No. 23-367

In the Supreme Court of the United States

STARBUCKS CORPORATION,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHANIE A. MALONEY
MARIA C. MONAGHAN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

GREGORY G. GARRE
Counsel of Record
PETER E. DAVIS
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Amici Curiae

(*Additional Counsel Listed on Inside Cover*)

ERICA KLENICKI
MICHAEL A. TILGHMAN II
NAM LEGAL CENTER
733 Tenth Street, NW
Suite 700
Washington, DC 20001
(202) 637-3000

ELIZABETH GAUDIO MILITO
PATRICK J. MORAN
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004
(202) 406-4443

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INTEREST OF *AMICI CURIAE*[1]

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

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million men and women, contributes $2.85 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal

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

Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the Nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Yet the decision below applied a "significantly lower" "threshold" to injunctions sought by the Board under Section 10(j) of the NLRA. *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 n.10 (5th Cir. 2010). This watered-down approach, good for the Board and the Board alone, eliminates two of the bedrock prerequisites for obtaining a preliminary injunction—likelihood of success on the merits, and irreparable harm—and minimizes other important equitable considerations. The result is a cudgel that the Board has wielded against American businesses with increasing frequency in recent years. Petitioner's brief persuasively explains why Section 10(j) injunctions are properly governed by the traditional four-part standard, rather than the lenient two-part standard applied by the Sixth Circuit below. *Amici* agree with those arguments, but focus on two additional points that warrant elaboration.

First, the watered-down injunction standard amounts to an amped-up version of *Chevron* deference, in a context where deference is especially inappropriate. It requires extreme deference on the law, facts, and equities. The Board's legal and factual theory carries the day under this standard so long as it is "neither insubstantial nor frivolous." *El Paso Disposal*, 625 F.3d at 850-51. And the Board's interests come first, and harms to private parties are minimized, if they are considered at all. *See Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009). The result is a triple whammy of

administrative deference that results in the grant of injunctions for the Board that district courts could—and would—never have granted a private party. Assuming such an extreme form of pro-agency deference were even constitutional, it would require an especially clear authorization from Congress. The NLRA provides no such authorization; to the contrary, the Act's use of classic equitable terms—"just and proper"—points to application of the traditional injunction factors. *See* Pet. Br. 22-25.

Second, the Board has leveraged the watered-down injunction standard to inflict substantial harm on businesses. Section 10(j) injunctions enable the Board to control an employer's core operations—*e.g.*, which employees it hires and fires; what shifts employees work; the terms of employee manuals; and what plants are opened or closed. Such injunctions can be especially harmful because they are indefinite: the injunction lasts as long as the administrative proceedings, and *the Board* controls the length of those proceedings, which typically last an extended period. By giving the Board effectively unchecked sway over both the grant and length of the injunction, the Sixth Circuit's rule assures unwarranted, long-term meddling in employers' lawful business practices. These harms are magnified by the current Board's broad-scale assault on employers. Granting the Board the deference it seeks in the Section 10(j) context would allow it to implement by injunction much of its anti-employer agenda, with district courts unable to play the role they have always played—to ensure that this extraordinary remedy is truly warranted, and never issued as of right.

All this has created the worst of both worlds: an agency bent on pushing the limits of its statutory

authority to hammer the regulated public, coupled with an unprecedented form of agency deference that essentially eliminates Article III courts as a check on the agency's abuses and, indeed, effectively enlists the courts in perpetuating them. The Court should reverse the judgment of the Sixth Circuit and bring an end to this ill-begotten and damaging regime.

ARGUMENT

I. The Watered-Down Injunction Standard Results In An Extreme And Unwarranted Form of Deference To The NLRB

The Sixth Circuit's lenient, two-part standard for Section 10(j) injunctions requires district courts to defer to the Board three times over—on the law, on the facts, and on the equities. This deference compels district courts to ignore their own judgment about whether an injunction is warranted, and instead accept practically any assertion put forward by the Board. Given the glaring constitutional concerns with this extreme form of administrative deference, this Court should require the clearest of statements from Congress before accepting it. Yet far from providing such a clear statement, the NLRA instead supports the traditional four-part standard.

A. The Watered-Down Injunction Standard Requires Courts To Defer To The Board On The Law, Facts, And Equities

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

Ninth) correctly interpret Section 10(j) to require the Board to meet the traditional four-factor preliminary injunction test set out in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 23 (2008), other circuits use the far more lenient two-prong standard advocated by the Board. *See* Pet. 3-4.

Under the first prong of that test, the Board need only provide "'reasonable cause' to believe that the unfair labor practices alleged have occurred"—a "'relatively insubstantial' burden." *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988) (citation omitted). Under the second prong, the Board need only show (in these courts' view) that the injunction avoid the "potential for future impairment of the Board's remedial power." App. 29a (Readler, J., concurring). Together, the two-prong test demands deference to the Board on the law, on the facts, and on the equities—an unprecedented trifecta.

1. Deference on the law

The Sixth Circuit's standard for Section 10(j) injunctions requires district courts to defer to the Board's legal theories. Unlike the traditional *Winter* test, the Board need not show a likelihood of success on the merits. *Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 625 F.3d 844, 851 (5th Cir. 2010); *accord Chester ex rel. NLRB v. Grane Healthcare Co.*, 666 F.3d 87, 97 (3d Cir. 2011); *Arlook ex rel. NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). Instead, injunctions may be issued under the watered-down standard so long as the Board's "theor[y] of law" is "not insubstantial [or] frivolous"—a standard that puts a brick on the scale in favor of the Board's actions. *S. Lichtenberg*, 952 F.2d at 371 (citation omitted); *accord Schaub v. West Mich.*

Plumbing & Heating, Inc., 250 F.3d 962, 969 (6th Cir. 2001) (Board "need not prove a violation of the NLRA *nor even convince the district court of the validity of the Board's theory of liability*" (emphasis added)). This gives the NLRB more legal deference than any other party seeking injunctive relief in federal court, and effectively flips the burden in favor of finding the Board's legal position adequate.

This is *Chevron* deference on steroids. Under *Chevron*, agencies have routinely assumed broad authority to adopt new rules and regulations, and courts applying *Chevron* "reflexive[ly] defer[]" to the agency's interpretation of the law so long as the interpretation is "reasonable," *Pereira v. Sessions*, 585 U.S. 198, 221 (2018) (Kennedy, J., concurring). The Board's standard here is far more lax: its theory of liability need not be "reasonable," it just has to clear the exceedingly low bar of "'not insubstantial and frivolous.'" *S. Lichtenberg*, 952 F.2d at 371 (citation omitted). Accordingly, district courts in these circuits will not "make a definitive determination of federal labor law" or even determine "whether a violation has actually occurred," but only determine whether the Board's theory of liability is colorable. *Calatrello v. Rite Aid of Ohio, Inc.*, 823 F. Supp. 2d 690, 698 (N.D. Ohio 2011). As with modern *Chevron* doctrine—and, indeed, even more so—the watered-down injunction standard causes the courts to defer to the agency on matters of legal interpretation that the Constitution generally reserves to Article III courts. *See* U.S. Chamber *Amicus Curiae* Br. 12, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. July 24, 2023) ("lenient deference undermines federal courts' constitutionally assigned duty to interpret the law"); *id.* ("By giving undue deference to agencies' statutory interpretation,

courts reallocate primary interpretive authority (*i.e.*, the judicial power) to the Executive.").

This standard essentially eliminates the role of the courts in reviewing legal arguments *before* the entry of injunctive relief, requiring fealty to the Board's arguments as long as they are not frivolous.

2. Deference on the facts

The Sixth Circuit's standard for Section 10(j) injunctions also requires deference on the facts. The Board has a "minimal burden of proof," and district courts must accept all factual assertions that are "neither insubstantial nor frivolous." *El Paso Disposal*, 625 F.3d at 850-51 & n.11. That minimal standard applies even though—unlike in the substantial evidence review context—the Board's factual assertions are merely preliminary and do not have the backing of any final agency decision. Moreover, district courts "need not resolve conflicting evidence between the parties"; instead, so long as facts exist that "*can* support the Board's theory of liability," the district court must side with the Board. *West Mich. Plumbing*, 250 F.3d at 969 (emphasis added).

Remarkably, district courts will defer to the Board's initial and untested allegations even if they are *contradicted* by evidence in the underlying administrative proceeding. For example, in *Sullivan ex rel. NLRB v. IBN Construction, Inc.*, the employer (IBN) presented evidence that allegedly adverse work assignments "were, in reality, comparable tasks," and that employees terminated allegedly for union support were, in fact, terminated for missing consecutive workdays. 637 F. Supp. 3d 151, 158-59 (D.N.J. 2022), *dismissed sub nom. NLRB v. IBN*

Constr. Corp., No. 22-3111, 2023 WL 33119374 (3d Cir. Apr. 26, 2023). The district court recognized the weight of IBN's arguments, but it nevertheless deferred to the Board's version of the facts because its task under Third Circuit precedent adopting the watered-down standard was "only to determine whether the Board has met its relatively low burden of proof." *Id.* at 159. And once again, this is deference to the Board's preliminary *allegations*—not to any of the facts found in a final agency decision reviewed by an ostensibly neutral decisionmaker.

Similarly, in *Sharp ex rel. NLRB v. La Siesta Foods, Inc.*, the court found reasonable cause to issue an injunction despite its view that the "evidence" was "in substantial dispute," because the court was obligated to "interpret the conflict in the light most favorable to the [Board]." 859 F. Supp. 1370, 1373 (D. Kan. 1994). Even courts applying a hybrid approach to Section 10(j) injunctions are "required to defer to the perspective adopted by the [Board]"—including where the Board uncritically adopted "the Union's position" and failed to make any "in-depth study of which side had the more reasonable perspective." *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 355 (E.D.N.Y. 2012). This standard leaves employers all but powerless to contest allegations of unfair labor practices before being subject to a Section 10(j) injunction.

Requiring such factual deference is especially inappropriate given the limited tools available to employers to defend against Section 10(j) injunctions. At this early juncture of the case, most of the relevant facts are within the hands of the Board. And the Board vigorously fights employer attempts to obtain

discovery to mount a meaningful defense against the intrusive, years-long injunctions.

One egregious example of the Board's conduct involves Petitioner here. In 2022, Petitioner sought discovery to defend against a Section 10(j) injunction; the Board's General Counsel opposed all discovery. After Petitioner served subpoenas that the district court refused to quash, the General Counsel brought a separate unfair-labor-practice complaint against Petitioner alleging that the subpoenas violated the NLRA based on NLRB-deferential rules that do not track the Federal Rules of Civil Procedure. *Starbucks Corp. & Workers United*, Case 03-CA-304675, JD-33-23, 2023 WL 3478197 (N.L.R.B. Div. of Judges Mar 12, 2023) (on appeal before Board). The Board's ALJ then *agreed* that Petitioner's discovery requests constituted an unfair labor practice, because, in the ALJ's view, the subpoenas sought information that was "not relevant to the 10(j) proceeding" or for which "the [Petitioner's] interest in supporting its defense in the 10(j) proceeding" was "outweigh[ed]" by the NLRA's "confidentiality interests" under the NLRB-deferential rules. *Id.* The district court overseeing the 10(j) proceeding made a different determination regarding both the information's relevance and the interest balancing, but the Board's General Counsel continues to ask for deference to the ALJ's findings on the permissible scope of discovery. NLRB Br. 42, *Leslie v. Starbucks Corp.*, No. 23-1194 (2d Cir. Oct. 20, 2023), ECF No. 48. By restricting employers' ability to ascertain the basic facts underlying the Board's assertions in seeking injunctive relief, the Board further stacks the factual deck in its favor.

3. Deference on the equities

The Sixth Circuit's watered-down injunction standard requires deference to the Board on the equities as well. Under that standard, district courts do not apply "traditional rules of equity" and are precluded from properly weighing the employer's interests before issuing injunctions. *El Paso Disposal*, 625 F.3d at 850-51 (citation omitted); *see Ahearn ex rel. NLRB v. Jackson Hosp. Corp.*, 351 F.3d 226, 239 (6th Cir. 2003). As one court has explained, the Sixth Circuit's approach "slight[s] the countervailing harms to the nonmoving party and the public interest, which the traditional four-factor standard expressly requires courts to weigh." *Spartan Mining*, 570 F.3d at 543.

A review of Section 10(j) cases in circuits applying the two-prong test confirms that the employer's interests are rarely factored into the district court's analysis of the equities. Consider *El Paso Disposal*, where the court ordered reinstatement of employees that had been terminated many months earlier. 625 F.3d at 855-57. Nowhere did the Court balance the disruption resulting from such reinstatement—including the potential that reinstatement would require termination of employees hired into those positions. *See id.* at 854-57. Similarly, in *Overstreet ex rel. NLRB v. Albertson's, LLC*, the court granted an injunction reinstating an employee terminated a year earlier, reasoning that the Board deserved "leniency to delay filing a 10(j) petition because deference to the Board is built into the statutory scheme of the Act." 868 F. Supp. 2d 1182, 1191 (D.N.M. 2012); *cf. Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1118–19 (9th Cir. 2022) (vacating preliminary injunction in circuit applying traditional *Winter* test

where district court improperly presumed irreparable harm to the Board without considering underlying facts).

In short, the standard for Section 10(j) injunction creates a rule of triple deference in the circuits applying the Board's preferred test. Such extreme deference has immense consequences for employers located in these circuits, as discussed below.

B. The Watered-Down Injunction Standard Requires District Courts To Issue Injunctions Unsupported By Law Or Fact

Under this extreme-deference regime, Section 10(j) injunctions are routinely upheld and district courts must issue injunctions they may believe are unsupported by the best reading of the law, facts, and equities—a particularly perverse result.

For example, in *Renaissance Equity*, the Board sought a Section 10(j) injunction to reinstate employees to former conditions of employment and to compel the employer to bargain in good faith. 849 F. Supp. 2d at 342. The facts supporting the Board's theory of liability were closely contested: the employer maintained that the union's refusal to make a counterproposal with meaningful cost cuts had caused bargaining to fail, while the union asserted the employer's request for cuts caused bargaining to fail. *Id.* at 354-55. The district court also recognized the Board had been "politically compromised." *Id.* at 355. Nevertheless, the district court issued a Section 10(j) injunction even where the Board failed to make any "in-depth study of which side had the more reasonable perspective" and "simply adopt[ed] the Union's position and dismiss[ed] that of [the employer]." *Id.*

Even the Board recognizes these injunctions can be at least partially unwarranted. In *IBN Construction*, for example, the employer (IBN) presented evidence that allegedly adverse work assignments "were, in reality, comparable tasks." 637 F. Supp. 3d at 158. Although the district court recognized this "not insubstantial" argument against issuing the Section 10(j) injunction, it felt compelled to issue the injunction in its entirety because the Board met its "relatively low burden of proof." *Id.* at 159. After IBN appealed to the Third Circuit—and after the appeal was fully briefed—the ALJ reached a decision in the underlying administrative proceedings concluding that the Board had failed to prove IBN had retaliated by giving adverse work assignments. *See* Decision & Order 68, *IBN Constr. Corp. & New Jersey Building Laborers District Council*, JD-(NY)-05-23 (N.L.R.B. Apr. 3, 2023), attachment to Rule 28(j) Letter, *NLRB v. IBN Constr. Corp.*, No. 22-3111 (3d Cir. Apr. 6, 2023), ECF No. 30 ("*IBN* Rule 28(j) Letter"). At that point, the Board advised the Third Circuit that it "no longer [sought] affirmance of the district court's case-and-desist provision" of the injunction. *See IBN* Rule 28(j) Letter at 1.

Had the district court applied the traditional four-factor test, the NLRB would have had to supply the necessary evidence to support each aspect of its Section 10(j) injunction from the start—and the Board would have lost. Instead, despite IBN's best efforts, IBN had to await further administrative proceedings while the injunction was in place—and bear the costs of briefing an appeal—before being partially vindicated. This shows that employers subject to the watered-down injunction standard are faced with an impossible decision: either try to contest injunctions

unsupported by law or fact and deal with the litigation costs of that often fruitless fight, or else settle unwarranted charges with the Board. Many understandably opt for the latter. *See infra* at 17-18.

C. Even Assuming Congress Could Require A Court To Grant Such Deference To The Board, There Is No Basis To Read It Into A Statute That Fails To Express It

Nothing in the NLRA authorizes or requires this form of extreme deference to the Board. Rather, in terms that track traditional equity, Section 10(j) authorizes the district court "to grant to the Board such temporary relief or restraining order as [the court] deems just and proper." 29 U.S.C. § 160(j). The Board did not identify any specific textual basis for lenience in its brief in opposition certiorari, relying instead on language elsewhere in the statute granting it "authority to develop and apply fundamental national labor policy." Opp. 7 (citation omitted). But the Board's general authority to develop labor policy does not empower it to seek the "extraordinary remedy" of a preliminary injunction from an Article III court using anything short of the traditional injunction standard. *Winter*, 555 U.S at 24.

To the contrary, given the concerns posed by the Sixth Circuit's deferential standard, Congress at least would need to have spoken clearly to authorize the watered-down standard advocated by the Board. *See, e.g.*, *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836); *see also* Pet. Br. 21-22. Just as in the *Chevron* context, excessive judicial deference to the Board's legal judgments threatens to "transfer . . . the [Article III] judge's exercise of interpretive judgment to the agency." *Perez v. Mortgage Bankers Ass'n*, 575 U.S.

92, 124 (2015) (Thomas, J., concurring in the judgment); *cf. Loper* U.S. Chamber *Amici Curiae* Br. 12-14. This abdication of the judicial role is especially troubling in the Section 10(j) context, given that preliminary injunctions are a "drastic remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010), and because the Sixth Circuit's standard requires upholding injunctions even where the district court disbelieved the Board's theory of liability. *See West Mich. Plumbing*, 250 F.3d at 969. Meanwhile, employers are stuck with the Board's theory and the injunction for the years until the labor proceeding is over, even if a court ultimately rejects the Board's theory on the merits.

Section 10(j) contains anything but a clear statement requiring deference; it instead uses prototypical equitable terms—"just and proper." *See* Pet. Br. 22-25. This Court should reject the watered-down injunction standard and the deference it requires and hold that the "extraordinary" remedy of a preliminary injunction should only be granted where the Board can meet the test set out in *Winter*.

II. The Board Has Leveraged Its Watered-Down Injunction Standard To Engage In Substantial And Unchecked Interference With American Businesses

All of this is bad enough in the abstract. But in practice, the Board has abused this watered-down standard for securing Section 10(j) injunctions by directly interfering with American businesses, large and small, in an increasingly aggressive manner. And to make matters worse, the watered-down injunction standard has effectively nullified the courts as a check on this blatant agency abuse.

A. Section 10(j) Injunctions Inflict Great Harm On Businesses

The Board's approach to Section 10(j) injunctions, backed by the Sixth Circuit below, has caused immense harm to employers in circuits that have adopted the watered-down standard. An injunction is a "drastic" remedy. *Monsanto Co.*, 561 U.S. at 165-66. And Section 10(j) injunctions are particularly intrusive: they can interfere with day-to-day business operations (like staffing) and they can require fundamental changes to business models (like requiring businesses to reverse a store closure). Moreover, these injunctions frequently last for years while proceedings move at a glacial pace before the Board. Such lengthy intrusions on employers' activities *should* require the strongest justification. But the deferential standard applied below does the opposite by effectively requiring courts to rubber stamp injunctions under an extreme form of deference that prevents courts from second-guessing the Board. The resulting harm to businesses is clear and unjustifiable.

Several examples illustrate the severe effects of Section 10(j) injunctions. For starters, the Board frequently seeks to require employers to reinstate employees terminated for cause *months or years after the fact*. *See, e.g.*, *Albertson's*, 868 F. Supp. 2d at 1192 (requiring reinstatement nearly a year and a half post-termination). The Board has also successfully sought reinstatement of employees who have violated employment policies, including those who have harassed co-workers, *see Muffley ex rel. NLRB v. Jewish Hosp. & St. Mary's Healthcare, Inc.*, No. 12-MC-00006, 2012 WL 1576143, at *1, *6 (W.D. Ky. May 3, 2012), and where reinstatement caused newly hired

employees to lose their jobs, *see Overstreet ex rel. NLRB v. El Paso Disposal, L.P.*, 668 F. Supp. 2d 988, 1010-11 (N.D. Tex. 2009), *modified and aff'd in part*, 625 F.3d 844 (5th Cir. 2010). The Board has required wholesale revisions to employment manuals, interfering with employers' own standards for their employees. *See West Mich. Plumbing*, 250 F.3d at 972. And the Board does not consider the harms that Section 10(j) injunctions have on employers: it has required employers to reinstate employes receiving unaffordable wages, *see Renaissance Equity*, 849 F. Supp. 2d at 361-62, and even to reopen a manufacturing plant closed for lack of profitability, *Hirsch ex rel. NLRB v. Dorsey Trailers, Inc.*, 147 F.3d 243, 248 (3d Cir. 1998).

These are dramatic infringements on business operations that hurt small and large businesses alike—and they are made all the worse by the length the injunctions are in effect. Section 10(j) injunctions often last for years as "glacial" proceedings drag on before the Board. *Lineback ex rel. NLRB v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (citation omitted); *see also* App. 21a (Readler, J., concurring) ("Complaints often take a year for the Board to resolve, and months more to bring the matter to completion"). And because the Board (and not the court) essentially can control through the pace of its proceedings how long a Section 10(j) injunction lasts, it has no incentive to resolve unfair labor practice charges quickly. While a big company like Petitioner may be able to continue the fight, the delay—and attendant costs—built into Section 10(j) injunctions are crippling for most businesses.

Unsurprisingly, many employers are effectively forced to throw in the towel and settle with the Board.

Indeed, nearly 50% of Section 10(j) cases since 2010 have settled. *See* Pet. 23; NLRB, 10(j) Injunctions, https://www.nlrb.gov/what-we-do/investigate-charges/10j-injunctions (last visited Feb. 26, 2024). The Board itself sees this as a good thing—its own manual states that Section 10(j) injunctions are "a strong catalyst for settlement." NLRB Office of the General Counsel, Section 10(j) Manual § 5.5 (Feb. 2014), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/MASTER%20REVISED%202013%2010(J)%20MANUAL.pdf. But, in reality, Section 10(j) injunctions have grossly tilted the playing field in favor of the agency, no matter the strength (or weakness) of the underlying charges.

B. The Board Has Weaponized Section 10(j) Injunctions To Impose Its Own, Anti-Employer Goals On Businesses

The Board's recent approach to Section 10(j) injunctions, combined with its broader hostility toward American employers, underscores the risks of the Sixth Circuit's watered-down standard.

The Board's General Counsel has vowed to "aggressively" seek Section 10(j) injunctions, NLRB, Memorandum GC 21-05 from General Counsel Jennifer A. Abruzzo to All Regional Directions et al. at 1 (Aug. 19, 2021), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos ("General Counsel Memos"), and has directed regional directors to bring the "weight of a federal district court's order" down on employers at the "earliest" stage of proceedings, Memorandum GC 22-02 at 1 (Feb. 1, 2022), *supra*, General Counsel Memos. Regional directors have heeded the call, and are now pursuing Section 10(j) injunctions at a faster clip. As Judge

Readler observed below, "[t]he Board now puts § 10(j) to work more than *six times* as often as it did before." App. 21a (Readler, J., concurring) (emphasis added). The Board has even begun to pursue nationwide injunctions in circuits that have adopted the watered-down standard. *See Kerwin v. Starbucks Corp.*, 657 F. Supp. 3d 1002, 1006-07, 1011 (E.D. Mich. 2023) (refusing to issue nationwide injunction), *appeal filed*, No. 23-1187 (6th Cir. Mar. 2, 2023).

This is especially concerning in light of the Board's broader efforts reflexively favoring unions at the expense of employers. *See generally* U.S. Chamber of Commerce, *The Biden Administration's "Whole of Government" Approach To Promoting Labor Unions* at 3 (2023), https://www.uschamber.com/assets/documents/U.S.-Chamber-White-Paper-Whole-of-Government-Approach-to-Promoting-Labor-Unions.pdf (reviewing numerous executive-branch actions harming employers). As noted above, in one particularly egregious example, the Board argued that Petitioner violated the NLRA by seeking discovery *to defend itself* against a separate Section 10(j) injunction. *See supra* at 10. In agreeing with the Board that Petitioner's discovery requests violated federal labor law, the ALJ even acknowledged that the Board was using its own precedent as a "sword to weaken [Starbucks's] 10(j) defense and [thereby] obtain an injunction." *Starbucks Corp.*, 2023 WL 3478197.

This example illustrates a disturbing trend in the Board's enforcement tactics—not only is the Board getting more aggressive in its use of Section 10(j) injunctions, as discussed *supra*, but it is also twisting its own precedents to prevent employers from using the procedures available in federal court to mount a

defense to those injunctions. This one-two punch puts employers at an extreme disadvantage in fighting for their rights and, in some cases, livelihood. In this case, the Board has aimed its sights on one of America's great corporate success stories. But the threat extends to small and fledgling businesses that do not stand a chance in fighting the Board's actions.

The harms from the Board's aggressive use of Section 10(j) injunctions are magnified by the Board's and General Counsel's recent efforts to overturn longstanding Board precedent.[2] The Board's General Counsel recently stated, for example, that she will push to overturn longstanding precedent allowing employers to hold mandatory meetings to address union representation with employees.[3] *See* Parker Purifoy & Ian Kullgren, *NLRB General Counsel Looks to Hit Union Busters With Big Damages*, Bloomberg Law, Feb. 8, 2024, https://news.bloomberglaw.com/daily-labor-report/nlrb-general-counsel-looks-to-hit-union-busters-with-big-damages. In announcing this policy goal, the General Counsel specifically named Petitioner, accusing it—along with other major companies—of disregarding labor law. *See id.* The General Counsel then called for an end to the doctrine that prevents the Board from imposing damages on companies that refuse to bargain with a union, saying that the Board "need[s] to hit employers in their

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[2] *Cf. NLRB v. Valley Health Sys., LLC*, Nos. 22-1804, 22-1978, slip op. at 14 (9th Cir. Feb. 20, 2024), ECF No. 57 (O'Scannlain, J., concurring) (explaining that the Board "frequently changes its mind, seesawing back and forth between statutory interpretations depending on its political composition" to the detriment of "employers" and others).

[3] *See also* Memorandum GC 22-04 at 1 (Apr. 7, 2022), *supra*, General Counsel Memos.

pockets." *Id.* In other words, the Board is just getting started.

These efforts are consistent with the Board's broader pro-union, anti-employer agenda, reflecting policy preferences that disproportionately and blatantly favor unions at the expense of employers. For example, in *Stericycle, Inc.*, the Board held that neutral work rules are presumptively unlawful simply because an employee "could" interpret them to restrict the employee's Section 7 rights. Cases 04-CA-137660, et al., 372 NLRB No. 113, at 9 (N.L.R.B. Aug. 2, 2023). This has led the Board to strike down employee handbook language requiring respectful and non-vulgar communication. *See Starbucks Corp.*, Case 04-CA-294636, 2023 WL 5140070 (N.L.R.B. Div. of Judges Aug. 10, 2023). This undermines employers' ability to enforce longstanding and commonsense workplace rules unrelated to union activity.

Similarly, the Board has declared standard confidentiality and non-disparagement provisions in voluntary severance agreements *per se* unlawful. In *McLaren Macomb*, the Board held that an employer's mere offer of standard confidentiality and non-disparagement provisions in a voluntary severance agreement constitutes an unfair labor practice. Case 07-CA-263041, 372 NLRB No. 58, at 3 (N.L.R.B. Feb. 21, 2023). In so holding, the Board overturned prior precedent requiring evidence that the offer in question was coercive or otherwise made in conjunction with an unfair labor practice. *See Baylor Univ. Med. Ctr.*, Case 16-CA-195335, 369 NLRB No. 43, at 1-2 (N.L.R.B. Mar. 16, 2020).

The Board has even recognized and imposed novel compensatory damages as the new default remedy

against employers. In *Thryv, Inc.*, the Board reversed prior precedent and held that the standard "make-whole" remedy must include not just back-pay but also damages for all "direct or foreseeable pecuniary harms." Cases 20-CA-250250, -251105, 372 NLRB No. 22, at 1 (N.L.R.B. Dec. 13, 2022) (emphasis omitted). As several Members explained in partial dissent, this standard "opens the door to awards of speculative damages that go beyond the Board's remedial authority." *Id.* at 25 (Members Kaplan & Ring, concurring in part and dissenting in part). Together with the Board's expansive Section 10(j) power, the threat of expanded damages awards is used to force settlements on employers.

At the same time, the watered-down injunction standard essentially eliminates the courts as a check on these abusive agency actions. Because district courts under the Sixth Circuit's rule must grant Section 10(j) injunctions so long as the Board's legal theory is non-frivolous, courts have practically no ability to monitor the bounds of the Board's legal authority and invalidate abusive Section 10(j) injunctions. This raises the prospect that the Board will implement much of its pro-union agenda by injunction—rather than through the ordinary administrative and judicial review process that tests the lawfulness of agency decisions.

C. Congress In No Way Authorized This Regime

Congress by no means sanctioned this bureaucratic onslaught against American businesses. Rather, the NLRA authorizes the district court "to grant to the Board such temporary relief or restraining order as [the court] deems just and

proper." 29 U.S.C. § 160(j). That language does not require district courts to blind themselves to the law, facts, and equities and instead issue injunctions based on the Board's fiat. *See supra* at 14-15; Pet. Br. 22-29. The Board has offered no meaningful justification for departing from the traditional *Winter* factors when it comes to the extraordinary and drastic remedy of an injunction, let alone for the extreme form of deference that the watered-down standard grants to the Board. Congress would have had to speak especially clearly to do either—and it has done the opposite in using traditional equitable language in Section 10(j), "just and proper." Far from authorizing a departure from the standards that have governed—and checked—the entry of injunctive relief for centuries, that language signals Congress's intent to leave those guardrails in place. This Court should therefore reject the watered-down standard applied by the Court below, and restore the courts' role as a meaningful check on the Board's practices.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

STEPHANIE A. MALONEY
MARIA C. MONAGHAN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

ERICA KLENICKI
MICHAEL A. TILGHMAN II
NAM LEGAL CENTER
733 Tenth Street, NW
Suite 700
Washington, DC 20001

GREGORY G. GARRE
Counsel of Record
PETER E. DAVIS
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

ELIZABETH GAUDIO MILITO
PATRICK J. MORAN
NFIB SMALL BUSINESS LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004
(202) 406-4443

Counsel for Amici Curiae

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