

No. 17-17413

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JILL COFFMAN, Regional Director of Region 20 of the
National Labor Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

QUEEN OF THE VALLEY MEDICAL CENTER,

Respondent-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR PETITIONER-APPELLEE
NATIONAL LABOR RELATIONS BOARD

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**ON APPEAL FROM AN ORDER OF THE
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**BRIEF FOR PETITIONER-APPELLEE
NATIONAL LABOR RELATIONS BOARD**

**I. STATEMENT OF SUBJECT-MATTER AND APPELLATE
JURISDICTION**

The district court had subject-matter jurisdiction under Section 10(j) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, 160(j).¹ This Court

¹ See the Statutory Addendum, attached to this brief, for the full text of Section 10(j) and other relevant sections of the Act.

has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). The court below issued its order granting a temporary injunction on November 30, 2017. (ER 1-10.)² Appellant Queen of the Valley Medical Center (“QVMC”) filed its timely notice of appeal on December 1, 2017. (ER 70-72.)

II. COUNTERSTATEMENT OF THE ISSUES

1. QVMC was required to bargain after the National Union of Healthcare Workers (“Union”) decisively won an election and the Board certified the Union. QVMC did, in fact, unconditionally recognize and bargain with the Union for several months but then abruptly refused to bargain and withdrew recognition, claiming it was testing the Board’s certification. Under Board law, unconditional bargaining waives an employer’s ability to later challenge the Union’s certification. Did the district court properly find that the Regional Director (“Director”) was likely to succeed on the merits of her claim that QVMC unlawfully withdrew recognition and failed to bargain in good faith?

2. QVMC harbored strong union animus, knew that employee Miguel Arroyo supported the Union, and reassigned Arroyo to make him “hurt” for his union support. The evidence further suggests that QVMC’s justification for changing Arroyo’s schedule was pretextual. Did the court abuse its discretion in

² “ER” references are to the Excerpts of Record submitted by QVMC. “Br.” references are to QVMC’s opening brief.

finding that the Director was likely to succeed on her claim that QVMC unlawfully discriminated against Arroyo for his union support?

3. QVMC's unlawful actions have undermined the Union and chilled employees' union support. Moreover, this Court has recognized that an employer's refusal to bargain in good faith inherently threatens irreparable harm to employees' statutory rights, the collective bargaining process, and the Board's remedial effectiveness. Did the district court act within its discretion in balancing the harms and the public interest and concluding that injunctive relief is just and proper to prevent irreparable damage pending a final Board order?

III. COUNTERSTATEMENT OF THE CASE

This case is before the Court on QVMC's appeal from an order of the United States District Court for the Northern District of California, the Honorable Yvonne Gonzalez Rogers, District Judge, granting the Board's petition for a temporary injunction under Section 10(j) of the Act. (ER 1-10.) Among other things, the district court ordered QVMC to recognize and bargain in good faith with the Union; upon the Union's request, rescind any and all unilateral changes; provide the Union with requested, relevant information; and offer an employee his previous work schedule, which QVMC had discriminatorily changed. (ER 8-10.)

A. Background: QVMC Employees Decisively Vote to Unionize; QVMC Unsuccessfully Attempts to Overturn the Election

QVMC operates an acute-care medical facility in Napa, California.

(ER 703.) On October 4, 2016, the Union filed a petition to represent a unit of 419 nonprofessional and technical employees at QVMC's facility. (ER 699-702.) On November 15, 2016, Region 20 of the Board held a mail ballot election. (ER 696, 703-10.) Over 90 percent of the bargaining unit returned mail ballots, and a majority of eligible employees voted for union representation by a wide margin.

(ER 710.) On November 22, 2016, QVMC filed objections to the election. (ER 258-63.) On December 22, 2016, the Director overruled those objections and certified the Union as the bargaining representative of the unit. (ER 711-31.)

Following the Union's certification, QVMC filed a timely request for review with the Board on January 9, 2017. (ER 265-92.)

B. Upon the Union's Certification, QVMC Recognizes the Union and Bargains Regarding Employee Terms and Conditions of Employment as Issues Arise, While Preparing for Negotiations for an Initial Collective Bargaining Agreement

Following the Union's election and certification, QVMC exchanged emails and telephone calls with the Union, provided it with requested information, and met in person with union representatives to bargain over represented employees' terms and conditions of employment. On several occasions, QVMC management

reserved private space at its facilities for the Union to conduct union business, including for bargaining team meetings. (ER 786, 870-77.)

A few days before the election, QVMC changed the job assignment of employee Rene Frogge, a vocal union supporter.³ (ER 680-82, 687-90, 740, 748-50.) In response, the Union sent a cease-and-desist letter to QVMC regarding that and other unilateral changes to employees' schedules in the same department. (ER 485, 741, 754-56, 787, 878-79.) In December 2016, the Union proposed dates to bargain with QVMC over Frogge's new assignment and requested relevant information. (ER 482-83, 683, 690, 742, 760, 762, 764-65, 787, 886-88.) The Union received no meaningful response to the information request. (ER 743, 767, 891-94.) Nevertheless, the parties met to discuss the schedule change, and QVMC ultimately offered to change Frogge's assignment. (ER 475, 480-81, 684-85, 692-93, 744-46, 767, 787, 880-81, 895.) The Union rejected the proposed assignment because it would displace another employee and because QVMC had furnished insufficient information to justify the initial change. (ER 477, 480, 788, 896-97.) The Union made a counter-proposal by email, which QVMC considered but rejected in late February. (ER 477, 479-80, 788, 896-97.) Bill Candella, QVMC's Labor Director, insisted on being involved in this bargaining. (ER 482.)

³ Because Frogge subsequently quit her employment with QVMC, the Director is not seeking injunctive relief on the Region's allegations that QVMC's change in her work assignment violated Section 8(a)(3) and (1) of the Act.

On January 10, the Union requested bargaining unit information from QVMC to prepare for negotiations to reach an initial collective bargaining agreement. (ER 493-95, 778, 812-15.) In mid-February, QVMC responded to some, but not all, of the information requests and promised to further supplement its response. (ER 497-502, 778-79, 821-25.) In its response, QVMC referenced “preparation for the upcoming negotiations for an initial collective bargaining agreement” and pledged to “bargain in good faith with the NUHW” over any of its objections to the Union’s information requests. (ER 497.)

On January 16, QVMC notified the Union that Dietary Department unit employees’ job duties would be affected by QVMC’s “pre-petition decision” to close its cafeteria and kitchen during renovation. (ER 446, 792, 926.) The Union sent a cease-and-desist letter to QVMC and proposed bargaining dates to discuss the issue. (ER 448, 792-93, 927-29.) The parties (including Candella on behalf of QVMC) met to bargain over the closure, and QVMC presented the Union with a document listing “proposed” schedules and temporary assignments for the affected employees. (ER 450-56, 458, 793, 929.) Later, the Union requested relevant information, some of which QVMC provided. (ER 463-67, 793, 930-31, 943-45.) In mid-February, the Union presented QVMC with a proposed “Letter of Understanding” regarding the kitchen closure, which was explicitly “contingent upon ratification” by union-represented employees. (ER 460-61, 793, 933, 948-

49.) The parties met to discuss that counter proposal a few days later, and exchanged more relevant information. (ER 463-67, 794, 933.) QVMC then emailed the Union its “counter on the impact bargaining,” also explicitly contingent on ratification, along with additional information. (ER 463-71, 794-95, 933-34, 950-51.) The parties reached a tentative agreement on February 17. (ER 795, 938, 952-53.) Unit employees voted to ratify the kitchen closure agreement a few days later, and the Union notified QVMC, which responded by email, “[g]reat news!” (ER 795, 938.)

On February 10, QVMC notified the Union that it needed to implement the provisions of its workforce reduction policy, which “will impact one position in the Point of Care classification” in the bargaining unit, and proposed to meet. (ER 512, 785, 862.) The parties then met to discuss possible layoffs and other impacts on the bargaining unit, and QVMC orally furnished information that the Union had requested. (ER 785, 863-64.) QVMC later emailed the Union a formal notice of layoff for one unit employee. (ER 785.)

C. QVMC Continues To Recognize and Bargain with the Union After the Board Rejects Its Election Challenge on February 28, 2017; QVMC Abruptly Changes Course Beginning on March 16, 2017 and Withdraws Recognition

The Board denied QVMC’s request for review on February 28, 2017. (ER 732-33.) QVMC initially continued to bargain with the Union over unit members’ terms and conditions of employment. The Union was ecstatic that QVMC was

“out of appeals” and looked forward to negotiating a first contract. (ER 535, 537.)

On March 16, however, QVMC sent the Union a letter claiming that the mail-ballot election was flawed and demanded that the Union stipulate to a new in-person election. (ER 802-04.) If the Union refused, QVMC would “formally notify the Union that ... the unit certification was faulty and, therefore, [QVMC] will refuse to bargain with the Union so that it can pursue its review of the certification in the courts.” (ER 777, 802-04.) QVMC added that, notwithstanding this proposed “technical refusal to bargain,” it would nevertheless engage in conditional bargaining for a first contract, pending the final outcome of its appeals. (ER 777, 803.) On March 24, QVMC emailed the Union and stated that unless an agreement is reached consistent with its March 16 letter, QVMC would refuse the Union’s requests to meet. (ER 778, 809, 811.) The Union rejected QVMC’s demand for a new election and offer to engage in conditional bargaining, citing its position that QVMC had already recognized and bargained with the Union over a host of issues for months. (ER 777-78, 806-08.)

After March 16, QVMC abruptly changed course on a number of issues it had been negotiating with the Union. For example:

- 1. QVMC expresses willingness to bargain over changes to the Lab Department, then refuses**

In February the Union had sent QVMC a cease-and-desist letter regarding significant planned changes to phlebotomists’ schedules and proposed bargaining

dates on the issue. (ER 780, 834-36.) After the Board denied QVMC's request for review, but before its March 16 and March 24 communications, QVMC expressed willingness to bargain over the issue, proposed dates for bargaining, and attempted to schedule a meeting with the Union. (ER 780-81, 836, 840-42.) In late March, however, QVMC stated that it would not meet over the scheduling changes due to pending issues between it and the Union. (ER 781, 784, 840, 843-44.)

2. QVMC bargains over issues in the Sterile Processing Department, then abruptly stops

In January and February, the Union and unit employees expressed concerns about the retaliatory actions of a supervisor in the Sterile Processing Department and requested to meet with QVMC to work through the issues. (ER 788-89, 901-10, 916-17.) On or about February 28, QVMC informed the Union that it needed to implement significant schedule changes in the department and attached a proposal of the changes. (ER 789, 911.) On March 2, after the Board denied QVMC's request for review, the Union requested information from QVMC justifying the changes and asked it to cease and desist from implementing them until the parties could bargain over the issue. (ER 779, 789-90, 913.) QVMC met with the Union and employees that same day to discuss the proposed scheduling changes (ER 790, 901, 908-10), and QVMC invited the employees to create their own schedule, with certain restrictions, and submit it to QVMC for consideration (ER 790-91, 916-17).

When later presented with the employees' proposed schedule, QVMC was not satisfied (ER 674, 791-92), and on March 15, QVMC formally responded to the Union's proposal (ER 920-21). On March 17, QVMC posted the new schedule notwithstanding that the employees and Union were not satisfied with it. (ER 791-92.)

3. QVMC initially agrees to allow a union representative in an investigatory meeting, then refuses

On February 28, QVMC approved an employee's request for a union representative to attend an investigatory meeting and told her to make the necessary arrangements with the Union. (ER 782, 845.) From March 1 to March 21, QVMC actively worked with the Union to schedule the investigatory meeting to accommodate the union representative. (ER 782, 847-52.) QVMC scheduled the meeting for March 21; however, technical issues prevented the Union from receiving the calendar invite. (ER 782, 852.) QVMC offered to again reschedule the meeting. (ER 782-83, 852-53.) Before the meeting, however, QVMC suddenly told the Union that it would not allow a representative to attend after all, "consistent with" its March 24 email. (ER 783, 843-44, 854.)

4. QVMC provides additional first contract bargaining information and promises to respond to the Union's proposed bargaining dates

On March 1, after the Board denied QVMC's request for review, QVMC provided more requested bargaining information "for the employees that NUHW

asserts representation rights,” and stated that it would further respond “as [data] becomes available.” (ER 508-10, 779, 826-33.) That same day, the Union emailed QVMC and proposed bargaining dates “[p]er our conversation this morning” for the parties’ initial contract. (ER 444.) Thereafter, after repeated inquiries by the Union, QVMC emailed the Union on March 7 and 10, stating that it would soon respond to the Union’s information requests and proposed dates for first contract bargaining. (ER 779, 832.)

5. A QVMC manager bargains over schedules and changes to job duties in the Pharmacy Department

On March 13, a QVMC Pharmacy Department manager copied the Union in its confirmation email for a meeting to discuss restructuring the pharmacy employees’ schedules and job descriptions. (ER 855.) On March 15, QVMC met with a group of employees, including three bargaining team members. (ER 784, 855, 857.) At that meeting, QVMC asked the team members to ascertain the Union’s position regarding seniority issues. (ER 857.)

D. QVMC Implements Numerous Unilateral Changes and Disavows the Parties’ Kitchen Closure Agreement

Since March 16, QVMC has ignored the Union and implemented unilateral changes without bargaining. QVMC unilaterally changed Sterile Processing Department employees’ schedules and restricted the Union’s access in its facilities. (ER 82-91, 94-95, 98-105, 779-80, 786, 941-42, 959-60, 962-65, 992-94.)

QVMC also disavowed the parties' kitchen closure agreement. (ER 959.)

After the Union requested bargaining over a perceived delay in the project, QVMC responded that "because the certification of the election results is flawed, we cannot recognize the [Union] as the exclusive representative of the employees[,] and for the same reason, we are not bound by the" signed agreement. (ER 959-60, 962-65.)

E. QVMC Retaliates Against Union Supporter Miguel Arroyo by Changing His Shift Schedule

Approximately one week before the Union's election, QVMC transferred employee Arroyo to a different shift. (ER 685, 693, 741.) Arroyo, an avid union supporter, wore union buttons and appeared on the Union's flyers and Facebook page. (ER 685, 741, 1004.) Arroyo had worked with his wife (who shared his last name) in the same department on the same shift for three years. (ER 685, 693, 741.) Their department was among the most active in the Union's organizing campaign. (ER 743.) On multiple occasions prior to the election, a QVMC manager spoke disparagingly about the Union and mentioned retaliating against union supporters. (ER 1004.) After discovering Arroyo's appearance on the Union's Facebook page, that manager discussed with another QVMC manager how to "make it hurt" for Arroyo and concluded that changing his schedule would create transportation issues for the Arroyo family. (ER 1004-05.) Arroyo's manager then worked with a human resources employee to structure Arroyo's shift

change so that it would not appear retaliatory. (ER 1005-06.) Ultimately, he decided to tell Arroyo that the change was based on QVMC's policy that spouses are not allowed to work the same shift in the same department. (ER 685, 693, 741.) QVMC, however, had not enforced the policy in the past. (ER 685, 693, 741.)

F. QVMC's Withdrawal of Recognition, Unilateral Changes, and Retaliation, Causes a Decline in Union Support

In January 2017, the bargaining unit employees elected around 30 bargaining team members to represent them in first-contract negotiations. (ER 91-92, 975.) From January through March, the Union held monthly bargaining team meetings at QVMC's facility and 30 or more unit members attended. (ER 91-92, 975.) After QVMC withdrew recognition, employee attendance at the bargaining team meetings precipitously fell to 14 employees in April, 12 employees in May, and, after some fluctuation over the summer, to just 9 employees in November. (ER 91, 975.) The employees who attended these meetings expressed frustration with the Union for its ineffectiveness at representing them, stated that it was becoming harder to maintain coworkers' support for the Union, and were told by coworkers that they do not want to be identified as union supporters. (ER 737-38, 975, 983-84.) Employees informed the Union that they feared retaliation and were not willing to "stick their necks out" for the Union, and indeed, some unit members stepped back from their union engagement, resigned their bargaining team

positions, or even quit their employment at QVMC. (ER 85-88, 92-93, 796-98, 975, 977-78, 983-84.) Employees in several departments cited a tense work environment caused by QVMC's hostility toward the Union, and some, including Arroyo, refused to participate in Board proceedings out of fear of retaliation. (ER 742, 744, 954, 958, 978, 981.)

QVMC also increased its security presence at the facility when the Union is present, and managers told employees that they are not supposed to talk to the Union. (ER 92, 798, 956-59, 979-81.) While the Union's representative has not been barred from QVMC's cafeteria and other public spaces, she has been prevented from accessing department break rooms where she previously had access, and she has noticed security guards appearing to record her, gesturing to her that she is being watched, and pacing in front of the cafeteria while she meets with employees. (ER 86, 95-96, 110-11, 798-800, 956-57, 980.) QVMC's managers have prevented her from speaking with unit members, and bargaining unit members expressed reluctance to speak with her, even asking if it was legal for her to be at the facility. (ER 798-800, 958-59, 979-81.)

QVMC's unilateral changes also caused a decline in union support. Whereas the Union and employees previously were able to bargain over such changes, QVMC now denies the Union's efforts, which confuses employees and makes the Union suddenly appear ineffective. (ER 89-90, 960-61, 982-85.) One

employee even asked a union representative, “is the Union even in yet because I hear two different stories?” (ER 90.) Employees in the Dietary Department, in particular, expressed frustration with the Union’s inability to enforce the signed kitchen closure agreement. (ER 960-61.) And employees who previously opposed QVMC’s unilateral changes have since expressed reluctance to, and futility in, fighting such changes further given the Union’s perceived ineffectiveness. (ER 89, 800, 960-61, 981-83.)

G. The District Court Enjoins QVMC’s Conduct that is Irreparably Harming Employee Free Choice, the Collective-Bargaining Process, and the Board’s Remedial Authority

Based on unfair-labor-practice charges filed by the Union, the Region issued an administrative complaint on May 31, 2017 (subsequently amended June 15 and July 24), alleging numerous violations of Section 8(a)(1), (3), and (5) of the Act, 29 U.S.C. § 158(a)(1), (3), (5). On August 1, the Board authorized the Director to seek injunctive relief. (ER 115.) Although the Board’s General Counsel initially authorized the Director to wait to file her petition until the administrative proceedings concluded (and the Region so advised the parties), in light of a lengthier-than-expected administrative proceeding and scheduling delays, the General Counsel ultimately authorized the Director to proceed on the partial

administrative record.⁴ (ER 116.) On September 26, the Director petitioned the district court for temporary injunctive relief under Section 10(j) of the Act. (ER 1082-1105.)

Specifically, the petition alleged that QVMC violated the Act by withdrawing recognition from and refusing to bargain with the Union, unilaterally changing employees' terms and conditions of employment, failing to provide the Union with requested information, denying an employee her right to union representation during an investigatory meeting, and discriminatorily changing Arroyo's schedule. (ER 1088-98.) The petition also alleged that a preliminary injunction was necessary to prevent irreparable harm to employees' statutory bargaining rights, the public's interest in the collective-bargaining process, and the Board's remedial authority. (ER 1098-1100.)

On November 21, the district court held a hearing on the petition. (ER 11-53.) On November 30, the court entered a temporary injunction order. Specifically, the court found that the Director established a likelihood of success on the merits that QVMC violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and subsequently refusing to bargain,

⁴ Between August 7 and November 2, an Administrative Law Judge held a ten-day hearing in the underlying administrative case. (ER 116-17.) The parties are currently awaiting her decision, and once issued, can appeal her decision to the Board. (ER 1072.)

including by making unilateral changes and failing to respond to the Union's information requests. (ER 3-5, 8-9.) The court concluded that the Director produced persuasive and sufficient evidence that QVMC's interactions with the Union up until March 16 "demonstrated unconditional bargaining" and recognition of the Union, "which waived the preservation of its certification challenge."

(ER 3.)

The court further concluded that the Director established a likelihood of success on the merits of the unlawful discrimination charge. (ER 5-6.) In so finding, the court pointed to evidence that Arroyo's manager exhibited union animus, wanted to make Arroyo "hurt" for supporting the Union, and structured Arroyo's shift change to conceal his retaliatory motive. (ER 5.) In light of that evidence, the court rejected QVMC's alleged non-discriminatory justification.

(ER 5.)

The court also concluded that irreparable harm to statutory rights was likely in the absence of injunctive relief. (ER 6.) The court noted that absent injunctive relief, when an employer unlawfully refuses to bargain, the "union is likely weakened in the interim, and it will be difficult to recreate the original status quo with the same relative position of the bargaining parties." (ER 6 (quoting *Frankl v. HTH Corp.* (*Frankl I*), 650 F.3d 1334, 1363 (9th Cir. 2011)).) On top of that likely harm, the court found persuasive the Director's evidence that union support had

already eroded as a result of QVMC's unlawful actions, that employees had expressed fear of retaliation for any outward union support, and that QVMC had made a number of unilateral changes. (ER 6.)

Next, the court found that the balance of harms favored granting the injunction. (ER 6.) Although the court acknowledged that a bargaining order may impose some hardship on QVMC, the court ultimately concluded that any possible hardship to QVMC is outweighed by the likelihood that a delay in bargaining would render the Board's make-whole relief inadequate. (ER 6-7.) The court also found that injunctive relief was in the public interest to ensure that QVMC's unfair labor practices "will not succeed" (ER 6-7.) In so finding, the court noted that "[i]njunctive relief in the context of an unlawful withdrawal of recognition is particularly appropriate," and rejected QVMC's argument that the injunction would prevent it from further challenging the election. (ER 7.)

On December 1, QVMC filed its notice of appeal of the district court's order and filed a motion with the district court seeking a stay of the injunction pending the appeal. (ER 63-72.) The court denied that motion on December 5. On December 12, QVMC filed a motion with the Ninth Circuit seeking a stay, which the Court granted on December 27.

IV. THE STANDARD OF APPELLATE REVIEW

The Court should reverse a district court's grant of Section 10(j) relief only if the court abused its discretion by relying on clearly erroneous findings of fact or an erroneous legal standard. *Scott v. Stephen Dunn & Assoc.*, 241 F.3d 652, 659 (9th Cir. 2001). The Court "review[s] de novo whether the district court applied the correct legal standards." *Small v. Avanti Health Systems, LLC (Avanti)*, 661 F.3d 1180, 1187 (9th Cir. 2011).

V. SUMMARY OF THE ARGUMENT

The Director has satisfied the criteria for injunctive relief under Section 10(j). The Director is likely to succeed in proving QVMC's extensive violations of the Act. And, applying traditional equitable criteria and balancing the harms, injunctive relief is "just and proper" to preserve the status quo and prevent further dissipation of union support pending the administrative proceeding.

The district court properly found that the Director presented persuasive evidence, together with an arguable legal theory, sufficient to show a likelihood of success on its claims that QVMC violated Section 8(a)(1), (3), and (5) of the Act. After the Union decisively won the election and the Board certified the Union, QVMC recognized and bargained with the Union. QVMC even continued to bargain with the Union for two weeks after the Board denied its request to review the representation proceeding. Notably, throughout this period of bargaining with

the Union, QVMC never indicated that its recognition of the Union was conditioned on the outcome of its intent to test the Board's certification. Then, after months of bargaining, QVMC abruptly announced that it was withholding recognition to test the Board's certification of the Union in federal court, unless the Union agreed to a re-run election. However, under Board law, QVMC waived its right to test the Union's certification by recognizing and bargaining with the Union unconditionally. The district court properly found that the Director was likely to succeed in showing that when QVMC made good on its threat and unlawfully withdrew its recognition and refused to further bargain with the Union—by, among other things, making unilateral changes and refusing to provide relevant information—it violated Section 8(a)(5) and (1) of the Act.

In so finding, the district court properly rejected QVMC's argument that it was simply engaging in a "technical refusal to bargain" to test the Union's certification. QVMC could not test the Board's certification after unconditionally recognizing and bargaining with the Union, and its reliance on technical-refusal-to-bargain cases is misplaced. Those cases establish that an employer who is challenging certification cannot defend against a refusal-to-bargain charge by claiming that it was bargaining "in good faith." Those cases, however, do not address what type of conduct preserves (or waives) an employer's ability to test

certification, particularly where, as here, the employer engages in extensive unconditional bargaining with the Union.

The Director also presented a “better than negligible chance” of success in proving that QVMC unlawfully retaliated against union supporter Arroyo by changing his schedule. *Scott*, 241 F.3d at 662. The Director presented persuasive evidence that Arroyo engaged in protected union activity and that Arroyo’s manager knew about, and disapproved of, that activity. In light of that showing, the district court correctly rejected QVMC’s affirmative defense—that it changed Arroyo’s schedule based on its policy that relatives are not allowed to work together in the same department on the same shift—particularly since Arroyo had been working with his wife for three years without issue.

Finally, the district court did not err in balancing the equities and finding that QVMC’s conduct will likely irreparably harm its employees, the Union, and the public interest. A likelihood of success on a bad-faith bargaining violation, along with permissible inferences regarding the likely effects of that violation, can demonstrate a likelihood of irreparable injury sufficient to warrant an interim injunction. Here, the Director also presented concrete and persuasive evidence of a chill in union activity, employee fear of retaliation, and dissipation of union support, all flowing from QVMC’s unlawful conduct. By the time the Board issues its final order, it will be too late for the Union to regain its lost support, and

QVMC will profit permanently from its illegal conduct. Thus, the district court properly found that any evidence of harm presented by QVMC was outweighed by evidence of likely irreparable harm to employees' Section 7 rights, the collective bargaining process, and the Board's remedial authority. Injunctive relief, pending Board adjudication on the merits, is therefore appropriate.

VI. ARGUMENT

A. The Applicable Section 10(j) Standards

Section 10(j) of the Act authorizes district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice charges. In enacting Section 10(j), Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. *See Scott*, 241 F.3d at 659; *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. at 8, 27 reprinted in 1 Leg. Hist. 414, 433 (LMRA 1947)).

Section 10(j) directs district courts to grant relief that is "just and proper." In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Avanti*, 661 F.3d at 1187; *Frankl I*, 650 F.3d at 1355. Thus, to obtain a preliminary injunction, the Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable

harm in the absence of preliminary relief, (3) that the balance of equities tips in the Board's favor, and (4) that an injunction is in the public interest. *Frankl I*, 650 F.3d at 1355 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). These elements are evaluated on a "sliding scale" in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *See Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011). When "the balance of hardships tips sharply" in the Director's favor, the Director must establish only "serious questions going to the merits." *Id.* Of course, the Director must always establish "a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135.

1. Likelihood of Success

Likelihood of success in a Section 10(j) proceeding "is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Director occurred and that the Ninth Circuit would grant a petition enforcing that order." *Frankl I*, 650 F.3d at 1355. *See also Avanti*, 661 F.3d at 1187. In evaluating the likelihood of success, "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." *Frankl I*, 650 F.3d at 1356.

Unlike in the underlying administrative proceeding, the Director need not prove by a preponderance of the evidence that the respondent committed the alleged unfair labor practices. *See Scott*, 241 F.3d at 662. Such a standard would “improperly equat[e] ‘likelihood of success’ with ‘success.’” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). Rather, the Director makes a threshold showing of likelihood of success by producing “some evidence” in support of the unfair labor practice charge “together with an arguable legal theory.” *Avanti*, 661 F.3d at 1187. *See also Scott*, 241 F.3d at 662 (the Director need only show “a better than negligible chance of success”). Therefore, in a Section 10(j) proceeding, the district court should sustain the Director’s factual allegations if they are “within the range of rationality,” and “[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel.” *Frankl I*, 650 F.3d at 1356. “A conflict in the evidence does not preclude the Regional Director from making the requisite showing for a section 10(j) injunction.” *Scott*, 241 F.3d at 662.

2. Irreparable harm, balancing the equities, and examining the public interest

In applying traditional equitable principles to a Section 10(j) petition, courts must consider the matter in light of the underlying principles of Section 10(j), which are “to protect the integrity of the collective bargaining process and to preserve the Board’s remedial power while it processes the charge.” *Miller*, 19

F.3d at 459-60. As this Court has recognized, “[i]n the context of the NLRA, ‘permit[ting an] alleged unfair labor practice to reach fruition and thereby render meaningless the Board’s remedial authority is irreparable harm.’” *Frankl I*, 650 F.3d at 1362. *See also Avanti*, 661 F.3d at 1196.

Likely irreparable injury is established in a Section 10(j) case by showing “a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by later relief.” *Frankl I*, 650 F.3d at 1362. The Director can make the requisite showing of likely irreparable harm either through evidence that such harm is occurring, *see, e.g., Scott*, 241 F.3d at 667-68, or from “inferences from the nature of the particular unfair labor practice at issue [which] remain available,” *Frankl I*, 650 F.3d at 1362. The same evidence and legal conclusions establishing likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the unfair labor practices, provide support for a finding of irreparable harm. *Avanti*, 661 F.3d at 1195. Thus, for “violations of Section 8(a)(5), continuation of that unfair labor practice, failure to bargain in good faith, has long been understood as likely causing irreparable injury... .” *Frankl I*, 650 F.3d at 1362.

The public interest in a Section 10(j) case “is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge.” *Frankl I*, 650 F.3d at 1365. *See also Avanti*, 661 F.3d at

1196. A strong showing of likelihood of success and of likely irreparable harm will establish that Section 10(j) relief is in the public interest. *Frankl I*, 650 F.3d at 1365. *See Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 300 (7th Cir. 2001).

B. The District Court Correctly Concluded that the Director Is Likely To Succeed in Establishing that QVMC Violated the Act

1. The Director established a strong likelihood that the Board will conclude that QVMC violated Section 8(a)(5) and (1) of the Act

Section 8(a)(5), as augmented by Section 8(d), of the Act prohibits an employer from refusing to bargain collectively in good faith with its employees' bargaining representative regarding terms and conditions of employment.

29 U.S.C. § 158(a)(5), (d). The district court acted within its discretion in finding that the Director is likely to succeed on its claim that QVMC violated Section 8(a)(5) and (1) of the Act when it unlawfully withdrew recognition from the Union and refused to bargain in good faith by, among other things, imposing numerous changes to unit employees' terms and conditions of employment without consulting the Union and refusing to provide the Union with relevant information. (ER 3-5, 6, 8.)

a. QVMC unlawfully withdrew recognition from the Union and refused to bargain in good faith

Board certification of a union establishes the union as the employees' collective-bargaining representative. *Brooks v. NLRB*, 348 U.S. 96, 98-99 (1954). Following certification, an employer is required to recognize and bargain in good

faith with the certified union. *Id.* at 104. *Accord Audio Visual Servs. Grp., Inc.*, 365 NLRB No. 84, 2017 WL 2241025 at *1 (May 19, 2017). The bargaining obligation continues pending Board consideration of a request for review. *Audio Visual*, 2017 WL 2241025 at *2. Absent unusual circumstances, an employer violates Section 8(a)(5) and (1) by withdrawing recognition during a union’s certification year. *See Brooks*, 348 U.S. at 98-99.

Board certification is not an “order” subject to judicial review; thus, if an employer intends to seek judicial review of a Board-issued certification, it must refuse to bargain and later defend against the resulting refusal-to-bargain complaint by asserting an affirmative defense that the certification was improper. *See Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). This is often referred to as “testing certification.” In that context, the “Board is presumed to have certain expertise,” and the Court “will defer to the Board’s decisions unless it has committed an abuse of discretion.” *NLRB v. All-Weather Architectural Aluminum, Inc.*, 692 F.2d 76, 78 (9th Cir. 1982).

The process to “test certification” is described in *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326-27 (8th Cir. 1984), *enforcing*, 268 NLRB 258 (1983):

In order to challenge certification of a collective bargaining unit, an employer must refuse to recognize a union after its certification. If the union files unfair labor practice charges for refusal to bargain, under § 8(a)(5) of the Act, the employer may then raise the issue of the propriety of the unit as

an affirmative defense to the charges. An employer then obtains judicial review of a certification determination via review of the unfair labor practice charges [I]n order to challenge the propriety of a certification, *an employer must refuse to recognize a union immediately after the collective bargaining unit has been certified and the union has been elected as the representative of the bargaining unit.* (emphasis added)

“An employer who fails to follow this procedural course waives the right to contest certification.” *Id.* Thus, an employer who intends to pursue federal court review must be clear that it is planning to seek review, or that it is “testing certification,” and may not rely on an inference of its intent simply because it sought from the Board a review of the certification. *See Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 224 (D.C. Cir. 1996) (employer made clear that bargaining was “subject to the final judgment of the federal courts”). An employer who has not recognized a union or commenced bargaining may still engage in bargaining, but it must make clear that the results of that bargaining are conditioned on the disposition of the employer’s test of certification in federal court. *Id.* *See Fred’s Inc.*, 343 NLRB 138, 138 & n.2 (2004) (employer “clearly indicated in its communications with the General Counsel and the [u]nion its intention to test the [u]nion’s certification”). Although such “conditional bargaining” preserves an employer’s ability to test certification in federal court, it is considered by the Board to be unlawful bad-faith bargaining. *E.g., Fred’s*, 343 NLRB at 138-39.

In contrast, an employer that engages in unconditional bargaining with the certified union effectively recognizes the union and waives its objections to the validity of the certification; it may not subsequently attempt to “test certification” by engaging in a technical refusal to bargain. *Technicolor*, 739 F.2d at 326-27; *King Radio Corp.*, 166 NLRB 649, 661 (1967), *enforced*, 398 F.2d 14, 20 (10th Cir. 1968); *Michael Konig*, 318 NLRB 901, 903-04 (1995), *enforced*, 1996 WL 199152 (3d Cir. 1995). *See MaxPak*, 362 NLRB No. 138, 2015 WL 4179686 at *2 (Jun. 26, 2015) (employer waived right to challenge validity of certification when it entered into negotiations with union); *Prof'l Transp., Inc.*, 362 NLRB No. 60, 2015 WL 1510979 at * 2 (2015) (same). *See also Garcia v. Fallbrook Hosp. Corp.*, 952 F.Supp.2d 937, 953-54 (S.D. Cal. 2013) (same).

The district court correctly applied these principles in concluding that QVMC unlawfully withdrew recognition from the Union. (ER 3.) The district court correctly found that QVMC’s initial interactions with the Union, from approximately December 2016 until its March 16, 2017 letter, “demonstrated unconditional bargaining which waived the preservation of its certification challenge.” (ER 3.) With no qualifications or indication that bargaining was conditioned on testing certification, QVMC negotiated with the Union over numerous aspects of its employees’ terms and conditions of employment. For example, after the Union’s certification, QVMC notified and bargained with the

Union over changes to employees' schedules, provided first contract bargaining information, negotiated and signed the kitchen closure agreement, and notified and bargained with the Union over upcoming reductions in force.

Critically, QVMC continued to bargain with the Union even *after* the Board's February 28 denial of its request for review, again without any conditions or even mention of its intent to test certification in federal court. To the contrary, QVMC's communications reflected an unconditional willingness to meet, bargain over the effects of decisions on unit employees, exchange proposals, and furnish information. Indeed QVMC (i) on March 6 expressed willingness to meet and proposed bargaining times for discussing changes to phlebotomists' schedules; (ii) between March 1 and March 21, worked with the Union to schedule an investigatory meeting so that a unit employee's *Weingarten* representative⁵ could attend; (iii) on March 1, provided the Union with additional information to prepare for first-contract bargaining and promised more as it became available; (iv) on March 2, met and bargained with the Union over scheduling changes and other

⁵ In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that an employee has a Section 7 right to request union representation as a condition of participation in an investigatory interview "where the employee reasonably believes the investigation will result in disciplinary action." 420 U.S. 251, 257 (1975). This right does not extend to non-union workplaces. *IBM Corp.*, 341 NLRB 1288, 1288 (2004). Thus, QVMC's efforts to include the Union in an investigatory meeting, followed by its abrupt denial of that right, is indicative of its initial recognition of the Union and subsequent withdrawal, as well as establishes a separate violation of Section 8(a)(1) of the Act.

issues in the Sterile Processing Department; (v) on March 7 and 10, promised to contact its labor team and respond to the Union's outstanding first-contract bargaining information requests and the Union's proposed bargaining dates; (vi) on March 15, met with bargaining team members in the Pharmacy Department to discuss schedule and job assignment changes; and (vii) on March 15, formally responded to concerns raised in the March 2 meeting about changes to the Sterile Processing Department. Given the extent and nature of this bargaining conduct, and QVMC's failure to indicate at any time that any of the bargaining was conditional, the district court did not err in finding that QVMC engaged in unconditional bargaining.

It was not until its March 16 letter that QVMC first expressed its intention to condition bargaining on its certification challenge. Then, by email on March 24, QVMC effectively withdrew recognition by refusing to continue to meet, bargain, or honor any of its previous agreements with the Union. Yet, under Board law, this refusal to bargain failed to preserve its certification challenge. QVMC's prior unconditioned dealings with the Union constituted recognition that unequivocally waived its right to "test certification." *Technicolor*, 739 F.2d at 326-27.

A number of QVMC's arguments challenging the district court's decision are premised on a misunderstanding of Board precedent or attempt to take well-established Board principles out of context. To that end, QVMC's reliance

(Br. 25-30) on language from technical-refusal-to-bargain cases, *e.g.*, *Terrace Gardens*, 91 F.3d at 226; *Fred's*, 343 NLRB at 138-39; *GKN Sinter Metals, Inc.*, 343 NLRB 315 (2004), is misplaced, and the district court properly rejected that precedent as inapposite. (See ER 4-5 (distinguishing *Fred's*.) Although each of those cases indeed found that “an employer [who] continues to challenge the validity of a union’s certification, [] is effectively refusing to bargain with the union,” *Fred's*, 343 NLRB at 138, those findings arose where the Board was considering whether the employer could rely on its conditional bargaining to defend against allegations that it unlawfully refused to bargain in good faith. Here, however, the question is not whether QVMC engaged in *good faith* bargaining; rather, the question is whether QVMC engaged in *any* bargaining that recognized the Union as the employees’ representative, and thus waived its ability to later challenge the Union’s certification. Notably, none of QVMC’s cited cases address what conduct waives an employer’s ability to test certification, and none of its cases hold that an employer’s challenge to a Union’s certification alone preserves that ability, especially in the absence of any explicit conditions on bargaining. Compare *Fred's*, 343 NLRB at 138 & n.2 (employer’s letters to union clearly conveyed intent to test certification); *Terrace Gardens*, 91 F.3d at 224 (same); *Overland Trans. Sys., Inc.*, 323 NLRB 491, 491 (1997) (attorney offering to meet with union had no negotiating authority), *enforced*, 187 F.3d 637 (6th Cir. 1999).

By attempting to excise language from the limited technical 8(a)(5) context, QVMC essentially advocates for a general rule that an employer cannot be found to have recognized or bargained with a union if the employer is also appealing the union's certification, unless the employer "disavows" its certification challenge, even when the employer's conduct indicates that it is bargaining unconditionally. (Br. 25-26.) But the Board has never held that an employer can engage in collective bargaining like QVMC did here (*e.g.*, responding to numerous information requests, meeting and negotiating with the Union several times, and even signing an agreement ratified by unit employees—all without reference to any certification challenge) only to claim later that it was refusing to bargain all along, purely by legal operation of its objections and request for review. To allow the *de jure* refusal-to-bargain rule urged by QVMC despite an employer's *de facto* unconditional bargaining would ignore and undermine the well-settled principle that an employer who intends to challenge a union's certification must refuse to bargain. See *King Radio*, 166 NLRB at 661.⁶ The district court did not abuse its

⁶ QVMC's attempt (Br. 36-39) to distinguish the Director's cases falls flat. That waiver may have been more glaring in those cases does not preclude finding waiver here, and QVMC points out distinctions without a difference. In finding waiver, the Board in those cases did not explicitly require any specific length of bargaining or rely on the fact that bargaining was for an initial contract. And, even if the definition of collective bargaining were confined to bargaining for a first contract (as QVMC erroneously suggests), the parties here had started that process through the Union's information requests and QVMC's responses, including its mid-February reference to preparing for negotiations for an initial collective

discretion in declining to extend Board law arising in the unique and distinguishable technical 8(a)(5) context to the facts of this case. To the contrary, the district court appropriately recognized that the Director need only “produce some evidence to support the unfair labor practice charge, together with an arguable legal theory.” (ER 2.) That the district court was “hospitable to the views of the [Director], however novel,” is no grounds for reversing its decision.⁷ *Frankl I*, 650 F.3d at 1356.

What is more, the Director is likely to succeed on its withdrawal and refusal-to-bargain theory, even accepting, *arguendo*, QVMC’s premise that it had free reign to recognize and bargain with the Union during the pendency of its request for review without waiving its ability to challenge the Union’s certification. Between February 28 (when the Board denied QVMC’s request for review) and March 16 (when QVMC first raised the possibility of a technical refusal to bargain), QVMC continued to bargain with the Union over terms and conditions of employment without expressing any intent to challenge the Union’s certification in

bargaining agreement. *See, e.g., Richmond, Div. of Pak-Well*, 206 NLRB 260, 261 (1973) (“a request for relevant information constitutes a request for bargaining”).

⁷ QVMC ascribes far too much weight (Br. 39-43) to the district court’s stated deference to the Board’s Section 10(j) authorization in this matter (ER 2-3). The Director’s case and the court’s decision are well-supported by the facts and the law, making any special deference superfluous.

federal court. Indeed, after the Board denied the request for review, the Union publicly communicated its belief that QVMC was “out of appeals,” that the employees’ “vote to form a union stands,” and that it had sent management dates to begin bargaining for an initial contract. (ER 535, 537, 568-69.) Tellingly, QVMC glosses over (Br. 11, 13, 26, 34) its conduct between February 28 and March 16, disingenuously claiming that the Director presented evidence of only one instance of bargaining during that time (the March 2 meeting in the Sterile Processing Department) and downplaying the Union’s role in that meeting. As detailed above, the record demonstrates otherwise.

QVMC’s misunderstanding of Board precedent is further evidenced by its attempt (Br. 30-31) to apply the Board’s “clear and unmistakable waiver” standard here. The Board applies the clear and unmistakable waiver standard when analyzing whether a party has waived its right to bargain over a mandatory subject of bargaining. QVMC cites no case applying it to the issue of whether an employer waived its right to test certification, and its cited cases address distinguishable factual and legal scenarios—namely, unions’ waiving employees’ statutory rights. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-07 (1983) (right of union officials to be protected from more severe sanctions); *Resorts Int’l Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993) (right to receive information relevant to collective bargaining); *United Steelworkers of America, AFL-CIO v.*

NLRB, 536 F.2d 550, 555 (3d Cir. 1976) (right to bargain over new grievance reporting system).

Likewise unavailing, is QVMC's reliance (Br. 33-34) on *Terracon, Inc.*, 339 NLRB 221, 225 (2003), which addressed whether an employer voluntarily recognized a union through its conduct. The issue of voluntary recognition, and the type of employer conduct that constitutes such recognition, arises when there has been no Board certification. Here, the Union decisively won the election and is the employees' Board-certified bargaining representative. Accordingly, this, and other voluntary recognition cases, are inapplicable.

Finally, QVMC makes the unavailing policy argument (Br. 35-36, 56-57) that the Director's position will ultimately prevent employers from speaking with unions during the pendency of their certification challenges. This overstates the Director's position, however, which is not that an employer cannot engage with a union while challenging its certification. Rather, the Director's position is that to avoid waiver, the employer must simply make clear that its communications and negotiations with the union are conditional and that it intends to challenge the union's certification. On (and after) March 16, QVMC had no trouble doing just that. (See ER 802-04, 809, 811, 840, 854, 860-61.) Any other result would allow employers to recognize and bargain with a union for a time, and then unilaterally decide to stop. As discussed below, and contrary to "arguably limit[ing] the harm

to the union and employees involved,” as QVMC unconvincingly claims (Br. 35), such conduct confuses employees, sends the message that their right to bargain collectively is unpredictable and subject to the whim of their employer, dissipates their support for the Union, and disrupts the industrial peace the Act is designed to promote.

Accordingly, the district court properly found that the Director has a strong likelihood of success in establishing that QVMC unconditionally recognized and bargained with the Union before March 16, thereby waiving any right to “test certification” in federal court and rendering its withdrawal of recognition unlawful.⁸

b. QVMC implemented unilateral changes without notifying the Union and bargaining to impasse

The Director also established a likelihood of success in proving that QVMC violated Section 8(a)(5) and (1) by implementing unilateral changes to unit employees’ terms and conditions of employment without consulting the Union. “An essential aspect of the [u]nion’s role in collective bargaining is its right to be consulted by the employer about mandatory subjects of bargaining and to make comments, objections, or suggestions to the employer before action is taken.”

⁸ Indeed, as will be shown below, arguably “the balance of hardships tips [so] sharply” in the Director’s favor, that she need only raise “serious questions going to the merits,” which she has clearly done. *Alliance for the Wild Rockies*, 632 F.3d at 1131-35.

Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 408 (9th Cir. 1978). An employer violates its duty to bargain in good faith “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 737 (1962)).

Since it withdrew recognition, QVMC has made numerous changes to unit employees’ terms and conditions of employment without consulting the Union, including changing employees’ schedules in the Sterile Processing Department, restricting union access in its facilities, and rescinding the kitchen closure agreement that dealt with Dietary Department employees’ schedules and temporary job assignments. Indeed, QVMC concedes that it “has made numerous changes to its operations.” (Br. 51-52.) These were changes to QVMC’s past practices concerning mandatory subjects of bargaining; thus, QVMC violated Section 8(a)(5) and (1) of the Act in implementing them without notifying the Union and bargaining to impasse. *See, e.g., Frankl v. HTH Corp. (Frankl II)*, 693 F.3d 1051, 1064 (9th Cir. 2012); *Beverly Health v. NLRB*, 297 F.3d 468, 479 (6th Cir. 2002).

c. QVMC failed to provide the Union with presumptively relevant information

In addition, the Director is likely to prevail on its claim that QVMC violated Section 8(a)(5) and (1) by refusing to provide the Union with relevant information concerning unit employees’ terms and conditions of employment. “An employer’s

duty to bargain collectively in good faith includes, in the absence of a valid reason that supports non-disclosure, an obligation to produce information ‘relevant to the union’s collective bargaining duties.’” *Retlaw Broadcasting v. NLRB*, 172 F.3d 660, 669 (9th Cir. 1999). Without relevant information, “the union would be unable to properly perform its duties . . . and no meaningful bargaining could take place.” *NLRB v. Stanford Univ.*, 715 F.2d 473, 474 (9th Cir. 1983). *Accord NLRB v. Truitt Mfg.*, 351 U.S. 149, 153 (1956) (stating that “good faith bargaining necessarily requires that claims made by either bargainer should be honest claims” supported by some proof of accuracy). Information pertaining to wages, hours, and working conditions of unit employees is “intrinsic to the core of the employer-employee relationship” and thus presumptively relevant. *Retlaw*, 172 F.3d at 669.

Both before and after withdrawing recognition, QVMC failed to respond to a number of the Union’s presumptively relevant information requests. Notably, the Union’s January 10 letter to QVMC requested vital information “needed by [the Union] for [first contract] negotiations.” (ER 812-15.) And although QVMC initially responded with some requested information and promised more, many of the Union’s information requests remain outstanding, and QVMC has since stopped responding. (ER 779, 826-32.) In addition to failing to provide first-contract bargaining information, QVMC has ignored the Union’s requests for other presumptively relevant information, including that regarding several changes to

unit employees' schedules and job duties (ER 746, 779-80, 784, 791), a housekeeping employee's termination (ER 780), and productivity policies in the Patient Access Services department (ER 163, 780). QVMC does not deny that it has failed to respond to the Union's requests for presumptively relevant information, and the Director is likely to prevail on this claim.

2. The Director established a strong likelihood that the Board will conclude that QVMC violated Section 8(a)(3) and (1) in discriminatorily changing union supporter Arroyo's schedule

The district court acted well within its discretion in finding that the Director demonstrated a likelihood of success in proving that QVMC unlawfully retaliated against union supporter Arroyo in violation of Section 8(a)(3) and (1). (ER 5-6.) Section 8(a)(3) of the Act prohibits "discrimination in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). In evaluating the lawfulness of an employer's adverse action, the Board applies the well-established test from *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management*, 462 U.S. 393, 397, 401-03 (1983). Under *Wright Line*, the legality of an adverse action depends on the employer's motivation. If an employer's hostility toward union activities was "a motivating factor" in an employer's adverse action against an employee, the employer's action violates the Act unless the employer demonstrates, as an

affirmative defense, that it would have taken the same action even in the absence of these activities. *Wright Line*, 251 NLRB at 1089.

The General Counsel may establish discriminatory motive through evidence of, among other things, “the employer’s knowledge of the employee’s union activities, the employer’s hostility toward the union, and the timing of the employer’s action. *United Nurses Ass’ns of California v. NLRB*, 871 F.3d 767, 779 (9th Cir. 2017). An employer fails to prove that it would have taken the adverse action against an employee even absent the employee’s union or other protected activity when, for example, the record shows that the employer’s justification for its action is pretextual. *Transp. Mgmt.*, 462 U.S. at 395, 398-403; *Wright Line*, 251 NLRB at 1084, 1089. *Accord United Nurses*, 871 F.3d at 779 (“hallmarks” of employer’s pretextual justification include deviations from internal practices, disparate treatment, and ex post facto justifications); *Shattuck Denn Min. Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where stated motive for adverse action is false, Board can infer that “motive is one that the employer desires to conceal”).

Here, the Director can easily show that QVMC discriminatorily changed union supporter Arroyo’s schedule. (ER 5-6.) Arroyo engaged in protected activity and supported the Union by, among other things, appearing in a pro-Union picture posted on the Union’s Facebook page. Arroyo’s supervisor knew of

Arroyo's union support after seeing the Facebook post, made comments evidencing his union animus and desire to "hurt" Arroyo for his union support, and discussed with Human Resources how to conceal his retaliatory motive. Shortly after seeing the Facebook post, and just one week before the union election, Arroyo's supervisor changed Arroyo's schedule, causing him to lose shift differential pay and creating transportation issues for him and his wife. Although QVMC offered some evidence of a non-discriminatory reason for the shift change (its policy prohibiting relatives from working together in the same department), the district court correctly found that "evidence of retaliatory animus undermines the likelihood that QVMC can show that it would have taken the same action in the absence of Arroyo's union activity" (ER 6), as it must to prevail on its affirmative defense. Furthermore, the Director presented compelling evidence that QVMC's asserted justification is pretextual—that is, QVMC had not enforced the policy in the past. Indeed, the Arroyos had worked together for three years without issue. QVMC, however, enforced its policy only after it learned of Arroyo's union support, and only against Arroyo. The Director is thus likely to prevail in showing that QVMC discriminatorily changed Arroyo's schedule.

QVMC makes no meaningful challenge to the district court's finding that the Director is likely to prevail on its claim that QVMC discriminatorily changed Arroyo's schedule. (Br. 57-58.) Certainly, the fact that the record contains

conflicting evidence on this allegation, or evidence allegedly based on hearsay, does not warrant a different result. *Scott*, 241 F.3d at 662 (conflict in the evidence does not preclude Section 10(j) injunction); *Asseo v. Pan Am. Grain*, 805 F.2d 23, 26 (1st Cir. 1986) (“Affidavits and other hearsay materials are often received in preliminary injunction proceedings.”).

Further, contrary to QVMC’s suggestion (Br. 58), the district court acted well within its discretion in rejecting (ER 6) QVMC’s affirmative defense in light of its animus and pretext. “Where . . . the General Counsel makes a strong showing of discriminatory motivation, the employer’s rebuttal burden is substantial.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011)). *See Ozburn–Hessey Logistics v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016) (“If the Board concludes . . . that the employer’s purported justifications for adverse action against an employee are pretextual, then the employer fails as a matter of law to carry its burden at the second prong of *Wright Line*.”). Given that the Director presented direct evidence of animus, and persuasive evidence that QVMC’s justification for the schedule change was pretextual, QVMC is unlikely to meet its substantial rebuttal burden here.

C. The District Court Correctly Determined that an Injunction Is Just and Proper

Congress has declared that “encouraging the practice and procedure of collective bargaining” is “the policy of the United States....” 29 U.S.C. § 151. Employees have the right to decide whether they wish “to bargain collectively through representatives of their own choosing....” 29 U.S.C. § 157. If the lawful status quo is not quickly restored, QVMC’s actions will inflict irreparable harm to the national labor policy encouraging collective bargaining embodied in Section 1 of the Act, the employees’ right to organize under Section 7 of the Act, and the efficacy of the Board’s ultimate remedial order. Without an injunction, QVMC permanently will defeat the Union and profit from its illegal conduct. Thus, the district court’s granting of an injunction was a sound exercise of its discretion.

1. QVMC’s withdrawal of recognition and refusal to bargain in good faith will cause irreparable injury if not immediately enjoined

The district court properly found that QVMC’s withdrawal of recognition and refusal to bargain in good faith will likely cause irreparable harm to the bargaining relationship and the Board’s remedial authority. (ER 6.) This Court, and others, have held that these types of Section 8(a)(5) violations—*e.g.*, a refusal to recognize and bargain in good faith over mandatory subjects of bargaining—“ha[ve] long been understood as causing an irreparable injury to union representation.” *Frankl I*, 650 F.3d at 1362; *Avanti*, 661 F.3d at 1191 (“when the

Director establishes a likelihood of success on a failure to bargain in good faith claim, that failure to bargain will likely cause a myriad of irreparable harms”); *Bloedorn*, 276 F.3d at 297-98. Thus, “a finding of likelihood of success as to a § 8(a)(5) bad-faith bargaining violation in particular, along with permissible inferences regarding the likely effects of that violation, can demonstrate the likelihood of irreparable injury” sufficient to warrant an interim injunction. *Frankl I*, 650 F.3d at 1362. Stated differently, independent evidence of irreparable harm is generally not required where an employer unlawfully refuses to recognize a union. *Avanti*, 661 F.3d at 1191-1194; *Bloedorn*, 276 F.3d at 297-98.

These harms are apparent here. Absent an injunction, QVMC’s refusal to recognize and bargain with the Union threatens to irreparably undermine employee selection of and support for the Union and negate the efficacy of the Board’s final bargaining order. *See, e.g., Brown v. Pacific Tel. & Tel.*, 218 F.2d 542, 544 (9th Cir. 1955) (withdrawal of recognition will cause “drifting away” of employee support for union); *Asseo v. Centro Medico*, 900 F.2d 445, 454-55 (1st Cir. 1990) (“very real danger” that withholding recognition from the union would erode employee support “to such an extent that the [u]nion could no longer represent those employees”). Without interim recognition and bargaining, the employees’ support for their chosen representative will predictably erode, as the Union is unable to adequately protect them or affect their working conditions through

collective bargaining during the period that the case is pending before the Board. *See Frankl I*, 650 F.3d at 1362; *Asseo v. Pan Am. Grain*, 805 F.2d 23, 26–27 (1st Cir. 1986) (“[e]mployee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining”) (quoting *I.U.O.E. v. NLRB (Tiidee Products, Inc.)*, 426 F.2d 1243, 1249 (D.C. Cir. 1970)). This Union is particularly vulnerable since it was recently certified and trying to bargain a first contract. *See Ahearn v. Jackson Hosp.*, 351 F.3d 226, 239 (6th Cir. 2003); *Arlook v. S. Lichtenberg*, 952 F.2d 367, 373 (11th Cir. 1992) (recently certified unions are “highly susceptible to management misconduct”).

Moreover, QVMC’s unilateral changes, are a “circumvention of the duty to negotiate which frustrates the objectives of [Section] 8(a)(5) much as does a flat refusal” to bargain. *Katz*, 369 U.S. at 743. *See Morio v. Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (unremedied unilateral changes warrant Section 10(j) relief). Indeed, “[t]here is no clearer or more effective way to erode the ability of the Union to bargain for the employees than for [an employer] to make such changes without consultation with the Union.” *Merrill & Ring*, 262 NLRB 393, 395 (1982), *enforced*, 731 F.2d 605 (9th Cir. 1984). Absent interim relief, the Union is forced to bargain back what the employees already lost through the employer’s conduct, rather than focusing its efforts on improving employees’ terms and conditions of employment. *Harrell v. Am. Red Cross*, 714 F.3d 553, 558

(7th Cir. 2013). An employer's unilateral action thus sends the message to employees that their union is "ineffectual, impotent, and unable to effectively represent them," *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002), and union support will predictably diminish.

On top of its unlawful unilateral changes, QVMC's refusal to provide presumptively relevant information leaves the Union unable to even attempt to bargain over QVMC's unilateral changes, let alone reach an initial collective bargaining agreement, thus compounding the effect of QVMC's unlawful conduct. *See Frankl II*, 693 F.3d at 1066 (employer's unilateral changes and refusal to provide information show a failure to bargain in good faith, which establishes a "likelihood of irreparable harm").

Consistent with these permissible inferences, the Director also presented concrete evidence that employee support for the Union was already beginning to dissipate. (ER 6.) Employee attendance at union meetings dramatically decreased after QVMC stopped bargaining with the Union. Employees have expressed frustration with the Union's ability to represent them effectively and confusion about whether the Union even still represented them. Although employees initially fought QVMC's unilateral changes, they have since expressed reluctance to, and futility in, fighting such changes further given the Union's perceived ineffectiveness. And, given the tense environment, some employees have

expressed fear of retaliation if they are identified as union supporters. Some have stepped back or stopped their union engagement, and some even have quit their employment at QVMC.

Given the predictable and actual decline in employees' support for the Union, absent the court's injunction and with the passage of time, a final Board order would be unable to restore the lawful status quo. By the time the Board issues its final bargaining order, it will be too late for the Union to regain lost support. *See Bloedorn*, 276 F.3d at 299 (the longer a union "is kept ... from working on behalf of ... employees, the less likely it is to be able to organize and represent those employees effectively" under an eventual Board order). At that point, the employees will have been unaffected by collective bargaining for an extended period of time. They will have no concrete reason to support the Union and will likely refuse to do so. *See I.U.O.E.* 426 F.2d at 1249 ("[w]hen the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees"). An incumbent union needs the support of the employees it represents in order to bargain effectively. *Avanti*, 661 F.3d at 1193; *I.U.O.E.*, 426 F.2d at 1249 (employer "may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively"). Thus, absent the court's interim bargaining order, meaningful collective bargaining after a final

Board decision will be impossible, and the Board's final bargaining order will be ineffective. *Moore-Duncan v. Horizon House*, 155 F.Supp. 2d 390, 396-97 (E.D. Pa. 2001) (without employee support, a union has little leverage and "will be hard-pressed to secure improvements in wages and benefits at the bargaining table"); *Duffy Tool v. NLRB*, 233 F.3d 995, 998 (7th Cir. 2000) ("By undermining support for the union, the employer positions himself to stiffen his demands ... knowing that if the process breaks down the union may be unable to muster enough votes to call a strike"). Conversely, ordering QVMC to immediately recognize and bargain with the Union offers the best chance of preserving the Union's support, protecting the efficacy of the Board's final remedy, and preventing QVMC from profiting from its illegal conduct. *See Scott*, 241 F.3d at 669 ("[s]uccessful bargaining could restore the employees' interest in the [u]nion"); *NLRB v. Electro-Voice*, 83 F.3d 1559, 1575 (7th Cir. 1996) (absent injunctive relief "time works on the side of the employer-perpetrator to help him achieve his illegal purpose").

Finally, absent interim bargaining, the unit employees will be deprived of any benefits of union representation pending the Board's decision, a loss that a Board order in due course cannot remedy. *Avanti*, 661 F.3d at 1191-92; *Bloedorn*, 276 F.3d at 299.

QVMC, however, speciously argues that the Director's evidence is "speculative." (Br. 46-48.) But the Director's evidence, showing an ongoing loss

of union support as a result of QVMC's conduct, is exactly the type of evidence that courts rely on in granting Section 10(j) relief when an employer refuses to bargain. *See, e.g., Harrell*, 714 F.3d at 555, 557 (drop in attendance at union meetings, fear of retaliation, frustration with union); *Lineback v. Spurlino Materials*, 546 F.3d 491, 496, 501 (7th Cir. 2008) (drop in attendance at union meetings, fear of being associated with union, frustration with union); *Overstreet v. Thomas Davis Med. Centers*, 9 F. Supp. 2d 1162, 1167 (D. Ariz. 1997) (employee resignations, drop in attendance at union meetings).

QVMC's claim (Br. 44-45 & n.13) that the Director's evidence of irreparable harm is stale fares no better. QVMC conveniently overlooks evidence of irreparable harm continuing through November 2017 that the Director presented to the district court in its reply. (See ER 82-97.) Notably, QVMC filed an objection to the Director's introducing this evidence of ongoing irreparable harm, which the district court properly overruled, as such evidence is "pertinent to the factors for issuance of 10(j) relief and within the scope of rebuttal." (ER 2 n.1.) QVMC's weak challenges to the Director's evidence do not cast doubt on the district court's well-supported finding that QVMC's refusal to bargain likely caused irreparable harm.

2. QVMC's discrimination is causing irreparable harm to employees' Section 7 rights

QVMC's discriminatory treatment of union supporter Arroyo communicates to employees that their employer will retaliate against them for their protected union activities, and that the Union will be ineffective in protecting them. *Cf. Frankl I*, 650 F.3d at 1363 (“a likelihood of success as to a § 8(a)(3) [termination] violation with regard to union activists that occurred during contract negotiations or an organizing drive largely establishes likely irreparable harm, absent unusual circumstances”). Indeed, as the district court found, employees have already stated that they are discouraged from supporting the Union because they fear retaliation. (ER 6.) Thus, an order with respect to QVMC's retaliatory conduct is necessary to reassure employees that they are free to support the Union and exercise their Section 7 rights without fear of retaliation and to ensure an effective final Board order. *Spurlino*, 546 F.3d at 501-02 (finding irreparable harm where employer discriminated against union supporters in work assignments). *See McKinney v. Ozburn-Hessey Logistics*, 875 F.3d 333, 341 (6th Cir. 2017) (“With [u]nion support waning, the message that [the employer] would send by moving one of its most outspoken pro-Union employees to a more difficult job might undermine the [u]nion's strength on the eve of its first collective bargaining opportunity.”).⁹

⁹ Contrary to QVMC's claim (Br. 58-59), a finding of irreparable harm as to Arroyo individually, rather than to the unit as a whole, is not required.

3. The injunction poses no meaningful harm to QVMC

In contrast to these well-recognized harms to employee rights and to the Board's remedial authority, the injunction poses no meaningful harm to QVMC, as the district court recognized. (ER 6-7.) The interim bargaining order merely requires QVMC to bargain in good faith with the Union the same way it does at its other facilities. Further, QVMC's bargaining obligation will only extend to the issuance of the Board's order; bargaining will be required beyond that only if the Board finds an unlawful refusal to bargain. *See Seeler v. The Trading Port*, 517 F.2d 33, 40 (2d Cir. 1975) ("there is nothing permanent about any bargaining order ... particularly an interim order which will last only until the final Board decision"). It does not compel agreement to any specific term or condition of employment. Rather, it only requires bargaining with the Union in good faith to agreement or impasse. *See Thomas Davis*, 9 F.Supp.2d at 1167; *Penello v. United Mine Workers*, 88 F. Supp. 935, 943 (D. D.C. 1950). Moreover, it does not require anything that cannot be undone; any agreement reached between the parties under the injunction can contain a condition subsequent to take into account the possibility of the Board's ultimate refusal to grant a final bargaining order remedy. *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1054 (2d Cir. 1980). Also, the costs in terms of time and money spent on collective bargaining is a burden that falls on

both parties and does not amount to irreparable harm that defeats an interim bargaining order. *Scott*, 241 F.3d at 669.

Additionally, an interim order requiring QVMC to rescind its unilateral changes (at the Union's request) will simply require QVMC to do "what the law demands," which is not a meaningful hardship. *Frankl II*, 693 F.3d at 1066. The Director does not seek to prohibit QVMC from ever changing employees' schedules, restricting union access to certain areas in its facility, or changing the kitchen closure agreement; rather, QVMC must simply bargain with the Union before doing so.

Similarly, an order requiring QVMC to fulfill its duty to provide the Union with the requested information poses little hardship. Courts have ordered the production of relevant information under a Section 10(j) injunction in order to permit a union to properly represent its members, as well as to prevent an employer from irreparably undermining a union. *See, e.g., Frankl II*, 693 F.3d at 1064-65 (ordering production of financial information); *Mattina v. Chinatown Carting Corp.*, 290 F. Supp. 2d 386, 395-96 (S.D.N.Y. 2003) (ordering production of employee names and dates of hire).

In arguing that the balance of hardships tips in its favor, QVMC misapplies Board precedent and exaggerates its speculative harm. To start, relying on cases such as *Boire v. Pilot Flight*, 515 F.2d 1186 (5th Cir. 1975), QVMC incorrectly

asserts that an interim bargaining order is a disfavored remedy and would force a new bargaining relationship here where none before existed. (Br. 48-50.) But this argument ignores one salient fact: here, a bargaining relationship *does* exist. The Union decisively won the election, the Board certified the Union, and QVMC recognized the Union as its employees' representative, until it unlawfully withdrew recognition. Thus *Boire* and QVMC's other cited cases are distinguishable, as they deal with remedial bargaining orders issued pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), a case which QVMC concedes is "fundamentally different" (Br. 49). Bargaining orders under *Gissel* apply where a bargaining representative has lost the election, or where there was no election at all, because the extent of the employer's unfair labor practices made a fair election impossible. In contrast, in cases like this one, as *Boire* itself acknowledges, "courts have not hesitated to issue interim bargaining orders where a pre-established bargaining relationship is being eroded by unfair labor practices." 515 F.2d at 1194.

QVMC claims that it has made "numerous" changes to its operations to improve "patient care," and argues, without detail or support, that rescinding changes to employees' terms and conditions of employment would threaten the safety of patients and staff. (Br. 51-53.) This hyperbole, however, overlooks the fact that the only unlawful unilateral changes specifically alleged in the petition and the underlying administrative complaint relate to (i) changing schedules in the

Sterile Processing Department, (ii) restricting union access to QVMC's facility, and (iii) rescinding the kitchen closure agreement, the latter of which QVMC negotiated and signed. (ER 1046-47, 1088-89.) QVMC has offered little evidence of its harm beyond speculating that rescinding the changes would “wreak[] havoc,” “sow[] chaos,” and jeopardize patient safety. Such speculation is not enough. *See Winter*, 555 U.S. at 27 (district courts must defer to “specific predictive judgments” and may not rely on merely speculative harms). The district court's order would simply restore the status quo to that which existed before QVMC's unfair labor practices. QVMC's suggestion that rescinding the changes would negatively affect unit employees ignores the fact that changes are rescinded only “[u]pon the Union's request.”¹⁰ (ER 9.)

QVMC's assertion (Br. 53) that granting access to the Union was an unwarranted remedy, and that the Board must specifically justify the need for this remedy, is also misplaced. QVMC previously allowed the Union's representative access to its facilities, then abruptly restricted that access. Ordering QVMC to “[r]estore the Union's access” (ER 9) is nothing more than a rescission of its

¹⁰ Post-certification unilateral changes are not “the norm” during an employer's technical refusal to bargain as QVMC now argues. (Br. 45.) Even if this were a technical-refusal case, it is well-established that an employer who makes unilateral changes during the pendency of its union certification challenge “acts at its peril,” as QVMC conceded at oral argument before the district court. (ER 30-31.) *See Harrell*, 714 F.3d at 556.

unilateral change. *Frankl II*, 693 F.3d at 1064. *United Steelworkers of America v. NLRB*, 646 F.2d 616 (D.C. Cir. 1981), cited by QVMC (Br. 53) is distinguishable, as that case involved a petition for review of a Board’s remedial order that granted union access—not only to the plant where the unfair labor practices occurred, but also to the employer’s non-union facilities—and not restoration of the status quo. *Id.* at 619.

Similarly, QVMC’s assertion of harm from a public reading of the district court’s order is without merit. (Br. 53-54.) Such a reading “is not an extraordinary remedy but rather an ‘effective but *moderate* way to let in a warming wind of information and, more important, reassurance.’” *United Nurses*, 871 F.3d at 789 (emphasis in original). It has been affirmed by this Court as a “just and proper” remedy under Section 10(j). *See Norelli v. HTH Corp.*, 699 F.Supp. 2d 1176, 1206-07 (D.Haw. 2010) (“In light of [the employer’s] numerous violations of the NRLA and the [employees’] fear of openly supporting the [u]nion, the court believes that [a public notice reading] will help restore the [u]nion support and enforce that [the employer] will recognize and bargain in good faith with the [u]nion”), *aff’d*, 650 F.3d 1334 (9th Cir. 2011).

Confusingly, QVMC asserts (Br. 28 n.6, 54, 56 & n.14) that the district court “deprives QVMC of due process.” The process for reviewing the “correctness of the certification,” however, is well-settled and not in dispute. *Boire*

v. Greyhound Corp., 376 U.S. 473, 477 (1964). QVMC’s own conduct, and not that of the district court, cut off its opportunity to determine the “correctness of the certification” in federal court. By its unconditional bargaining during the pendency of its request for review and, importantly, in the time following the Board’s denial of review, QVMC recognized and negotiated with the Union and thereby waived the option of seeking review in federal court.¹¹

Finally, QVMC’s attempt to argue that the district court’s “forcing recognition and bargaining” with the Union violates its employees’ Section 7 rights is misplaced and suspect. (Br. 54.) As this Court has noted, “courts generally are skeptical about an employer’s claimed ‘benevolence as its workers’ champion against their certified union.’” *Frankl I*, 650 F.3d at 1365. Here, QVMC employees decisively voted for the Union, which the Board later certified over QVMC’s objections. Although QVMC attempts to weave a tale of its “transparency” and “respect[for] every employees’ right to support or not support a union,” the record tells a different story. (Br. 50, 54.) Far from being a

¹¹ To the extent that QVMC is arguing that “good faith bargaining” pursuant to the injunction will somehow waive its ability to pursue its technical-refusal-to-bargain theory on appeal, its concerns are misplaced. The record in the administrative proceeding is closed. The parties have briefed the case and are awaiting the judge’s decision on that record. The good faith bargaining that ensues pursuant to the injunction will therefore have no bearing on the ultimate determination in the administrative case.

“champion” of employees’ Section 7 rights, QVMC in all likelihood violated them, causing irreparable harm.¹²

4. The public interest favors injunctive relief

As this Court has recognized, “[i]n § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge.” *Scott*, 241 F.3d at 657. *See also Frankl I*, 650 F.3d at 1365. The Director has demonstrated a strong likelihood of success on the merits and impending irreparable harm. A final Board order, however, is months—if not years—away. Given the decline in union support, absent injunctive relief, QVMC will succeed in avoiding its bargaining obligations and defeating the Union by virtue of its unlawful conduct. Such an outcome would clearly contravene the public interest. *See Bloedorn*, 276 F.3d at 300 (“the interest at stake in a section 10(j) proceeding is ‘the public interest in the integrity of the collective bargaining process’”).

5. The director did not improperly delay seeking injunctive relief

QVMC’s repeated assertions (Br. 45-46, 55) that the Director unduly delayed in filing for injunctive relief are baseless. There was no delay in processing this case. The Region’s investigation and processing of the charges filed by the Union here met all internal and casehandling timelines established by

¹² QVMC identifies no harm resulting from the requirement that it return Arroyo to his prior schedule.

the Board. (ER 115.) The Board filed its first administrative complaint within months of the conduct at issue and the petition for injunctive relief within four months of the initial complaint. This timing fits well within the parameters that this Court and others have found appropriate. *See Frankl I*, 650 F.3d at 1363-65 (16 months between administrative complaint and 10(j) petition); *Overstreet v. El Paso Disposal*, 625 F.3d 844, 856 (5th Cir. 2010) (18 months between administrative complaint and 10(j) petition); *Muffley v. Spartan Mining*, 570 F.3d 534, 544-45 (4th Cir. 2009) (18 months between administrative complaint and 10(j) petition); *Hirsch v. Dorsey Trailers*, 147 F.3d 243, 248-49 (3d Cir. 1998) (five months between administrative complaint and 10(j) petition); *Gottfried v. Frankel*, 818 F.2d 485, 490, 495 (6th Cir. 1987) (six months between administrative complaint and 10(j) petition).

QVMC correctly notes (Br. 45) that the Director received authorization from the Board to petition for injunctive relief on August 1, 2017. With authorization from the Board, however, the Director waited to file the Petition until September 26 because she originally planned to file the administrative record with the petition. (ER 115-16.) The administrative hearing, however, ran unexpectedly long, and the parties encountered scheduling conflicts, so the Director sought, and received, authorization from the Board's General Counsel to proceed on the partial administrative record. (ER 116.) Contrary to QVMC's suggestion (Br. 55), this

brief delay was not “intentional[]” or strategic and has no bearing on whether injunctive relief is appropriate in this case.

Moreover, delay is significant only if the lawful status quo cannot be restored, and interim relief would be no more effective than a final Board order. *Frankl I*, 650 F.3d at 1364. That is not the case here. The passage of time has not yet “so weakened the Union that even interim relief could not salvage it.” *Arlook*, 952 F.2d at 374. Despite QVMC’s violations, the Union remains present, with some support remaining. As described above, however, injunctive relief is essential to enable the Union to engage in the collective-bargaining process before the Union’s strength irreparably diminishes.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court’s order.

Respectfully submitted,

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Dated at Washington, DC
January 25, 2018

STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-17413

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief*.
I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) separately represented parties; (2) a party or parties filing a single brief in response to multiple briefs; or (3) a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or
Unrepresented Litigant

s/ Rebecca J. Johnston

Date

1/25/2018

("s/" plus typed name is acceptable for electronically-filed documents)

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. Sec. 151 et. seq.

National Labor Relations Act

Section 7 (29 U.S.C. § 157)	A-1
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	A-1
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	A-1
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	A-2
Section 8(d) (29 U.S.C. § 158(d)).....	A-2
Section 10(j) (29 U.S.C. § 160(j)).....	A-2

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) (29 U.S.C. Sec. 158(a)):

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) 29 U.S.C. Sec. 158(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . .

..

Section 10(j) (29 U.S.C. Sec. 160(j)):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JILL COFFMAN, Regional Director of)
REGION 20 of the National Labor Relations)
Board, for and on behalf of the NATIONAL)
LABOR RELATIONS BOARD)

Appellee-Petitioner)

v.)

No. 17-17413

QUEEN OF THE VALLEY MEDICAL CENTER,)

Appellant-Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 25th day of January, 2018