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NCLA Amicus Brief Asks U.S. Supreme Court to Reject NLRB-Specific Preliminary Injunction Standard

Starbucks Corporation v. M. Kathleen McKinney, Regional Director of Region 15 of the NLRB

Washington, DC (February 28, 2024) – Today, the New Civil Liberties Alliance filed an *amicus curiae* brief at the Supreme Court in *Starbucks Corp. v. McKinney*, a case challenging a deferential legal standard that allows the National Labor Relations Board to enjoin a company's conduct without showing that it likely broke the law. Instead, NLRB can initiate an administrative enforcement proceeding and then obtain a preliminary injunction in federal district court just by demonstrating that (1) its claims are not frivolous, and (2) those claims serve NLRB's remedial purposes. The U.S. Court of Appeals for the Sixth Circuit upheld the injunction granted below due to prior circuit precedent. NCLA's brief asks the Supreme Court to reject this textually baseless test, reverse the Sixth Circuit's ruling, and require NLRB to satisfy the same injunction standard as every other litigant.

The Supreme Court has clarified, in many other contexts, that federal courts may not issue preliminary injunctions unless the party seeking the P.I. has met four requirements: (1) it is likely to succeed on the merits; (2) it would suffer irreparable injury absent an injunction; (3) the balance of equities favors an injunction; and (4) an injunction serves the public interest. The same test should apply here. Yet five federal circuits apply a relaxed standard when NLRB seeks a preliminary injunction, permitting it to punish an employer based on legal and factual allegations that do not meet the usual test. These courts uphold an injunction even if NLRB's claims are more likely than not meritless and even when doing so disproportionately burdens the enjoined employer.

The National Labor Relations Act does not support this practice, and the special P.I. standard NLRB enjoys does not apply to any other federal agency. The unique test also defies the Fifth Amendment's prohibition against the deprivation of property without due process of law. Under the Sixth Circuit's approach, NLRB can obtain a punitive injunction that forces Starbucks to retain and pay unwanted employees for an indefinite period—resulting in a loss of the company's property—without the agency ever having to prove even a likely violation of law.

This "reasonable cause" test employed by the lower courts exhibits improper judicial deference to NLRB's legal theories, a problem NCLA is addressing separately in the pending Supreme Court case *Relentless Inc. v. Department of Commerce*. In fact, because the "reasonable cause" test is even more deferential to agencies than *Chevron* deference, and the Supreme Court has never endorsed the idea, the case for rejecting it is even stronger.

Once it secures a preliminary injunction under the inappropriately relaxed standard, NLRB has every incentive to drag out administrative proceedings, because it has already forced the employer to do what the Board wants. Meanwhile, the P.I. imposes mounting economic costs on the employer for the duration of the administrative proceedings, whose length is entirely within NLRB's control. Capitulation is often a company's only viable option to stanch the financial bleeding. NCLA asks the Supreme Court to eliminate this coercive dynamic and force NLRB to meet the traditional preliminary injunction standard rather than the Sixth Circuit's preferential version.

NCLA released the following statements:

"By deferring to NLRB's factual and legal theories, the Sixth Circuit allows the Board to obtain costly preliminary injunctions against employers even when the presiding judge concludes that the Board's allegations are likely meritless, turning the constitutional principle on its head that the government may not deprive someone of property without due process of law."
— Sheng Li, Litigation Counsel, NCLA

"The Sixth Circuit's odd, NLRB-specific preliminary injunction standard sets an absurdly low bar for the Board to clear. The Supreme Court should overturn this non-statutory, judge-made test and instead require NLRB to satisfy the same factors that apply to preliminary injunction requests by (and against) every other federal agency."
— Mark Chenoweth, President, NCLA

For more information visit the *amicus* page here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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