No. 23-367

IN THE

Supreme Court of the United States

STARBUCKS CORPORATION,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has

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[1] No counsel for any party to this case authored this brief in whole or part, and no party or counsel other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus curiae* notified Petitioner of NCLA's intention to file this brief on October 13, 2023 and notified Respondent of its intention to file this brief on October 24, 2023.

developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the Sixth Circuit's use of an atextual, judge-made doctrine that enables an administrative agency to obtain preliminary injunctions against private parties without having to demonstrate the merits of its legal allegations or satisfy any of the traditional elements of equitable relief. Such easy access to injunctive relief allows the agency to deprive a party of property rights without the due process of law and to coerce parties it subjects to administrative prosecutions to settle on unfavorable terms.

BACKGROUND

Section 10(j) of the National Labor Relations Act ("NLRA") authorizes the National Labor Relations Board ("NLRB" or "Board") to "petition any United States district court … for appropriate temporary relief or [a] restraining order[]" against an employer while the Board pursues an administrative enforcement action against that employer. 29 U.S.C. § 160(j). The district court may grant a preliminary injunction "as it deems just and proper," and such injunction remains in place for the remainder of NLRB's administrative proceeding against the employer. *Id.*

"A preliminary injunction is an 'extraordinary and drastic remedy[.]'" *Munaf v. Geren*, 553 U.S. 674, 689

(2008) (quoting 11A C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE AND PROCEDURE § 2948, p. 129 (2d ed.1995)). Consistent with long-standing principles of equity to meet this test, a party seeking a preliminary injunction "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. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Yet, in deciding whether to award a preliminary injunction under section 10(j), only four circuit courts apply this well-established, four-factor test. *See Muffley v. Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001); *McKinney v. S. Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015); *Hooks v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1106 (9th Cir. 2022).

By contrast, five circuit courts, including the court below, evaluate section 10(j) injunctions under a different—and far more lax—two-factor test that requires the district court to find "reasonable cause" to believe the employer violated the NLRA and that a preliminary injunction is "just and proper." *See Chester v. Grane Healthcare Co.*, 666 F.3d 87, 89 (3d Cir. 2011); *Kinard v. Dish Network Corp.*, 890 F.3d 608, 612 (5th Cir. 2018); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). Finally, two circuit courts apply a hybrid approach. *See Pye v. Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 63 (1st Cir. 1994); *Kreisberg v. Healthbridge Mgmt., LLC*, 732 F.3d 131, 141 (2d Cir. 2013).

The Sixth Circuit below affirmed a section 10(j) injunction granted under the "reasonable cause" test, which is "relatively insubstantial" as compared to the traditional four-factor test. Pet.App.27a (Readler, J., concurring). Under that test, NLRB may obtain a preliminary injunction against an employer based on legal and factual allegations that fall far short of being likely to succeed on the merits. Rather, as Judge Readler's concurrence explained, an injunction may be granted "as long as the [legal] theory is substantial and not frivolous," Pet.App.28(a) (quoting *Gottfried v. Frankel*, 818 F.2d at 493), and "'facts exist which *could* support' its theory of liability." *Id.* (quoting *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017)). Additionally, the Board need not demonstrate irreparable harm because the "mere potential for future impairment of the Board's remedial power is enough to justify injunctive relief." Pet.App.29(a) (citing *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988)). Nor does the injunction's burden on the employer have any weight in the "reasonable cause" test.

SUMMARY OF ARGUMENT

The Sixth Circuit's "reasonable cause" test is wrong. It departs, without warrant, from long-standing principles of equity that require district courts to use the traditional four-factor test when deciding whether to grant a request for a preliminary injunction. Nothing in the NLRA authorizes such a departure. Nor can section 10(j) authorize the "reasonable cause" test because that test is incompatible with the Constitution's guarantee that

no person shall be deprived of property without due process of law. *See* U.S. CONST. amend. V.

The "reasonable cause" test allows NLRB to obtain an injunction that deprives an employer of property—here by forcing Starbucks to retain and pay unwanted employees—without establishing that the employer likely violated the law. Furthermore, by loosening the preliminary-injunction standard for the Board for no reason other than it is the Board, the atextual "reasonable cause" test requires the district court to place a thumb on the scale that is incompatible with the due-process obligation of impartial tribunals. Finally, the grant of a section 10(j) injunction under the "reasonable cause" test creates undue economic pressure to settle the Board's administrative enforcement proceedings.

The Court should grant the petition for certiorari.

ARGUMENT

I. THE SIXTH CIRCUIT'S 'REASONABLE CAUSE' TEST IMPROPERLY DEPARTS FROM LONG-STANDING PRINCIPLES OF EQUITY

Section 10(j) authorizes district courts, on petition from the Board, to grant "appropriate temporary relief or restraining order[]" when it deems such relief "just and proper." 29 U.S.C. § 160(j). Neither that section nor the rest of the statute specifies which standard courts should apply in evaluating NLRB's petitions. But that is unsurprising because traditional principles of equity have always bound district courts' equitable powers. *See Weinberger v. Romero-Barcelo*, 456 U.S.

305, 312 (1982) ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."). Thus, "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'" *Id.* (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). *See also Salazar v. Buono*, 559 U.S. 700, 714 (2010) ("An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief."). This Court has instructed lower courts time and again that the injunctive relief standard simply does not change depending on the statute authorizing the issuance of an injunction.

For example, *Romero-Barcelo* reversed a grant of an injunction against the U.S. Navy which was issued pursuant to the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 *et seq*. Although it was not disputed (at least in this Court) that the Navy was violating provisions of the FWPCA, the Court explained that "[a]n injunction [was] not the only means of ensuring compliance[,]" because, *inter alia*, the FWPCA "provide[d] for fines and criminal penalties." 456 U.S. at 314. Thus, while injunctive relief was not foreclosed, the Court concluded that district courts retained traditional equitable powers to "to arrive at a nice adjustment and reconciliation between the competing claims," so as to "balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Id.* at 312 (cleaned up).

Provisions of the FWPCA that authorized injunctive relief are nearly identical to § 10(j). *Compare* 33 U.S.C. § 1319(b) (authorizing the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction[]" and empowering district courts "to restrain such violation and to require compliance") *with* 29 U.S.C. § 160(j). It stands to reason that the injunction standard under the NLRA is no different than that under the FWPCA.

Traditional principles of equity guide the issuance of injunctive relief even where the legal rights are fully settled and consist of more than merely plausible allegations. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). That is so because "the creation of a right is distinct from the provision of remedies for violations of that right[,]" *id.* at 392, and equity requires district courts, after applying the traditional four-factor test, to "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "[T]raditional equitable principles do not permit … broad classifications[]" which could "suggest[] that injunctive relief [could or] could not issue in a broad swath of cases." *eBay*, 547 U.S. at 393.

There is no reason to believe that district courts' equitable powers should apply differently in NLRA cases than in nearly every other case that comes before them. To the contrary, "a major departure from the long tradition of equity practice should not be lightly implied." *Romero-Barcelo*, 456 U.S. at 320. And the very provision that authorizes district courts to grant preliminary injunctive relief only authorizes it to the extent that it is "just and proper." 29 U.S.C. § 160(j). But relief is only proper if it complies with traditional

equitable principles. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) ("An injunction should issue *only* if the traditional four-factor test is satisfied.") (emphasis added). An approach that "presume[s] that an injunction is the proper remedy for a [statutory] violation except in unusual circumstances[]" does not meet that standard, and instead "invert[s] the proper mode of analysis." *Id.*

The fact the Government is the one seeking an injunction does not change the calculus. This Court has long (and correctly) insisted that "the Government should turn square corners in dealing with the people [just as] the people should turn square corners in dealing with their government[.]" *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61, n.13 (1984) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). There is thus no reason to permit a near-automatic grant of a preliminary injunction when the Government seeks it, given that the NLRA permits assessment of penalties and other remedies for violations, *see* 29 U.S.C. § 162, while rejecting such an automatic rule for private petitioners. *See Romero-Barcelo*, 456 U.S. at 314 (rejecting appropriateness of a near-automatic injunction because, *inter alia*, the statute "provide[d] for fines and criminal penalties.").

II. THE 'REASONABLE CAUSE' TEST'S DEPARTURE FROM PRINCIPLES OF EQUITY IS INCOMPATIBLE WITH THE DUE PROCESS OF LAW

The Fifth Amendment prohibits the federal government from depriving a person of life, liberty or

property without due process of law. U.S. CONST. amend. V. By departing from principles of equity, the "reasonable cause" test violates the due process of law in at least three ways. *First*, it allows NLRB to deprive an employer of property without having to establish a legal violation likely occurred. *Second*, it requires the district court to display systematic bias in favor of NLRB in preliminary-injunction hearings simply because it is the Board. *Third*, the grant of a section 10(j) injunction under the "reasonable cause" test transforms the Board's administrative adjudications into coercive proceedings.

A. SECTION 10(j) INJUNCTIONS GRANTED UNDER THE 'REASONABLE CAUSE' TEST DEPRIVE ENFORCEMENT TARGETS OF PROPERTY WITHOUT DUE PROCESS

After bringing an administrative action against an employer for allegedly engaging in unfair labor practices, the Board may seek in district court a preliminary injunction to halt that allegedly unlawful practice for the duration of its administrative proceeding. 29 U.S.C. § 160(j). Under the "reasonable cause" test, the Board may obtain an injunction from the district court even when its enforcement action is unlikely to succeed on the merits. Rather, as Judge Readler's concurrence explained, all that is needed is the "[a]bsen[ce of] legal frivolity on the Board's part[]" and "'facts [that] exist which *could* support' its theory of liability." Pet.App.28a (emphasis in original) (*quoting Ozburn-Hessey Logistics*, 875 F.3d at 339).

In other words, in the Sixth Circuit, the Board may obtain a section 10(j) preliminary injunction depriving

an employer of its property—here by forcing Starbucks to retain and pay unwanted employees—even where the district court determines that the employer most likely complied with the law. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (alteration in original) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). A proceeding in which the Government need not establish a likely violation of law before depriving the accused of its private property flunks any plausible definition of due process of law.

The "reasonable cause" test fails even the flexible framework under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Under *Mathews*, the adequacy of pre-deprivation procedure is determined by weighing: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of [that] interest"; and (3) "the Government's interest[.]" *Id.*

To start, the "reasonable cause" test entirely fails to consider private interests affected by a section 10(j) injunction. The traditional four-factor test requires balancing equities between the Government's interest and the injunction's burden on the employer. *See Winter*, 555 U.S. at 20. By contrast, the "reasonable cause" test completely omits the balance of equities, giving no consideration to the burden on the employer's property rights. In one case, for instance, a court applying the "reasonable cause" test enjoined an employer from selling a facility that was operating at a loss. *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998). This complete evisceration of property rights was not accompanied by any analysis

of the burden on the employer and instead considered only the Board's interest in "'facilitat[ing] peaceful management-labor negotiation[.]'" *Id.* (quoting *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 879 (3d Cir. 1990)).

Next, the "reasonable cause" test carries an extremely high "risk of [an] erroneous deprivation of [that] interest[,]" *Mathews*, 424 U.S. at 335, because the Board can obtain a section 10(j) injunction based on threadbare allegations. By evading the traditional "likelihood of success on the merits" requirement, the "reasonable cause" test allows the Board to obtain injunctions that deprive employers of property even when the Board's allegations are more likely than not meritless. Such erroneous deprivation of property rights is not just an unfortunate byproduct of the test's departure from traditional injunction analysis; rather, it is the inescapable point of such departure.

Finally, NLRB's interest in enforcing labor-relations laws does not provide adequate justification for maintaining the "reasonable cause" test. There is no reason why the Board cannot adequately perform its duties under the traditional injunction test, which would require the Board to establish, *inter alia*, a likelihood of success on the merits and a favorable balance of the equities. There is simply no legitimate government interest in obtaining meritless and inequitable injunctions.

B. THE 'REASONABLE CAUSE' TEST REQUIRES DISTRICT COURTS TO SHOW SYSTEMATIC BIAS IN THE GOVERNMENT'S FAVOR

The due process of law, including its basic requirement of unbiased judging, is an ancient and profound principle of justice. *See Weiss v. United States*, 510 U.S. 163, 178 (1994). The traditional four-factor injunction test reflects that principle by requiring district courts to exercise their equitable powers evenhandedly, *i.e.*, without regard to the identities of the parties. It was inappropriate for the Sixth Circuit to instead use the "reasonable cause" test to systematically privilege one of parties—the Government—in granting equitable relief.

Justice Gorsuch recently expressed grave concern over the constitutionality of judge-made doctrines that "introduce into judicial proceedings a 'systematic bias toward one of the parties.'" *Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of *certiorari*) (quoting Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016)). While he was speaking of *Chevron* deference to agencies' statutory interpretations, *id.*, the "reasonable cause" test for injunctive relief raises the same kind of due-process concerns.

Like *Chevron*, the "reasonable cause" test was created through "judicial fiat" and is untethered to statutory text. *See* Pet.App.27a (Readler, J., concurring). The standard likewise "place[s] a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against

everyone else." *Buffington*, 143 S. Ct at 19 (Gorsuch, J., dissenting from denial of *certiorari*).

The traditional test requires a district court to consider which side is most likely to succeed on the merits and to balance the equities without regard to the parties' identities. *Winter*, 555 U.S. at 20 (citations omitted). The "reasonable cause" test, by contrast, requires the district court to tip the scales in favor of the Board when exercising its equitable powers.

An injunction test that favors the Board solely on account of being the Board exhibits a type of judicial bias incompatible with due process and fundamental fairness. To be sure, the bias arises from institutional deference rather than individual animus, but this makes bias and the Fifth Amendment due process problem especially serious. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1729, 1732 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by … bias").

This Court has held that even the appearance of potential bias toward a litigant violates the Due Process Clause. *See Caperton*, 556 U.S. 868. All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon" them. 28 U.S.C. § 453. And the oath of office requires federal judges to disqualify him or herself in cases where he or she holds "a personal bias

or prejudice concerning a party," *id.* at § 455(a), (b)(1). What holds for "personal bias" applies equally for the more widespread systematic bias that the "reasonable cause" test compels.

C. Section 10(j) Injunctions Granted Under the 'Reasonable Cause' Test Coerce Employers Toward Unfair Settlements in NLRB Proceedings

The grant of a section 10(j) preliminary injunction spells certain defeat to employers in the Board's enforcement proceedings. Such an injunction lasts for the duration of the underlying proceeding, which is entirely within the Board's control and often lasts for years. *See, e.g.*, *Tesla, Inc.*, 370 NLRB 101 (2021) (three-year proceeding).

Once it obtains a section 10(j) injunction, the Board has every incentive to drag out proceedings because it has already obtained the result sought. Meanwhile, the employer faces ever-mounting economic costs from the injunction, which will continue for as long as the Board desires. At that point, surrender is often the only viable option. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 621–22 (1966) (Fortas, J., dissenting) ("A 'preliminary' injunction, in effect during the years required to complete the Commission's proceedings, often—probably usually—means that the plans to merge will be abandoned. … 'Preliminary' here usually means final.").

The "reasonable cause" test allows the Board to obtain a section 10(j) preliminary injunction without having to make any showing of success on the merits,

which gives the accused employer little choice but to surrender. Such undue pressure amounts to coercion that violates due process of law. *See Perez v. Pan-Am. Berry Growers, LLC*, No. 6:13-CV-1439-TC, 2014 WL 198781, at *1 (D. Or. Jan. 15, 2014), *report and recommendation adopted*, No. 6:13-CV-1439-TC, 2014 WL 1668254 (D. Or. Apr. 24, 2014). In *Perez*, the Department of Labor brought an enforcement action against a blueberry producer for alleged labor violations and entered a "hot goods" objection, which prevents goods allegedly produced in violation of labor laws from entering commerce. *Id.* at *1. Because the blueberries at issue were perishable, the producer was faced with irreparable economic loss unless it settled with the agency, even though the agency had made no showing as to the merits of its allegations. *Id.* at *4. The court held that such a settlement was invalid because it was obtained through improper economic duress and thus violated due process of law. *Id.* at *5.

The "reasonable cause" test generates the same type of improper economic duress. NLRB can obtain a preliminary injunction against an employer based on threadbare allegations that are unlikely to succeed on the merits. The injunction imposes upon the employer continued economic costs—here paying unwanted employees—for as long as the Board wishes or until the employer confesses. Exacting such extreme economic duress violates the employer's right to due process of law.

Because the "reasonable cause" test is incompatible with the Constitution's guarantee of due process of law, section 10(j) cannot authorize the grant of preliminary injunctions based on that test. Rather,

the traditional four-factor test should apply, and the Court should grant the petition for certiorari to say so.

CONCLUSION

The Court should grant the Starbucks Corporation's petition for a writ of certiorari.

Respectfully submitted,

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