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P R O C E E D I N G S

(11:39 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-367, Starbucks Corporation versus McKinney.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

Section 10(j) authorizes district courts to grant preliminary injunctions that they deem just and proper. 10(j) thus requires district courts to apply the traditional four factors as set out in Winter versus NRDC.

This Court should reverse. The court of appeals held that Winter's four factors do not apply under Section 10(j). All that mattered below was whether any facts supported a non-frivolous legal theory and whether there was harm, not whether that harm was irreparable.

The government argues that whether a two- or four-part test governs, statutory context compels district courts to conduct "a less exacting and more deferential inquiry into

1 the merits without undertaking an intensive
2 effort to resolve factual issues." But 10(j)
3 contains no language, much less clear language,
4 diluting the traditional standard.

5 Preliminary injunctions are
6 extraordinary and drastic remedies. Here, the
7 Board seeks a coercive injunction backed by
8 contempt sanctions, and the Board seeks the very
9 same injunctive relief that it would get if it
10 won the case.

11 Such relief is highly inappropriate
12 absent a clear showing under all four factors.
13 The government justifies deference because the
14 Board, not trial courts, ultimately decide the
15 merits at the back end. But Congress directed
16 trial courts, not the Board, to apply the Winter
17 factors at the front end.

18 The Board hasn't even made any factual
19 findings to defer to. Agencies have no
20 expertise whatsoever in how courts should
21 exercise their equitable discretion. Indeed,
22 the Board in its adjudication will not even
23 consider the four Winter factors. This Court
24 has never deferred to an agency's litigation
25 position, and it should not start here.

1 I welcome your questions.

2 JUSTICE THOMAS: Ms. Blatt, the
3 government says that Petitioner's ahistorical,
4 decontextualized approach is inconsistent with
5 the statutory text, the basic premises of
6 equity, and over a century of case law.

7 What's your reaction to that?

8 (Laughter.)

9 MS. BLATT: No.

10 (Laughter.)

11 MS. BLATT: I don't even know where
12 they're getting that. I mean, this Court in
13 Winter and a million other cases have said that
14 these four factors are longstanding, and the
15 clear statement rule goes back to Justice Story.
16 But I just think the text on its face, you don't
17 have to get too far, says "just and proper."
18 That obviously harks to traditional equity.
19 And, here, we have the four factors.

20 JUSTICE THOMAS: Do you think their
21 real -- their -- the government argues that
22 you're -- because they are protecting the
23 Board's jurisdiction, as opposed to the courts'
24 jurisdiction, that that's a difference.

25 MS. BLATT: Not at all. Not at all.

1 I mean, a preliminary injunction -- I mean, it's
2 assigned to the district court. It has the same
3 reasons. You have to show that there's a
4 likelihood of success on the merits. And,
5 obviously, if the harm is recoverable, you're
6 not entitled to the injunction at all in balance
7 of the equities.

8 There's no -- I don't even understand
9 the Board's jurisdiction. There are a multitude
10 of contexts where an agency has an adjudication,
11 and if it wants a preliminary injunction, it's
12 got to make the showing that every other party
13 would have to make.

14 JUSTICE JACKSON: But this is not just
15 the standard preliminary injunction that
16 district courts do on a daily basis in regular,
17 ordinary cases within their jurisdiction that
18 they control. I mean, this is an injunction
19 that is being provided for in a specific
20 paragraph of this statute, which I'm sure you
21 agree, does, the statute, require some
22 consideration of the Board's prerogatives. The
23 Board is the one that is ultimately making this
24 unfair labor practice determination in the first
25 instance. Congress is setting up a Board to

1 take care of these issues.

2 So it's -- it's not the ordinary PI
3 that the -- that district courts see, correct?

4 MS. BLATT: No, not at all. It is an
5 ordinary preliminary injunction, and this is an
6 ordinary statute with a call to just and proper
7 remedies. And we cite six statutes in the U.S.
8 Code that use the "just and proper" standard and
9 a multitude of statutes saying "necessary and
10 improper" or just "proper."

11 JUSTICE JACKSON: No, I understand,
12 but we are in a particular context, and I think
13 the context has to inform how we understand what
14 Congress intended with respect to this provision
15 of the statute providing for this kind of
16 injunction.

17 MS. BLATT: Well, maybe we should just
18 talk about what we're talking about, and that is
19 does anything in that statute or anything in
20 common sense say the Board gets to walk in and
21 get a coercive injunction on the notion that
22 they have a non-frivolous legal theory and the
23 district court is barred from finding facts,
24 it's barred from weighing witness credibility,
25 and all that matters is the government has not

1 presented a joke.

2 JUSTICE JACKSON: Well, I guess what
3 I'm -- what I'm referring to is that we already
4 have a very different context insofar as the
5 Board is assigned by Congress with the
6 requirement or duty to investigate unfair labor
7 practices and make the decision in the first
8 instance as to whether or not they occurred.

9 That doesn't happen in other PI
10 contexts. So I get that in other PI contexts,
11 the district court is doing the fact finding and
12 all of the things you're talking about. This is
13 a different context.

14 MS. BLATT: So, on pages 42 and 44 of
15 our brief, we cite SEC, FTC, CPFC -- I'm going
16 to run out of the alphabet -- EEOC, a bunch of
17 cases where agencies have adjudicatory
18 processes. There's three that we cite on pages
19 23 and 42 where it involves you can go to
20 district court.

21 But, remember, neither the Board nor
22 the court of appeals on -- on reviewing of a
23 final agency will ever consent or -- consider
24 the normal standards for preliminary injunction.

25 It -- I mean, just in terms of where

1 all this leads you is why would the Board get
2 deference when the Board doesn't deserve any
3 deference and has no expertise on how equity
4 should be -- should be weighed? And in terms of
5 -- we could talk about the four factors. At
6 most, statutory context, like every other
7 injunction, takes account of -- of the statutory
8 context. If we were here because there was
9 going to be a nuclear accident, I would think
10 that's an important statutory context too.

11 JUSTICE KAGAN: So --

12 JUSTICE SOTOMAYOR: Ms. Blatt, you
13 used in your brief 12 times the description of
14 using the stringent version of the four-factor
15 test. Is that different than the standard
16 four-factor test?

17 MS. BLATT: This Court in *Pharma*
18 versus *Walsh* and in *Winter* said clear showing,
19 so -- but, yes, I think that is a stringent --

20 JUSTICE SOTOMAYOR: So it's different
21 than the traditional?

22 MS. BLATT: Traditional factor test is
23 a clear showing. And what I think --

24 JUSTICE SOTOMAYOR: Well, all right.
25 Now you're doing something else.

1 MS. BLATT: Okay.

2 JUSTICE SOTOMAYOR: I understand very
3 well why you say we don't give deference to the
4 Board on the likelihood of success on the
5 merits, which -- there's some language in some
6 of the court's decisions below that they think
7 they have to, and that's the stuff about not
8 weighing credibility, et cetera.

9 I -- I do understand why that needs to
10 be corrected because you're right, it's the
11 Court that has to decide the likelihood of
12 merits.

13 But, with respect to the other three
14 prongs -- irreparable harm, balance of the
15 equities, public interest -- in Winter and Nken,
16 we talked about that there has to be a
17 recognition of the -- the public interest, the
18 Navy's interest in doing what it needs to do,
19 the -- here, I think it's in the NLRB's interest
20 in making sure that its remedial power can be
21 returned after the status quo.

22 We have to consider in the balance of
23 equities the court below, the harm both to the
24 employer but the harm to the union and the harm
25 to the NLRB. And, finally, the public interest

1 is clear in the Board's requirement. So it's --
2 I don't know that either Winter or Nken or
3 anything else, the word "deference" is just
4 misplaced here.

5 MS. BLATT: Well, so we've gotten
6 likelihood of success off the table, but both
7 the court of appeals and the trial court refused
8 to find any facts even on the irreparable harm.
9 So all the Board cited the evidence and only one
10 cited the evidence was considered on irreparable
11 harm.

12 And in terms of irreparable harm,
13 that's something that district courts do day in
14 and day out. And what the Board has here and
15 has been arguing in all these cases and what the
16 court of appeals found is anytime there's an
17 unfair labor practice, if you can show evidence
18 of chill because people are afraid of being
19 retaliated against if they support the union,
20 then -- and I'm quoting from the NLRB -- that
21 faith in workplace democracy can never be
22 restored.

23 And so, in their manual, their 10(j)
24 manual, it's basically a playbook and every case
25 they say fill in the blank, they're always

1 saying, if there's evidence of chill, if anyone
2 says --

3 JUSTICE SOTOMAYOR: I mean, firing all
4 eight of the union organizers, I think --

5 MS. BLATT: Well, if all eight --

6 JUSTICE SOTOMAYOR: -- it's hard to
7 see that, although I do understand that some of
8 the organizers did different things than others.

9 MS. BLATT: Right.

10 JUSTICE SOTOMAYOR: And the ALJ who's
11 made factual findings here to whom the Court
12 will have to eventually give deference found
13 that at least two of these union representatives
14 should have been fired because they did
15 something more than stay after hours.

16 MS. BLATT: Right.

17 JUSTICE SOTOMAYOR: There were
18 employees there who were staying after hours
19 that weren't fired.

20 MS. BLATT: Remember, we're here on
21 the injunction. Obviously, the -- the ALJ's
22 findings don't deserve any deference. If
23 there's a final decision by the Board and that
24 goes to a court of appeals, they get substantial
25 evidence deference. But --

1 JUSTICE SOTOMAYOR: But I'm going back
2 to the point.

3 MS. BLATT: But into the injunction
4 standard, if all eight employees commit gross
5 misconduct, then there's a -- you know, that's a
6 basis for termination.

7 JUSTICE SOTOMAYOR: But there were two
8 others who didn't union organize that weren't
9 fired.

10 MS. BLATT: And one union organizer
11 didn't engage in the misconduct and wasn't
12 fired. But here's --

13 JUSTICE GORSUCH: You -- you don't
14 dispute, though, the district court could take
15 that fact that --

16 MS. BLATT: Sure.

17 JUSTICE GORSUCH: -- Justice Sotomayor
18 mentioned into account in the course of weighing
19 whether an injunction's warranted?

20 MS. BLATT: Absolutely. I mean, this
21 is a classic case of burden-shifting, was there
22 anti-union animus that justified -- that -- that
23 prompted the terminations, and Starbucks'
24 managers explained that -- and the employees
25 conceded this violated company policy, so the

1 only issue is whether the policy was enforced in
2 other stores.

3 JUSTICE GORSUCH: Yeah, pretextual,
4 and a district court could make that
5 determination the way the ALJ did perhaps.

6 MS. BLATT: Exactly. The problem
7 in -- in the circuit split is, and in this case
8 in particular, both the district court and the
9 court of appeals said district courts are barred
10 from considering the evidence. And if you count
11 the Board's theory that whenever you have a harm
12 to unionization, and their story is union
13 support is very fragile, whether it's before the
14 union's been voted in or after the union is
15 voted in, and any type you -- anytime you have
16 an unfair labor practice, that's irreparable
17 harm. And we're just saying no.

18 JUSTICE BARRETT: But you'd be happy
19 with weighing, right?

20 MS. BLATT: Yes.

21 JUSTICE BARRETT: You'd be happy with
22 weighing the harm to the union organizing
23 against the harm to Starbucks in retaining the
24 employees who had violated store policy by
25 staying after hours, with all the pretext

1 considerations that Justices Gorsuch and
2 Sotomayor have referred to.

3 MS. BLATT: Factor --

4 JUSTICE BARRETT: You'd be happy with
5 that, the balance?

6 MS. BLATT: Very happy for Factor 3.
7 But Factor 2 is irreparable arm.

8 JUSTICE JACKSON: But wait. Before
9 you leave Factor 3, why -- why is -- I'm sorry,
10 is that the irreparable harm factor you're
11 talking about?

12 MS. BLATT: Balance of the equities
13 was exactly what Justice Barrett said.

14 JUSTICE JACKSON: Oh, I see. All
15 right. So irreparable harm, what -- what is the
16 -- what is being addressed there? I thought it
17 was the Board's -- whether the Board's remedial
18 authority would be harmed, that that's why
19 they're seeking a preliminary injunction.

20 MS. BLATT: Yeah, and that just is
21 empty words without saying what -- what in the
22 harm is irreparable, why can't an order of
23 reinstatement matter. And the problem with the
24 Board's theory in all these cases is they're
25 always entitled to an injunction. There's

1 always irreparable harm --

2 JUSTICE JACKSON: But -- but --

3 MS. BLATT: -- by definition.

4 JUSTICE JACKSON: -- but you -- you --
5 you've said that many times and you suggest that
6 this is happening all the time. There's record
7 evidence that in the last year the Board has
8 sought 14, 14, 1-4, 10(j) injunctions. So it's
9 not as though this is happening a lot.

10 MS. BLATT: Well, totally fair, just
11 when it happens, but in terms of the --

12 JUSTICE JACKSON: Right. But what I'm
13 saying is, if -- if we're -- if we're worried
14 about than an abusive Board doing things that
15 it's not supposed to be, giving undue deference,
16 it seems like the Board is pretty careful when
17 it's determining whether or not to even seek
18 these injunctions since it's only asked for it
19 14 times.

20 MS. BLATT: Well, I'd like to take
21 that on because I do think that they are relying
22 on the fact that they've done a fair
23 investigation. And no matter how much
24 investigation and how much careful
25 consideration, it's still a litigating position.

1 It's not the -- the fact finding, the
2 adjudication that Congress assigned it.

3 And second of all, the Board is asking
4 for more deference to a litigation position than
5 it would get at the back end. The Board could
6 never get this kind of deference even if it had
7 gone through the full adjudication.

8 And, third, the Board can't have it
9 both ways. Either they're spending so much time
10 investigating, maybe they should spend that time
11 adjudicating so you don't need these year-long
12 injunctions, or if they're saying, well, it
13 takes so long for us to adjudicate, maybe
14 because it's a hard question.

15 JUSTICE JACKSON: But I guess what I'm
16 saying is they're only saying that in 14 cases.
17 I mean, you're right, maybe -- maybe they should
18 be going faster, but they have only asked for
19 this kind of injunction in a very, very small
20 number of cases. Twenty thousand complaints are
21 filed with the Board. Seven hundred result in
22 Board action. And of those 700 that the Board
23 is investigating and doing and determining,
24 they've asked for this kind of injunction 14
25 times.

1 So, I mean, I appreciate that maybe
2 the standards we need to look at and I
3 understand four factors versus two factors, but
4 this is not sounding like a huge problem.

5 MS. BLATT: Well, restraint is not a
6 basis for deference. And whether or not it's a
7 huge problem, what Petitioner wants is just a
8 level playing field, the normal injunctive
9 factors that agencies and private parties should
10 get. So even if the Board only sought one
11 injunction, can -- can you please hold that the
12 four factors apply?

13 JUSTICE KAGAN: So, when you said the
14 normal process, so it's just the traditional
15 four-factor test applied normally? That's what
16 you want?

17 MS. BLATT: Yes. Yes. I hope I
18 didn't -- that's not a trick question.

19 JUSTICE KAGAN: Yeah. No.

20 (Laughter.)

21 JUSTICE KAGAN: It's -- it's supposed
22 to be a clarifying question.

23 MS. BLATT: Yeah, four factors with no
24 deference and to please make sure that --

25 JUSTICE KAGAN: Maybe I'll take that

1 as a compliment --

2 (Laughter.)

3 JUSTICE KAGAN: -- that you think I'm
4 that crafty, but really --

5 MS. BLATT: I -- I think we -- we
6 definitely need a reversal with the four
7 factors.

8 JUSTICE KAGAN: And -- and -- and just
9 on -- on the -- on this -- on the irreparable
10 harm part, you say in your reply brief that
11 under that four-factor test, applied normally,
12 the Court is supposed to decide whether delay is
13 going to frustrate, I'm using your words,
14 frustrate the Board's ability to remedy the
15 alleged unfair labor practices, so you have no
16 problem with that?

17 MS. BLATT: Right, as long as it's --
18 it's actually irreparable, like there's some --
19 so let me just see if I can try to be -- you
20 know, help here. Chill can't be -- chill can be
21 irreparable, but it has to be chilled from
22 something that's about to happen, an event that
23 can't be unscrambled.

24 And so, when we talk about the Board's
25 remedial factors, it can't be faith in workplace

1 democracy. It has to be -- there's -- there's
2 an event, there's an election that they've
3 actually, you know, barricaded the store and
4 employees can't get into vote unless we get this
5 injunction, you can't recreate the conditions.
6 So that's all we're talking about.

7 And, there, the Board's remedial power
8 is being frustrated and there's irreparable
9 harm, but all the more reason you've, you know,
10 balance of the equities, it may be that the
11 employer had to shut down the store because it's
12 not making money.

13 JUSTICE KAGAN: And on the equities
14 and the public interest, I mean, I think also in
15 your brief you acknowledge that when the -- a
16 statute like this is involved and public
17 interests are involved, a court is supposed to
18 take that into account in a way that's different
19 from what it might in a statute between private
20 parties -- excuse me, in a case between private
21 parties with only private interests.

22 MS. BLATT: I -- I think that's
23 correct because, by definition, the public
24 interest is broader than a breach of contract.
25 And if you have, you know, the environment or --

1 or, I don't know, voting rights, there's public
2 interest, but the case that this originates and
3 in the Oakland Cannabis and the Virginia
4 Railway, it's public interest as deliberately
5 expressed in legislation. So where the Court
6 has been on public interest is saying district
7 courts can't reach out the confines of the
8 statute either in going too far or too little.
9 And that's -- that, I think, does go to public
10 interest.

11 But I do think our point is this
12 public interest wasn't even referenced below,
13 except for the district court saying there's a
14 public interest in the statute, is that if
15 there's not a showing under all three factors,
16 the public interest is not served by, you know,
17 putting a scarlet letter on an employer and
18 having them just live under an injunction that
19 they violated the act based on a non-frivolous
20 legal theory, with not even their side of the
21 evidence being heard. That is very damaging to
22 the public interest in my view.

23 JUSTICE BARRETT: Are you saying that
24 chill is never enough for irreparable harm?

25 MS. BLATT: No, chill can be.

1 JUSTICE BARRETT: It can be. It can
2 be.

3 MS. BLATT: Yes.

4 JUSTICE BARRETT: It's just that it
5 requires more of a showing than the Sixth
6 Circuit required here?

7 MS. BLATT: Yeah. So the Sixth
8 Circuit three times said, you know, there's
9 inherent chill, but they also pointed to
10 evidence of chill. And all we're saying is
11 evidence of chill needs to be tied to something
12 that can't be undone like we -- we can't vote,
13 now that we're chilled from voting, there's
14 about to be a vote.

15 The court said two things here in
16 terms of chill. They said no one was wearing
17 union pins because they were scared, and, two,
18 the terminated employees, although they're on
19 the bargaining unit, it's not as convenient to
20 talk to your -- the fellow employees if you're
21 not on the shift.

22 And those are harms, but they're not
23 harms that are ir- -- they're not the harms that
24 are irreparable unless you're going to say
25 anytime that you have a allegation there's fear

1 of retaliation or an encumbrance, somehow that's
2 not -- not reparable. There was not even a
3 bargaining thing scheduled.

4 JUSTICE SOTOMAYOR: Now all you're
5 doing is --

6 MS. BLATT: The union had just won the
7 vote.

8 JUSTICE SOTOMAYOR: Now you're doing
9 -- asking us in the opinion to weigh the factors
10 ourself and say what the correct weighing is.

11 MS. BLATT: I wouldn't do that --

12 JUSTICE SOTOMAYOR: I thought you --

13 MS. BLATT: -- if I were you.

14 JUSTICE SOTOMAYOR: Right. Well, you
15 came in here and said apply the traditional
16 test, right?

17 MS. BLATT: Yeah, I -- I agree. I was
18 just trying to explain to Justice Barrett that
19 we concede that chill could definitely be
20 relevant, but what we're concerned about is the
21 Board's definition of chill automatically leads
22 to, whenever there's something against
23 unionization effort, that's irreparable harm.

24 But, yeah, if I were you, I would
25 leave this a very short opinion, but please make

1 clear --

2 JUSTICE JACKSON: But can I --

3 MS. BLATT: -- that irreparable harm
4 means irreparable.

5 JUSTICE JACKSON: Can I ask you about
6 likelihood of success in this situation? I know
7 others may have taken it off the table, but I'm
8 a little curious as to why the district court
9 would not at least have to put itself in the
10 shoes of the Board when making this predictive
11 judgment.

12 I mean, this is why I said context
13 matters in my view and that we're in the context
14 of a statute in which Congress has given the
15 Board the ability to determine the merits and --
16 at least in the first instance, and the ability
17 to make the investigation, to find the facts.
18 And in this context, that body has made a
19 preliminary determination in these 14 cases that
20 an injunction is warranted.

21 So -- so is that relevant to the
22 district court's determination, or it just comes
23 in and handles this as though there was no Board
24 or the Board is just one of the parties and it
25 doesn't pay any attention --

1 MS. BLATT: So --

2 JUSTICE JACKSON: -- to those
3 preliminary determinations?

4 MS. BLATT: -- it's totally irrelevant
5 because, when the Board is --

6 JUSTICE JACKSON: Irrelevant or
7 relevant?

8 MS. BLATT: Totally irrelevant because
9 us the Board is a prosecuting party. It is a
10 party that -- the NLRB is the general counsel.
11 He's an adversary even before the Board.

12 JUSTICE JACKSON: But not according to
13 the statute. The statute -- it doesn't just
14 relegate the Board to prosecuting party status.
15 The statute says the Board is the one that's
16 making the initial merits determination. And
17 so, when you're asking in the context of the
18 preliminary injunction what is the likelihood of
19 success on the merits, it doesn't seem to me to
20 be irrelevant that the Board has determined
21 based on its preliminary investigation that an
22 injunction is warranted.

23 MS. BLATT: Well, it's the general
24 counsel, a separate authority under the statute.
25 But I would be embarrassed if I were the Board

1 to say, yeah, we've made up our mind and we hope
2 district courts --

3 JUSTICE JACKSON: No, it's not that
4 they've made up their mind.

5 MS. BLATT: Well, they haven't.

6 JUSTICE JACKSON: The question is --
7 the question is, given this unique statutory
8 context in which we have the Board as a fact
9 finder and a decisionmaker and also a
10 prosecutor, as you've pointed out, right, that's
11 what makes this context different than when we
12 would ordinarily apply the four factors as a
13 court.

14 MS. BLATT: And all --

15 JUSTICE JACKSON: We have an authority
16 here that has made a preliminary determination
17 that these facts are such that there's a
18 likelihood of success on the merits. So how can
19 the district court ignore that?

20 MS. BLATT: Because that, what you
21 just said, basically sums to a litigation memo
22 that a lawyer wrote to the Board and the Board
23 signs off not in its capacity as a fact finder,
24 but it's just authorizing litigation.

25 JUSTICE GORSUCH: Is your --

1 MS. BLATT: There's nothing to defer
2 to. They haven't found any facts.

3 JUSTICE GORSUCH: Is your point here
4 that the litigating arm of the Board has brought
5 this action, but the Board in its adjudicative
6 powers as the Board has not yet determined
7 anything?

8 MS. BLATT: And they better not have
9 because then they're going to look biased. But,
10 more importantly, the Board -- the litigating
11 arm can file this injunction and then turn
12 around and change his or her theory before the
13 ALJ and the Board. It's not certain --

14 JUSTICE JACKSON: I understand. But
15 we're talking about a prediction, and so I would
16 think that the litigating arm of the Board would
17 have a pretty good predictive capacity in terms
18 of assessing what the Board might do in this
19 case.

20 MS. BLATT: Well --

21 JUSTICE JACKSON: And I just want to
22 know why that's irrelevant to a district court
23 in this situation also determining likelihood of
24 success on the merits.

25 MS. BLATT: Okay. So, if you have a

1 pure legal issue, this is completely irrelevant
2 because who cares what a lawyer in NLRB thinks.
3 I mean, if there's a meaning of the statute, it
4 just doesn't matter. In terms of this case,
5 which is a question of burden shifting in terms
6 of what caused a termination, that is a mixed
7 question of law and fact. And if it takes the
8 Board two years to figure it out at the back
9 end, it can't be that you would get deference
10 when they haven't found any fact. But I --

11 JUSTICE GORSUCH: I suppose otherwise
12 we -- a district court might take cognizance of
13 the fact that agencies almost always win --

14 MS. BLATT: Well, that's what --

15 JUSTICE GORSUCH: -- before their --

16 MS. BLATT: I was just going to say --

17 JUSTICE GORSUCH: -- their

18 adjudicative bodies.

19 MS. BLATT: -- if they have a
20 90 percent success rate, we'll always lose. I
21 mean, really, that can predict -- and the Board
22 tells courts this, you should know we're going
23 to win because we always win. That's in their
24 manual.

25 JUSTICE SOTOMAYOR: I mean, the fact

1 is the government cites at page 39 of its brief
2 that applying the two-part test, that they --
3 that the success rate of the NLRB is only
4 61 percent. So it's not a rubber stamp.

5 MS. BLATT: So --

6 JUSTICE SOTOMAYOR: Even the two-part
7 test is not.

8 MS. BLATT: Right. And we're saying
9 that's because, in the two-part test, the
10 overwhelming cases settle. And so that takes --
11 it's pretty -- the fortitude of those employers
12 that fight on is probably because they have a
13 good case.

14 JUSTICE GORSUCH: It's kind of --
15 it's kind of --

16 MS. BLATT: But, whether or not they
17 win or lose, it should be the right test.

18 JUSTICE GORSUCH: It's kind of
19 interesting too that the government fights a
20 test that it claims it does better under.

21 MS. BLATT: I don't understand the
22 government's position except to say that --

23 JUSTICE GORSUCH: It points out it
24 does better with the four-part test than the
25 two-part test. But yet it's fighting the

1 four-part test.

2 MS. BLATT: I think the government's
3 view is we'll take the traditional test if you
4 apply it untraditionally.

5 JUSTICE JACKSON: Consistent with the
6 untraditional context in which we are operating?

7 MS. BLATT: Yes, and all I'm trying to
8 say it's not that untraditional to have an
9 administrative agency. There's a lot of them in
10 the federal government. And the -- and the
11 Congress authorizes injunctions a lot, and when
12 it uses terms like "just and proper," Congress
13 knows how to -- and we cite examples in our
14 brief -- to give the agencies a leg up. It does
15 that -- or at least in the trademark context.
16 It does in another context where they'll presume
17 irreparable harm. I think, in the antitrust
18 context, there's also special concerns. So
19 Congress knows how to do that.

20 But the fact it went to the district
21 court, which is completely outside the normal
22 process of Board review, suggests that Congress
23 expected district courts to do what they do all
24 the time, and that is to apply -- to apply
25 Winter.

1 JUSTICE JACKSON: Isn't the history of
2 this that Congress originally took the district
3 courts completely out of it and that they just
4 kind of brought them in in this one capacity?
5 That's what I had understood.

6 MS. BLATT: Yeah, that -- that's
7 correct, that Norris-LaGuardia basically put a
8 -- almost an absolute categorical ban on
9 injunctions because courts were too aggressive
10 in stopping unions. And then it shifted in 1947
11 pro-employers. So it's a little ironic that the
12 government is relying on a statute that was
13 supposed to help employers.

14 But the district court is, you know,
15 supposed to exercise the just and proper
16 discretion. Otherwise, it's banned under the
17 statute -- Norris-LaGuardia from entering an
18 injunction.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas?

21 Justice Alito?

22 Justice Kagan?

23 Justice Gorsuch?

24 Justice Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: And Justice
2 Jackson? Okay.

3 Thank you, counsel.

4 Mr. Raynor.

5 ORAL ARGUMENT OF AUSTIN RAYNOR

6 ON BEHALF OF THE RESPONDENT

7 MR. RAYNOR: Mr. Chief Justice, and
8 may it please the Court:

9 I think the question in this case has
10 narrowed considerably, so I'll just walk through
11 the factors.

12 First, on irreparable harm, in its
13 opening brief, Petitioner fought the idea that
14 the irreparable harm inquiry should focus on
15 whether the Board is going to be able to remedy
16 the harm at the end of its proceedings. At page
17 2 of its reply, it now concedes the focus is on
18 the Board's remedial power. And I understood my
19 friend to further concede that point in her
20 argument this morning.

21 Second, on harm, the question is not
22 whether there is a certainty of harm. The
23 question is whether there's a likelihood of
24 harm. The test used by the Sixth Circuit is
25 reasonably necessary. That's the Ahearn case.

1 We think that's fully consistent with this
2 Court's precedents.

3 And as to whether all discharges
4 count, we agree that not all unlawful discharges
5 necessarily show irreparable harm. The question
6 that the Board looks at and the question that we
7 think the Court should look at is whether that
8 extinguishes the momentum of the union drive or
9 impairs it in such a serious way that an order
10 from the Board a year or two down the road won't
11 be able to restart the drive.

12 Second, on public interest and the
13 equities, our basic point here is that when
14 Congress makes a judgment about what is in the
15 public interest, the court cannot override that
16 judgment in weighing the equities at that stage.
17 This is the Oakland Cannabis case. The Court
18 says, if Congress has made a judgment that
19 something is unlawful, you can't basically make
20 that thing lawful at the equities stage by
21 refusing to enforce Congress's judgment.

22 That doesn't mean that in some cases
23 at the preliminary stage, if there's extremely
24 compelling interests on the other side or public
25 interests on the other side, that an injunction

1 will automatically be necessary. But we think
2 that in a case like this one, where Congress has
3 made a judgment in -- in a run-of-the-mine case,
4 there's only going to be purely private profit
5 -- profit motive interests on the other side,
6 injunctive relief is typically going to be
7 warranted. Again, I think Petitioner concedes
8 this basic point at page 13 of its reply. It
9 says that courts are not entitled to revise
10 Congress's judgment.

11 Third, that leaves the merits, which I
12 think has been the subject of a lot of
13 discussion this morning. We think that the
14 Court should take into account all relevant
15 context. One piece of context is the statistics
16 that Justice Jackson mentioned. The Board
17 receives 20,000 unfair labor charges every year.
18 It issues 750 complaints. Last year it
19 authorized 14 petitions and filed seven. That's
20 seven out of 20,000.

21 We think that a court can properly
22 take account of that in trying to make a
23 predictive judgment about how the Board is going
24 to come out. This ultimately is a predictive
25 judgment. How is the Board going to come out?

1 What is the likelihood of success before the
2 Board? And it's relevant that there is
3 substantial winnowing that goes on before the
4 complaint is filed in district court.

5 I think it's also relevant to note
6 that the Board has approved the Section 10(j)
7 petition. And just to clarify the separation of
8 functions within the agency here, the general
9 counsel is the prosecutorial arm to the Board.
10 The Board members themselves are the
11 adjudicative authority.

12 But the statute, Section 10(j) itself,
13 vests in the Board the power to approve a
14 Section 10(j) petition. So before a 10(j)
15 petition is filed in court, the Board itself has
16 approved it. And that's relevant in making the
17 predictive judgment about how this claim is
18 likely to come out before the Board. The
19 adjudicator has already preliminarily signalled
20 its view of the merits.

21 That doesn't mean the Board has made
22 up its mind. It hasn't seen all the evidence,
23 but that's a relevant consideration for the
24 district court to think about in determining
25 whether there is a likelihood of success on the

1 merits.

2 CHIEF JUSTICE ROBERTS: Counsel, you
3 mentioned that it's a small number of -- I
4 forget exactly your framing -- that -- that,
5 what, reached the question in court about the
6 application of the factors?

7 MR. RAYNOR: Out of the 20,000 --

8 CHIEF JUSTICE ROBERTS: Yes.

9 MR. RAYNOR: -- there's only seven
10 that get to court, right, last year. That was
11 the -- those were the numbers.

12 CHIEF JUSTICE ROBERTS: And you said
13 therefore we should assume what?

14 MR. RAYNOR: I think -- I think what
15 the Court should do is just think about the fact
16 that the Board has looked -- basically brought
17 the cream of the crop cases before the Board --
18 this is -- before the court.

19 This is an expert agency that has said
20 we think these are the most deserving of relief.
21 And --

22 CHIEF JUSTICE ROBERTS: Well --

23 MR. RAYNOR: -- as Justice Jackson was
24 mentioning earlier, this isn't a case where the
25 Board has engaged in abuse or bringing all sorts

1 of claims before courts. It's been --

2 CHIEF JUSTICE ROBERTS: Well, I don't
3 know why the inference --

4 MR. RAYNOR: -- highly selective.

5 CHIEF JUSTICE ROBERTS: I don't know
6 why the inference isn't the exact opposite, that
7 these are the ones that you really feel that
8 you've got to put, you know, the best behind
9 them because these are the ones that are going
10 to end up in court, the ones that are most
11 vulnerable.

12 MR. RAYNOR: But the function of the
13 Section 10(j) position, Mr. Chief Justice, is to
14 preserve the Board's remedial authority. So
15 these are the cases where the Board is worried
16 about irreparable harm accruing before the Board
17 can issue its decision.

18 JUSTICE GORSUCH: I thought that --

19 JUSTICE ALITO: Mr. Raynor, I'm a
20 little curious about your statistical argument.
21 So let's say that the -- that your office files
22 a motion for emergency relief, and you want to
23 try to convince us that there's a probability
24 that we're going to grant certiorari.

25 If -- if you, in making that argument,

1 you say: Look, we're very selective in the
2 solicitor general's office about when we're
3 going to petition for certiorari. We get lots
4 of requests from the litigating divisions to
5 file cert petitions. And we go along with that
6 in a tiny minority of the cases. And we have
7 quite a good record of success when we do
8 petition for cert. Is that something we should
9 consider in that context?

10 MR. RAYNOR: Justice Alito, I don't
11 think there's any bar to the Court considering
12 it.

13 (Laughter.)

14 MR. RAYNOR: If I may.

15 JUSTICE ALITO: Seriously?

16 MR. RAYNOR: I certainly don't think
17 there's a bar. This is an equitable analysis.
18 But I think the context here is different in
19 that Congress --

20 JUSTICE ALITO: Yeah, I think it's --
21 you're going to have to tell me why it's
22 different.

23 MR. RAYNOR: The reason is that
24 Congress has set up a scheme where the agency
25 can seek 10(j) relief to protect its own

1 adjudicative authority.

2 And as Justice Jackson mentioned, the
3 history here is that initially there was pretty
4 widespread judicial intrusion into labor
5 disputes. And in 1932 Congress cut that off and
6 said we're not going to allow district courts to
7 intervene. And in 1935 it centralized
8 adjudication of disputes in the Board.

9 In 1947, it decided it had to walk
10 back its restriction a little bit. And so it
11 allowed Section 10(j) relief, but it didn't
12 allow Section 10(j) relief for district courts
13 to engage in a wide ranging and intrusive
14 involvement in labor disputes. It allowed
15 courts to come in basically as ancillary to the
16 agency proceedings and protect the integrity of
17 those proceedings.

18 And in that context, I do think it is
19 relevant that the Board is selective about the
20 petitions that it files.

21 JUSTICE GORSUCH: I -- I appreciate
22 that point, but would you agree that the
23 likelihood of success on the merits inquiry
24 means likelihood of success on the merits in
25 this case?

1 MR. RAYNOR: As opposed to some other
2 case, Justice?

3 JUSTICE GORSUCH: As opposed to other
4 cases.

5 MR. RAYNOR: Correct. It's a focus on
6 this particular case.

7 JUSTICE GORSUCH: It has to be
8 focused, and so we have to look at the merits of
9 this case, right?

10 MR. RAYNOR: Correct.

11 JUSTICE GORSUCH: And so the Sixth
12 Circuit's rule that you can't engage in fact
13 finding has to be wrong.

14 MR. RAYNOR: Justice Gorsuch, we agree
15 that some fact-finding is permissible. And I
16 think there's been a tendency to caricature what
17 the Sixth Circuit is doing. There was a two-day
18 evidentiary hearing in this case and there was
19 discovery.

20 JUSTICE GORSUCH: Well, the Sixth
21 Circuit said fact-finding is inappropriate.

22 MR. RAYNOR: Correct. It did -- it
23 did say that. And I agree that language, if
24 taken out of context --

25 JUSTICE GORSUCH: And so -- and walk

1 us --

2 MR. RAYNOR: -- could be read in that
3 way.

4 JUSTICE GORSUCH: Okay. So that's
5 wrong.

6 MR. RAYNOR: I -- I agree --

7 JUSTICE GORSUCH: That statement is
8 wrong.

9 MR. RAYNOR: -- that that statement on
10 is.

11 JUSTICE GORSUCH: Yeah. And -- and --
12 and you've walked through the four factors,
13 which seems to suggest you agree there are,
14 indeed, four factors.

15 MR. RAYNOR: We agree that all four
16 considerations from Winter are relevant to this
17 analysis.

18 JUSTICE KAVANAUGH: Do we apply the
19 test the same way we usually apply it as a
20 general matter?

21 MR. RAYNOR: I think it -- no, I --

22 JUSTICE KAVANAUGH: Or does a district
23 court apply it the same way as --

24 MR. RAYNOR: I think there has to be
25 some translation to this context. And on --

1 just focusing on likelihood of the merits for a
2 moment, we think that there has to be a
3 substantial legal theory and that there has to
4 be sufficient facts that a reasonable
5 fact-finder could find for the Board. And we do
6 think that --

7 JUSTICE KAVANAUGH: That doesn't sound
8 like -- yeah.

9 JUSTICE GORSUCH: It doesn't sound
10 like likelihood on success on the merits at all.

11 MR. RAYNOR: It -- it's likelihood on
12 success of the merits in the sense that you're
13 assessing how likely is the Board to succeed?
14 And we think they have to show a reasonable
15 probability of success. That's the standard
16 that we think governs here. And we think that
17 is consistent with --

18 JUSTICE GORSUCH: Not likelihood of
19 success, reasonable? What's reasonable? Is
20 that -- it's obviously -- is that above
21 50 percent? Is that 30 percent?

22 MR. RAYNOR: I'm hesitant to put a
23 percentage on it, Justice Gorsuch.

24 JUSTICE GORSUCH: I'm not surprised.

25 JUSTICE KAVANAUGH: It's lower than

1 50.

2 MR. RAYNOR: I think it's consistent.
3 For example, you know, Justice Kavanaugh, your
4 opinion in Labrador says fair prospect. I think
5 that's generally along the lines of what we have
6 in mind. We don't think reasonable probability
7 necessarily needs a percentage to spell it out.

8 JUSTICE KAGAN: So, I'm sorry, are you
9 saying it's the same or it's a lower bar than
10 the usual likelihood of success standard as
11 applied in courts every day under Winter?

12 MR. RAYNOR: We think that it is a
13 lower standard, principally for the -- the
14 factual part which I mentioned, which is we
15 think if a reasonable fact-finder can find for
16 the Board, that is sufficient.

17 We do think that that's effectively
18 the test the Sixth Circuit has been applying. I
19 could point you to Ozburn-Hessey, which is a
20 decision where the Sixth Circuit says look, the
21 Board has put in evidence that this --

22 JUSTICE KAGAN: And is the reason for
23 this lower standard only that the Board is, you
24 know, generally restrained in asking for these
25 along the lines that you said or is there some

1 other reason why we should apply -- why courts
2 should apply a lower standard?

3 MR. RAYNOR: I think it's a structural
4 point, which is that Congress intended the Board
5 to be the primary adjudicator here.

6 JUSTICE KAGAN: Well, it did intend
7 the Board to be the primary adjudicator, but it
8 also gave this power over injunctions to the
9 court.

10 MR. RAYNOR: Right. But we think that
11 power has to be recognized cognizant of the fact
12 that the Board is going to be adjudicating this
13 dispute. The court is not going to get out in
14 front of the Board. It's going to protect the
15 Board's authority.

16 JUSTICE GORSUCH: I don't -- I don't
17 see why that follows, because it's a preliminary
18 analysis. It's just a quick look. And what
19 happens at the merits happens at the merits.
20 And in all sorts of alphabet soup agencies, we
21 don't do this.

22 District courts apply the likelihood
23 of success test, as we normally conceive it. So
24 why is this particular statutory regime
25 different than so many others that your friend

1 points out?

2 MR. RAYNOR: Well, Justice Gorsuch,
3 with respect to the statutes that they identify,
4 the case law in the lower courts does not
5 uniformly support them. It's actually quite
6 mixed. There's a lot of it that supports our
7 position.

8 JUSTICE GORSUCH: There's a lot on the
9 other side too.

10 MR. RAYNOR: I acknowledge that it is.

11 JUSTICE GORSUCH: An awful lot. And
12 -- and I -- I just -- I struggle to understand
13 what you're asking lower courts to do and how it
14 would be unique to the NLRB context as opposed
15 to others, cognizant as well that these
16 injunctions often run against employers and for
17 the benefit of unions too, so whatever standard
18 we come up with here, you know, goose and
19 gander, we have to be cognizant of that.

20 MR. RAYNOR: I think to the extent you
21 adopt a standard in this case, its
22 generalizability will actually be fairly
23 limited. There is only a handful of statutes
24 they identify that allow injunctive relief,
25 pending administrative proceedings. There's

1 three in particular; the FTC, the EEOC, the
2 Department of Labor.

3 JUSTICE GORSUCH: Right.

4 MR. RAYNOR: But other statutes, for
5 example, simply involving the federal
6 government, the authority to sue to enforce
7 federal law, we don't think it would generalize
8 because there's not the structural concerns I
9 raised with Justice Kagan.

10 JUSTICE JACKSON: Mr. Raynor, is that
11 because what we're talking about here is a
12 predictive judgment related to what the Board is
13 likely to find, that there are predictive
14 judgments or there's the preliminary relief
15 determination that courts are used to making,
16 which is who's going to win, you know, from my
17 perspective as between the parties that are
18 before me, right?

19 Someone has brought a complaint.
20 Someone is defending. I'm looking at this
21 preliminarily and making a judgment as to who's
22 likely to win on the merits of the legal issue
23 that they have brought.

24 That's the ordinary course of things.
25 I think -- and maybe I'm wrong and you can --

1 that -- that the predictive judgment here is not
2 that.

3 The predictive judgment here is the
4 Board is seeking injunctive relief to protect
5 its remedial authority and what -- to the extent
6 we're applying the four factors, it's the
7 likelihood that the Board is going to decide
8 that there is an unfair labor practice in this
9 situation and reverse the stakes on the ground
10 or whatever. Is -- is that right?

11 MR. RAYNOR: Yes. I do think that's
12 correct. The Board is the principal adjudicator
13 here. We're trying to predict how they're going
14 to come out.

15 JUSTICE KAGAN: I -- I don't --

16 JUSTICE KAVANAUGH: They're not the
17 final --

18 JUSTICE KAGAN: -- see how that could
19 possibly be, Mr. Raynor, that, you know, a court
20 is supposed to say well, I have one view of the
21 law but I'm just going to assume that the Board
22 has a different view of the law just because
23 this case was brought?

24 MR. RAYNOR: No. I took the --

25 JUSTICE KAGAN: It's got to be the

1 court's view of the law, right?

2 MR. RAYNOR: Well, I took the premise
3 of Justice Jackson's question to be, for
4 example, if there's NLRB precedent that the
5 Court hasn't weighed in on yet. We -- but we
6 know that precedent is going to apply before the
7 Board. It would have to think about the fact
8 that that precedent --

9 JUSTICE KAGAN: Yes, sure, if there's
10 NLRB precedent, that -- you know, that's the
11 reigning -- that's the governing law, the court
12 is supposed to think about that.

13 MR. RAYNOR: Correct.

14 JUSTICE KAGAN: Because that's the
15 governing law.

16 MR. RAYNOR: Correct.

17 JUSTICE KAGAN: But it's just supposed
18 to think about that as a court doing what courts
19 normally do, which is applying the law as the
20 court finds it to a case.

21 MR. RAYNOR: Yes, Justice Kagan. And
22 if you all were inclined just to think that the
23 likelihood of success test applies exactly the
24 same way in this case that it does in others, I
25 still would submit that it would be easier for

1 the Board to satisfy that test, principally
2 because, as I mentioned earlier, the Board has
3 already approved the petition. It has signaled
4 its preliminary view of the merits.

5 JUSTICE BARRETT: But that means we're
6 giving the Board a boost because of the
7 screening function that it's engaged in. And
8 we're saying, well, you know, the Board clearly
9 thought it was meritorious when it had its
10 prosecutorial hat on, so we should assume that
11 when the Board has its adjudicatory hat on, that
12 it's going to rule in favor of itself.

13 MR. RAYNOR: Justice Barrett, I
14 acknowledge that the Board could change its mind
15 once it has all the evidence before it. It
16 doesn't have the evidence before it, the ALJ
17 hearing evidence, for example, at the time it
18 approves the petition.

19 But I would dispute the notion that
20 it's acting in a prosecutorial role at this
21 stage. It's approving the petition -- the 10(j)
22 petition to protect its adjudicative authority.
23 And Congress hasn't given it -- for example, the
24 way that district courts have the authority to
25 issue a PI to protect their own authority,

1 Congress hasn't given that to the Board and said
2 you have to ask the district court.

3 JUSTICE BARRETT: Because the district
4 court is an independent check, right? Because
5 this a big deal --

6 MR. RAYNOR: Correct.

7 JUSTICE BARRETT: -- to have the
8 injunction in place no matter who it enjoins.
9 So the district court is an independent check,
10 so it seems like it should be just doing what
11 district courts do since it was given the
12 authority to do it.

13 MR. RAYNOR: Yes. We -- we
14 acknowledge this isn't a rubber stamp, but I
15 think the success statistics in the various
16 circuits bear that out. And we do think that
17 there has to be an inquiry into the merits.
18 Ozburn-Hessey, again, is an example where the
19 court said the evidence is overwhelming against
20 the Board. We're not going to blind ourselves
21 to that. We're not going to grant relief here.

22 There is some factual weighing that
23 goes on. We're not disputing that it is a
24 check. The only question is what -- to what
25 extent it should be a check?

1 JUSTICE GORSUCH: Let me -- let me see
2 if I can put it this way: So the district court
3 is supposed to ask likelihood of success on the
4 merits. Is it supposed to ask what I think are
5 the likelihood of success on the merits,
6 objectively as best I can come up with, as
7 neutral judgment as I can muster? Or is it
8 supposed to ask, well, I don't think you're
9 likely to succeed but I think the Board will?

10 Is that what -- is that -- is that --
11 that seems to me the delta between the positions
12 here. And, you know, I -- I -- gosh, it's clear
13 to me that your -- you know, your friend's going
14 to win, but the Board's going to rule otherwise.
15 Is -- is that -- you know, is that really
16 supposed to be what a district judge is supposed
17 to do?

18 MR. RAYNOR: Well, Justice Gorsuch,
19 I'm not sure, I guess, in the hypothetical what
20 would be the basis for the discrepancy.

21 JUSTICE GORSUCH: I -- nor would I,
22 except for maybe the statistics you keep
23 referencing, the fact that boards tend to win in
24 front of boards. They sometimes lose in later
25 review, but they win at least in front of the

1 board.

2 And I guess, if we're going to take
3 account of statistics, why not also ask how
4 often the NLRB gets reversed? You know, I mean,
5 where -- where does it end? And -- and why,
6 again, shouldn't a district judge just ask, as
7 best they can muster, with relevant NLRB
8 precedent in mind, all of the law, all of the
9 facts? And it may have different facts before
10 it too than -- than the Board did when it
11 authorized the 10(j). It's going to hold a
12 hearing.

13 MR. RAYNOR: Right.

14 JUSTICE GORSUCH: So it's going to be
15 a different factual record. It's going to look
16 at all the law. What's wrong with the best
17 judgment a neutral magistrate can issue?

18 MR. RAYNOR: Justice Gorsuch, setting
19 aside our front-line position about how we think
20 it's a lower standard here, if you thought it
21 was the same standard, then our position is
22 simply that all context should be considered.
23 We're -- we're not contending that any one
24 particular characteristic should be dispositive.
25 Ours is the pro-context position.

1 JUSTICE GORSUCH: Okay. Thank you.

2 JUSTICE JACKSON: But why -- so why do
3 you think it's a lower standard?

4 MR. RAYNOR: Justice Jackson, again, I
5 think it's a couple things, but it's principally
6 structural. We think the Board is -- is the
7 adjudicator here. The role of the district
8 court is to -- to protect and facilitate the
9 Board's adjudication --

10 JUSTICE JACKSON: And that's in the
11 statute from your view -- it is not your view of
12 just sort of how it should be?

13 MR. RAYNOR: Correct.

14 JUSTICE JACKSON: You -- you see --
15 you read the statute as set -- as setting up
16 this structure?

17 MR. RAYNOR: Yes, exactly. This is
18 the function of a Section 10(j) petition. The
19 10(j) petition expires when the Board issues its
20 order. At that point, there's a different
21 statutory authority that allows the Board to
22 enforce its order in court. And so all we're
23 talking about is a petition that's specifically
24 designed to protect the Board's adjudication.

25 And, again, the historical record

1 supports this in the sense that Congress didn't
2 want wide-ranging district court involvement in
3 labor disputes. It wanted to give a limited
4 district court authority to protect the Board's
5 adjudicative authority.

6 JUSTICE KAVANAUGH: Why do you think
7 Congress did that?

8 MR. RAYNOR: I think the reason is
9 that in 1932 when it passed the Norris-LaGuardia
10 Act, it imposed very stringent restrictions on
11 district court ability to issue injunctions.
12 And in the post-war period, there was
13 essentially a lot of labor unrest that courts
14 weren't able to step in expeditiously and stop.
15 And the court thought that was necessary. And
16 so if you look at the legislative history,
17 Congress says, look, it sometimes takes the
18 Board a while to rule and there might be a loft
19 of harm inflicted in the meantime, so we need to
20 give district courts the authority to prevent
21 that harm while Board proceedings are ongoing.

22 JUSTICE GORSUCH: It's certainly true,
23 though, that Congress was not eager to
24 resuscitate the labor injunction and Debs,
25 right?

1 MR. RAYNOR: Correct. And --

2 JUSTICE GORSUCH: Yeah. And -- and
3 that was not a particularly glorious era for
4 courts. And you would think, therefore, maybe a
5 more restrictive injunctive test, rather than a
6 looser one, might apply?

7 MR. RAYNOR: Well, Justice Gorsuch, I
8 think I would actually frame the --

9 JUSTICE GORSUCH: Traditional rules of
10 equity might -- you -- you -- you might want
11 them.

12 MR. RAYNOR: I would frame it actually
13 a little differently. I think what Congress was
14 concerned about doing was restricting the power
15 of district courts and protecting --

16 JUSTICE GORSUCH: Yes.

17 MR. RAYNOR: -- the centralized
18 adjudicative authority --

19 JUSTICE GORSUCH: And in --

20 MR. RAYNOR: -- of the Board.

21 JUSTICE GORSUCH: -- restricting the
22 power of district courts, you maybe want the
23 full considerations of equity brought to bear,
24 rather than a looser standard that results in
25 more judicial interference in labor affairs.

1 MR. RAYNOR: I recognize that that's
2 one way to think about it, but our view is that
3 ours is actually a more modest conception of the
4 judicial role, which is that it's protecting the
5 Board's adjudicative authority, rather than
6 engaging in its own free-ranging exploration of
7 the merits.

8 JUSTICE JACKSON: In this context,
9 consistent with the kind of injunction that
10 we're talking about here, it's not sort of
11 protecting the parties in general; it's
12 protecting this particular interest, which is
13 the Board's authority?

14 MR. RAYNOR: Exactly. And there's
15 public -- we are not suing on behalf of any
16 private parties. The Board is suing to protect
17 public rights only. And we do think to the
18 extent this is generalizable, it's actually a
19 relatively limited set of statutes to which our
20 rule here would apply.

21 If the Court has no further questions?

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Do you agree with your friend on the
25 other side that we can dispose of this in a

1 short opinion?

2 (Laughter.)

3 MR. RAYNOR: Yeah.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Justice Thomas?

7 JUSTICE THOMAS: Mr. Raynor, if the
8 injunction -- the -- if the approach here is to
9 protect the interests of the Board, do -- do
10 other agencies benefit from the same -- from
11 this approach?

12 MR. RAYNOR: Justice --

13 JUSTICE THOMAS: And if they don't,
14 why?

15 MR. RAYNOR: Justice Thomas, as I
16 acknowledged earlier, I think other agencies
17 that have a specific statutory authority to seek
18 injunctive relief pending agency proceedings
19 likely could benefit from a similar kind of
20 rule.

21 We don't think that the rule that
22 we're requesting here would reply -- would apply
23 to all the statutes that they cite where, for
24 example, the government simply has to ability to
25 sue to enforce federal law. That doesn't have

1 the same type of ancillary quality that we think
2 the injunctive relief in this case does.

3 CHIEF JUSTICE ROBERTS: Justice Alito?
4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: The ALJ ruled last
6 May. Exceptions have been filed. How -- how
7 long is this going to take?

8 MR. RAYNOR: The statistics are that,
9 typically, from complaint to final Board order
10 is about two -- two years. It varies somewhat
11 every fiscal year, but about two years. So
12 we're coming up on when you might expect the
13 Board to rule on that basis.

14 The -- the complaint --

15 JUSTICE SOTOMAYOR: And the injunction
16 lasts until then or lasts until what?

17 MR. RAYNOR: It lasts until the Board
18 issues its order. At that point, there's a
19 different statutory authority in 10(e) where the
20 Board can go get preliminary relief --

21 JUSTICE SOTOMAYOR: Are we sure that
22 before we rule, the Board isn't going to have
23 issued its preliminary injunction so that this
24 case is mooted?

25 MR. RAYNOR: I'm not sure about that.

1 I'm not privy to what the Board's timing will
2 be, so I can't make any representations. If --
3 if the Board were to rule before this Court were
4 to rule, I think that there would be a question
5 of mootness because the petition would expire --
6 the injunction would expire by its own terms.
7 So we --

8 JUSTICE SOTOMAYOR: That's why I was
9 asking. Thank you.

10 MR. RAYNOR: And we would, obviously,
11 make a submission on that point if that were to
12 occur.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: I just want to make
15 sure I completely understand how you think that
16 this case is narrowed. You started, you said --
17 you quoted Ms. Blatt's reply brief as to
18 irreparable harm as to the equities and public
19 interest.

20 I -- I take it that you -- and I don't
21 think that Ms. Blatt at all retreated from her
22 reply brief today. So I take it that that's
23 pretty much not at issue now and that the real
24 question in dispute is whether the likelihood of
25 success inquiry is ratcheted down somewhat.

1 Is that what you understand the only
2 issue in dispute to be?

3 MR. RAYNOR: I think so, Justice
4 Kagan, assuming that the way we understand
5 irreparable harm is that it focuses on the
6 Board's remedial authority and there only has to
7 be a reasonably likely showing of irreparable
8 harm. And then on the public interest, our view
9 is simply that Congress said with the public
10 interest here is. If you think there's been a
11 likelihood of success on the violation, however
12 you want to define that, by the time we get to
13 public interest and weighing of the equities,
14 it's going to have to be a pretty compelling
15 private interest on the other side to overcome
16 Congress's judgment that this kind of conduct
17 should be illegal.

18 JUSTICE KAGAN: And then with respect
19 to the likelihood of success, you're not arguing
20 as I understand it that somehow the Court is
21 supposed to say let's pretend I'm not a court,
22 let's pretend that I'm the Board. A court is
23 supposed to do what a court does.

24 Is that correct?

25 MR. RAYNOR: Yes, Justice Kagan.

1 JUSTICE KAGAN: Look at the law and
2 make the best decision on the law.

3 Now you have a different standard that
4 you think that the court ought to apply when the
5 court looks at the law and makes the best
6 decision on the law and I understand that
7 difference, but this isn't something where
8 you're saying like the court is supposed to
9 pretend to be the Board?

10 MR. RAYNOR: Justice Kagan, I think
11 that's generally correct with a caveat we do
12 think it's relevant the Board has approved the
13 petition. And we do think in circumstances
14 where there may be a law or rule that applies to
15 the Board but not to the district court, the
16 district court would have to take that into
17 account, for example, NLRB precedent.

18 JUSTICE KAGAN: Okay, thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE KAVANAUGH: Just one thing on
22 irreparable harm. You just said reasonably
23 likely. I think they say likelihood. Are those
24 the same things?

25 MR. RAYNOR: Yes. I -- I -- I know --

1 I think basically what we think it has to be
2 reasonably necessary. And --

3 JUSTICE KAVANAUGH: Okay.

4 MR. RAYNOR: -- that's the way the
5 Sixth Circuit framed it and that's the test we
6 would stand by. I don't think there's a whole
7 lot of daylight between those different
8 formulations.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 Justice Jackson?

13 JUSTICE JACKSON: Just one final
14 thing. Why is it relevant in this context that
15 the Board has approved the petition when it
16 wouldn't be in a normal -- in an ordinary
17 scenario of the -- the court just making the
18 kind of determination that Justice Kagan put
19 forward?

20 MR. RAYNOR: Justice Jackson, in a
21 normal scenario, the Board -- excuse me, the
22 court itself is determining whether to issue a
23 preliminary injunction. So it doesn't have
24 reference to another actor that may or may not
25 have approved preliminary relief.

1 In this case, we know the Board is the
2 ultimate adjudicator. And we know that it has
3 signalled it's preliminary view of the merits by
4 approving the petition. That type of structural
5 relationship isn't present when the district
6 court is issuing the preliminary injunction
7 without regard to an agency request.

8 I don't want to overstate this point.
9 As I mentioned, the Board can change its mind
10 once it hears the evidence. It hasn't
11 prejudged, but we do think this is relevant to
12 the predictive inquiry about how this case is
13 going to come out, what the likelihood of
14 success is.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Rebuttal, Ms. Blatt?

19 REBUTTAL ARGUMENT OF LISA S. BLATT

20 ON BEHALF OF THE PETITIONER

21 MS. BLATT: Thank you, may it please
22 the Court:

23 Just a couple things. On page 91 of
24 the district court, the district court said, in
25 terms of likelihood of success my next inquiry

1 focuses on whether there are any facts
2 supporting each allegation without resolving
3 conflicting evidence. So there's no question
4 there was none of that.

5 And in terms of the standard that as
6 long reasonable facts support the Board's
7 theory, that should be enough. If that sounds
8 familiar, it's because it's the standard for
9 summary judgment. And that obviously is not the
10 standard for an injunction.

11 And it's a little bit ironic that
12 that's the standard from summary judgment
13 because if you can survive summary judgment, at
14 least we get a trial. So this is even worse
15 than a party would have at summary judgment.

16 So they should have to prove their
17 case like any other party.

18 In terms of -- so the likelihood of
19 success, just another thing to keep in mind, the
20 only evidence that the district court is going
21 to have is the evidence before the district
22 court.

23 In terms of the legal theory, the --
24 the Board has been very, very aggressive on some
25 of its legal theories, including in a case where

1 Starbucks sought discovery, the Board turned
2 around and called that an unfair labor practice
3 and then told the district court they had to
4 defer to it.

5 The Board also says that you have to
6 bargain with the unions that have been
7 decertified. So these are very serious legal
8 questions that do come up.

9 And the other thing, if they want
10 deference to their -- their investigative
11 decision, then why aren't they producing their
12 litigation memo? I mean, really. If they --
13 that's what you're supposed to do when you get
14 deference is show your work.

15 And this is obviously a privileged
16 document and their manual is a cookie cutter
17 thing saying here's how you get your litigation
18 memo, here's how you get Board approval. So at
19 least disclose it.

20 In terms of getting out in front,
21 obviously the district court's findings aren't
22 binding on the ALJ or the Board. And in terms
23 of lower courts, the only thing I'll add is that
24 almost all the cases that kind of water down the
25 standard are pre-Winter.

1 There was one post-Winter case that
2 didn't cite Winter, and then the Ninth Circuit,
3 the government relied on and cited the court
4 said this is intentional with Winter.

5 We'd ask that the judgment be
6 reversed.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:31 p.m., the case
10 was submitted.)

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Official - Subject to Final Review

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