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,
*Respondents*.

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

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICI CURIAE*[1]

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

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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[1] Counsel for the parties received timely notice of *amici*'s intent to file this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

*Amici*'s members include thousands of employers subject to the Nation's statutory and regulatory regimes, including the National Labor Relations Act ("NLRA"). *Amici* have a strong interest in the proper standard for granting preliminary injunctive relief under Section 10(j) of the NLRA. Underscoring an entrenched circuit conflict, the Sixth Circuit has granted the National Labor Relations Board ("the Board") broad and unchecked authority to obtain years-long injunctions against employers. This watered-down rule for obtaining such injunctions defies longstanding equitable guardrails on the drastic remedy of a preliminary injunction, enables the Board to interfere with employers' most basic business decisions without due cause, and ultimately will embolden the Board to take increasingly aggressive action against the Nation's employers. *Amici* file this brief to urge the Court to grant certiorari and reverse.

## INTRODUCTION AND SUMMARY OF ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In open conflict with the Fourth, Seventh, Eighth, and Ninth Circuits, the Sixth Circuit—joined by several other courts of appeals—applies a "significantly lower" "threshold" to injunctions sought by the Board under Section 10(j) of the NLRA. *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 n.10 (5th Cir. 2010). This watered-down approach eliminates two of the bedrock prerequisites for obtaining a preliminary injunction—likelihood of success on the merits, and irreparable harm—and it minimizes

other important equitable considerations. The result is a cudgel that the Board, aided by courts applying this erroneous standard, has wielded against American businesses with increasing frequency in recent years.

The petition amply explains why this case warrants this Court's review: the circuits are undeniably divided over an important and recurring question, and the Sixth Circuit's decision is clearly incorrect. *Amici* do not repeat that discussion. Instead, *amici* write to emphasize three points.

*First*, the stark circuit conflict over the proper standard for Section 10(j) injunctions has major implications for businesses. Four circuits apply the "traditional four-factor standard" for preliminary injunctions: the petitioner must show that it is likely to succeed on the merits, that it will likely suffer irreparable harm without preliminary relief, that the balance of the equities tips in its favor, and that an injunction is in the public interest. *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009). Five other circuits, including the Sixth Circuit below, apply a far more lenient two-prong analysis, specific to the Board: petitioner must show only that there is "reasonable cause" to believe that an unfair labor practice occurred (a "relatively insubstantial" burden heavily weighted toward the Board, *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 237 (6th Cir. 2003) (citation omitted)) and that relief is "just and proper" (a mere possibility that the Board's authority "'may be nullified'" absent judicial intervention, *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982) (citation omitted)). The Board itself instructs its lawyers to exploit this conflict. Pet. 22. Employers laboring under the

watered-down standard face a very difficult task in opposing injunctions.

*Second*, the two-prong test for Section 10(j) injunctions poses a significant threat to businesses. Section 10(j) injunctions enable the Board to control an employer's core operations—*e.g.*, which employees it hires and fires, and what shifts they work; what an employee manual requires and permits; and what plants it opens and closes. Such injunctions can be especially harmful because they are indefinite: the injunction lasts as long as the administrative proceedings, and *the Board* controls the length of those proceedings, which typically last an extended period. By giving the Board unchecked sway over both the grant and length of the injunction, the Sixth Circuit's rule assures unwarranted, long-term meddling in employers' lawful business practices. The Board's sustained effort to seek Section 10(j) injunctions against Petitioner Starbucks Corp. is a high-profile example of the consequences of this relaxed standard. But many harms are less visible, as small businesses unable to challenge the Board settle unfair labor practice charges at the outset rather than fight a lengthy, losing battle.

*Finally*, the Board's recent across-the-board assault on employers underscores the need for this Court to grant review now. The Board has recently issued decisions and rules that limit employers' ability to enforce common workplace rules and policies; modify the Board's default remedy to include new and speculative compensatory damages awards; expand the definition of "joint employer" to impose new obligations on a range of businesses; threaten to impose collective bargaining without a secret ballot election; and punish employer speech. At the same

time, the Board has vowed to "aggressively" seek Section 10(j) injunctions in service of its agenda. Memorandum GC 21-05 from NLRB General Counsel Jennifer A. Abruzzo to All Regional Directors, et al. ("Aug. 2021 Abruzzo Mem.") at 1 (Aug. 19, 2021), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos. District courts in circuits applying the watered-down standard must defer to *any* non-frivolous legal theory offered by the Board to support its claims; they cannot refuse an injunction even if they believe the Board has exceeded the appropriate bounds of its legal authority. Only this Court can prevent the Board from using Section 10(j) injunctions to advance its aggressive anti-employer agenda—to the detriment of thousands of businesses, including *amici*'s members.

The Court should grant certiorari.

## ARGUMENT

### I. This Case Presents An Entrenched Circuit Split With Major Implications For Employers

Section 10(j) of the NLRA permits the Board, upon filing an unfair labor practice complaint, to petition a district court for temporary relief, and it authorizes the district court "to grant to the Board such temporary relief or restraining order as [the court] deems just and proper." 29 U.S.C. § 160(j).

The circuits are openly and undeniably split on the proper standard for granting Section 10(j) injunctions. Courts on both sides of the split, including the Sixth Circuit in the decision below, have recognized the conflict. App. 17a-18a; *see, e.g.*, *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 541 (4th Cir. 2009) ("[T]he issue . . . has divided our sister circuits."); *Chester ex rel. NLRB v. Grane*

*Healthcare Co.*, 666 F.3d 87, 93 (3d Cir. 2011) (similar). Treatises and commentators have highlighted the split. *See, e.g.*, 13 James Wm. Moore, *Moore's Federal Practice* § 65.22[1][a] (3d ed. 2023 online update). And the Board's own Section 10(j) manual contains a lengthy appendix reviewing the conflict and explaining how attorneys should present injunctive relief claims in different circuits. *See* NLRB Office of the General Counsel, Section 10(j) Manual, app. D (Feb. 2014), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/MASTER%20REVISED%202013%2010(J)%20MANUAL.pdf. Rarely has a circuit split been so widely and clearly acknowledged.

As the petition explains, the Fourth, Seventh, Eighth, and Ninth Circuits apply the traditional four-factor preliminary-injunction test set out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 23 (2008). In those circuits, the Board "must establish [(1)] that [it] is likely to succeed on the merits, [(2)] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in [its] favor, and [(4)] that an injunction is in the public interest." *Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1114 (9th Cir. 2022) (brackets around numbering in original) (citation omitted); *see also McKinney ex rel. NLRB v. Southern Bakeries, LLC*, 786 F.3d 1119, 1122-23 (8th Cir. 2015); *Spartan Mining*, 570 F.3d at 543; *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989). Adhering to longstanding equitable principles, these circuits restrict such relief for "'serious and extraordinary' cases." *Southern Bakeries*, 786 F.3d at 1123 (citation omitted).

By contrast, the Third, Fifth, Sixth, Tenth, and Eleventh Circuits apply a far more lenient two-prong test crafted specifically for the Board. *See Grane Healthcare*, 666 F.3d at 93; *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 (5th Cir. 2010); *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 237 (6th Cir. 2003); *Sharp ex rel. NLRB v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); *Arlook ex rel. NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). First, the Board need only provide "'reasonable cause' to believe that the unfair labor practices alleged have occurred." *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988) (citation omitted). This prong poses a "'relatively insubstantial' burden in section 10(j) cases." *Id.* (citation omitted). Second, the Board must show that injunctive relief is "just and proper"—which these courts interpret to require only that the injunction avoid the "potential for future impairment of the Board's remedial power." App. 29a (Readler, J., concurring).[2]

The "threshold" for granting Section 10(j) injunctions in these five circuits, as the Fifth Circuit has acknowledged, "is significantly lower than" the threshold under the traditional four-factor test—all but assuring that businesses with operations in these circuits will face injunctions for conduct that would

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[2] As the petition explains, two circuits—the First and Second—follow a hybrid approach that takes elements from both the traditional approach and the more lenient two-prong test. Pet. 20 (citing *Pye ex rel. NLRB v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994), and *Hoffman ex rel. NLRB v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364-65 (2d Cir. 2001)). *Amici* agree with the petition's discussion of those circuits' approach.

not have been enjoined in other circuits. *El Paso Disposal*, 625 F.3d at 851 n.10; *see* App. 37a ("[O]ur § 10(j) jurisprudence has dramatically lowered the bar for the Board in securing an injunction . . . .") (Readler, J., concurring). Three specific differences are especially important.

*First*, the Board need not show a likelihood of success on the merits to obtain a Section 10(j) injunction in these five circuits. The Fifth Circuit has again made this explicit: a "'likelihood of success'" requirement would improperly "raise the factual threshold that the NLRB must reach." *El Paso Disposal*, 625 F.3d at 851; *accord Grane Healthcare*, 666 F.3d at 97; *S. Lichtenberg*, 952 F.2d at 371. Instead, district courts in these circuits play the very limited role of ensuring the Board's "theories of law and fact are not insubstantial and frivolous." *S. Lichtenberg*, 952 F.2d at 371 (citation omitted); *accord Schaub v. West Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001) (Board "need not prove a violation of the NLRA *nor even convince the district court of the validity of the Board's theory of liability*" (emphasis added)).

Several examples illustrate the leniency of this approach. In *Sharp ex rel. NLRB v. La Siesta Foods, Inc.,* for instance, the court found reasonable cause to issue an injunction despite its view that the "evidence" was "in substantial dispute," because the court was obligated to "interpret the conflict in the light most favorable to the [Board]." 859 F. Supp. 1370, 1373 (D. Kan. 1994). Even courts applying the hybrid approach are "required to defer to the perspective adopted by the [Board]"—including where the Board uncritically adopted "the Union's position" and failed to make any "in-depth study of which side

had the more reasonable perspective." *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 355 (E.D.N.Y. 2012). This watered-down standard puts a heavy thumb on the scale in the Board's favor—and makes it far more difficult for employers in these circuits to contest an injunction.

*Second*, the Board need not establish irreparable injury before obtaining injunctive relief in these five circuits. In rejecting an irreparable harm requirement, the Sixth Circuit has explained that "Congress has authorized relief under section 10(j) upon a showing that such relief is 'just and proper' and not upon a more stringent requirement such as irreparable harm." *Nixon Detroit Diesel*, 859 F.2d at 30 n.3; *accord Grane Healthcare*, 666 F.3d at 97; *El Paso Disposal*, 625 F.3d at 851; *S. Lichtenberg*, 952 F.2d at 371. That "just and proper" analysis, according to these courts, asks only for evidence that injunctive relief may serve to protect the Board's remedial authority. *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982). This inquiry can consider harms, but it permits injunctions based on hazy notions of agency authority and statutory purpose. In *Angle v. Sacks ex rel. NLRB*, for example, the court stated that injunctive relief was just and proper because "the purposes of the [NLRA] could be defeated if some temporary relief were not granted." 382 F.2d 655, 661 (10th Cir. 1967). Circuits applying the traditional rule, by contrast, reject injunctions where the Board fails to "clear the 'relatively high hurdle' of demonstrating irreparable injury." *Southern Bakeries*, 786 F.3d at 1125 (citation omitted).

*Third*, the lenient two-prong standard "slight[s] the countervailing harms to the nonmoving party and

the public interest, which the traditional four-factor standard expressly requires courts to weigh." *See Spartan Mining*, 570 F.3d at 543. While acknowledging that equitable principles factor into the analysis, the Fifth Circuit, for example, has made clear that "traditional rules of equity may not control the proper scope of § 10(j) relief." *El Paso Disposal*, 625 F.3d at 851 n.11 (citation omitted).

A review of these circuits' Section 10(j) cases confirms that the employer's interests are rarely factored into the district court's analysis. Consider *El Paso Disposal*, where the court ordered reinstatement of employees that had been terminated many months earlier. *Id.* at 855-57. Nowhere did the Court balance the disruption resulting from such reinstatement—including the potential that reinstatement would require termination of employees hired into those positions. *See id.* at 854-57. Similarly, in *Overstreet ex rel. NLRB v. Albertson's, LLC*, the court granted an injunction reinstating an employee terminated a year earlier, reasoning that the Board deserved "leniency to delay filing a 10(j) petition because deference to the Board is built into the statutory scheme of the Act." 868 F. Supp. 2d 1182, 1191 (D.N.M. 2012). By ignoring the full scope of equitable interests in favor of a one-sided look at the Board's preferences, these circuits further stack the deck against employers in Section 10(j) proceedings.

The lenient two-prong standard boils down to a rule of deference: deference to the Board's version of the facts; deference to the Board's theory of the law; and deference to the Board's pro-unionization goals. Such deference has immense consequences for employers located in these circuits. They cannot meaningfully dispute factual errors in the Board's

Section 10(j) request; they cannot challenge nonfrivolous legal theories; and they cannot assert that the employer's particular interests tip the scales against injunctive relief. This rule enables the Board to pursue groundless injunctions that interfere with the basic decisions of American businesses.

## II. The Sixth Circuit's Watered-Down Standard For Section 10(j) Injunctions Harms American Businesses

The Sixth Circuit's watered-down standard for Section 10(j) injunctions causes immense harm to employers. Any injunction is a "drastic" remedy. *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 165 (2010). And Section 10(j) injunctions are particularly intrusive: they can interfere with day-to-day business operations (like staffing and property access) and they can require fundamental changes to business models (like requiring businesses to reverse a store or plant closure). Moreover, these injunctions frequently last for years while proceedings transpire before the Board. Such lengthy intrusions on employers' activities *should* require the strongest justification. But the deferential standard applied below does the opposite. The resulting harm to businesses is clear and unjustifiable.

1. Section 10(j) injunctions authorize judicial and administrative interference with a considerable swath of employer conduct. The Board frequently seeks to require employers to reinstate employees that had been terminated for cause—sometimes at the expense of new employees hired to fill their roles. *See, e.g.*, *Albertson's*, 868 F. Supp. 2d at 1192. But the Board also pursues broader relief, including wholesale revisions to employment manuals, *West*

*Mich. Plumbing & Heating*, 250 F.3d at 972, and orders barring employers from closing unprofitable facilities, *Hirsch ex rel. NLRB v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998). A few such examples underscore the breadth of Section 10(j) relief sought by the Board, and the aggressiveness with which the Board uses Section 10(j) to control employers' decisions.

- Reinstatement of employees that have violated employment policies or otherwise committed misconduct. In *Muffley ex rel. NLRB v. Jewish Hospital & St. Mary's Healthcare, Inc.*, the Board demanded (and the court ordered) that the employer reinstate an employee terminated after violating internal policies and harassing co-workers, a full seven months after the employee's discharge. No. 3:12-MC-00006-R, 2012 WL 1576143, at *1, *6 (W.D. Ky. May 3, 2012).
- Belated reinstatement of discharged employees at expense of current employees. In *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, the Board waited nearly eighteen months after several employees' discharge to demand reinstatement under Section 10(j). 668 F. Supp. 2d 988, 1010-11 (W.D. Tex. 2009). The court nevertheless granted that request because "the Board must be afforded a 'certain leniency . . . , stemming from the deference to the Board that is built into the statutory scheme.'" *Id.* at 1009 (alteration in original) (citation omitted). The court dismissed the argument that newly hired employees "will

be harmed by losing their current employer," because such harm is "not the focus of the Court's inquiry." *Id.* at 1011.

- Reinstatement of employees receiving unaffordable wages. In *Renaissance Equity*, the Board sought an injunction reinstating "bargaining-unit employees" on terms that were plainly unprofitable to the employer—*i.e.*, wages the employer was not "financially capable of paying." 849 F. Supp. 2d at 361-62.
- Recognizing bargaining unit even though a majority of employees opposed union. In *Southern Bakeries,* the Board sought an order requiring the employer to recognize the union even though "unrefuted evidence" indicated that "a majority of Southern Bakeries' employees have not supported the Union." 786 F.3d at 1124.
- Ordering an employer to reopen a manufacturing plant it had closed for lack of profitability. In *Dorsey Trailers*, the Board requested and the Third Circuit granted temporary relief requiring a manufacturer to reopen a plant it had closed because it was a "cash drain and financial burden." 147 F.3d at 248. The court ordered such relief notwithstanding that the employer had already closed the plant and had spent nearly a million dollars moving equipment to a facility in a different state.

Some courts—particularly in circuits applying the traditional four-part injunction test—refuse the

Board's requests to interfere with employers' reasonable business choices. Thus, the Eighth Circuit in *Southern Bakeries* did not countenance an order requiring the employer to recognize a union that lacked majority support. 786 F.3d at 1124; *see also, e.g.*, *Nexstar Broad.*, 54 F.4th at 1119-20 (overturning injunction where Board had failed to proffer any evidence of irreparable harm to union representation).

But district courts in circuits applying the watered-down standard rarely have that option. Because they must defer both to the Board's view of the law and facts—and because their inquiry focuses myopically on the Board's goals—these courts are required to grant requests for almost any intrusive relief the Board demands. The result is cases like *Dorsey Trailers*, where courts order extremely costly measures like reopening facilities long since closed simply because the Board believes doing so could help advance its pro-union goals.

2. The harmful effects of Section 10(j) injunctions are magnified by the length of time they are typically in effect. These injunctions ordinarily bind employers as long as internal agency proceedings are pending. But the pace of the Board's proceedings is "glacial." *Lineback ex rel. NLRB v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (citation omitted). "Complaints often take a year for the Board to resolve, and months more to bring the matter to completion." App. 21a (Readler, J., concurring). This case, for example, has been pending for well over a year. The result is years-long injunctions interfering with the employers' staffing and policy decisions.

What makes such lengthy interference especially intolerable is that *the Board*—and not any court—

controls how long the injunction lasts, because *the Board* controls the pace of internal agency proceedings. Thus, if the district court grants a Section 10(j) injunction, the Board has no incentive to move quickly to resolve the unfair labor practice charge; to the contrary, it has every reason to delay and hope the district court's injunction forces a settlement. This is entirely unlike ordinary preliminary injunctions, in which the court—a neutral arbiter—controls the course of proceedings and ensures the parties' interests are protected. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204 (2d Cir. 1970) (upholding injunction on view that case must "proceed speedily to trial"); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2950 (3d ed. Apr. 2023 update) (commending courts to expedite proceedings in case of preliminary injunction to "minimize[] the potential adverse effect of what may prove to be an unjustified restraint on defendant"). And it underscores the need for at least as much scrutiny before granting Section 10(j) injunctions as applied to ordinary preliminary injunctions.

3. The problematic nature of Section 10(j) injunctions, coupled with the Sixth Circuit's relaxed standard, is a recipe for employer harm. The Board routinely obtains lengthy and harmful injunctions that should never have been granted—whether because the facts and law did not support them, or because the equities should have foreclosed them.

But the effects go even beyond improperly issued injunctions: many employers, particularly small businesses, cannot fight years-long battles against the Board's charges, especially when faced with the threat of immediate injunctive relief. As a result,

many employers settle cases at the outset rather than fight unfair labor practice charges. The Board makes no secret of that fact, stating in its Section 10(j) manual that injunctions create "a strong catalyst for settlement." Section 10(j) Manual, *supra*, § 5.5 at 15. It is no surprise, then, that nearly 50% of Section 10(j) cases since 2010 have settled. *See* Pet. 23; NLRB, 10(j) Injunctions, https://www.nlrb.gov/what-we-do/investigate-charges/10j-injunctions (last visited Nov. 1, 2023). The consequences are especially acute in circuits applying the two-prong test, where employers undoubtedly settle unwarranted charges that they could have successfully defended in circuits that properly evaluate the facts, law, and equities.

## III. The Current Board's Anti-Employer Agenda Underscores The Need For Certiorari Now

The circuits have been divided over Section 10(j) for several decades, and now is the time for this Court to grant review to resolve that conflict. In recent years, the Board has requested Section 10(j) injunctions at a greater clip, and the current Board has avowed to seek Section 10(j) injunctions more frequently and more aggressively. These efforts pose special concerns in connection with the current Board's broader efforts to tilt the playing field in favor of unions and against employers. Because district courts in the Third, Fifth, Sixth, Tenth, and Eleventh Circuits must grant injunctions so long as the Board's legal theory is non-frivolous, they have little ability to police the proper bounds of the Board's legal authority. This raises the prospect that the Board will successfully implement much of its agenda by unreviewable injunction.

1. As Judge Readler observed below, "[t]he Board's § 10(j) activity is on the rise," and "[t]he Board now puts § 10(j) to work more than *six times* as often as it did before." App. 21a (Readler, J., concurring) (emphasis added). The current Board has vowed to "aggressively" seek Section 10(j) injunctions in service of its agenda. Aug. 2021 Abruzzo Mem., *supra*, at 1. The Board's General Counsel directed regional directors to bring the "weight of a federal district court's order" down on employers at the "earliest" stage of proceedings. Memorandum GC 22-02 from NLRB General Counsel, Jennifer A. Abruzzo, to All Regional Directors, et al., at 1 (Feb. 1, 2022), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

Adding fuel to the fire, the Board has begun pursuing nationwide injunctions in its preferred circuits. In *Kerwin v. Starbucks Corp.*, for example, the Board sought a "nationwide cease-and-desist order" covering all Starbucks employees in all of its U.S. stores. Civil Action No. 22-cv-12761, 2023 WL 2186563, at *2, *6 (E.D. Mich. Feb. 23, 2023). The district court correctly rejected that request, because Starbucks certainly had no "corporate policy to violate labor laws." *Id.* at *6. But the Board's bold request for a nationwide injunction reflects its intent to sidestep the circuit split by seeking broader, nationwide relief in its preferred venue.

The Board's current approach to Section 10(j) injunctions underscores the urgency of this Court's review. Absent this Court's intervention, the question of the proper Section 10(j) standard will arise with increasing frequency, and the Board will wield the conflict strategically against employers.

2. Review is particularly needed now in light of the current Board's broader efforts to tip the scales in favor of unions and against employers. Outside of Section 10(j), the Board has undertaken major efforts to expand employer liability for unfair labor practices, and otherwise broaden union protections. A few examples are illustrative:

- Undermining employers' ability to enforce longstanding and commonsense workplace rules unrelated to union activity. In *Stericycle, Inc.*, the Board held that neutral work rules are presumptively unlawful simply because an employee "could" interpret them to restrict the employee's Section 7 rights. 372 NLRB No. 113, at 9 (Aug. 2, 2023). This has led the Board to strike down employee handbook language requiring respectful and non-vulgar communication. *See Starbucks Corp. & Workers United*, Case 04-CA-294636, 2023 WL 5140070 (N.L.R.B. Div. of Judges Aug. 10, 2023).
- Declaring standard confidentiality and non-disparagement provisions in voluntary severance agreements *per se* unlawful. In *McLaren Macomb*, the Board held that an employer's mere offer of standard confidentiality and non-disparagement provisions in a voluntary severance agreement constitutes an unfair labor practice. 372 NLRB No. 58, at 3 (Feb. 21, 2023). In so holding, the Board overturned prior precedent requiring evidence the offer was coercive or otherwise made in conjunction with an unfair labor practice.

*See Baylor Univ. Med. Ctr.*, 369 NLRB No. 43, at 1-2 (Mar. 16, 2020).

- Recognizing and imposing novel compensatory damages as new default remedy against employers. In *Thryv, Inc.*, the Board reversed prior precedent and held that the standard "make-whole" remedy must include not just back-pay but also damages for all "direct or foreseeable pecuniary harms." 372 NLRB No. 22, at 1 (Dec. 13, 2022). As several Members explained in partial dissent, this standard "opens the door to awards of speculative damages that go beyond the Board's remedial authority." *Id.* at 16. Taken in conjunction with the Board's Section 10(j) power, it allows the Board to use the threat of expanded damages awards to force settlements.
- Expanding the definition of joint employer. The Board has issued a rule that dramatically changes the definition of "joint employer," replacing the prior rule with a standard likely to sweep far more business relationships under the Board's jurisdiction. *Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73,946 (Oct. 27, 2023).
- Banning so-called "captive audience" meetings. The Board's General Counsel has issued a memorandum stating that meetings where employers meet with employees during work time to address union representation violate the NLRA,

> even though such meetings have generally been recognized as lawful since 1948. Memorandum GC 22-04 from NLRB General Counsel Jennifer A. Abruzzo, to All Regional Directors, et al., at 1 (Apr. 7, 2022), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

These are only a few examples of the Board's recent efforts to favor unions at the expense of settled practice. There are others. *See, e.g.*, *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130 (Aug. 25, 2023) (adopting new rule governing signature cards that threatens to impose collective bargaining absent secret ballot); *see generally* U.S. Chamber of Commerce, *The Biden Administration's "Whole of Government" Approach To Promoting Labor Unions* (2023), https://www.uschamber.com/assets/documents/U.S.-Chamber-White-Paper-Whole-of-Government-Approach-to-Promoting-Labor-Unions.pdf (reviewing numerous executive-branch actions harming employers).

Even setting aside these major policy changes, the Board has sought to tip the scales in favor of unions in one-off elections—including through more dubious methods. The Board's Inspector General found that a regional director had grossly mismanaged a Starbucks store's union election in St. Louis. *See* Memorandum from NLRB Inspector General David Berry to NLRB General Counsel Jennifer Abruzzo, Report of Investigation – OIG-I-569, at 15 (July 8, 2023), https://aboutblaw.com/baQV. Among other things, the investigation showed that the director had improperly communicated with union officials, "call[ing] into question the Region's neutrality in the process." *Id.* at 12, 15; *see also* Robert Iafolla,

*Starbucks Vote Botched by Labor Board Official, Watchdog Finds*, Bloomberg Law: Daily Report (Oct. 5, 2023), https://news.bloomberglaw.com/daily-labor-report/starbucks-vote-botched-by-labor-board-official-watchdog-finds.

The Sixth Circuit's watered-down rule for preliminary relief means that employers are unable to meaningfully challenge either the one-off union favoritism or the policy changes in the context of Section 10(j) injunctions. As explained above, courts cannot meaningfully scrutinize or challenge the facts the Board presents or the scope of the Board's legal authority; all the Board need establish is a "non-frivolous" legal theory for liability. *S. Lichtenberg*, 952 F.2d at 371. And because the Board "need not prove a violation of the NLRA nor even convince the district court of the validity of the Board's theory of liability," *West Mich. Plumbing & Heating*, 250 F.3d at 969, the Board may obtain preliminary injunctive relief based on novel and untested theories of liability. The court's hands are tied even where the court believes that the Board "has been politically compromised, and that the full force of the federal government is effectively being brought to bear in favor of organized labor against th[e] employer." *Renaissance Equity*, 849 F. Supp. 2d at 355. "[A] rational basis" for the Board's view is enough to require the court to grant the injunction. *Id.* These results are "inconsistent with [this Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter,* 555 U.S. at 22. Absent this Court's intervention, the Board may be able to implement

much of its legally dubious agenda, with no judicial oversight or correction.

As Justice Holmes wrote, "[m]en must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920). Yet, the decision below (and those of the other circuits adopting the same rule) cuts corners *for the government*—here, the Board—when it comes to obtaining an otherwise "drastic and extraordinary remedy." *Monsanto,* 561 U.S. at 165. The Board has noticed, and is ramping up its efforts to harness this drastic power against the Nation's employers. This Court's intervention is urgently needed.

## CONCLUSION

The Court should grant the petition and reverse the judgment of the Sixth Circuit.

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