No. 23-367

# In the Supreme Court of the United States

STARBUCKS CORPORATION,
PETITIONER,

*v.*

M. KATHLEEN MCKINNEY, REGIONAL DIRECTOR OF REGION 15 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

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Section 10(j) injunctions are potent weapons: They can "interfere with day-to-day business operations" and "require fundamental changes to business models" based on yet-unproven labor-law violations. Chamber Br. 11. The NLRB increasingly seeks nationwide relief. Pet. 5. And, once obtained, the NLRB decides how long these injunctions last; they expire only when the agency finishes years-long in-house proceedings. The NLRB's General Counsel recently promised to wield the "weight of a federal district court's order" against employers at the "earliest" moment to force settlements. Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to Regional Directors 1 (Feb. 1, 2022), https://tinyurl.com

/bdnjvs44. Self-evidently, the standard governing years-long injunctions matters immensely.

Courts, commentators, the NLRB's section 10(j) manual, and the NLRB's brief below recognize that circuits are split over that standard. Pet. 21-22. Four circuits—the Fourth, Seventh, Eighth, and Ninth—apply the traditional four-factor preliminary-injunction test, considering likelihood of success on the merits, irreparable harm, countervailing harm to employers, and the public interest. But five circuits—including the Sixth Circuit below—apply an undemanding two-factor test where the NLRB need only show that its legal theory is non-frivolous ("reasonable cause") and that injunctions serve remedial purposes.

"Rarely has a circuit split been so widely and clearly acknowledged." Chamber Br. 6. Yet the NLRB (at 9) now dismisses the split as "verbal distinctions." But courts and the NLRB's manual agree that the two-factor test is far less stringent. Pet. 3-4, 26-28. Many real-world examples confirm that courts applying the traditional four-factor test reject injunctions that courts would impose under the relaxed two-factor test, and vice versa. Pet. 25-27; Chamber Br. 7-11. The NLRB ignores these examples.

Starbucks' experience confronting twelve authorized 10(j) injunction requests across multiple circuits over two years reinforces the standards' importance. *See* NLRB, *10(j) Injunctions*, https://tinyurl.com/yr6tywnd. While the NLRB (at 11) cursorily questions whether the standard mattered here, seven pages of Judge Readler's concurrence yield a resounding yes. Pet.App.30a-36a. This Court should grant review, restore uniformity to the NLRA, and stop circuits from issuing injunctions under an atextual test.

## ARGUMENT

### I. The Widely Acknowledged Split Is Not Semantic

"[C]ircuits are undeniably divided" over the standard for section 10(j) injunctions. Chamber Br. 3; *see* Pet. 15-22. The relaxed two-factor test used by five circuits—including the Sixth Circuit below—"dramatically lower[s] the bar for the Board in securing an injunction" compared with the traditional four-factor test that four circuits employ. Pet.App.37a (Readler, J., concurring). That stark difference routinely determines whether employers are subject to lengthy injunctions.

1. The NLRB (at 8) calls the split "essentially terminological" because all courts consider the merits and equities. But the circuits themselves have acknowledged a split in substance, not semantics, because circuits assess both the merits and equities differently depending on the test. Pet. 21 (citing six cases acknowledging the split). The NLRB's manual likewise instructs attorneys to tell judges that the standards differ. Section 10(j) Manual, *supra*, app. L, at 5. District courts employing the relaxed reasonable-cause test have granted section 10(j) injunctions despite marginal or hotly disputed evidence, lengthy NLRB delays, or invocations of statutory purpose instead of irreparable harm. Pet. 26-27. Those same features prompt courts applying traditional preliminary-injunction factors to deny relief. Pet. 25-26; Chamber Br. 9. That "deep circuit conflict" with "significant impact[s] on employers" is real. CDW Br. 4.

*First*, circuits significantly diverge in assessing the merits. Pet. 15-21; Chamber Br. 6-7; CDW Br. 7-9. The four circuits applying traditional criteria require a "likelihood of success on the merits," *i.e.*, a "probability that the Board will … determin[e] that the unfair labor practices … occurred and that [a] Court w[ill] … enforc[e] that

order." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011). The NLRB "bears the burden" of establishing a "likelihood of prevailing on the merits" "by a preponderance of the evidence"—*i.e.*, better than even odds. *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 500 (7th Cir. 2008).

The five circuits applying the two-factor test just look for "reasonable cause to believe that unfair labor practices have occurred." Pet.App.10a (citation omitted). Under that "relatively insubstantial" burden, the NLRB "need not … even convince the district court of the validity of [its] theory." *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017) (citation omitted). The NLRB must merely "show that [its] legal theory is substantial and not frivolous," and courts defer to the NLRB's theories and evidentiary assertions. *Id.* (citations omitted); *see Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); Pet. 17-19.

Clearly, courts do not "evaluate the merits in essentially the same way" (BIO 8) when one camp requires the NLRB to show a significant chance of winning and the other camp requires only a non-frivolous legal theory, with heavy deference to the NLRB. In the Fifth Circuit's words: The "threshold" for reasonable cause "is *significantly lower* than a requirement to show … 'likelihood of success.'" *Overstreet v. El Paso Disposal*, 625 F.3d 844, 851 n.10 (5th Cir. 2010) (emphasis added). In the NLRB's words: "[R]equiring … a likelihood of success on the merits gives too little deference to the agency's interpretation of the facts and the inferences to be drawn from the facts." *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999). Other courts agree: "[R]easonable cause … speaks to the substantiality of the [NLRB's] theory, not the likelihood of success." *McKinney v. Kellogg Co.*, 2014 WL 4954351, at *4 (W.D. Tenn. Oct. 2, 2014).

The NLRB's citation (at 8-9) to *Chester v. Grane Healthcare Co.*, 666 F.3d 87 (3d Cir. 2011), confirm these differences. The Third Circuit there reversed the district court for applying "the incorrect four-part standard" instead of the "less strict" two-factor test. *Id.* at 100. As for *Muffley v. Spartan Mining Co.* (cited at BIO 8), the Fourth Circuit believed that the "likelihood of success on the merits" tracked the "reasonable cause" inquiry in the context of that case, where the district court took a hybrid approach blending the traditional and relaxed tests. 570 F.3d 534, 543 (4th Cir. 2009). *Muffley* does not show that the two tests generally use the same merits inquiry.

*Second*, circuits apply disparate equitable criteria. Pet. 15-21; Chamber Br. 10. The four circuits employing the traditional test make the NLRB "clear the relatively high hurdle of demonstrating irreparable injury." *McKinney v. S. Bakeries, LLC*, 786 F.3d 1119, 1125 (8th Cir. 2015) (citation omitted). The NLRB must show that the case presents the "rare situation" where a serious injury "cannot later [be] remed[ied]" by the NLRB's "very potent remedial powers." *Id.* (citation omitted). And the NLRB must identify "evidence in the record" showing that "a present or impending deleterious effect" would "not be cured by later relief." *Hooks v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1117 (9th Cir. 2022) (citation omitted).

But the five circuits applying the relaxed test only ask whether an injunction is "just and proper"—*i.e.*, if relief is necessary to "protect the Board's remedial powers under the NLRA," with deference to the NLRB. Pet.App.10a (citations omitted). "[T]he mere potential for future impairment of the Board's remedial power" or frustration of the NLRA's statutory purposes suffices. Pet.App.29a (Readler, J., concurring); *accord Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 234-35 (6th Cir. 2003).

Requiring the NLRB to demonstrate a likely, permanent injury obviously differs from deferring to the NLRB's projection of diminished remedial powers. The Sixth Circuit has contrasted the "just and proper" test with the "more stringent requirement … [of] irreparable harm." *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 n.3 (6th Cir. 1988). District courts agree: "The just and proper standard is less stringent than traditional equitable principles and does not require consideration of elements such as irreparable harm." *Muffley v. APL Logistics Mgmt. Warehouse Servs.*, 2008 WL 544455, at *5 n.2 (W.D. Ky. Feb. 27, 2008).

The NLRB's citations (at 9) prove the point. The Sixth Circuit in *Ahearn* recognized that it would amount to an "overhaul[]" of the "just and proper" standard to "adopt[] the traditional test." 351 F.3d at 236. While the Tenth Circuit in *Sharp* suggested that the relaxed test "subsumes various equitable considerations," *Sharp* then excused the NLRB's seven-month delay between filing a complaint and seeking injunctive relief. 225 F.3d at 1135-37 & n.3. Under the traditional test, such dilatory tactics refute irreparable harm. *E.g.*, *Ohr v. Arlington Metals Corp.*, 148 F. Supp. 3d 659, 674 (N.D. Ill. 2015).

*Third*, the traditional test "expressly requires courts to weigh" "the countervailing harms to the nonmoving party and the public interest"—considerations the reasonable-cause test may "slight." *Muffley*, 570 F.3d at 543; Pet. 26; Chamber Br. 10. Again, the NLRB's citations show that the two tests materially differ. *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401 (6th Cir. 1992) (cited at BIO 9), did not "balance[] the parties' relative harms"—that quote came from the district court opinion the Sixth Circuit *reversed* for "fail[ing] to address the appropriate question" under the reasonable-cause test. *Id.* at 1410. The Sixth Circuit emphasized that irreparable

harm is "more stringent" than the "just and proper" prong of the two-factor test. *Id.* at 1409 n.3. Likewise, *Sheeran v. American Commercial Lines, Inc.* reduced whether "judicial action is in the public interest" to whether "a reasonable apprehension" existed that "the efficacy of the Board's final order may be nullified." 683 F.2d 970, 979 (6th Cir. 1982).

2. Downplaying the differences between circuits' tests, the NLRB (at 10) invokes circuits' recognition that section 10(j) relief should be an "extraordinary remedy." Likewise, the NLRB (at 10) claims circuits applying the traditional test lower the bar by accounting for the "context" of section 10(j) relief. But courts championing the relaxed two-factor test emphasize that the "primary difference" between circuits "is that the two-part test … grant[s] a sufficient measure of deference to the Board" that the traditional test denies. *Chester*, 666 F.3d at 99. And cases that the NLRB ignores show how ordinary section 10(j) relief has become in permissive circuits, notwithstanding occasional recognition that relief should be "extraordinary." Pet. 27, 29; Chamber Br. 8-9. Only this Court can stop these disparate standards from subjecting employers and unions to materially different outcomes based on geography.

Finally, the NLRB (at 9) suggests that even for "ordinary preliminary injunctions," the precise test is irrelevant because "courts use a bewildering variety of formulations." But here, the circuits disagree over *every* element of the section 10(j) test. Moreover, this Court clarified the preliminary-injunction test in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008), even though the circuits disagreed over a more modest issue—whether irreparable harm must be *likely*

or *possible*—and the brief in opposition called those differences semantic. Br. in Opp. 16, *Winter*, 555 U.S. 7 (No. 07-1239), 2008 WL 2199938.

## II. The Standard for 10(j) Injunctions Is Exceedingly Important, Recurrent, and Cleanly Presented

Section 10(j) injunctions are the howitzers of the NLRB's enforcement arsenal. How leniently courts grant section 10(j) relief carries enormous consequences: Years-long injunctions "compel or constrain a broad range of business activity," including forcing employers to reopen closed stores, rehire terminated workers, and restructure operations. CDW Br. 12; *see* Pet. 24-25; Chamber Br. 11-16. This case is a prime example. Had the district court required the NLRB to satisfy the traditional test, its "victory would have been much less certain." Pet.App.30a-32a (Readler, J., concurring).

1. Disregarding the NLRB General Counsel's recent promise to "aggressively" pursue injunctions, Pet. 23 (citation omitted), the NLRB (at 11) denies that its 10(j) activity is "on the rise" by arbitrarily comparing 39 requests in 2022-23 to higher numbers in 2014-15. Missing from the count: intervening years in which annual 10(j) requests dipped under 14. Robert Iafolla & Chris Marr, *Punching In: Labor Board Notches Wins with Injunction Strategy*, Bloomberg L. News (Nov. 27, 2023), http://tinyurl.com/bddnhbd6. As the NLRB's spokeswoman observed, the General Counsel's promise to zealously pursue 10(j) relief has already extracted more settlements. *Id.*

Likewise, that the NLRB seeks 10(j) injunctions in only a "small fraction" of cases (BIO 10-11) is cold comfort when the agency seeks 20-plus business-disrupting injunctions a year and increasingly demands nationwide relief. Indeed, the NLRB sought two more injunctions against Starbucks since this petition was filed—the

NLRB has now authorized *twelve* injunction requests against Starbucks in two years. *See 10(j) Injunctions*, *supra*. Companies with nationwide operations should not have to structure their businesses around the prospect that different standards in different circuits will produce different results for the same alleged conduct. Pet. 29-30.

2. The NLRB (at 11) claims the difference in standards would not matter here. But, as seven pages of Judge Readler's concurrence detail, the result might have "been drastically different had the NLRB been asked to satisfy the *Winter* standard." Pet.App.30a-36a.

Start with the merits. The NLRB (at 11) says it would win even under the traditional test because it was not pursuing an "esoteric legal theory." But parties do not show likelihood of success just by pressing an oft-litigated type of claim; parties must show they are likely to prevail *in this case*. *Hooks*, 54 F.4th at 1106.

The NLRB (at 11) notes that Starbucks did not appeal the district court's reasonable-cause determination. That is because the reasonable-cause prong "is no real obstacle" for the NLRB—so employers in Starbucks' shoes "often decline to challenge the Board's showing." Pet.App.31a-32a (Readler, J., concurring). By contrast, the NLRB's "victory would have been far less certain" had the NLRB tried to show a likelihood of success with "thorough probing … [of] the facts as well as the Board's legal theories." Pet.App.30a.

For instance, the district court heard conflicting testimony on a key merits issue: whether Starbucks was aware of labor organizing when Starbucks terminated union-affiliated employees. Pet.App.31a-32a (Readler, J., concurring). Under the traditional test, the court "would have been obligated to settle [those] disputes of material fact, at least on a preliminary basis." Pet.App.31a. But

under the reasonable-cause test, the court merely asked whether "facts exist to support the Board's theory," refusing to "resolve conflicting evidence or weigh credibility." Pet.App.89a (citation omitted).

Additionally, the NLRB could not have obtained an injunction were irreparable harm required—here, that Starbucks "so thoroughly douse[d] the nascent unionization movement's fire" that nothing could reignite it. Pet.App.35a (Readler, J., concurring). The NLRB showed no such harm. Yet, under the relaxed test, the district court "presum[ed] that termination of union supporters necessarily produces an insurmountable chill on organizing." Pet.App.35a-36a.

Further, though the NLRB (at 12) claims the district court considered traditional equitable factors, the court nowhere mentioned irreparable harm or likelihood of success on the merits, let alone balanced the equites. The court weighed hardship to the employees that an injunction might force Starbucks to fire to make room for reinstated partners, Pet.App.117a, but ignored *Starbucks'* interests. As for the public interest, the court merely asserted without analysis that an injunction "is in the public interest to effectuate the policies of the NLRA." Pet.App.118a (citation omitted). The court thus ignored clear public interests cutting the other way—like employers' ability to freely operate their businesses before the government proves any wrongdoing. *See* NCLA Br. 11.

3. Finally, the NLRB (at 6) says this Court should deny review because one denied petition presented the same question ten years ago. *HealthBridge Mgmt., LLC v. Kreisberg*, 574 U.S. 1066 (2014) (No. 14-93). But that petition (from which Justice Alito was recused) had glaring vehicle problems not present here. The primary

question presented was whether NLRB's General Counsel could pursue section 10(j) relief when the Board lacked a quorum. *HealthBridge* Pet. i. This Court would have had to first resolve that thorny issue—and side with the NLRB—to consider the subsidiary question whether the district court applied the correct injunction standard. By contrast, the NLRB identifies no impediments to resolving the clean, standalone question here—an issue which often evades this Court's attention because the NLRB aggressively pressures parties to settle. Pet. 23-24.

**III. The Decision Below Is Incorrect**

The traditional preliminary-injunction test applies unless Congress plainly says otherwise. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Section 10(j) does not say otherwise, instructing district courts to issue injunctions only when "just and proper," 29 U.S.C. § 160(j), *i.e.*, when equity warrants. The reasonable-cause test lacks any textual basis, especially since Congress dictated a reasonable cause standard for a different type of NLRA injunction, but not 10(j). Pet. 30-32.

The NLRB disputes none of these points. The NLRB (at 6) agrees that courts "should consider the same general factors that are normally relevant to the granting of interim equitable relief." But the NLRB retracts, demanding (at 7) that courts "assess the merits and the equities in a manner that accounts for the deference owed to the Board's expert judgments."

The NLRA provides no textual hook for that deference-heavy ask. Nor does the NLRB explain how agency expertise somehow relieves the NLRB alone of the need to show likelihood of success, irreparable harm, and other equitable criteria. Quite the contrary, Congress charged district courts, not the NLRB, with deciding whether it is "just and proper" to preliminarily enjoin employers. 29

U.S.C. § 160(j). Even final NLRB decisions lack effect without a court of appeals' order. *Id.* § 160(e).

The NLRB's deference request is particularly remarkable because the agency has not rendered any final determinations when seeking 10(j) injunctions. Ordinarily, courts defer to final agency factfinding—not to "significant pre-filing consideration" by agency prosecutors. BIO 7. That is because agency adjudications are supposed to be a level playing field that produce reasoned final decisions for judicial review. Deferring to the NLRB's initiation of complaints would give the agency an injunction whenever it pairs well-pleaded allegations with a few labor-law citations—effectively removing courts from the section 10(j) process. Pet.App.31a (Readler, J., concurring).

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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