No. 01-1875

In the Supreme Court of the United States

GUARD PUBLISHING COMPANY,
dba THE REGISTER-GUARD, PETITIONER

v.

RAYMOND D. WILLMS, ACTING REGIONAL DIRECTOR,
NINETEENTH REGION OF THE NATIONAL LABOR
RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Acting Regional Director of the National Labor Relations Board was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-5a) is not published in the *Federal Reporter*, but it is available at 25 Fed. Appx. 620.[1] The orders of the district court (Pet. App. 6a-9a, 10a-15a, 54a-58a) are unreported. The decision and recommended order of the administrative law judge (Pet. App. 16a-52a) are unreported.

[1] As reflected in the opinions of the courts below, the correct name of respondent here (petitioner below) is Raymond D. Willms, not the name that appears on the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2002. A petition for rehearing was denied on March 21, 2002 (Pet. App. 53a). The petition for a writ of certiorari was filed on June 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner publishes a newspaper in Eugene, Oregon. Pet. App. 3a. In May 2000, Teamsters, Local Union No. 206 (Union) began an organizing campaign among the workers employed in petitioner's distribution department. *Id.* at 19a-19a. Petitioner, after learning of the organizing campaign, advised the distribution department employees in writing that it was opposed to union organization. *Id.* at 26a. Over the next several months, petitioner's actions in opposition to the organizing campaign were the subject of unfair labor practice charges filed by the Union with the National Labor Relations Board (NLRB).

On November 17, 2000, following an investigation of the Union's charges, the NLRB's General Counsel issued a consolidated amended administrative complaint against petitioner. The complaint alleged that petitioner had responded to the Union's organizing campaign by committing numerous unfair labor practices in violation of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* See Pet. App. 31a-40a.

As relief, the General Counsel requested (among other actions) that the NLRB issue petitioner a remedial bargaining order of the type approved in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. 40a-41a. In *Gissel*, this Court held that the NLRB may require an employer to bargain with a union, without

holding an election among employees, both in "exceptional" cases involving "outrageous" and "pervasive" unfair labor practices (referred to as "category I" cases), as well as in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (referred to as "category II" cases). 395 U.S. at 613-614.

On February 16, 2001, while the administrative proceeding was pending before an administrative law judge (ALJ), the NLRB's Acting Regional Director for Region 19 filed a petition in federal district court under Section 10(j) of the NLRA, 29 U.S.C. 160(j). That provision authorizes the NLRB to seek, and district courts to grant, such preliminary and interim injunctive relief as is "just and proper." Pet. App. 10a.[2] The Acting Regional Director sought an order from the district court requiring petitioner (among other things) to bargain with the Union on an interim basis pursuant to *Gissel* pending the NLRB's final disposition of the administrative complaint. *Id.* at 6a-7a, 8a, 10a.

2. On April 5, 2001, after a hearing, the ALJ issued a decision in the administrative proceeding. Pet. App. 16a-52a. The ALJ found that petitioner had committed "serious and pervasive unfair labor practices in its attempt to discourage support for the Union." *Id.* at

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[2] Section 10(j) provides, in relevant part: "The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j).

42a. Those practices included firing employee Kama Cox because of her activities on behalf of the Union, contrary to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). Pet. App. 36a-41a.[3] The ALJ also found that petitioner committed numerous violations of Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), including timing a substantial wage increase to "curtail the Union's organizational campaign" (Pet. App. 33a); soliciting employee grievances "to interfere with the employees' union activities" (*id.* at 34a); and creating the impression among employees that petitioner's editor and publisher, Tony Baker, had their union activities under surveillance (*id.* at 35a).[4]

As a remedy, the ALJ recommended (among other things) that the NLRB issue a *Gissel* category II bargaining order. Pet. App. 40a-43a, 45a-46a. In support of such an order, the ALJ found that, as of June 1, 2000, the Union enjoyed the support of a majority of the employees in the distribution department. *Id.* at 25a, 41a. As of that date, the ALJ found, the Union had obtained 41 valid signatures on union authorization petitions from petitioner's 60 distribution center employees. The petitions signed by the majority contained "unambiguous representation language." *Id.* at 25a.[5]

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[3] Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

[4] Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157, among which is the right "to form, join, or assist labor organizations." 29 U.S.C. 158(a)(1).

[5] The petitions bore the following heading: "The undersigned hereby authorize the International Brotherhood of Teamsters,

The ALJ rejected, on factual grounds, petitioner's contention that the Union had not achieved majority status because some of the employees who signed authorization petitions did so "believing that they were only authorizing a vote on whether to be represented by the [Union] because of the representations made by the persons who solicited their signatures." *Id.* at 19a; see *id.* at 20a-25a.

The ALJ also concluded that petitioner's "unlawful conduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the employees' wishes are better gauged by the Union's card majority rather than by an election." Pet. App. 43a. In so concluding, the ALJ explained that petitioner had not only fired Cox, a "leading union advocate," but had timed her discharge to occur on the day before a scheduled employee meeting with the Union. *Id.* at 41a. The ALJ further explained that petitioner's unlawful grant of wage increases, which affected every employee in the distribution department, was "a powerful weapon in [petitioner's] antiunion campaign." *Id.* at 42a. The ALJ noted that such wage increases have a particularly long-lasting effect on employees that is difficult to counteract with traditional remedies. *Ibid.* The ALJ further observed that Baker, petitioner's highest ranking official, played "a direct part in some of the unlawful activity." *Id.* at 41a-42a.

Petitioner filed exceptions to the ALJ's decision and recommended order with the NLRB. Those exceptions

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Local Union No. 206 as their representative to bargain collectively with their employer on their behalf and to negotiate agreements concerning wages, hours, and all other conditions of employment." Pet. App. 20a.

are currently pending before the NLRB. See Pet. 15 n.2.

3. In an order dated May 1, 2001, as amplified by a subsequent order denying petitioner's request for a stay, the district court granted the Acting Regional Director's request for interim relief under Section 10(j), including an interim *Gissel* bargaining order. Pet. App. 6a-15a, 54a-58a. The court explained that it was required to "rely on traditional equitable principles to determine whether interim relief is appropriate" under Section 10(j). *Id.* at 10a (quoting *Scott* v. *Stephen Dunn & Assocs.*, 241 F.3d 652, 660 (9th Cir. 2001)); see *id.* at 54a-55a. Applying those principles, the court found a "probability [of] the Regional Director's success on the merits" before the NLRB in the administrative proceeding against petitioner. *Id.* at 12a; see *id.* at 4a.

With respect to the interim *Gissel* bargaining order, the district court found that the record evidence supported the ALJ's finding that the Union had achieved majority status among the employees on the basis of signed authorization petitions. Pet. App. 12a-13a; see *id.* at 55a. The court further found that the record evidence supported the ALJ's finding that "[petitioner's] actions so undercut and frustrated the employees' organizing efforts that the conditions existing prior to the alleged unfair labor practices cannot be restored." *Id.* at 57a. The court found "no credible argument that an interim bargaining order would cause [petitioner] any hardship." *Id.* at 13a. To the contrary, the court concluded that "[f]urther delays in implementing a bargaining order would operate only to the detriment of the employees, and also undermine the enforcement of statutory prohibitions against unfair labor practices." *Id.* at 57a.

4. The court of appeals affirmed the issuance of the Section 10(j) injunction in an unpublished memorandum decision. Pet. App. 2a-5a. The court of appeals concluded that the district court acted within its discretion in granting the injunction, and that the district court had "identified the correct legal standards, and applied them in a reasonable manner." *Id.* at 4a.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the district court's grant of an interim bargaining order under Section 10(j) of the NLRA, 29 U.S.C. 160(j), pending the NLRB's disposition of the administrative complaint against petitioner. The court of appeals and the district court correctly applied settled law to the particular facts of this case. Although, as petitioner notes (Pet. 17), the circuits have adopted different verbal formulations of the standard for granting Section 10(j) relief, those formulations are unlikely to produce different results. And, in any event, the Ninth Circuit, in which this case originated, has adopted petitioner's preferred formulation. This Court's review is, therefore, not warranted.

1. Section 10(j) "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). Numerous courts of appeals agree that Section 10(j) relief, including an interim *Gissel* bargaining order, is appropriate where, as here, an employer has attempted to defeat a union organizing campaign that has garnered the support of a majority of the employees by committing unfair labor practices that are serious and pervasive enough to render a fair election unlikely. See, *e.g.*, *Scott* v. *Stephen Dunn &*

Assocs., 241 F.3d 652 (9th Cir. 2001); *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied, 519 U.S. 1055 (1997); *Asseo* v. *Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986); *Seeler* v. *Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975); cf. *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1194 (5th Cir. 1975) (upholding refusal to issue interim bargaining order where court of appeals was "not convinced that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover"), cert. denied, 426 U.S. 934 (1976). In such cases, "the election process has been rendered so meaningless by the employer, that the authorization cards are a clearly superior gauge of employee sentiment." *Trading Port*, 517 F.2d at 40. An interim Section 10(j) bargaining order "then becomes a just and proper means of restoring the pre-unfair labor practice status quo and preventing further frustration of the purposes of the Act." *Ibid.*

2. Petitioner contends (Pet. 7-15) that a district court lacks authority to issue an interim bargaining order in a *Gissel* category II case if the union has not tested its representational claims in an election conducted by the NLRB. There is no merit to that contention. By committing unfair labor practices that are serious and pervasive (even if not "outrageous" under *Gissel* category I), an employer may render the NLRB's election process "meaningless." *Trading Port*, 517 F.2d at 40. In that situation, a union may rationally conclude that there is no practical reason to petition the NLRB to conduct an election. Unions are not required to seek elections, nor is the NLRB required to hold them, in an atmosphere of unremedied unfair labor practices that are likely to skew the outcome. As this Court explained in *Gissel*, the propriety of a bargaining order in a category II case turns solely on whether "the

possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and * * * employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614-615. The district court determined that other interim remedies would not suffice to ensure a fair election in this case (see Pet. App. 13a, 57a), and the court of appeals affirmed. There is no reason for this Court to review that fact-specific determination.[6]

Petitioner asserts (Pet. 10) that the district court should not have issued an interim bargaining order here because "[a]n employer may lawfully refuse to bargain even when a union makes a demand to bargain based on majority support," and petitioner doubted whether the Union enjoyed majority support absent an NLRB election. The principle upon which petitioner relies is inapposite here. An employer who is faced with a union's demand for recognition based on a purported card majority may, generally speaking, refuse that demand and require the union to invoke the NLRB's election processes. An employer may *not* do so, however, when it "has engaged in an unfair labor

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[6] Petitioner suggests (Pet. 8, 10-11) that the Union's failure to file a representation petition deprived petitioner of "objective notice" that the Union was seeking to represent its employees. As the district court observed, that contention "borders on the frivolous." Pet. App. 56a. The district court found that petitioner "clearly had actual notice that the union was organizing its employees to obtain representation status," which notice was the "catalyst" for subsequent unfair labor practices that "effectively negated the organizational effort." *Ibid.* In any event, even if petitioner could assert a colorable claim of lack of notice, that claim would be of no significance beyond this case.

practice that impairs the electoral process." *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301, 310 (1974); accord *Gissel*, 395 U.S. at 594, 600. The district court found that the Acting Regional Director would probably succeed in establishing that petitioner had engaged in such practices. See Pet. App. 12a, 55a.

Petitioner contends (Pet. 8-9, 15, 17) that the district court should not have issued an interim bargaining order because the Acting Regional Director relied on signed authorization petitions, rather than authorization cards, to demonstrate the Union's majority status. As the district court noted (see Pet. App. 12a, 15a n.5), there is no legal authority for the distinction that petitioner would draw between authorization cards and authorization petitions. The Acting Regional Director, moreover, carried his burden of demonstrating that the employee petitions were "arguably valid to establish a majority." *Stephen Dunn & Assocs.*, 241 F.3d at 659. Under settled law, a signed card stating that the employee authorizes the union to represent him for purposes of collective bargaining is valid unless the individual soliciting the card told the employee that the card would be used only to obtain an election. See *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 1269 (1963), enforced by 351 F.2d 917 (6th Cir. 1965); see also *Gissel*, 395 U.S. at 584, 606 (discussing *Cumberland Shoe* test). Based on its review of the record, the district court concluded that there was no reason to "second guess" the ALJ's finding (which was based in part on credibility determinations) that, under the *Cumberland Shoe* test, the 41 signatures appearing on the Union's authorization petitions were valid. See Pet. App. 12a-13a, 15a n.5, 56a; see also *id.* at 18a-25a.

Petitioner suggests (Pet. 12-14) that the district court should not have issued an interim bargaining

order because the ALJ's recommended final bargaining order, if adopted by the NLRB, is unlikely to be enforced by the reviewing court. The decisions on which petitioner relies declined to enforce bargaining orders in circumstances that are not present here. For example, petitioner cites a number of cases that address whether changed circumstances occurring after the employer's commission of unfair labor practices (such as significant employee turnover) undermined the NLRB's conclusions about the possibility of the holding of a fair election.[7] Here, however, in recommending a bargaining order, the ALJ explained that petitioner had made only "passing mention" of employee turnover in the distribution department and introduced "scant" evidence into the record on that subject. Pet. App. 51a n.6. Other cases cited by petitioner involve unfair labor

[7] See, *e.g.*, *Douglas Foods Corp.* v. *NLRB*, 251 F.3d 1056, 1066 (D.C. Cir. 2001) (noting that the employer "no longer maintained 'retail' operations" some five years after the unfair labor practices and that "fewer than five of the employees" from that period "were still in [its] employ"); *Flamingo Hilton-Laughlin* v. *NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1998) (noting "changes in the [employer's] operation and personnel in the years since the election"); *NLRB* v. *Taylor Mach. Prods., Inc.*, 136 F.3d 507, 520 (6th Cir. 1998); *Be-Lo Stores* v. *NLRB*, 126 F.3d 268, 282-283 (4th Cir. 1997); *Charlotte Amphitheater Corp.* v. *NLRB*, 82 F.3d 1074, 1078-1080 (D.C. Cir. 1996); *Harpercollins San Francisco* v. *NLRB*, 79 F.3d 1324, 1332-1333 (2d Cir. 1996); *J.L.M., Inc.* v. *NLRB*, 31 F.3d 79, 84 (2d Cir. 1994)); *Impact Indus., Inc.* v. *NLRB*, 847 F.2d 379, 383 (7th Cir. 1988); see also *Somerset Welding & Steel, Inc.* v. *NLRB*, 987 F.2d 777, 782 (D.C. Cir. 1993) (remanding for NLRB to consider, *inter alia*, whether "changes in management and employee turnover have made a bargaining order unnecessary"); *Montgomery Ward & Co.* v. *NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990).

practices that were less severe and pervasive than those at issue here.[8]

Petitioner contends (Pet. 16) that the district court "gave entirely too much deference to the recommendation of the ALJ." The district court, however, issued the interim bargaining order based on its "own review" of the record, as well as on the ALJ's findings and conclusions. Pet. App. 4a. As the Seventh Circuit has explained, moreover, an ALJ's decision is "relevant to the propriety of [S]ection 10(j) relief." *Bloedorn* v. *Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). Because the ALJ has "presided over the merits hearing" as the NLRB's "first-level decisionmaker," "the ALJ's factual and legal determinations supply a useful benchmark against which the [Regional] Director's prospects of success may be weighed." *Ibid.*

3. Petitioner contends (Pet. 19-23) that this Court should grant review to resolve an asserted "conflict" among the circuits with respect to the standard for granting interim injunctive relief under Section 10(j). There is no square conflict on that question that

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[8] See, *e.g.*, *Skyline Distribs.* v. *NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996) (noting that unfair labor practices consisted "solely" of "the grant of economic inducements"); *Kinney Drugs, Inc.* v. *NLRB*, 74 F.3d 1419, 1432 (2d Cir. 1996) (concluding that all but one of the unfair labor practices were "trivial" and that the other was not "egregious"). Petitioner contends (Pet. 15), citing *P.H. Nursing Home, Inc.*, 332 N.L.R.B. No. 21 (Sept. 28, 2000), that the NLRB itself may reject the ALJ's recommended *Gissel* order. *P.H. Nursing Home* is unlike this case. There, the employer did not time a wage increase to discourage employee support for the union, and none of the employer's misconduct "emanated from upper level management." 332 N.L.R.B. No. 21, slip op. 12-13. *P.H. Nursing Home* thus did not involve the employer conduct that the ALJ and the district court found was particularly likely to affect adversely the results of any election here.

warrants the Court's review. The courts of appeals, while adopting different verbal formulations of the standard, require district courts to consider similar criteria. It is thus unlikely that those formulations would produce differences in outcome. In any event, since the Ninth Circuit already applies petitioner's preferred formulation, this Court's adoption of that formulation would be of no benefit to petitioner.

a. Some courts of appeals, including the Ninth Circuit, assess whether Section 10(j) relief is "just and proper," 29 U.S.C. 160(j), by "evaluat[ing] the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry." *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989). Accordingly, those courts consider, as part of the "just and proper" inquiry, whether the Regional Director has demonstrated that "she has some likelihood of succeeding on the merits," that "the labor effort would be irreparably harmed absent the injunction," and that "the irreparable harm outweighs any irreparable harm to the employer." *Electro-Voice*, 83 F.3d at 1567-1568; accord, *e.g.*, *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 456-461 (9th Cir. 1994) (en banc).

Other courts of appeals apply a two-part analysis of the propriety of Section 10(j) relief, which considers whether the Regional Director has demonstrated "reasonable cause" to believe that the NLRA was violated and has demonstrated that interim relief would be "just and proper" under the circumstances. See, *e.g.*, *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Pilot Freight*, 515 F.2d at 1188-1189. That analysis may also involve the consideration of "general equitable criteria." *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d

Cir. 1980). The "reasonable cause" inquiry, like an inquiry into the "likelihood of success on the merits," considers the strength of the Regional Director's position. See, *e.g.*, *Pilot Freight*, 515 F.2d at 1189. The "just and proper" inquiry may consider whether interim relief is necessary "to prevent irreparable harm or to preserve the status quo," *Hoffman* v. *Inn Credible Caterers, Ltd.*, 247 F.3d 360, 368 (2d Cir. 2001); whether interim relief would impose an unwarranted burden on the employer, see *Calatrello* v. *"Automatic" Sprinkler Corp.*, 55 F.3d 208, 215 (6th Cir. 1995); and "the public interest," *Hirsch* v. *Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); accord, *e.g.*, *Conagra*, 70 F.3d at 164.

The courts of appeals thus appear to be in substantial agreement with respect to the criteria under which district courts are to evaluate a Regional Director's request for interim injunctive relief under Section 10(j). See *Sharp* v. *Parents in Community Action, Inc.*, 172 F.3d 1034, 1038 (8th Cir. 1999) (noting that "the significance of this theoretical debate [about the test for Section 10(j) relief] diminishes when one recalls the flexibility inherent in traditional equitable principles"). Any differences in approach among the circuits seem unlikely to produce differences in outcome.

b. Finally, even if any variation among the circuits with respect to the standard for Section 10(j) relief warranted the Court's resolution in an appropriate case, this is not such a case. Here, the district court, affirmed by the court of appeals, applied the "traditional equitable principles" test advocated by petitioner in determining that the Acting Regional Director was entitled to Section 10(j) relief. See Pet. App. 3a-5a, 10a-11a, 54a-55a. Although petitioner suggests (Pet. 21-22) that the district court actually applied a "reason-

able cause" test, that suggestion is incorrect. As the court of appeals explained, although the district court used the term "reasonable cause" in the text of its injunction decree (see Pet. App. 6a), the order accompanying the decree made "clear" that "the district court identified and applied the correct legal standard in reaching its decision, regardless of the 'reasonable cause' language." *Id.* at 5a n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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