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

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, HR POLICY ASSOCIATION, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the National Labor Relations Act, the National Labor Relations Board (NLRB) issues, prosecutes, and adjudicates complaints alleging that employers committed unfair labor practices. 29 U.S.C. § 160(b). Section 10(j) of the Act authorizes federal district courts, while the NLRB adjudication remains pending, to grant preliminary injunctive relief at the NLRB's request "as [the court] deems just and proper." *Id.* § 160(j).

The question presented, on which the courts of appeals are openly and squarely divided, is:

Whether courts must evaluate the NLRB's requests for Section 10(j) injunctions under the traditional, stringent four-factor test for preliminary injunctions or under some other more lenient standard.

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INTEREST OF *AMICI CURIAE*[1]

Amici respectfully ask the Court to grant certiorari and reverse the erroneous decision of the Sixth Circuit.

The Coalition for a Democratic Workplace (CDW) is composed of hundreds of organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry. CDW's members are joined by their mutual concern over regulatory overreach by the NLRB that threatens employees, employers, and economic growth.

Associated Builders and Contractors (ABC) is a national construction industry trade association that represents members consisting largely of firms performing work in the industrial and commercial sectors of the U.S. construction industry. ABC represents more than 22,000 members, spanning across all specialties.

The HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of nearly 400 of the largest corporations doing business in the United States and globally. Col-

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[1] Counsel of record for petitioner and respondent were notified of *amici*'s intent to file this brief on November 3, 2023, and counsel for neither party objected. Counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and that no person other than *amici* and their counsel made such a monetary contribution.

lectively, their companies employ more than 10 million employees in the United States – nearly 9 percent of the private sector workforce.

The National Retail Federation (NRF) represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers. It is the world's largest retail trade association, and retail is the nation's largest private-sector employer. The retail industry supports one in four U.S. jobs, or 52 million American workers, and contributes $3.9 trillion per year to the national Gross Domestic Product.

The Sixth Circuit's decision to allow the extraordinary remedy of Section 10(j) injunctive relief to issue without requiring the NLRB to demonstrate a likelihood of success on the merits of the underlying dispute or otherwise satisfy the traditional, equitable criteria for preliminary relief, encourages overreach by the NLRB. *Amici* are uniquely situated to highlight, as they do in this brief, how the Sixth Circuit's deferential standard enables the NLRB to seek and obtain broad, long-lasting "temporary" injunctions that can have significant business impacts for employers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The four-factor test a plaintiff must satisfy to obtain a preliminary injunction is well-established. Chief among those four factors is that the plaintiff must demonstrate a likelihood of success on the merits. This likelihood-of-success requirement is critical. The preliminary injunction is a drastic remedy that affords relief to one party before it ever proves its case and before a defendant has the opportunity to mount and present its defense that basic principles of due process require. Requiring a plaintiff to demonstrate a likelihood of success on the ultimate merits ensures that such extraordinary relief is preserved for extraordinary cases.

This case is about the standard for a particular type of preliminary injunction—one issued pursuant to Section 10(j) of the NLRA. Section 10(j) exists to provide preliminary relief before the merits of the case are litigated through the NLRB's administrative process. Only the NLRB can seek a Section 10(j) injunction.

As petitioner explains, the courts of appeals are split over the proper standard for evaluating the NLRB's requests for Section 10(j) injunctions. Four courts of appeals (the Fourth, Seventh, Eighth, and Ninth Circuits) apply the same four-factor test that applies to every other request for preliminary equitable relief. But six courts of appeals (the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits) apply a "reasonable cause" standard that does not evaluate the NLRB's likelihood of success on the merits. These courts of appeals demand only that the NLRB's legal

theories be "coherent" and "substantial" in the sense that they are "not frivolous." If these minimal hurdles are cleared, these courts defer to the NLRB's take on the merits. As a result, the strength (or lack thereof) of the NLRB's case on the merits rarely impedes the agency's ability to obtain Section 10(j) injunctions in the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits.

This case presents the Court with the opportunity to resolve the deep circuit conflict over the proper standard for Section 10(j) injunctions. That conflict has significant impact on employers across industries. The resulting injunctions can affect a range of business activity—from employment of particular workers, to closing or relocating facilities, to selling financially draining assets. *Amici* therefore respectfully request that the petition for certiorari be granted so the Court can clarify that the four-factor test for preliminary injunctive relief applies to Section 10(j) injunctions.

ARGUMENT

I. The "reasonable cause" standards applied by the majority of the courts of appeals make it exceedingly easy for the NLRB to obtain a Section 10(j) injunction.

A. The traditional, four-factor test—and in particular, the likelihood-of-success factor—reserves preliminary relief for extraordinary cases.

"It goes without saying that an injunction is equitable remedy." *Weinberger* v. *Romero-Barcelo*, 465 U.S. 305, 311 (1982). A preliminary injunction, in particular, "is an extraordinary and drastic remedy" that "is never awarded as of right." *Munaf* v. *Geren*, 553 U.S. 674, 689–90 (2008) (cleaned up). Courts may exercise their discretion to issue such extraordinary relief only when a plaintiff satisfies the well-established four-factor test: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). These same, generally applicable principles of equity govern requests for other forms of preliminary or temporary relief. See *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (stay pending appeal). For, as this Court has explained, "a major departure from the long tradition of equity practice should not be lightly implied." *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006) (cleaned up).

The four-factor test ensures that preliminary injunctions do not become ordinary. All four factors must be considered and found to favor the plaintiff before a preliminary injunction may issue. See *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1943–44 (2018) ("[A]s a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits."); *Munaf*, 553 U.S. at 690 (preliminary injunction improper where the opinions below lacked "any mention of a likelihood of success as to the merits"). This Court has described the first two factors—likelihood of success and irreparable harm—as "the most critical." *Nken*, 556 U.S. at 434.

The likelihood-of-success factor is especially important "because the need for the court to act is, at least in part, a function of the validity of the applicant's claim." 11A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 2948.3 (3d ed.). "It is not enough that the chance of success on the merits be better than negligible" or "a mere possibility." *Nken*, 556 U.S. at 434 (cleaned up). The party seeking a preliminary injunction—relief *before* the party has proved its claim and *before* its adversary has been given a full and fair opportunity to present its defense—must at least make out a prima facie case. See *Gonzales* v. *O Central Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). Otherwise, "preliminary injunctions would be the rule, not the exception." *Munaf*, 553 U.S. at 690.

B. The "reasonable cause" standards defer to the NLRB without demanding any showing as to likelihood of success on the merits.

The injunctions contemplated by Section 10(j) of the NLRA are a form of preliminary or temporary injunction. Indeed, Section 10(j) injunctions are an extraordinary form of this already extraordinary remedy. Through administrative procedures, the NLRB adjudicates unfair labor practice charges in the first instance. See 29 U.S.C. § 160(a)–(d). Even when those administrative procedures yield a final decision, the NLRB's order is without effect unless and until the NLRB successfully petitions to enforce it. 29 U.S.C. § 160(e). Because the administrative process can take significant time to complete, Congress created a special proceeding to permit the NLRB to petition for "appropriate temporary relief or restraining order," 29 U.S.C. § 160(j), just as parties to a civil action may seek appropriate temporary relief or restraining order, see Fed. R. Civ. P. 65. A court may only issue such relief "as it deems just and proper," 29 U.S.C. § 160(j),—a standard that invokes traditional equitable principles, see Pet. 30. A Section 10(j) "temporary relief or restraining order" is, therefore, a form of preliminary or temporary injunctive relief. See also *Silverman* v. *MLB Players Rel. Comm.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) (Sotomayor, J.) ("Provision 10(j) of the Act authorizes district courts to grant temporary injunctions pending the outcome of unfair labor practice proceedings before the Board.").

The Fourth, Seventh, Eighth, and Ninth Circuits evaluate Section 10(j) preliminary injunctions under

the same four-factor test that governs other preliminary injunctions—requiring the NLRB to show (among other things) a likelihood of success on the merits. *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009); *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001); *McKinney* v. *S. Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015); *Hooks* v. *Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022).[2]

But the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits issue Section 10(j) injunctions without evaluating the NLRB's likelihood of success on the merits. These courts of appeals instead require a minimal showing of "reasonable cause" to believe that the alleged unfair labor practice occurred—a low standard that often can and will be satisfied by excessive deference to the NLRB's allegations and legal theories alone—and that relief be "just and proper" in the sense that it will preserve the NLRB's remedial authority, restore the status quo ante, or prevent alleged interference with union activity.

- The Second Circuit holds that district courts "must give considerable deference to the Board or Regional Director when making a determination of reasonable cause." *Hoffman ex rel. NLRB.* v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360, 370 (2d Cir. 2001).

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[2] The First Circuit also applies the traditional four-factor test to satisfy the "just and proper" standard, requiring the NLRB to satisfy that test in addition to showing there is reasonable cause to believe an unfair labor practice occurred. *Rivera-Vega* v. *ConAgra, Inc.*, 70 F.3d 153, 158, 164 (1st Cir. 1995).

- The Third Circuit requires that the agency's legal theory be merely "substantial and not frivolous." *Chester* v. *Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011).
- The Fifth Circuit instructs district courts that they "need only decide that the Board's theories of law and fact are not insubstantial or frivolous." *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975).
- The Sixth Circuit demands only that the Board have a "not frivolous" legal theory. *Gottfried* v. *Frankel*, 818 F.2d 485, 493–94 (6th Cir. 1987).
- The Tenth Circuit requires "deference to the Board" and that the evidence be viewed "in the light most favorable to the Board." *Sharp* v. *Webco Indus., Inc.*, 225 F.3d 1130, 1134-36 (10th Cir. 2000) (cleaned up).
- The Eleventh Circuit requires only that the NLRB's legal theory be "coherent." *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992).

Contrast that with the likelihood-of-success burden imposed on any other litigant seeking extraordinary, preliminary relief. Demonstrating "a mere possibility" of success would not suffice for any other litigant. *Nken*, 556 U.S. at 434. Yet, the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits *defer* to the NLRB's legal theories, so long as they pass the exceedingly low bars of "coherent" and "not frivolous." The less-demanding burden these courts of appeals afford the NLRB is irreconcilable with the fact that preliminary injunctions, like Section 10(j) injunctions, are

supposed to be extraordinary. See, *e.g.*, *Winter*, 555 U.S. at 24.

II. The ease with which the NLRB may obtain Section 10(j) injunctions under the "reasonable cause" standards has substantial consequences for employers.

The deferential "reasonable cause" standards are a low hurdle. They are easy for the NLRB to clear, which makes it easier for the NLRB to obtain Section 10(j) injunctions. The consequences for employers are substantial. Section 10(j) exists precisely because the underlying agency proceedings are slow—meaning Section 10(j) injunctions, while "temporary," can persist for years. See Pet. 5, 24. Moreover, Section 10(j) proceedings are supposed to be reserved for extraordinary cases, but the NLRB has been pursuing Section 10(j) relief with greater frequency. See Pet. 23.

A more-demanding standard is all the more necessary because the NLRB prosecutes cases in order to advance the agency's novel interpretations of the NLRA or reverse existing precedent.[3] In doing so, the NLRB stubbornly adheres to a policy of "non-acquiescence" to federal court rulings that disagree with the NLRB's interpretation of the statute. *D. L. Baker Inc.*,

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[3] In the last year alone, the NLRB has issued multiple decisions overturning decades of precedent and adopting radically different interpretations of the NLRA. See, *e.g.*, *Cemex Constr. Materials Pac. LLC*, 372 N.L.R.B. No. 130 (Aug. 25, 2023); *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (Aug. 2, 2023); *Lion Elastomers*, 372 N.L.R.B. No. 83 (May 1, 2023); *McLaren Macomb*, 372 N.L.R.B. No. 58 (Feb. 21, 2023); *Bexar Cnty. Performing Arts Ctr. II*, 372 N.L.R.B. No. 28 (Dec. 16, 2022); *Am. Steel Constr.*, 372 N.L.R.B. No. 23 (Dec. 14, 2022).

351 N.L.R.B. 515, 529 n.42 (2007) ("The Board generally applies its 'nonacquiescence policy' … and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court.").

For example, in *FedEx Home Delivery* v. *NLRB*, 563 F.3d 492 (D.C. Cir. 2009) ("*FedEx I*"), the D.C. Circuit rejected the NLRB's standard for determining whether a worker is an independent contractor, rather than employee covered by the NLRA. In a materially indistinguishable case involving the same parties, the NLRB applied the very standard the D.C. Circuit rejected, resulting in that court invalidating the test a second time and admonishing the agency. See *FedEx Home Delivery* v. *NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) ("Having chosen not to seek Supreme Court review in *FedEx I,* the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer."). Undeterred, earlier this year, the NLRB again reinstated the independent-contractor standard the D.C. Circuit has twice rejected. *Atlanta Opera, Inc.* 372 N.L.R.B. No. 95 (June 13, 2023).

The NLRB's shifting interpretations of the NLRA sometimes come at the expense of other statutes. In *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018), the Court rejected the NLRB's interpretation of the NLRA "in a way that limits the work of a second statute, the [Federal] Arbitration Act." *Id.* at 1629. The lower courts should not defer to the NLRB's efforts to

interpret the NLRA in novel ways that ignore the mandates of other federal statutes.[4]

Deferring to the NLRB's legal theories under the "reasonable cause" standards can have severe consequences for employers. Section 10(j) injunctions can compel or constrain a broad range of business activity, not just the reinstatement of discharged employees. Courts that apply the deferential "reasonable cause" standards have issued Section 10(j) injunctions against the sale, closure, or relocation of business facilities.

For example, in *Hirsch* v. *Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998), the district court had denied the NLRB's request for a Section 10(j) injunction because, in part, maintenance of the closed plant was a "cash drain and financial burden" on the employer and because "sale of the plant would bring new jobs to the region." *Id.* at 247-48. Applying its lenient "reasonable cause" standard, the Third Circuit reversed and directed the district court to enjoin the sale. *Id.* at 249.

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[4] The NLRB's recent decision in *Lion Elastomers*, 372 N.L.R.B. No. 83 (May 1, 2023), is another example of a case in which the NLRB interprets the NLRA in way that undermines the goals of other important federal statutes. *Id.* slip op. at 26 (Member Kaplan, dissenting) ("The majority brushes aside the legitimate concern that there is a conflict between the Board's … standards and employers' efforts to comply with antidiscrimination laws."); See also *Consolidated Commc'ns, Inc.* v. *NLRB*, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring) (criticizing the NLRB's decisions which "have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace").

Likewise, in *Dunbar ex rel. NLRB* v. *Carrier Corp.*, 66 F. Supp. 2d 346 (N.D.N.Y. 1999), the court granted a Section 10(j) injunction, preventing a manufacturer from taking any action to relocate its facility from New York to North Carolina. *Id.* at 355. When the court issued the injunction, the manufacturer had already purchased a new facility and "contracted for the purchase of a substantial amount of new equipment and services." *Id.* at 353.

In *Denholm* v. *Smyrna Ready Mix Concrete, LLC*, 2021 WL 297571 (E.D. Ky. 2021), the district court enjoined an employer from converting its plant to an on-demand facility—something it had already done as a cost-saving measure. *Id.* at *8–9, 12. The district court found the Board had met "its insubstantial burden" of demonstrating "reasonable cause" to believe redesignation of the plant violated the NLRA, despite the employer's assertions that the plant was "running below its desired efficiency." *Id.* at *9.

These cases are merely illustrative of the substantial impact Section 10(j) injunctions can have on an employer's business operations. Section 10(j) injunctions also are used to enjoin broad and ill-defined categories of conduct. For example, one court recently enjoined an employer "to cease and desist from discharging employees because they engaged in protected concerted activity and from, *in any like or related manner* interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the NLRA"—only there was no specific activity enjoined and thus nothing to give meaning to the words "in any like or related manner." *King v. Amazon.com Servs. LLC*, 2022 WL 17083273,

at *9 (E.D.N.Y. 2022) (emphasis added). The result was a broad injunction to comply with the NLRA.

Section 10(j) injunctions are thus no less drastic a remedy than other preliminary injunctions. The NLRB should be held to the same burden as other litigants seeking such relief, including by satisfying the court the NLRB is likely to succeed on the merits of the underlying dispute. Unlike the First, Fourth, Seventh, Eighth, and Ninth Circuits, the Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits permit the NLRB to obtain sweeping, long-lasting Section 10(j) injunctions without any meaningful inquiry into the likely outcome of the case. This Court should grant the petition to resolve the circuit conflict and make clear Section 10(j) injunctions should be reserved for extraordinary cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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