No. 25A725

In the Supreme Court of the United States

PG PUBLISHING CO., INC.
DBA PITTSBURGH POST-GAZETTE, APPLICANT

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

FEDERAL RESPONDENT'S RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION FOR A STAY

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The Solicitor General, on behalf of respondent National Labor Relations Board (Board), respectfully submits this response in opposition to the emergency application for a stay of the injunction.

More than nine months ago, the court of appeals issued a preliminary injunction pending appeal that ordered applicant to, *inter alia*, rescind the unilateral changes it made to the healthcare plan for employees in a particular bargaining unit. Appl. App. 21a-23a. Rather than immediately seeking a stay or further review of that order, applicant decided to await a merits decision while declining to comply with the injunction's plain language. On November 10, 2025, the court of appeals issued its merits decision upholding the determination of the Board that applicant committed unfair labor practices by failing to engage in good-faith bargaining and by unilaterally imposing new terms and conditions of employment without bargaining to impasse. *Id.* at 5a-18a. At the same time, the court reiterated applicant's obligation under the preliminary injunction to revert the bargaining-unit employees to the health insurance coverage provided prior to the unilateral change in the healthcare

plan that applicant imposed. *Id.* at 3a-4a.

Applicant now seeks an emergency stay of the preliminary injunction—which remains in place until the mandate for the merits decision issues—while it pursues further review of the merits decision in the en banc court and potentially in this Court. The Court should deny the application.

Applicant's stay request suffers from a fundamental mismatch: It seeks to stay the preliminary injunction, while acknowledging that applicant is not seeking further review of that order. Instead, applicant raises purportedly certworthy issues arising from the court of appeals' merits decision. But the two orders are not the same and cannot be conflated to manufacture an emergency that warrants this Court's intervention. Indeed, the primary issue applicant raises with respect to the merits decision is the Board's authority to require applicant to pay for direct or foreseeable pecuniary harms suffered as a result of unfair labor practices. But that remedy is not a part of the preliminary injunction and any concerns regarding its validity cannot be used as a basis to stay the preliminary injunction pending further review. The secondary issue applicant raises—the standard the court of appeals applied in holding that applicant did not engage in good-faith bargaining—is likewise immaterial to the validity of the healthcare-related provisions of the preliminary injunction that applicant seeks to escape. The Board independently held that applicant had prematurely declared an impasse—a conclusion the application does not challenge—and the injunction to revert to employees' preexisting healthcare coverage is valid on that basis alone.

Nothing prevented applicant from seeking further review of the preliminary injunction when the court of appeals issued it back in March. That applicant chose not to do so then hardly warrants emergency relief now, least of all based on objec-

tions directed at the court's later merits decision.

Further, the application should independently be denied because neither issue applicant identifies warrants further review in this case. The court of appeals correctly held that applicant did not preserve its argument regarding the Board's remedial authority to require payment for direct or foreseeable pecuniary harms as a remedy. And the court of appeals' assessment of whether applicant engaged in good-faith bargaining is consistent with the standard applied by other courts of appeals. This Court is therefore unlikely to engage in any further review of this case.

The remaining factors also weigh against granting a stay. Applicant overstates the irreparable harm it will face if it complies with the preliminary injunction pending any further review of the court of appeals' merits decision. The injunction requires applicant to revert bargaining-unit employees to their prior healthcare plan, but nothing about that order will lock applicant into the healthcare plan in the event the court's merits decision is overturned on further review. Nor has applicant shown that contractual requirements with the healthcare plan would have that effect. And applicant's significant delay in seeking relief from the preliminary injunction, along with its continued failure to comply with that injunction, counsel against granting relief here. The application should be denied.

STATEMENT

A. Legal Background

The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, "encourag[es] the practice and procedure of collective bargaining" between labor and management to resolve "industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U.S.C. 151. The Act protects employees' rights "to self-organization, to form, join, or assist labor organizations, to bargain col-

lectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. The Act also prohibits employers from engaging in certain "unfair labor practice[s]," including "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 157," 29 U.S.C. 158(a)(1), or "refus[ing] to bargain collectively with the representatives of [their] employees," 29 U.S.C. 158(a)(5). The Act defines the duty to bargain as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). If a newly certified union and management have not reached a collective-bargaining agreement, or if an existing agreement between the union and management has expired, this Court has held that "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991).

The Board is charged with enforcing the prohibition on unfair labor practices. 29 U.S.C. 160(a). When a charge is filed with the Board alleging that an employer or labor union has engaged in an unfair labor practice, a regional director will investigate the charge and, "if the charge appears to have merit, the director institutes a formal action against the offending party by issuing an administrative complaint." *Starbucks Corp.* v. *McKinney*, 602 U.S. 339, 343 (2024) (brackets, citation, and quotation marks omitted). An administrative law judge (ALJ) adjudicates the complaint, followed by the Board itself. *Ibid*; see 29 U.S.C. 160(b) and (c); 29 C.F.R. 101.10-101.12. After the Board issues its final order, an aggrieved party may seek judicial review—and the Board may seek enforcement—in a federal court of appeals. 29

U.S.C. 160(e) and (f). The NLRA provides that, on review, the Board's findings of fact "shall be conclusive" "if supported by substantial evidence." *Ibid.*

The Act also provides mechanisms for the Board to obtain temporary relief while administrative and enforcement proceedings are ongoing. As relevant here, Section 160(e) provides that when the Board is seeking to enforce a final order in the court of appeals, it may petition the court "for appropriate temporary relief or restraining order," and the court has the "power to grant such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(e).

B. Factual And Procedural Background

1. Applicant publishes a print and electronic newspaper in Pittsburgh, Pennsylvania. Respondent Newspaper Guild of Pittsburgh/CWA Local 38061 (the Guild) is the exclusive collective-bargaining representative of a unit of editorial employees. Appl. App. 7a. For decades, applicant and the Guild have bargained over wages and healthcare for company employees. *Id.* at 54a-55a. The most recent collective-bargaining agreement was effective from October 15, 2014 through March 31, 2017. *Id.* at 54a. Applicant and the Guild began bargaining for a successor to that agreement in March 2017. *Id.* at 55a. Applicant sought numerous concessions, including the exclusive and unrestricted ability to assign bargaining-unit work to nonbargaining-unit employees or independent contractors; unilateral control over work hours; an expanded no-strike clause; and the replacement of applicant's existing union-sponsored healthcare plan—the Western Pennsylvania Teamsters and Employers Welfare Fund (Teamsters plan)—with a company-run plan that would give applicant the "right to change or terminate the healthcare plan at its discretion." *Id.* at 56a; see *id.* at 55a-56a, 63a-64a.

Applicant and the Guild met on numerous occasions over the next two years.

Appl. App. 56a. While the parties exchanged proposals on a variety of terms and conditions of employment, applicant continued to seek significant concessions and the parties remained unable to come to an agreement. *Id.* at 56a-65a. On August 6, 2019, applicant presented the Guild with a "best offer" contract proposal, which "reflected [applicant's] prior offers on most issues." *Id.* at 8a. The parties met again on September 6, 2019, and the Guild presented a counterproposal. *Ibid.* The parties did not review the entire proposal during the bargaining session. Following the meeting, the Guild filed a charge with the Board alleging that applicant had engaged in an unfair labor practice by failing to bargain in good faith over the preceding six months. *Id.* at 8a-9a.

The parties met again in February 2020, but again failed to reach an agreement. Appl. App. 9a. The subsequent meeting was cancelled due to the pandemic. *Ibid.* In May 2020, applicant sent the Guild a written response to its September 2019 proposal, but the Guild did not reply. *Ibid.* In June 2020, applicant sent a letter to the Guild to convey its "last, best, and final offer," which generally reflected the terms offered in August 2019. *Ibid.* The parties then exchanged letters in which they disagreed about whether they had reached an impasse. *Ibid.* The Guild expressed its view that no impasse had been reached because the "parties had not finished going through the [Guild's] September 6, 2019 proposal." *Id.* at 70a. On July 27, 2020, applicant declared impasse and unilaterally implemented terms and conditions of employment, including the transition to the company-run healthcare plan. *Id.* at 71a; see *id.* at 73a. Most of the terms applicant implemented were the same as those in its final offer, but "some were better for employees." *Id.* at 9a; see *id.* at 72a-73a. The Guild thereafter filed a second charge against applicant, alleging that applicant had failed to engage in good-faith bargaining and unlawfully declared impasse. *Id.* at 9a.

2. Following an investigation, the Board's regional director issued a complaint against applicant. Appl. App. 10a. After a hearing, the ALJ issued a decision finding, as relevant here, that applicant committed unfair labor practices by failing to bargain in good faith and unilaterally implementing changes to terms and conditions of employment after prematurely declaring an impasse. *Id.* at 52a-94a.

With respect to the failure to bargain in good faith, the ALJ determined that applicant "presented proposals that, viewed as a whole, evidence an intent not to reach an agreement." Appl. Appl. 76a. The ALJ highlighted several proposals within applicant's last, best offer, and explained that they "would authorize an employer to make unilateral changes to a broad range of significant terms and conditions of employment," which is "at odds with the basic concept of a collective-bargaining agreement." *Id.* at 78a (citation omitted). For example, the proposals would enable applicant to unilaterally subcontract work and "assign[] bargaining unit work to employees outside of the bargaining unit"; afford applicant discretion over hours of work; and allow applicant to "unilaterally alter or scale back its bargaining unit employees' healthcare." *Ibid.* The ALJ found that, by proposing to provide applicant with the unilateral ability to alter numerous, significant terms and conditions of employment during the contract term, applicant "failed to bargain in good faith." *Id.* at 79a. Applicant'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," because they would eliminate the union's statutory right—even absent a contract—to prior notice and bargaining over changes or modifications in significant terms and conditions of employment. *Ibid.* The ALJ explained that the proposals "effectively sought the discretion to limit the [Guild's] jurisdiction (via subcontracting and assigning bargaining unit work to non-unit employees) and remove the [Guild] from

representing bargaining unit members interests concerning" various terms and conditions of employment. *Ibid.*

The ALJ also concluded that applicant committed an unfair labor practice by unilaterally imposing terms and conditions of employment on the bargaining unit after prematurely declaring an impasse. Appl. App. 81a-84a. The ALJ explained that "[t]he question of whether an impasse exists" depends on "several factors, including: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations." *Id.* at 81a. In finding that applicant's declaration of an impasse was premature, the ALJ relied on his conclusions with respect to applicant's bad-faith bargaining, as well as his view that "neither party could have reasonably believed that they were at the end of their rope." *Id.* at 82a. At the time applicant declared an impasse, the ALJ explained, the parties "had not yet finished discussing the [Guild's] contract proposal from September 2019," and "did not have a bargaining session to discuss [applicant's] last, best, and final offer" or "the additional updated proposals that [applicant] used when it declared impasse and unilaterally implemented terms and condition s of employment." *Id.* at 82a-83a. The ALJ noted that by "implementing terms and conditions of employment that differed" from applicant's last, best, and final offer, applicant "demonstrated that it had room to move from what it characterized as its last, best, and final offer * * * and thus demonstrated that the parties were not at impasse." *Id.* at 83a n.26. The ALJ found that those factors "outweigh the fact that negotiations were lengthy and the fact that the parties' disagreement centered around critical issues." *Id.* at 84a.

The ALJ then ordered a variety of remedies. Appl. App. 88a-94a. Among other

things, the ALJ ordered applicant to, on request from the Guild, "rescind the unlawful unilateral changes and put into effect the corresponding terms and conditions of employment set forth in the collective-bargaining agreement that expired on March 31, 2017"; to "make its employees whole for any loss of earnings and other benefits that resulted from its unlawful unilateral changes"; and to "compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes," consistent with the Board's decision authorizing such a remedy in *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022). Appl. App. 88a.

3. The Board affirmed the ALJ's rulings, findings, and conclusions, and adopted the ALJ's remedial order with slight modifications. Appl. App. 24a-28a. In addition to adopting the ALJ's findings, the Board noted that "even absent [applicant's] failure and refusal to bargain in good faith with the [Guild] during the negotiations for the successor collective-bargaining agreement, [the Board] would still find that the [applicant] had not reached a valid impasse prior to implementing the changes to the employees' terms and conditions of employment." *Id.* at 24a n.1. In support of that conclusion, the Board cited: (1) the parties' written communications, which "reflected substantive movement" in proposals from the Guild and applicant "that had not been discussed"; (2) the Guild's "attempt[s] to schedule further bargaining"; and (3) that applicant "implemented terms that differed from its final offer, thus demonstrating that it had additional room to move from what it had previously termed its 'final' negotiating positions." *Ibid.*

4. a. Applicant sought review of the Board's order in the court of appeals, and the Board cross-applied for enforcement. The Board also filed a motion for temporary relief under Section 160(e), asking the court to enjoin applicant to comply

with certain aspects of the Board's order during the court's review. C.A. Doc. 21 (Dec. 20, 2024).[1]

On March 24, 2025, the court of appeals granted the Board's motion in relevant part. Appl. App. 21a-23a. The court specifically ordered that, "[o]n request by the [Guild]," applicant must "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." *Id.* at 23a.

Judge Phipps dissented from the grant of the injunction. Appl. App. 22a n.1. He would have concluded that "none of the harms associated with the non-enforcement of the Board's order are irreparable." *Ibid.*

Two days after the court of appeals' injunction order issued, the Guild requested that applicant rescind the changes it made to health insurance and restore the Teamsters plan that was previously in place. See C.A. Doc. 80 Att. B (June 17, 2025).

b. Applicant sought en banc review of the injunction and filed a motion seeking clarification. In the clarification motion, applicant explained that under the terms applicant had unilaterally imposed, Guild-represented employees currently received healthcare coverage through applicant's company-sponsored healthcare plan. C.A. Doc. 59, at 2 (Mar. 27, 2025). Applicant requested that the court of appeals clarify "that the Court's Order allows [applicant] to continue the existing plan coverage for employees while negotiating for a replacement plan with the Guild." *Ibid.* The Board opposed the motion for clarification, explaining that the "unambiguous language of the Court's Order" requires applicant to "reinstitute the Western Pennsylvania Teamsters and Employers Welfare Fund that was in place under the parties'

[1] All citations to court of appeals documents are from No. 24-2788.

expired collective-bargaining agreement." C.A. Doc. 60, at 2 (Apr. 4, 2025).

The court of appeals denied en banc review and the motion for clarification. Appl. App. 19a-20a. Applicant did not seek review of the injunction in this Court by filing either a petition for a writ of certiorari or a stay application.

Applicant nevertheless continued providing healthcare coverage to unit employees on the company-sponsored plan rather than the Teamsters plan. Accordingly, the Board filed a motion asking the court of appeals to hold applicant in contempt. C.A. Doc. 80 (June 17, 2025). The Board requested that applicant be compelled to comply with the order within 14 days of the issuance of the contempt order; that applicant be subject to prospective fines if it failed to comply after 14 days; and that applicant be required to pay the Board's and the Guild's fees and costs incurred in connection with the contempt motion. *Id.* at 14-16.

c. On November 10, 2025, the court of appeals denied the Board's contempt motion without prejudice. Appl. App. 3a-4a. In denying the motion, the court "clarif[ied]" that its order required applicant to "revert health insurance coverage for unit employees to the coverage provided prior to the unilateral implementation of terms." *Ibid.*

5. On the same day it denied the contempt motion, the court of appeals issued a nonprecedential decision denying applicant's petition for review and granting the Board's application for enforcement. Appl. App. 5a-18a.

The court of appeals first held that the Board did not err in finding that applicant committed an unfair labor practice by bargaining in bad faith. Appl. App. 12a-13a. The court explained 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." *Id.* at 12a. The ALJ had

found that applicant's proposals warranted that inference, and the court concluded that "[s]ubstantial evidence supports the ALJ's finding" that the proposals "*as a whole* would have required the Guild to cede to [applicant] the most fundamental of employment terms." *Id.* at 13a.

The court of appeals next held that the Board did not err in finding that applicant improperly declared an impasse. Appl. App. 13a-16a. The court found "substantial evidence in the record that [applicant] bargained in bad faith," and that "[s]ubstantial evidence" likewise supported the conclusion that applicant declared an impasse at a time when "neither party would have been warranted in assuming that further bargaining would be futile." *Id.* at 14a-15a.

The court of appeals also addressed applicant's argument that the Board acted unlawfully in requiring applicant to pay for direct or foreseeable pecuniary harms consistent with the Board's decision in *Thryv*. Appl. App. 17a-18a. The court concluded that it could not consider the validity of the *Thryv* remedy because applicant failed to raise it before the Board. *Id.* at 17a. The court explained that Section 160(e) prohibits a court from considering any "objection that has not been urged before the Board," absent "extraordinary circumstances," and that a Board regulation requires a party to "concisely state the grounds for the objection." *Ibid.* (quoting 29 U.S.C. 160(e) and 29 C.F.R. 102.46(a)(1)(D)) (brackets omitted). The court determined that applicant had not put the Board on "adequate notice of the basis for its objection" to the remedy. *Ibid.* Rather, applicant simply excepted to the ALJ's order to compensate workers for "direct or other foreseeable pecuniary harms," without "expounding on the rationale for the objection." *Ibid.*

6. Following issuance of the merits decision, applicant filed a motion to stay the Section 160(e) preliminary injunction pending its petition for en banc review

of the merits decision. C.A. Doc. 108 (Nov. 19, 2025). The court of appeals denied the motion. Appl. App. 2a. Applicant then moved for panel rehearing and rehearing en banc of that denial. C.A. Doc. 112 (Dec. 1, 2025). The panel denied the motion without referring the request to the full court, consistent with its internal operating procedures. Appl. App. 1a; see 3d Cir. I.O.P. 10.3.3.

7. On December 24, applicant filed a petition for rehearing en banc. C.A. Doc. 116.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, an applicant for a stay of a lower court's injunction must show a reasonable probability that this Court would grant certiorari, a likelihood of success on the merits, and a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," the Court also considers the balance of the equities and the public interest. *Ibid*.

Applicant cannot make the requisite showing. Applicant seeks a stay of a preliminary injunction, but the court of appeals long ago denied rehearing en banc regarding that injunction, and applicant does not intend to seek further review of that injunction in this Court. Nor do the court of appeals' orders regarding the injunction actually present the questions that applicant claims are worthy of review. Moreover, those questions will not warrant this Court's review when applicant eventually seeks further review of the court of appeals' recent merits decision. Finally, applicant overstates the irreparable harm it claims to face, and the balance of the equities weighs against relief in light of applicant's delay in seeking relief and its failure to comply with the injunction thus far.

A. There Is A Fundamental Mismatch Between The Relief Applicant Seeks And The Order Of Which It Plans To Seek Review

Applicant seeks a stay of the preliminary injunction that the court of appeals granted back in March to preserve the status quo pending appeal. Yet applicant forthrightly acknowledges (Appl. 29) that it is not seeking this Court's review of that injunction—indeed, it could no longer timely do so. See 28 U.S.C. 2101(c). Applicant suggests (Appl. 29) that it has been forced into this position because "this is the rare preliminary injunction that *originated* in a court of appeals," such that applicant purportedly had "no realistic avenue of interlocutory appellate review." But nothing prevented applicant from seeking certiorari from this Court after the court of appeals issued the injunction or denied rehearing en banc.

When circumstances warrant, this Court has granted review of preliminary lower-court orders, see, *e.g.*, *Starbucks* v. *McKinney*, 602 U.S. 339, 344-345 (2024); *Department of Education* v. *Career Colleges & Schools of Texas*, 145 S. Ct. 1039 (2025), including where the case and order originated in the court of appeals, see, *e.g.*, *FDA* v. *R.J. Reynolds Vapor Co.*, 606 U.S. 226, 231 n.2 (2025). Applicant rendered such review impossible by failing to timely pursue that route when the injunction issued and instead awaiting the merits decision of the court of appeals. Perhaps applicant took that path because it did not consider there to be any "realistic" possibility that this Court would grant certiorari (or even a stay) of the injunction at that juncture. Appl. 29. But applicant should not be permitted to make that strategic litigation decision and then profit from it by invoking a self-created emergency.

The mismatch inherent in the application is most evident when comparing the scope of the order applicant seeks to have stayed with the merits arguments applicant raises. Applicant argues (Appl. 4, 34-37) that it will suffer irreparable harm based

on the effects of the preliminary injunction—specifically, the requirement that it revert bargaining-unit employees to the Teamsters healthcare plan. But the primary merits issue applicant raises (Appl. 2, 16-22) involves the Board's power to require *compensation* for direct or foreseeable pecuniary harm—a remedy that the preliminary injunction does not direct at all. Whatever the merits of that challenge, applicant's ability to raise it does not depend on staying the preliminary injunction.

Likewise, applicant's challenge to the standard the court of appeals applied in holding that it did not engage in good-faith bargaining is insufficient to call into question the preliminary injunction. The Board determined that "even absent the [applicant]'s failure and refusal to bargain in good faith," it "would still find that the [applicant] had not reached a valid impasse prior to implementing the changes to the employees' terms and conditions of employment." Appl. App. 24a n.1. The Board grounded that conclusion in its findings that the parties had not yet discussed certain proposals, that the Guild was attempting to schedule further bargaining, and that the terms applicant unilaterally imposed differed from—and were better than—its final offer, "demonstrating that it had additional room to move from what it had previously termed its 'final' negotiating positions." *Ibid.* That conclusion independently supports the preliminary injunction's requirement to revert bargaining-unit employees to the Teamsters plan. And while the court relied in part on its bad-faith holding in affirming the Board's impasse determination, see *id.* at 15a, there is no indication that the court would have rejected the Board's conclusion that the impasse determination could stand independently, nor has applicant suggested that the question of whether the parties had reached impasse would merit this Court's review.

The disconnect between applicant's merits arguments and the order it challenges is sufficient basis to deny the application. Applicant cannot tie alleged irrep-

arable harm from one aspect of one order to two merits questions raised by different aspects of a separate order and somehow create a basis for this Court to grant emergency relief. Cf. *Winter* v. *NRDC*, 555 U.S. 7, 23 (2008) (criticizing the district court for going beyond the scope of the specific challenges raised when assessing the likelihood of irreparable harm).[2]

B. There Is No Reasonable Probability That This Court Would Grant Certiorari In Applicant's Case

Even setting aside the mismatch between the preliminary injunction order applicant seeks to stay and the merits order applicant seeks to challenge, the Court should deny the stay application because the Court is unlikely to grant certiorari in this case on either of the issues applicant has raised.

1. Applicant primarily contends (Appl. 16-22) that there is a reasonable likelihood that this Court will grant certiorari on the question whether the Board has authority to require compensation for direct or foreseeable pecuniary harm. Regardless of whether that question warrants review in some other case, applicant's case

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[2] Despite disavowing any request for this Court to review the preliminary injunction itself, applicant spends several pages arguing (Appl. 29-34) that the injunction was improperly issued. Applicant contends (*ibid.*) that the court of appeals ignored this Court's decision in *Starbucks* v. *McKinney*, *supra*, in issuing the injunction and that the injunction is effectively permanent rather than temporary. In addition to being irrelevant, those contentions are unfounded. There is no basis to conclude that the court of appeals did not apply the four-factor test articulated in *McKinney*. Although the court's order issuing the injunction did not set out its reasoning, the parties briefed the issue on the understanding that the four-factor test applied. See, *e.g.*, C.A. Doc. 21, at 11-12 (Dec. 20, 2024). The Board simply added the caveat that, unlike in *McKinney*, the court should review the Board's final factual findings under substantial-evidence review. *Id.* at 12-14. The Court in *McKinney* viewed deference to the Board's "preliminary legal and factual views" as inappropriate in the context of a preliminary injunction under Section 160(j), which issues while administrative proceedings are ongoing and before the Board issues a merits decision. 602 U.S. at 351. Under Section 160(e), by contrast, the Board has made a final determination and its factual findings are then reviewable for substantial evidence. See 29 U.S.C. 160(e). Moreover, for the reasons explained at p. 22, *infra*, applicant is incorrect that the preliminary injunction is effectively permanent.

does not provide a proper vehicle for its consideration. The court of appeals correctly declined to consider the question because applicant failed to adequately raise it before the Board. Appl. App. 17a-18a.

Section 160(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). That provision requires that parties provide the Board with "adequate notice that [they] intend[] to press the specific issue" they raise before the court. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953). A "general objection" does not suffice. *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255 (1943). As the Board's regulations explain, when a party files an exception to the ALJ's decision, each exception must "[s]pecify the questions of procedure, fact, law, or policy to which exception is taken" and "[c]oncisely state the grounds for the exception." 29 C.F.R. 102.46(a)(1)(i)(A) and (D).

Applicant did not adequately raise the remedial issue before the Board. In excepting to the ALJ's decision, applicant stated that it objected "[t]o the ALJ's remedy consistent with *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 14 (2022), that [applicant] shall also compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes." 5 C.A. App. 213. In support of the exception, applicant relied on its accompanying brief. *Ibid.* But the accompanying brief stated only that applicant "did not violate the Act" and "[t]herefore, there is no basis for any [r]emedy" at all. *Id.* at 272. That general objection to the imposition of any remedy did not put the Board on notice that applicant was further objecting to the Board's authority, even if it found a violation of the Act, to issue the particular remedy requiring applicant to compensate employ-

ees for direct or foreseeable pecuniary harm. The court of appeals thus correctly held that applicant "did not preserve its argument," and that under Section 160(e), the court could not review it. Appl. App. 18a.[3]

Applicant protests (Appl. 22) that Section 160(e) permits courts, in "extraordinary circumstances," to excuse a failure to raise an issue before the Board. And applicant asserts (*ibid.*) that such circumstances existed here because applicant filed its exceptions before any court had invalidated the remedy at issue. But as the court of appeals explained, "[n]othing prevented [applicant] from raising its argument against the *Thryv* remedy before the Board" even in the absence of circuit precedent adopting that argument. Appl. App. 18a n.5. Indeed, that is precisely what another challenger did, resulting in a Third Circuit opinion holding that the *Thryv* remedy exceeds the Board's authority under the Act. See *NLRB* v. *Starbucks Corp.*, 125 F.4th 78, 95 (2024) (noting that while Starbucks failed to raise certain challenges to the remedy before the Board, it had "argued in its briefing before the Board that the NLRA does not allow monetary damages beyond backpay and benefits").

Applicant does not and cannot contend that the court of appeals' application of Section 160(e) to bar review of its claim is an issue that warrants this Court's review. And in the event that the Court is interested in considering the merits of the argument that applicant did not preserve, applicant notes (Appl. 19) that there is a pending petition for certiorari arising from the Ninth Circuit's decision on the issue. See *Macy's, Inc.* v. *NLRB*, No. 25-627 (filed Nov. 26, 2025). There would be no basis for

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[3] Applicant suggests (Appl. 20 n.5) that this case could provide an opportunity for this Court to consider whether Section 160(e)'s administrative-exhaustion requirement is jurisdictional. But whether exhaustion is a jurisdictional rule or a claim-processing rule is immaterial in this case. Although claim-processing rules would be subject to forfeiture, they "assure relief to a party properly raising them," as the Board did here. *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005); see C.A. Doc. 52, at 52-54 (Mar. 14, 2025).

the Court to grant certiorari on the validity of *Thryv* remedies in applicant's case arising from the Third Circuit, where applicant acknowledges that the court has now adopted the very holding applicant favors. See Appl. 21; *Starbucks*, 125 F.4th at 95-97. And because the court of appeals correctly held that applicant failed to preserve the argument, there would be no basis to grant, vacate, and remand the case in the event the Court granted and ultimately reversed the Ninth Circuit's holding in *Macy's*.

2. Applicant fares no better in contending (Appl. 23-28) that this Court is reasonably likely to grant certiorari on the question whether the court of appeals erred in finding that applicant engaged in bad-faith bargaining. Contrary to applicant's contention (Appl. 23-25), the court's decision is consistent with holdings reached by other courts, including the D.C. Circuit.

a. Although 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), the parties must bargain in good faith, 29 U.S.C. 158(a)(5). Because the "Board should not pass upon the desirability of the substantive terms of labor arrangements," the Board may not conclude that any particular proposal is, "*per se*, an unfair labor practice." *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 408-409 (1952). Courts may nevertheless view "the facts of each case" to determine whether an employer is making proposals that, as a whole, "will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment.'" *Id.* at 409.

That is what the court of appeals did here. The court held that applicant's "proposals *as a whole*" evidenced bad faith because they "would have required the Guild to cede to [applicant] the most fundamental of employment terms." Appl. App. 13a. Giving applicant such "unilateral control" would mean that "Guild members would have been afforded more rights working without a contract than by accepting

all of [applicant's] proposals." *Id.* at 13a. Other courts of appeals have reached similar conclusions. See, *e.g.*, *Public Service Co.* v. *NLRB*, 318 F.3d 1173, 1178 (10th Cir. 2003) (upholding bad-faith determination where company "insist[ed] throughout negotiations on proposals undermining the [u]nion's representational function," a determination that the court deemed not inconsistent with the view that the Board may not condemn a company "merely for bargaining for certain proposals"); *Sparks Nugget, Inc.* v. *NLRB*, 968 F.2d 991, 994-995 (9th Cir. 1992) (upholding bad-faith determination where company "failed to compromise in its negotiations" and proposed retaining "total control of wages, seniority, and work rules"); *NLRB* v. *A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir.) (upholding bad-faith determination where company "insisted on unilateral control over virtually all significant terms and conditions of employment," which "would have left the [u]nion and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the [u]nion's certification"), cert. denied, 469 U.S. 1035 (1984); *NLRB* v. *Wright Motors, Inc.*, 603 F.2d 604, 608 & n.5 (7th Cir. 1979) (upholding bad-faith determination where company "insist[ed] on unreasonable positions" that "would have put the employees in a far worse position with the [u]nion than without it" and would have "damaged the [u]nion's ability to function as the employees' bargaining representative").

Applicant asserts (Appl. 23-25) that the D.C. Circuit has reached a contrary result, but that is incorrect. Indeed, the court of appeals here directly relied on D.C. Circuit precedent in support of its holding. See Appl. App. 12a-13a (citing *District Hospital Partners, L.P.* v. *NLRB*, 141 F.4th 1279, 1294 (2025)). In *District Hospital*, as here, the court upheld the Board's bad-faith determination based on "proposals pressed by the [company]" that would have the "cumulative effect" of "strip[ping] the

[u]nion's representational role to such a degree as to nearly nullify it." 141 F.4th at 1291; see *id.* at 1291-1294. Those proposals would have undermined the union's "ability to function as the employees' bargaining representative," thereby leaving employees "with fewer rights than they would have without a contract." *Id.* at 1294 (citation omitted). Applicant claims (Appl. 26 n.8) that *District Hospital* is distinguishable because the court there relied on "evidence of bad faith away from the bargaining table." But while the court discussed the company's actions seeking to decertify the union and cancel bargaining sessions when describing the factual background, 141 F.4th at 1287, the court did not rely on those facts as a basis for upholding the finding of bad faith, much less hold that they are essential to such a finding, *id.* at 1291-1294. Nor can applicant differentiate this case from *District Hospital* by asserting (Appl. 26 n.8) that the proposals there "were designed to undermine the union's representational capacity." The court of appeals here reached a similar conclusion: that the combination of proposals would "encroach on the Guild's jurisdiction" and give the company "unilateral control" over "fundamental" employment terms. Appl. App. 13a.

In support of its claim of a circuit split, applicant relies on *Cincinnati Newspaper Guild, Local 9* v. *NLRB*, 938 F.2d 284, 288 (D.C. Cir. 1991). See Appl. 23. But that reliance is misplaced. Consistent with this Court's decision in *American National*, the D.C. Circuit in *Cincinnati Newspaper* simply held that an employer may not treat "a particular bargaining position" as "an unfair labor practice per se." 938 F.2d at 288. But the court distinguished the circumstances at issue in *Cincinnati Newspaper* from a case in which a proposal would "interfere[] with the employees' right to bargain collectively" by "depriv[ing] the employees of their right to have their representative bargain for them over a mandatory subject." *Id.* at 289. The court of appeals here concluded—as the D.C. Circuit did in *District Hospital*—that the com-

pany's proposals as a whole effectively resulted in such interference. Applicant identifies no decision by the D.C. Circuit (or any other court of appeals) that has rejected a bad-faith-bargaining finding by the Board in such circumstances.

C. The Other Factors Do Not Support Granting A Stay

Because the court of appeals has now issued its merits decision and applicant is highly unlikely to obtain this Court's review (or en banc review) of that decision, any "irreparable injury" stemming from the preliminary injunction should have no significant weight in the analysis. In any event, applicant's asserted irreparable harm is overstated and the equities weigh against relief here.

1. Applicant's assertion of irreparable harm is largely based on its claim (Appl. 34) that absent a stay of the preliminary injunction, it will be "lock[ed] * * * into" the Teamsters healthcare plan "at least through [the] next round of collective bargaining with the Guild," even if this Court (or the en banc court) were to reverse the Board's order. That assertion is unfounded. The Section 160(e) injunction requires applicant to revert to the health insurance terms of the last collective-bargaining agreement; it does not require applicant to enter into a new collective-bargaining agreement. If applicant obtains further review and convinces this Court (or the en banc court) that it acted lawfully in unilaterally imposing a new healthcare plan, the court will deny enforcement of the Board's order and dissolve the interim injunction. At that point, labor law would not require applicant to maintain the healthcare plan that it re-implemented only due to the court order. Applicant does not cite any authority suggesting otherwise. Instead, it relies on the general proposition that employers must maintain "the status quo as to terms and conditions of employment" pending bargaining for a new collective-bargaining agreement. Appl. 34 (quoting *Wilkes-Barre Hospital Co.* v. *NLRB*, 857 F.3d 364, 374 (D.C. Cir. 2017)). But the court

in *Wilkes-Barre* also recognized that if parties bargain to "lawful impasse," the employer may impose new terms. 857 F.3d at 375. The court did not address whether an employer that lawfully reached impasse must continue to maintain terms and conditions of employment that the employer restored under an invalid Board no-impasse order that was later reversed on appeal. And if a lawful impasse was in fact reached, and the injunction invalidated on that ground, then the relevant "status quo" for labor-law purposes would be the employment terms lawfully implemented given the impasse, not the improperly mandated continuation of prior benefits.

Applicant separately contends (Appl. 36) that by reinstating the Teamsters healthcare plan, it would become subject to a trust agreement that would be binding even if applicant "ultimately prevailed on the merits in this litigation." But applicant has not provided any support for that claim. Applicant was previously able to withdraw from the Teamsters healthcare plan and impose its own. Applicant has not cited any provision of the trust agreement that would prevent the same conduct in the future. In all events, any such possibility cannot justify a stay given applicant's inability to show a likelihood of success in obtaining reversal of the Board's order, let alone success that would be relevant to the scope of the Third Circuit's preliminary injunction.

2. Finally, the balance of the equities does not favor applicant. As explained, see p. 14, *supra*, the alleged emergency situation is one of applicant's own making, based on its failure to seek this Court's review of the preliminary injunction when it was issued. The Court should not reward applicants' nearly nine-month delay by granting a stay. And applicant's continued failure to comply with the injunction—including after the court of appeals expressly clarified what that order requires—should likewise preclude equitable relief in these circumstances. See *Precision Instrument Mfg. Co.* v. *Automotive Maint. Mach. Co.*, 324 U.S. 806, 814-815 (1945).

CONCLUSION

The application should be denied.

Respectfully submitted.

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Solicitor General

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