

QUICK HEARINGS AS A STRIKE AGAINST BUREAUCRATIC DELAY: AN ALTERNATIVE ADMINISTRATIVE PROCEDURE FOR 10(J) CASES BEFORE THE NLRB

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The National Labor Relations Board (NLRB or Board) is charged with enforcing the keystone statute of U.S. labor law, the National Labor Relations Act (NLRA or Act), including its prohibition against employers' firing workers in retaliation for union organizing. In a time of rising labor agitation, however, the NLRB's procedures for remediating such alarmingly frequent discharges are woefully inadequate. This Note examines the perennially underutilized section 10(j) of the NLRA, which provides for injunctive relief in discriminatory discharge cases where the Board's own slow-moving administrative procedures would defeat the purpose of the Act, and explains why current 10(j) procedures are plagued by delay and failure. It then proposes an alternative administrative procedure for 10(j) cases—including a delegation of prosecutorial discretion, quick evidentiary hearings, and review of Administrative Law Judge determinations by the Board—that would address many of the section's shortcomings. The Note considers the salutary consequences of implementing this alternative procedure through notice and comment rulemaking before concluding by demonstrating how this procedure would enhance the Board's enforcement of the Act. Ultimately this Note argues that section 10(j) can, through long-overdue procedural reform, become a robust guarantee of the statutory rights of workers that are at the heart of the NLRB.

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INTRODUCTION

The highly publicized firing of Chris Smalls and Gerald Bryson, leaders of the nascent Amazon Labor Union, from their Staten Island, New York warehouse jobs cast into sharp relief the risks workers face when organizing their workplaces.¹ The years following the COVID-19 lockdowns have seen a marked increase in union organizing among nonunion workers in the U.S.² Prolific accusations that employers, including major corporations like Starbucks and Amazon, illegally retaliate against organizing workers through disci-

¹ See Andrea Hsu & Alina Selyukh, *He Was Fired by Amazon 2 Years Ago. Now He’s the Force Behind the Company’s 1st Union*, WBUR (Apr. 2, 2022), <https://www.wbur.org/npr/1090353185/amazon-union-chris-smalls-organizer-staten-island> [<https://perma.cc/BQ4K-BR66>] (reporting that Smalls was fired for leading a 2020 walkout in protest of Amazon’s COVID-19 policies); Karen Weise, *A Judge Ruled That Amazon Must Reinstate a Staten Island Worker Who Was Fired*, N.Y. TIMES: DAILY BUSINESS BRIEFING (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/business/amazon-protest-firing-ruling.html> [<https://perma.cc/ERN6-4BV4>] (describing Bryson’s termination and reinstatement efforts); see also King *ex rel.* NLRB v. Amazon.com Services, No. 1:22-cv-01479-DG-SJB, 2022 WL 17083273, at *1 (E.D.N.Y. Nov. 18, 2022) (considering a 10(j) injunctive petition related to Bryson’s termination).

² See *Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22*, NLRB (Oct. 6, 2022), <https://www.nlr.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in> [<https://perma.cc/RZY9-3DWJ>] (noting 2510 union election petitions in fiscal year 2022, compared to 1638 in 2021). This trend is supported anecdotally, as well. See, e.g., Thomas Kochan & Wilma Liebman, *America’s Seeing a Historic Surge in Worker Organizing. Here’s How To Sustain It*, WBUR (Sept. 5, 2022), <https://www.wbur.org/cognoscenti/2022/09/05/worker-organizing-labor-day-thomas-kochan-wilma-liebman> [<https://perma.cc/E2K6-3LSP>]; Andrea Hsu, *Starbucks Workers Drive Nationwide Surge in Union Organizing*, NPR (May 1, 2022, 5:00 AM), <https://www.npr.org/2022/05/01/1095477792/union-election-labor-starbucks-workers-food-service-representation> [<https://perma.cc/RKD8-UUAX>]; Michael Sainato, *US Sees Union Boom Despite Big Companies’ Aggressive Opposition*, GUARDIAN (July 27, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/jul/27/us-union-boom-starbucks-amazon> [<https://perma.cc/P7Q8-NH6H>].

pline or termination accompany these unionization campaigns.³ The National Labor Relations Board (“NLRB” or “Board”) has responded to these alleged violations of U.S. labor law with scrutiny and enforcement.⁴ Generally, the oversight relationship between the NLRB and the employers of organizing workers is acrimonious. For example, Starbucks has publicly accused the NLRB of collusion with workers and bias against management in its facilitation of contested union elections.⁵ As the current unionization surge unfolds, employers are certain to continue contesting the NLRB’s broad array of policies, procedures, and enforcement priorities. Less certain is whether the tools at the Board’s disposal will prove both sufficiently nimble to protect unionizing workers and rigorous enough to survive judicial scrutiny.

Union organizing campaigns and collective bargaining are highly dynamic processes that implicate explicit statutory rights of

³ See, e.g., Hilary Russ, *Starbucks Union Claims Company Closed Two Cafes in Retaliation*, REUTERS (Aug. 23, 2022, 3:47 PM), <https://www.reuters.com/business/retail-consumer/starbucks-workers-union-claims-retaliation-closing-two-cafes-2022-08-23> [<https://perma.cc/9J2T-TAYR>] (documenting accusations that Starbucks shuttered locations in Kansas City and Seattle after workers petitioned for union elections); Noam Scheiber, *Amazon Suspends Workers After Protest Over Warehouse Fire*, N.Y. TIMES (Oct. 4, 2022) (quoting U.S.C. § 157), <https://www.nytimes.com/2022/10/04/business/amazon-warehouse-suspended-workers.html> [<https://perma.cc/3FQH-KZ7J>] (reporting the union’s intent to file charges with the NLRB alleging Amazon retaliated against protected concerted activity for “mutual aid or protection”); Erica Grieder, *Upper Kirby Starbucks Becomes First in Houston to Unionize*, HOUSTON CHRON. (Sept. 23, 2022, 6:03 PM), <https://www.houstonchronicle.com/business/article/Houston-has-its-first-unionized-Starbucks-17462541.php> [<https://perma.cc/UNH8-7CDZ>] (“The lead organizer, Josh DeLeon, . . . said he was fired Saturday, the last day of voting [in the union election at his workplace].”).

⁴ See, e.g., Noam Scheiber, *Regulators Accuse Amazon of Singling Out Union Organizers for Discipline*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/business/economy/amazon-labor-union-nlr.html> [<https://perma.cc/RQ8L-HJ95>] (documenting NLRB actions against Amazon); Josh Eidelson, *U.S. Labor Board Accuses Starbucks of Retaliatory Firings*, BLOOMBERG (May 6, 2022, 7:57 PM), <https://www.bloomberg.com/news/articles/2022-05-06/u-s-labor-board-accuses-starbucks-of-violating-law-in-n-y> [<https://perma.cc/M2UE-LAV6>] (same against Starbucks); Daniel Wiessner, *Apple Interfered with Union Drive at NYC Store, Says U.S. Labor Agency*, REUTERS (Oct. 6, 2022, 6:43 AM), <https://www.reuters.com/legal/government/apple-interfered-with-union-drive-nyc-store-says-us-labor-agency-2022-10-05> [<https://perma.cc/V8KU-NCK8>] (same against Apple).

⁵ Letter from Zabrina Jenkins, Acting Exec. Vice President and Gen. Couns., Starbucks Corp., and Kimberly J. Doud, Couns., Starbucks Corp., to Lauren M. McFerran, Chairman, NLRB, and Jennifer A. Abruzzo, Gen. Couns., NLRB (Aug. 15, 2022), <https://aboutblaw.com/4ty> [<https://perma.cc/6SRV-N4G8>] (asserting, among other things, that “National Labor Relations Board personnel in NLRB Region 14 and elsewhere have engaged in highly improper, systemic misconduct involving Starbucks and Workers United”).

employees, unions, and employers.⁶ Employers that transgress the legal bounds of their discretion and unlawfully terminate employees threaten both the right of workers to act collectively without retaliation and the right of unions to organize without the chilling effects firings have on campaigns. These harms can be irreparable.⁷ Accordingly, the National Labor Relations Act (“NLRA” or “Act”) provides for the NLRB to petition district courts for injunctive relief to preserve parties’ rights while it more fully adjudicates alleged misconduct.⁸ Petitions for injunctive relief under section 10(j) of the NLRA are a potentially potent way to protect these rights through court orders reinstating workers fired for union organizing.⁹ With union organizing on the rise, this statutory provision has recently received renewed attention.¹⁰ As a remedy, however, 10(j) injunctions are not as dynamic as the situations they seek to police and take months or years to issue, if they are issued at all.¹¹ For decades, both organized labor and management have criticized the administrative

⁶ See National Labor Relations Act § 1, 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”); *id.* § 7, 29 U.S.C. § 157 (enumerating employees’ rights); Labor Management Relations Act, 1947 § 1, 29 U.S.C. § 141 (“Industrial strife . . . can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other . . .”).

⁷ See Memorandum GC 22-02 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, at 1 (Feb. 1, 2022), <https://apps.nlr.gov/link/document.aspx/09031d4583683bd0> [<https://perma.cc/Q32F-8X9M>] (noting the potential for “irreparable destruction of employee rights resulting from employers’ unlawful responses to workplace organizing campaigns”); *infra* note 74 and accompanying text.

⁸ National Labor Relations Act §§ 10(j), 10(l), 29 U.S.C. §§ 160(j), 160(l). Section 10(j) provides for injunctive relief at the discretion of the NLRB while section 10(l) mandates injunctive relief in the event of certain specified misconduct by labor organizations.

⁹ See, e.g., Memorandum GC 21-05 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers (Aug. 19, 2021) [hereinafter Abruzzo Memorandum], <https://apps.nlr.gov/link/document.aspx/09031d458351637c> [<https://perma.cc/R587-5E2R>] (“I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act.”); Catherine Hodgman Helm, Comment, *The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions*, 7 INDUS. RELS. L.J. 599, 607 (1985) (“[T]he case for section 10(j) relief—no matter what the violation—is a strong one.”).

¹⁰ Since becoming General Counsel in early 2021, Jennifer Abruzzo has released three memos directly addressing 10(j) cases. See Abruzzo Memorandum, *supra* note 9; *infra* notes 174, 187.

¹¹ See *infra* Section I.C.

procedures the Board deploys in 10(j) cases.¹² These perceived failures have contributed to a general sense that the NLRB is falling short of its mandate to protect the rights of workers to organize their workplaces.¹³

One consequence of such criticism is an effort to reform section 10(j) through the proposed PRO Act, introduced and passed through the House by the Democratic majority in 2021.¹⁴ Notwithstanding some limited bipartisan support,¹⁵ statutory reform is unlikely given general Republican opposition to the PRO Act and the continued existence of the filibuster.¹⁶ With legislative solutions stymied, the potential for change is ripest through administrative reform within the NLRB itself.

¹² See, e.g., Randal L. Gainer, Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 IND. L.J. 515, 517 (1981) (arguing current procedures are too slow and arbitrary for workers and unions, ignoring many meritorious claims); James P. Osick, *Compelling Collective Bargaining Under Section 10(j) of the National Labor Relations Act*, 36 WASH. & LEE L. REV. 187, 202 (1979) (“*Gissel* situations [seeking injunctive bargaining orders under section 10(j)] present serious problems, however, in protecting the legitimate rights of the parties involved, and the present administrative procedures and remedies do not appear capable of providing workable solutions.”); Louis P. DiLorenzo, *The Management Perspective: A Management Practitioner’s Observations Concerning the Latest General Counsel’s Initiatives Regarding the Use of 10(j) Injunctions During Organizing Campaigns*, in RESOLVING LABOR AND EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 17, 26 (Ross E. Davies ed., 2012) (contending that under current 10(j) procedures, “the employer is effectively deprived of its day in court”); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FLA. INT’L UNIV. L. REV. 361, 377 (2010) (“[T]he NLRB’s remedial authority as practiced seems particularly deficient [including under section 10(j)].”).

¹³ See Charles J. Morris, *A Tale of Two Statutes Redux: Anti-Union Employment Discharges Under the NLRA and RLA, with a Solution*, 40 BERKELEY J. EMP. & LAB. L. 295, 297 (2019) (characterizing the enforcement of the NLRA’s protections as “virtually a total failure”).

¹⁴ Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 108 (2021) (giving statutory priority to injunctive relief in cases of employer violations of employees’ NLRA section 7 rights under sections 8(a)(1), (3), and (4) of the Act and repealing sections 10(k) and 10(l)).

¹⁵ Mark Weiner, *John Katko Among 5 in House GOP Who Vote for Pro-Union Bill Expanding Labor Rights*, SYRACUSE.COM (Mar. 10, 2021, 11:15 AM), <https://www.syracuse.com/politics/2021/03/john-katko-among-5-in-house-gop-who-vote-for-pro-union-bill-expanding-labor-rights.html> [<https://perma.cc/42WX-M8AF>] (naming five Republican representatives who voted with the Democratic majority to pass the PRO Act).

¹⁶ See *The PRO Act: A Radical Union Boss Wish List*, COMM. ON EDUC. & THE WORKFORCE, <https://republicans-edlabor.house.gov/legislation/pro-act.htm> [<https://perma.cc/M743-BG8V>] (compiling House Republican and interest group opposition to the PRO Act); Steve Wishnia, *Facing Filibuster of PRO Act, Senate Democrats to Add Employer Fines to Budget Bill*, LABORPRESS (July 21, 2021), <https://www.laborpress.org/facing-filibuster-of-pro-act-senate-democrats-to-add-employer-fines-to-budget-bill> [<https://perma.cc/FVG3-6T9D>] (noting the “almost certain filibuster of the [PRO] Act by Senate Republicans”).

Despite some attempts to heed the many calls for “substantive revision of the [Board’s 10(j)] administrative processes,”¹⁷ the procedure for procuring injunctive relief for violations of workers’ and unions’ rights has not meaningfully changed since its inception in 1947.¹⁸ But the NLRB possesses tools at its disposal to overhaul its procedures in ways that address the concerns of both labor and management. One of the NLRB’s most powerful tools is also one of its most underutilized: administrative rulemaking.¹⁹

This Note argues that the NLRB should utilize its rulemaking authority to promulgate a new administrative procedure for handling 10(j) cases. The alternative procedure proposed here would delegate the Board’s prosecutorial functions to its Regional Directors, provide quick evidentiary hearings before an Administrative Law Judge, and leave the final authority to issue an injunctive petition with the Board itself.²⁰ These changes would better utilize the Board’s resources, reduce duplicative factfinding, and align the structure of 10(j) proceedings with other kinds of adjudicatory proceedings before the Board. While 10(j) injunctions can be sought against both unions and employers,²¹ they arise most frequently in the context of alleged employer misconduct and unlawful discharge.²² This Note largely focuses on 10(j) procedures in the context of union supports during initial recognition and contract campaigns.

This Note joins a long tradition, among both legal academics and practitioners, that is deeply critical of the NLRB’s 10(j) procedures.²³

¹⁷ Osick, *supra* note 12, at 202; *see also* Estreicher, *supra* note 12, at 363 (identifying “changes the NLRB can implement on its own, without statutory amendment, to improve its administration of the NLRA”); *infra* note 174 (collecting recent examples of General Counsels emphasizing the use of 10(j) in policy memos).

¹⁸ *See* Morris, *supra* note 13, at 318–20 (surveying the history of 10(j) relief and its use by various NLRB General Counsels from the 1940s to the 2010s).

¹⁹ 29 U.S.C. § 156 (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act, 5 U.S.C. §§ 551–559], such rules and regulations as may be necessary to carry out the provisions of this Act.”).

²⁰ I thank former NLRB Regional Director and former Acting General Counsel Dan Silverman for originally conceptualizing this proposed alternative procedure. *See infra* notes 59, 88 and accompanying text.

²¹ *Section 10(j) Categories*, NLRB, <https://www.nlr.gov/what-we-do/investigate-charges/10j-injunctions/section-10j-categories> [<https://perma.cc/ASL5-QNB8>] (listing fifteen categories of conduct by both management and labor that may warrant injunctive relief under section 10(j)).

²² *See* NLRB, SECTION 10(J) MANUAL USER’S GUIDE § 2.1 (2020) [hereinafter 10(J) MANUAL] (listing “Interference with Organizational Campaign” with or without majority union support as the first two categories of 10(j) cases); *id.* § 5.6 (dedicating a section to “Nip-in-the-bud and *Gissel* Cases”).

²³ *See supra* note 12 and accompanying text; *see also, e.g.,* Helm, *supra* note 9, at 600 (“Since 1960, labor experts have peppered the pages of journals and Board reports with

It also draws from others' ideas that the NLRB would benefit institutionally from more frequent use of rulemaking.²⁴ But the proposals considered here go further by advocating systemic—rather than discretionary or merely symbolic—changes to 10(j) enforcement.²⁵ By challenging the entire structure of 10(j) case handling, this Note invites a thorough reexamination and reimagination of this injunctive device, its attendant investigatory and administrative procedures, and its outcomes for workers at the points in unionization campaigns when they are most vulnerable to illegal retaliation.

Part I of this Note describes and evaluates the current Board procedure for handling 10(j) cases, including the current results of ineffective relief under the prevailing scheme. Part II proposes in detail an alternative procedure and discusses how the alternative better implements the purpose of section 10(j). Part III considers the rulemaking authority of the NLRB and argues that implementing the alternative 10(j) procedure through rulemaking would have salutary consequences. Finally, Part IV explores the alternative procedure's implications in practice, considers its effects on the specific category of discriminatory discharge petitions as a case study, and addresses other reforms and potential critiques.

I

10(J) INJUNCTIONS TODAY

While injunctions in the labor context are today mostly confined to section 10(j), the salience of the “labor injunction” stretches back at least one hundred years. 10(j) emerged out of the curious and dramatic history of the labor injunction, a history traced in brief detail in the first Section of this Part. The second Section of this Part outlines the contemporary procedures the Board utilizes to prosecute 10(j) cases, while the third and final Section evaluates these procedures and their shortcomings.

proposals to reduce the delay in unfair labor practice proceedings.”); Morris, *supra* note 13. Professor Morris's 2019 article, revisiting the 10(j) problem two decades after his initial analysis and finding the situation had only deteriorated, was particularly influential, and this Note is conceived as responding to the same problems he identified but suggesting stronger procedural solutions. For Morris's original article, see Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317 (1998).

²⁴ See *infra* notes 132, 147 and accompanying text.

²⁵ See *infra* Section IV.B.

A. A Brief Historical Background of Section 10(j)

Relations between employees, employers, and labor organizations are governed under federal law by the NLRA, originally passed in 1935.²⁶ Prior to the amendment of the NLRA and the enactment of section 10(j) by the Labor Management Relations Act of 1947 (“LMRA” or “Taft-Hartley Act”),²⁷ injunctive relief in the labor law context already had a complicated history. In the nineteenth century, federal courts issued broad injunctions at the request of management to quash labor organizing and strikes.²⁸ Critics condemned this as “government by injunction,”²⁹ and Congress responded by codifying a policy against labor injunctions in the Norris-LaGuardia Act of 1932.³⁰ The LMRA, which in 1947 generally shifted the balance of U.S. labor law in favor of management, revived labor injunctions but cabined them within the NLRB.³¹ The NLRB must implement the LMRA’s policy “to equalize legal responsibilities of labor organizations and employers,”³² and section 10(j) “was meant to provide temporary injunctive relief in every case that could not be effectively remedied through the NLRB’s lengthy adjudicatory procedures.”³³

²⁶ 29 U.S.C. §§ 151–169.

²⁷ Labor Management Relations Act, H.R. 3020, 80th Cong. § 10(j) (1947) (enacted at 61 Stat. 136, 149) [hereinafter LMRA].

²⁸ See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930) (providing a comprehensive history of the use and abuse of injunctions against organized labor); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (providing in Parts III, IV, and V a succinct history of the labor injunction and efforts to end its use); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017) (exploring the connections between the policy backlash against the labor injunction and the development of modern civil procedure).

²⁹ Gainer, *supra* note 12, at 520.

³⁰ Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101); see also Gainer, *supra* note 12, at 516 n.5 (“This affirmative grant of jurisdiction [in section 10(j)] was necessary since in 1932 Congress, by means of the Norris-LaGuardia Act . . . had for all practical purposes, eliminated the use of labor injunctions by federal courts.”).

³¹ LMRA, *supra* note 27; see also Gainer, *supra* note 12, at 521–22 (noting that the LMRA Congress favored the increased use of injunctions against unions and “was forced by the dynamics of the legislative process to accede to the demands of the prolabor minority that only the Board be given the authority to petition for temporary injunctions and that the Board be allowed to seek injunctions against employer unfair labor practices”) (citation omitted). For comprehensive accounts of section 10(j)’s legislative history, see generally *id.* at 518–22, and William K. Briggs, Note, *Deconstructing “Just and Proper”: Arguments in Favor of Adopting the “Remedial Purpose” Approach to Section 10(j) Labor Injunctions*, 110 MICH. L. REV. 127, 142–49 (2011).

³² S. REP. NO. 105-80, at 1 (1947), reprinted in 1 SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. AND PUB. WELFARE, *LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947*, at 407 (Comm. Print 1974).

³³ Gainer, *supra* note 12, at 516.

Crucially, “Congress left the effect to be given section 10(j) to the discretion of the Board.”³⁴

B. Current 10(j) Policy and Procedures

10(j) petitions are formal administrative requests by the NLRB to federal district courts for temporary injunctive relief while parties await the Board’s adjudication of a complaint. Accordingly, the Board does not prosecute standalone 10(j) cases. Instead, 10(j) injunctive petitions are an offshoot of unfair labor practice (“ULP”) charges filed with the NLRB in the event of alleged illegal conduct. As such, the Board’s handling of these petitions is governed primarily by the NLRB’s ULP Handbook,³⁵ though the NLRB has also produced a handbook dedicated specifically to 10(j) cases, with additional considerations and procedures.³⁶ The formal, general NLRB procedures outlined in its rules and regulations also shape the proceedings.³⁷ Under this regime, the NLRB occupies two potentially contradictory positions at once, as both the adjudicator of the underlying ULP charge and the prosecutor of the 10(j) petition seeking to apply a temporary injunction to the underlying ULP charge. As the rest of this Section demonstrates, this contradiction is the result of the procedure prescribed by the Board itself that culminates in a petition under section 10(j).

Section 8 of the NLRA outlines the types of conduct that constitute ULPs.³⁸ Section 8(a) describes employer violations, actions which undermine the rights of workers and unions set out in section 7 of the Act.³⁹ When a union or worker alleges that an employer has committed a ULP, they must file their charge with the NLRB Regional Director for the region in which the offense took place.⁴⁰ Charges are investigated by a Board agent acting in a neutral capacity,⁴¹ and the Regional Director, under the supervision of the General Counsel, uses the Board agent’s report to make the initial determination whether

³⁴ *Id.* at 522.

³⁵ NLRB, CASEHANDLING MANUAL, PART 1, UNFAIR LABOR PRACTICE PROCEEDINGS §§ 10310–10320 (2023) [hereinafter CASEHANDLING MANUAL].

³⁶ 10(j) MANUAL, *supra* note 22.

³⁷ 29 C.F.R. §§ 101–103 (2021) [hereinafter NLRB Rules and Regulations].

³⁸ National Labor Relations Act § 8, 29 U.S.C. § 158.

³⁹ *Id.* §§ 8(a), 7, 29 U.S.C. §§ 158(a), 157.

⁴⁰ NLRB Rules and Regulations, *supra* note 37, §§ 102.9–10; CASEHANDLING MANUAL, *supra* note 35, §§ 10018.2–3; see also *Unfair Labor Practice Process Chart*, <https://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> [<https://perma.cc/F7EV-K328>] (representing the steps in the ULP process as a flowchart).

⁴¹ CASEHANDLING MANUAL, *supra* note 35, §§ 10050–10070.

the charge has merit and whether to issue a complaint.⁴² This prefatory decision whether or not to issue a complaint can be reviewed by the General Counsel, since the complaint “constitutes the exercise of the General Counsel’s final authority.”⁴³ This complaint is then litigated before an Administrative Law Judge (“ALJ”) with the Regional Director acting in a prosecutorial capacity on behalf of the General Counsel.⁴⁴ The ALJ’s decision can be appealed to the Board itself which maintains final adjudicatory authority in the administrative process.⁴⁵

Within this process, the procedure for considering and seeking injunctive petitions in 10(j) cases unfolds very differently. The ULP Manual instructs that “[c]ases raising potential 10(j) and 10(l) injunctive relief should be identified as soon as possible *after the filing of the case.*”⁴⁶ The Regional Director may consider 10(j) injunctive relief upon the request of the charging party or sua sponte.⁴⁷ Further, the Regional Director need not wait until she has issued a determination on the merits of the charge to consider or recommend injunctive relief, though pursuing an actual 10(j) petition for injunctive relief before the courts does require a complaint to have already been issued.⁴⁸ Here, the similarities between the 10(j) process and the underlying ULP process diverge. If the Regional Director determines that injunctive relief is merited, she must submit a memorandum to

⁴² *Id.* §§ 10068.2–3; *see also* BNA, HOW TO TAKE A CASE BEFORE THE NLRB, ch. 2, § 2.I (Julie Gutman Dickinson, John E. Higgins, Jr. & David A. Kadela eds., 2021) (“In practice, the General Counsel is responsible for the processing and management of these cases through supervision of the regional offices.”).

⁴³ CASEHANDLING MANUAL, *supra* note 35, § 10260 (citing section 3(d) of the NLRA); *see also* NLRB Rules and Regulations, *supra* note 37, § 102.19 (outlining the charging party’s process for appealing to the General Counsel a Regional Director’s determination not to issue a complaint).

⁴⁴ *See* CASEHANDLING MANUAL, *supra* note 35, §§ 10380, 10380.3 (“As counsel for the General Counsel the trial attorney represents the public’s interests by prosecuting the complaint on behalf of the General Counsel, under the direction of Regional Office management and supervision.”); NLRB Rules and Regulations, *supra* note 37, §§ 102.15–.51 (explaining how formal proceedings are instituted by the Regional Director); *see also Unfair Labor Practice Process Chart*, *supra* note 40.

⁴⁵ NLRB Rules and Regulations, *supra* note 37, §§ 102.45–50 (detailing how ALJs’ decisions are transferred to the Board for final adjudication and enforcement and how parties may file exceptions to ALJs’ decisions with the Board).

⁴⁶ CASEHANDLING MANUAL, *supra* note 35, § 10027 (emphasis added).

⁴⁷ *Id.* § 10310.

⁴⁸ *See id.* § 10310.3 (“If the complaint has not issued by the time the Region’s 10(j) recommendation is prepared, the Region should not delay submission of its 10(j) recommendation.”). *But see* 10(j) MANUAL, *supra* note 22, § 5.1 (“The statute provides that the Board may petition a district court for temporary relief ‘upon issuance of a complaint.’ Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.”).

various bureaucratic entities within the NLRB⁴⁹: the General Counsel,⁵⁰ the Division of Advice,⁵¹ and the Injunctive Litigation Branch.⁵² Ultimately, the Board itself will weigh in on the Regional Director's recommendation if it is supported by the General Counsel.⁵³ The Regional Director makes a "paper case," usually with supporting evidence limited to affidavits, to the Board, which does not formally hear management's response to the recommendations.⁵⁴ The Board may then authorize the pursuit of 10(j) relief, at which point the Regional Director must file the 10(j) petition in district court within forty-eight hours.⁵⁵ The petition will then be litigated and the court will either grant or deny the petition.⁵⁶

The general ULP process sees the Board occupy an adjudicatory role in an adversarial process. Within this process, the procedures for 10(j) petitions shift the Board into a prosecutorial role but circumscribe its power in many layers of administrative bureaucracy. The following Section demonstrates the tensions and failings in this arrangement.

C. *Evaluating Deficiencies of Current 10(j) Practices*

The chief shortcoming of the current NLRB 10(j) procedure is delay: Months or years is too long to wait for relief when a worker is illegally fired and a union campaign is accordingly chilled. Delay—resulting from cumbersome, non-adversarial internal consultation procedures and redundant factfinding and resource allocation—is often cited by courts in denying 10(j) petitions.⁵⁷ The causes and consequences of delay and other resulting deficiencies in 10(j) procedures are most apparent when evaluated in three distinct but interrelated ways: by analyzing the procedure's baked-in inefficiencies, by reviewing how 10(j) petitions play out in courts, and by considering

⁴⁹ 10(j) MANUAL, *supra* note 22, § 5.0.

⁵⁰ *Id.* § 5.2.

⁵¹ *Id.* § 5.3.

⁵² CASEHANDLING MANUAL, *supra* note 35, § 10310.3.

⁵³ 10(j) MANUAL, *supra* note 22, § 5.5.

⁵⁴ See DiLorenzo, *supra* note 12, at 26 (criticizing the lack of opportunity for management to present evidence at the administrative stages of a 10(j) case). For an example of judicial skepticism towards these "paper cases," see *infra* note 121 and accompanying text.

⁵⁵ 10(j) MANUAL, *supra* note 22, § 5.5.

⁵⁶ See Briggs, *supra* note 31, at 129–35 (outlining the judicial standards applied when weighing 10(j) petitions); Gainer, *supra* note 12, at 534–38 (criticizing the judicial standards for 10(j) injunctive relief). See generally Jonathan M. Turner & Jesse M. Koppin, *Discovery in NLRA Section 10(j) Proceedings*, 27 A.B.A. J. LAB. & EMP. L. 385 (2012) (discussing procedures developed by district courts for hearing 10(j) petitions).

⁵⁷ See *infra* notes 68–71.

the current prophylactic effects (or lack thereof) of injunctive relief as a remedy under the NLRA.

First, the Board's current practice is inherently awkward and inefficient, requiring the Board to balance 10(j) cases on two parallel tracks. The dual, prosecutorial-and-adjudicatory role for the Board is not in itself improper and in fact is provided for by statute.⁵⁸ However, this procedure is inefficient and ineffective for several reasons. First, the involvement of so many subdivisions within the NLRB creates bureaucratic delay.⁵⁹ Second, the NLRB often must rely only on its agents' affidavits and written reports in determining whether to authorize a 10(j) petition; the persuasive power of these affidavits have been questioned by both management attorneys and courts.⁶⁰ Finally, this structure produces duplicative factfinding, since both the district court hearing the 10(j) petition and the ALJ hearing the underlying ULP must establish independent records on which to base their decisions.⁶¹ The innate shortcomings of the 10(j) procedures not only produce delay but also contribute both to inadequate results from injunctive petitions before courts and to the failure of the NLRA to prophylactically restrain unlawful terminations of union supporters.⁶²

In addition to 10(j)'s inherent inefficiencies, petitions drag out and falter in the courts at high rates. For 10(j) petitions authorized between 2010 and 2021, the NLRB fully litigated 160 injunctive petitions before district courts.⁶³ The average 10(j) petition was author-

⁵⁸ See 29 U.S.C. § 153(d) (establishing the General Counsel's prosecutorial role under the Board); *id.* § 160(b) (establishing the Board's role as adjudicator and modeling its proceedings on district court civil procedure); *id.* § 160(e) (granting the Board powers to pursue enforcement of its decisions through the courts of appeals); *id.* § 160(j) (granting the Board specific powers to seek injunctive relief through the district courts).

⁵⁹ Telephone Interview with Daniel Silverman, former Acting Gen. Couns. and former Reg'l Dir. for Region 2, NLRB (Dec. 1, 2021) (on file with author); see also *infra* notes 68–71 (discussing the deleterious effects of such delay).

⁶⁰ See DiLorenzo, *supra* note 12, at 26 (criticizing these affidavits); see also *infra* note 121 and accompanying text (noting judicial skepticism of the NLRB's section 10(j) affidavits).

⁶¹ See Telephone Interview with Daniel Silverman, *supra* note 59 (characterizing this duplicative factfinding as needlessly delaying resolution of 10(j) cases); cf. Turner & Koppin, *supra* note 56, at 389 (providing examples of the ways courts shape their factfinding and limit discovery as they hear 10(j) petitions); NLRB Rules and Regulations, *supra* note 37, § 102.45 (outlining the record ALJs are required to produce in their adjudications).

⁶² See *infra* notes 115–17 and accompanying text.

⁶³ Publicly available data aggregated from 10(j) *Injunction Activity at the National Labor Relations Board*, NLRB [hereinafter 10(j) *Injunction Activity*], <https://www.nlr.gov/what-we-do/investigate-charges/10j-injunctions> [<https://perma.cc/9HU5-X677>] (on file with author). This count includes petitions granted, granted in part, and denied. During this same period, seventy-nine additional 10(j) cases were settled after a

ized around 240 days after a charge was filed with the Regional Director.⁶⁴ Once the petition was authorized, courts on average took approximately 108 days to reach a decision.⁶⁵ 10(j) injunctions issue after almost a year if they issue at all—speedy relief this is not. During the same period, district courts denied at least in part approximately thirty-eight percent of the 10(j) petitions that reached their dockets; district courts in two circuits, the Fifth and Eleventh, denied every 10(j) petition.⁶⁶ Although the application of inconsistent controversial standards to 10(j) petitions in different circuits accounts for some of this failure rate,⁶⁷ the procedure itself is also to blame.

Over the last decade, courts have denied petitions on the grounds of delay, failure to show irreparable harm, and the balance of equities. Courts cited administrative delay as at least one reason for denying injunctive relief in around thirty-one percent of denials between 2010 and 2021.⁶⁸ Delay also comes up in denials for other reasons, such as when the passage of time has changed circumstances so dramatically

petition was authorized, ninety-eight cases were settled before a petition was authorized, and sixteen petitions were withdrawn by the Board after being authorized. *Id.* This timeframe spans three different presidential administrations, is representative of modern 10(j) cases, and represents a fluid, snapshot account of the results in such cases. I thank Bill Baker, NYU Law '22, for sharing his initial aggregation of these cases, which served as the basis of my own data.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* This percentage represents ninety-nine petitions granted to thirty-two denied and twenty-nine granted only in part. *Id.* These numbers reflect both the relatively small number of petitions that are brought as well as the fact that some petitions are granted in part and denied in part. Cases in which petitions produced both success and failure on the merits in 10(j) cases are counted as petitions granted. *See, e.g.,* *Overstreet ex rel. NLRB v. NP Red Rock, LLC*, No. 2:20-cv-02351-GMN-VCF, 2021 U.S. Dist. LEXIS 134802, at *1, 15–17 (D. Nev. July 20, 2021) (representing a mixed-result case where the court granted a *Gissel*-type injunctive bargaining order but denied reinstatement of two fired union supporters).

⁶⁷ The actual effect of the judicial standard applied is difficult to conclusively state. *Compare 10(j) Injunction Activity, supra* note 63 (documenting that, between 2010 and 2021, courts applying the equitable principles standard rejected approximately thirty-three percent of petitions while those applying the remedial purpose standard rejected approximately forty-five percent of petitions), *with* *Briggs, supra* note 31, at 130 (“As a practical matter, the remedial purpose approach results in greater judicial deference to the Board’s determinations than the equitable principles approach.”).

⁶⁸ *10(j) Injunction Activity, supra* note 63. For an example of a petition at least partly denied on the basis of delay, see *Diaz ex rel. NLRB v. Hartman & Tyner, Inc.*, No. 12-60978, 2012 U.S. Dist. LEXIS 92459, at *11 (S.D. Fla. June 29, 2012) (“The Board then waited *more than four months* [six months after the terminations at issue] before petitioning the Court for injunctive relief At this point, it is highly questionable ‘whether an order of reinstatement would be any more effective than a final Board order.’”) (citation omitted), *aff’d*, 2013 U.S. App. LEXIS 7555 (11th Cir. Apr. 16, 2013).

that injunctive relief is unlikely to return parties to the status quo,⁶⁹ when the prolonged absence of relief has decreased workers' interest in reinstatement,⁷⁰ or when purported entrepreneurial decisions by management have shifted the balance of equities against injunctive relief meant to restore the status quo.⁷¹ That around thirty-seven percent of recent decisions denying 10(j) petitions cite failure to show irreparable harm as a reason for denial also suggests that the Board's current procedure falls short in screening for truly meritorious claims and anticipating management defenses before the district courts.⁷²

Finally, the prevalence of discriminatory discharge, a violation highly amenable to remedy by 10(j) injunctions, demonstrates the normative failure of 10(j) injunctions as a prophylactic measure. Terminations in the midst of organizing and collective bargaining implicate not only the rights of the fired worker,⁷³ but also of the union that seeks to represent all of the workers, since "the discharge of active and open union supporters risks a serious adverse impact on employee interest in unionization and can create irreparable harm to the collective bargaining process."⁷⁴ In other labor contexts, injunctive relief for discriminatory discharges has largely eliminated unlawful

⁶⁹ See, e.g., *Cowen ex rel. NLRB v. Mason-Dixon Int'l*, No. 2:21-cv-05683-MCS-JC, 2021 U.S. Dist. LEXIS 162870, at *15–16 (C.D. Cal. Aug. 27, 2021) ("[T]he Court doubts that an injunction would return the parties to the status quo ante given . . . the magnitude of changed circumstances since the alleged unfair labor practices occurred The Compton facility has been closed for over a year and a half; the Unit's former positions no longer exist.").

⁷⁰ *Id.* at *9 ("The Court further questions Petitioner's evidence that the dismissed drivers remain interested in reinstatement."); *McKinney ex rel. NLRB v. Citmed Corp.*, No. 17-0234-KD-M, 2017 U.S. Dist. LEXIS 84807, at *10 (S.D. Ala. June 2, 2017) ("Speculation that the employees may move away or otherwise be unavailable for reemployment should the Board render a favorable decision, does not weigh in favor of granting the extraordinary remedy of an interim injunction requiring reinstatement of the discharged employees."); see also Helm, *supra* note 9, at 604 (noting the Aspin and Stephens-Chaney studies that found acceptance rates for reinstatement declined the longer they were offered after termination, but that "nobody refused reinstatement when the case was settled in less than a month").

⁷¹ See *Mason-Dixon*, 2021 U.S. Dist. LEXIS 162870, at *18–21 (finding that a company's subsequent investments in shifting its business towards an owner-operator model, as opposed to an employee model, meant reinstatement "would impose significant economic harm" on the company and tipped the balance of equities in favor of denying injunctive relief).

⁷² *10(j) Injunction Activity*, *supra* note 63; see, e.g., *Overstreet ex rel. NLRB v. NP Red Rock, LLC*, No. 2:20-cv-02351-GMN-VCF, 2021 U.S. Dist. LEXIS 134802, at *27–28 (D. Nev. July 20, 2021) (finding legitimate, nondiscriminatory reasons for failure to recall union supporters after COVID-19-related layoffs during an organizing campaign, despite Board arguments that such failure amounted to discriminatory discharges).

⁷³ See National Labor Relations Act § 7, 29 U.S.C. § 157 (codifying the right of employees to organize and collectively bargain).

⁷⁴ *Frankl ex rel. NLRB v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011); see also Helm, *supra* note 9, at 605 ("[Not only the wrongfully terminated worker,] but also . . . his

terminations altogether. Professor Morris's longitudinal studies comparing outcomes of discriminatory discharge claims under the NLRA and the Railway Labor Act (RLA) provide one such example.⁷⁵ Professor Morris observes that, while the RLA has had great success in reducing discriminatory discharges, the NLRA has permitted an "epidemic" of unlawful terminations to develop.⁷⁶ Although exact numbers are difficult to ascertain, workers, without question, face a significant risk of unlawful termination for participating in union activity.⁷⁷

The NLRA's casual attitude towards the rights of organizing workers reflects the fact that "[a]n employer . . . who violates the [NLRA] can rest easy in the knowledge that he can, if he chooses, avert punishment for a very long time."⁷⁸ 10(j) injunctions are not currently effective at avoiding the frustration of the NLRA's purposes by the NLRB's own procedures and are simply not enough to convince employers that they will face timely accountability and corrective action when they violate the law by firing workers for union activity. This perception is compounded by the highly visible struggles and frequent failures the NLRB has faced in court when it has pursued 10(j) petitions;⁷⁹ employers have good reason to view the Board as a paper tiger and the NLRA's prohibitions against unlawful terminations as

fellow employees may be injured if he is not reinstated. His failure to return to the workplace may chill the exercise of their section 7 rights.") (citation omitted).

⁷⁵ Morris, *supra* note 13 (discussing the success of the Railway Labor Act's injunctive relief provisions in reducing discriminatory discharges and comparing the NLRA unfavorably to the RLA).

⁷⁶ *Id.* at 296.

⁷⁷ See *id.* at 300–05 (finding that more than eight hundred thousand workers were awarded backpay for discriminatory discharges since the NLRA's passage and noting the deficiencies in such data); Samuel Estreicher & Jeffery M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 348 (2014) (collecting scholarship on terminations without cause and noting the statistical difficulties). For a union-side study of wrongful terminations for union activity, see CELINE McNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., UNLAWFUL 1 (2019) ("[O]ne out of five union election campaigns involves a charge that a worker was illegally fired for union activity.").

⁷⁸ Helm, *supra* note 9, at 599 (noting also that in 1980 the median time between the filing of a ULP charge and the circuit court's final decision on the charge was 969 days); Estreicher, *supra* note 12, at 371–72 (documenting average timeframes between stages of 10(j) cases); Memorandum GC 19-02 from Peter B. Robb, Gen. Couns., to All Div. Heads, Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Dec. 7, 2018), <https://apps.nlr.gov/link/document.aspx/09031d4582a0f839> [<https://perma.cc/7LEV-WJCJ>] (noting that since the 1980s, the average time between just the filing of a meritorious ULP charge and the issuance of a complaint by a Regional Director increased from between forty-four and fifty-five days to 128 days by 2018).

⁷⁹ See *supra* notes 66–72 and accompanying text.

practically unenforceable in all but the rarest case. Delay and evidentiary shortcomings combine to produce 10(j)'s prophylactic failure.

The NLRB's unsuccessful attempt to win Gerald Bryson reinstatement to his job in Amazon's Staten Island warehouse through a 10(j) injunctive petition serves to illustrate how these shortcomings compound to fail workers.⁸⁰ The conduct for which Bryson was fired—advocating greater protections against the risk of COVID-19 infection and protesting Amazon's failure to implement adequate health precautions—occurred in March and April 2020, and Amazon fired him in April 2020.⁸¹ Bryson filed the underlying ULP charge in June 2020 and the NLRB issued a complaint in December of that year.⁸² However, owing to the delays inherent in the current 10(j) procedure, the NLRB did not file an injunctive petition in district court until July 2022.⁸³

The intervening two years saw several changes that undermined the injunctive petition. First, the Amazon Labor Union won its representation election at the warehouse, indicating a lack of irreparable harm to the organizing effort;⁸⁴ delay paradoxically turned a victory for the union into defeat for Bryson. Second, the district court declined to credit Bryson's claims about his status as a union leader. Bryson's contemporaneous affidavit describing his role as a union leader, collected in 2020 as part of the NLRB's "paper case" for a 10(j) injunction, was outweighed by Chris Smalls's 2022 deposition in the underlying ULP proceeding. Smalls testified that Bryson often had to explain who he was to new workers at the Amazon warehouse, which the court felt undercut claims that Bryson's firing chilled organizing efforts.⁸⁵ Finally, the district court expressed skepticism of the original affidavits and found general evidentiary shortcomings in the NLRB's case.⁸⁶ Ultimately, Bryson will have to wait for a final determination by the Board of the underlying ULP charge, which is

⁸⁰ See *King ex rel. NLRB v. Amazon.com Services*, No. 1:22-cv-01479-DG-SJB, 2022 U.S. Dist. LEXIS 210056, at *26–30 (E.D.N.Y. Nov. 18, 2022) (finding reasonable cause to believe Bryson was unlawfully terminated, and therefore will likely prevail in the underlying ULP proceedings, but declining to reinstate him through a 10(j) injunction).

⁸¹ *Id.* at *2.

⁸² *Id.* at *4.

⁸³ *Id.* at *1.

⁸⁴ *Id.* at *26 (“[The Amazon Labor Union victory] strongly cuts against [the NLRB’s] contention that Amazon employees’ willingness to engage in protected concerted activities will be irreparably harmed absent Bryson’s reinstatement.”).

⁸⁵ See *id.* at *36 (“[N]otably, the record indicates that Bryson typically must explain to employees who he is, why he is organizing, and that he was fired by Amazon . . .”).

⁸⁶ See *id.* at *6 (describing the initial affidavits as “untested”); *id.* at *27 (“[T]he record does not contain adequate concrete, non-speculative evidence to suggest that employee engagement has been hindered as a result of Bryson’s absence . . .”).

almost certain to order his reinstatement, and then a likely appeal by Amazon to the circuit court before he sees vindication of his right to organize free from unlawful termination.⁸⁷

The Board's inefficient 10(j) procedures invite substantial delay in its handling of discriminatory discharges of union supporters. This delay negatively impacts the results of the Board's 10(j) injunctive petitions before courts. Moreover, the combination of long delay and judicial skepticism of affidavit evidence renders the NLRA inconsequential as a prophylactic from the perspective of an employer committed to an aggressive union avoidance strategy and considering taking unlawful steps to quash its employees' organizing. The procedures themselves generate this dysfunction. The next Part proposes changes to these procedures that address the failings documented here.

II

AN ALTERNATIVE PROPOSAL FOR LITIGATING 10(j) PETITIONS

The current way 10(j) injunctive petitions are processed by the NLRB is "unique" in that it does not separate the General Counsel and the Regional Directors from the Board on prosecutorial decisions.⁸⁸ This process is both aberrational and ineffectual. The first Section of this Part outlines an alternative administrative procedure based in part on other adjudicatory procedures already employed by the Board as well as the appellate model utilized in the federal courts. The second Section will evaluate the merits of this alternative compared to the system that currently prevails.

A. *The Proposal*

This alternative proposal has three key features. The first is a delegation of prosecutorial discretion at the initial stages of a 10(j) case from the Board to the Regional Directors, under the supervision and guidance of the General Counsel. The second is the introduction of a short evidentiary hearing before an ALJ soon after a Regional Director's determination that a 10(j) petition is appropriate, followed by an initial ruling on the propriety and likelihood of success of the petition by the ALJ. The third aspect of this proposal is a shift in role for the Board itself, from a prosecutorial body in 10(j) cases to an appellate body before whom either party can take exception to the

⁸⁷ See NLRB Rules and Regulations, *supra* note 37, § 101.14 (permitting appeal of Board decisions in federal circuit courts).

⁸⁸ Telephone Interview with Daniel Silverman, *supra* note 59.

ALJ's decision. These changes aim to eliminate bureaucratic hurdles and provide a more thorough and public fact-finding process before the ALJ, while still preserving final decisionmaking authority in 10(j) cases with the Board. This proposal also leaves untouched the existing processes for handling underlying ULP charges and complaints and aligns 10(j) practice with the general norms of NLRB procedure.

1. *Delegation to the Regional Directors*

The first feature of this proposal is the delegation of the Board's power to its Regional Directors. As a preliminary consideration, the NLRA expressly authorizes the Board to delegate its investigatory powers. Section 11 of the NLRA states in relevant part: "Any member of the Board, or *any agent or agency designated by the Board for such purposes*, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required . . . at any designated place of *hearing*."⁸⁹

In the ULP context from which 10(j) cases arise, the NLRA in section 10(b) further provides that designated agents of the Board can initiate and facilitate evidentiary hearings.⁹⁰ The Board is directed by statute in the distinct representation and initial unionization contexts to utilize its Regional Directors for evidentiary hearings and initial determinations in a way analogous to the proposed alternative 10(j) procedures. Under section 153 of the NLRA, the Board

is also authorized to delegate to its regional directors its powers . . . to determine the unit appropriate for the purpose of collective bargaining, to investigate and *provide for hearings*, and determine whether a question of representation exists, and [to direct and certify an election], except that upon the filing of a request therefor with the Board by any interested person, the Board may *review any action of a regional director delegated to him under this paragraph*, but such a review *shall not*, unless specifically ordered by the Board, *operate as a stay of any action taken by the regional director*.⁹¹

Concerning the General Counsel, the NLRA provides:

[The General Counsel] shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, *and in respect of the prose-*

⁸⁹ 29 U.S.C. § 161(1) (emphasis added).

⁹⁰ *Id.* § 160(b) ("Whenever it is charged that any person has engaged in [an] unfair labor practice, the Board, or *any agent or agency designated by the Board* . . . , shall have power to issue . . . a complaint stating the charges . . . , and containing a *notice of hearing* before the Board . . . [or] *designated agent*") (emphasis added).

⁹¹ *Id.* § 153(b) (emphasis added).

cution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.⁹²

Taken together, this language provides a basis for the Board's authority to delegate initial prosecutorial discretion and investigatory powers in 10(j) cases to the Regional Directors under the supervision of the General Counsel. Such a delegation has in fact already received judicial approval.⁹³ The delegation is analogous to the discretion Regional Directors already exercise in their determinations of the merit of underlying ULP charges.⁹⁴ In effect, the Board would extend its preexisting guidance to Regional Directors to be "vigilant" for cases warranting 10(j) relief,⁹⁵ and the Regional Directors would "provide for [a] hearing[]" before the ALJ to aid in determining whether to pursue an injunctive petition.⁹⁶ This new structure reduces delay and streamlines 10(j) determinations by removing several layers of bureaucratic advice and consultation.⁹⁷ Regional Directors could still decide to seek injunctive relief either *sua sponte* or at a party's request, and the General Counsel, as final prosecutorial authority before the Board, could provide guidance and supervision to the Regional Directors through memoranda directing their discretion and outlining strategies for evidentiary hearings.⁹⁸

2. *Quick Hearings Before ALJs*

The second feature of this proposal is the provision of quick evidentiary hearings before an ALJ following the Regional Director's

⁹² *Id.* § 153(d) (emphasis added).

⁹³ See Muffley *ex rel.* NLRB v. Spartan Mining Co., 570 F.3d 534, 540 (4th Cir. 2009) ("Delegation of the prosecutorial decision to request relief does not interfere with the structure of the NLRA nor divest the Board of its adjudicative power. The Board may therefore lawfully delegate § 10(j) authority to the General Counsel pursuant to § 3(d) of the NLRA."); *id.* at 540 n.2 (finding that the "unambiguous language" of the NLRA and the NLRB's "established practice" support a delegation of section 10(j) authority). See generally Joseph S. Bowman, Muffley *ex rel.* NLRB v. Spartan Mining Co., 61 S.C. L. REV. 633 (2010) (contextualizing and analyzing the *Spartan Mining Co.* decision).

⁹⁴ See *supra* note 41 and accompanying text.

⁹⁵ 10(j) MANUAL, *supra* note 22, § 5.1.

⁹⁶ See *supra* note 91.

⁹⁷ See *supra* notes 49–52 and accompanying text.

⁹⁸ For examples of how General Counsels already provide policy guidance to their subordinates within the procedural confines of NLRB adjudications through an informal memo process analogous to this proposal, see generally Abruzzo Memorandum, *supra* note 9; see also *infra* notes 187–89 and accompanying text (discussing a guidance memo that instructs Regional Directors to pursue voluntary interim settlements temporarily reinstating workers). This procedure would bolster, rather than limit, the ability of the General Counsel to effectuate her prosecutorial priorities. See *infra* notes 176–77 and accompanying text (discussing General Counsels).

determination that a 10(j) injunctive petition is warranted. The contours of the ALJ hearing are already provided for in the NLRB's rules and regulations and internal guidance.⁹⁹ Such evidentiary hearings would function as an initial, expedited fact-finding exercise specific to 10(j) cases and would provide the ALJ an opportunity to focus on the alleged misconduct and evaluate the evidence supporting the allegations against standards a district court would apply.¹⁰⁰ Such hearings would supplement the affidavits and other documents produced by the Board's agent in the course of her investigation. This in turn produces a more thorough and clear record for the district court which will consider the injunctive petition, reduces the need for delicate factfinding in district court regarding the 10(j) petition, and potentially reduces the overall time between when the petition is submitted and when the court rules on it.¹⁰¹

To ensure swiftness, the NLRB should model these hearings on the evidentiary hearings it currently uses in jurisdictional disputes under section 10(k) of the NLRA.¹⁰² These time-limited, narrowly focused hearings direct factfinding to the pertinent questions at issue in such disputes.¹⁰³ In the 10(j) context, the standard for granting such

⁹⁹ See NLRB Rules and Regulations, *supra* note 37, §§ 102.9–.59 (providing formal ULP hearing procedures); CASEHANDLING MANUAL, *supra* note 35, §§ 10380–10409 (outlining NLRB guidelines for handling ALJ hearings).

¹⁰⁰ See *supra* note 56 and accompanying text (describing the different judicial standards across circuits).

¹⁰¹ See Turner & Koppin, *supra* note 56, at 392 (noting that courts “rely almost entirely on the record compiled in the underlying Board proceedings and affidavits in support of the request for section 10(j) relief”); *id.* at 394 (“When making . . . ‘predictive judgment[s]’ [about a complaint’s success,] the court is careful not to usurp the role of the ALJ or the Board regarding the inferences to be drawn from the Regional Director’s evidence in support of the [ULP] complaint upon which the section 10(j) petition is based.”) (citations omitted).

¹⁰² 29 U.S.C. § 160(k); see also CASEHANDLING MANUAL, *supra* note 35, §§ 10200–10220 (describing the procedures in greater detail). Proceedings under section 10(k), as well as injunctions against certain union ULPs under section 10(l), have “statutory priority” within the NLRB. *Id.* § 10200. However, the Board maintains for itself discretion over how to handle its cases. See Gainer, *supra* note 12, at 521–22 (describing how the legislative process that produced the LMRA balanced the Board’s duty to pursue injunctions against unions with its discretion to pursue them against management). The Board could still maintain such statutory priority for 10(k) and 10(l) cases while utilizing similar mechanisms in 10(j) cases. For example, the Board could decline to apply to 10(j) cases the expediated timeline required in scheduling the underlying ULP hearing in 10(k) and 10(l) situations. See CASEHANDLING MANUAL, *supra* note 35, § 10200.1 (outlining the expedited timeliness guidelines applicable in 10(k) and 10(l) cases).

¹⁰³ See generally OFF. OF THE GEN. COUNS., NLRB, GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS (2003) [hereinafter NLRB GUIDE FOR HEARING OFFICERS] (outlining procedures for hearings on jurisdictional disputes between unions). The NLRB provides these general guidelines for its hearing officers in both representation and 10(k) contexts, see *id.* §§ I–IV, but provides specific guidelines for 10(k) cases with the goal of effectuating the statutory priority accorded to

injunctive relief in the relevant district court dictates the ALJ's focus and factfinding should concentrate on establishing details like the status quo before the alleged misconduct, the likelihood of irreparable harm, and the ongoing nature of the harm.¹⁰⁴ These 10(j) hearings, like hearings under section 10(k), would focus on developing the record and determining, through neutral factfinding by the ALJ, whether the facts adequately support the continued pursuit of an injunctive petition. The record of the underlying ULP complaint will incorporate the record produced by the ALJ's hearing, alleviating some of the fact-finding burden and avoiding duplicative efforts.¹⁰⁵ These evidentiary hearings would also address one of management's chief complaints with 10(j) proceedings, that management is denied the opportunity to respond to the alleged misconduct early in the injunctive process.¹⁰⁶ To enhance hearings' speed, convenience, and accessibility for witnesses, the Board should explicitly provide for the option that hearings be held over online video conferencing platforms like Zoom or Skype.¹⁰⁷

jurisdictional disputes, see *id.* § X. While NLRB determinations under section 10(k) have been criticized for “rubberstamping” employer work assignments, Jennifer A. Machlin, Comment, *Redefining the Appointed Limits: Work Assignment Disputes Among Television Craft Unions*, 26 UCLA L. REV. 805, 821 (1979), challenges to 10(k) decisions do not reference the procedures themselves, instead resting on other technical grounds. See, e.g., *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 544 F. App'x 657, 659 (9th Cir. 2013) (declining to disturb the district court's finding that the NLRB lacked jurisdiction to issue a 10(k) award).

¹⁰⁴ This narrow focus is analogous to the focused “Relevant Areas of Inquiry” hearing officers are to pursue and address in the hearing record. See NLRB GUIDE FOR HEARING OFFICERS, *supra* note 103, § X(H) (listing fourteen specific topics the hearing officer must ensure parties address on the record); see also Briggs, *supra* note 31, at 129–30 (describing the different inquiries considered under the different standards applied by federal circuits).

¹⁰⁵ But see NLRB Rules and Regulations, *supra* note 37, § 102.45(b) (providing that “the transcript of the hearing” is included in the record) (emphasis added). While this is a small issue, these rules would perhaps need to be amended to explicitly permit the inclusion of information from a new 10(j) hearing in addition to the underlying ULP hearing.

¹⁰⁶ See *supra* note 12 and accompanying text. The opportunities for management to participate in neutral ALJ factfinding and to fully litigate injunctive petitions in district court also ameliorate due process concerns. Cf. *Beaird-Poulan Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 598 (8th Cir. 1981) (holding that, in the ULP context, due process was satisfied when the employer “was ably represented by counsel,” “had the opportunity to produce evidence and to cross-examine adverse witnesses,” received “material evidence unknown to the Company” from the NLRB General Counsel, and “demonstrated no prejudice”).

¹⁰⁷ The Board has already promulgated a proposed rule on extending the video conferencing available during the pandemic as an option to parties in all aspects of ULP and representation matters before the Board. See *Use of Videoconference Technology to Conduct Unfair Labor Practice and Representation Case Proceedings*, 86 Fed. Reg. 61090 (Nov. 5, 2021) (to be codified at 29 C.F.R. pt. 102).

3. *Review of ALJ Opinions by the Board in 10(j) Cases*

The final component of this proposal is the Board's application of its final adjudicative authority to the record compiled by the Regional Director and the determination of the ALJ whether to pursue a 10(j) petition in the district court. This model would resemble the appeals process within the judiciary, with the ALJ in the role of a court of first impression and the Board acting as a court of appeals. This structure also already exists in the NLRB's procedures for adjudicating underlying ULP charges,¹⁰⁸ and other administrative agencies use substantially similar appeal and review procedures in their adjudications.¹⁰⁹

In the NLRB's 10(j) cases, the ALJ would evaluate the injunctive petition's likelihood of success and therefore the propriety of its pursuit, informing the Board's final decision whether to authorize the injunctive petition. This process would follow the NLRB's preexisting regulations for review of exceptions (i.e., appeals from ALJ decisions), with the ALJ's decision becoming the decision of the Board,¹¹⁰ subject to any discretion the Board may wish to make prior to filing the petition in district court.¹¹¹ Ideally, the procedure would limit the time elapsed between the filing of the charge and the Board's review of the ALJ's findings to around thirty days.¹¹² Either the charged

¹⁰⁸ See *supra* notes 40–44 and accompanying text.

¹⁰⁹ The Securities and Exchange Commission and, in the immigration context, the Department of Justice both use analogous structures. See, e.g., *Office of Administrative Law Judges*, SEC (Nov. 19, 2020), <https://www.sec.gov/page/aljsectionlanding> [<https://perma.cc/VAZ7-48NB>] (“An administrative law judge’s initial decision is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings.”); *Board of Immigration Appeals*, DEP’T OF JUST. (Oct. 6, 2022), <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> [<https://perma.cc/3PL2-URGA>] (“Primarily, the BIA reviews appeals from certain decisions that Immigration Judges and district directors of the Department of Homeland Security (DHS) render . . .”).

¹¹⁰ National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (“In case the evidence is presented before . . . an [ALJ], . . . such judge . . . shall issue . . . a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days . . . , such recommended order shall become the order of the Board”); see also NLRB Rules and Regulations, *supra* note 37, § 102.48(a) (“If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge’s decision will . . . automatically become the decision and order of the Board and become its findings, conclusions, and order, and all [appeals are deemed waived].”).

¹¹¹ National Labor Relations Act § 10(d), 29 U.S.C. § 160(d) (“Until the record in a case shall have been filed in a court, . . . the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.”).

¹¹² See *infra* note 167 and accompanying text (situating this timeline goal in the broader administration of this alternative procedure).

party or the Regional Director prosecuting the case could take exception to the ALJ's decision before the Board.¹¹³

Equipped with a thorough record, adversarial representation, live witnesses, and a reasoned opinion, the Board would then go to the district court to litigate. This proposed alternative—the prosecutorial delegation to the Regional Directors, the quick evidentiary hearings, and the Board as adjudicator in 10(j) cases—seeks to accelerate the process and produce better documentation for, and thus results before, the district courts. The next Section considers how this proposal strengthens the NLRB's position and improves its chances of success before oft-skeptical judges.

B. *Evaluating the Proposal*

The NLRB's current procedures themselves are a root cause of the delay, redundancies, and inconsistent outcomes that plague 10(j) cases. Taken as a whole, the proposal endeavors to expedite the 10(j) mechanism by streamlining its procedures, improving outcomes in courts, and strengthening its deterrent effect. Individually, each of this alternative proposal's three parts addresses some feature of the challenge facing the Board in making 10(j) a relevant and robust protection for the rights enshrined in the NLRA.

The first aspect of this proposal—the delegation of initial discretion to the Regional Directors—would remove several layers of bureaucracy from the 10(j) proceedings, align 10(j) procedures with other ULP procedures, and make the overall proceeding more public and transparent. Decentralization more evenly distributes the prosecutorial burden and eliminates the bottleneck at the NLRB.¹¹⁴ The cost of the unusually tight control exercised by the Board directly over 10(j) cases is months of additional delay,¹¹⁵ strain on the agency's

¹¹³ NLRB Rules and Regulations, *supra* note 37, § 102.46(a) (providing twenty-eight days for either party to file exceptions). Twenty-eight days may be too long a window for exceptions under this particular remedy if the aim is combatting delay. Two possible solutions are shortening this opportunity to file exceptions or providing for the Board's own discretionary review of the ALJ's record and determination concurrent with the window for allowing the parties to consider exceptions.

¹¹⁴ See *supra* notes 49–53 and accompanying text (describing multiple layers of bureaucratic advice and consultation at the Division of Advice, Injunctive Litigation Branch, and the Board under current procedures for initial 10(j) determinations); How to TAKE A CASE BEFORE THE NLRB, *supra* note 42, ch. 2, § 2.I (“The Board makes the final decision on requests for Section 10(j) discretionary injunctions . . . but, again, rules on *only those requests that the General Counsel has first approved.*”) (emphasis added).

¹¹⁵ See Estreicher, *supra* note 12, at 371 (noting that on average, the administrative advice stage of a 10(j) case lasted for 111 days after the Regional Director's determination to pursue injunctive relief and was one among other lengthy delays between administrative actions).

resources due to centralization of consideration and determination authority and a concomitant reduction in capacity to bring 10(j) cases,¹¹⁶ and a success rate of only slightly better than sixty percent in federal courts despite an allegedly deferential standard of review.¹¹⁷

The second aspect of this proposal—the quick evidentiary hearing before an ALJ—has three main benefits. First, the knowledge that parties in violation of the law will be brought before an ALJ quickly to account for alleged misconduct may deter misconduct in the first place.¹¹⁸ An adversarial evidentiary hearing before an ALJ will be a more dynamic and participatory process than the plodding trail of recommendations and consultation that ultimately culminates in 10(j) authorization under the current system. The combination of increased accountability through a quick hearing in cases of alleged egregious violations and the additional opportunity for the accused party to contest such allegations should appeal both to unions and workers seeking to reliably vindicate their rights and management seeking a voice in the proceedings.

Second, the evenhandedness of these hearings may “bolster the agency’s credibility in the district courts” and provide the NLRB with more consistent success before the judiciary.¹¹⁹ This alternative procedure addresses two main criticisms leveled at 10(j) petitions: first, that administrative delay has rendered injunctive relief ineffective,¹²⁰ and second, that a thin administrative record has failed to carry the

¹¹⁶ See Gainer, *supra* note 12, at 530–31 (documenting the NLRB’s claims that its limited resources preclude more rigorous pursuit of 10(j) cases).

¹¹⁷ See *supra* note 66 and accompanying text (documenting failure rates in courts); *infra* note 125 and accompanying text (stating “appropriate deference” is owed to the Board’s conclusions).

¹¹⁸ See Morris, *supra* note 13, at 313–15 (accounting for the success of enforcement against discriminatory discharges under the Railway Labor Act).

¹¹⁹ Estreicher, *supra* note 12, at 379. For an example of greater judicial deference towards an injunctive petition based on a record and formal hearing (in this case, a trial), see Denholm *ex rel.* NLRB v. Smyrna Ready Mix Concrete, LLC, No. 5:20-CV-320-REW, 2021 WL 297571, at *6 (E.D. Ky. 2021) (“There is sufficient evidence *in the record* to support the Board’s theory. . . . Fact questions aside, the Board’s assertions have *record* support.”) (emphasis added).

¹²⁰ See, e.g., McKinney *ex rel.* NLRB v. Horseshoe Bossier City Hotel & Casino, No. 5:18-cv-01450-SMH-ML, 2019 U.S. Dist. LEXIS 62914, at *12 (W.D. La. Apr. 10, 2019) (“The caselaw has held that such a delay in seeking relief is a factor that weighs against issuing an injunction under Section 10(j) as it is evidence that the ULP’s alleged detrimental effect has already taken its toll, rendering it too late to try to preserve the status quo.”); Cowen *ex rel.* NLRB v. Mason-Dixon Int’l, No. 2:21-cv-05683-MCS-JC, U.S. Dist. LEXIS 162870, at *11 (C.D. Cal. Aug. 27, 2021) (“Over a year and a half has passed since the alleged unfair labor practices occurred, and a court injunction is not likely to return the parties to the status quo or be more effective than relief from the Board.”).

NLRB's burden of showing that an injunction is "just and proper."¹²¹ These two challenges are intertwined, as Regional Directors sometimes choose to supplement their affidavits in support of a 10(j) petition with the record produced before an ALJ in the course of litigating the underlying ULP.¹²² This strategy tends towards delay, since the Regional Director must wait for the ULP proceedings to unfold before citing them as evidence. In some cases, the underlying ULP record, once produced, has been used in successful 10(j) petitions before various district courts.¹²³ But this approach ultimately frustrates the purpose of section 10(j) by making injunctive petitions reliant on the very same sluggish administrative procedures 10(j) injunctions are meant to bypass. A swift evidentiary hearing before an ALJ would bolster the record before the district court and provide a more efficient alternative to current reliance on the underlying ULP record.

Third, in addition to a more thorough record, a quick evidentiary hearing produces something else useful to the NLRB: a preliminary determination on the potential merits of an injunctive petition from an impartial ALJ. Courts are generally solicitous towards ALJ opinions, showing them respect only somewhat short of outright deference.¹²⁴ This deference to ALJs supplements the "appropriate

¹²¹ 29 U.S.C. § 160(j) ("Upon the filing of any such [10(j)] petition the court shall . . . have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."); *see, e.g., Mason-Dixon*, U.S. Dist. LEXIS 162870, at *12 (questioning whether NLRB affidavits demonstrate continued employee interest in reinstatement, dismissing one affiant's statements as "hearsay[,] and posing a series of evidentiary questions left unanswered by the affidavit).

¹²² *See Turner & Koppin, supra* note 56, at 387, 393 n.70 (noting that courts "normally choose to rely on the record as developed in the underlying Board proceedings" and highlighting a case where the district judge denied "the Regional Director's petition for section 10(j) relief . . . based on affidavits and the ALJ's factual findings [in the underlying ULP hearing]").

¹²³ *See, e.g., Overstreet ex rel. v. NP Red Rock, LLC*, No. 2:20-cv-02351-GMN-VCF, 2021 WL 3064120, at *1 (D. Nev. July 20, 2021) (granting a motion to try the petition on the basis of the administrative record before granting in part the petition); *Smyrna*, 2021 WL 297571, at *5 (incorporating evidence from the administrative record into the court's decision granting the NLRB's petition); *Goonan ex rel. NLRB v. Amerinox Processing, Inc.*, No. 1:21-cv-11773-NLH-KMW, 2021 WL 2948052, at *9 (D.N.J. July 14, 2021) (same); *see also Turner & Koppin, supra* note 56, at 387 ("[T]he district courts normally choose to rely on the record as developed in the underlying Board proceedings.").

¹²⁴ *See, e.g., Smyrna*, 2021 WL 297571, at *5 ("The ALJ issued a detailed, 30-page opinion that weighed fully the record, the testimony, and the legal standards. . . . [I]n the assessment of reasonable cause, the studied product of a neutral decisionmaker surely is worthy of note in the calculus."); *Hadsall ex rel. NLRB v. ADT, LLC*, No. 21-cv-9-jdp, 2021 WL 2283884, at *3 (W.D. Wis. June 4, 2021) ("The court of appeals has provided additional guidance for evaluating the law and the facts in the context of a § 160(j) petition. First, '[t]he court will give some measure of deference to the view of the ALJ in

deference [owed] to the specialized knowledge of the Board.”¹²⁵ If the Board elects to pursue an injunction based on an ALJ’s positive evaluation, then it does so with the support of an independent factfinder. ALJ determinations after hearings would also serve an important screening function, identifying meritless claims and avoiding wasted efforts on flimsy “paper cases.”¹²⁶ Should the Board disagree with the ALJ and pursue an injunction despite her negative evaluation, it faces the difficult—but not impossible—task of winning deference to its own determination and proving its case in the district court despite the ALJ decision.¹²⁷ But the Board could at least move ahead forewarned of skeptical perspectives and forearmed with arguments that anticipate judicial objections to the proposed injunction.

Finally, the third aspect of this proposal—moving the Board into an adjudicatory role while delegating its powers to prosecute the 10(j) case to the Regional Directors and General Counsel—aligns and streamlines these 10(j) cases with the rest of the NLRB’s practice. By applying the same procedural principles that control ULP complaints, the Board can still exercise all of its available discretion to authorize injunctive litigation in the district courts.¹²⁸ The Board’s legal determination of the propriety of injunctive relief is owed at least some deference by courts.¹²⁹ It may find error with the ALJ’s legal reasoning, reverse the ALJ’s conclusion, and authorize or decline to authorize the injunctive petition based on its own interpretation of the record.¹³⁰ But when it *does* elect to issue a petition, it will have done so through a reasoned opinion based on a fuller record than affidavits alone,

determining the likelihood of success.” (quoting Harrell *ex rel.* NLRB v. Am. Red Cross, Heart of Am. Blood Servs. Region, 714 F.3d 553, 556 (7th Cir. 2013)).

¹²⁵ *Silverman v. Major League Baseball Player Rel. Comm.*, 880 F. Supp. 246, 254 (S.D.N.Y. 1995) (Sotomayor, J.) (quotation omitted) (citing *Silverman v. 40-41 Realty Assocs.*, 668 F.2d 678, 681 (2d Cir. 1982)); *id.* (“Indeed, the Board’s view of the facts should be sustained ‘unless the court is convinced that it is wrong.’” (quoting *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980))).

¹²⁶ See *supra* notes 54, 72 and accompanying text.

¹²⁷ Judicial deference to ALJ decisions is thus a double-edged sword in close cases. See, e.g., *Greater Omaha Packing Co. v. NLRB*, 790 F.3d 816 (8th Cir. 2015) (upholding elements of the NLRB’s final ULP determination that accorded with the ALJ but vacating the Board’s findings of unlawful interrogation and surveillance that overturned the ALJ’s decision). *But cf.* Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency’s Success in the Federal Courts of Appeals*, 5 FLA. INT’L UNIV. L. REV. 437, 440–56 (2010) (proposing concrete ways the Board can more effectively defend before courts its modifications to ALJ decisions).

¹²⁸ National Labor Relations Act, § 10(d), 29 U.S.C. § 160(d) (“Until the record in a case shall have been filed in a court . . . the Board may . . . modify or set aside, in whole or in part, any finding or order made or issued by it.”).

¹²⁹ See *supra* note 125 and accompanying text.

¹³⁰ NLRA § 10(d), 29 U.S.C. § 160(d).

potentially earning more deference from the district court for its determination that injunctive relief is “just and proper” and thereby increasing the likelihood of success.¹³¹

While less circumspect than the current NLRB procedures, which rely heavily on internal consultation and advice, the proposed alternative relies on fundamental principles of the adversarial system to quickly produce a faithful record to serve as the basis for a compelling case before the district court. This proposal would not produce perfect results, but no system can. Instead, these new procedures hasten accountability for violations of the NLRA and enhance the prophylactic effect of section 10(j). Sharpening the deterrent effect of section 10(j) will require consistent use of quick hearings and injunctive petitions over time, and so the next Part weighs how best to establish this new procedure and ensure its reliable and durable application amid political vacillation within the NLRB.

III

IMPLEMENTING THE ALTERNATIVE PROPOSAL THROUGH RULEMAKING

This alternative procedure for bringing 10(j) petitions would constitute a significant change in NLRB practice. To properly implement such a sweeping reform and insulate the procedure from invalidation if challenged, the Board should engage in notice and comment rulemaking to embed the new procedure in its rules and regulations.¹³² First, while the NLRB has the authority to engage in both procedural and substantive rulemaking,¹³³ the NLRB has not used its rulemaking powers to implement an arguably procedural change like this in the past. However, recent judicial skepticism of “procedural” rulemaking that implicates substantive rights militates in favor of the

¹³¹ See *supra* notes 56, 67, 100 and accompanying text for the different judicial standards applied by the circuits and how the NLRB could tailor its 10(j) evidentiary hearings to meet these standards.

¹³² See Estreicher, *supra* note 12, at 372–74 (advocating more extensive use of rulemaking).

¹³³ National Labor Relations Act § 6, 29 U.S.C. § 156 (“The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter.”); Administrative Procedure Act § 5, 5 U.S.C. § 553 (prescribing rulemaking procedures); see also NLRB Rules and Regulations, *supra* note 37, §§ 101–103 (containing in sections 101 and 102 all procedural rules and regulations promulgated under section 156, and in section 103 the few substantive rules the agency has produced); *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 614, 616 (1991) (determining the Board can engage in substantive rulemaking and upholding rules governing bargaining units in acute care hospitals).

deference notice and comment rulemaking affords.¹³⁴ Second, the formalization and predictability afforded by notice and comment rulemaking would actuate the normative prophylactic benefits of this alternative procedure.

As a preliminary matter, the Board has traditionally been reluctant to use its rulemaking authority.¹³⁵ The past decade has, however, seen it break somewhat with this tradition and utilize its substantive rulemaking authority more regularly.¹³⁶ The Board has used rulemaking more frequently to promulgate “procedural, privacy, and housekeeping rules,” but it has generally done so informally by issuing these as “final rules without notice and comment.”¹³⁷ Courts have defined the boundaries of the “procedural exception” to notice and comment differently over time, but the contemporary standard permits agencies to implement many procedural rules that affect or foreclose the rights of parties.¹³⁸ The Board is explicitly permitted to promulgate such procedural rules without notice and comment under the Administrative Procedure Act and, at first blush, this may appear to be the best method for implementing this new procedure quickly and efficiently.¹³⁹

¹³⁴ See *infra* notes 139–45 and accompanying text.

¹³⁵ See, e.g., Jeffery S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT’L UNIV. L. REV. 411, 413 (2010) (“[T]he Board maintained its resistance to rulemaking, despite its apparent success in the health care bargaining unit rule.”); Charlotte Garden, *Towards Politically Stable NLRB Rulemaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1471, 1471 (2015) (noting the Board’s resistance to rulemaking and calls among academics for its increased use).

¹³⁶ See Garden, *supra* note 135, at 1477–83 (documenting the use of rulemaking by the Obama administration); *National Labor Relations Board Rulemaking*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking> [<https://perma.cc/9DZW-D6BY>] (listing topics, both substantive and procedural, on which the NLRB seeks comment for rulemaking).

¹³⁷ Lubbers, *supra* note 135, at 412 & n.13.

¹³⁸ Compare *Air Transp. Ass’n of Am. v. Dept. of Transp.*, 900 F.2d 369, 376 (D.C. Cir. 1990) (finding FAA rules governing adjudication of civil penalties “encode[d] a substantive value judgment” regarding parties’ rights and thus fell outside of the procedural exception to notice and comment (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987))), *vacated*, 498 U.S. 1077 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991), *with id.* at 383 (Silberman, J., dissenting) (“Of course, procedure impacts on outcomes and thus can virtually always be described as affecting substance, but to pursue that line of analysis results in the obliteration of the distinction that Congress demanded.”) and *JEM Broad. Co. v. FCC*, 22 F.3d 320, 329 (D.C. Cir. 1994) (overturning *Air Transport Association* and upholding agency “hard look” procedures promulgated without notice and comment under the procedural exception). Under the current standard, courts determine, first, whether the procedure alters the rights of parties and, second, whether the interest in public participation outweighs the agency’s interest in efficiency. *JEM Broad. Co.*, 22 F.3d at 326–27.

¹³⁹ 5 U.S.C. § 553(b)(3)(A) (excepting “rules of agency organization, procedure, or practice” from notice and comment rulemaking requirements); see also NLRB Rules and

However, the 2020 D.C. District Court decision in *AFL-CIO v. NLRB* by then-Judge Ketanji Brown Jackson highlights the perils of using less formal procedural rulemaking to implement such a dramatic change in 10(j) practice.¹⁴⁰ There, the AFL-CIO challenged five changes relating to the Board's representation rules promulgated without notice and comment and persuaded Judge Jackson that these rules did not fall under the procedural exception to the notice and comment requirement.¹⁴¹ Judge Jackson rejected the agency's contention that "any rule that merely *relates* to procedures as opposed to substantive rights [is] a procedural rule for the purpose of the APA."¹⁴² She instead found that "section 553(b)(A) of the APA does not encompass any and all rules that relate to procedures that an agency says a regulated entity must follow; instead, procedural rules are . . . rules that relate primarily to 'internal house-keeping measures organizing agency activities . . .'"¹⁴³ The proposed alternative procedure for 10(j) cases, implicating as it does the rights of the parties to a short hearing on the record early in the process, may fall beyond the "narrow scope of the procedural-rule exception" to the notice and comment requirement.¹⁴⁴ Specifically, the expedited timing of evidentiary hearings before an ALJ and delegation of authority to the Regional Directors and General Counsel could be challenged by an employer facing an injunctive petition.¹⁴⁵ The Board could argue per-

Regulations, *supra* note 37, § 101.37 (containing preexisting and very general regulations governing injunctive petition procedures).

¹⁴⁰ *AFL-CIO v. NLRB*, 466 F. Supp. 3d 68 (D.D.C. 2020) (Jackson, J.), *aff'd in part and rev'd in part*, 57 F.4th 1023 (D.C. Cir. 2023).

¹⁴¹ The challenged rules would have: 1) given parties the right to litigate election challenges before the election is conducted, 2) instructed the Regional Directors to schedule an election no fewer than twenty days after the election was directed, 3) extended from two days to five days the deadline for an employer to furnish the required voter list to the Regional Director and other parties, 4) limited election observers to bargaining unit members whenever possible, and 5) prevented the Regional Directors from issuing a certification of a bargaining unit after an election if a review of the election is pending or if the time limit to request a review has not passed. *Id.* at 78–79.

¹⁴² *Id.* at 92.

¹⁴³ *Id.* (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980)).

¹⁴⁴ *Id.* at 90. While the D.C. Circuit on appeal reversed Judge Jackson in part and found that the first and second proposed rules (pre-election litigation challenges and the default rule for election scheduling, respectively) were in fact procedural rules excepted from notice and comment, *AFL-CIO*, 57 F.4th at 1043, these rules are distinguishable from the proposed alternative procedure because the latter "'impose[] no *new* substantive obligations' or burdens upon the parties' rights and interests." *Id.* (emphasis added) (quoting *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011)).

¹⁴⁵ The timing of the hearings is akin to the second rule, requiring elections within twenty days, struck down by Justice Jackson. *See supra* note 141. A substantially similar, though not identical, delegation of prosecutorial authority was challenged but upheld in the *Spartan Mining Co.* decision. *See supra* note 93 and accompanying text.

suasively that the procedure merely “alter[s] the *manner* in which the parties present themselves or their viewpoints to the agency,”¹⁴⁶ and so falls within the procedural exception, but Judge Jackson’s decision demonstrates that such an outcome is not guaranteed.

The benefits of implementing this change through notice and comment rulemaking are not limited to the new procedure’s ability to survive a court challenge. Commentators have held out rulemaking for decades as a solution to the oscillation of Board precedent that results from its reliance on adjudication for policymaking and the shifting composition of the Board as control of the Executive swings from one political party to the other.¹⁴⁷ This oscillation is seen not just in the Board overturning its own precedents through adjudication, but also the highly variable rate at which 10(j) petitions are brought by the NLRB through its centralized authorization process under different administrations.¹⁴⁸ Purely procedural rules are easily amended and thus subject to this same oscillation.¹⁴⁹ Such inconsistency dissipates

¹⁴⁶ JEM Broad. Co. v. FCC, 22 F.3d 320, 329 (D.C. Cir. 1994) (emphasis added) (quoting *Batterton*, 648 F.2d at 707).

¹⁴⁷ See, e.g., Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729, 731 (1961) (“The Board’s failure to use rule-making procedures may have been the cause of some of its recent difficulty in securing judicial acceptance of newly promulgated doctrines.”); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170–71 (1985) (noting increasing policy oscillation at the Labor Board and suggesting rulemaking as a solution); Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1120–21 (2005) (“Commentators over the years have been virtually unified, however, in calling for the NLRB to abandon its practice of making policy almost entirely through individual adjudications and to instead engage in notice and comment rulemaking under the Administrative Procedure Act”); Estreicher, *supra* note 12, at 374 (“NLRB policy reversals – which come with each new administration as surely as spring follows winter – is another area where properly employed rulemaking would enhance the confidence of the parties that acting in conformity with preexisting Board law will not result in adverse remedial consequences.”).

¹⁴⁸ See *10(j) Injunction Activity*, *supra* note 63 (documenting thirty-two 10(j) petitions authorized in 2016, the last year of the Obama administration, compared to only eleven petitions authorized in 2020, the last year of the Trump administration). For an example of how a General Counsel representing a new president can influence 10(j) practice, see Abruzzo Memorandum, *supra* note 9, extolling the virtues of injunctive relief early in a new Democratic administration under Biden, perhaps foretelling a renewed use of 10(j). The NLRB’s 10(j) activity in the year following this memo, however, suggests that any actual increase in enforcement has been slight. See *10(j) Injunction Activity*, *supra* note 63 (indicating that in the period from January through December 2022, following Abruzzo’s memo of August 19, 2021, the NLRB authorized seventeen 10(j) petitions as compared to seventeen over that period in 2021, eleven over that period in 2020 under the Trump administration, and thirty-two over that period in 2016 under the Obama administration).

¹⁴⁹ See *supra* note 139 and accompanying text (excepting “procedural rules” from burdensome notice and comment requirements under the APA).

any prophylactic effect 10(j) injunctions might have on parties contemplating a violation of the NLRA.

Unlike policy statements and adjudicatory precedent, notice and comment rulemaking is not so easily undone.¹⁵⁰ Once it has established a final rule by notice and comment rulemaking, an agency must go through the arduous process a second time to repeal it.¹⁵¹ Without oscillation, violators would know their actions would be investigated and scrutinized quickly and consistently, discouraging violations in the first place.¹⁵² The delegation of initial prosecutorial discretion to the General Counsel and career Regional Directors, rather than the political Board appointees, would routinize the prompt investigation, conducted through an evidentiary hearing, of alleged misconduct potentially warranting injunctive relief. Under the alternative procedure, the Board could still exercise its discretion in multiple ways. It can choose to make final authorization determinations based on its expert interpretation of the established record and publicize its policy intentions through statements and memos. These decisions would influence how the agency pursues its priorities through the new 10(j) procedure. But the alternative procedure itself—with its expeditious initial process, more robust factfinding, and the promise of prompt accountability before an ALJ—would remain in effect, a consistent and imminent deterrent to violations of the rights guaranteed in the NLRA.

IV

THE ALTERNATIVE PROPOSAL IN PRACTICE

This final Part considers this proposed reform's effects on the paradigmatic 10(j) case: the discriminatory discharge of a union supporter during an organizing or bargaining campaign.¹⁵³ Though not

¹⁵⁰ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983) (holding that an agency must provide a rationale based on the factual record when it seeks to rescind or amend a regulation, not just when it seeks to implement a new rule); Estreicher, *supra* note 12, at 374 (“Confining the Board thus would promote certainty and establish a process likely to lead to better rules.”).

¹⁵¹ See *Humane Soc’y of the U.S. v. U.S. Dep’t of Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022) (“Providing for notice and comment before repeal of a final rule ‘ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.’” (quoting *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982))).

¹⁵² See *Morris*, *supra* note 13, at 314 (“In contrast, carriers under the RLA ordinarily do not fire union-related employees during election campaigns. Their management and/or attorneys fully understand the likely response to federal-court injunctive action that would likely follow.”).

¹⁵³ See *NLRB Gen. Couns. Mem.* 10-07 1 (Sept. 30, 2010) [hereinafter Solomon Memorandum], <https://apps.nlr.gov/link/document.aspx/09031d4580989438> [<https://>

the only kind of employer violation that can be remedied under 10(j),¹⁵⁴ discriminatory discharges cause extraordinary harm to both the worker and the union and require the “extraordinary remedy” afforded by a 10(j) injunction ordering reinstatement.¹⁵⁵ Wrongful terminations also happen all the time,¹⁵⁶ and would likely be an early target for a Board keen to utilize its new procedure.¹⁵⁷ The first Section of this Part offers a hypothetical to demonstrate how the alternative 10(j) process would operate in a case of discriminatory discharge. The second Section considers how this Note’s proposal would interact with other suggested reforms of 10(j) and addresses potential objections.

A. A Hypothetical Firing

Imagine a hypothetical workplace and a hypothetical worker named W. W is involved in a campaign to unionize their workplace; in fact, W has been actively organizing the shop by discussing the job with coworkers, asking them to take concerted action, and encouraging them to sign union authorization cards. W’s employer learns of the campaign, and one manager hears that W is a leader of the effort. Thinking to nip the campaign in the bud, the employer fires W. On these facts, what recourse would W have?

W and the union representing them file a charge with the NLRB, which in its early stages is handled exactly as all ULPs are currently initiated and investigated.¹⁵⁸ After reviewing Board agents’ initial investigatory reports, the Regional Director, following the General Counsel’s most recent guidance memo, determines that W’s case is likely a discriminatory discharge in violation of section 7 of the NLRA. She issues a complaint and proceeds with the ULP under section 8 of the NLRA, all per existing procedures.

For relief under section 10(j), however, this proposed alternative procedure begins to diverge from current practice. Once they have determined that a 10(j) petition is warranted, the Regional Director

perma.cc/AR5G-WE6A] (“Discriminatory discharges are among the most serious nip-in-the-bud violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights.”).

¹⁵⁴ *Section 10(j) Categories*, *supra* note 21.

¹⁵⁵ *McKinney ex rel. NLRB v. Citmed Corp.*, No. 17-0234-KD-M, 2017 WL 2414777, at *2 (S.D. Ala. June 2, 2017) (collecting cases and noting the drastic nature of injunctive relief as a remedy).

¹⁵⁶ *See generally supra* note 76 and accompanying text.

¹⁵⁷ *See* *Abruzzo Memorandum*, *supra* note 9 (promising aggressive use of 10(j) proceedings and celebrating the reinstatement of five union supporters by the injunction granted through the 2021 *Amerinox Processing* decision).

¹⁵⁸ *See supra* notes 40–45 and accompanying text.

and General Counsel, under the NLRA's authority, hold an evidentiary hearing before the ALJ.¹⁵⁹ The timeline of this hearing should be set by the Board's regulations but should ideally occur within a few working days or weeks.¹⁶⁰ The hearing is tightly focused on interrogating the specific aspects of W's case that a district court would consider in weighing injunctive relief.¹⁶¹ W has a chance to tell their story, as does management and the union organizing the workplace. The record also includes the investigatory documentation produced by the Board's agents following the initial charge. Perhaps, after the hearing and its formalities, the Board and its agents facilitate a voluntary settlement reinstating W.¹⁶²

If no settlement is forthcoming, following the hearing, and again on a timeline set by the Board, the ALJ issues a determination on the merits of a prospective 10(j) petition.¹⁶³ Either party could take exception to the ruling and appeal to the Board, but the Board has absolute discretion to follow, modify, or contradict the ALJ's opinion.¹⁶⁴ The Board must wait at least until the end of the exceptions period to issue its decision and, if appropriate, authorize the General Counsel and Regional Director to file an injunctive petition to the district court.¹⁶⁵ The Board could simply adopt the ALJ's logic or substitute its own reasoned opinion in this decision, perhaps supplementing the decision with additional corroborating evidence gathered by Board agents while the ALJ deliberated.¹⁶⁶

Assume the ALJ finds sufficient evidence to meet the relevant district court's standard for 10(j) injunctive relief in W's termination.

¹⁵⁹ See *supra* notes 89–90 and accompanying text.

¹⁶⁰ For an example of NLRB rulemaking implicating specific timeline requirements in ULP cases, see *supra* note 141 and accompanying text. The author sees no need to prescribe a specific timeline here and simply observes that such a technical determination is what notice and comment rulemaking is meant to facilitate.

¹⁶¹ For suggestions on the structure of these hearings, see *supra* notes 102–04 and accompanying text. For the various standards courts apply to injunctive petitions under 10(j), see *supra* note 56 and accompanying text.

¹⁶² See CASEHANDLING MANUAL, *supra* note 35, §§ 10124–10170 (describing general NLRB guidelines for informal settlements and formal settlement stipulations). For current General Counsel guidance affirming settlement in the 10(j) context, see *infra* notes 187–89 and accompanying text.

¹⁶³ Current NLRB regulations give ALJs discretion to “fix a reasonable time for . . . filing [briefs], but not in excess of 35 days from the close of the hearing.” NLRB Rules and Regulations, *supra* note 37, § 102.42. This timeframe should be explicitly compressed in the 10(j) context to encourage expeditious decisions by the ALJ.

¹⁶⁴ See *supra* notes 110–11 and accompanying text (outlining statutory requirements for exceptions to ALJ decisions).

¹⁶⁵ See *supra* note 113 and accompanying text.

¹⁶⁶ Proceedings in the underlying ULP case may well develop the administrative record after the ALJ's initial opinion.

W's employer waits until the last day of the exception period to file its appeal. The Board, after review, believes the case is strong and adopts the ALJ's opinion with some modification in authorizing the petition. By this point, a few weeks would have passed. Ideally, the Board would tailor its guidelines to limit the elapsed time since the filing of charges to thirty working days.¹⁶⁷ This is another crucial point of settlement leverage, as the potential costs of litigating the petition in district court start to add up quickly for the employer.¹⁶⁸

Once the petition is filed with the district court, the timeline is out of the NLRB's hands. Courts introduce their own delays into the process.¹⁶⁹ But by providing the court with the ALJ's thorough, adversarial record, the Board lightens the factfinding load on the court and should reduce the time that it takes to issue a ruling on the injunctive petition.¹⁷⁰ The NLRB can also continue to apply settlement pressure on the employer as the proceedings unfold in court; W's employer may be more amenable to settlement after several administrative and judicial hearings drive home its accountability and disabuse its belief that it can "avert punishment for a very long time."¹⁷¹ If the employer is confident, it can litigate its case against the injunction before the court, but it cannot abuse the process by simply holding out for the worker to move on with their life or by relying on delay to undermine a legitimate case.

Ultimately, the district court rules on the petition and either issues or denies the injunction. Assuming the case did not settle out before its conclusion and the court agrees with the Board that an injunction is warranted, W will be reinstated at their job pending the final adjudication of the underlying ULP complaint. The ULP proceeding provides the fullest opportunity for the NLRB to make W whole for the violation of their statutory rights, including ordering

¹⁶⁷ See Helm, *supra* note 9, at 604 ("[N]obody refused reinstatement when the case was settled in less than a month.").

¹⁶⁸ The Board already recognizes the filing of the petition as a crucial point of settlement pressure. See 10(j) MANUAL, *supra* note 22, § 5.5 ("During the 48 hours from the authorization of Section 10(j) proceedings until the filing of the Section 10(j) court papers, the Region should vigorously continue to pursue settlement efforts."). *But see infra* notes 190–91 and accompanying text (discussing how current procedures stymie settlement).

¹⁶⁹ See *supra* note 63 and accompanying text (documenting the current average of 108.7 days between when a petition is filed in the district court and when that court rules on the petition).

¹⁷⁰ Cf. Turner & Koppin, *supra* note 56 (analyzing how courts already limit post-administrative discovery and factfinding in 10(j) cases). Courts may be comfortable further limiting factfinding if they are provided with a more thorough administrative record, reducing the time they take to reach decisions on petitions.

¹⁷¹ See *supra* note 78 and accompanying text.

permanent reinstatement and backpay.¹⁷² But with the injunction, W at least avoids continual harm while the ULP charge plays out. Their reinstatement through 10(j) may not be objectively quick, but it is certainly *quicker* than the system that prevails now.¹⁷³ The final Section of this Part will consider other implications raised by W's hypothetical discriminatory discharge.

B. *Implications for Discretion, Other Reforms, and Potential Objections*

Examining this alternative 10(j) procedure in practice highlights ramifications for the prosecutorial discretion of the NLRB General Counsel and provides an opportunity to evaluate the procedure's compatibility with other frequently proposed reforms of 10(j). The hypothetical also clarifies important potential objections warranting an explicit response.

First, a noteworthy aspect of this new procedure is that it will enable the agency to better effectuate the prosecutorial policy towards 10(j) cases set by the General Counsel. The General Counsel currently sets a policy orientation with regards to potential injunctive relief in periodic memoranda, reminding Regional Directors of the requirement that they remain vigilant for possible 10(j) cases and reaffirming the usefulness of the remedy.¹⁷⁴ But the General Counsel's prosecutorial priorities matter little in the face of layered and duplicative bureaucracy, months-long delays at various consultation stages,

¹⁷² See CASEHANDLING MANUAL, *supra* note 35, § 10128.2(e) (“[R]einstatement is one of the most effective remedies available under the Act.”); NLRB Rules and Regulations, *supra* note 37, § 101.16 (discussing backpay proceedings).

¹⁷³ Provided the Board was able to structure the Regional Director's investigation and prosecution of a 10(j) petition so that the petition issues within thirty working days, see *supra* note 167 and accompanying text, and assuming the court issues its ruling in its roughly current average timeframe of 108.7 days, see *supra* note 65 and accompanying text, the petition would issue around four months after the termination—a marked improvement from the year or longer on average injunctions take to issue now. See *supra* notes 64–65 and accompanying text (noting between 2010 and 2021 an average duration of 349.2 days between the filing of a charge and the issuance of an injunction).

¹⁷⁴ See, e.g., Memorandum GC 22-02 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Feb. 1, 2022), <https://apps.nlr.gov/link/document.aspx/09031d4583683bd0> [<https://perma.cc/4XHL-QGZE>] (affirming in 2022 the use of 10(j) proceedings in cases of illegal threats or coercion by management); Abruzzo Memorandum, *supra* note 9 (affirming the 10(j) program in 2021); Memorandum GC 14-03 from Richard F. Griffin, Jr., Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 2 (Apr. 30, 2014), <https://apps.nlr.gov/link/document.aspx/09031d45816c172b> [<https://perma.cc/ZJ2T-WHDS>] (affirming the 10(j) program in 2014); Solomon Memorandum, *supra* note 153 (affirming the 10(j) program in 2010).

centralized Board determinations of the propriety of a 10(j) petition, and courts offering minimal deference to the agency's procedures.¹⁷⁵

The alternative procedure, however, would empower the General Counsel to issue meaningful guiding criteria, timelines, and case targets to the Regional Directors, who would then implement these directives on their own initiative.¹⁷⁶ The General Counsel would no longer be just another bottleneck in the prosecution of 10(j) discriminatory discharge cases. Instead, she could genuinely shape the agency's efforts by setting concrete policies for the Regional Directors to follow. For example, she may direct them "to seek section 10(j) relief in *every* case where there is reasonable cause to believe an employer fired an employee during an organizing . . . campaign for exercising statutory rights."¹⁷⁷ Such an order would not simply produce more prospective cases limited to affidavits that languish at various levels of the NLRB bureaucracy but would instead produce a flurry of prompt and decentralized investigations, ALJ factfinding, and determinations for the Board to review and utilize in its final authorization decisions. The priorities set by the General Counsel and the Board would still significantly determine outcomes.

Second, the foregoing discussion illustrates this alternative procedure's compatibility with other proposed reforms of 10(j). One scholar suggests that the proper way to set prosecutorial priorities is to create a rebuttable presumption in favor of 10(j) petitions in discriminatory discharge cases, subject to a discretionary declination by the General Counsel or Regional Director.¹⁷⁸ Another labels the current haphazard approach an abuse of discretion and advocates for the Board's sua sponte consideration of 10(j) petitions in all potential cases of unlawful terminations for union activity.¹⁷⁹ Still another, noting the agency's capacity and resource limitations, advocates for annual numerical targets for 10(j) petitions sought, suggesting 500 as an ambi-

¹⁷⁵ See *supra* Section II.B.

¹⁷⁶ This structure has a criminal law analogy in the District Attorney's office, where the District Attorney sets fundamental policies that are then executed in individual cases under the discretion of the prosecutors. See, e.g., SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO (2019) (outlining the District Attorney's policy priorities and directing the activities of prosecutors working under her). The memo lists other, similar policy directives enacted by other District Attorneys' offices. *Id.* at Appendix A.

¹⁷⁷ Estreicher, *supra* note 12, at 379.

¹⁷⁸ See Morris, *supra* note 13, at 327–37 (outlining a proposal to *authorize* preliminary injunctions in *all* discriminatory discharge cases).

¹⁷⁹ See Gainer, *supra* note 12, at 527–31 ("Such a class action [alleging abuse of discretion] could seek an injunction ordering the NLRB to reform its section 10(j) procedures so that *every* section 8(a)(3) case is *considered* for *possible* section 10(j) action.") (emphasis added).

tious but obtainable goal.¹⁸⁰ These proposed approaches may or may not be practical or ineffective, but the current plodding advice and authorization process effectively closes the door on all of them. The more dynamic process this Note proposes would not only ensure that *more* alleged violators face injunctions that remedy their misconduct but also would produce *better* records for the district courts to consider. Over time, the General Counsel can refine her priorities to target different types of misconduct or allow for more prosecutions of 10(j) cases. This shift in factfinding and legal reasoning workload also allows for more efficient allocation of agency resources by relieving some pressure on Board agents in the field to collect exhaustive affidavits and relieving the Injunctive Litigation Branch and the Division of Advice of duplicative bureaucratic involvement with individual cases.¹⁸¹ The NLRB already suffers from resource limitations that adversely impact its ability to bring 10(j) cases to court.¹⁸² Importantly, the proposed procedure accomplishes efficiencies without requiring greater agency expenditure in time or funds by relying on adversarial hearings that integrate into 10(j) cases the ALJs already working within the NLRB Division of Judges, which does not suffer from the same significant capacity limitations afflicting other Board departments.¹⁸³

¹⁸⁰ See Helm, *supra* note 9, at 643 (“Thus the 5000- and 2500- and even the 1000-case plans would seem to be impossible to implement unless the regions were to reduce drastically the attention they give to all cases except section 10(j) cases. The 500-case plan, however, might be manageable.”).

¹⁸¹ See Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. LEGIS. 19, 27–28 (2014) (“Efficiency involves committing no more resources . . . to addressing a problem than necessary. Institutional design may bear on the efficiency of government action. For example, the costs of administering redundant structures ‘represent lost funds for other tasks. . . . [R]edundant structures impose additional opportunity costs.’”) (citation omitted).

¹⁸² Braden Campbell, NLRB’s 10(j) Injunction Pace Reflects Tight Staffing, LAW360 (Apr. 18, 2023), <https://www.law360.com/employment-authority/articles/1598503/nlrbs-10-j-injunction-pace-reflects-tight-staffing> [<https://perma.cc/KLB8-6KF3>] (“The National Labor Relations Board’s . . . average of nearly 10 months to get to court for emergency injunctions despite the chief prosecutor’s embrace of this potent tool reflects the agency’s struggle to manage a growing caseload with a shrinking staff.”).

¹⁸³ See Telephone Interview with Daniel Silverman, *supra* note 59 (noting that while the staff in Regional Offices face resource limitations, ALJs, who would have a much greater role under the proposed alternative 10(j) procedures, are underutilized by the Board at present); see also *Administrative Law Judge Decisions*, NLRB, <https://www.nlr.gov/cases-decisions/decisions/administrative-law-judge-decisions> [<https://perma.cc/2MQH-ZEBE>] (indicating the thirty ALJs of the NLRB’s Division of Judges produced, collectively, an average of 9.9 decisions per month between January and December 2022); Press Release, NLRB, Statement on NLRB Funding in the 2023 Omnibus Bill (Dec. 29, 2022), <https://www.nlr.gov/news-outreach/news-story/statement-on-nlr-b-funding-in-the-2023-omnibus->

Finally, critics of this alternative procedure may object that the goal of speedier proceedings is, first, unobtainable without sacrificing too much in the quality of the NLRB's advocacy or, second, that discretionary reforms by the Board and General Counsel are more practicable than and preferable to structural change through formal rulemaking. This first criticism is unpersuasive: The quality of the NLRB's advocacy is already compromised by the delay its procedures produce and the correspondingly high rate of failure before district courts.¹⁸⁴ While calibrating the case handling timelines to accommodate the NLRB's limited capacity while still prioritizing speed carries difficulties,¹⁸⁵ these challenges are best addressed through the expert balancing of interests and capacities that rulemaking represents.¹⁸⁶

The second critique—that reforms short of dramatic structural change are adequate to enhance the effect of section 10(j)—appears bolstered by recent guidance from the General Counsel.¹⁸⁷ The guidance memo instructs Regional Directors to pursue voluntary interim settlements temporarily reinstating workers while the underlying ULP charge is litigated.¹⁸⁸ It also announces some streamlining of the process for initiating 10(j) petitions by the NLRB's Injunction Litigation Branch with the goal of “obtaining Board authorization more promptly.”¹⁸⁹ These reforms properly diagnose the delay problem undermining section 10(j)'s effectiveness and represent concrete steps towards addressing the process's shortcomings.

However, the reforms outlined in this General Counsel's memo will not address the fundamental problems with the Board's 10(j) procedures. In fact, the memo highlights why more dramatic structural changes are needed. First, the memo undermines its own goals by suggesting that 10(j) petitions are a losing bet in district court; the directive to seek voluntary settlements is motivated by the goal to avoid

bill [<https://perma.cc/TA3B-HEDM>] (noting that since 2002 overall NLRB staffing has fallen thirty-nine percent and staffing in Field Offices has fallen by fifty percent).

¹⁸⁴ See *supra* notes 66–67 and accompanying text.

¹⁸⁵ See *supra* notes 160, 180 and accompanying text.

¹⁸⁶ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (“Expert discretion is the lifeblood of the administrative process.”) (citation omitted).

¹⁸⁷ See Memorandum GC 23-01 from Jennifer A. Abruzzo, General Counsel, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers 1 (Oct. 20, 2022), <https://apps.nlr.gov/link/document.aspx/09031d45838c703a> [<https://perma.cc/E8GD-DPUA>] (emphasizing interim settlement agreements in 10(j) cases and announcing several minor administrative changes to 10(j) case procedures).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (replacing lengthy narratives previously required for authorization with a “fillable form” to submit to the Injunction Litigation Branch and an “abbreviated ILB memo” to submit to the Board).

litigating the petitions at all.¹⁹⁰ This capitulation degrades the Board's settlement leverage, since pressure to settle is generated by the costs associated with fast and effective accountability before a tribunal for violations of the NLRA. Without the genuine threat of serious litigation in the courts, 10(j) settlements will not be forthcoming, particularly given current hostilities between the Board and major employers.¹⁹¹

Second, and closely related, the memo's outlined reforms leave untouched the Board's plodding consultation and advice procedures for authorizing 10(j) petitions, making only minor administrative changes on the margins. While these changes make *requesting* authorization easier for Regional Directors, they address neither the internal authorization procedures that currently produce months of bureaucratic delay and poor outcomes before the courts nor the evidentiary and record deficiencies courts cite in denying 10(j) petitions.¹⁹² Finally, General Counsel guidance and prosecutorial priorities are subject to political oscillation and retraction from one administration to the next; this memo and its reforms, for all their symbolic virtue, will not durably entrench 10(j) as a deterrent to violations of the NLRA.¹⁹³

The mismatch between the discretionary adjustments to 10(j) sought by the NLRB and the severity of the problems with its current procedures underscores the need for significant structural reforms. The alternative procedure proposed in this Note would improve the ability of the Board and its agents to pursue injunctive petitions for unlawful terminations and provide a stronger foundation to build 10(j) through successive reforms and calibrations. Eventually, the 10(j) injunctive petition can become the powerful remedy for and deterrent against violations of rights guaranteed under the NLRA that it is meant to be.

¹⁹⁰ See *id.* at 2 ("It is my hope that this initiative . . . will reduce the need for district court litigation.").

¹⁹¹ See *10 Year Record of 10(j) Activity*, NLRB, <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/injunction-litigation/10-year-record> [<https://perma.cc/U4ZJ-HJF6>] (documentating only three settlements in 2021 and four in 2022 under the Biden Board, as compared to a recent high watermark of seventeen in 2014 and sixteen in 2015, when the Board was authorizing substantially more 10(j) petitions). For consideration of some key moments of settlement leverage—including the ALJ's initial decision, the Board's final authorization of an injunctive petition, and the commencement of litigation in court—in a 10(j) case under the alternative proposal, see *supra* notes 166, 168, 171 and accompanying text. For the current tenor of relations between the Board and employers, see *supra* note 5 and accompanying text.

¹⁹² See *supra* Section II.B.

¹⁹³ See *supra* Part III.

CONCLUSION

Injunctive relief under section 10(j) of the NLRA ought to be one of the agency's most forceful remedies for the most egregious violations. However, the plodding, bureaucratic advice and authorization procedures that produce such petitions and petitions' inconsistent success before courts mean the 10(j) injunction provides, at best, delayed justice, and, at worst, no justice at all. The three-part reform advocated here—the delegation of the Board's prosecutorial authority, the introduction of a quick evidentiary hearing, and a shift in the Board's role to something more like an appellate body—addresses the chief shortcomings of current procedures by decentralizing the Board's 10(j) decision-making in line with its other ULP procedures, legitimating the injunctive petitions before courts, and bolstering the 10(j) injunction's deterrent effect. Implementing this change through formal rulemaking would not only insulate the new procedure from judicial scrutiny but also introduce much needed stability, ensuring that potential NLRA violators will swiftly and predictably face accountability and bolstering the 10(j) injunction as a prophylactic measure. The test of this proposal is whether reliable administrative scrutiny could lessen the harms imposed by violations of the NLRA. The experience under other U.S. labor statutes with more robust injunctive remedies suggests that this alternative would indeed furnish a strong deterrent to unlawful terminations under the NLRA.¹⁹⁴ As more workers risk their livelihoods to exercise their rights to organize, the human toll for workers like Gerald Bryson and Chris Smalls is too high to ignore the obvious failings of section 10(j) any longer. Though the NLRB has remained trapped in a decades-long repetition of tired patterns under section 10(j), the possibility exists for substantial reform of its procedures to better effectuate its mission of enforcing the rights granted under the Act.

¹⁹⁴ See *supra* notes 75–76 and accompanying text (discussing the success of the RLA compared to the NLRA's failure to prevent discriminatory discharges).