No. 24-50761

In the United States Court of Appeals For the Fifth Circuit

AMAZON.COM SERVICES LLC,
Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, A FEDERAL ADMINISTRATIVE AGENCY, JENNIFER ABRUZZO, IN HER OFFICIAL CAPACITY AS THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, LAUREN M. MCFERRAN, IN HER OFFICIAL CAPACITY AS THE CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, AND MARVIN E. KAPLAN, GWYNNE A. WILCOX, AND DAVID M. PROUTY, IN THEIR OFFICIAL CAPACITIES AS BOARD MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD,
Defendants-Appellees, and

TEAMSTERS AMAZON NATIONAL NEGOTIATING COMMITTEE,
Intervenor.

On Appeal from the United States District Court for the Western District of Texas (5:24-cv-01000)

INTERVENOR TEAMSTERS AMAZON NATIONAL NEGOTIATING COMMITTEE'S ("TANNC") OPPOSITION BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Case No. 24-50761, *Amazon.com Services LLC v. National Labor Relations Board, et. al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Amazon.com Services LLC ("Amazon"), the Plaintiff and Appellant.

2. National Labor Relations Board, a federal administrative agency, Defendant and Appellee.

3. Jennifer Abruzzo, in her official capacity as the General Counsel of the National Labor Relations Board, Defendant and Appellee.

4. Lauren M. McFerran, in her official capacity as Chairman of the National Labor Relations Board, Defendant and Appellee.

5. Marvin E. Kaplan, in his official capacity as Board Member of the National Labor Relations Board, Defendant and Appellee.

6. Gwynne A. Wilcox, in her official capacity as Board Member of the National Labor Relations Board, Defendant and Appellee.

7. David M. Prouty, in his official capacity as Board Member of the National Labor Relations Board, Defendant and Appellee.

16. Kurt G. Larkin, Attorney for Amazon.

17. Tyler James Wiese, Attorney for Defendants/Appellees.

18. Christine Flack, Attorney for Defendants/Appellees.

19. Michael Samuel Dale, Attorney for Defendants/Appellees.

20. David K. Watsky, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

21. David O'Brien Suetholz, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

22. Edward M. Gleason, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

23. Hector De Haro, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

24. Jeanne Mirer, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

25. Julie Gutman Dickinson, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

26. Mathew Sollett, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

27. Pamela M. Newport, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

28. Richard Griffin, Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

29. William Burden, Jr., Attorney for Intervenor Teamsters Amazon National Negotiating Committee.

30. Intervenor Teamsters Amazon National Negotiating Committee (TANNC) is not a nongovernmental corporation, it has no parent companies, and no publicly held company has 10% or greater ownership in it.

31. Amazon Labor Union No. 1, International Brotherhood of Teamsters ("ALU-IBT Local 1"), member organization of Intervenor, the Teamsters Amazon National Negotiating Committee, representing Amazon employees.

32. Teamsters Local Union 396, member organization of Intervenor, the Teamsters Amazon National Negotiating Committee, representing Amazon employees.

33. Teamsters Local Union 705, member organization of Intervenor, the Teamsters Amazon National Negotiating Committee, representing Amazon employees.

34. International Brotherhood of Teamsters, parent organization for Intervenor, the Teamsters Amazon National Negotiating Committee, and its member unions.

/s/Julie Gutman Dickinson
Attorney for Intervenor-Teamsters
Amazon National Negotiating Committee

STATEMENT REGARDING ORAL ARGUMENT

Intervenor Teamsters Amazon National Negotiating Committee ("TANNC") agrees that the matter should be set for oral argument, and will participate in the oral argument currently scheduled to take place on November 18, 2024.

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INTRODUCTION

Amazon has unilaterally decided that it is no longer subject to the National Labor Relations Act ("NLRA") or to an administrative process that has for nearly 90 years been the only venue for most private-sector employees to vindicate their right to collectively improve their terms and conditions of employment. Amazon seeks to shatter this bedrock principle of modern society and to ignore the concerns of its nearly 2-million employees across the country. Thus, rather than engaging in good faith with the certified bargaining representative of the 8,000 JFK8 employees in Staten Island, New York, Amazon seeks to escape its duties under the NLRA so that it can continue to exploit and profit off the labor of these workers who have made Amazon's success possible over the years.

To make this perverse wish a reality, Amazon mocks both the administrative system it wishes to escape and this Court, distorting long-established processes in an attempt to achieve its goal of depriving millions of employees of their rights under the NLRA. First, after years of voluntarily engaging with the NLRB's processes regarding its JFK8 employees, it abruptly decided that it did not want to wait for the NLRB to issue its final decision and then, if necessary, challenge that decision

in the appropriate circuit court according to the NLRA's long-established statutory review procedures. Instead, it invented the most tenuous of reasons to forum shop and seek refuge in the Western District of Texas as its best shot to challenge the NLRB's fundamental ability to continue functioning.

Then, likely realizing the District Court was not buying the speculative and unsupported reasons purveyed to justify its request for a temporary restraining order and injunction, Amazon fabricated an exigency to bypass the District Court by seeking emergency relief in this Court. Through this contrivance, Amazon obtained a stay pending appeal, which helped Amazon achieve one of its nefarious objectives—further delay, sending a message to the JFK8 employees who are *currently* being deprived of their right to sit across the bargaining table from Amazon that their rights may not be vindicated. Thus, this Court should refuse to hear Amazon's improper appeal because there was never an "effective denial" of its motion before the District Court; just an artificial deadline invented by Amazon to game the system.

Most critically, however, this Court must reject Amazon's demand for an injunction because Amazon's end game—incapacitating the agency

tasked with enforcing the NLRA through a preliminary injunction—will cause irreparable harm to the JFK8 employees who would be stripped of their right to bargain and never see the benefit of the courageous decision they made to improve their lives by coming together to collectively face Amazon.

But the insidious effects that would result if Amazon obtained a preliminary injunction do not stop there. Granting Amazon its injunction would send the message to employees across the country that their rights under the NLRA are worthless, and the agency authorized to enforce those rights is powerless. Employees would be chilled from trying to utilize the "protections" of the NLRA to collectively improve their workplaces, and society would be in danger of returning to the dangerous labor unrest and industrial strife that predominated prior to the passage of the NLRA.[1]

This case threatens sweeping impact far beyond the 8,000 JFK8 employees. Its scope exceeds the bounds of the workplaces where

[1] *See e.g.*, Steve Greenhouse, "Major US corporations threaten to return labor to 'law of the jungle'" The Guardian (March 10, 2024) *available at* https://www.theguardian.com/us-news/2024/mar/10/starbucks-trader-joes-spacex-challenge-labor-board.

thousands of other Amazon employees who have already unionized are also seeking to bring Amazon to the bargaining table through their chosen representative, Intervenor Teamsters Amazon National Negotiating Committee ("TANNC"). The injunction Amazon seeks reaches farther than the hundreds of thousands of other Amazon employees who are attentively waiting to see if the JFK8 employees' years of struggle will be for naught. This case implicates the rights of millions of workers throughout the United States who have expressed interest in union representation and would see the futility of exercising their rights under the NLRA if a corporate giant like Amazon is not held accountable for its violations of the law, but instead neutralizes the one federal agency authorized to protect them. Amazon's success in its quest for an injunction would thus be an afront to the public interest and the balance of equities strongly weighs against issuance of any injunction.

On top of the detrimental effect that issuing an injunction would have on employees across the country, an injunction is not proper here because Amazon can prove neither a likelihood of success on, nor irreparable harm from, any of its three claims.

First, Amazon cannot show that it has suffered *any* injury—much less irreparable harm—from its removal protections claim because the President's properly appointed (and Senate confirmed) NLRB members are carrying out the duties entrusted to them, and the President has not expressed any disapproval with or desire to remove them. And even if that were not the case, Amazon waived this argument by failing to raise it for years as it participated in NLRB proceedings.

Second, Amazon cannot show any likelihood of success or irreparable harm from its Seventh Amendment claim because it is completely speculative—not only are the remedies that Amazon is concerned with currently foreclosed by NLRB precedent, but there has been no indication that the NLRB is primed to change the law and grant these remedies against Amazon, and it certainly will not award any monetary relief in this first step of the Board's bifurcated proceedings. Moreover, the Supreme Court has explicitly authorized the equitable relief that Amazon mischaracterized as legal relief. And even if that were not the case, this Court lacks jurisdiction over Amazon's claim because it is statutory in nature—not constitutional—and Amazon has an effective review process available to it .

For these reasons, this Court should not order Amazon's radical remedy—lethal to employee rights long honored by the NLRA—and cannot sanction Amazon's abuse of the court system. This Court should therefore reject Amazon's appeal and request for an injunction, and should dissolve the temporary stay pending appeal so that the NLRB can continue its time-honored work in the interest of maintaining industrial peace.[2]

JURISDICTION STATEMENT

This Court does not have jurisdiction over the instant appeal. Circuit courts of appeal have jurisdiction over appeals of "orders" "refusing . . . injunctions." 28 U.S.C. § 1291(a)(1). Here, Amazon did not appeal a District Court's order or refusal to issue an injunction. Instead, as further described herein, Amazon bypassed the District Court by filing a premature appeal before the District Court issued its decision. There is no basis for this Court to find that there was an "effective denial" of

[2] *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 271 (1964) ("'The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.'" (citation omitted)); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of [the NLRA] is industrial peace."); *United Steelworkers of America v. ASARCO, Inc.* (5th Cir. 1992) 970 F.2d 1448, 1452.)

Amazon's motion at the District Court level, and this Court does not have jurisdiction over this appeal.

Further, even if this Court finds that there was an effective denial of Amazon's motion and this Court can properly hear Amazon's appeal, this Court lacks jurisdiction over Amazon's Seventh Amendment claim under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Specifically, at its core, Amazon's claim is nothing more than speculation that the NLRB *might* exceed its statutory authority *if* it grants some unspecified monetary remedy against Amazon. Amazon has available to it an existing, meaningful review process under the NLRA to challenge any remedy ordered by the NLRB, *before that order is enforceable*. There is no basis for Amazon to bypass this statutory review process, which means neither the District Court nor this Court have jurisdiction to hear Amazon's speculative claim regarding remedies the NLRB may issue at some future point in time.

STATEMENT OF ISSUES

(1) Whether this Court has jurisdiction over the instant appeal premised on an alleged "effective denial" by the District Court.

(2) Whether Amazon waived its removal protection argument by failing to raise it with the NLRB or with the Courts during the years that the dispute was before the NLRB.

(3) Whether this Court has jurisdiction over the claim Amazon has fashioned as a Seventh Amendment claim when Amazon has an effective statutory review process for that claim.

(3) Whether this Court should deny Amazon's motion for a preliminary injunction because Amazon cannot meet any of the required elements.

STATEMENT OF THE CASE

This case was born inside an Amazon warehouse in Staten Island, New York.

In April 2020, employees working at Amazon's JFK8 warehouse in Staten Island were concerned about COVID safety measures around the warehouse. *Amazon.com Servs. LLC,* 2022 WL 1137178; 2022 NLRB LEXIS 158 (April 18, 2022). They began to engage in protected concerted activity to advocate for improved working conditions. This activity included, *inter alia,* staging protests in JFK8's parking lot. *Id.* Amazon

responded to this activity by unlawfully terminating an employee in retaliation for his taking part in the protests. *Id.*

By the following year, in April 2021, JFK8 employees decided to form a union—the Amazon Labor Union ("ALU")—and to petition for an NLRB-conducted union representation election. ROA. 433 at ¶ 5; *Amazon.com Servs. LLC*, 2023 WL 1107695, 2023 NLRB LEXIS 33 (January 30, 2023). Amazon, yet again, committed unfair labor practices in response to employee advocacy and protected activities. *Amazon.com Servs. LLC,* 2023 WL 1107695, 2023 NLRB LEXIS 33 (January 30, 2023).

As acknowledged by Amazon in its lower court Complaint, the ALU filed a representation petition with the NLRB on December 22, 2021. ROA. 17 at ¶ 19. That petition, assigned NLRB Case No. 29-RC-288020, marked the beginning of the employee election process central to the present litigation. Following the filing of that petition, the ALU and Amazon stipulated to the terms of the NLRB-conducted election which took place at JFK8 over several days in March 2022. ROA. 17 at ¶ 19; 453 at ¶ 6.

The ALU won that election by over 500 votes. ROA. 17 at ¶ 19. Armed with this support, on April 2, 2022, the ALU requested to

collectively bargain with Amazon. ROA. 21 at ¶ 30; 453 at ¶ 7. Amazon's refusal to bargain *at all* with the ALU—much less bargain in good faith as required by the NLRA—led the ALU to file the unfair labor practice charge in NLRB Case No. 29-CA-310869 and, ultimately, resulted in the issuance of an administrative complaint by the NLRB against Amazon. ROA. 453 at ¶ 8.

There is no dispute that Amazon contested its loss in the March 2022 election and blamed misconduct by the ALU, by NLRB staff, and by the NLRB itself as reasons for the loss. Amazon, however, did not seek redress in court. Instead, it availed itself of the NLRB's time-tested administrative process for challenging election results. ROA. 18-20. Amazon requested that the administrative proceedings be moved from the NLRB's New York office [which Amazon accused of misconduct]. The NLRB agreed with that request and transferred the case to an office headquartered in Phoenix, Arizona ("Region 28"). ROA. 19. Once transferred, an administrative hearing took place over 24 business days, during which Amazon had a full opportunity to produce evidence supporting its claims, to examine and cross-examine witnesses, and to subpoena documents. The hearing officer who presided over the

administrative hearing issued a preliminary report recommending that Amazon's claims be denied. *Id.* Thereafter, Amazon appealed to the Director of the NLRB's Region 28 office, who also concluded Amazon's claims should be denied. *Id.* Then Amazon appealed to the NLRB panel itself, which also considered Amazon's claims and concluded they should be denied, upholding the election result. ROA. 19-20. At no time did Amazon assert any constitutional claims or allege the NLRB or its processes were constitutionally deficient.

As Amazon's administrative appeal concerning the election progressed, so too did the case initiated by the ALU concerning Amazon's refusal to bargain. ROA. 21 at ¶ 30-33. On August 29, 2024, the NLRB issued its decision upholding the March 2022 election result. ROA. 20 at ¶ 27. The following day, the NLRB issued an administrative order to show cause requiring Amazon, by September 13, 2024, to explain why it had refused to bargain with the ALU after (and since) the ALU's 2022 election victory. ROA. 21 at ¶ 33; 83; 109 at ¶ 33; 130-140.

After fully participating in the NLRB process for years, Amazon apparently decided—at this point—that the entire process had been an unconstitutional infringement on its rights. On September 5, 2024, just

eight calendar days before its deadline to respond to the NLRB, Amazon filed its Complaint in the Western District of Texas. ROA. 13-34. It was there that Amazon, for the first time, sought relief from the NLRB's alleged "unconstitutional administrative proceedings" against it. ROA. 14. On September 10, 2024, just three days before its response was due to the NLRB, Amazon filed a motion for a temporary restraining order ("TRO") and preliminary injunction with the District Court. ROA. 76. Notably, while Amazon mentioned its September 13, 2024, deadline to respond to the NLRB in its motion to the District Court, it did not request expedited briefing and did not request that the District Court act by any specific date. ROA. 83.

The District Court held a hearing on Amazon's motion for a TRO and preliminary injunction on September 24, 2024.[3] After providing each party, including the TANNC,[4] an opportunity to address the Court, and

[3] By that time, the NLRB had provided Amazon an extension until September 27, 2024, to reply to the administrative order to show cause. ROA. 558 at ln. 2-7.

[4] On June 3, 2024, the ALU affiliated with the International Brotherhood of Teamsters ("IBT"), becoming Amazon Labor Union No. 1, IBT ("ALU-IBT Local 1"). ROA. 433 at ¶ 8. Then, in August 2024, IBT affiliates representing Amazon employees created the TANNC to serve as the national negotiating body for Amazon employees. ROA. 434 at ¶ 9-11. The TANNC is now the bargaining representative for the Amazon

engaging in a lengthy discussion with the parties about various aspects of Amazon's motion and underlying complaint, the Court announced the parties could provide supplemental letter briefs by 12:00 p.m. Central Time on September 27, 2024 and that the Court would take the matter under submission. ROA. 611, 614. Amazon's counsel did not object to that timeline, did not argue that immediate relief was imperative, did not state that September 27, 2024, was too late for the Court to accept further briefing, and did not specifically request that the Court issue its order by a particular date, although Amazon did vaguely state that the NLRB *could* act as early as September 30, 2024.[5] Each party submitted letter briefs to the District Court. ROA. 508-517, 523-527.

Amazon used its letter brief, which it filed a day early on September 26, 2024, as an opportunity to threaten the District Court. Amazon—all of a sudden—demanded that, because the NLRB "*could* issue its decision" as early as September 30, 2024, the District Court *must* rule on Amazon's

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employees at the JFK8 facility and at various other facilities where employees have chosen to unionize.

[5] During the hearing, however, the District Court asked Amazon's counsel to estimate how long it might take the NLRB to act after September 27, 2024. Amazon's counsel admitted that it "normally [takes the NLRB] weeks" to act in such circumstances. ROA 558, lns. 16-23.

motion by the morning of September 27, 2024. ROA. 509. Amazon threatened that if it did not receive a ruling by then, it would consider its motion "effectively denied" and seek an appeal before this Court. *Id*. It was thus not until the day before the fateful "deadline" that Amazon first pronounced it to be of any legal significance.

Amazon filed a Notice of Appeal on the morning of September 27, 2024—several hours before the noon deadline set by the District Court for letter briefs, claiming that it needed to do so to meet this Court's deadline for emergency motions, which was not until hours later at 12:00 p.m. Central Time. ROA. 519-522; App. Ct. Dkt. 1.

Contrary to Amazon's assertions, the District Court did act expeditiously, issuing an order on Amazon's motion for a TRO and preliminary injunction on September 29, 2024. ROA. 528-541. After considering Amazon's claims and well-settled Fifth Circuit precedent, the District Court correctly denied Amazon's requested relief, finding Amazon's claim of irreparable harm to be "both speculative and unripe." ROA. 540.

SUMMARY OF THE ARGUMENT

As a threshold matter, there was no "effective denial" of Amazon's lower court motion, meaning that this Court lacks appellate jurisdiction over this matter. There is no case holding that a party can strip a district court of its jurisdiction the way Amazon seeks to do so here—by waiting to the last minute to seek injunctive relief, then waiting until the last second before manufacturing a deadline for the district court to act, and then taking the case to the circuit court when the district court does not meet that fictional deadline. To the contrary, courts have recognized that such cases "open[] the door for 'mischief' wherein plaintiffs can come up with creative reasons for demanding prompt preliminary-injunction rulings under a dictated timeline." *Chamber of Commerce v. CFPB*, No. 4:24-CV-00213-P, 2024 WL 2310515, at *5 (N.D. Tex. May 10, 2024). Here, there was no valid basis for Amazon to bypass the District Court as the District Court acted expeditiously even under Amazon's counterfeit timeline. Thus, this Court should reject Amazon's appeal, lift the administrative stay, and remand to the District Court.

If this Court does, however, reach the merits of Amazon's motion, this Court should agree with Judge Rodriguez—and with the Sixth

Circuit in a near identical case, *YAPP USA Automotive Sys., Inc. v. NLRB*, No. 24-1754, Order, 2024 WL 4489598 (Oct. 13, 2024)—and deny Amazon's request for an injunction.

Amazon's removal protection claim fails because, at its core, it is nothing more than an unavailing attack on the President's ability and authority to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3, cl. 1. Through his properly-*appointed* NLRB members, the President ensures that the NLRA is faithfully executed. Yet Amazon perversely argues that these properly-*appointed* officials should be prevented from enforcing the law, and prevented from moving forward in the cases pending against Amazon, because NLRB members are improperly insulated from *removal* by the President.

But even if improper removal protections existed in this case, they would not automatically invalidate the actions taken by those officials *if those officials were properly appointed by the President.* Here, no one disputes that the President properly appointed the current NLRB Members, the President has never expressed any desire to remove these officeholders, and Amazon has not shown that the President would have removed these members but for their tenure protections.

Amazon is then asking this Court to stop the President and his subordinates from faithfully executing the law in order to protect the President's right to remove those subordinates, in a situation where the President has not sought to exercise that right himself or expressed any desire to do so. It is this erroneous stance that would violate separation of powers principles, not the NLRB's appointment regime or decisions in this case. Moreover, the allegedly unconstitutional removal protections that Amazon challenges have not caused Amazon any harm—because Amazon cannot show that anything would be different in the underlying case even if the NLRB members did not have these removal protections—a fact that is fatal to Amazon's motion for a preliminary injunction.

Amazon does not have a proxy to exercise the President's removal authority when the President has not even indicated that these removal protections impede his ability to faithfully execute the law, which means his NLRB appointees are doing what they were appointed to do. The Sixth Circuit recently agreed that there is no basis for an injunction against an NLRB proceeding, where the plaintiff had not shown a causal harm connected to the removal protections—just as Amazon has failed to do in the instant case. *YAPP*, 2024 WL 4489598. Indeed, Justice

Kavanaugh denied the employer-petitioner's application for writ of injunction to the Supreme Court of the United States following the Sixth Circuit's decision.[6]

Amazon's Seventh Amendment claim fares no better. To begin, this claim is entirely speculative and unripe. Amazon's entire argument for a jury trial is that the Board *may* order some sort of unspecified monetary remedy that Amazon characterizes as legal, under a theory that the Board has already rejected. Such speculation cannot be the basis for an injunction. Further, the underlying NLRB proceeding of which Amazon complains is on a summary judgment motion related solely to whether Amazon is refusing to bargain with the Union. Amazon admits that it has refused to bargain, so there is no factual question on liability that a jury would need to address. Thus, any monetary relief that did issue would not be determined until the second, compliance stage of the Board's bifurcated proceeding, making Amazon's claim premature at best.

In addition, even if Amazon's claims were not speculative and unripe, they would be meritless and were long ago foreclosed by the

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[6] *See* Supreme Court Case Docket *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a348.html.

Supreme Court in *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937). The Board's proceedings—and the speculative relief Amazon points to—are equitable in nature and do not implicate the Seventh Amendment. And even if this Court found that a rogue Board was likely to imminently impose legal monetary remedies, this would be a *statutory* question regarding the limit of the Board's remedial authority. Such statutory questions are properly heard in a circuit court of appeals through the routine review process the NLRA already provides for parties to challenge the NLRB's remedial orders. Under that review process, circuit courts are able to modify the NLRB's orders—before those orders are enforceable—to remove any remedies that go beyond the limits of the NLRA. Because Amazon has this statutory review process available to it and has not exhausted that process, this Court lacks jurisdiction over Amazon's Seventh Amendment claim.

Amazon's separation of powers argument is similarly unavailing. Courts have long rejected the contention that an administrative Board is unconstitutionally structured if it exercises executive, judicial, and legislative functions. While Amazon attempts to carve out an exception that would invalidate the NLRB's role in representation elections, this

Court must reject that baseless attempt. Moreover, even putting that aside, Amazon's separation of powers argument is not implicated by the proceeding that Amazon seeks to enjoin because those proceeding involve a single undisputed issue, whether Amazon refused to bargain, which means this argument cannot form a basis for an injunction.

Thus, for these reasons, Amazon cannot—under any of its three separate theories—show the likelihood of success nor the imminent irreparable harm that would be necessary for an injunction to issue.

To that same end, the balance of equities is strongly in favor of denying the injunction. Noticeably absent from Amazon's briefing is any consideration or even acknowledgement of the workers who are being deprived of their rights and who would be detrimentally impacted by the injunction Amazon seeks. It has long been recognized that delaying the commencement of bargaining for a newly organized union causes irreparable harm to the union and to the employees it represents. And it is well-recognized that delays in the NLRB's proceedings may cause irreparable harm to industrial peace as well as the collective-bargaining rights that the NLRA protects. This actual harm—balanced against the

non-existent harm Amazon would suffer if the NLRB issued a decision in the failure to bargain case—weighs strongly against an injunction.

The Court should deny Amazon's motion.

ARGUMENT

A. This Court Lacks Jurisdiction Because There is No "Effective Denial" of Amazon's Lower Court Motion

Amazon claims jurisdiction under 28 U.S.C. § 1291(a)(1), which confers jurisdiction upon this Court over appeals of "orders" "refusing . . . injunctions." That statute is to be "construed . . . narrowly." *Carson v. American Brands, Inc.,* 450 U.S. 79, 84 (1981). Yet Amazon seeks to have this Court sanction a reading of that statute that would allow any future party to bypass district court review by inventing an artificial deadline and then immediately claiming that the district court's failure to comply constitutes an "effective denial" of the party's underlying motion, regardless of the diligent steps the district court took to address the request for relief. This Court cannot allow Amazon to circumvent its well-established procedures in this manner; doing so guarantees that this Court will become a court of first impression on injunction requests, rather than a court of review.

Amazon did not file its Motion for a Temporary Restraining Order and Preliminary Injunction until September 10, 2024, just days before its final briefing was due to the NLRB in the failure to bargain unfair labor practice case. But Amazon did not request an expedited briefing schedule or oral argument. That day, the District Court set a briefing schedule, and set oral arguments for September 24, 2024. Amazon did not mention to the District Court that this date was too late or that the District Court had to issue an immediate decision.

Amazon, the NLRB, and Intervenor TANNC participated in these oral arguments. Amazon did not inform the Judge that he had to make a decision by September 27, 2024. After the hearing, Judge Rodriguez gave the parties until mid-day on September 27, 2024, to submit supplemental briefs— Amazon agreed to this schedule and at no point commented that September 27, 2024, was too late.

It was only later, likely realizing that Judge Rodriguez did not seem convinced by Amazon's speculative and unsupported claims during oral arguments, and seeking a third bite at the apple before Judge Rodriguez could rule, that Amazon decided that September 27, 2024, was now the date of emergency. Thus, on September 26, 2024, Amazon wrote a letter

to Judge Rodriguez threatening to file the instant appeal if the District Court did not issue a decision within less than 24 hours. Amazon then filed the instant appeal with this Court on the morning of September 27, 2024, claiming that Judge Rodriguez's failure to abide by Amazon's invented deadline constituted an effective denial of Amazon's motion. But it is clear that this was nothing more than a self-serving attempt by Amazon to avoid a negative decision from Judge Rodriguez.

This scenario is a far cry from the cases Amazon relies on to buttress its claim that its motion was effectively denied by the District Court. For example, *In re Fort Worth Chamber of Commerce,* 100 F.4th 528, 531 (5th Cir. 2024) concerned plaintiffs moved for an injunction against the imposition of an administrative Final Rule—which had a firm effective date known to all well in advance—and requested expedited briefing and review. Although the district court found good cause to expedite briefing, it did not rule on the substantive motion. Instead, it requested briefing on venue and invited the defendant to file a motion to transfer venue. The Fifth Circuit concluded the lower court had "effectively denied" the plaintiffs' motion in those specific circumstances, noting the clear, imminent effective date of the challenged Final Rule and

the plaintiffs' diligent and timely action, including; (1) filing its motion within two days of the issuance of the Final Rule; (2) requesting expedited briefing, and (3) clearly requesting that the district court act by a certain date. As the Court noted, this context as a whole revealed that the district court did not act promptly enough. *Id.* at 534.

As in *Fort Worth,* the moving party in *Clarke v. CFTC,* 74 F.4th 627, 635 (5th Cir. 2023), also asked the lower court for expedited review of its motion. Having received no ruling for *three months*, the moving party sought appellate review. The Fifth Circuit's motions panel determined the lower court's failure to act after that extended period of time had the practical effect of a denial. *See id.* And finally, in *NAACP v. Tindell,* 90 F.4th 419 (5th Cir. 2024) *withdrawn and superseded on other grounds by* 95 F.4th 212 (5th Cir. 2024), the plaintiff-appellant sought an injunction about six weeks before the clear and imminent effective date of a new state law. Having received no ruling as of two days before that effective date, the plaintiff-appellant sought emergency relief from this Court. *Id.* Then, when the district court did issue an order denying the request for an injunction, the plaintiff perfected the appeal by addressing the order denying the injunction in its updated appeal.

No such genuinely urgent non-fabricated context is present here. There is no imminent effective date of the alleged potential harm to Amazon. Amazon waited years before bringing its claim in district court without requesting expedited briefing or expedited review or court action by any specific date, only to first seek a preliminary injunction from the District Court mere days before the *possible* date of an administrative decision by the NLRB. Even through the oral arguments heard by the District Court, Amazon never raised the ostensible need for a decision by September 27, 2024. Instead, the day before supplemental letter briefs were due to the district court, Amazon demanded the district court grant a restraining order that day, threatening to file this appeal if the district court did not immediately act. Amazon acted on its threat and filed this appeal before Judge Rodriguez issued his decision. And once Judge Rodriguez did issue his order denying Amazon's motion, Amazon did not perfect its appeal by adding and addressing Judge Rodriguez's denial—it instead continued with this appeal based on the purported "effective denial." This conduct deviates from the conduct and context in *Fort Worth, Clarke, and Tindell* that justified a finding of "effective denial."

Indeed, it is clear that Amazon is not acting in good faith. This Court cannot allow Amazon to hijack the Court's processes in this manner.

There has been no effective denial by the lower court and, as such, this Court does not have jurisdiction in this action.

B. Amazon is Not Entitled to a Preliminary Injunction Restraining NLRB Action Based on Its Removal-Protections Claim

1. To Secure Injunctive Relief Restraining NLRB Action Based on a Removal-Protections Claim, Amazon Must Demonstrate a Presidential Desire to Remove an Inferior Officer

The Constitution "vest[s] in a President" the "executive power" and charges the President with the duty to "take Care that the Laws be faithfully executed." *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (*quoting* U.S. CONST. art. II, § 3, cl. 1). But "no single person could fulfill that responsibility alone," and so the President may appoint subordinates to assist him in faithfully executing the laws. *Id* at 204. Where those subordinates are "properly appointed[,]" they possess "the authority to carry out the functions of the[ir] office." *Collins v. Yellen*, 594 U.S. 220, 257–58 (2021) (emphasis omitted).

Amazon seeks to enjoin the NLRB proceeding against it because of an alleged flaw in the NLRB members' statutory protections. But in

seeking to prohibit these officials from executing their duties, Amazon does not claim that those officials were improperly appointed, in which case they would have been "vested with authority that was never properly theirs to exercise" and their actions would be "void *ab initio*." *Collins v. Mnuchin*, 938 F.3d 553, 593 (5th Cir. 2019) (en banc). Instead, Amazon contends the Board members must be prevented from assisting the President in faithfully executing the law because their statutory removal protections violate the Take Care clause of the Constitution by interfering with the President's authority to "keep [executive] officers accountable[.]" Dk. 55 at 15 (Appellant's Opening Brief, hereinafter "Amazon Br.") (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.* 561 U.S. 477, 483 (2010)).

This cannot be so. The "unlawfulness of [a] removal provision does not strip [an inferior officer] of the power to undertake the . . . responsibilities of his office." *Collins*, 594 U.S. at 258 n.23; *see also id.* at 267 (Thomas, J., concurring) ("The mere existence of an unconstitutional removal provision . . . generally does not automatically taint Government action by an official unlawfully insulated."). As this Court has explained, cases involving "[r]estrictions on removal are different" from cases

alleging improper appointments, because in removal protection cases, "the conclusion is that the officers are duly appointed by the appropriate officials and exercise authority that is properly theirs." *Collins v. Mnuchin*, 938 F.3d at 593. Accordingly, a plaintiff seeking relief from agency action on a removal-restrictions claim may only prevail by proving that the restriction *has actually interfered with the President's authority to supervise subordinates* in their particular case, and thereby inflicted "compensable harm" on the *plaintiff*—for instance, where "the President had attempted to remove [an officer] but was prevented from doing so" or "had made a public statement expressing displeasure" with the officer's actions. *Collins*, 594 U.S. at 259–60. To abandon the requirement to make this showing, as Amazon requests, would actually *prevent* the President, through his subordinates, from ensuring that the "Laws be faithfully executed," based on a totally theoretical assertion that the President *may* someday want to remove those subordinates.

Recognizing the absurdity of such a result, this Court has emphasized—in cases ignored or misread by Amazon—that to demonstrate a likelihood of success on a claim that seeks to restrain agency action, a plaintiff "must show not only that the removal restriction

transgresses the Constitution's separation of powers but also that the unconstitutional provisions caused (or would cause) them harm," *i.e.*, that "the President's inability to fire an [agency officer] affected the complained-of-decision." *Cmty. Fin. Servs. Assoc. of Am. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022) ("*CFSA*"). Drawing on the Supreme Court's decision in *Collins*, this Court has set forth a detailed test establishing "three requisites for proving [such] harm":

> (1)A substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor.

Id.

Needless to say, Amazon has not met any of these three requisites. Nor could it; the President has never expressed a desire to remove the NLRB members.

The Sixth Circuit recently denied an emergency motion for preliminary injunction seeking to enjoin an NLRB proceeding precisely because the plaintiff failed to show the type of harm caused by removal protections that this Court requires under *Collins* and *CFSA*. *YAPP*,

2024 WL 4489598 (Oct. 13, 2024).[7] As the *YAPP* Court explained, "[e]ven if the removal protections of the NLRB Board members . . . are unconstitutional, [plaintiffs] [are] not automatically entitled to an injunction." *Id.* at 2. "[A] party challenging an agency's removal protection scheme is not entitled to relief unless that unconstitutional provision inflicts compensable harm." *Id.* (cleaned up). And in the preliminary injunction analysis, the need to show causal harm goes both to likelihood of success—*i.e.*, is an element of the claim—and to the need to show irreparable harm. *Id.* at 3.

Amazon addresses the causal harm requirement only in arguing irreparable harm, and tries to escape *CFSA*'s requirements by arguing that they do not apply where a litigant prospectively "seeks to stop a constitutionally-deficient proceeding from *occurring in the first instance*." Amazon Br. 36-37 (emphasis in original). But this Court directly refuted such a crabbed application of the *CFSA* requirements, holding that the

[7] Judge Kavanaugh on October 15, 2024, denied YAPP's emergency application for a writ of injunction submitted to the Supreme Court on October 14, 2024. *See* Supreme Court Case Docket *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a348.html.

concrete injury required by *Collins* "did not rest on a distinction between prospective and retrospective relief." *CFSA*, 51 F.4th at 631.

Regardless of whether a plaintiff seeks forward- or backward-looking relief, the issue was "whether a 'harm' occurred [or is likely to occur] that would create an entitlement to [any] remedy, rather than the nature of the remedy." *Id.* In dismissing the claims of the petitioners in *Collins* on remand, this Court reaffirmed *CFSA*'s holding. *See Collins v. U.S. Dep't of Treasury*, 83 F.4th 970, 981 (5th Cir. 2023) ("After *Collins*, a party challenging agency action must show not only that the removal restriction transgresses the Constitution's separation of powers but also that the unconstitutional provision caused (*or would cause*) them harm." (emphasis added)). And this Court has been unanimously joined by the three other circuits who have considered the issue, including by the Sixth Circuit in its *YAPP* decision.[8]

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[8] *See YAPP*, 2024 WL 4489598, *3; *Leachco, Inc. v. CPSC*, 103 F.4th 748, 757 (10th Cir. 2024) ("*Collins*' relief analysis applies to both retrospective and prospective relief," and therefore plaintiff "failed to establish that it would suffer future irreparable harm if the preliminary injunction is denied"); *CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 180–81 (2d Cir. 2023); *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 316 (6th Cir. 2022), *cert. granted, opinion rev'd on other grounds*, 598 U.S. 623 (2023).

2. *Cochran* and *Axon* Did Not Modify this Court's Remedial Requirements

Rather than engage with *CFSA*'s harm requisites, Amazon relies on this Court's decision in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021), and the Supreme Court's affirmance of that decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), to argue that merely being subject to an agency proceeding before unconstitutionally insulated officials is a "here-and-now injury" that is irreparable and sufficient to warrant relief from those proceedings. *See, e.g.,* Amazon Br. 34–35. But those cases dealt exclusively with a threshold jurisdictional question not at issue here—whether a plaintiff must raise its removal-protections claim via post-enforcement statutory review procedures. *Cochran*, 20 F.4th at 211 (deciding "only the issue of whether the Exchange Act divested district court jurisdiction over [removal-protection claims]; our holding extends no further."); *Axon*, 598 U.S. at 180 ("Our task today is not to resolve those challenges; rather it is to decide where they may be heard."). *Cochran* and *Axon* determined *where* (district court) and *when* (pre-enforcement) a plaintiff can challenge removal protections. But neither case discussed *what* a plaintiff needs to prove to ultimately obtain relief from agency proceedings. *YAPP*, sl. op. 5 ("*Axon* did not address issues of

relief or injury." (cleaned up); *Leachco*, 103 F.4th at 758-59 (noting that *Axon*'s "here-and-now injury" statements weren't made "within the context of determining the plaintiffs' entitlement to preliminary injunctive relief"). This Court has answered the "what" question with a retort that requires rejection of Amazon's arguments.

Even assuming the district court had subject matter jurisdiction over Amazon's removal-protection claims, alleging facts that establish jurisdiction does not mean that Amazon has alleged facts entitling it to injunctive relief restraining the Board's proceedings. As mentioned, an unconstitutional removal restriction is, "remedially speaking, unique[,]" *CFPB v. All American Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022) (Jones, J., concurring), because the infirm removal provision "does not strip [an inferior officer] of the power to undertake the other responsibilities of his office," *i.e.*, does not render him or her an "illegitimate decisionmaker," unless the plaintiff makes a cognizable showing of harm caused by that constitutional infirmity, *Collins*, 594 U.S. at 258 n.23. Without such a showing, an injunction restraining

Board action would interfere with—rather than protect—the President's duty to take care that the laws are faithfully executed.[9]

The Sixth Circuit in *YAPP* rejected the erroneous reading of *Axon* that Amazon presses, finding that *Axon* involved a question of jurisdiction and didn't overrule *Collins*. *YAPP*, 2024 WL 4489598, *5. Similarly, the Tenth Circuit in *Leachco* rejected the same erroneous reading of *Axon* in addressing an emergency motion for preliminary injunction to stop a Consumer Products Safety Commission proceeding, explaining that "[t]he Supreme Court's jurisdictional analysis [in *Axon*] did not change the relief analysis required under *Collins*." 103 F.4th at 765. The Tenth Circuit declined to read *Axon*'s "limited jurisdictional holding" as a "broad ruling that creates an entitlement on the merits to

[9] Indeed, Justice Kagan, the author of the unanimous opinion in *Axon*, would be particularly astonished by the notion that *Axon* eliminated *Collins*'s requirement of proof of harm to obtain prospective relief. n her concurrence in *Collins*, she made clear her view that "plaintiffs alleging a removal violation are entitled to injunctive relief . . . only when the President's inability to fire an agency head affected the complained-of decision," and that "[w]hen an agency decision would not capture a President's attention, his removal authority could not make a difference—and so no injunction should issue." 594 U.S. at 274–75 (Kagan, J., concurring).

a preliminary injunction in every case where such constitutional challenges are raised." *Id.*

Accordingly, nothing in *Cochran* or *Axon* disturbs the remedial holdings in *Collins* or this Court's later decisions. Because Amazon makes no effort to fulfill *CFSA*'s three requisites to show harm, its motion must be denied.

3. In Any Event, This Court Should Find that Amazon has Waived Its Claims Regarding the NLRB Member's Removal Protections

Even if Amazon's claim were not completely foreclosed by Amazon's failure to show any harm arising from the NLRB members' allegedly unconstitutional removal protections, this Court should find that Amazon waived its removal argument by, without justification, failing to raise it at any point during the years of proceedings it has participated in before the NLRB. Beyond failing to at any point raise its claim that the NLRB's proceedings were causing it irreparable harm by merely moving forward, Amazon went as far as subjecting itself to and availing itself of that process repeatedly.

As discussed above, the events underlying this case go back as far as 2020 when employees at JFK8 first began to organize and filed unfair

labor practice charges against Amazon. Amazon did not raise its constitutional claims at that point. Instead, when it was found to have violated the Act, it filed and fully briefed exceptions—to be considered and decided by the very NLRB that Amazon now claims is not empowered to act at all—without raising these constitutional issues. *See e.g. Amazon.com Servs. LLC*, No. 29-CA-280153, 2023 WL 1107695 (Jan. 30, 2023) (finding Amazon committed unfair labor practices involving the JFK8 employees).[10]

When the JFK8 employees filed their representation petition in 2022, Amazon did not raise its constitutional claims. Instead, Amazon stipulated to the terms of that representation election, and then continued to voluntarily engage in the NLRB's processes by filing voluminous objections to that election, including an objection involving the NLRB's alleged conduct. Amazon knew these objections would have to be heard and decided by the very NLRB it was accusing of interfering with the election, through the very process that Amazon now claims is causing it irreparable harm. Yet Amazon did not at this point raise an

[10] *See also* NLRB Case Docket and Filed Documents for Case No. 29-CA-280153, *available at* https://www.nlrb.gov/case/29-CA-280153.

objection to the NLRB's authority or ability to decide those objections. Instead, it chose to proceed with 24 days of hearing where it made every effort to convince the hearing officer that it should not have to bargain with the JFK8 employees. When the hearing officer rejected Amazon's arguments for invalidating the JFK8 election, Amazon appealed to the Regional Director and then to the NLRB itself, as is its right under the NLRA.

It was only after Amazon had exhausted its arguments regarding that election before the NLRB that Amazon filed the court action underlying this appeal, as a last-ditch effort to stop the NLRB before it issued an order that it could seek to enforce in the federal circuit courts. There was no exigency requiring Amazon to petition the courts for injunctive relief at this point. Amazon could have waited for the NLRB to issue its decision and could have then sought review in the appropriate circuit court of appeals, as contemplated by the NLRA, without suffering any harm because the Board's orders are not self-enforcing.

But Amazon did file suit, and for the first time raised its constitutional challenges to the NLRB, implausibly claiming that irreparable harm would result if the process it had voluntarily—indeed,

extravagantly—engaged with for years was allowed to continue for even one more day. This self-serving failure to raise its concerns until the last possible minute not only negates any argument that Amazon makes regarding how the NLRB process continuing at all causes irreparable harm, but it also means that—under this Circuit's precedent—Amazon has waived its right to bring this claim.[11]

In similar circumstances, the Fifth Circuit has held that a party waives an unconstitutional *appointment* argument—which is more consequential than an unconstitutional removal protection argument because any action taken by unconstitutionally appointed officers is void

[11] Alternatively, this unexplained and prejudicial delay undertaken by Amazon should foreclose Amazon's removal protection claim—and its separation of powers and Seventh Amendment claims—under the doctrine of laches. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 333-334 (2017) ("Laches is "a defense developed by courts of equity" to protect defendants against "unreasonable, prejudicial delay in commencing suit.") (*citing Petrella v. Metro-Goldwyn-Mayer, Inc.,* 572 U.S. 663 (2014); *and* 1 D. Dobbs, Law of Remedies §2.3(5), p. 89 (2d ed. 1993) (Dobbs) ("The equitable doctrine of laches bars the plaintiff whose unreasonable delay in prosecuting a claim or protecting a right has worked a prejudice to the defendant")). Here, Amazon's delay was prejudicial to the JFK8 employees and to their chosen collective bargaining representative because it caused them to expend resources and delayed their ability to bargain, only for Amazon to then challenge those very proceedings. These employees are entitled to have the NLRB issue a decision in this case.

ab initio—by failing to timely raise that argument. *Flex Frac Logistics, L.L.C. v. N.L.R.B.,* 746 F.3d 205, 208 (5th Cir. 2014) ("We decline to address the merits of Flex Frac's constitutional argument and instead hold that Flex Frac waived its constitutional challenge . . . ."). This Court made clear that "appellate courts shall not consider objections that have not been raised before the NLRB unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *Id*. Amazon has not provided *any* reason—much less proven extraordinary circumstances—to justify why it waited so long to bring these claims. Thus, this Court should find that Amazon has waived its unconstitutional removal protections claim.

Even if this Court were to find that the removal issue is not waivable—a position the TANNC believes is foreclosed by Fifth Circuit precedent, as described above—Amazon is fully capable of obtaining effective review of the NLRB members' removal protections through the statutory review process under Sections 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). Once the NLRB issues its decision on the current motion for summary judgment before it, Amazon could either seek its own review of that decision in a circuit court of appeals, or it could raise its

constitutional arguments when the NLRB seeks enforcement of its order in the circuit courts. Amazon has once again failed to provide any basis for why this statutory review process would be insufficient to protect its interests.

In fact, this statutory review process has already been effectively used in a case involving the unlawful appointment of NLRB members. Specifically, the respondent in *Noel Canning* waited for a final order from the NLRB and then sought review of that order in the DC circuit, prevailing on its argument that the NLRB at that point contained unconstitutionally appointed members. Respondent in that case then also prevailed when the Supreme Court took up the issue, and obtained effective relief for its unconstitutional appointment claim. *See NLRB v. Noel Canning,* 573 U.S. 513 (2014). At no point during that process did the respondent in *Noel Canning* suffer any cognizable injury because NLRB orders are not self-enforcing, and the respondent was therefore not required to take any action during the pendency of its review. That is also true here—any NLRB order issued against Amazon will not be self-enforcing, and Amazon has not provided any basis for short-circuiting the NLRA's statutorily mandated process for obtaining judicial review,

particularly where the constitutional injury claim raised is of a substantially more ephemeral nature than the unconstitutional recess appointments at issue in *Noel Canning*.

C. Amazon Is Not Entitled to a Preliminary Injunction on Its Seventh Amendment Claim

Amazon also claims that the NLRB proceeding violates the Seventh Amendment because the NLRB allegedly seeks compensatory damages. Amazon Br. 22-24. But Amazon's claim that the Board seeks compensatory damages is entirely speculative. And even if it were not, questions regarding the NLRB's remedial authority are statutory in nature and raise no Seventh Amendment claim. Amazon is then not entitled to an injunction pursuant to its Seventh Amendment claim.

1. The Board Will Not Order Any Monetary Relief in the Matter Currently Before it, and any Claim that it Will is Speculative and Unripe, and Cannot be the Basis of a Preliminary Injunction

Amazon contends that the NLRB seeks "compensatory damages" for the "lost opportunity" to bargain. Amazon Br. 22. Before the district court, Amazon argued that the "lost opportunity" remedy was pursuant to the Board's recent remedial decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022). *See e.g.* ROA. 8. After TANNC pointed out that no one sought *Thryv* remedies in the proceeding before the Board and that remedies for

the lost opportunity to bargain are different remedies than *Thryv* remedies, Amazon has now abandoned its claim that the NLRB seeks *Thryv* remedies. Instead, it presents an entirely speculative argument that the Board *may* impose some unknown remedy that *may* involve consequential damages. Amazon Br. 23. That conjecture cannot sustain a preliminary injunction, particularly in the current posture of the NLRB proceeding. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant."); *Janvey v. Alguire*, 647 F.3d 585, 601 (5th Cir. 2011) ("The party seeking a preliminary injunction must also show that the threatened harm is more than mere speculation.")

First, the traditional remedy in a refusal-to-bargain case such as this one is an order requiring the employer to bargain with the union. *Arrmaz Prod., Inc.*, 372 NLRB No. 12 (Dec. 6, 2022) ("The Board's standard remedy for a technical refusal to bargain is an affirmative bargaining order requiring the employer to recognize and bargain with the union. That order is judicially reviewable, and that review necessarily encompasses the validity of the underlying certification on

which the bargaining order rests."). Such an order is classic equitable relief and doesn't involve any monetary relief. Accordingly, there is no likelihood that the Board will issue an order with any monetary relief, let alone anything that could be labelled compensatory damages. It is true that the NLRB's *General Counsel* has referenced a remedy for the "lost opportunity" to bargain. ROA. 144 at ¶13(a). But the Board has never authorized such a remedy, and indeed explicitly rejected it in *Ex-Cell-O Corp*, 185 NLRB 107 (1970). While the General Counsel has urged the Board to revisit its prior holding in a number of refusal-to-bargain cases like this one, the Board has consistently severed the request to consider that remedial question at a later time, while ruling on the remainder of the case. *See, e.g., Nexstar Media Inc.*, 373 NLRB No. 88, sl. op. 2 (2024); *Universal Protection Servs., LLC*, 373 NLRB No. 38, sl. op. 2 (2024); *Cognizant Tech. Solutions U.S. Corp. and Google, LLC*, 373 NLRB No. 9, sl. op. 3 (2024); *UPS Supply Chain Solutions, Inc.*, 372 NLRB No. 121, sl. op 2 (2023); *Arrmaz*, 372 NLRB at sl. op. 2; *Longmont United Hosp.*, 371 NLRB No. 162, sl. op. 2 (2022).

And even if the Board did include such a remedy, that remedy would not look anything like compensatory damages—it would instead

be an estimate of backpay based on what the parties would have bargained had Amazon not refused to bargain. *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 426 F.2d 1243, 1252 (D.C. Cir. 1970) (urging the Board to consider the type of make-whole bargaining remedy sought by the General Counsel in this instant case because such a make-whole remedy would be nothing more than "a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice . . . . [Such a] make-whole remedy— which could be measured not by any sentiment as to what the parties should have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties would have agreed to—provides money compensation as a remedy for past wrongs."). Amazon concedes that backpay is a form of equitable relief. Amazon Br. 25.

Accordingly, Amazon's claim that the Board will issue a remedial order that includes anything like compensatory damages based on the NLRB General Counsel's request for a remedy related to the lost opportunity to bargain is entirely speculative, and certainly does not warrant injunctive relief.

Second, Amazon claims that the Board now assumes the authority to "issue any remedy [it] deem[s] appropriate"—a gross overstatement of the Board's remedial position—and that itself supports an injunction based on a Seventh Amendment violation. Amazon Br. 23. This claim is more rank speculation. Essentially, Amazon argues again that the Board *may* issue some remedy that *could* be a legal remedy, and so would violate the Seventh Amendment. But it makes no effort to even try to argue what that violative remedy would be. That is far too speculative to support an extraordinary remedy of injunctive relief.

Third, even if the Court determined the make-whole remedy for a refusal to bargain was a legal remedy and that Amazon's allegations were more than speculative because the Board was likely to imminently award such a remedy—and the existence of either of those factors actually made a difference to the Seventh Amendment analysis—there still would be no Seventh Amendment issue here. NLRB proceedings bifurcate liability from the determination of remedial amounts. *See* NLRB Office of the Executive Secretary, *Guide to Board Procedures*, Question 7(a), page 43 (May 2023) ("As noted above, after the Board Order issues, the Regional Director serves as an agent of the Board in effecting compliance with the

Order. During the compliance investigation, the Regional Compliance Officer will have numerous discussions with the charging party(ies) and the respondent regarding satisfaction of the affirmative provisions of the Board's Order. The Compliance Officer will share the Officer's conclusions regarding the backpay period interim earnings, and backpay and benefit amounts that will satisfy the Board's Order."), https://www.nlrb.gov/sites/defaultfiles/attachments/pages/node-174/guide-to-board-procedures-2023.pdf. The only fact issue in the liability stage in this matter is whether Amazon is refusing to bargain with the Union, which Amazon admits. ROA. 136 at ¶ 23 ("[T]here is no genuine issue of material fact that Respondent refuses to recognize and bargain with the Union.").[12] There are thus no disputed facts for a jury to determine in the liability stage of this proceeding. Even if Amazon has a Seventh Amendment right to a jury determination of the remedial

[12] Amazon disputes facts determined by the Board in rejecting its objections to the representation election, but the Board doesn't allow for relitigation of those issues in the type of refusal-to-bargain case now before it. *See, e.g., Nexstar Media*, 373 NLRB No. 88, sl. op. 1 (finding that employer had refused to bargain and explaining that the employer's defenses regarding the Board's erroneous certification of the union as exclusive bargaining representative "were fully litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent has not raised litigable issues in this proceeding.").

amount, that right would not attach until the case moved to the compliance proceeding. Accordingly, there is no warrant for injunctive relief at this time.

2. Because the NLRB is Statutorily Prohibited from Issuing Punitive Remedial Orders, Any Award of Legal Monetary Remedies Would Simply Violate the Statute, Not the Seventh Amendment, and so this Court Lacks Jurisdiction Over Amazon's Seventh Amendment Claim

Even crediting Amazon's argument, there is no constitutional issue. There would only be a statutory issue that could be remedied by a federal circuit court when reviewing the NLRB's order.

The Seventh Amendment "extends to a particular statutory claim [only] if the claim is legal in nature," and does not extend to "suits which are [] of equity or admiralty jurisdiction." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024). "To determine whether a suit is legal in nature," courts must "consider the cause of action and the remedy it provides[,]" with remedy being the "more important consideration." *Id.* at 2129 (cleaned up). "What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to restore the status quo." *Id.* at 2129 (cleaned up).

The Board's remedial authority itself is limited to restoring the status quo, not to punish. *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 235–36 (1938) ("The [Board's] power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) ("We think that affirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth."). Accordingly, where the Board's order exceeds the Act's remedial and restorative purpose, and so does not act to "dissipat[e] [] the effects of the prohibited action[,]" the order "becomes punitive and beyond the power of the Board." *Local 60, United Broth. of Carpenters & Joiners of Am. v. NLRB*, 365 U.S. 651 (1961) (cleaned up); *see also, e.g., Denton Cnty. Elec. Coop. Inc. v. NLRB*, 962 F.3d 161, 175 (5th Cir. 2020) (vacating notice-reading and bargaining order remedies as impermissibly punitive).

The Supreme Court, and this Court, have approved monetary relief under the NLRA because it is incidental to equitable relief and not

intended to punish. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 48 (explaining that because an NLRB "proceeding is one unknown to the common law[,]" and because the Seventh Amendment "has no application to cases where recovery of monetary damages is an incident to equitable relief[,]" the Seventh Amendment was inapplicable to remedies "imposed for violation of the [NLRA,]" including backpay) *Virginia Elec. and Power Co. v. NLRB*, 349 U.S. 533, 543 (1943) (enforcing Board order that required employer to reimburse employees for dues paid to a sham union created by the employer); *Agwilines, Inc. v. NLRB*, 87 F.2d 146, 151 (5th Cir. 1936) (explaining that Board exerts "power to restore status disturbed in violation of statutory injunction similar to that exerted by a chancellor in issuing mandatory orders to restore status").

But, as shown, if the monetary relief goes beyond what's needed to dissipate the effects of the unfair labor practice, that would be punitive and beyond the Board's statutory authority. And a court of appeals reviewing the Board's order in the normal statutory review process can modify the Board's order to remove the offending remedy. *See* 29 U.S.C. § 160(e) and (f) (authorizing court of appeals to modify Board order); *see*

also, e.g., Denton Cnty., 962 F.3d at 175 (enforcing Board order, but vacating those remedies court determined were impermissibly punitive). As such, even if the Court found that the Board would imminently issue an order containing monetary remedies that are punitive and thus legal, this would be a statutory—not constitutional—issue. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("[b]efore inquiring into the applicability of the Seventh Amendment, we must first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." (cleaned up)).

Indeed, for that reason, this Court lacks jurisdiction over Amazon's argument under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 which governs when plaintiffs can challenge agency action collaterally in district court rather than using the statutory review procedures. The first factor *Thunder Basin* considers is whether precluding federal court jurisdiction would "foreclose all meaningful judicial review" of the claim. *Id.* at 212. Because, at bottom, Amazon is making a garden-variety claim that the Board will exceed its statutory authority if it grants "compensatory damages," that argument could receive meaningful judicial review through the NLRA's procedures. *See* 29 U.S.C. §§ 160(e).

A garden-variety claim that the Board exceeded its statutory remedial authority is also not "wholly collateral to [the] statute's review provisions," 510 U.S. at 212 (*Thunder Basin*'s second factor), and further is not "outside the agency's expertise," *id.* (*Thunder Basin*'s third and final factor). Accordingly, the NLRA's review procedures must be followed, and this Court lacks jurisdiction to hear Amazon's claim. *Nexstar Media, Inc. Group v. NLRB*, Case No. 4:24-cv-01415, 2024 WL 4127090 *3-5 (N.D. OH Aug. 26, 2024); *YAPP USA Automotive, Sys. v. NLRB*, No. 24-12173, 2024 WL 4119058 *10-12 (E.D. Mich. Sept. 9, 2024).[13]

[13] Amazon asserts that NLRA claims sound in common-law. Amazon Br. 23-24. But the Supreme Court has directly refuted this characterization. *Virginia Elec. & Power*, 319 U.S. at 543 ("it is erroneous to characterize [the Board's] reimbursement order . . . as the adjudication of a mass tort"); *Jones & Laughlin*, 301 U.S. at 48 (explaining that an NLRB proceeding is "not a suit at common law or in the nature of such a suit"); *also Agwilines, Inc.*, 87 F.2d at 151 ("the statute may not be construed as establishing . . . a common-law right to damages. . . . If it gives any right, it gives a new one unknown to the common law."). That's because "under the common law, collective bargaining was unlawful." *Janus v. AFSCME Council 31*, 585 U.S. 878, 904 n. 7 (2018) (cleaned up). And other characteristics of NLRB adjudications show that they are not "made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Jarkesy*, 144 S.Ct. at 2132. The NLRA "did not borrow its cause of action from the common law." *Id.* at 2137. The rights established in the NLRA don't "reiterate common law terms of art" and so "bring no common law soil with them." *Id.* at 2137. And, unlike the

D. Amazon is Not Entitled to a Preliminary Injunction on its Separation of Powers Claim

Amazon suggests that the Board is somehow violating the principle of separation of powers by "wielding [] executive, judicial, and legislative functions[.]" Amazon Br. 28 (capitalization omitted). The claim ignores, however, that the Supreme Court generally, and at least four circuit courts specifically in the context of the NLRB, have rejected the argument that the mixing of legislative, executive, and judicial functions in an agency is a violation of the separation of powers doctrine. *Withrow v. Larkin,* 421 U.S. 35, 46-56 (1975); *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1174 (D.C. Cir. 1998); *Kessel Food Mkts., Inc. v. NLRB,* 868 F.2d 881, 887-88 (6th Cir. 1989); *NLRB v. Sanford Home for Adults,* 669 F.2d 35, 37 (2d Cir. 1981); *Eisenberg v. Holland Rantos Co.,* 583 F.2d 100, 104 n. 8 (3d Cir. 1978); see also *Humphrey's Ex'r v. United States,* 295 U.S. 602 (1935) (approving creation of an executive agency to "perform . . . duties as a legislative or as a judicial aid;" that is, to "act in

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fraud claims in *Jarkesy*, unfair labor practice claims "had never been brought in an Article III court" prior to the passage of the Act. *Id*. at 2138.

part quasi legislatively and in part quasi judicially"). Amazon's separation of powers and due process claims are therefore unavailing.

Amazon acknowledges some of these cases in its principal brief, Amazon Br. 31-32, while ignoring others. But rather than accept that this line of cases is fatal to its separation of powers argument, Amazon attempts to carve out an exception to these cases based solely on the fact that Amazon chose to file an objection to the JFK8 union election in 2022 which concerned the Board's own conduct. Specifically, Amazon's basis for this claim is that the Board members previously voted to authorize the General Counsel to seek an injunction pursuant to Section 10(j) of the NLRA (29 U.S.C. § 160(j)), which Amazon later alleged—through an election objection —unduly influenced the election results, a contention the NLRB rejected. *Id.* But Amazon's argument that this conduct violates the separation of powers and that the instant proceedings before the NLRB must be enjoined does not carry water.

To begin, neither the Board's authorization of the Section 10(j) injunction nor its ruling on Amazon's objections is at issue in the matter that Amazon seeks to enjoin. The proceedings that Amazon seeks to enjoin is before the Board on a summary judgment motion involving a

single matter—whether Amazon is refusing to recognize and bargain, which Amazon admits. It is true that Amazon defends its refusal to bargain by claiming that the NLRB's certification of the ALU as the exclusive bargaining representative for JFK 8 employees was erroneous for various reasons, including due to the influence of the Section 10(j) injunction. But, as mentioned above, the Board does not allow relitigation of those issues in the type of unfair labor practice proceeding that Amazon seeks to enjoin. *See, e.g., Nexstar Media,* 373 NLRB No. 88, sl. op. 1. Thus, there is nothing in *this matter* that falls within Amazon's theory of a separation of powers violation, and an injunction cannot issue.

Moreover, Amazon already has a meaningful avenue of review in an appropriate circuit court of appeals, a review process which would be triggered by the very Board decision that Amazon seeks to enjoin. There is no reason for this Court to allow Amazon to escape that existing review process because that process fully protects Amazon's rights and Amazon will not suffer any harm from utilizing that process. Even if the NLRB does issue a decision which, as Amazon speculates, "find[s] that Amazon violated the NLRA for refusing to bargain, order[s] Amazon to bargain with the union, and impose[s] monetary damages," Amazon Br. 30, this

order by the NLRB is not self-enforcing. The NLRB would have to seek enforcement of that order before an appropriate circuit court before Amazon is under any legal obligation to comply, and Amazon can challenge the Board's decision on the objections in that enforcement proceeding—including on the basis that the Board's decision was wrong because it acted not based on facts but based on its alleged bias or prejudgment. Alternatively, Amazon need not wait for the NLRB to seek enforcement, Amazon could seek review of the NLRB's order in an appropriate circuit court, and raise these arguments about why the NLRB's decision on objections was incorrect to try to prove that it does not have a duty to bargain. Thus, the existing statutory review process gives Amazon a meaningful avenue for review of its claim that the NLRB's decision on objections was incorrect.

Granting Amazon's preliminary injunction on this basis, on the other hand, would create an exception that swallows the rule and would eviscerate the NLRB's statutory role in representation cases. If this Court buys Amazon's argument, in every single representation case across the country an employer seeking to avoid its duty to bargain could do so by merely filing an objection that involves the NLRB directly, no

matter how farfetched, and then use that objection to claim that the NLRB is no longer empowered to decide that representation case. Even if a federal court ultimately rejected the employer's contentions, the delay to the bargaining process that would result and the chilling effect that this would have on employees across the country would be serious and irreparable.

Thus, Amazon's separation of powers argument does not provide a basis for this Court to enjoin the proceedings currently before the NLRB.

E. The Balance of Equities and Public Interest Favor Denying the Injunction Because Granting the Injunction Would Cause Significant Harm to the TANNC and the Employees it Represents

Amazon has now multiple times repeated the refrain that "a preliminary injunction will do the NLRB no harm whatsoever." Amazon Br. 39 (cleaned up). This unequivocal statement completely ignores the clear harm that results from a public agency—the only agency in the country empowered to protect certain rights granted to private sector employees by Congress—being stripped of its ability to comply with its congressional mandate. Such interference with a duly enacted law constitutes irreparable injury to the public interest. *See, e.g., Tex. All. for Ret. Ams. v. Hughs,* 976 F.3d 564, 569 (5th Cir. 2020); *Valentine v. Collier,*

956 F.3d 797, 803 (5th Cir. 2020); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 734 F.3d 406, 419 (5th Cir. 2013). And in fact, in these types of cases, "the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016).

But the more glaring omission from Amazon's assertion that the balance of equities tips in its favor—and a major reason why it was necessary for TANNC to be granted intervenor status in this case—is Amazon's lack of any consideration of the clear irreparable harm that would be inflicted on the employees who would be detrimentally impacted by this injunction. To begin, JFK8 employees voted years ago to be able to collectively bargain with Amazon—creating a duty under the NLRA for Amazon to bargain with the employees—but they have now for years been unable to cause Amazon to come to the bargaining table. An injunction here would tell these employees that it is irrelevant that the NLRB has certified the ALU (now ALU-IBT Local 1 and a member of TANNC) as the exclusive bargaining representative of Amazon's warehouse workers at the JFK8 facility, or that the NLRB has rejected Amazon's objections to the election where employees overwhelmingly

voted in favor of collective representation, because Amazon can just run to the courts and stop the NLRB from actually requiring Amazon to comply with its obligation to bargain. *See* 29 U.S.C. § 158(a)(5).

As the NLRB itself recognized over 80 years ago,

> Employees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

Karp Metal Prod. Co., Inc., 51 NLRB 621, 624 (1943). An injunction here would play into Amazon's continued refusal to bargain by indefinitely delaying the TANNC's ability to represent and bargain over the terms and conditions of employment for the Amazon employees who have chosen union representation. Like the NLRB, the Supreme Court and federal circuit courts have long acknowledged that delay in recognizing and bargaining results in continued loss of support, causing irreparable harm. As the Sixth Circuit explained,

> there was a very real danger that if the employer continued to withhold recognition from the Union, employee support would erode to such an extent that the Union could no longer

> represent those employees. At that point, any final remedy which the Board could impose would be ineffective.

Frye v. Speciality Envelope, Inc., 10 F.3d 1221, 1226–27 (6th Cir. 1993) (cleaned up); *also Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944) ("[U]nlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions"); *Frankl ex rel. NLRB v. HTH Corp.* (9th Cir. 2011) 650 F.3d 1334, 1362-1363 ("As time passes, the benefits of unionization are lost and the spark to organize is extinguished. The deprivation to employees from the delay in bargaining and the diminution of union support is immeasurable.") (quoting *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996)); *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1192 (9th Cir. 2011) ("[A] delay in bargaining weakens support for the union, and a Board order cannot remedy this diminished level of support. Employees suffer from the employer's delay, and remedies other than injunctive relief [to prevent employer-instigated delay] may be less than adequate").

On top of that, in cases involving refusals to bargain and delay to the bargaining process, the Board cannot later remedy the harm to industrial peace that arises from delays in bargaining. *Id.* ("[A] failure to bargain in good faith threatens industrial peace . . . [and t]he Board cannot fashion a retroactive remedy for the harm to industrial peace that occurs during the period that the employer refuses to bargain."). One of the primary reasons the NLRA was enacted was to prevent the "industrial strife or unrest" that results when employers refuse to collectively bargain. 29 U.S.C. § 151. The passage of the NLRA gave workers an avenue to assert their rights and helped move the country away from dangerous and disruptive industrial strife. *See* Wachter, Michael L., *The Striking Success of the National Labor Relations Act, in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427 (Cynthia L. Estlund & Michael L. Wachter, eds.) (2012) ("Industrial strife and unrest at the time of the passage of the Wagner Act meant more than the inconvenient strikes . . . . Instead, it meant violent strikes that paralyzed the national economy and frequently required the deployment of the National Guard or federal troops to restore order."). Without that avenue to redress their rights through the

NLRA, chaos will ensue, and workers will be put back into the dangerous position they were in prior to the NLRA's passage in 1935.

Accordingly, it is well-recognized that delays in the NLRB's proceedings may cause irreparable harm to industrial peace as well as the collective-bargaining rights that the NLRA protects. An injunction here would indefinitely delay enforcement and realization of TANNC's right to engage Amazon in collective bargaining on behalf of the thousands of workers it represents, raising a significant risk irreparable harm, including a loss of support among the employees and—because of Amazon's nationwide reach—possible industrial strife that could have an adverse effect on our economy and supply chain. It is then no exaggeration to say that an injunction would threaten industrial unrest and could permanently defeat the workers' and Teamsters' right to organize and engage in collective bargaining with Amazon.[14]

Moreover, JFK8 is not the only facility where Amazon employees are taking steps to exercise their rights under the NLRA—more and more Amazon employees at facilities across the country continue to select

[14] Commentators across the ideological spectrum have raised concerns about a potential for industrial strife and "chaos" if the NLRA is ruled unconstitutional in suits such as the instant one. *See supra* n.1.

union representation and to demand that Amazon bargain with them collectively, hopeful that Amazon will ultimately be forced to comply with its duties under the NLRA. This expanded exercise of employee rights, however, is also in peril if this Court grants Amazon's motion. If that happens, hundreds of thousands of employees across the country will receive the message that their attempts to exercise their rights are futile because Amazon can just violate the law and then, right when it is going to be held to account for those violations, can stop the agency empowered with enforcing the NLRA from remedying those violations. Quashing these nascent organizing campaigns in this manner would run counter to the purposes underlying the NLRA, which the NLRB has been dutifully enforcing for nearly a century.

Thus, there is no question that the balance of equities and the public interest strongly favor this Court denying the injunction.

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CONCLUSION

The motion for a preliminary injunction should be denied.

DATED: October 17, 2024 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitations of 32(a)(7)(B), because it contains 12,819 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2024, I caused this brief to be electronically filed with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. I further certify that Counsel for Appellant and Appellees have been served by email at the address listed below.

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