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

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard for granting interim injunctive relief under 29 U.S.C. 160(j).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 77 F.4th 391. The order of the district court (Pet. App. 67a-121a) is not published in the Federal Supplement but is available at 2022 WL 5434206.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2023. The petition for a writ of certiorari was filed on October 3, 2023, and granted on January 12, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. 160(j) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

STATEMENT

A. Statutory Background

The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, prohibits employers and unions from engaging in various unfair labor practices. 29 U.S.C. 158. The National Labor Relations Board (NLRB or Board) enforces that prohibition. 29 U.S.C. 160(a).

If a person believes that an employer or union has committed an unfair labor practice, the person may file a charge with the agency. 29 C.F.R. 101.2. A regional director, exercising authority delegated by the General Counsel, investigates the charge. 29 C.F.R. 101.4. Generally, "[b]efore any complaint is issued or other formal action taken," the regional director "affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment." 29 C.F.R. 101.7.

If the investigation "reveals that there has been no violation" of the Act "or the evidence is insufficient to substantiate the charge," then the regional director "recommends withdrawal of the charge by the person who filed," and "dismisses the charge" if the person does not agree to withdraw it. 29 C.F.R. 101.5, 101.6. But if "the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful," the regional director issues a complaint. 29 C.F.R. 101.8; see 29 U.S.C. 153(d), 160(b).

An administrative law judge (ALJ) then holds a hearing and issues a recommended decision, "stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues." 29 C.F.R. 101.11(a); see 29 C.F.R. 101.10. If neither party challenges the ALJ's decision, it becomes final as the order of the Board. 29 C.F.R. 101.11(b). In the event a party files exceptions, the ALJ's recommendation is subject to review by the Board, which independently reviews the record and issues a decision containing "findings of fact" and "conclusions of law." 29 C.F.R. 101.12(a). If the Board finds that a party has engaged in an unfair labor practice, it "shall" order the party to "cease and desist" from the violation and to take such affirmative action, including "reinstatement of employees," as will effectuate the policies of the Act. 29 U.S.C. 160(c).

The Board may petition for enforcement of its order in a court of appeals. 29 U.S.C. 160(e); see 29 C.F.R. 101.14. Any person aggrieved by the Board's order may also seek review in a court of appeals. 29 U.SC. 160(f); see 29 C.F.R. 101.14. On review, the Board's findings of fact are "conclusive" "if supported by substantial evidence." 29 U.S.C. 160(e) and (f). Its legal conclusions are similarly

entitled to deference. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).

Because an employer's or union's conduct may cause harm while the administrative process is pending, Congress has empowered the Board, after the issuance of a complaint, to petition a federal district court "for appropriate temporary relief or restraining order" under Section 10(j) of the Act. 29 U.S.C. 160(j). By longstanding agency practice, when an NLRB regional director concludes that an unfair-labor-practice case has merit and that temporary relief would be appropriate, the regional director typically will submit a written memorandum to the General Counsel recommending the initiation of Section 10(j) proceedings. See Office of the General Counsel, NLRB, *Section 10(j) Manual* § 5.2, at 15 (Mar. 2020) (*10(j) Manual*). If, upon review, the General Counsel agrees that such proceedings should be initiated, the General Counsel will present the recommendation to the Board. *Ibid.* If the Board then authorizes the proceeding, the regional director will file a petition in district court. *Id.* § 5.5, at 17.

A district court considering a Section 10(j) petition may "grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j). In the event the district court grants relief, agency proceedings are expedited and accorded priority. 29 C.F.R. 102.94(a).

B. Factual Background

1. Petitioner Starbucks Corp. operates a global chain of coffeehouses. Pet. App. 71a. In early 2022, employees at a Starbucks in Memphis, Tennessee, began an organizing drive to join Workers United. *Id.* at 72a-73a. In response, petitioner allegedly used various unlawful tactics to stifle the drive, including disciplining one of the leaders of the organizing effort, *id.* at 74a; dramatically increasing

managerial oversight of the store, *id.* at 87a-88a; closing the store lobby during planned sit-ins, *id.* at 80a; and taking down union organizing material, *id.* at 81a-82a. Petitioner's alleged misconduct culminated in the firing of seven union activists, including five of the six members of the organizing committee. *Id.* at 5a-7a, 82a.

Following the terminations, every employee on the morning shift at the Memphis store, with one exception, stopped wearing union pins. Pet. App. 6a-7a. And the "firings spread anxiety and fear among [employees] who were considering unionizing at other Starbucks locations." *Id.* at 7a. For example, employees at a store in Jackson, Tennessee reported a reluctance to organize after petitioner posted a notice in their store detailing the termination of the Memphis employees. *Ibid.*

In response to petitioner's actions, the union filed unfair-labor-practice charges with the Board. Pet. App. 7a. The union alleged that petitioner had unlawfully interfered with its employees' right to form a union, see 29 U.S.C. 158(a)(1), and had unlawfully discriminated against union supporters, see 29 U.S.C. 158(a)(3). Pet. App. 7a. After investigating the charges, the General Counsel issued an unfair-labor-practice complaint. *Id.* at 7a-8a.[1]

2. Following issuance of the complaint, the regional director (respondent here) filed a petition for temporary relief on behalf of the agency in the United States District Court for the Western District of Tennessee. Pet. App. 50a. In accordance with Section 10(j), the agency sought

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[1] The union drive at the Memphis store was one of the first in a series of unionization efforts that eventually expanded to hundreds of petitioner's stores nationwide. The breadth of petitioner's response to that drive has led the NLRB to seek a total of 12 injunctions against petitioner in the past two years. See Pet. Br. 10.

relief pending resolution of the unfair-labor-practice proceedings before the Board. *Id.* at 8a.

The district court granted the agency's petition in part. Pet. App. 67a-121a. The court explained that, under circuit precedent, district courts may grant Section 10(j) relief only if there is "'reasonable cause' to believe that an unfair labor practice has occurred" and "injunctive relief is 'just and proper.'" *Id.* at 88a (citation omitted).

The district court first found reasonable cause to believe that petitioner had committed unfair labor practices. Pet. App. 89a-108a. The court explained that the Board must offer a "substantial" legal theory and facts that are "supportive" of that theory, *id.* at 89a, though "factual inconsistencies are for the Board to review in its administrative proceeding, not for the [c]ourt to resolve" on a Section 10(j) petition, *id.* at 97a. The court observed that the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the Act or to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization." *Id.* at 90a (quoting 29 U.S.C. 158(a)(1) and (3)). And the court found sufficient evidence to support the agency's claims that petitioner had interfered with its employees' union activity and discriminated against employees to discourage union membership. *Id.* at 91a-108a.

The district court then determined that a temporary injunction was just and proper. Pet. App. 108a-119a. The court explained that petitioner's conduct—which included firing more than 80% of the union organizing committee at the Memphis store—had eroded support for the nascent unionization movement. *Id.* at 110a-111a. The court noted that petitioner's actions had discouraged employees

from publicly supporting the union, wearing union pins, engaging in union protests, and discussing union activity in the Memphis store, and that the lone remaining member of the organizing committee expressed fear of recruiting others to join the union unless she felt "comfortable trusting them." *Id.* at 111a-116a.

The district court accordingly awarded the agency "some, but not all," of the relief sought. Pet. App. 109a. The court issued a temporary injunction that, among other things, enjoined petitioner from discriminating against employees because of union activity and required the interim reinstatement of the seven discharged Memphis employees. *Id.* at 119a-121a; see *id.* at 119a (denying requested relief relating to distribution of court's order).

The district court and the court of appeals denied petitioner's motions for a stay pending appeal. Pet. App. 40a-48a, 49a-66a.

3. After the district court granted temporary relief, the ALJ issued his decision in the underlying agency proceeding. See C.A. Doc. 62, at 4-63 (May 5, 2023). The ALJ found unlawful the majority of petitioner's conduct covered by the Section 10(j) injunction, including the discharges of five of the seven employees, the temporary store closure during planned pro-union activities, the increased presence of managers, and the removal of pro-union postings. *Id.* at 39-59. The ALJ dismissed the charges related to two of the discharges and the discipline of one of the employees. *Id.* at 48-59.

Both the regional director and petitioner filed exceptions to the ALJ's decision, which are currently pending with the Board.

4. The court of appeals affirmed the district court's injunction. Pet. App. 1a-39a.

The court of appeals observed that, under circuit precedent, the Board may obtain temporary relief pursuant to Section 10(j) only if it can show that "(1) there is 'reasonable cause to believe that unfair labor practices have occurred' and (2) injunctive relief is 'just and proper,'" meaning "'necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA.'" Pet. App. 10a (citations omitted). Petitioner did not contest the district court's reasonable-cause finding, *id.* at 11a, and the court of appeals determined that the district court did not abuse its discretion in finding interim injunctive relief just and proper, *id.* at 11a-15a.

The court of appeals upheld the district court's finding that petitioner's firing of seven employees who had engaged in pro-union activity harmed the union campaign in ways that a subsequent Board remedy could not repair. Pet. App. 12a. The court of appeals highlighted "actual evidence of chill," including evidence that employees had stopped wearing union pins and discussing union activity after the discharges. *Ibid.* And it found "sufficient evidence" that "temporary relief [wa]s necessary to preserve the status quo pending resolution of the Board's proceedings." *Id.* at 15a. Although the court acknowledged that employees at the Memphis store had voted to unionize following petitioner's alleged misconduct, *id.* at 7a, it concluded that "a successful union election does not preclude the continuance of a chilling impact on employees' willingness to exercise other rights safeguarded by the Act," *id.* at 13a.

Judge Readler issued a concurring opinion. Pet. App. 18a-39a. He criticized the circuit precedent that had established a two-part test for evaluating requests for temporary injunctive relief under Section 10(j). *Id.* at 19a. He

was of the view that courts should instead use the "familiar" four-factor test for preliminary injunctive relief that they apply in other legal contexts. *Id.* at 18a.

SUMMARY OF ARGUMENT

Section 10(j) empowers the Board to seek temporary injunctive relief against employers and unions pending administrative proceedings on an unfair-labor-practice complaint. A Section 10(j) injunction preserves the Board's ability to remedy violations of rights and statutory protections enshrined in the NLRA. In exercising their equitable discretion to grant relief under that provision, district courts should consider the broader statutory framework established by the NLRA and the function of Section 10(j) within that framework, as the court of appeals properly did in this case.

A. Section 10(j) authorizes a district court to grant relief "as it deems just and proper." 29 U.S.C. 160(j). The terms "just" and "proper" mean appropriate to the circumstances facing the court and the parties before it. In order to craft appropriate relief, a court necessarily needs to account for the relevant statutory context.

Petitioner contends that the phrase "just and proper" evokes the four-factor test used to determine whether preliminary injunctive relief is appropriate in other contexts, and urges (Br. 2) "stringent" application of that test. Petitioner contends that the government requests a "departure" from those principles. *Id.* at 22 (citation omitted). The government's position, however, is not that courts should *disregard* traditional equitable principles, but rather that the statutory context should *inform* courts' application of those principles.

This Court has long embraced that proposition, including in the very cases on which petitioner relies. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330-331 (1944).

And in the specific context of suits brought by a federal agency to enforce federal law, the Court has recognized time and again that equity assumes a more flexible character than in suits brought to vindicate purely private interests. See, *e.g.*, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).

History confirms that statutory context is relevant to applying Section 10(j). The courts of appeals, including those that purportedly apply a four-factor test, uniformly exercise their equitable discretion in light of the NLRA's broader framework. Moreover, decisions taking that approach extend all the way back to Section 10(j)'s enactment, shedding light on the provision's original meaning.

The NLRA's distinctive characteristics inform the assessment of both the merits and the equities under Section 10(j). As to the merits, a district court should keep in mind that the Board—not the courts—is responsible for adjudicating the underlying unfair-labor-practice charge. Because a Section 10(j) injunction is designed to *preserve* the Board's authority to adjudicate the case—not to *supplant* that authority—the district court is not called upon to conduct a full-blown merits inquiry. The agency's preliminary assessment of the merits of the charge further supports a measure of deference at this stage.

The NLRA's framework also informs the harm analysis. Because the Board is responsible for adjudicating the underlying charge, the irreparable-harm inquiry appropriately focuses on whether the Board's ability to grant effective relief at the conclusion of administrative proceedings would be impaired in the absence of an injunction. Moreover, certain harms that may be difficult to quantify—such as harm to the momentum of a union-

organizing drive—are nevertheless critical to the NLRA's scheme and often justify relief.

Lastly, the statutory context also affects the assessment of the public interest and the balancing of harms. In the NLRA, Congress made the express judgment that unfair labor practices undermine the purposes of the Act and that certain labor activities deserve protection. It further determined that the Board should be the agency principally responsible for enforcing those protections. Courts evaluating a Section 10(j) petition should respect that judgment.

B. In considering the propriety of injunctive relief under Section 10(j), the Sixth Circuit correctly applies the traditional equitable factors in light of the distinctive context of the NLRA.

The Sixth Circuit assesses the Board's likelihood of success by requiring a substantial legal theory and facts consistent with that theory. It finds a likelihood of irreparable harm when relief is reasonably necessary to preserve the Board's ultimate remedial authority. And it finds that the public interest is served by effectuating the statutory policies, if there are no significant opposing considerations in the balance. As to each factor, the court's approach appropriately accounts for equitable considerations and the specific features of the NLRA, including the Board's status as principal adjudicator of the underlying unfair-labor-practice complaint and Congress's own judgment about the public interest. At the same time, the four-factor test could also be invoked for these purposes, if properly and flexibly applied to take account of the provisions and policies of the NLRA as relevant at each step.

C. Petitioner's remaining arguments lack merit. It contends that the two-part test creates implausible

anomalies, including that the same constitutional theory might be subject to different standards in Section 10(j) and ordinary preliminary injunction proceedings. Because the Board enjoys no deference on constitutional questions, however, that anomaly will not arise.

Petitioner also identifies other statutory provisions using the phrase "just and proper," and contends that courts interpreting those provisions consider equitable factors. But the government agrees that equitable factors are relevant, and the sparse caselaw on those other provisions does not support petitioner's view that statutory context is excluded from consideration. Petitioner also points to provisions authorizing injunctive relief in contexts far afield from this case. The caselaw there is both irrelevant and largely unfavorable to petitioner.

Finally, petitioner contends that Section 10(j) injunctions should be subject to an especially strict standard because they are unduly burdensome. Other aspects of the scheme already mitigate any unfair burden, however, including the requirement for expediting Section 10(j) cases, see 29 C.F.R. 102.94(a), and a party's ability to move to modify an injunction in light of changed circumstances.

ARGUMENT

Section 10(j) empowers the Board to seek, and a district court to grant, temporary injunctive relief against both employers and unions pending administrative proceedings on unfair-labor-practice charges. Unlike a typical preliminary injunction, a Section 10(j) injunction does not protect the court's exercise of its own jurisdiction, and the proceedings are not a precursor to the court's own subsequent adjudication of the merits. Instead, the injunction preserves the adjudicative and

remedial authority of the Board to protect the rights conferred by the NLRA and prevent the harms caused by unfair labor practices. Congress has empowered the Board—not district courts—to resolve alleged violations of the NLRA, subject to review in a court of appeals. See, *e.g.*, *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978). Even on judicial review of a final decision of the Board, a court of appeals will not decide the issues anew, but rather will accord substantial deference to the Board's findings and conclusions. See, *e.g.*, 29 U.S.C. 160(e) and (f).

It is thus entirely appropriate for a district court adjudicating a Section 10(j) petition, in determining what relief (if any) is "just and proper," 29 U.S.C. 160(j), to account for the distinctive function of Section 10(j) relief and its place in the overall statutory scheme. The statutory terms "just and proper," *ibid.*, and the broader tradition of equity, accord courts the flexibility to grant relief that respects the Board's ultimate adjudicative authority and reflects the specific interests the NLRA is designed to protect. Petitioner's ahistorical, decontextualized approach is inconsistent with the statutory text, the basic premises of equity, and over a century of caselaw.

A. The Statutory Context Informs Whether Section 10(j) Relief Is "Just And Proper"

1. The statutory text requires a context-specific inquiry

Section 10(j) authorizes the Board to petition a district court for "appropriate temporary relief or restraining order" "upon issuance of a complaint" charging unfair labor practices. 29 U.S.C. 160(j). It then confers jurisdiction on a district court "to grant to the Board such temporary relief or restraining order as it deems just and proper." *Ibid.*

It is "a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd.* v. *United States*, 585 U.S. 274, 284 (2018) (citation and ellipsis omitted). As petitioner concedes, the terms "just" and "proper" authorize relief that is "appropriate" to the circumstances facing the court and the parties before it. Pet. Br. 23 (citation omitted). "Just" means "[c]onformable to the standard, or to what is fitting or requisite." 5 *Oxford English Dictionary* 638 (1933) (*Oxford*); see, *e.g.*, *Webster's New International Dictionary* 1348 (2d ed. 1958) (*Webster's*) ("Conforming to, or consonant with, what is legal or lawful"); *Funk & Wagnalls New Standard Dictionary of the English Language* 1334 (1946) (*Funk*) ("Consistent with what is proper or reasonable"; "Syn.: equitable, even, exact, fair, fitting"). "Proper," in turn, means "[a]dapted to some purpose or requirement expressed or implied; fit, apt, suitable; fitting, befitting; *esp.* appropriate to the circumstances or conditions." 8 *Oxford* 1470; see, *e.g.*, *id.* at 1469 ("special, particular, distinctive, characteristic"); *Webster's* 1983 ("Befitting one's nature, qualities, etc.; appropriate; suitable; right; fit"); *Funk* 1985 ("Having special adaptation or fitness; specially suited for some end").

To craft relief that is "appropriate to the circumstances," 8 *Oxford* 1470, and "specially suited for" achieving the NLRA's ends, *Funk* 1985, a court must consider the broader statutory framework established by the NLRA and the terms and function of Section 10(j) relief within that framework. Disregarding those considerations could result in a grant or denial of relief that is neither "suitable" nor "fit." *Webster's* 1983.

2. Equity embraces statutory considerations

Rather than dispute the plain meaning of the terms "just and proper," 29 U.S.C. 160(j), and their necessary link to the NLRA's substantive unfair-labor-practice and procedural provisions, petitioner simply contends (Br. 23) that the text of Section 10(j) naturally "invokes equitable principles." We of course agree with that general proposition.

Petitioner further notes (Br. 19) that, under the common four-factor test for determining whether to issue a preliminary injunction, a plaintiff "must establish 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. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Petitioner characterizes the government's position as a "'departure'" from equitable principles reflected in that four-part inquiry, and cites cases requiring "clear statements from Congress" before courts "undertake 'any substantial expansion of past [equitable] practice.'" Pet. Br. 21-22 (citations omitted; brackets in original). That argument misconceives the dispute in this case. The government's position is not that courts should *disregard* traditional equitable principles, but rather that relevant context—especially statutory context—should *inform* courts' application of those principles here. See Br. in Opp. 6. This Court has repeatedly endorsed that view, including in the particular context of suits brought by federal agencies to enforce federal law. The same approach is warranted in this case.

a. The Court has long held that statutory context is relevant to the consideration of equitable relief. Petitioner relies heavily (Br. 22, 26) on *Hecht Co.* v. *Bowles*,

321 U.S. 321 (1944), which interpreted a statutory provision stating that injunctive or other relief "shall be granted" in a suit brought by the federal government for violations of an emergency price-control statute. *Id.* at 322 (citation omitted). The Court rejected the argument that this language made injunctive relief mandatory in all circumstances. *Id.* at 328. Instead, it observed that "[f]lexibility rather than rigidity has distinguished" "equity jurisdiction" historically, and concluded that "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Id.* at 329.

At the same time, the Court reaffirmed the significant role that statutory considerations play in a suit for equitable relief. The Court explained that "traditional practices" should be "conditioned by the necessities of the public interest which Congress has sought to protect" in the relevant statute. *Hecht*, 321 U.S. at 330. The Court further emphasized that courts' "discretion under [the statutory provision authorizing relief] must be exercised in light of the large objectives of the" statute, "[f]or the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Id.* at 331.

Nor is *Hecht* an outlier. For over a century, the Court has repeatedly recognized that statutory considerations should inform the propriety and fashioning of equitable relief. See, *e.g.*, *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130 (1962) (observing that a court "has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate the remedial objectives" of the statute); *United*

States v. *Morgan*, 307 U.S. 183, 194 (1939) ("It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved," as determined by "Congress" in a federal statute); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911) (stating that courts should focus on "giving complete and efficacious effect to the prohibitions of the statute").

The Court has applied these principles in the labor context. In *United Steelworkers* v. *United States*, 361 U.S. 39 (1959) (per curiam), the statute provided that the district courts "shall have jurisdiction to enjoin" strikes that imperil the national welfare and to grant other relief "as may be appropriate," *id.* at 40 (citation omitted). The Court rejected the contention that the district court had erred in granting injunctive relief despite failing to consider various factors that might have been relevant under a common equitable analysis, such as "the conduct of the parties to the labor dispute in their negotiations." *Id.* at 41. The Court explained that, "[t]o carry out its purposes, Congress carefully surrounded the injunction proceedings with detailed procedural devices and limitations," including "[t]he public report of a board of inquiry, the exercise of political and executive responsibility personally by the President in directing the commencement of injunction proceedings, the statutory provisions looking toward an adjustment of the dispute during the injunction's pendency, and the limited duration of the injunction." *Ibid.* In the Court's view, those features reflected "a congressional determination of policy factors involved," which "is of course binding on the courts." *Ibid.*

b. In the particular context of cases (like this one) involving a suit brought by a federal agency to effectuate a federal scheme, the Court has recognized that a distinctive approach to equitable relief is appropriate. As the Court recently explained in a similar setting, "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Kansas* v. *Nebraska*, 574 U.S. 445, 456 (2015) (citation omitted). The Court has reaffirmed that principle over decades, including the year before Section 10(j) was enacted in 1947. See, *e.g.*, *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 383 (1965) (recognizing special breadth of equitable authority in suit brought by federal agency to enforce federal law); *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398 (1946) (same); *United States* v. *City & Cnty. of San Francisco*, 310 U.S. 16, 31 (1940) ("The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective.").

The Court has recognized the public interest in effectuating federal labor policy specifically. In *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937), the Court affirmed an injunction requiring a railroad to negotiate with its employees' representatives, *id.* at 541. The Court noted that "[t]he peaceable settlement of labor controversies * * * is a matter of public concern," and thus "[m]ore is involved than the settlement of a private controversy without appreciable consequences to the public." *Id.* at 552. The Court observed that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are

accustomed to go when only private interests are involved." *Ibid.* And the Court concluded that "[t]he fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." *Ibid.*

c. Petitioner does not address the relevant language and reasoning of any of these precedents. Instead, it invokes cases requiring a clear statement before interpreting a statute to effect a "'major departure'" from traditional equitable principles, such as by "impos[ing] 'an absolute duty' to enjoin violations 'under any and all circumstances.'" Pet. Br. 26 (citations omitted); see, *e.g.*, *id.* at 27 (discussing *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982)). But this case is not about imposing absolute duties or adopting rigid standards. It is instead about whether and how the governing federal statute informs the application of equitable considerations. This Court's precedents answer that question, and there is nothing "novel" or "extreme," *id.* at 17, about applying an approach that this Court has applied for over 100 years.

Petitioner asserts that "this Court has always applied the same equitable rules—including for preliminary injunctions—when the 'United States is plaintiff, or petitioner' seeking injunctive relief." Pet. Br. 19 (brackets and citation omitted); see *id.* at 48 (arguing that the same test "govern[s] agencies and private parties alike"). But this Court has plainly held that different consideration *is* appropriate in certain contexts, and petitioner fails to acknowledge, much less distinguish, the long line of precedent recognizing the special weight that statutory provisions have in agency suits in equity to enforce federal law.

3. History confirms that statutory context is relevant to granting relief under Section 10(j)

The history of Section 10(j) confirms that courts should take statutory context into account in granting or denying relief under that provision.

a. Congress enacted Section 10(j) as part of the Labor Management Relations Act of 1947 (LMRA), ch. 120, 61 Stat. 149. Section 10(j) was the culmination of a decades-long congressional effort to calibrate the extent of judicial involvement in labor disputes. In the Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (29 U.S.C. 101 *et seq.*), Congress had "drastically * * * curtail[ed]" courts' power to grant injunctions in labor disputes, in reaction to what Congress perceived as undue judicial intrusion in the preceding period. *Milk Wagon Drivers' Union* v. *Lake Valley Farm Prod., Inc.*, 311 U.S. 91, 101-103 (1940). Then, in light of a wave of labor unrest in the years following the end of the Second World War, Congress decided to broaden the availability of injunctive relief in the LMRA. See S. Rep. No. 105, 80th Cong., 1st Sess. 2 (1947) (Senate Report).

The Senate Report on the LMRA observed that "[t]ime is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." Senate Report 8. Section 10(j) was designed to enable the Board to prevent conduct that might "make it impossible or not feasible to restore or preserve the status quo." *Id.* at 27. And in recognition of this Court's

precedents governing equitable suits brought by federal agencies to vindicate federal policies, see, *e.g.*, *Porter*, 328 U.S. at 398, the Senate Report explained that the LMRA authorized the Board to seek relief "in the public interest and not in vindication of purely private rights," Senate Report 8; see *id.* at 27; see also *Seeler* v. *Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975) (recognizing that this legislative history invoked the Court's public-interest precedents).

That contemporaneous explanation of Section 10(j)'s function and effect is inconsistent with petitioner's insistence (Br. 19, 48) that courts must apply a closed set of equitable factors in exactly the same way in all circumstances, regardless of whether private or public interests are at stake. By contrast, it strongly supports an approach that provides for courts to account for the specific characteristics of the NLRA statutory scheme and the function of Section 10(j) in determining whether to grant or deny relief.

b. The courts of appeals have uniformly held that statutory context and purposes should inform the application of equitable principles under Section 10(j). Petitioner conceded at the certiorari stage that the Third, Fifth, Sixth, Tenth, and Eleventh Circuits apply a two-part test that accounts for the NLRA's distinctive features. See Pet. 17-19. Petitioner acknowledged that the First and Second Circuits take a "hybrid approach" that similarly considers statutory context. Pet. 19; see Pet. 19-21. And although petitioner contended that the Fourth, Seventh, Eighth, and Ninth Circuits "analyze section 10(j) injunctions using the ordinary four-factor test" for whether preliminary injunctive relief should be granted, Pet. 15; see Pet. 15-17; see also *Winter*, 555 U.S. at 20, that overly general characterization obscures

the real issue. Each of those courts, too, considers statutory context in assessing a request for relief under Section 10(j), applying the four-factor test in a way that largely parallels the two-factor and hybrid tests employed by the other circuits.

For example, the Ninth Circuit has held that "[t]he court must evaluate the traditional equitable criteria through the prism of the underlying purpose of section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power." *Frankl* v. *HTH Corp.*, 650 F.3d 1334, 1355 (2011) (citation omitted), cert. denied, 566 U.S. 904 (2012). The court explained that "in evaluating the likelihood of success, 'it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals.'" *Id.* at 1356 (citation omitted). It further observed that, "[i]n the context of the NLRA, 'permitting an alleged unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority is irreparable harm.'" *Id.* at 1362 (brackets and citation omitted). Other circuits employing the four-factor test have taken a similar approach. See *Muffley* v. *Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009) ("[O]f course, district courts should apply this test in light of the underlying purpose of § 10(j): preserving the Board's remedial power pending the outcome of its administrative proceedings."); *Sharp* v. *Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (endorsing the "careful application of traditional equitable principles to the context of a § 10(j) preliminary injunction"); *Kinney* v. *Pioneer Press*, 881 F.2d 485, 494 (7th Cir. 1989) (directing district courts to

apply "the traditional standards used in injunctive cases filed by public officials").

Courts have given due consideration to the distinctive features of the NLRA in Section 10(j) cases stretching all the way back to the enactment of that provision in 1947. In *Douds* v. *Local 294*, 75 F. Supp. 414 (N.D.N.Y. 1947), decided only a few months after Section 10(j)'s enactment, the court observed that equitable "rules are applied with different degrees of rigidity in private litigation, and when the public interest is involved," *id.* at 419. The court concluded that relief is appropriate under Section 10(j) "when the factual jurisdiction requirements are shown, and credible evidence is presented which, if uncontradicted, would warrant the granting of the requested relief, having in mind the purpose of the statute and interests involved in its enforcement." *Id.* at 418.

Many subsequent cases were to the same effect. For example, in *Douds* v. *Anheuser-Busch, Inc.*, 99 F. Supp. 474 (D.N.J. 1951), the court observed that "Congress clearly intended that the court should exercise its discretion with due regard to the large objectives of the Act." *Id.* at 477. And it cited, among other decisions, *Hecht*, *supra*, and *Virginian Railway*, *supra*, in observing that, in light of Congress's "desire to effectuate a statutory policy, the courts have consistently held that the grant of the injunction depends upon the standards set forth in the statute." *Douds*, 99 F. Supp. at 477; see, *e.g.*, *Jaffee* v. *Henry Heide, Inc.*, 115 F. Supp. 52, 58 (S.D.N.Y. 1953) (awarding Section 10(j) relief "to preserve the issues presented for the determination of the Board as provided in the Act, and to avoid irreparable injury to the policies of the Act"); *Lebus* v. *Manning, Maxwell & Moore, Inc.*, 218 F. Supp. 702, 705 (W.D. La.

1963) (observing that because Section 10(j) relief "is for the protection of the public interest and in aid of a policy which Congress has made plain," "the area for the exercise of the traditional discretion not to grant an injunction is much more limited").

Those judicial decisions following Section 10(j)'s enactment help shed light on "the original meaning" of that provision. *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019). Moreover, although Congress has repeatedly amended Section 10 in the decades since its enactment, see Act of Aug. 28, 1958, Pub. L. No. 85-791, § 13(a)-(c), 72 Stat. 945-946; Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 704(d), 73 Stat. 544-545; Trademark Clarification Act of 1984, Pub. L. No. 98-620, Tit. IV, § 402(31), 98 Stat. 3360, it has never disturbed the relevant language or suggested that courts should rigidly apply a four-factor test for preliminary relief or disregard the distinctive character of NLRA proceedings. See, *e.g.*, *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 535-537 (2015) (finding congressional ratification of lower-court precedent); see also *Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 338 (1988) (discussing related doctrine of acquiescence).

c. Petitioner disputes little of this historical account. It does not contest the mountain of caselaw applying equitable principles "through the prism of" the NLRA in adjudicating Section 10(j) petitions. *Frankl*, 650 F.3d at 1355. Petitioner's argument (Pet. 15) that four circuits use "the ordinary four-factor test" elides the *way* those circuits apply that test. As shown, they apply it with sensitivity to the NLRA's structure and purposes. Petitioner has not identified *any* circuit that has

embraced the decontextualized, ahistorical analysis it advocates.

Petitioner cites (Br. 31-32) a smattering of historical statements that it claims support its view, but none is persuasive. For example, even assuming that Section 10(j) was designed for "emergency" situations, Pet. Br. 31 (quoting I. Herbert Rothenberg, *Rothenberg On Labor Relations* 632 n.4 (1949)) (emphasis omitted), that is fully consistent with the Board's highly selective approach to filing petitions, see p. 39, *infra*. Petitioner also cites (Br. 31-32) a law review article, but that source acknowledges that "Congress delegated to the" Board, "and not to the district courts, the duty to give an expert and experienced content and direction to the" NLRA. Frank W. McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 97 (1962). And the article explains that the harm inquiry turns in part on whether the Board's "subsequent remedy [will] be adequate to restore the status quo and dissipate the consequences of the unfair labor practice." *Ibid.* Those observations corroborate—rather than undermine—the government's position here.

4. The NLRA's framework informs courts' consideration of both the merits and equities

The principles above make clear that a court conducting an equitable analysis under Section 10(j) must account for the relevant legal landscape in granting or denying relief. Here, the process that the NLRA establishes for resolving charges of unfair labor practices properly informs application of all four factors under the test on which petitioner relies: likelihood of success on the merits; likelihood of irreparable harm; the public

interest; and the balance of the equities. See *Winter*, 555 U.S. at 20.

a. The NLRA establishes a comprehensive framework for prosecuting and adjudicating complaints of unfair labor practices. A regional director, acting on behalf of the General Counsel, investigates a charge and then issues a complaint if warranted. 29 C.F.R. 101.4, 101.8. The ALJ conducts a trial-like hearing that includes witness testimony and other evidence, and at the conclusion of the hearing the ALJ makes both findings of fact and conclusions of law. 29 C.F.R. 101.10(a), 101.11(a). In cases where the parties file exceptions to the ALJ's decision, the Board then independently reviews the record and reaches its own determination as to the proper disposition of the complaint. 29 C.F.R. 101.12(a). Although the Board's decision is reviewable in the courts of appeals, its factual findings are "conclusive" "if supported by substantial evidence." 29 U.S.C. 160(e) and (f). Its "application of law to facts" is similarly entitled to deference, *NLRB* v. *United Ins. Co.*, 390 U.S. 254, 260 (1968), as are its legal interpretations of the NLRA, see, *e.g.*, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984), and its choice of remedies, see *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).[2]

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[2] The Court is presently considering whether to overrule *Chevron, U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), concerning the deference owed to agency interpretations of ambiguous statutes. See *Loper Bright Enters.* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024); *Relentless, Inc.* v. *Department of Comm.*, No. 22-1219 (argued Jan. 17, 2024). Deference to the Board's statutory interpretations predates *Chevron*. See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111, 130-131 (1944). Regardless, even if those

Because Congress entrusted the Board, not the courts, with "the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" *Beth Israel Hosp.*, 437 U.S. at 500-501 (citation omitted), a Section 10(j) proceeding differs markedly from a typical preliminary injunction proceeding. In the latter, the district court's findings of fact and conclusions of law are "preliminary" to its own resolution of those issues at trial. Fed. R. Civ. P. 65(a) (capitalization and emphasis omitted); see, *e.g.*, Fed. R. Civ. P. 65(a)(2) (providing that "evidence that is received on the [preliminary] motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial"). But in the Section 10(j) context, there will never be a trial on the merits before the district court. The Board, not the court, is responsible for adjudicating the charge of unfair labor practices.

In short, because a Section 10(j) injunction is designed to *preserve* the Board's authority to find facts, interpret and apply law to facts, and fashion a remedy—not to *supplant* that authority—Section 10(j) does not call for the district court to conduct a probing inquiry into the merits. Even the courts of appeals that purportedly apply a four-factor test recognize that basic point. See, *e.g.*, *Frankl*, 650 F.3d at 1356 ("[I]n evaluating the likelihood of success, 'it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals.'") (citation omitted); *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 287 (7th Cir. 2001) (same). In this context, it is appropriate

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interpretations did not warrant deference, that would not change the proper outcome in this case for the other reasons given.

for a court to be "hospitable" to the allegations and supporting evidence in the Board's submission, as well as reasonable inferences drawn therefrom, without undertaking an intensive effort to resolve factual issues or make credibility determinations that will be made by the Board. *Frankl*, 650 F.3d at 1356 (citation omitted); *Bloedorn*, 276 F.3d at 287 (same).

The substantial administrative process that precedes the filing of a Section 10(j) petition also counsels in favor of a less exacting and more deferential inquiry into the merits by the district court than in a case where a private litigant seeks preliminary injunctive relief without any similar safeguards. A regional director may file a Section 10(j) petition only following an investigation and "upon issuance of a complaint" charging the respondent with engaging in unfair labor practices. 29 U.S.C. 160(j); see 29 C.F.R. 101.4, 101.8. And by longstanding practice, the regional director typically makes a recommendation to the General Counsel to approve the filing of a Section 10(j) petition, who in turn seeks approval from the Board. See *10(j) Manual* §§ 5.2, 5.5, at 15, 17; see also 29 U.S.C. 160(j) (conferring authority to seek relief on "[t]he Board").

The Board's approval of a Section 10(j) petition does not prejudge its ultimate resolution of the case. The decision to approve a Section 10(j) petition is made without the benefit of the ALJ record and is not preclusive on the Board's later adjudication of the complaint, just as a district court's resolution of a preliminary injunction is "not binding at trial on the merits." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981). But because "[a]ssessing the [Regional] Director's likelihood of success calls for a predictive judgment about what the Board is likely to do with the case," *Bloedorn*,

276 F.3d at 288, the agency's preliminary assessment of the merits is material to that inquiry.

Petitioner disputes (Br. 41) the relevance of the agency process to the Section 10(j) proceeding. But it offers no basis for suggesting that Congress, in enacting a provision designed to preserve agency authority to adjudicate unfair-labor-practice charges in the first instance, would have expected district courts to pretermit the Board's exercise of that authority or, through protracted proceedings, to prevent the Board from obtaining necessary relief to protect that authority and its ability to award an effective remedy. And although petitioner notes (*ibid.*) that Board decisions are ultimately reviewable in the courts of appeals, it concedes that the Board's factual determinations are reviewed under the deferential substantial-evidence standard and that the Board's application of law to facts is likewise reviewed deferentially given the myriad scenarios to which the Board must apply the Act's general terms in light of its experience and expertise.

In support of a more demanding standard, petitioner observes that the Court has "denied preliminary injunctions where the 'facts and the inferences [are] much in dispute.'" Br. 20 (quoting *Phoenix Ry. Co.* v. *Geary*, 239 U.S. 277, 281 (1915)) (brackets in original). But the cited case involved a party's request for an interlocutory injunction barring enforcement of an agency order, and the Court held "that the presumption of reasonableness existing in favor of the action of the Commission was not overcome in the showing that was made upon the application for an injunction." *Phoenix Ry. Co.*, 239 U.S. at 282. If anything, the decision's solicitude for agency processes supports the government in this case, not petitioner.

b. The Board's status as principal adjudicator also affects the irreparable-harm inquiry. Section 10(j)'s function is to give "jurisdiction to the courts to issue injunctions in unfair labor practice proceedings * * * *pending final disposition by the Board*." *Muniz* v. *Hoffman*, 422 U.S. 454, 462 (1975) (emphasis added). If, absent an injunction, the Board likely would not be able to restore the parties to the status quo ante at the conclusion of administrative proceedings, then the harm is, for purposes of Section 10(j), "irreparable." Pet. Br. 20 (citation omitted). Again, even the courts on which petitioner relies recognize that the harm inquiry in this context centers on the Board's power to award complete relief. See, *e.g.*, *Muffley*, 570 F.3d at 543 (observing that courts should apply the four-part test "in light of the underlying purpose of § 10(j): preserving the Board's remedial power pending the outcome of its administrative proceedings"); *Sharp*, 172 F.3d at 1038 (similar).

The nature of the harms that occur in the labor context also informs the inquiry. In a case (like this one) involving alleged employer unfair labor practices, Congress charged the Board with enforcing labor rights in both their individual dimensions (such as the harm suffered by a wrongfully discharged employee) and collective dimensions (such as the harm to a unionization drive). See, *e.g.*, 29 U.S.C. 157 (protecting employees' right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection"); *NLRB* v. *Fansteel Metallurgical Co.*, 306 U.S. 240, 257 (1939). In assessing the likelihood of harm, courts must ask whether the Board's ability to vindicate each of those interests is likely to be impaired. See, *e.g.*, *Sharp*, 172 F.3d at 1038 (holding that "the irreparable harm to be addressed under § 10(j) is the

harm to the collective bargaining process or to other protected employee activities").

That inquiry requires difficult predictive judgments. Employer bargaining and organizing violations may, for example, weaken the momentum of a union drive at a critical time in a way that would be impossible to repair after the fact. See, *e.g.*, *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704 (1944) (endorsing Board's view that "unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions"); *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996) ("As time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable."), cert. denied, 519 U.S. 1055 (1997). Moreover, such harms can materialize quickly. "[I]n the labor field, as in few others, time is crucially important in obtaining relief." *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).

The Board is especially experienced and suited to make those kinds of judgments. This Court has "recognize[d] the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Unlike a court, the Board has expertise in the "actualities of industrial relations" and in balancing "the conflicting legitimate interests" of employers and employees. *Ibid.* (citations omitted); see, *e.g.*, *Gissel Packing*, 395 U.S. at 612 n.32.

The harm inquiry under Section 10(j) may sometimes differ from the harm inquiry in run-of-the-mine

preliminary injunction cases, where a court need only ask whether a tangible harm (like physical injury) is likely and whether that harm can be redressed by retrospective relief (like damages). See, *e.g.*, *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages."). Harms that are highly significant in the Section 10(j) context—such as stopping or hindering union momentum—may seem less concrete on their face than physical or monetary injury. But rather than reflecting a "feeble test," Pet. Br. 36 (citation omitted), that conception of harm simply reflects the nature of the rights and protections that Congress chose to codify in the NLRA. A test that pays heed to those rights and protections properly advances *Congress's* "policy prerogatives." *Ibid.*

Although this case involves alleged employer misconduct, the harm inquiry is similar in cases of alleged union misconduct. See, *e.g.*, 29 U.S.C. 158(b) (listing "[u]nfair labor practices by labor organization"); see also *Muniz*, 422 U.S. at 462 (Section 10(j) authorizes injunctive relief "against unions or management"). There, too, a court should focus on the Board's ability to remedy any harm to the employer or labor rights more generally at the conclusion of administrative proceedings. For example, striking employees have "no license to commit acts of violence," *Fansteel Metallurgical Co.*, 306 U.S. at 253, and such conduct may inflict irreparable harm absent temporary injunctive relief, see *Frye* v. *District 1199, Health Care & Soc. Serv. Union*, 996 F.2d 141, 144-145 (6th Cir. 1993); see also, *e.g.*, *Kobell* v. *United Paperworkers Int'l Union*, 965 F.2d 1401, 1405, 1411 (6th Cir. 1992) (enjoining bargaining violations by union).

For its part, petitioner criticizes any standard that focuses on the "future impairment of the NLRB's remedial power." Br. 35 (brackets and citation omitted). But petitioner offers no alternative, coherent understanding of how to assess irreparable harm to the interests protected by the Act in a context where the agency, not the court, is charged with ultimately repairing any harms that occur.

c. The NLRA's distinctive framework also informs the assessment of the public interest and balance of harms. The policy of the NLRA is to safeguard commerce and promote industrial stability by "restoring equality of bargaining power between employers and employees," "eliminat[ing]" labor practices that "prevent[ ] the free flow of goods" and promote "unrest," and "encouraging the practice and procedure of collective bargaining." 29 U.S.C. 151. The Board is "the agency charged by Congress" with effectuating those policies, *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), both in administrative proceedings and in suits for relief under Section 10(j).

As explained, because "the public interest is involved" when a federal agency sues to enforce federal law, a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398; see pp. 18-19, *supra*. And "[t]he fact that Congress has indicated its purpose to make" certain labor practices unlawful "is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." *Virginian Ry. Co.*, 300 U.S. at 552.

Those principles apply with full force here. As in a number of other cases where the Court has recognized a distinctive and flexible role for equity, Section 10(j) is

limited to suits brought by a federal agency to enforce federal law. See *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, 517 (1955) (private litigants cannot sue under Section 10(j)). And in filing a Section 10(j) petition, the Board seeks to advance Congress's determination of the public interest, which requires special solicitude in the court's equitable weighing. See *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for * * * the courts to enforce them when enforcement is sought."); cf. *Nken* v. *Holder*, 556 U.S. 418, 435 (2009) (stating that the factors of "harm to the opposing party and weighing the public interest * * * merge when the Government is the opposing party").

B. Either A Two-Factor Or Four-Factor Test May Reflect The Appropriate Considerations

1. Petitioner trains its efforts on showing that a "four-factor test" is better than a "two-part test." Br. 33. But the number of factors or parts is largely beside the point. See Br. in Opp. 8 (explaining that the "distinctions" between the circuits "are essentially terminological rather than substantive"). The question instead is whether a particular formulation appropriately accounts for traditional equitable considerations in light of the statutory context, as discussed above. The two-part test applied by the Sixth Circuit below, along with the similar tests of other circuits, does so, and in a manner that largely maps onto the familiar four-factor test. In particular, the reasonable-cause prong parallels likelihood of success under the four-factor test, while the "just and proper" prong, correctly construed, incorporates irreparable harm, the public interest, and the balance of equities.

Likelihood of success. The reasonable-cause standard used by the court of appeals "essentially parallels" the traditional likelihood-of-success inquiry, *Muffley*, 570 F.3d at 543; see *Chester* v. *Grane Healthcare Co.*, 666 F.3d 87, 99 (3d Cir. 2011) (similar), while accounting for the distinctive context of a Section 10(j) petition. Petitioner did not challenge the district court's reasonable-cause finding in the court of appeals, see Pet. App. 11a, but the Sixth Circuit has held that the Board's legal theory must be "'substantial and not frivolous'" and "the facts of the case [must] be consistent with the Board's legal theory," *Ahearn* v. *Jackson Hosp. Corp.*, 351 F.3d 226, 237 (2003) (citation omitted). Although courts "consider[ ] the evidence in the light most favorable to the Board," *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992), and do "not resolve conflicting evidence," Pet. App. 10a, their preliminary review of the merits "is not without teeth," *McKinney* v. *Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 343 (6th Cir. 2017).

Petitioner faults the Sixth Circuit for not requiring district courts to conduct a more searching factual inquiry, such as by resolving "issues of witness credibility." Br. 47 (citation omitted). That contention ignores the fundamental point that "[p]roceedings pursuant to § 10(j) are subordinate to the unfair labor practice proceedings to be heard before the Board." *Schaub* v. *West Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001). It would be inconsistent with the arrangement Congress prescribed to conduct a preliminary mini-trial before one adjudicator (the district court) in advance of a full-fledged hearing before another (the agency). See pp. 26-28, *supra*. The Sixth Circuit's approach reasonably accommodates and respects the

Board's role as principal adjudicator. Indeed, the court's articulation of this factor—whether "there is 'reasonable cause to believe that unfair labor practices have occurred,'" Pet. App. 12a (citation omitted)—better captures the role of the district court in assessing the Board's submission than an unelaborated reference to "likelihood of success," Pet. Br. 47, which could imply that a court should proceed in the same manner in which it adjudicates a motion for a preliminary injunction in a case that it will ultimately decide.

Irreparable harm. The court of appeals held that relief is "just and proper where it is necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA." Pet. App. 10a (citation and internal quotation marks omitted). And it found that standard satisfied on these facts, where petitioner terminated "80% of the organization committee" and "the record contains actual evidence of chill." *Id.* at 12a; see, *e.g.*, *Pye* v. *Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001) (holding that "the 'discharge of active and open union supporters . . . risks a serious adverse impact on employee interest in unionization'") (citation omitted); *Electro-Voice*, 83 F.3d at 1572-1573 (similar).

Petitioner criticizes the Sixth Circuit for treating "the mere *potential* for future impairment of the NLRB's remedial power" as sufficient to show harm. Pet. Br. 35 (quoting Pet. App. 29a (Readler, J., concurring)) (emphasis added; brackets omitted). The quoted language, however, comes from the separate opinion of Judge Readler, not the majority. The Sixth Circuit instead asks whether relief is "reasonably necessary" to preserve the Board's remedial authority. *Ahearn*, 351 F.3d at 239 (citation omitted). That inquiry in the

special context of Section 10(j) corresponds to the rule under the four-factor test that a movant need only show "likely"—not certain—harm, *Winter*, 555 U.S. at 22 (emphasis omitted), and fits well within the range of phrasings that courts use in this context, cf. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (in stay context, explaining that applicant must show "reasonable probability" that Court will grant review and "fair prospect" that it will reverse).

Public interest. The Sixth Circuit has held that "the principal consideration" in assessing a request for Section 10(j) relief "is whether, under the circumstances of the case, judicial action is in the public interest." *Sheeran* v. *American Com. Lines, Inc.*, 683 F.2d 970, 979 (1982); see *Fleischut* v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988) (similar). In this case, the district court found that "ordering Starbucks to cease and desist [its unlawful] practices 'is in the public interest to effectuate the policies of the NLRA and to protect the NLRB's remedial powers.'" Pet. App. 118a (citation omitted).

Petitioner offers no critique of the Sixth Circuit's conception of the public interest. Instead, it summarily asserts (Br. 36) that circuit precedent "does not require the district court to assess" the public interest. That is incorrect.

Balance of equities. Although the Sixth Circuit correctly emphasizes the other factors, cf. *Nken*, 556 U.S. at 434 (noting that "[t]he first two factors of the traditional [stay] standard are the most critical"), it does not "foreclose consideration of equitable factors," *Schaub* v. *Detroit Newspaper Agency*, 154 F.3d 276, 280 (6th Cir. 1998); see, *e.g.*, *Ahearn*, 351 F.3d at 235-236. But petitioner, which the district court below found reasonable

cause to believe had committed unfair labor practices at the core of the Act, cannot show any unique equities in this case that would outweigh the equities of the Board in ensuring that it will be able to order meaningful relief if petitioner is ultimately found to have committed unfair labor practices. And the court of appeals considered another equitable factor when it rejected, on the merits, petitioner's argument that the union acted with "unclean hands." Pet. App. 16a (capitalization and emphasis omitted); see *id.* at 117a (district court balancing hardships). In that respect, the court likely accorded petitioner *more* equitable consideration than it was due, since this Court has rejected application of the unclean-hands defense "where Congress authorizes broad equitable relief to serve important national policies." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

Again, petitioner offers no critique of the Sixth Circuit's approach to the balance of the equities, other than to claim (Br. 36) that the court never balances the equities at all. And again, that is incorrect.

2. As the above makes clear, the two-part inquiry undertaken by the Sixth Circuit and other courts for interim relief under Section 10(j) subjects Board petitions to meaningful scrutiny, and does not call for courts merely to "rubber-stamp" agency requests. Pet. Br. 17. Historical case outcomes confirm that fact. According to data publicly maintained by the agency, the Board has litigated 135 Section 10(j) cases to a merits resolution since 2012. See NLRB, *Section 10(j) Injunctions - Litigation Success Rate Report*, (2024), https://www.nlrb.gov/reports/nlrb-case-activity-reports/section-10j-injunctions-litigation-success-rate-report. The Board's overall success rate (cases in which an injunction was

granted in whole or part) in those cases was 74%. *Ibid.* But the success rate in circuits that apply a two-part test was lower than in circuits that apply a four-part test. In courts that apply a two-part test, the success rate was 68%; in those that apply a hybrid test, it was 81%; and in those that apply a four-part test, it was 74%. *Ibid.* In the Sixth Circuit, the success rate was 61%. *Ibid.* Those statistics refute petitioner's assertion that the two-part test "stacks the deck in the [NLRB's] favor." Br. 36 (citation omitted; brackets in original).

Nor is there anything surprising about the fact that the Board prevails on a substantial majority of Section 10(j) petitions. The Board is highly selective in the petitions it authorizes, and the extensive pre-petition review that takes places at multiple levels ensures that requests presented to the courts have a significant chance of success. The agency's publicly available statistics show that, in fiscal year 2023, it received 19,869 unfair-labor-practice charges, and issued 743 unfair-labor-practice complaints. See NLRB, *Unfair Labor Practice Charges Filed Each Year*, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges. Despite that caseload, the Board authorized the filing of only 14 Section 10(j) petitions. See NLRB, *Litigation - Injunction*, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/litigation/injunction-litigation (*Injunction Activity*).[3]

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[3] Petitioner asserts that "the NLRB's '§ 10(j) activity is on the rise.'" Br. 6 (citation omitted). In reality, the agency's Section 10(j) litigation has fallen over the last decade. See *Injunction Activity*. The Board authorized the filing of 38 Section 10(j) petitions in fiscal year 2014 and 36 petitions in 2015, but only 21 petitions in 2022 and only 14 petitions in 2023. *Ibid.* The fact that the number of Board

C. Petitioner's Remaining Arguments Lack Merit

Petitioner offers several additional arguments relating to policy concerns and other statutes that authorize relief in different contexts. None of those arguments is persuasive.

1. Petitioner mistakenly contends (Br. 36) that the two-part test "creates implausible anomalies." Petitioner suggests that the Board need only present a "non-frivolous legal theory" to overcome constitutional defenses raised by employers or unions in Section 10(j) proceedings, whereas those same employers or unions would have to satisfy the "ordinary four-factor" test to obtain a preliminary injunction against the Board's proceedings on the basis of the same constitutional theories. Br. 37.

Petitioner's premises are mistaken. The Board's legal theory must be "substantial," Pet. App. 28a (citation omitted), not merely "non-frivolous," Br. 37. And the substantiality standard applies only to "the Board's legal theory underlying the allegations of unfair labor practices," *Ahearn*, 351 F.3d at 237, not any constitutional defenses. "[B]ecause constitutional decisions are not the province of the NLRB (or the NLRB's Regional Director or General Counsel), the task[] of evaluating the constitutional pitfalls of potential interpretations of the Act" is "committed *de novo* to the courts." *Overstreet* v. *United Bhd. of Carpenters & Joiners*, 409 F.3d 1199, 1209 (9th Cir. 2005); see *SJT Holdings, Inc.*, 372 N.L.R.B. 82, at 2 n.5 (2023) (discussing Board's approach to constitutional claims raised in agency proceedings).

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approvals has rebounded since the precipitous drop that occurred during the COVID-19 pandemic, *ibid.*, is unsurprising, contra Cert. Reply Br. 8.

Petitioner also contends (Br. 38) that it is unclear how the standard for stays pending appeal "might mutate if district courts started off by applying the relaxed two-part test to grant the injunction." But the standard applies the same way here that it does elsewhere. For example, to show that it is likely to succeed in overturning a Section 10(j) injunction on appeal, *Nken*, 556 U.S. at 426, a stay applicant must demonstrate that it is likely to persuade the court of appeals that the district court erred in finding that the Board presented a substantial legal theory and satisfied the other prerequisites to relief under Section 10(j). See Pet. App. 44a; see also *Ahearn*, 351 F.3d at 237 (articulating appellate review standards for Section 10(j) injunctions).

2. Petitioner points to other statutory provisions that use the phrase "just and proper" and contends that courts have interpreted those provisions "to give courts 'the ability to consider equitable factors.'" Br. 24 (citation omitted). Again, that is a strawman: no one disputes that courts applying Section 10(j) may consider equitable factors. See, *e.g.*, *Sharp*, 172 F.3d at 1038 ("The question is not whether traditional equitable principles are relevant."). In any event, the limited caselaw interpreting other provisions that, like Section 10(j), authorize courts to grant relief to federal agencies seeking to enforce federal law is either inconclusive or supports the government. See, *e.g.*, *American Foreign Serv. Ass'n* v. *Baker*, 895 F.2d 1460, 1463 n.** (D.C. Cir. 1990) (R.B. Ginsburg, J.) (observing that courts play an "auxiliary role" in the statutory scheme and should take care not to "improper[ly] * * * enlarge" that role); *Reuben* v. *FDIC*, 760 F. Supp. 934, 941-942 (D.D.C. 1991) (holding that the relevant provision "makes it easier for the Authority to satisfy one major element in the

traditional equitable equation," namely, irreparable injury) (citing Section 10(j) precedent).

Petitioner also points to a host of provisions authorizing injunctive relief using different language and contends (Br. 42) that the government's interpretation would "distort" those provisions too. Of course, the effect of statutory text and context on the equitable analysis necessarily depends on *which* statute is at issue. See, *e.g.*, Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies: Damages, Equity, Restitution* 186 (3d ed. 2018) ("The statute remains the best beginning place for identifying the rights and the permissible range of discretion in administering remedies."). Many of the statutes that petitioner cites, for example, do not involve temporary relief pending an administrative proceeding—a critical characteristic of Section 10(j) relief. See Pet. Br. 45-46. Those statutes have little bearing on the analysis here.

In any event, petitioner offers virtually no support for its claim that courts ignore statutory context in applying those other provisions. See Pet. Br. 43, 45. Indeed, petitioner cites far more decisions *rejecting* its interpretation than accepting it. Compare *id.* at 44 n.7, with *id.* at 43-44. And contrary to petitioner's suggestion (Br. 44 n.7), it is not just "older" cases that do so. See, *e.g.*, *FTC* v. *Consumer Def., LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019); *SEC* v. *Zera Fin. LLC*, No. 23-1807, 2023 WL 8269775, at *4 (C.D. Cal. Oct. 30, 2023) (citing cases). Petitioner responds (Br. 44 n.7) that all of the decisions adverse to its position are "untenable." Although the Court should decline to address the proper interpretation of those other statutes in this case, petitioner's summary broadside on a wide, deep, and longstanding body of circuit precedent confirms that it

is petitioner—not the government—that seeks to "rewrite" the law of statutory injunctions. Pet. Br. 43.

3. Petitioner argues that Section 10(j) relief should be subject to a strict standard because it is unduly burdensome on employers and unions. Petitioner contends (Br. 6) that Section 10(j) injunctions "put powerful pressure on employers to settle, especially since the NLRB controls how long administrative proceedings last." Agency regulations, however, provide for cases in which Section 10(j) relief has been granted to be "heard expeditiously" and "given priority * * * over all other cases except cases of like character and cases under Section 10(l) and (m) of the Act." 29 C.F.R. 102.94(a).

Petitioner also complains (Br. 40) that changed circumstances may call into question the continued need for a Section 10(j) injunction, but that is true of any preliminary injunction. A party subject to a Section 10(j) injunction that has become unwarranted in light of changed circumstances is free to move to stay or modify that injunction in whole or part, like any other party. See, *e.g.*, 2 Steven S. Gensler, *Federal Rules of Civil Procedure*, *Rules and Commentary* R. 65 Practice Comment. (Feb. 2024 update); see also 29 C.F.R. 101.38 (Board regulations providing for notification to courts when ALJ recommends dismissing complaint).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2024