OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 24-05 **July 16, 2024**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Section 10(j) Injunctive Relief and the U.S. Supreme Court's Decision in *Starbucks Corp. v. McKinney*

At the start of my tenure as General Counsel three years ago, I, like my predecessors, issued a GC Memorandum regarding Section 10(j) injunctive relief under the National Labor Relations Act. Specifically, in GC Memorandum 21-05 I confirmed that effective enforcement of our statute requires that we timely protect employees' Section 7 rights to engage in union and protected concerted activities free from retaliation, and that Section 10(j) provides the Agency with an important tool in ensuring that employees' rights will be adequately protected from remedial failure due to the passage of time. Thus, I stated then, and repeat now, it remains my intention to aggressively seek Section 10(j) injunctions where necessary to preserve the status quo and efficacy of Board final orders.

For almost eighty years, the Agency has utilized this important enforcement tool that Congress provided to us in order to promote industrial stability and diminish workplace conflict. I applaud Regional offices and the Injunction Litigation Branch (ILB), with whom Regional offices have consulted, for the significant successes that they have achieved during and prior to my tenure as General Counsel in securing Section 10(j) injunctions in a wide array of cases, including those referenced in GC Memorandum 21-05. *See also, e.g., Rubin v. Grill Concepts Services, Inc.*, 2023 WL 334017 (9th Cir. Jan. 20, 2023) (affirming district court Section 10(j) order requiring employer to bargain in good faith); *Coffman v. UPS Supply Chain Solutions*, 2024 WL 36174 (E.D. Cal. Jan. 3, 2024) (ordering interim reinstatement of unlawfully discharged lead union activist after election victory); *Sullivan v. HSA Cleaning, Inc.*, 2023 WL 4362749 (D. N.J. July 6, 2023) (ordering

interim reinstatement of two union activists discharged during organizing campaign); *Hitterman v. List Industries, Inc*., 610 F. Supp. 3d 1105 (N.D. Ind. 2022) (issuing interim reinstatement order and *Gissel* bargaining order, among other remedies). I also applaud Regional offices for comporting with GC Memorandum 23-01 by securing timely and effective remedies for violations of employees' statutory rights through interim settlement agreements resolving the Section 10(j) portion of a case where an agreement for an overall settlement of the entire matter is not obtained.[1]

Earlier this year, the United States Supreme Court granted certiorari in *Starbucks Corp. v. McKinney* to resolve a split among the circuit courts of appeals on the applicable standard to use in Section 10(j) cases. As you know, Courts in the Third, Fifth, Sixth, Tenth, and Eleventh Circuits applied a two-part test that inquired into whether there was (1) reasonable cause to believe that a violation occurred and (2) whether injunctive relief was just and proper. Courts in the Fourth, Seventh, Eighth, and Ninth Circuits applied the traditional four-factor test used for preliminary injunctions generally, which inquired into whether: (1) petitioner has a likelihood of success on the merits, (2) there is a likelihood of irreparable harm in the absence of an injunction, (3) the balance of harms favors injunctive relief, and (4) the public interest supports the injunction. Courts in the First Circuit considered "reasonable cause" as a threshold issue, but also considered all four traditional factors. Courts in the Second Circuit applied the two-part test, but explicitly considered the irreparable harm, balance of harms, and public interest factors as part of the "just and proper" analysis.

On June 13, 2024, the United States Supreme Court issued its decision in *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024), setting a uniform standard applicable to all Section 10(j) injunction petitions. It determined that the four-factor test articulated in *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7 (2008), which was already being applied by the Fourth, Seventh, Eighth, and Ninth Circuits where we had successfully obtained injunctive relief in numerous cases, should be the test applicable to all injunction petitions filed under Section 10(j) of the National Labor

[1] Underscoring the importance of Section 10(j) relief, I also announced an initiative, through GC Memorandum 22-02, to seek injunctions in certain case where workers have been subject to threats or other coercive conduct during an organizing campaign.

Relations Act. *Starbucks Corp.*, 144 S. Ct. at 1575, 1577. In its decision, the Court noted that the "reasonable cause" prong of the two-part test applied by the Sixth Circuit, which is where this particular case arose, was too lenient as it would allow a district court to grant Section 10(j) relief based on "a minimally plausible legal theory, while ignoring conflicting law or facts." *Starbucks Corp.*, 144 S. Ct. at 1578. It advised that courts must consider the petitioner's likelihood of success on the merits and "must evaluate any factual conflicts or difficult questions of law." *Id*.

Please be advised that the Supreme Court's decision does not change my approach to seeking Section 10(j) injunctive relief in appropriate cases. Notably, we do not seek Section 10(j) relief in cases where the legal theory is "minimally plausible", nor do we pursue injunctive relief under Section 10(j) without a full evaluation and careful consideration of any factual conflicts or difficult questions of law. And, we do not pursue Section 10(j) relief based solely on a novel theory of law or one not otherwise supported by extant Board law. Thus, while the Supreme Court's decision in *Starbucks Corp.* provides a uniform standard to be applied in all Section 10(j) injunctions nationwide, adoption of this standard will not have a significant impact on the Agency's Section 10(j) program as the Agency has ample experience litigating Section 10(j) injunctions under that standard. *See*, *e.g.*, *Small v. Avanti Health Sys., LLC,* 661 F.3d 1180, 1187 (9th Cir. 2011); *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 541-42 (4th Cir. 2009); *Lineback v. Spurlino Materials, LLC,* 546 F.3d 491, 500 (7th Cir. 2008). And, not only do we have experience litigating under that standard, Regions have a high rate of success in obtaining Section 10(j) injunctions under the four-part test, a success rate equivalent to or higher than the success rate in circuit courts that applied the two-part test. *See* NLRB, *Section 10(j)Injunctions-Litigation Success Rate Report* (2024), https://www.nlrb.gov/reports/nlrb-case-activity-reports/section-10j-injunctions-litigation-success-rate-report.

ILB will be providing further guidance on an ongoing basis to Regional offices, particularly to those who previously litigated under the two-part test, to ensure that they are equipped with our strong arguments under the four-part equitable test. As I intend to continue the Agency's Section 10(j) program in full force, Regional office requests for Section 10(j) authorization will continue to be processed and injunction petitions will continue to be litigated pursuant to our decades-long experience in applying and litigating

under the four-part test. And, I have no doubt that Regions will continue to be successful in obtaining injunctive relief at around the same rate.

Thank you all for your hard work and dedication to the mission of the Agency and to the public that we faithfully serve.

J.A.A.