lose faith that the justice system will protect them and their interests if a company can ignore a court of appeals' injunction for nine months and then have this Court stay the order, defeating the injunction entirely. With that lesson squarely learned, Union employees would likely abandon the Union entirely, seeing nothing to be gained by fighting for their right to organize and collectively bargain against a recalcitrant employer. And open defiance of the court's order would not only cause irreparable harm to the Union's support and the employees' exercise of their NLRA rights, but also to the greater public interest, which benefits when a court's order is obeyed.

At bottom, the Post-Gazette has managed to avoid compliance with the court below's injunction for nine months. In an act of grace, the Third Circuit allowed the company one more opportunity to comply without holding it in contempt, but spelled out in detail what it expected from the Post-Gazette. Instead of following the panel's instruction, the company asks this Court for the extraordinary relief of staying the injunction pending its en banc petition and petition for writ of certiorari. But such a stay would permanently defeat the injunction, as the injunction will dissolve by its own terms when the Post-Gazette exhausts its appeals attempts and the mandate issues. This Court should not reward the Post-Gazette's noncompliance by permanently relieving it of its obligations under the court of appeal's injunction, and should deny the stay application.

STATEMENT OF THE CASE

For decades, the Union has represented the Editorial Department employees at the Post-Gazette. These are the employees largely responsible for the newspaper's content. The company and Union have bargained a series of successive collective-bargaining agreements, with the most recent one dated from October 15, 2014 to March 31, 2017. Under these agreements, the parties agreed to obtain healthcare benefits for the employees through the Western Pennsylvania Teamsters' and Employers Welfare Fund ("Fund").

From 1992 through the most recent CBA, the parties' collective bargaining had largely been smooth and drama-free. But things changed in 2017. From the beginning of bargaining through its final proposal, the Post-Gazette sought to gut

the parties' collective-bargaining agreement, leaving the Union and the employees it represented with few rights. Indeed, the authority the Post-Gazette sought to maintain would mean that, under the company's Final Offer, a Union-represented worker could come to work one day and the Post-Gazette could:

- unilaterally take his merit pay increase away;
- unilaterally re-assign his usual work to a supervisor, and reduce his work schedule to only one hour a week;
- inform him that the company has unilaterally decided to subcontract all his work and will be laying him off immediately, while keeping workers doing the same work but who have less seniority than him;
- unilaterally decide to eliminate his short-term disability benefit;
- unilaterally change his share of the health insurance premium cost from 30% of the premium to 100%, or reduce the benefits to eliminate coverage for such basic healthcare needs, like medication;
- make similar unilateral and detrimental changes to his dental, vision, and life insurance.

See App. 40a-41a; Docket No. 33-3 at J.A. 1304, 1391.

The company's proposals, taken as a whole, would give it the power to unilaterally transform the Union workers' jobs from full-time time positions that pay living wages and provide decent benefits into part-time positions with reduced pay and unattainable and useless benefits, or even no position at all.

After years of insisting on its proposals with little change, the Post-Gazette on July 14, 2020 declared that the parties were at an impasse in the bargaining. App. 37a. At the time, the parties had not fully discussed each party's most recent proposal. *Ibid*. In response to the declaration of impasse, the Union disputed that

assertion and asked the company to continue to bargain. *Ibid*. The Post-Gazette did not agree to continue to bargain, and implemented new terms and conditions of employment. *Id*. at 37a-38a. This included implementing new healthcare benefits that removed the employees from the Fund, and instead placed them into a company plan. However, the implemented terms didn't include much of the unilateral discretion the Post-Gazette continuously maintained in its proposals throughout bargaining. *Id*. at 38a.

Pursuant to charges filed by the Union, the NLRB's General Counsel issued a complaint against the Post-Gazette, accusing it, among other things, of violating Section 8(a)(5) of the NLRA by bargaining in bad faith and by unilaterally implementing new terms and conditions of employment when no valid bargaining impasse existed. App. 28a. An administrative law judge found merit to these allegations.

In finding a bad-faith bargaining violation, the ALJ explained that an "inference of bad faith is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights than provided by law without a contract." App. 41a. The ALJ found that the Post-Gazette's final proposals fell into this category. *Ibid*. He also noted that the company largely adhered to these proposals throughout bargaining and didn't offer any economic incentives for the Union employees to accept the proposals. *Ibid* and n.22.

And in finding a unilateral change violation, the ALJ found that an impasse was precluded by the Post-Gazette's bad-faith bargaining. Additionally, the ALJ found that the facts did not show a true impasse, as the parties had not fully discussed their most recent proposals, and the Union explicitly sought to meet further. App. 43a.

The Board largely adopted the ALJ's decision. However, the Board indicated that it found a valid impasse didn't exist regardless of the bad-faith bargaining finding. App. 24a n.1. Based on these two violations of Section 8(a)(5), the Board ordered the Post-Gazette to "rescind the changes in the terms and conditions of employment for unit employees that were unilaterally implemented on about July 27, 2020." App. 26a. This is the traditional remedy for an improper unilateral change to terms and conditions.

The Post-Gazette filed a petition for review of that decision in the Third Circuit. While the petition was pending, the NLRB filed a motion for an injunction pending the appeal pursuant to Section 10(e) of the NLRA. Within that motion, the Board asked that the court order the Post-Gazette to "rescind the changes in the terms and conditions of employment for unit employees that were unilaterally implemented on about July 27, 2020." Docket No. 21 at 27. In opposing the motion, the Post-Gazette acknowledged that it understood "[r]escinding the implementation would require a return to the Fund[.]" Docket No. 26-1 at 24-25.

A motions panel granted the motion for injunctive relief in part on March 24, 2025. Docket No. 57. In relevant part, the panel majority ordered that the Post-

Gazette, "rescind the changes in terms and conditions of employment related to health insurance for its unit employees that were unilaterally implemented on about July 27, 2020." App. 23a. The Post-Gazette subsequently published a news article the same day indicating that the order required it to "restor[e] insurance coverage that was in effect in 2020[.]" Kris B. Mamula, *Court Grants Injunction to Striking Post-Gazette Employees; Company Plans an Appeal*, PITTSBURGH POST-GAZETTE (Mar. 25, 2025), https://www.post-gazette.com/business/career-workplace/2025/03/24/post-gazette-union-nlrb-injunction-contract/stories/202503240081.

However, after the court below issued its order, the Post-Gazette claimed it no longer understood the order to rescind the implemented benefits to include reinstatement of the Fund benefits. On March 27, the company filed a motion to clarify that suggested that it needed only to rescind the implemented benefits and bargain over what the new benefits would be (while maintaining the implemented benefits until the parties reached an agreement over what the new benefits would be). *See* Docket Nos. 59, 63. Even after the court below denied this motion (Docket No. 69), the Post-Gazette continued to refuse to comply with the March 24th order.

After nearly three months of noncompliance, the NLRB filed a motion for contempt. Docket No. 80. In response, the Post-Gazette again claimed the order required only rescission of the imposed health benefits, but not reinstatement of the prior agreed-to Fund benefits. Docket No. 87 at 14-16. The company also raised a

number of new objections to the court's order as explanation for its noncompliance. *Ibid*.

On November 10, the court below unanimously denied the Post-Gazette's petition for review of the Board's decision and granted the NLRB's enforcement petition. App. 5a-18a. In addition, the court below denied the NLRB's motion for contempt "without prejudice[,]" but it clarified that its order "requires that [the Post-Gazette] 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 the parties' 2014-2017 collective-bargaining agreement. App. 3a-4a.

The Post-Gazette then filed a motion to stay the injunction pending an en banc petition. Docket No. 108. This was denied by the panel. Docket No. 111. The Post-Gazette then sought en banc review of the denial of its motion to stay, Docket No. 112; this was also denied by the panel. Docket No. 113 (construing en banc petition as motion for rehearing). On December 24, the Post-Gazette filed an en banc petition on the court below's merits decision. Docket No. 116.

ARGUMENT

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). Instead, a stay is "an exercise of discretion," *id.* at 433 (quoting *Virginian R. Co. v. U.S.*, 272 U.S. 658, 673 (1926)), and "granted only in

extraordinary circumstances," *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

To obtain a stay, a party must make a "strong showing" that it is likely to succeed on the merits, that it will be irreparably harmed by the denial of the stay, that the stay will not "substantially injure" another party, and that the public interest lies with the stay. *Nken*, 556 U.S. at 434. Where the stay is sought pending a writ of certiorari, the applicant must also show "a reasonable probability" that this Court will grant certiorari and "a fair prospect" of reversal. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In cases like this one, that remain before the court of appeals at the time of the stay request, this Court grants stay applications "only upon the weightiest considerations." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers) (cleaned up). Further, because the court of appeals has already denied a request to stay the injunction here, "applicant has an especially heavy burden." *Ibid.*

I. A Stay Is Unwarranted as the Post-Gazette Presents No Cert-Worthy Question

This Court should deny the stay application because the Post-Gazette can't make the initial necessary showing—a reasonable probability that this Court will grant certiorari on any relevant question. Neither of the Post-Gazette's proposed questions is of the ilk that would lead this Court to exercise its discretionary review, and even if they were, neither would affect the injunction.

A. The Post-Gazette's First Proposed Question Presented Is Jurisdictionally Barred; Even if Not, this Court Is Unlikely to Review it in the First Instance; and Even if this Court Did, the

Issue Is Unrelated to the Injunction the Post-Gazette Seeks to Stay and so Would Have no Effect on the Injunction

The Post-Gazette asserts that this Court should issue a stay because this Court is likely to grant certiorari on its first question presented—"whether the NLRB may award consequential damages for 'foreseeable pecuniary harms' traceable to an unfair labor practice[.]" Stay Appl. 13. This question is related to the viability of the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), *enforced in part and review granted in part*, 102 F.4th 727 (5th Cir. 2024), where the Board modified its standard remedy for monetary injury to include reimbursement for any "direct and foreseeable pecuniary harms" caused by an unfair labor practice. *Id.* at slip op. at 6. According to the Post-Gazette, the circuits are split on whether this remedy exceeds the Board's equitable remedial authority.[1] But this case would be an unlikely vehicle for this Court to examine that question, since the court below didn't address it. Instead, the panel held that the Post-Gazette was jurisdictionally barred by Section 10(e) of the NLRA, 29 U.S.C. § 160(e), from raising the question

[1] The purported circuit split is not nearly as square as the company suggests. All four circuits to address *Thryv* agree that the NLRA limits the Board to equitable remedies. *See Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 155 F.4th 1023, 1046, 1050 (9th Cir. 2025); *NLRB v. Starbucks Corp.*, 125 F.4th 78, 95 (3d Cir. 2024); *Hiran Mgt., Inc. v. NLRB*, 157 F.4th 719, 725 (5th Cir. 2025); *NLRB v. Starbucks Corp.*, 159 F.4th 455, 469 (6th Cir. 2025). They also agree that equitable monetary remedies are not strictly limited to lost wages. *See Operating Eng'rs*, 155 F.4th at 1054; *Starbucks*, 125 F.4th at 96; *Hiran Mgt.*, 157 F.4th at 727; *Starbucks*, 159 F.4th at 479. The Ninth Circuit, however, understood *Thryv* remedies to potentially include those equitable monetary remedies that go beyond just lost wages, and left it to the NLRB's compliance proceedings to determine what remedies exactly the Board will order, at which point the court could evaluate whether the ordered remedies went beyond the statutory bounds. *Operating Eng'rs*, 155 F.4th at 1054. The other courts of appeal assumed in the abstract that *Thryv* remedies were only those beyond the allowable equitable monetary remedies, and so struck them down. *See Starbucks*, 125 F.4th at 96-97; *Hiran Mgt.*, 157 F.4th at 727-29; *Starbucks*, 159 F.4th at 479-80. Accordingly, all the courts of appeal may end up in the same place as to what the NLRA allows as equitable monetary remedies; the Ninth Circuit simply may do so after an NLRB compliance proceeding orders actual reimbursement of any direct and foreseeable pecuniary harm caused by an unfair labor practice.

because it failed to first present the issue to the Board. App. 17a-18a. As the court below explained, while the Post-Gazette raised a bare-bones exception to the Board to the *Thryv* remedy's inclusion in the administrative law judge's recommended order, the company failed to provide any basis for its objection. *Ibid*. That is not sufficient to satisfy Section 10(e)'s requirement, because the Board would have no basis upon which to deliberate the objection. This jurisdictional hurdle means that this case is a poor vehicle to address the validity of *Thryv* remedies.[2]

Despite this, the Post-Gazette suggests that this Court will not just overcome the jurisdictional hurdle but then address the question in the first instance. That is, this Court will grant certiorari on the *Thryv* issue, not whether or not the Post-Gazette was jurisdictionally barred from raising the *Thryv* issue on appeal. But as this Court has repeatedly stated, it is a "court of review, not of first view[.]" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, it is exceedingly unlikely that this Court will grant certiorari in this case to review the *Thryv* remedy question.

Perhaps most importantly, even if this Court were inclined to use this flawed vehicle to reach the *Thryv* issue, that would have no bearing on the injunction the Post-Gazette seeks to stay. The injunction requires the Post-Gazette to reinstate the prior, agreed-to Fund plan; it does not require the company to reimburse any

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[2] The Post-Gazette suggests that the 10(e) jurisdictional bar shouldn't apply because there are exceptional circumstances present, namely that it had to raise its objections before there were any cases holding that *Thryv* remedies exceed the Board's authority. Stay Appl. 22. But the fact that there are now cases that reach such a holding undermines the Post-Gazette's argument; if other parties were able to preserve their arguments against *Thryv* remedies without the benefit of courts of appeals decisions to point to, then the Post-Gazette could have also.

employee for any direct and foreseeable pecuniary harms. What potential monetary remedies the Board may issue through a future compliance proceeding has no relation to the Post-Gazette's obligation to reinstate the prior, agreed-to Fund benefits. And without that relation, there is no basis to stay the injunction because this Court may take up the *Thryv* issue.[3]

Accordingly, the Post-Gazette's first question presented provides no basis for a stay.

B. The Post-Gazette's Second Proposed Question Presents a Legal Issue on Which the Circuits Agree; and Even if the Court Below Was Wrong, it also Affirmed a Violation on a Separate Ground that Would Still Support the Injunction

The Post-Gazette further asserts that a stay is warranted due to the second question it intends to present—"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." Stay Appl. 13. According to the company, the court below and the Board found it engaged in bad-faith bargaining solely due to the substance of its proposals, and that conflicts directly with the D.C. Circuit's case law. But the Post-Gazette misreads the D.C. Circuit's cases, which hold only that bargaining proposals on lawful topics cannot be per se bad-faith bargaining. That circuit—like the rest that have addressed the issue—understands

[3] The company further suggests that a stay is appropriate because this Court *may* grant certiorari on the *Thryv* question through a different petition, and so *may* hold a future Post-Gazette petition and issue a GVR. Stay Appl. 19-20 (citing *Macy's, Inc. v. NLRB*, No. 25-627 (filed Nov. 26, 2025)). But that argument is seriously flawed. *First*, this Court would still need to overcome the hurdle of the court below's jurisdictional finding in order to issue a GVR. *Second*, the fact that this Court may someday GVR the panel decision could not be a basis for a stay. The GVR, issued so that the court below can determine the impact of a decision related to a remedial issue, would not show that the Post-Gazette would likely ultimately prevail on the merits question that supports the injunction.

that bargaining proposals, especially ones that, taken together, would leave the union employees worse off than if they had no contract at all, can evince bad faith. And even if the unanimous courts of appeals were wrong, a reversal on that point would not undo enforcement of the Board's order; the Board also rested its bad-faith bargaining finding on a separate ground—that the Post-Gazette declared a bargaining impasse prematurely, and so was not entitled to unilaterally change terms and conditions of employment. Because that finding, which the Post-Gazette doesn't seriously attempt to reverse, also requires restoration of the prior, agreed-to healthcare benefits, the Post-Gazette's second question doesn't support a stay of the injunction.

1. Initially, the factual premise of the Post-Gazette's question is wrong. The Board and court below did not reach the bad-faith bargaining finding solely off the substance of the company's proposals.

The ALJ, whose decision the Board adopted, described that "[i]n assessing whether a party has failed or refused to bargain in good faith, the Board considers the totality of circumstances, including conduct both at and away from the bargaining table." App. 40a. The ALJ further explained that it is only "[f]rom the context of an employer's total conduct" that the Board determines whether an employer is engaged in "hard but lawful bargaining" or is endeavoring to "frustrate the possibility of arriving at any agreement." *Ibid*. Accordingly, the Board recognized that the bad-faith bargaining inquiry involved an examination of the Post-Gazette's "total conduct." *See ibid*.

In evaluating the Post-Gazette's total conduct to reach a bad-faith bargaining finding, the ALJ identified the following facts (none of which the Post-Gazette disputes): 1) the "combination" of proposals, "taken as a whole," would leave the Union and its employees with substantially fewer rights than provided by law without a contract; 2) the Post-Gazette's "insist[ence]" on "identical or less favorable" proposals throughout bargaining; 3) the lack of "meaningful economic concessions" offered "in exchange for the broad discretion" contained in the Post-Gazette's proposals; and 4) that the Post-Gazette "prematurely declared" a bargaining impasse, effectively ending bargaining. App. 41a-42a and n.22. It is clear that the ALJ, and Board, relied on more than the proposals alone to reach the bad-faith bargaining finding.

In enforcing that finding, the court below rejected the Post-Gazette's argument that "the ALJ improperly found that it bargained in bad faith because the ALJ's decision was based solely on the substance of [the Post-Gazette's] bargaining proposals." App. 12a. In response to the Post-Gazette's argument, the Third Circuit initially found that "[s]ubstantial evidence supports the ALJ's finding" that an "inference" of bad faith was warranted because the proposals "*as a whole*" would have required the Union to "cede" to the Post-Gazette "the most fundamental employment terms." App. 12a-13a. It then rejected the legal argument at the heart of the Post-Gazette's petition for review—that the substance of a party's proposals can never evince bad faith. App. 13a. The court stated that none of the cases the company cites precludes the ALJ from "examining the totality of the party's

conduct, including all of its proposals together, to decide whether a party has met its statutory obligation to bargain in good faith." App. 13a (citation omitted).

Accordingly, in examining the totality of the Post-Gazette's conduct, the Board relied on facts beyond the combination of proposals that would have left the Union with fewer rights than if no contract existed. In enforcing that finding, the court below focused on the combination of proposals because that was how the Post-Gazette sought to attack the ALJ's finding. Docket No. 105 at 9. But the decision acknowledges that the ALJ reviewed the totality of the party's conduct, which "includ[ed]" the proposed terms taken together, to reach his finding. *Ibid*. As such, neither the Board nor the court below rested the bad-faith bargaining finding solely on the bargaining proposals.

2. Even had the Board and court below found bad faith from the fact that the Post-Gazette insisted on a combination of proposals that, taken as a whole, would have left the Union and its members with fewer rights than if they had no contract at all, such a finding would not create a circuit split.

At least eight circuits agree with the Third Circuit that, in evaluating the totality of the circumstances, the bargaining proposals advanced and adhered to at the bargaining table can evince a bad-faith intent to avoid agreement. *See*, *e.g.*, *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953); *Cont'l Ins. Co. v. NLRB*, 495 F.2d 44, 49-50 (2d Cir. 1974); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993); *NLRB v. Holmes Tuttle Broadway*

Ford, Inc., 465 F.2d 717, 719 (9th Cir. 1972); *Pub. Serv. Co. of Okla. v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003); *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 874 (11th Cir. 1984); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1188 (D.C. Cir. 1981). At least five circuits specifically agree with the Third Circuit that insistence on proposals that would leave union employees worse off with an agreement than without is telling evidence of bad-faith bargaining. *See, e.g.*, *Cont'l Ins. Co.*, 495 F.2d at 49-50 (2d Cir.); *Radisson Plaza Minneapolis*, 987 F.2d at 1382 (8th Cir.); *Altura Commc'n Sols. v. NLRB*, 848 F. App'x 344, 345 (9th Cir. 2021); *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177 (10th Cir.); *Dist. Hosp. Partners, L.P. v. NLRB*, 141 F.4th 1279, 1290-91 (D.C. Cir. 2025). Moreover, at least five circuit courts, in addition to the Third Circuit, have enforced a bad-faith bargaining finding based on proposals alone. *See, e.g., Vanderbilt Prods., Inc. v. NLRB*, 297 F.2d 833, 833 (2d Cir. 1961) (enforcing bad-faith bargaining finding on insistence on "terms which no self-respecting union could brook"); *Wright Motors*, 603 F.2d at 608 (7th Cir.) (enforcing bad-faith bargaining finding where "[t]he sole . . . question is whether the employer's conduct at the bargaining table demonstrated that it was not negotiating in good faith"); *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177 (10th Cir.) ("[T]he Company's rigid adherence throughout negotiations to a battery of contract proposals undermining the Union's ability to function as the employees' bargaining representative demonstrated it could not seriously have expected meaningful collective bargaining. The Board did not err in inferring bad faith from this conduct."); *A-1 King Size Sandwiches*, 732 F.2d at 873 (11th Cir.) (enforcing bad-

faith bargaining finding even though "[t]here is no evidence that the Company engaged in any conduct away from the bargaining table that might tend to show it would not conclude an agreement with the Union"); *Dist. Hosp. Partners*, 141 F.4th at 1291 (D.C. Cir.) ("The Board examined a trio of proposals pressed by the Hospital and determined that their cumulative effect would strip the Union's representational role to such a degree as to nearly nullify it. . . . We find that the Board's findings are supported by substantial evidence and well-settled law."). As such, the court below's decision fits squarely within the unanimous position of the courts of appeals.

3. It makes sense that circuits were unanimous on this point, as it is consistent with the principles of the NLRA.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees[.]" 29 U.S.C. § 158(a)(5). Section 8(d) defines the obligation to bargain collectively, in part, as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times . . . with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . ." 29 U.S.C. § 158(d). Taken together, these provisions manifest a "statutory objective of establishing working conditions through bargaining." *NLRB v. Katz*, 369 U.S. 736, 744 (1962).

However, Congress recognized that simply requiring parties to engage in bargaining was not likely to achieve "[t]he object of the [NLRA, which] is industrial peace and stability, fostered by collective-bargaining agreements providing for the

orderly resolution of labor disputes between workers and employe[r]s." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). For that reason, Congress further imposed a duty to bargain "in good faith," 29 U.S.C. § 158(d), which requires more than just "purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'"; the duty to bargain in good faith "presupposed a desire to reach ultimate agreement, to enter into a collective bargaining agreement." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960) (cleaned up). Parties are then expected to "approach the [collective-bargaining] negotiations with an open mind and sincere intention to reach an agreement." *NLRB v. Noah's Ark Processors, LLC*, 98 F.4th 896, 900 (8th Cir. 2024) (cleaned up); *see also Blevins Popcorn*, 659 F.2d at 1187 (explaining that while no party is "required to make concessions or to yield any position fairly maintained", they are "under an obligation to make a sincere, serious effort to adjust differences and to reach an acceptable common ground"); *Norris, a Dover Res. Co. v. NLRB*, 417 F.3d 1161, 1170 (10th Cir. 2005) ("the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all" (cleaned up).

As the ALJ below noted, "[t]he touchstone of bad-faith bargaining is a purpose to frustrate the very possibility of reaching an agreement." App. 76a (citing *Phillips 66*, 369 NLRB No. 13, slip op. at 6 (2020)). "Whether bargaining negotiations are carried on in good faith requires a factual determination of the intent of the parties." *Kayser-Roth Hosiery Co. v. NLRB*, 430 F.2d 701, 703 (6th Cir.

1970). "Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence . . . ." *Cont'l Ins.*, 495 F.2d at 48. Thus, "absent specific evidence of bad faith bargaining, the Board must consider the totality of the circumstances in order to determine whether a party has negotiated in good faith." *NLRB v. Suffield Acad.*, 322 F.3d 196, 198 (2d Cir. 2003).

Ultimately, determining if bad faith was present involves the evaluation of a highly complex factual scenario that calls on the expertise of the NLRB. *See Ins. Agents' Int'l Union*, 361 U.S. at 505–06 (noting, in the bad-faith bargaining context, that this Court "has recognized that the significance of conduct, itself apparently innocent and evidently insufficient to sustain a findings of an unfair labor practice, 'may be altered by imponderable subtleties at work which it is not our function to appraise' but which are, first, for the Board's consideration upon all the evidence." (citation omitted)). Indeed, "in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *Dall. Gen. Drivers, Loc. Union No. 745 v. NLRB*, 355 F.2d 842, 844–45 (D.C. Cir. 1966); *Kitsap Tenant Support Servs., Inc. v. NLRB*, No. 18-1187, 2019 WL 12276113, at *2 (D.C. Cir. Apr. 30, 2019) ("drawing of inferences as to good or bad faith in the bargaining process is largely a matter for the Board's expertise" (quoting *Int'l Woodworkers v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972))); *Kayser-Roth*, 430 F.2d at 703 ("The appropriate inferences to be drawn from what is often

confused and tangled testimony . . . makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation," quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., separate opinion)). Therefore, "[i]n judging a party's compliance with Sections 8(a)(5) and (d), the Board has been afforded flexibility to determine whether conduct at the bargaining table evidences a real desire to come to agreement." *Holmes Tuttle*, 465 F.2d at 719 (cleaned up) (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

"The Board has long held that, in some cases, the content of specific proposals is relevant to determining whether the proposal was made in good faith." *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 286 (3d Cir. 2024) (cleaned up); *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177 ("in determining good faith, the Board should examine the totality of circumstances, including the substantive terms of proposals"). Indeed, "[t]he Board 'must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations' if it is not to be 'blinded by empty talk and by the mere surface motions of collective bargaining.'" *Holmes Tuttle*, 465 F.2d at 719 (quoting *Reed & Prince Mfg.*, 205 F.2d at 134). In fact, "[s]ometimes, especially if the parties are sophisticated, the *only* indicia of bad faith may be the proposals advanced and adhered to." *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177 (quoting *Wright Motors*, 63 F.2d at 609) (emphasis added).

Most relevant here, "the Board . . . has consistently found that an employer's proposals evidence bad-faith bargaining when they would confer on the employer unilateral control over virtually all significant terms and conditions of employment." *Altura Commc'n Sols., LLC*, 369 NLRB No. 85, slip op. 4 (2020), enforced, *Altura*, 848 F. App'x 344. That is so because

> [p]roposals that would . . . authorize an employer to make unilateral changes to a broad range of significant terms and conditions of employment, or that would amount to a 'perpetual reopener clause' as to those terms during the life of the contract, are thus at odds with the basic concept of a collective-bargaining agreement.

Ibid. The Board's hard look at bargaining proposals that provide the employer unilateral control over substantive terms of employment has long-standing "court approval." *Ibid*.; *see, e.g., Cont'l Ins. Co.*, 495 F.2d at 49–50 (reviewing company's proposals as evidence of bad-faith bargaining, and finding substantial evidence to support a bad-faith bargaining violation where company's proposal "would have been to place the employees in a worse position than if they had no contract at all"); *Radisson Plaza Minneapolis*, 987 F.2d at 1382 (finding substantial evidence to support bad-faith bargaining violation in part on company's "proposal [that] would have permitted [it] to unilaterally change working conditions whenever it pleased"), *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177 ("[T]he Company's rigid adherence throughout negotiations to a battery of contract proposals undermining the Union's ability to function as the employees' bargaining representative demonstrated it could not seriously have expected meaningful collective bargaining. The Board did not err in inferring bad faith from this conduct." (cleaned up)). As such, "[t]he NLRB

may infer bad faith where an employer's contract proposals 'would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members.'" *Altura*, 848 F. App'x at 345 (quoting *Frankl v. HTH Corp.*, 650 F.3d 1134, 1359 (9th Cir. 2011)). And, as shown above, at least six circuits have enforced a Board order solely on the bargaining proposals advanced and adhered to, without requiring any other conduct away from the table to find bad-faith bargaining.

4. The Post-Gazette claims that the D.C. Circuit is squarely split from the Third Circuit on whether the Board can infer bad faith from proposals alone. But the Post-Gazette misreads the D.C. Circuit's precedents.

Indeed, the company's claim about the D.C. Circuit's position is belied by the circuit's recent decision in *District Hospital Partners*, where the circuit in fact did enforce the Board's order finding bad-faith bargaining based solely on the company's adherence to three proposals whose cumulative effect would be to leave the Union and its employees with fewer rights than no contract. 141 F.4th at 1296. There, the court explained that "the hospital held fast to a trio of proposals that would have [1] granted it sweeping unilateral control over the terms and conditions of employment, [2] imposed a no-strike clause, and [3] eliminated binding arbitration." *Id.* at 1284. The court further explained that the Board applied its "settled totality-of-conduct test" and found that, "when considered together, the hospital's core proposals would have left union employees worse off than if no contract existed at all. *Ibid*. Given this, the Board inferred that the hospital intended to frustrate agreement." *Ibid*. The court denied the company's petition for

review because "[t]he Board's factual findings are supported by substantial evidence, and its legal conclusions are consistent with governing precedent." *Ibid.*

And the D.C. Circuit's description of the governing precedent matches the Third Circuit's:

> Although the Board does not compel particular substantive concessions, it may evaluate whether the nature and persistence of a package of bargaining demands reflect an absence of good-faith intent, as measured by objective indicia. . . . Such an inference may be warranted where 'the employer's proposals, taken as a whole, would leave employees with substantially fewer rights and less protection' than they would enjoy under the Act in the absence of a contract.

Id. at 1290 (citations omitted). *District Hospital Partners*, thus, shows that the D.C. and Third Circuits are in agreement.

The Post-Gazette tries to distinguish *District Hospital Partners* by implausibly arguing that the decision was not based solely on the bargaining proposals insisted upon, but was also based on other considerations, including conduct away from the table. Stay Appl. 26 n.8. No legitimate review of *District Hospital Partners* can come to this conclusion. While, in reciting the background facts, the court mentioned that the company withdrew recognition from the union and announced to the employees that they were non-union, nowhere in the court's actual analysis of the bad-faith bargaining finding does it refer to these facts. *See Dist. Hosp. Partners*, 141 F.4th at 1287. Instead, it looked solely to the company's insistence on the trio of proposals that would have left the union and its employees with fewer rights than no contract to find substantial evidence to support the Board's finding. *See, e.g., id.* at 1294 ("the Board's view that the Hospital's

maintenance of its triad of proposals amounted to surface bargaining is both factually supported and legally sound").

While attempting to distinguish the directly on-point *District Hospital Partners*, the Post-Gazette cites three off-point D.C. Circuit cases to try to suggest that circuit's position is actually that a party's conduct at the bargaining table, without more, can never be the basis of an unfair labor practice. However, none of those cases held any such thing.

Indeed, one of the cases it cites, *Teamsters Local Union No. 515 v. NLRB*, wholly undermines the company's argument. 906 F.2d 719 (D.C. Cir. 1990). There, the court did say, as the Post-Gazette quotes, that "[a]damant insistence on a bargaining position . . . is not itself a refusal to bargain in good faith." *Id*. at 727. But the court prefaced this by stating that "[r]igid adherence to disadvantageous proposals *may* provide a basis for inferring bad faith." *Id*. at 726 (quoting *Blevins Popcorn Co.*, 659 F.2d at 1188). The court further explained that "[i]f a company insists on terms that no self-respecting union could brook, it may not be fulfilling its obligation to bargain." *Ibid* (cleaned up). The court went on to note that the decision regarding "good faith" turns on whether it is to be "inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union." *Ibid*. As demonstrated above, this is exactly the position of the sister circuits, and it is also consistent with *District Hospital Partner*'s position that bad

faith can be inferred from the proposals, taken as a whole, adhered to during bargaining. Indeed, *District Hospital Partner* cites to *Teamsters Local Union No. 515* in support of that proposition. 141 F.4th at 1285. Thus, *Teamsters Local Union No. 515* is no help to the company.

That leaves two cases. Both cases address a separate question from the one in this case—they discuss whether the Board can find adherence to a proposal to maintain unilateral control over merit wage increases to be per se unlawful, without a totality-of-conduct analysis. *See Cincinnati Newspaper Guild, Loc. 9 v. NLRB*, 938 F.2d 284 (D.C. Cir. 1991); *NLRB v. McClatchy Newspaper, Inc.*, 964 F.2d 1153 (D.C. Cir. 1992). In *Cincinnati Newspaper Guild,* the NLRB's General Counsel argued to the ALJ that the company's proposal to reserve unilateral control over merit wage increases was per se unlawful; that is, unlawful in and of itself, regardless of the totality of the circumstances.[4] 938 F.2d at 288. Recognizing the General Counsel's argument that the proposal was per se unlawful, the court stated "[t]his should be the end of the matter, for the courts have held that the Act precludes almost any argument that a particular bargaining position constitutes an unfair labor practice per se." *Ibid*. The court noted, however, that the Board for some time continued to hold insistence on a particular proposal as per se unlawful. *Id*. at 288-89. But "[t]he Board now seems to have accepted the courts' repeated teaching that an employer's bargaining position is not itself bad faith but only

[4] The petitioner union in that case also argued to the court that the merit-increase proposal was per se unlawful. *See Cincinnati Newspaper Guild, Loc. 9 v. NLRB*, Br. of Pet., 1990 WL 10552471, at *30 (D.C. Cir. Dec. 12, 1990) ("if . . . the Employer sought unilateral control over wages, then the Employer is guilty of an unfair labor practice").

evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence." *Id.* at 289. In other words, the D.C. Circuit in *Cincinnati Newspaper Guild* recognized that the Board no longer held that simply proposing unilateral control over merit increases was per se bad-faith bargaining, with no examination of the totality of the circumstances. The court did not hold that evidence outside of the bargaining positions is necessary to find bad-faith bargaining.

The Post-Gazette next cites to *NLRB v. McClatchy Newspaper, Inc.*, without acknowledging that the language it cites is from a solo concurrence. *See* Stay Appl. 25, *citing* 964 F.2d 1153, 1164 (D.C. Cir. 1992) (Edwards, J., concurring). Obviously, a solo concurrence does not establish the position of the circuit. Moreover, *McClatchy* is not even a case examining bargaining conduct to determine whether bad faith was present; it is a unilateral change case. Even in the quoted passage of the concurring decision, Judge Edwards simply reiterated what the court said in *Cincinnati Newspaper Guild*—that the NLRA does not allow for the Board to find a proposal to maintain unilateral control over a mandatory subject of bargaining (again there, merit wage increases) per se unlawful. *Compare McClatchy*, 964 F.2d at 1164 *with Cincinnati Newspaper Guild*, 938 F.2d at 288.

Thus, the D.C. Circuit's position is entirely in line with the other circuit courts that have addressed whether bad faith can be inferred from the proposals, taken as a whole, advanced and adhered to during bargaining. Because the ability to infer bad faith from an evaluation of the total conduct, including the proposals

adhered to, creates no circuit split and is entirely consistent with the principles of the NLRA, this Court is unlikely to grant certiorari on this question. A stay is therefore unwarranted.

5. Next, even if the Court disagreed with this reading of the circuit law, a stay is still not warranted. The Board separately found, and the court below affirmed, that the Post-Gazette violated Section 8(a)(5) of the NLRA by prematurely declaring a bargaining impasse and unilaterally imposing terms and conditions of employment. Docket No. 105 at 10. That finding in and of itself supports the injunction, so any relief the company would win from its second question presented would not affect the injunction.

An employer violates Section 8(a)(5) of the NLRB "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). As the ALJ explained, a bargaining impasse exists "when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope." App. 42a. Whether a bargaining impasse exists is a matter of judgment that requires examination of such factors as "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations . . . ." *Taft Broad. Co.*, 163 NLRB 475, 478 (1967). Further, a bargaining impasse that privileges unilateral changes is not found lightly because the NLRA declares the

policy of the United States is to "encourag[e] the practice and procedure of collective bargaining", 29 U.S.C. § 151, and, "[t]he object of the [NLRA] is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees . . . ." *Auciello Iron Works*, 517 U.S. at 785. When the Board finds that an employer violated Section 8(a)(5) by prematurely declaring impasse and unilaterally changing terms of employment, the Board's traditional remedy is to require the employer to rescind the changes and restore the status quo ante terms. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215-17 (1964).

Here, the Board initially found that a valid impasse didn't exist because of the Post-Gazette's bad-faith bargaining. App. 24a n.1. But even without the bad-faith bargaining finding, the Board held that the company still implemented its unilateral changes when no bargaining impasse existed. *Ibid*. As the Board explained, the parties made substantive movements in the Union's September 6, 2019 proposal and the Post-Gazette's June 12, 2020 proposal that the parties never had an opportunity to fully discuss prior to the implementation. *Ibid.* The Union attempted to schedule further bargaining, and the Post-Gazette implemented terms that were different (and more favorable to the Union) than in its Final Offer, which indicated room to move. *Ibid*. Accordingly, even without the bad-faith bargaining finding, the Board separately found no valid impasse existed that privileged the Post-Gazette to unilaterally change terms and conditions of employment. This finding itself would support the Board's order requiring the Post-Gazette to "rescind

the changes to the terms and conditions of employment of its unit employees that were unilaterally implemented on about July 27, 2020." App. 26a. Since the Board's order is the basis for the court below's March 24th Section 10(e) injunction requiring the Post-Gazette to rescind the changes to the healthcare benefits, a reversal on the bad-faith bargaining finding would have no ultimate effect on the Board's order or the court below's injunction.

The Post-Gazette addresses this separate premature impasse finding only to suggest that the Board's and the court below's decisions were reliant on the bad-faith bargaining finding. App. 24a n.7. As demonstrated above, that reading of the Board's decision is clearly flawed, and it is an equally flawed reading of the Third Circuit's panel decision. The Third Circuit found substantial evidence supported both of the Board's bases for finding that no valid impasse existed: (1) the Post-Gazette acted in bad faith, App. 14a, and (2) the Post-Gazette declared impasse when neither party was warranted to assume that further bargaining would be futile and that neither party believed it was at the end of its rope. App. 15a. As to the latter, the panel pointed to the same facts relied on by the Board for its impasse finding. *Ibid*. While ultimately the panel found substantial evidence to support the Board's impasse finding based on both the bad faith and what the parties were warranted to assume about further bargaining, nothing in its decision suggests it would not have found substantial evidence to support the impasse finding on just what the parties were warranted to assume about further bargaining.

Accordingly, the Post-Gazette's second question presented is no reason to grant a stay, because even if it eventually won total relief on that question, it can't carry its burden to show that the injunction would be affected.

II. The Post-Gazette Can Demonstrate, at Most, Only Limited Harm from Compliance with the Injunction

The Post-Gazette claims that, absent a stay, it will suffer "severe" irreparable harm from compliance with the court below's injunction. Stay Appl. 34. This severe irreparable harm, according to the company, is that (1) it will be required to maintain the Fund benefits even if it were to ultimately prevail, because that plan would become a term of employment that the Post-Gazette can't change without bargaining to impasse or agreement, and (2) it will be subject to incalculable costs because the Fund now requires that a participating employer be subject to the terms of the Fund, which was something that didn't exist before. *See ibid.* Neither of these claims are true and simply amount to fearmongering.

As to the claim that it will be stuck with the Fund benefits until it bargains to impasse or an agreement, the Post-Gazette points to no decisions by the Board or courts of appeal holding that a term of employment imposed by a court order becomes part of the status quo, even if the court order is later found to be improper. And for good reason; there is no basis to believe that the Board or a court of appeals would so hold. The court below ordered the Post-Gazette to reinstate the prior, agreed-to Fund plan because it concluded (preliminarily) that the Post-Gazette was not privileged to unilaterally change the benefits. If it turns out that the company was actually privileged to make the change, neither the Board nor a court is likely

to hold that the Post-Gazette's compliance with an improper injunction deprived it of the privilege to revert back to the unilaterally imposed benefits. *See Rieth-Riley Constr. Co., Inc. v. NLRB*, No. 23-1899, 2025 WL 3298085, at *4 (6th Cir. Nov. 26, 2025) (holding that employer wouldn't waive a defense it maintained in another case if its actions were compelled by an enforced Board order, as opposed to voluntary). This harm, then, is at most speculative, and more likely non-existent.

The Post-Gazette's claim that it would now be bound to the terms of the Fund plan if it participates in the plan, which it asserts is something new, is also speculative, and most likely non-existent. *First,* this is no new requirement. The Post-Gazette points to changed language in the Fund's trust agreement to assert that it would now be bound to the terms of the agreement, and that such an obligation didn't exist before. But that argument goes against the weight of case law, which unanimously holds that simply contributing to a benefits plan binds the employer to the plan's terms. *See, e.g., Plumbers & Steamfitters Loc. 150 Pension Fund v. Vertex Constr. Co., Inc.*, 932 F.2d 1443, 1451 (11th Cir. 1991) ("We fail to see how Vertex can avail itself of the benefits of the Funds without also being subjected to the rules that govern them."); *Wise Foods, Inc. v. UFCW Health & Welfare Fund of Ne. Pa.*, No. 21-cv-1261, 2021 WL 1253546, at *4-5 (E.D. Pa. Apr. 5, 2021) (collecting cases). So, the Post-Gazette, as a matter of law, was always bound by the terms of the trust agreement when it contributed to the plan, meaning there is no harm caused by it now contributing to the plan. *Second*, the Post-Gazette's descriptions of economic disaster by being bound to the Fund's terms are pure

speculation. Indeed, consistent with its policies, the Fund will maintain the costs and benefits without change for at least one year. Accordingly, speculation about a harm that is extremely unlikely to occur is no basis for a stay. *See Nken*, 556 U.S. at 434-35 ("more than a mere 'possibility' of relief is required" and "simply showing some possibility of irreparable injury fails to satisfy the second factor [of the traditional standard needed for a stay pending appeal]" (cleaned up)).

The only actual irreparable harm the Post-Gazette claims is the cost it would pay to the Fund. Stay Appl. 36. But even that is mitigated by the fact that the company would no longer pay the costs associated with the healthcare benefits it currently provides the Union employees. Moreover, the Post-Gazette repeatedly claimed through bargaining—and continues to—that it was not asserting an inability to pay for the Fund's benefits. *See* App. 29a-30a. As such, while the cost paid out to the Fund may constitute some minor irreparable harm if the Post-Gazette ultimately prevails, it is quite limited and not a cost the Post-Gazette cannot afford.

III. The Harm of a Stay to the Union, the Union-Represented Employees, and the Public Interest Would be Great

While the harm to the Post-Gazette from compliance with the injunction would be limited, the harm to the Union and the employees it represents from a stay would be significant, as would the harm to the public interest. *See Blum v. Caldwell*, 446 U.S. 1311, 1315-16 (1980) (declining to stay an injunction where this Court determined, when balancing the equities, that protecting the health and lives

of the class members was more important than the economic harm that the other party would suffer without a stay).

The purpose of granting interim relief under Section 10(e) is to protect the Board's ability to properly remedy unfair labor practices. *NLRB v. Heck's Inc.*, 390 F.2d 655, 655 (4th Cir. 1968) (explaining that 10(e) relief is warranted where "the remedial purposes of the act will be frustrated unless relief pendente lite is granted"). That is, injunctive relief under this section is warranted where harm caused to the integrity of the bargaining process will make it impossible to restore the status quo ante through a remedial order.

That harm is particularly acute considering the nature of the Post-Gazette's unfair labor practices and the effect they have on union representation. "By unilaterally changing the employees' terms and conditions of employment" the Post-Gazette "'minimize[d] the influence of organized bargaining' and 'emphasiz[ed] to the employees that there is no necessity for a collective bargaining agent.'" *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 233 (3d Cir. 2001) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)). Moreover, even after eventual enforcement of the Board's bargaining remedy, "the union is likely weakened in the interim, and it will be difficult to recreate the original status quo with the same relative position of the bargaining parties." *Frankl*, 650 F.3d at 1363.

This harm is not abstract. In support of the Board's motion for the Section 10(e) injunction, the Board and the Union submitted evidence documenting the harm caused to union representation by the Post-Gazette's unfair labor practices,

and the harm further threatened without interim relief. *See* Docket No. 21, 41-44 (Tanner Aff.); Docket No. 27, 20-21 (Tanner Aff.). The Union lost significant support after the Post-Gazette implemented the terms and conditions, including the new health benefits, and after the Union was forced to strike in protest of the company's unfair labor practices. Union employees continued to abandon the strike or leave the Post-Gazette altogether as the company kept insisting on its proposals, even after the Board ruled in its favor. Those that remained with the Union and on strike continued to lose heart that the justice system could ever make the Post-Gazette change its behavior.

But the court below's Section 10(e) injunction and enforcement decision have bolstered the Union employees, as they documented in their strike newspaper. *See* Steve Mellon, *'This is Everyone's Win': Striking PG Workers Celebrate a Big Victory*, PITTSBURGH UNION PROGRESS (Nov. 11, 2025), https://www.unionprogress.com/2025/11/11/this-is-everyones-win-striking-pg-workers-celebrate-a-big-victory/. Those legal victories allowed the Union to end the strike and return to work. But all of that gain would be undone by a stay. Such a stay would strongly signal that the Union and the NLRB have no ability to enforce the rights guaranteed by the NLRA. Support for the Union would immediately collapse to the point that, even if enforcement of the NLRB's order is ultimately upheld, the Union would lose any semblance of bargaining equality with the Post-Gazette. The company would ultimately be able to win at the bargaining table what

it couldn't before, by obfuscating its legal obligations until the Union members' will break. Such harm would be irreparable.

The harms to the Union's support and efficacy are not the only irreparable harms threatened by a stay. The current company-provided healthcare benefits are significantly more expensive to the employees than the Fund benefits. *See* Docket No. 21, 46-48 (comparing costs between the company-provided benefits as of 2023 and the Fund benefits). Those costs are especially crushing considering that the Union members have not had a raise in over twenty years. The high benefit costs have caused thirty percent of the Union employees to forego the company-provided healthcare benefits. The inability to afford the unilaterally-imposed insurance coverage has led to workers foregoing doctors' visits, treatments, and medications. *See* Docket No. 21, 46-48. While the greater out-of-pocket costs could ultimately be reimbursed by the Post-Gazette, the negative healthcare outcomes associated with foregoing medical interventions cannot be recompensed after the fact.

Lastly, a stay threatens serious harm to the public interest. The Post-Gazette has avoided complying with a court of appeals injunction for over nine months. In doing so, it has invented one argument after another. The public's interest is in having court orders obeyed promptly. To allow the Post-Gazette to come to this Court now, after nine months of avoiding compliance, would undermine any public faith in the administration of justice.

IV. The Post-Gazette Misunderstands this Court's Decision in *McKinney*

The Post-Gazette argues that this Court should consider when evaluating the equities that the court below's injunction was "irregular[]". Stay Appl. 30. One of the Post-Gazette's bases for claiming irregularity is its flawed argument that compliance with the injunction would set the status quo for terms and conditions of employment that the company would have to maintain until it bargained to an agreement or an impasse. *Id*. at 32-34. That is plain wrong, as shown above. *See supra* pp. 32-33. The company's other basis for claiming irregularities is that the court below didn't follow this Court's recent decision in *Starbucks Corp. v. McKinney*. *See* 602 U.S. 339 (2024). But the Post-Gazette fails to understand that case.

McKinney involved the standard to apply to a request for a preliminary injunction by the NLRB under Section 10(j) of the NLRA. *See ibid.*, 29 U.S.C. § 160(j). There, this Court held that the NLRA requires district courts to apply "traditional principles of equity" in evaluating the NLRB's requests for injunctive relief pending the Board's administrative proceedings. *McKinney,* 602 U.S. at 345. "For preliminary injunctions, the four criteria identified in *Winter* [*v. NRDC, Inc.*, 555 U.S. 7 (2008)] encompass the relevant equitable principles." *Ibid*.

Here, the court below's injunction issued under Section 10(e) of the Act. *See* 29 U.S.C. § 160(e). Unlike a Section 10(j) injunction, which is sought prior to a final Board order, a Section 10(e) injunction follows the issuance of the Board's final order. *See ibid*. Because of the procedural posture of a Section 10(e) request, application of the *Winter* factors doesn't mirror that in a Section 10(j) proceeding. In

particular, in evaluating the likelihood of success of enforcement of the Board's order, the court below was required to defer to the Board's fact-finding, as long as there is substantial evidence in the record to support those findings.

In *McKinney*, this Court criticized the two-factor test applied by the Sixth Circuit to Section 10(j) requests because "it substantively lower[ed] the bar for securing a preliminary injunction by requiring courts to yield to the Board's preliminary view of the facts, law, and equities." *McKinney*, 602 U.S. at 349. This was not appropriate because "none of the views advanced in a § 10(j) petition represent the Board's formal position—they are simply the preliminary legal and factual views of the Board's in-house attorneys who investigated and initiated the administrative complaint." *Id.* at 351. As such, this Court held that the district court must "conduct[] an independent assessment of the merits" of the case, including by "resolv[ing] conflicting evidence or mak[ing] credibility determinations." *Id.* at 350 (cleaned up).

But that level of scrutiny would be inappropriate in evaluating a Section 10(e) request. The Section 10(e) request doesn't rest on the Board's "preliminary views" of the facts but relies on the Board's "formal position" and final decision-making on the facts. Section 10(e) also provides that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). This Court has long understood substantial-evidence review to be deferential to the Board's fact-finding. *See, e.g., Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937).

Accordingly, in evaluating the likelihood of success, the court below appropriately did not engage in the level of scrutiny required by *McKinney*. Indeed, as discussed earlier, deferral to the Board's fact-finding is particularly appropriate in a bad-faith bargaining/impasse case like this one. *See Kitsap Tenant Support Servs.*, 2019 WL 12276113 at *2 ("drawing of inferences as to good or bad faith in the bargaining process is largely a matter for the Board's expertise" (quoting *Int'l Woodworkers*, 458 F.2d at 854)).

There is then no irregularity in the court below's injunction that would provide any support for a stay.

CONCLUSION

The application for stay should be denied.

Dated: January 5, 2026

Respectfully submitted,

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