Labor Law — National Labor Relations Board — Deference — Starbucks Corp. v. McKinney *ex rel.* NLRB

Deference to agencies is in disfavor.[1] And while the demise of *Chevron*[2] has dominated legal discourse,[3] the Supreme Court's evolving views on agency deference in specific areas also merit attention. Rolling back deference in the labor law context, for example, can both have an outsized impact on Americans' everyday lives[4] and portend more extensive rollbacks to come. One such example involves section 10(j) of the National Labor Relations Act[5] (NLRA), which authorizes the National Labor Relations Board (NLRB) to seek preliminary injunctions in federal district court to enjoin unfair labor practices while the NLRB adjudicates the merits of the matter. Because the NLRA expressly allocates adjudicatory authority to the NLRB rather than the courts,[6] courts have been deferential to the NLRB's preliminary factual and legal positions in these injunctive proceedings. The Sixth Circuit exercised such deference by applying a two-part "reasonable-cause" test to section 10(j) preliminary injunctions,[7] rather than the traditional four-part test articulated in *Winter v. Natural Resources Defense Council, Inc*.[8] But no longer. After the NLRB successfully obtained a section 10(j) injunction in the Sixth Circuit against Starbucks to halt its union-busting activity in a Memphis location, Starbucks appealed to the Supreme Court.[9] Last Term, in *Starbucks Corp. v. McKinney ex rel. NLRB*,[10] the Supreme Court held that the NLRA did not displace the traditional principles of equity, determining that the four-part test for

---

[1] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron* deference).

[2] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[3] *See, e.g.*, Mario Loyola & Richard A. Epstein, *The End of* Chevron *Deference*, HERITAGE FOUND. (Aug. 6, 2024), https://www.heritage.org/courts/commentary/the-end-chevron-deference [https://perma.cc/JE98-H2CR]; *U.S. Supreme Court Overrules* Chevron*, Reshaping the Future of Regulatory Litigation*, SIDLEY AUSTIN (June 28, 2024), https://www.sidley.com/en/insights/newsupdates/2024/06/us-supreme-court-overrules-chevron-reshaping-the-future-of-regulatory-litigation [https://perma.cc/AAN6-DK3V].

[4] *See generally* Rajiv Bhatia et al., *Protecting Labor Rights: Roles for Public Health*, 128 PUB. HEALTH REPS. 39 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3945448 [https://perma.cc/X4A7-GD5H] ("The adoption and enforcement of labor laws protect and promote social, economic, and physical determinants of health, while incomplete compliance undermines these laws and contributes to health inequalities." *Id.* at 39.); *Developments in the Law — Labor and Employment*, 136 HARV. L. REV. 1585 (2023) (discussing current trends in labor law, including Americans' high approval ratings for labor unions in recent years).

[5] Labor Management Relations Act, 1947, ch. 120, sec. 101, § 10(j), 61 Stat. 136, 149 (codified at 29 U.S.C. § 160(j)).

[6] *See* 29 U.S.C. § 160(a)–(d).

[7] *See* McKinney *ex rel.* NLRB v. Starbucks Corp., 77 F.4th 391, 397 (6th Cir. 2023).

[8] 555 U.S. 7, 20 (2008).

[9] *See generally* Petition for a Writ of Certiorari, Starbucks Corp. v. McKinney *ex rel.* NLRB, 144 S. Ct. 1570 (2024) (No. 23-367), 2023 WL 6623099.

[10] 144 S. Ct. 1570 (2024).

preliminary injunctions applies in section 10(j) cases instead of the Sixth Circuit's two-part test.[11]

Indeed, on the question of the appropriate test, the Court was unanimous.[12] Under the two-part test, a court grants a section 10(j) injunction if: (1) "there is reasonable cause to believe that unfair labor practices have occurred"; and (2) "injunctive relief is 'just and proper.'"[13] But the Court reasoned that nothing in the text of the NLRA jettisoned the presumption in favor of the four-part *Winter* test.[14] Under that test, the petitioner must show: (1) they are "likely to succeed on the merits"; (2) they are "likely to suffer irreparable harm"; (3) "the balance of equities tips in [their] favor"; and (4) the "injunction is in the public interest."[15] In addition to resolving the circuit split on the appropriate test to employ,[16] the Court also held — over Justice Jackson's partial dissent — that the NLRB is not entitled to deference in section 10(j) proceedings.[17] The majority reasoned that the "statutory context does not compel" deference to what the Court labeled the NLRB's "convenient litigating position."[18] But though the Court limited the scope of deference in the section 10(j) context, it did not necessarily extinguish it. Because the *Starbucks* decision did not discuss parallel proceedings — an already-initiated agency adjudication concurrent with a federal district court's evaluation of a preliminary injunction — the Court's decision need not disturb courts' deference to decisions of Administrative Law Judges (ALJs). ALJ decisions remain a useful benchmark for assessing likelihood of success on the merits and bear the hallmark of impartiality.

Starbucks is one of the world's largest companies, employing around 400,000 people[19] in over 35,000 stores across more than 80 countries.[20] In 2021, a group of employees formed a union, Starbucks Workers United, to coordinate organizing efforts across the country in pursuit of better pay and working conditions.[21] Over the past few years, labor organizing at Starbucks has gained traction as workers in over 400

---

[11] *Id.* at 1576, 1579.

[12] *See id.* at 1574; *id.* at 1579–80 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part).

[13] *Id.* at 1575 (majority opinion) (quoting McKinney *ex rel.* NLRB v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 339 (6th Cir. 2017)).

[14] *Id.* at 1576.

[15] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[16] *Starbucks*, 144 S. Ct. at 1575.

[17] *Id.* at 1578–79.

[18] *Id.* (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)).

[19] *Corporate Careers*, STARBUCKS CAREERS, https://careers.starbucks.com/discover-opportunities/corporate [https://perma.cc/7FYB-QB43].

[20] *Company Profile*, STARBUCKS STORIES & NEWS (Feb. 6, 2023), https://stories.starbucks.com/uploads/2023/02/AboutUs-Company-Profile-2.6.23.pdf [https://perma.cc/66SX-ESTP].

[21] Taylor Giorno, *More than 400 Starbucks Workers at 21 Stores Seek to Join Union*, THE HILL (Feb. 21, 2024, 12:51 PM), https://thehill.com/business/4480839-more-than-400-starbucks-workers-at-21-stores-seek-to-join-union [https://perma.cc/JYX5-H9W8].

stores have unionized.[22] Unsurprisingly, Starbucks chafed against this development.[23] It was not until February of this year that the company and union agreed "to begin discussions on a foundational framework to achieve collective bargaining agreements."[24] Despite these seemingly collaborative developments, allegations against Starbucks for unfair labor practices have been numerous.[25]

In the present case, Starbucks fired seven employees, known as the "Memphis Seven,"[26] who subsequently filed charges with the NLRB.[27] The employees argued that they were fired for attempting to unionize, in violation of 29 U.S.C. § 158(a)(1) and (3).[28] Starbucks, in response, asserted that the terminations were legally justified because the employees had invited television crews into their store after hours to cover the unionization effort, which Starbucks claimed posed safety risks.[29] Finding that the charges appeared to have merit, the NLRB pursued formal action and issued a complaint against Starbucks.[30]

Generally, once a complaint is issued, the case proceeds before an ALJ, who holds a hearing and issues a decision,[31] which "contain[s] findings of fact, conclusions, and recommendations."[32] The Board then reviews the ALJ's decision, "afford[ing] deferential treatment to the ALJ's credibility determinations."[33] Finally, the Board can seek enforcement of its order in the relevant U.S. court of appeals, which will defer to the Board's findings of fact if they are "supported by substantial evidence."[34] This process can take years,[35] however, meaning that in the

---

[22] *Starbucks Workers United Hits 400-Store, 10,000-Worker Milestone with Miami, FL Win*, STARBUCKS WORKERS UNITED (2024), https://sbworkersunited.org/blog-post-1 [https://perma.cc/LN8C-GW3Y].

[23] *See* Megan K. Stack, Opinion, *Inside Starbucks' Dirty War Against Organized Labor*, N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/opinion/starbucks-union-strikes-labor-movement.html [https://perma.cc/W8Z6-ZRJN].

[24] Starbucks Workers United (@SBWorkersUnited), X (Feb. 27, 2024, 4:07 PM), https://x.com/SBWorkersUnited/status/1762585193628803508/photo/1 [https://perma.cc/6Q59-L5W2].

[25] Nik Popli, *Supreme Court Appears Poised to Side with Starbucks in Labor Dispute over Firing of Pro-Union Employees*, TIME (Apr. 23, 2024, 6:00 PM), https://time.com/6970211/starbucks-union-supreme-court [https://perma.cc/Y9R9-Y6SK].

[26] McKinney *ex rel.* NLRB v. Starbucks Corp., No. 22-cv-2292, 2022 WL 5434206, at *1 (W.D. Tenn. Aug. 18, 2022).

[27] *Starbucks*, 144 S. Ct. at 1575.

[28] *See id.*

[29] *See Starbucks*, 2022 WL 5434206, at *5, *7.

[30] *See Starbucks*, 144 S. Ct. at 1574–75.

[31] *See id.* at 1582 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part).

[32] NLRB v. Irving Ready-Mix Inc., 780 F. Supp. 2d 747, 751 n.1 (N.D. Ind. 2011).

[33] Hitterman *ex rel.* NLRB v. List Indus., Inc., 610 F. Supp. 3d 1105, 1129 (N.D. Ind. 2022).

[34] 29 U.S.C. § 160(e).

[35] *Starbucks*, 144 S. Ct. at 1574. In 2021, the most recent year with such data, it took on average 286 days from the date of an unfair labor practice complaint to the issuance of a decision or settlement by the ALJ, and then another 305 days on average for the Board to issue its order. NLRB, NLRB PERFORMANCE AND ACCOUNTABILITY REPORT 161 (2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-fy2023-par-508.pdf [https://perma.cc/FM9D-U2LH].

interim, employers can continue their union-busting tactics unabated and render the "efficacy of the NLRB's final order . . . nullified."[36]

Accordingly, section 10(j) of the NLRA authorizes the NLRB to petition a district court for a preliminary injunction enjoining the employer from engaging in further retaliatory actions while the merits of the case are adjudicated. The court will grant this relief if it is "just and proper."[37] The Board uses "a complicated ten-step process to decide whether to request a 10(j) injunction."[38] Regional Directors first investigate the charge and assess the need for injunctive relief.[39] Their findings are reviewed by the Injunction Litigation Branch of the NLRB's Office of the General Counsel.[40] If the General Counsel supports injunctive relief, they seek Board approval, and the Board votes on the issue.[41] In *Starbucks*, the Board permitted Regional Director Kathleen McKinney to proceed with a demand for injunctive relief in the Western District of Tennessee, seeking a cessation of Starbucks's unfair labor practices and "interim reinstatement of the Memphis Seven."[42]

At the district court, Judge Lipman applied the Sixth Circuit's two-part test and granted the NLRB's preliminary injunction in part.[43] First, she held that there was "reasonable cause" to believe Starbucks *did* fire the employees in retaliation for unionization efforts because the NLRB's legal "theory [was] substantial and not frivolous,"[44] and the facts were "consistent with [its] legal theory."[45] Second, citing adequate evidence that Starbucks's actions would have a "chilling effect" on unionization,[46] she held that injunctive relief would be just and proper because it was "necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers."[47] Importantly, the ALJ had not yet issued any decision in the parallel administrative proceeding.[48] Starbucks appealed to the Sixth Circuit.[49]

---

[36] *See* McKinney *ex rel.* NLRB v. Starbucks Corp., No. 22-cv-2292, 2022 WL 5434206, at *21 (W.D. Tenn. Aug. 18, 2022) (quoting Hooks *ex rel.* NLRB v. Ozburn-Hessey Logistics, LLC, 775 F. Supp. 2d 1029, 1051 (W.D. Tenn. 2011)).

[37] 29 U.S.C. § 160(j).

[38] William Baker, *Division and Delay: Evaluating the Efficacy and Underuse of the 10(j) Injunction*, 48 THE HARBINGER 1, 8 (2023).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* McKinney *ex rel.* NLRB v. Starbucks Corp., No. 22-cv-2292, 2022 WL 5434206, at *1 (W.D. Tenn. Aug. 18, 2022).

[43] *Id.* at *17–18, *22.

[44] *Id.* at *9–10 (quoting Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 29 (6th Cir. 1998)).

[45] *Id.* (quoting Muffley *ex rel.* NLRB v. Voith Indus. Servs., Inc., 551 F. App'x 825, 830 (6th Cir. 2014)).

[46] *See id.* at *18–20.

[47] *See id.* at *17–18 (quoting McKinney *ex rel.* NLRB v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 339 (6th Cir. 2017)).

[48] *See* McKinney *ex rel.* NLRB v. Starbucks Corp., 77 F.4th 391, 396 n.2 (6th Cir. 2023).

[49] *Id.* at 396.

While the Sixth Circuit heard oral arguments, the ALJ issued his decision[50] in favor of the NLRB on some, but not all, of the charges.[51] The Sixth Circuit, stating it was "not *compelled* to defer" to the ALJ decision,[52] nevertheless affirmed the preliminary injunction under the two-part test.[53] Starbucks then appealed to the Supreme Court, arguing that the Sixth Circuit's two-part test was unduly deferential and incorrectly divergent from other circuits' application of the traditional four-part test for preliminary injunctive relief.[54] The Court granted certiorari to resolve the circuit split about which test governed.[55]

Writing for the majority, Justice Thomas ruled in favor of Starbucks, holding that nothing in the text of section 10(j) indicated that Congress intended to depart from "traditional equitable principles."[56] Courts thus must apply the traditional four-factor *Winter* test in determining whether to grant a preliminary injunction.[57] Justice Thomas next rejected appeals to statutory context, determining that the two-part test is a "watered-down approach to equity."[58] The two-part test, he reasoned, does not merely "fine tun[e]" the traditional, four-part *Winter* test, but rather "substantively lowers the bar for securing a preliminary injunction by requiring courts to yield to the Board's preliminary view of the facts, law, and equities."[59] This is particularly evident when comparing how the two tests treat the NLRB's burden regarding the merits: The two-part test presents a lower bar, requiring a "substantial and not frivolous" legal theory, whereas the four-part *Winter* test presents a higher bar, requiring likely success on the merits.[60] Justice Thomas mused that "it is hard to imagine how the Board could lose under the [two-part] reasonable-cause test,"[61] as such a deferential test "render[s] the court more a spectator than a referee when it comes to matters of equity."[62]

Justice Jackson concurred in part, dissented in part, and concurred in the judgment.[63] While she agreed with the majority that nothing in the text of section 10(j) suggested a departure from the *Winter* test,[64] she nonetheless reasoned that the context in which the NLRB was born

---

50 *Id.* n.2.

51 *See* Brief for Petitioner at 13–14, *Starbucks*, 144 S. Ct. 1570 (No. 23-367).

52 *Starbucks*, 77 F.4th at 396 n.2 (emphasis added) (citing *Ozburn-Hessey Logistics*, 875 F.3d at 339–40).

53 *Id.* at 397, 400–01.

54 Brief for Petitioner, *supra* note 51, at 16–17.

55 *Starbucks*, 144 S. Ct. at 1575.

56 *Id.* at 1577.

57 *Id.*

58 *Id.* at 1578.

59 *Id.*

60 *Id.* (quoting Gottfried *ex rel.* NLRB v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987)).

61 *Id.*

62 *Id.* (quoting McKinney *ex rel.* NLRB v. Starbucks Corp., 77 F.4th 391, 408 (6th Cir. 2023) (Readler, J., concurring)).

63 *Id.* at 1579 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part).

64 *Id.* at 1579–80.

should guide how courts conduct their analyses.[65] Lamenting that "the majority cho[se] the simplicity of unfettered judicial discretion over the nuances of Congress's direction,"[66] Justice Jackson argued that the statutory context of the NLRA counseled in favor of at least some deference to the NLRB, even when deploying the traditional *Winter* test.[67] She emphasized that for many years, Congress aimed to restrict excessive judicial discretion in issuing injunctions during labor disputes, preferring to delegate resolution primarily to the Board.[68] Early in the twentieth century, federal courts were often seen as siding with management to hinder the formation and growth of labor unions.[69] Against this backdrop, Congress established the NLRB and enabled the Board to pursue injunctions.[70] Indeed, Congress recognized that empowering the NLRB to pursue injunctions was necessary to protect "labor rights 'during the "notoriously glacial" course of NLRB proceedings.'"[71] In Justice Jackson's mind, courts should exercise their equitable discretion in labor disputes, mindful of this history of misuse and Congress's desire to protect labor rights via speedy access to injunctive relief.[72]

Three elements of the statutory context, according to Justice Jackson, counsel in favor of some deference.[73] First, unlike in other contexts where a district court is "making a predictive judgment about how it will rule on the merits itself," when considering a section 10(j) injunction, it is making a judgment about the *Board's* future decision.[74] Second, when seeking a section 10(j) injunction, the Board is "acting in its adjudicatory capacity," rather than as a private party.[75] In that vein, the Board's "exceedingly rigorous" internal screening procedures culled nearly 20,000 unfair labor practice charges in 2023 down to just 14 section 10(j) injunction authorizations.[76] Such data strongly indicate that "the Board has already deemed" the charges underlying section 10(j)

---

[65] *See id.* at 1580–82, 1585–87.

[66] *Id.* at 1580.

[67] *See id.* at 1585–87.

[68] *Id.* at 1581.

[69] *See id.* at 1581–82 (quoting Boys Mkts., Inc. v. Retail Clerks Union, Loc. 770, 398 U.S. 235, 250 (1970); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1152 (1989)).

[70] *Id.* at 1582–83.

[71] *Id.* at 1583 (quoting Kinney v. Pioneer Press, 881 F.2d 485, 491 (7th Cir. 1989)).

[72] *Id.*

[73] *See id.* at 1585–87.

[74] *Id.* at 1585–86.

[75] *Id.* at 1586.

[76] *Id.*; *see also Litigation–Injunction,* NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/litigation/injunction-litigation [https://perma.cc/42ZG-MMPQ] (noting that in 2023, the NLRB authorized just 14 10(j) petitions); *Unfair Labor Practice Charges Filed Each Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges [https://perma.cc/R8QA-29XR] (stating that the NLRB received 19,869 unfair labor practice charges in 2023, on which the General Counsel filed 743 complaints). In other words, the number of 10(j) petitions the NLRB authorized constituted just 1.88% of the total number of complaints filed and only 0.07% of the number of unfair labor practice charges received.

injunctions to be "likely meritorious."[77] Third, "the NLRA gives federal courts only a limited role in reviewing the Board's decisions," commanding deference to the Board's factual findings.[78] These three statutory qualities indicate that review of whether a claim is likely to succeed on the merits "should be far less searching than normal."[79]

Starbucks, at first glance, does not seem to be particularly disruptive to the status quo or facially antilabor. Indeed, scholars have noted that section 10(j) petitions were more successful in circuits applying the four-factor *Winter* test than in circuits applying the two-part test.[80] The government itself seemed to argue there was little daylight between the two tests, considering its "position . . . [wa]s not that courts should *disregard* traditional equitable principles, but rather that the statutory context should *inform* courts' application of those principles."[81] Justice Thomas's approach to deference in *Starbucks*, however, is what makes the decision of consequence. In holding that the *Winter* test is required to determine whether to issue a section 10(j) injunction, he rejected giving deference to the NLRB, arguing that to do so would be inappropriate because its preliminary findings constitute only "an agency's convenient litigating position."[82] Given that the opinion presupposes a lack of *any* neutral agency proceedings, however, *Starbucks* need not thoroughly wring deference out of the section 10(j) process.

Specifically, Justice Thomas glossed over an important feature of the parallel nature of preliminary injunction and agency adjudication proceedings. That is, district courts often decide on section 10(j) injunctions *after* an ALJ renders their decision.[83] Because Justice Thomas's opinion did not directly speak to situations in which an ALJ has reached a decision on the administrative record at the time the Board seeks the injunction, courts can and should continue to afford some deference to

---

[77] *Starbucks*, 144 S. Ct. at 1586 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part).

[78] *See id.*

[79] *Id.*

[80] *See* Baker, *supra* note 38, at 11 (discussing how "injunctions fare worse in circuits which follow the supposedly more deferential" two-part test, where nearly fifty percent of injunctions are denied, compared to circuits using the four-part *Winter* test, where around thirty percent are denied).

[81] Brief for the Respondent at 9, *Starbucks*, 144 S. Ct. 1570 (No. 23-367).

[82] *Starbucks*, 144 S. Ct. at 1579 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)). Justice Thomas's disdain for deference falls squarely within a larger trend of judicial aggrandizement. *See* Allen C. Sumrall & Beau J. Baumann, Essay, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 41 (2023) ("[T]he Roberts Court has elevated judicial self-aggrandizement to new heights."). A series of blockbuster cases this Term epitomized this trend. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (interring *Chevron* deference); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447–48 (2024) (effectively extending statute of limitations for opposing agency rulemakings); SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024) (curtailing the use of ALJs in adjudicating fraud actions).

[83] In the five years spanning 2019–2023, there were thirty-one cases in which a district court ruled on the merits of a 10(j) preliminary injunction. *See* Appendix, https://harvardlawreview.org/print/vol-138/starbucks-v-mckinney-appendix [https://perma.cc/72S4-ARDA]. In ten of those cases, or 32% of the time, an ALJ had rendered a decision by the time the district court ruled on the injunction. *See id.*

ALJ decisions under the *Winter* test. Doing so would respect Congress's express allocation of labor adjudication authority to the NLRB and the NLRB's concomitant expertise.

The circuits that have traditionally applied the four-part test for section 10(j) injunctive relief are the Fourth, Seventh, Eighth, Ninth, and D.C. Circuits.[84] These are the circuits that, in the Court's eyes, have applied what it now calls the *Winter* test. Notably, these circuits have also consistently extended deference to ALJ decisions when they are presented in the section 10(j) context. For example, the Seventh Circuit has declared that "[t]he ALJ's opinion certainly is relevant to the propriety of section 10(j) relief."[85] Because "[t]he ALJ is the Board's first-level decisionmaker," their "factual and legal determinations supply a useful benchmark against which the Director's prospects of success may be weighed."[86] Courts in both the Eighth and Ninth Circuits have cited the Seventh Circuit's reasoning,[87] and courts in the Fourth and D.C. Circuits have gestured support for it too.[88] Lastly, courts in both the First and Second Circuits, which apply what the NLRB labels a "hybrid test,"[89] have also historically afforded some deference to ALJ decisions.[90]

In his opinion for the Court, Justice Thomas left the door open to such deference to ALJ decisions because he denied deference specifically

---

[84] *Section 10(j) Injunctions — Litigation Success Rate Report*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/section-10j-injunctions-litigation-success-rate-report [https://perma.cc/6JUJ-CPJK] (listing the Fourth, Seventh, Eighth, and Ninth Circuits as applying the traditional, four-part test). The NLRB webpage does not appear to discuss the D.C. Circuit, which also uses the traditional four-part test. *See, e.g.*, D'Amico *ex rel.* NLRB v. U.S. Serv. Indus., Inc., 867 F. Supp. 1075, 1085 (D.D.C. 1994) ("In determining whether the Board has met its burden under [the 10(j)] standard, the Court turns to this Circuit's established four-part test for injunctive relief.").

[85] Lineback *ex rel.* NLRB v. Spurlino Materials, LLC, 546 F.3d 491, 502 n.4 (7th Cir. 2008).

[86] Bloedorn *ex rel.* NLRB v. Francisco Foods, Inc., 276 F.3d 270, 288 (7th Cir. 2001).

[87] *E.g.*, McKinney *ex rel.* NLRB v. S. Bakeries, LLC, 38 F. Supp. 3d 1019, 1028 (W.D. Ark. 2014) ("In cases where an ALJ has issued a decision, like the instant case, courts give deference to the view of the ALJ." (citing *Lineback*, 546 F.3d at 502 n.4)), *vacated on other grounds*, 786 F.3d 1119 (8th Cir. 2015); Small *ex rel.* NLRB v. Avanti Health Sys., LLC, 661 F.3d 1180, 1186 (9th Cir. 2011) ("[T]hree other circuits have looked to ALJ decisions in reviewing the grant or denial of § 10(j) petitions . . . [and] [w]e find the . . . rationale compelling . . . .").

[88] *See* Muffley *ex rel.* NLRB v. Spartan Mining Co., 570 F.3d 534, 545 (4th Cir. 2009) ("Given the substantial violations of the NLRA that the ALJ found . . . the record indicates that the Board will very likely order permanent injunctive relief."); *D'Amico*, 867 F. Supp. at 1091 ("Petitioner has a substantial likelihood of demonstrating before the Administrative Law Judge that the adverse job actions were unfair labor practices . . . [so] the Court concludes that the Board has a substantial likelihood of success on the merits.").

[89] *Section 10(j) Injunctions — Litigation Success Rate Report*, *supra* note 84. In applying the hybrid test, the First and Second Circuits "determin[e] whether injunctive relief is 'just and proper' by considering the elements of the four-part test." *Id.*

[90] *See e.g.*, Walsh *ex rel.* NLRB v. Liberty Bakery Kitchen, Inc., No. 17-cv-10721, 2017 WL 2837006, at *1 (D. Mass. June 30, 2017) ("Plaintiff is likely to succeed on the merits, most importantly because the ALJ issued a ruling in favor of the Board . . . ."); Paulsen *ex rel.* NLRB v. 833 Cent. Owners Corp., No. 12-CV-5502, 2012 WL 6021507, at *3 (E.D.N.Y. Dec. 4, 2012) ("[T]hat issue [regarding the reason for the employee's termination] has already been decided by the ALJ and there is no reason for this court to re-decide it.").

to what he labeled a "convenient litigating position"[91] based on "the preliminary legal and factual views of the Board's in-house attorneys."[92] Although misleading in its disregard for the rarity and rigor that characterize section 10(j) injunction authorizations,[93] his language reflects *only* the circumstances in which the district court rules on a section 10(j) injunction *before* an ALJ has reached a decision. Otherwise, it would be dramatically inconsistent with the tradition of respect between the courts and the agencies to refer to ALJs as "in-house attorneys" and their decisions as "convenient litigating positions."[94] That Justice Thomas did not have ALJ decisions in mind is further supported by his statement that "the Board remains free to reach its own legal conclusions and develop its own record in its administrative proceedings."[95] Again, such language suggests that there cannot be deference to section 10(j) injunctions sought by the Board *before* ALJ development of the administrative record. To put an even finer point on it, some level of deference to ALJ findings and decisions in the section 10(j) context would correspond with Congress's express judgment in the Administrative Procedure Act[96] that, on appeal, neutral agency factfinding warrants deference.[97] In other words, courts that continue to afford deference to ALJ decisions in the section 10(j) context are on sure footing.

In foreclosing deference to the NLRB in section 10(j) injunction proceedings lacking an ALJ decision, the Court's decision is more broadly significant in three ways. First, it will encourage further delays by the Board. Not only would waiting for an ALJ decision raise the chance of proving the now-clarified "likely success on the merits" standard, but it

---

[91] *Starbucks*, 144 S. Ct. at 1579 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)). The Sixth Circuit noted that the ALJ in this case rendered a decision the same day that the parties had oral argument on appeal. McKinney *ex rel.* NLRB v. Starbucks Corp., 77 F.4th 391, 396 n.2 (6th Cir. 2023). The court stated it was "not *compelled* to defer to [the ALJ's decision]." *Id.* (emphasis added) (citing McKinney *ex rel.* NLRB v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 339–40 (6th Cir. 2017)). But not feeling *compelled* to defer to the ALJ is a far cry from not being *permitted* to do so. Justice Thomas made no reference to the Sixth Circuit's passing mention of the ALJ's decision.

[92] *Starbucks*, 144 S. Ct. at 1579.

[93] *See supra* note 76.

[94] *See* Benjamin W. Mintz, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U. L. REV. 877, 882 (1998) (discussing separation of functions in the agency context and respect for agency adjudications).

[95] *Starbucks*, 144 S. Ct. at 1579.

[96] 5 U.S.C. §§ 551–559, 701–706.

[97] *See id.* § 706(2)(E). And court deference to the Board's findings of fact comes on top of the Board's deference to ALJ findings of fact, particularly with regard to credibility determinations. *See* Hitterman *ex rel.* NLRB v. List Indus., Inc., 610 F. Supp. 3d 1105, 1129 (N.D. Ind. 2022) (citing, inter alia, Standard Dry Wall Prods., 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951)). Justice Thomas did briefly address and reject the relevance of the appellate standard of review, but on the grounds that the Board had merely advanced a "litigating position" rather than a "formal position." *Starbucks*, 144 S. Ct. at 1579 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988)). ALJ findings and decisions fall somewhere in between those two extremes and thus would warrant a proportionate level of deference.

would also protect the ALJ adjudication from district court intrusion. Such delays harm labor organizing by allowing employers more time to chill burgeoning unionization efforts.[98] Second, the Court's decision extends beyond the NLRB to other agencies empowered to seek preliminary injunctions pending administrative adjudication, including the Equal Employment Opportunity Commission, Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission.[99] Such agencies will now have a harder time securing interim relief, potentially compounding the underlying labor, economic, and financial harms they are trying to address. Third, the Court has set up two future disputes to be resolved. The first is whether ALJ decisions warrant any deference in the section 10(j) context, or if *only* final agency action warrants deference.[100] The second is whether deference to agency factfinding more generally might be on its way out on the heels of deference to agency legal conclusions.[101]

Ultimately, *Starbucks* marks a pivotal moment in the ongoing debate over agency deference in the labor law context. By mandating the application of the traditional four-part *Winter* test with no deference, the Court has reinforced its stance against agency power. The Court's decision is not merely procedural; it underscores a broader trend toward judicial scrutiny over agency decisions, potentially disrupting labor-rights enforcement and delaying crucial relief. While the decision narrows deference to the NLRB's preliminary views, importantly, it still leaves room for continued respect for ALJ decisions. Though the Court's remaking of administrative law is sweeping, it is not necessarily inflexible.

---

[98] *See Starbucks*, 144 S. Ct. at 1583 (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part) (discussing how Congress acknowledged that delays in enforcing labor rights during the slow pace of lengthy NLRB proceedings can result in their defeat and stating that "[t]his case is illustrative of the problem"); Baker, *supra* note 38, at 6–10 (discussing how elaborate internal procedures for determining whether or not to bring a 10(j) injunction petition already cause delay and therefore harm unionization efforts).

[99] *See* Brief for Petitioner, *supra* note 51, at 43–44. In fact, in the FTC's suit seeking a preliminary injunction against Microsoft to enjoin its merger with Activision Blizzard, Microsoft has already made a supplemental filing arguing that *Starbucks* applies in the FTC context. Citation of Supplemental Authorities at 1–2, FTC v. Microsoft Corp., No. 23-15992 (9th Cir. *appeal docketed* June 17, 2024), ECF No. 119.

[100] *See* Brief for Petitioner, *supra* note 51, at 40 ("Deferring to the NLRB staff attorneys' initial take, only for agency ALJs *or* the Board to reverse course, underscores why this Court has never deferred to agencies' *threshold submissions*." (emphases added)).

[101] *See generally* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27 (2018). This argument is beyond the scope of this Comment. But it is worth mentioning that, though decided on statutory grounds, *Starbucks* might reflect underlying constitutional concerns about intrusions on the Article III power. Justice Thomas, the author of *Starbucks*, made this point explicitly in his *Loper Bright* concurrence. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2274 (2024) (Thomas, J., concurring). And Justice Gorsuch raised similar concerns based on his skepticism that ALJs are "impartial fact finder[s]." *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2140 (2024) (Gorsuch, J., concurring) (quoting Bernard G. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424, 1426 (1976)).