No. 24A966

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Applicants,

v.

GWYNNE A. WILCOX, ET AL.,

Respondents.

ON APPLICATION TO STAY THE JUDGMENTS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus 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. Members of CDW are joined by their mutual concern over regulatory overreach by the National Labor Relations Board that threatens employees, employers, and economic growth. CDW addresses these concerns through litigation, legislation, and the regulatory process, and it works to advance policies that protect the rights of employees, foster the American Dream, and strengthen the economy.

In adjudicating the *Wilcox* application, the Court will apply a legal framework that considers non-merits factors such as irreparable harm, injury to third parties, and the public interest. CDW's members understand the harm that businesses and other regulated entities will face if the Court does not stay the District Court's judgment pending appeal. As described below, allowing Gwynne Wilcox to maintain her position on the Board could call every action of the Board into question and give rise to extensive follow-on litigation if President Trump's removal of Ms. Wilcox is subsequently upheld on appeal. CDW files this brief to highlight the negative externalities that would result if this Court declines to stay the District Court's judgment. Moreover, because regulated parties will continue to face similar

[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the amicus or its counsel made such a monetary contribution.

externalities for as long as the lawfulness of the President's removal order remains unresolved, CDW supports the Government's request for certiorari before judgment.

SUMMARY OF ARGUMENT

On one side of this litigation is Gwynne Wilcox, who was appointed to the National Labor Relations Board by President Biden in 2021. On the other side is President Donald J. Trump, who removed Ms. Wilcox from her seat on the Board on January 27, 2025, and Board Chairman Marvin Kaplan. But these are not the only parties whose interests are relevant to the Court's analysis. In evaluating the Government's stay application, this Court must also consider the interests of those regulated by the Board. The efficacy of President Trump's removal order and the status of that order during the pendency of this litigation have a significant effect on these regulated parties.

The National Labor Relations Act ("NLRA") grants the Board significant authority to regulate employer-employee relationships, shaping labor policy through a variety substantive rules, binding orders, and coercive remedies. *See* 29 U.S.C. § 151 *et seq*. For example, the Board conducts union elections, investigates and takes enforcement action regarding unfair labor practices, and issues remedies such as reinstatement and backpay. *See id.* The Board also issues regulations that affect broad swaths of the economy. These powers often leave employers—including CDW's members—with little choice but to comply with the Board's rulings. This Court has recognized the importance of the Board's regulatory authority, "emphasiz[ing] often that the [Board] has the primary responsibility for developing and applying national labor policy."

NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 786 (1990). But the Board's authority is not without limits. One clear statutory restriction is that the Board must have a quorum to exercise its powers, and a quorum requires at least three active Board members. *See* 29 U.S.C. § 153(b); *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010). Without Ms. Wilcox, the Board lacks such a quorum.

If this Court does not grant a stay, the Board will return to operating at full force, despite active litigation regarding the validity of the President's removal of Ms. Wilcox. Indeed, the Board did just that while the D.C. Circuit considered the Government's emergency stay motion, issuing decisions—with Ms. Wilcox participating and providing the essential third vote—up to *the day* the three-judge panel issued a stay. *See, e.g.*, *Pacific Bell Telephone Co.*, 374 NLRB No. 24 (Mar. 28, 2025) (ordering employers to cease and desist from activities violating the NLRA). The Board again resumed issuing decisions during the two-day period between the en banc D.C. Circuit's issuance of an order vacating the panel's stay and the Chief Justice's subsequent issuance of an administrative stay on April 9. *See, e.g.*, *HSCGP, LLC*, NLRB No. 19-CA-321939 (Apr. 8, 2025) (dismissing complaint because employer did not "engage[] in certain unfair labor practices").

In reviewing this application, the Court must consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding" as well as "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Courts often consider the interests of third parties when applying these factors, *see, e.g.*, *In*

re Revel AC, Inc., 802 F.3d 558, 569 (3d Cir. 2015); *In re NTE Connecticut, LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022), and this Court should take the same approach here.

Granting a stay would prevent substantial injury to regulated businesses and advance the public interest. Without a stay, Ms. Wilcox will continue to sit on the Board only by virtue of a District Court injunction, despite the President having issued an order removing her from that position. Her presence on the Board would create a quorum and thus facilitate regulatory action that would not otherwise be possible. That action is a double-edged sword: Regulated parties would have to expend the time and resources necessary to participate in the Board's proceedings, all while knowing both that the legal status of those proceedings is in doubt, and that the Board would need to vacate and restart them if President Trump's removal order is upheld on the merits. Additionally, in some cases, regulated parties would face the impossible choice of either (1) taking action to comply with Board orders that cannot easily be unwound at a later time (and in some cases cannot be unwound at all), or (2) choosing not to comply with the Board's orders—in reliance on the President's interpretation of Article II—and risking the consequences of noncompliance.

These harms to regulated parties counsel in favor of staying the District Court's judgment. Granting a stay would prevent businesses both from having to act under tremendous uncertainty, and from expending resources in proceedings that may need to be restarted from scratch. A stay also would significantly reduce the need for follow-on litigation about the validity of the Board's actions if President Trump's removal order is upheld on appeal. For many of the same reasons, the Court should

also grant the Government's request for certiorari before judgment. Regulated parties, their employees, and the public at large all have a strong interest in a lawfully operating Board, free of doubts about its power to act, and expedited consideration by this Court would serve that shared interest.

ARGUMENT

I. The Board's Regulatory Actions Have Significant Effects on Employers.

The Coalition and its members are intimately familiar with the significant power the Board wields in regulating employer-employee relationships. The Board makes national labor policy by ordering a wide range of remedies—and, increasingly, by promulgating binding rules with broad effect. Exercising its independent litigating authority, the Board seeks enforcement of its orders, along with preliminary relief *before* it has adjudicated a matter, in federal court. To support these enforcement efforts, the Board employs broad investigatory powers. It also conducts union elections, taking ballots and certifying winners. Collectively, those powers give the Board considerable discretion to shape labor relations and govern the way employers run their businesses.

But the Board requires a quorum of three members to act. Without Ms. Wilcox, it has no such quorum. Absent a stay, Ms. Wilcox will remain on the Board while the merits of this case are under consideration, thereby allowing the Board to continue as though the President's removal of Ms. Wilcox never happened. Thus, the Board would continue operating despite potentially lacking a valid quorum.

A. The Board Exercises Substantial Regulatory Authority Over Employers and Employees.

Congress established the Board to administer and enforce the National Labor Relations Act. 29 U.S.C. § 151 *et seq*. As this Court has "emphasized often[,] the [Board] has the primary responsibility for developing and applying national labor policy." *Curtin Matheson*, 494 U.S. at 786; *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (NLRA "charges the Board with the task of devising remedies to effectuate the [statute's] policies.").[2] In particular, the Board's core mandate is to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a). In other words, the Board has authority to set the ground rules for employer-employee relations across broad sections of the economy. The means by which the Board carries out this mandate involve the exercise of substantial regulatory power.

1. Adjudications. Historically, the Board has regulated employers through adjudications of unfair labor practice complaints. These adjudications can result in highly consequential orders that assert near-supervisory authority over employers and their businesses.

One type of order involves preventing employers from removing their employees. To take one example, the Board ordered an employer to reinstate an abusive

[2] Although this Court has admonished courts to "accord Board rules considerable deference," *Curtin Matheson*, 494 U.S. at 786, and stated that "the Board's views merit the greatest deference," *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994), it is unclear whether those decisions remain good law following *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

employee who screamed "f**k you [n-word]" at an African American employee "while gesturing with each of [his] middle fingers." *Airo Die Casting, Inc.*, 347 NLRB 810, 811 (2006). The Board's reinstatement orders 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." *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring).[3]

The Board has also contradicted its own precedent to prevent employers from terminating employees. For example, in *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024), the Board ruled that an employee had engaged in protected "concerted activity" when displaying a "Black Lives Matter" message on a work uniform, and thus could not be terminated—notwithstanding past Board precedents allowing employers to regulate the messages that employees may display while in uniform and on duty. *Id.* at *11. In a similar decision, the Board determined that an employer could not prohibit its employees from donning shirts displaying the words "Inmate" or "Prisoner" while on the job because "the totality of the circumstances would make

[3] *See also Cooper Tire & Rubber Co.*, 363 NLRB 1952, 1954–61 (2016) (protecting white picketer who said to African American employees "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."); *Briar Crest Nursing Home*, 333 NLRB 935, 937–38 (2001) (protecting striking employee's conduct, including threatening to arrange for fellow striker to "tail" a non-striking employee to "make sure [the non-striker] do[esn't] come to work"); *Calliope Designs*, 297 NLRB 510, 520–21 (1989) (ruling that it was not "serious misconduct" for striking employee to call a non-striking employee a "prostitute" and a "whore," and to accuse her of "having sex with [the employer's] president"); *Gloversville Embossing Corp.*, 297 NLRB 182, 193–94 (1989) (finding no actionable misconduct when male striker yelled at female non-strikers to join him if they wanted to "see a real man" and then proceeded to open his pants and expose his genitals).

it clear" that the employees wearing the shirt were not convicts. *Southern New England Telephone Co.*, 356 NLRB 883, 883 (2011).[4]

The Board has also sought to impose highly controversial restrictions on employer conduct through its orders in these adjudications. For example, in *Amazon Services, LLC*, 373 NLRB No. 136 (2024), the Board overturned nearly 75 years of precedent in holding that an employer may not inform employees of its views on unionization during a mandatory workplace meeting. *Id.* at *1–2. And in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), the Board overturned decades of settled law favoring secret ballot elections by making it a violation of the NLRA for an employer to decline a union's request for voluntary recognition, unless the employer first files a petition with the Board for an election in the union-requested bargaining unit. *Id.* at *37–38.

Another type of Board order involves regulation of the relationship between management and labor—for example by mandating the disestablishment of unions considered to be too friendly to employers. *See, e.g.*, *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597–600 (1941) (affirming Board's disestablishment of an employer-supported union); *NLRB v. Metro. Alloys Corp.*, 624 F.2d 743, 744 (6th Cir. 1980) (upholding Board's disestablishment of a union that was created by the employer).

[4] The D.C. Circuit set aside the Board's decision in *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015) (Kavanaugh, J.). The Court explained that the Board had applied the wrong standard, and that "given the straightforward evidence" introduced by the employer, the Board should have allowed the shirt ban, noting that "[c]ommon sense sometimes matters in resolving legal disputes." *Id.* at 94, 97.

2. Remedies. The Board's enforcement role also affects employers in important ways. When the Board determines that an employer has engaged in an unfair labor practice, it may impose a wide range of legal and equitable remedies. The Board may, for example, order the employer to "cease and desist from [the] unfair labor practice," 29 U.S.C. § 160(c), or direct the employer to "take such *affirmative* action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act, *id.* (emphasis added); *see also Fibreboard Paper Products Corp.*, 379 U.S. at 215–17 (describing Board's "broad discretionary" remedial authority).

In 2022, the Board (including Ms. Wilcox) asserted the authority to order wide-ranging "make-whole" remedies, including compensatory and consequential damages for "direct or foreseeable pecuniary harms suffered by affected employees." *Thryv, Inc.*, 372 NLRB No. 22, at *7 (2022).[5] It is difficult or impossible for employers to recoup these funds when, as in a recent Third Circuit case, the courts later conclude that the Board lacks authority to order such relief. *See Starbucks*, 125 F.4th at 95–97; *cf. Dep't of State v. AIDS Vaccine Advocacy Coal.*, 145 S. Ct. 753, 757 (2025) (Alito, J., dissenting from denial of application to vacate order) (noting the difficulty of recovering "money after it is paid because it would be quickly spent by the recipients").

[5] CDW believes that these remedies exceed the Board's statutory authority and violate the Seventh Amendment. But the courts of appeals are divided on the propriety of such remedies, and the Ninth Circuit has upheld the Board's power to grant them. *Compare Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 127 F.4th 58, 82–84 (9th Cir. 2025), *with NLRB v. Starbucks Corp.*, 125 F.4th 78, 95–97 (3d Cir. 2024).

Further, the NLRA empowers the Board to prosecute civil actions, independent of the Department of Justice, to enforce its remedial orders in the courts of appeals under Section 10(e) of the Act, as well as to seek preliminary injunctive relief in the district courts under Section 10(j) upon issuance of an unfair labor practice complaint. *See* 29 U.S.C. § 160(e), (j); *Starbucks Corp. v. McKinney*, 602 U.S. 339, 342–43 (2024) (describing Board's Section 10(j) authority).[6] Guidance from the Board's General Counsel describes Section 10(j) injunctions as "one of the [Board's] most important tools" and instructs Regional Directors to "aggressively seek" them in a wide range of circumstances.[7] A recent example illustrates just how aggressively the Board has acted on that front. In *King v. Amazon.com Services LLC*, No. 22-cv-1479, 2022 WL 17083273 (E.D.N.Y. Nov. 18, 2022), the Board sought a Section 10(j) injunction requiring reinstatement of a terminated employee (as well as other relief) two years after he was fired and just days before a high-profile representation election, despite evidence that the employee had been fired for referring to a female coworker as a "gutter b*tch," "crack ho," and "queen of the slums."[8] The district court granted the

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[6] Under the Board's operating procedures, the General Counsel evaluates in the first instance whether to seek Section 10(j) relief. *Starbucks*, 602 U.S. at 359 (Jackson, J., concurring in part and dissenting in part). But that is beside the point: "[B]y the statute's own terms, power is left to *the Board itself*" to seek Section 10(j) relief, and indeed, "[i]t is only after the Board approves" the General Counsel's recommendation that Section 10(j) requests are filed. *Id.* at 359–60 (emphasis added).

[7] Memorandum from Jennifer A. Abruzzo, General Counsel, to NLRB Regional Directors, Memorandum GC 21-05 (Aug. 19, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458351637c.

[8] *Amazon.com Servs. LLC and Gerald Bryson*, No. 29-CA-261755, 2022 WL 1137178, at Appendix A *1 (N.L.R.B. Div. of Judges Apr. 18, 2022) (transcript of video recording of terminated employee's statements).

requested relief in part, prohibiting the employer from taking certain actions against other employees, *see* 2022 WL 17083273, at *12, but the Second Circuit vacated that order, concluding that "the record showed inadequate—if not *no*—evidence of irreparable harm or a need to return to or preserve the status quo," *Poor v. Amazon.com Services LLC*, 104 F.4th 433, 444 n.10 (2d Cir. 2024). The employer thus had to invest considerable resources over a period of more than two years to stave off the Board's meritless demand for an interim injunction.

3. Investigations. To support its adjudicatory and enforcement authorities, the Board exercises broad investigative powers, such as issuing subpoenas, examining witnesses, receiving evidence, and seeking court orders compelling the production of evidence or provision of testimony. 29 U.S.C. § 161(1), (2). Employers must expend significant amounts of time and money responding to these Board actions as well.

4. Rulemaking. The Board has also asserted the power to issue highly consequential rules that bind regulated employers, unions, and employees. Although the Board generally eschewed substantive rulemaking for the first half-century of its existence,[9] it broke new ground in 1989 by adopting rules to determine appropriate bargaining units for hospital employees.[10] Since then, and particularly over the last decade, the Board has expanded its rulemaking activity, issuing rules that have shaped (and in some cases re-shaped) major parts of the modern labor economy. Since

[9] *See Bell Aerospace Co. Div. of Textron Inc. v. NLRB*, 475 F.2d 485, 496 (2d Cir. 1973) (Friendly, J.) (noting Board's "long-standing negative attitude" toward setting policy through rulemaking), *aff'd in part, rev'd in part*, 416 U.S. 267 (1974).

[10] Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (upholding this rule).

2023 alone, the Board has issued rules that (1) establish the legal standard for determining when two entities must be treated as joint employers;[11] (2) prescribe procedures for "representation cases" in which regulated parties seek an election to determine if employees wish to be represented by a union;[12] and (3) govern recognition of unions in various contexts.[13] Each of those rules substantially revised regulations, promulgated during President Trump's first term, that covered similar issues.[14] These policy reversals are but one example of a "troubling trend" in which the Board "frequently changes its mind, seesawing back and forth between statutory interpretations depending on its political composition, leaving workers, employers, and unions in the lurch." *Valley Hosp. Medical Center, Inc. v. NLRB*, 100 F.4th 994, 1003 (9th Cir. 2024) (O'Scannlain, J., specially concurring).

5. Elections. Finally, the Board is charged by statute with conducting union elections, including taking secret ballots and certifying the results. *See* 29 U.S.C. § 159. The Board plays a central role throughout the election process. As soon as a unionization petition is filed with the relevant Regional Office, the Board requires the employer to "post a Notice of Petition for Election" in "all places where notices to

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[11] Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (Oct. 27, 2023).

[12] Representation-Case Procedures, 88 Fed. Reg. 58,076 (Aug. 25, 2023).

[13] Representation–Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 89 Fed. Reg. 62,952 (Aug. 1, 2024).

[14] *See* Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective Bargaining Relationships, 85 Fed. Reg. 18,366 (Apr. 1, 2020); Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020); Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019).

employees are customarily posted." NLRB, *Conduct Elections*, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections. Board agents then "seek an election agreement" by overseeing meetings "between the employer, union, and other parties." *Id.* After an agreement is reached, the Regional Director conducts the election. *Id.* And if no election agreement is reached, the Regional Director "may *order* an election and set the conditions" following a hearing. *Id.* (emphasis added). The Board's oversight continues until the election is complete. *See id.* This unique authority allows the Board to play an outsized role in employer-employee relations.

* * *

When the Board exercises its regulatory authority, employers and unions often acquiesce in the Board's ruling—even if the Board is later determined to have lacked authority to have issued the order. Consider, for example, the aftermath of this Court's decision in *New Process Steel* (discussed at greater length in Part II). When this Court determined that the Board—after 27 months of issuing decisions under dubious authority—did not in fact possess a quorum, "parties in . . . 500 cases [before the Board] did not seek to have their cases re-opened or re-litigated."[15] As that data illustrates, regulated parties, and small businesses in particular, often lack the resources needed to litigate challenges to the Board's action and thus have little choice but to comply, even when they object to the outcome.

[15] Lafe Solomon, *Administering Labor Law in Political Turbulence*, 34 Berkeley J. Emp. & Lab. L. 273, 274 (2013).

In sum, the Board's regulatory powers have substantial real-world effects on employers—including CDW's members.

B. The Board Has Continued to Exercise Its Powers Even While the Existence of a Quorum Is in Doubt.

By statute, the Board may only exercise its powers if it has a requisite number of members to form a quorum. 29 U.S.C. § 153(b). When Congress originally established the Board in 1935, it provided that the Board would "be composed of three members," and that "two members of the Board shall, at all times, constitute a quorum." 49 Stat. 449, 451 (1935). But in 1947, Congress "increased the size of the [Board] from three members to five," and concurrently increased the quorum requirement "from two members to three." *New Process Steel*, 560 U.S. at 676; *see also* 29 U.S.C. § 153(a)–(b).[16] Thus, the Board is prohibited from deciding cases or "exercis[ing] the full power of the Board" if it has fewer than three members. *New Process Steel*, 560 U.S. at 680, 688.

Without Ms. Wilcox, the Board has only two members and no quorum. Thus, the legality of President Trump's removal of Ms. Wilcox is dispositive of the question whether the Board can act. Yet this uncertainty has not stopped the Board, which continued its work—as though it had a quorum—after the District Court blocked

[16] The NLRA seemingly includes an exception that allows two members to constitute a quorum if the Board delegates its authority to "any group of three or more members." 29 U.S.C. §153(b). But this Court has held that "a straightforward understanding of the text … coupled with the Board's longstanding practice, … requires a delegee group to maintain a membership of three." *New Process Steel*, 560 U.S. at 683.

President Trump's removal of Ms. Wilcox. Indeed, the Board issued several decisions while the D.C. Circuit panel was considering the Government's stay motion.

For example, several weeks after Ms. Wilcox's removal, the Board denied an employer's request for review of a Regional Director's unilateral issuance of a revised tally in a union election. *Wells Fargo Bank, N.A.*, NLRB No. 18-RC-340011 (Mar. 11, 2025) (unpublished). Another decision denied multiple petitions for rehearing based on the Board's interpretation of the term "expiration" as it pertains to Board members' terms. *Power Up Electrical Contractors, LLC*, NLRB No. 14-RC-318552 (Mar. 11, 2025). In yet another decision, the Board determined that an employer had "engaged in certain unfair labor practices," and "order[ed] it to cease and desist and to take certain affirmative action," including reinstating an employee who had engaged "in protected concerted activity." *Dumbo 301 LLC*, 374 NLRB No. 22, at *3 (Mar. 21, 2025). The Board continued issuing decisions up to *the day* that the D.C. Circuit panel issued its stay decision. *See, e.g.*, *Pacific Bell Telephone Co.*, 374 NLRB No. 24 (ordering employers to cease and desist from activities allegedly violating the NLRA). Similarly, the Board also continued issuing decisions during the two-day period between issuance of the en banc D.C. Circuit's order on April 7 and the Chief Justice's issuance of an administrative stay on April 9. *See, e.g.*, *HSCGP, LLC*, NLRB No. 19-CA-321939 (Apr. 8, 2025) (unpublished) (dismissing complaint because employer did not "engage[] in certain unfair labor practices"). In all but one of these decisions, the Board acknowledged the ongoing litigation involving Ms. Wilcox's removal in a footnote, demonstrating the Board's recognition that it may lack a

quorum. Yet Ms. Wilcox continued to act as the third Board member, allowing the Board to issue decisions that have a substantial impact on the parties involved.

If this Court declines to issue a stay and permits Ms. Wilcox to continue serving while the legality of her removal remains unresolved, the Board likely will resume operating as if it has a quorum, a status entirely contingent on the result of this case. As discussed below, that outcome would harm regulated parties and undermine the public interest.

II. The Ongoing Uncertainty for Regulated Parties Counsels in Favor of a Stay.

To obtain a stay, a party must demonstrate more than a likelihood of success on the merits. Deriving from traditional notions of equity, the necessary showing for a stay implicates a range of factors—including the rights and interests of parties not before the court. Here, the uncertainty resulting from the District Court's injunction and Applicants' ongoing challenge to that injunction puts regulated employers in an impossible position. If they comply with the Board's directives, they risk expending scarce resources complying with orders and participating in proceedings that may later need to be unwound (because the Board issued them without a quorum). In some cases, it will be difficult or impossible to later remedy the harm employers suffer by complying with Board orders during this interim period. On the other hand, if employers rely on the President's removal of Ms. Wilcox and refuse to comply with Board orders or participate in Board proceedings, they will risk severe sanctions for noncompliance. Staying the District Court's judgment pending appeal would spare regulated businesses from these injuries, and granting certiorari before judgment

would further mitigate the problems stemming from uncertainty regarding the Board's power to act. The relief requested by Applicants, in other words, would serve the interests of regulated parties and advance the public interest.

A. Harm to Regulated Parties Plays an Important Role in the Stay Analysis.

A "stay order is not a ruling on the merits." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays). Rather, this Court has traditionally considered four factors when deciding whether to grant a stay:

> "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Nken, 556 U.S. at 434. The last two factors take into account the interests of third parties—including, in this case, CDW's members.

Analysis of the third factor demands attention to the effect of the District Court's judgment on third-party stakeholders. One court of appeals has described this factor as focusing on the "interests of third parties," *In re Revel AC, Inc.*, 802 F.3d at 569 (quoting *Constructors Ass'n of W. Penn. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978)), and another has likewise relied on it in evaluating "third-party harms," *In re NTE Connecticut*, 26 F.4th at 991. That approach reflects the commonsense understanding that, when a case arises in an emergency posture, "other parties," such as "other individuals and businesses," may suffer irreparable harm in the absence of interim relief. *See Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in grant of stay).

Additionally, courts evaluate the effects a stay would have on third parties when determining where the public interest lies. For example, the D.C. Circuit granted a stay after determining that an electricity generator's participation in an auction "was expected to lower energy costs for New England consumers by generating more supply and competition in the electricity market." *In re NTE Connecticut*, 26 F.4th at 991. The effect on third parties is particularly salient when agencies threaten to act in excess of their authority, as "the 'public interest is in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Texas v. Biden*, 10 F.4th 538, 559–60 (5th Cir. 2021) (quoting *Washington v. Reno*, 35 F.3d 1093, 1102 (6th Cir. 1994) (brackets omitted)); *see also Alabama Ass'n of Realtors v. U.S. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 766 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action.").

B. Reinstatement Pending Appeal Puts Employers in an Impossible Position.

Congress has made clear that the Board cannot act in the absence of a quorum. *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). Yet here, regulated entities cannot know whether the Board's continued activity is lawful. Thus, the Board's approach—continuing to operate despite grave and unresolved questions about the presence of a quorum—puts businesses to an impossible choice. On the one hand, businesses risk incurring unrecoverable costs by

participating in Board proceedings and complying with the Board's mandates. On the other hand, businesses risk sanctions for noncompliance if they rely on the legality of the President's removal order—for example, by refusing to participate in Board proceedings and comply with Board orders while Ms. Wilcox's suit is pending.

Many courts of appeals have explained that regulatory compliance costs—unrecoverable due to the federal government's sovereign immunity—constitute irreparable harm. *See, e.g.*, *Restaurant Law Center v. U.S. Dep't of Lab.*, 66 F.4th 593, 597 (5th Cir. 2023); *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1302 (11th Cir. 2022); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs."). Submitting to the jurisdiction of the Board, whose authority to act is in question, would require businesses to incur significant, unrecoverable costs.

In the exercise of its powers, the Board can order employers to take a variety of costly actions, from reinstating abusive employees to dispersing backpay. When the Board orders an employer to reinstate an employee who has consistently made racially or sexually abusive comments, employers often have a "legitimate business reason" for wanting to terminate such an employee. *See Constellium Rolled Prods. Ravenswood, LLC v. NLRB*, 45 F.4th 234, 245–46 (D.C. Cir. 2022) (Sentelle, J., dissenting). Moreover, the NLRB has ordered large backpay awards—which some courts have enforced in a deferential review posture. *See, e.g.*, *NLRB v. Velocity*

Express, Inc., 434 F.3d 1198, 1201 (10th Cir. 2006) (enforcing an NLRB-ordered backpay award of $136,818.13 subject to mere review for reasonableness).

Meanwhile, a business that chooses not to submit to the Board must make a significant gamble. Both sides in this litigation have weighty constitutional arguments, and businesses cannot know for sure how the courts will resolve the merits. Accordingly, a business that relies on the President's view of the Constitution (and concludes that no quorum presently exists at the Board) would be putting its interests in jeopardy. For example, an employer might open itself up to contempt proceedings in which it would be liable for the Board's attorney's fees. *See NLRB v. Bannum, Inc.*, 102 F.4th 358 (6th Cir. 2024). Either way, businesses are forced to make decisions under tremendous uncertainty—with potentially substantial negative consequences against which these businesses will need to hedge.

Given that dynamic, the most prudent course of action is for this Court to stay the District Court's judgment. The Board's statutory scheme presupposes the possibility of the Board lacking a quorum, and issuing a stay would prevent the Board from putting businesses to the choice described above. Moreover, Ms. Wilcox's absence from the Board for the duration of this litigation would mean that the Board lacks a quorum—an unexceptional development.[17] By contrast, allowing Ms. Wilcox to

[17] As this Court observed in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), the Board lacked a quorum for more than a year in the early 2010s. Before that, this Court held that the Board did not have a quorum during the period at issue in *New Process Steel*. And during the Clinton Administration, the Board lacked a quorum for several months in 1993 and 1994. *See* John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 The Labor Lawyer 1, 6 & n.20 (2000).

continue participating as a Board member would increase the scope of uncertainty faced by regulated parties. Over time, more and more enforcement actions, elections, and other Board proceedings would be tainted by unresolved questions about whether the Board had a lawful quorum, expanding the number of matters that will need to be restarted or litigated in court if the President's position eventually prevails on the merits (as it should).

In the D.C. Circuit, the AFL-CIO argued in an amicus brief that "if the district court's judgment is stayed, the NLRB will be deprived of a quorum and the employees, employers, and unions who rely on the NLRB to adjudicate their cases will be substantially injured." Br. of *Amicus Curiae* American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) at 2, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 11, 2025). That argument presupposes that the Board has a quorum, but the validity of the quorum is directly at issue in this case. Nor can delayed administration of the Board's statutory scheme outweigh the harm of the Board having acted (and exacted compliance costs) in excess of its statutory authority, given that the statutory scheme assumes that the Board might lack a quorum at any given time. *Cf. New Process Steel*, 560 U.S. at 688 ("If Congress wishes to allow the Board to decide cases with only two members, it can easily do so.").

C. Granting the Stay Would Advance the Public Interest.

Before this Court issued an administrative stay, Ms. Wilcox held her seat on the Board by virtue of a District Judge's injunction. During that time, the Board represented to the public that it had a quorum and its work continued—despite

ongoing litigation about whether the asserted quorum is valid. This is not the first time that the Court has confronted such a situation with the Board. In the lead-up to this Court's decision in *New Process Steel*, the Board had attempted a maneuver to operate with a purported quorum despite having only two members. This Court determined that the maneuver was invalid and that the Board lacked a quorum. *See id.* at 687–88.

Because the Board had continued to act despite the uncertainty of its quorum, chaos ensued after this Court issued its decision. The Court observed that "[d]uring the 27–month period in which the Board had only two members, it decided almost 600 cases." *Id.* at 678. This Court's decision called the validity of those decisions into question, causing "much panic in the labor world."[18]

The question whether the Board needed to reopen the full slate of decisions was never fully tested in the courts. The Board's then-acting General Counsel described the aftermath of *New Process Steel* as "rocky times."[19] Those "rocky times" were a direct result of the Board refusing to stay its hand while it had just two members, instead attempting what the *New Process Steel* Court described as a "Rube Goldberg-style delegation mechanism" to bypass the quorum requirement. 560 U.S. at 682. By the time that this Court had issued its ruling in *New Process Steel*, President Obama

[18] Elizabeth Littlejohn, Note, NLRB v. Canning *Featuring the All-Powerful Senate: The National Labor Relations Board's Journey to Extinction*, 50 Valparaiso Univ. L. Rev. 271, 288 (2015).

[19] Solomon, *supra* note 15, at 274.

had attempted to fill the remaining vacancies through recess appointees.[20] Ultimately, the Board determined that it would re-adjudicate about 100 of the cases—those that "were still in some stage of litigation."[21] Although "[i]n most cases, the new decisions and the old decisions were the same, . . . that wasn't [so] in every single case."[22] Meanwhile, the regulated community had to contend with the resulting uncertainty—and the additional cost of adjudicating these matters a second time.

A similar situation occurred just four years later. In *Noel Canning*, this Court held that President Obama's extraordinary installation of recess appointees to the Board had been improper. *See* 573 U.S. at 557. Accordingly, the recess appointee-dominated Board had lacked a quorum in more than 1,000 decisions—which "appear[ed] to have been legally invalid" in light of this Court's opinion.[23] *Noel Canning* required the Board to reconsider the decisions at issue, causing uncertainty and undermining the integrity of prior agency action. *See, e.g.*, *NLRB v. Gaylord Chem. Co.*, 824 F.3d 1318, 1324 (11th Cir. 2016) (describing how, "[o]n remand [after *Noel Canning*], the NLRB considered *de novo* the ALJ's decision and the record").

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[20] Matthew D. Moderson, Note, *The National Labor Relations Board After* New Process Steel*: The Case for Amending Quorum Requirements Under the National Labor Relations Act*, 80 UMKC L. Rev. 463, 478 (2011).

[21] *Id.*

[22] Amanda Becker, *U.S. Supreme Court Ruling Seen Unlikely to Alter Past NLRB Decisions*, Reuters (June 26, 2014), https://www.reuters.com/article/2014/06/26/us-usa-courts-appointments-nlrb-idUSKBN0F12J820140626/ (quoting former NLRB Chair Wilma Liebman).

[23] Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 Harv. L. Rev. 124, 126 (2014).

These experiences demonstrate the public interest in staying the District Court's injunction. Absent a stay, the Board will act with a dubious quorum for the third time in two decades, subjecting regulated parties to similar harms stemming from the tide of *ultra vires* agency actions and the need to rehear many of the same cases. And although the Board ratified many of its prior, quorum-less decisions after *New Process Steel* and *Noel Canning*, there is no guarantee that the same will be true here if the President's removal order is upheld. That result would shift the partisan makeup of the Board and thus presumably the substance of many of its decisions. *See Valley Hosp. Medical Center*, 100 F.4th at 1003 (O'Scannlain, J., specially concurring) (describing the Board's "seesawing . . . depending on its political composition"). Indeed, the Board appears to be anticipating this possibility; in recent orders, it has noted that Ms. Wilcox's participation (and, thus, the resulting quorum) rests on uncertain legal footing. *See supra* Part I.B.

If this Court declines to grant a stay yet eventually rules for the President on the merits, the follow-on litigation could be voluminous. Lower courts could come to different conclusions about the validity of prior Board actions, especially if the Board declines to reopen disputes that became final during the pendency of this litigation. Indeed, challenges to these actions would fall into the limited category of presidential removal cases that this Court in *Collins v. Yellen* determined that private parties could bring. *See* 594 U.S. 220, 259–60 (2021) ("Suppose, for example, that the President had attempted to remove a [Member] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal. . . . In th[at]

situation[], the statutory [removal] provision would clearly cause harm."). Granting certiorari before judgment would ameliorate that problem by shortening the period of uncertainty, thus reducing the number of cases that would require reconsideration.

CONCLUSION

For the foregoing reasons, and for those expressed by Applicants, this Court should grant the application to stay the District Court's judgment pending appeal and grant Applicants' request for certiorari before judgment.

Respectfully submitted,

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