No. 23-325

IN THE
Supreme Court of the United States

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOUTH CAROLINA CHAMBER OF COMMERCE, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense because the targeted secondary employer could choose to take its business elsewhere and, in that way, can "control" the primary employer's work assignments.

2. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense even when no bargaining unit jobs are threatened.

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber")[1] is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have an interest in the critical protection afforded by the "secondary boycott" provisions in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, which make it unlawful for a union to entangle "neutral" parties in labor disputes involving other employers. A proper and effective application of that prohibition is essential to the free flow of commerce.

The South Carolina Chamber of Commerce (the "State Chamber") is a not-for-profit, statewide organization with a purpose to represent the interests of South Carolina's business community. The State Chamber's mission is to serve as the leading voice for business in South Carolina with a vision of making

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

South Carolina's economy the most vibrant in the United States, creating opportunity and prosperity for all.

The State Chamber's membership comprises businesses from across the state and across industries, from startups and family-owned businesses to multi-national enterprises—all of whom call South Carolina home. The State Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development and growth, and routinely participates in state and federal litigation as an amicus. The State Chamber has a keen interest in defending and promoting the state's right-to-work status.

The State Chamber's member companies rely on the efficient and reliable movement of goods to and from the South Carolina State Ports Authority, as they look to remain competitive in a global marketplace and recognize the crucial role the SCSPA plays as an economic engine for the entire Southeastern United States.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading

advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici submit this brief in support of Petitioners South Carolina State Ports Authority and State of South Carolina to illustrate how the underlying opinions of the Fourth Circuit and the National Labor Relations Board undermine the statutory purposes of the NLRA and erode the protection against unlawful secondary boycott activities.

SUMMARY OF ARGUMENT

In this case, the National Labor Relations Board ("NLRB") broke with both this Court's and its own precedent and blessed an unlawful secondary boycott that the International Longshoreman Association ("ILA") used to tighten its grip on container work at ports on the east coast. Rather than correct this error, the Fourth Circuit adopted the Board's erroneous reasoning, eviscerating the longstanding ban on secondary boycotts and threatening dramatic consequences for both labor law and the national economy.

In upholding the ILA's secondary pressure tactics, the Fourth Circuit ignored the plain language and clear purpose of the NLRA. The Act is explicit. Section 8(b)(4) makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce" with the goal of forcing that person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). That is exactly what happened here: The ILA coerced a group of maritime shipping carriers to cease doing business at the Port of Charleston unless the port authority acceded to the union's

separate demand to hire more union workers for new jobs operating lift equipment. As the dissenting Board member explained, "[y]ou could not ask for a more classic case of unlawful secondary pressure." App. 101a (dissent of Member Ring). And as Judge Niemeyer explained in his dissent from the Fourth Circuit panel majority, this is exactly the type of "'dangerous" union practice that "widen[s] industrial conflict by creating coercive pressures on neutral employers." App. 48a.

By upholding this "classic" secondary boycott, the Fourth Circuit's decision enables a disturbing recent trend at the NLRB. The current Board is deliberately abandoning precedent and tilting the playing field in favor of unions, while ignoring statutory directives to the contrary. *See, e.g.*, *Cemex Constr. Materials Pac., LLC*, 372 NLRB No. 130 (2023) (disregarding over fifty years of precedent by forcing employers to recognize unions without first holding a secret-ballot election); *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023) (holding that the NLRA prohibits standard confidentiality and non-disparagement terms in settlement); *Thryv, Inc.*, 372 N.L.R.B. No. 22 (2022) (allowing, for the first time, consequential damages in unfair labor practice cases for any "direct and foreseeable" financial harms); *Tesla, Inc.*, 370 N.L.R.B. No. 88 (2021) (ignoring sixty years of precedent by prohibiting commonplace workplace dress codes and uniform policies that limit but do not ban display of union insignia); *cf.* Memorandum GC 21-04, NLRB General Counsel (Aug. 12, 2021), and Memorandum GC 23-04, NLRB General Counsel (Mar. 20, 2023) (identifying numerous precedents the NLRB General Counsel intends to challenge). It has even resorted to

violating procedural rules for union elections to create pro-union outcomes, as an Inspector General report recently found. *See* Office of Inspector General, Report of Investigation, OIG-I-569 (July 8, 2023), *available at* https://tinyurl.com/2p8nx4s6.

Part of the balance struck by the NLRA is that unions cannot deploy pressure tactics against companies with whom they have no direct dispute to extract concessions from other employers. In this case, the Fourth Circuit ignored that principle and distorted the NLRA in ways that will have dramatic consequences for both the law of secondary boycotts and the broader national economy. The Fourth Circuit's decision conflicts with the holdings of at least three other circuits, including the Ninth, meaning that the same union pressure tactics that are banned by statute on the west coast are now purportedly protected by the same federal statute on the east coast.

The practical consequences of the Fourth Circuit's decision in this very case should not be overlooked. With the union's secondary boycott still in place, the new state-of-the-art Leatherman Terminal at the Port of Charleston is lying virtually dormant because no carriers are willing to deposit their cargo there, since the union now has a free hand to retaliate against them if they do. And other ports and shippers throughout the east coast will be vulnerable to similar boycotts—boycotts that are illegal under governing precedent in the west coast. This comes at precisely the time when the nation's supply chain is most in need of additional capacity. That stark result is at odds not only with common sense, but also with the law. This Court should grant review and reverse the decision below.

ARGUMENT

An overriding objective of the NLRA is to "minimize industrial strife" and to "eliminate … substantial obstructions to the free flow of commerce." 29 U.S.C. § 151. As a result, the ban on secondary boycotts has long been a feature of American labor law. Simply put, the ban on secondary boycotts prohibits unions from targeting one company with economic pressure in order to influence a *different* company to make pro-union concessions. For example, a union cannot call for a strike against employer A in order to make it stop doing business with employer B as a way of pressuring employer B to hire union workers.

This case involves a slightly different form of secondary pressure that is no less pernicious and unlawful. The union here filed a dubious $300 million lawsuit against a group of maritime shippers, threatening them with substantial liability unless they stopped calling at the Port of Charleston. The avowed purpose of the suit is to deprive the Port of the shippers' business, and pressure the Port to hire union workers to operate lift equipment at the new Leatherman Terminal, even though lift-equipment operators at the Port have always been non-union public employees.

Instead of enjoining this classic secondary boycott, the Fourth Circuit sharply departed from precedent and upheld it. To do so, the Fourth Circuit distorted and expanded what has previously been understood as a very narrow exception to the secondary boycott prohibition. Under the so-called "work preservation" exception, a union may pressure one employer to influence another employer's hiring decisions only if

two strict conditions are met: First, the union's action must genuinely be aimed at "preserving" existing union jobs rather than acquiring new ones. Second, the targeted employer must have actual "control" over the employees of the second employer. Here, neither of those conditions is met: The union's attack on the maritime shippers is designed to acquire new jobs at the Leatherman Terminal, not to preserve pre-existing union jobs. Moreover, the shippers do not "control" the port employees, who are employed and controlled exclusively by the port authority.

The Fourth Circuit's contrary decision lends a judicial imprimatur to the Board's recent trend of ignoring precedent in ways that are both inconsistent with the NLRA and contrary to employer and employee interests. This decision is inflicting immediate harm on South Carolina and the entire east coast, and threatening serious consequences for the nation's supply chain. In other words, the Fourth Circuit is enabling the very harms that the NLRA is meant to prevent.

I. The Fourth Circuit's Decision Eviscerates the Ban on Secondary Boycotts.

The NLRA prohibits secondary boycotts. The statute makes it unlawful to "threaten, coerce, or restrain any person engaged in commerce" with the objective of "forcing" that person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii); *see also id.* § 158(e) (prohibiting the use of "any contract or agreement" to achieve the same end). Here, the ILA has done exactly that: It has sued a group of shipping carriers seeking $300 million in damages to force them to stop doing business at the

new Leatherman Terminal of the Port of Charleston. The gravamen of the lawsuit is that ILA's collective-bargaining agreement with the U.S. Maritime Alliance requires the carriers to stop calling at the Leatherman Terminal because the South Carolina State Ports Authority ("SCSPA"), which runs the Terminal, is adhering to its longstanding practice of using non-union state employees to perform lift-equipment work there. The union's conduct is thus a classic secondary boycott: It is coercing the carriers to stop doing business at the Terminal unless a different party—the SCSPA—accedes to the union's demands to hire more union workers.

It makes no difference that ILA has chosen a lawsuit to enforce its collective-bargaining agreement as its means of pressuring the carriers. "It is well established that the otherwise lawful exercise of rights afforded by a collective bargaining agreement can become unlawful when aimed at securing an objective proscribed by section 8(b)(4)." *Sheet Metal Workers, Loc. Union No. 91 v. NLRB*, 905 F.2d 417, 424 (D.C. Cir. 1990); *accord Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983); App. 13a.

In the proceedings below, the Administrative Law Judge ("ALJ") recognized that the union's conduct was flatly illegal. App. 153a–54a. But the Board reversed that decision, upholding the union's pressure campaign under the so-called "work preservation" defense. App. 71a–72a. And the Fourth Circuit affirmed that conclusion. App. 24a, 27a. In reaching that result, the Board and the Fourth Circuit misapplied the law in a way that guts the NLRA's prohibition on secondary boycotts.

This Court has laid out a two-part test to determine if a union pressure campaign is authorized under the work-preservation defense: First, the union "must have as its objective the *preservation* of work traditionally performed by employees represented by the union." *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) ("*ILA I*") (emphasis added). In other words, while the union may seek to preserve its members' jobs, it cannot pressure an employer to award its members *new* jobs that they have not previously performed. And second, the employer targeted by the union's pressure tactics must actually "have the power to give the employees the work in question." *Id.* The union cannot target one employer as a way of indirectly coercing the hiring decisions of a *different* employer. If the union fails either prong of this test, then its conduct is prohibited.

Applying that test here should have been easy. The ILA's members have never performed lift-equipment work at the Port of Charleston, and the carriers targeted by the ILA have no control over who is assigned that work. But instead of following that simple path, the Fourth Circuit distorted both prongs of the law to favor the union.

A. The Fourth Circuit's Decision Blurs the Critical Line Between Work Preservation and Acquisition.

The purpose of the ILA's pressure campaign against the carriers was clearly not to preserve its members' jobs at the Port of Charleston, but instead to acquire new jobs that its members had never before performed at the Port. In reaching a contrary result, the Fourth Circuit conflated work preservation with

work acquisition. The result of this conflation will be to dramatically increase the range of circumstances when unions are allowed to engage in pressure campaigns—wielding them not as a shield to preserve their own jobs, but as a sword to take away the jobs of non-union employees.

The distinction between work preservation and work acquisition is clear and longstanding. The proper inquiry looks to the traditional division of work between union and non-union members *at the particular job site in question*. As this Court has explained, when distinguishing between preserving existing work and acquiring new work, "the Board must focus on the work of the bargaining unit employees, not on the work of other employees … doing the same or similar work." *ILA I*, 447 U.S. at 507. For instance, the union members in *Pipefitters* had "[t]raditionally … performed the internal piping on heating and air-conditioning units on the jobsite" as a general matter. *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Loc. Union No. 638*, 429 U.S. 507, 512 (1977). But because they had no history of doing so at the particular "site" they were boycotting, this Court held they were not engaged in work preservation. *Id.* at 530.

The NLRB's previous decisions have honored this basic point. *See, e.g.*, *Longshoremen Loc. 1291 (Holt Cargo Sys.)*, 309 N.L.R.B. 1283, 1286 (1992) ("With the exception of one brief period 20 years ago … the Union has never performed this work *at the Terminal*. Its claim that it was entitled to preserve its work is unavailing, because it performed no work that was capable of preserving." (emphasis added)); *Teamsters*

Loc. 610 (Kutis Funeral Home), 309 N.L.R.B. 1204, 1206 (1992) (union jobs outside local union does "not establish a work-preservation interest"). Thus, if a union wants to justify its conduct by asserting a purpose of job preservation, it must show that its members have traditionally performed the jobs in question at the location in question.

Applying that local-job-site principle here, this case is straightforward. As the ALJ correctly found, union members have never performed lift-equipment work at the Port of Charleston. App. 113a. Instead, for nearly five decades, the Port has operated under a "hybrid" model where some *other* work has been handled by union members, but lift-equipment work has been consistently handled by state employees who are not union members. *Id*. As a result, the ILA's effort to have lift-equipment jobs taken away from non-union state employees and reassigned to union members at the Port of Charleston is plainly an attempt at job *acquisition*, not job *preservation*.

Following the Board's lead, the Fourth Circuit did not disagree with the ALJ's findings that non-union members have always performed the relevant lift-equipment work at the Port of Charleston. App 6a–7a, 18a; *see* App. 57a. Instead, the Fourth Circuit held as a matter of law that the ILA's pressure campaign was properly aimed at work preservation because the ILA represents other members at *different* ports who perform the same type of work. The Circuit reasoned that the ILA's collective-bargaining agreements cover "all ports from Maine to Texas," including some ports where lift-equipment work is performed by union members. App. 18a. Thus, the Circuit held that by insisting on union members taking the new lift-

equipment jobs at the Port of Charleston, the union really was just *preserving* the general type of union work at issue at a "coast-wide" level. App. 18a.

By adopting that rationale, the Fourth Circuit defied this Court's decisions and eviscerated the distinction between work preservation and work acquisition. *Pipefitters* squarely held that the job "site," not the general type of work a union's members "[t]raditionally" perform, sets the benchmark for the work-preservation inquiry. 429 U.S. at 512, 530; *supra* p. 10. The Fourth Circuit tellingly did not cite *Pipefitters* on this point. *See* App. 15a-24a.

Moreover, "[t]he touchstone" for identifying permissible work-preservation boycotts is that they concern only the "relations of the contracting employer vis-à-vis his own employees." *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967). But under the Fourth Circuit's coast-wide definition of the work in question, the work performed by ILA members *for SCSPA* in Charleston is defined with reference to what other ILA members outside of the local union do *for other employers* at other ports in different parts of the country. This topsy-turvy approach to defining work "preservation" gives a green light for unions to use pressure tactics to take away jobs from non-union workers in places where they have long worked, as long as any union anywhere else performs the same type of work.

B. The Fourth Circuit's Decision Nullifies the Requirement of Employer Control over Work Assignments.

The Fourth Circuit's decision is even more misguided in how it construed the second prong of the

work-preservation defense. Under the second prong, a union must show that the targeted employer actually has "the power to give [union] employees the work in question." *ILA I*, 447 U.S. at 504. This captures the core purpose of the ban on secondary boycotts, which is to prevent unions from targeting a neutral company "in order to obtain work [from a different employer] that the [neutral company] has no power to assign." *Pipefitters*, 429 U.S. at 521.

As the Fourth Circuit itself previously recognized, this type of secondary pressure is hostile to the free flow of commerce because it "tends to enlarge the primary labor dispute between the union and the 'unfair' employer by involving neutral employers in the controversy, thereby magnifying the disruptive effects of the altercation on the economy." *Marrowbone Dev. Co. v. Dist. 17, United Mine Workers of Am.*, 147 F.3d 296, 301 (4th Cir. 1998) (quoting David M. Ebel, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 Mich. L. Rev. 1176, 1177 (1964)). Moreover, Congress found it unjust for union boycotts to ensnare "neutral parties, 'the helpless victims of quarrels that do not concern them at all.'" *ILA v. Allied Int'l, Inc.*, 456 U.S. 212, 225, (1982) (quoting H.R. Rep. No. 80-245, at 23 (1947)).

In *Pipefitters*, this Court recognized that the Board had followed the power-to-assign test "at least since 1958." 429 U.S. at 525. In that year, the Board held that a union violated the NLRA by mounting a pressure campaign against its employer, a subcontractor, that was "powerless" to give the union additional work that the union sought to obtain from the general contractor. *Id*. (citing *Deangulo, Clifton (York Corp.)*, 121 N.L.R.B. 676 (1958)).

A similar situation arose in *Pipefitters* itself. There, a subcontractor had agreed with its union that it would have its employees cut and thread pipe at the job site. *Id.* at 512. The general contractor at the site, however, decided to purchase pre-cut and pre-threaded pipe for the job. *Id.* The subcontractor's union objected to having the cutting and threading work taken away. *Id.* at 512–13. Its members thus refused to handle pre-cut and pre-threaded pipe, effectively pressuring the subcontractor to stop working with the general contractor. *Id.* The Court held that this "refusal to handle" was an unlawful secondary boycott of the subcontractor, because the subcontractor had no right to control the cutting and threading work at issue. *See id.* at 524–28. It was entirely up to the contractor what type of pipe it would purchase for the job. And that the subcontractor could have simply refused to work with the general contractor—and instead work only for contractors who would not use uncut and unthreaded pipe—was irrelevant to the inquiry. *Id.*

Here, the Fourth Circuit blessed the Board's defiance of precedent and evisceration of the "power to assign" test. Agreeing with the Board, it held that the freight carriers were fair game to be targeted by the union's pressure tactics even though the carriers have *no control whatsoever* over whether union workers are assigned lift-equipment work at the Port of Charleston. App. 24a–27a; *see* App. 72a. Indeed, the Fourth Circuit acknowledged that SCSPA "exclusively controls" the assignment of "the lift-equipment work at the Port of Charleston." App. 24a. But nevertheless, the Circuit held that the carriers effectively do have control over the assignment of the work in question,

because "they could bypass the Port of Charleston entirely and call on *other* fully union ports." *Id.* (emphasis added) (cleaned up).

This reasoning conflates the ability to choose a service provider with the right to control which workers the service provider may employ. As a result, it directly contradicts *Pipefitters* and guts the "power to assign" test. After all, a company targeted by union pressure can almost *always* decide to refuse to do business with service providers that do not use union labor, in favor of those that do. If that were enough to show that the neutral company has the "power to assign" the work in question, then the test would virtually always be met. Secondary boycotts then would be presumptively lawful, not unlawful.

This conflation also runs headlong into the uniform view of other circuits. *See, e.g*, *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 544 F. App'x 657, 658 (9th Cir. 2013) (the "argument regarding the shipping carriers[']ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the 'right to control' the assignment of the work" at the port); *Int'l Longshore & Warehouse Union v. NLRB*, 705 F. App'x 1, 3 (D.C. Cir. 2017) (enforcing the NLRB's decision that "labor practices targeted against … the shipping carriers, or any other neutral party to pressure the Port to re-assign the dockside reefer work [to union members] were unlawful secondary boycotts targeting an employer that did not have the right to control the work"); *Loc. Union No. 25, A/W Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 831 F.2d 1149, 1152 (1st Cir. 1987) (union engaged in unlawful secondary activity

by targeting subcontractor to pressure the contractor to favor union jobs, when the contractor "alone possessed and exercised the right to control the work").

If the Fourth Circuit's contrary decision is left standing, the same union pressure tactics will be deemed illegal on the west coast and a statutory right on the east coast. Absent the intervention of this Court, any company on the east coast can be targeted by a union pressure campaign on the theory that it somehow has effective control over the work assignments of *other companies* it deals with—companies that the union wants to employ its members. That opens the door to exactly the type of secondary boycott activity—and all of the attendant economic harms—that Congress expressly prohibited when it enacted Sections 8(b)(4)(ii) and 8(e) of the NLRA.

II. The Fourth Circuit's Decision Will Distort the Law and Damage the Economy.

As demonstrated above, the Fourth Circuit's decision in this case radically transforms the law of secondary boycotts under the NLRA. Under the correct approach, which the NLRB previously followed, the "work preservation" inquiry served to ensure that secondary boycotts could not happen. Union pressure campaigns were allowed only as defensive tactics targeting employers who had the power to assign away jobs that union members were already performing at a particular job site. But under the Board's and Fourth Circuit's new approach, unions can target companies with no power to assign the jobs at issue, even if the union's members have

never performed the jobs at the site in question. If that approach were accepted it would turn the NLRA upside down, converting the clear statutory ban on secondary boycott activity into a presumptive authorization. The consequences for the law and the national economy would be dire.

A. The Fourth Circuit's Decision Undermines Congress's Clear Intent.

In essence, the Fourth Circuit's decision seeks to reauthorize a specific form of union misconduct that Congress already squarely considered and rejected over 75 years ago. Prior to the enactment of Section 8(b)(4), the ban on secondary boycotts was temporarily lifted in 1932 under the Norris-LaGuardia Act, which "abolished … the distinction between primary activity … and secondary activity." *Nat'l Woodwork*, 386 U.S. at 623. In the wake of that change, it was widely recognized that the resulting "[l]abor abuses of the broad immunity granted by the Norris-LaGuardia Act" negatively affected commerce. *Id.*; *see also* H.R. Rep. No. 80-245, at 95 (1947) (Minority Report) ("No one can deny that labor unions have engaged in some activities that are so clearly unjustifiable that this Congress can and should legislate against them immediately."). As a direct result, Congress enacted Section 8(b)(4) to reinstate the ban on secondary activity targeting neutral employers.

The current ban on secondary boycotts thus represents Congress's codified view of the correct "balance to be struck" between the right of labor to organize and require the primary employer to bargain, and the need to prevent the type of "[l]abor

abuses" that had targeted neutral parties and restricted the free flow of goods in commerce. *Nat'l Woodwork*, 386 U.S. at 619, 623. As this Court has explained, secondary boycotts are prohibited due to their "significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 624 (1975). Indeed, allowing a union to target a neutral company with pressure tactics to extract concessions from a different employer has "substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625.

The Fourth Circuit's decision here undermines Congress's choice to ban secondary boycotts in two clear respects. First, the entire point of the ban is that a union seeking to obtain work from one employer should not be able to pressure a *different* employer (with no power to assign the work in question) as an indirect way of achieving its demands. But that is exactly what the Fourth Circuit's decision allows. While paying lip service to the "power to assign work" test under *Pipefitters*, it says that an employer has the power to assign work at a company whenever it could choose to refuse to do business with that company in favor of a different company that employs union labor. *Supra* pp. 14–16. In practice, that logic has the inevitable effect of blessing the exact type of secondary boycott Section 8(b)(4) was designed to prevent.

Second, the Fourth Circuit's decision impermissibly expands the permissible use of union pressure campaigns, by allowing not only defensive tactics to *preserve* union jobs, but also offensive tactics to *acquire* new ones. Under the long-established approach, unions could not pressure an employer to award work at a job site that union members had never previously performed. But under the Fourth Circuit's new departure from clear precedent, unions can do exactly that if they represent *other* employees who perform the same type of work at *different* job sites. That declares open season on non-union jobs, allowing them to be directly targeted by hard-knuckle union tactics. It also raises the stakes dramatically for representation fights at every job site, as a union representing employees in one place would give it leverage to coercively acquire the same type of work at other sites.

None of this is consistent with the balance Congress struck under the NLRA, which expressly limits unions' objectives to preserving jobs that union members actually hold by negotiating directly with the employer. The Fourth Circuit's decision ignores that balance, making *other* employers and *other* jobs collateral damage.

B. The Fourth Circuit's Decision Threatens the State and National Economy.

The economic and competitive harm flowing from the Fourth Circuit's decision has already been felt in the Port of Charleston and the state of South Carolina, and if not remedied it will inflict lasting harm on the entire east coast and the nation's supply chain.

South Carolina's ports drive significant economic growth, not only in the state of South Carolina, but throughout the entire southeast region of the United States. A recent economic impact study of the SCSPA showed that "[t]he total economic impact resulting from all activities associated with SC Ports on the state of South Carolina is estimated to be approximately $86.7 billion." Dr. Joseph C. Von Nessen, *The Economic Impact of the South Carolina Ports Authority: Statewide and Regional Analysis*, University of South Carolina Moore School of Business, at 4 (Oct. 2023), https://scspa.com/wp-content/uploads/sc-ports-economic-impact-study-2023.pdf. The direct and indirect activities of the SCSPA and other port users supports over 260,000 jobs across the state, or "1 out of every 9 jobs in South Carolina." *Id.* at 25. An additional $10.0 billion is generated through business transactions outside of South Carolina that require the use of South Carolina port facilities. *Id.* at 4. Moreover, the "economic ripple effect" caused by the direct and indirect activities of the SCSPA and other port users outside of the state of South Carolina, supports an additional 38,548 jobs across the southeastern region of the United States. *Id.* at 4, 14, 32.

Increasing activity at the Port of Charleston is necessary to South Carolina's development and to driving economic growth for the southeastern United States. But development of new terminals requires significant investments, as demonstrated by South Carolina's over $1.5 billion invested in the Leatherman Terminal. App. 105a. This investment in economic development is wasted if carriers cease doing business at the Terminal. And additional jobs—

including jobs for ILA union members and state employees at the Port of Charleston, as well as jobs that would be created through the Port's "economic ripple effect"—will not be created if the Leatherman Terminal lies all but dormant.

Here, the ILA's conduct has resulted in the Leatherman Terminal sitting virtually idle, as carriers have been deterred from calling there due to the threat of hundreds of millions of dollars in damages that the union is threatening through its punitive lawsuit. By scaring the carriers away from the Terminal, the union has thus effectively frustrated the significant investment that South Carolina has made in the Port to spark economic development in the state and the region. It has also prevented job growth for both the ILA's members and others throughout the state of South Carolina.

Moreover, the fact that the ILA's actions are occurring in a time of unprecedented disruption in the global supply chain in major United States ports compounds the harm to American consumers. As recognized by Federal Maritime Commissioner Louis E. Sola, the harm caused by significant underutilization of the Leatherman Terminal will impact our nation's economy and the global supply chain. Letter of Commissioner Sola to President Joe Biden (June 24, 2022), https://www.fmc.gov/letter-of-commissioner-sola-to-president-joe-biden-2/
(explaining that "the excessive backlog of vessels in one major port creates a domino effect in all others across the country"). The delays caused by carriers' refusal to use the Leatherman Terminal without fear of litigation by the ILA "contributes to the delay in the import and export of needed commodities and

contributes to the general level of Co2 emissions as ships loiter at sea awaiting an opening at the pier." *Id.* ("With every additional vessel queued up at sea waiting for a berth, Americans suffer with empty shelfs and higher prices."). Artificially reducing capacity through the authorization of ILA's conduct adds further strain to our already strained supply chains.

The harm to South Carolina, the east coast, and the country from this decision is also part of a broader pattern of disruption caused by the extreme lengths the present NLRB is willing to go to privilege union interests above all other considerations. The Board has eviscerated its precedents meant to ensure a reasonable balance of employer and employee interests, and even openly flouted its role as neutral arbiter, in a ham-fisted effort to maximize union victories. *Supra* pp. 4–5. The result has been economic disruption throughout the country. Strikes tripled between 2021 and 2022 and currently threaten to cripple the domestic auto industry.[2] At a time when Americans are facing sharp increases in the cost of living and shortages of consumer goods, the country needs a fair NLRB, not one that will countenance any

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[2] *See* Kris Maher, *Strikes Becoming More Common Amid Inflaction, Tight Labor Market*, Wall St. J., Sept. 16, 2022, https://www.wsj.com/articles/more-workers-head-to-picket-lines-amid-higher-inflation-and-a-tight-job-market-11663320635; Jennifer Williams-Alvarez & Mark Maurer, *Auto Industry Finance Chiefs Watch for Ripple Effects from UAW Strike*, Wall St. J., Sept. 22, 2023, https://www.wsj.com/articles/auto-industry-finance-chiefs-watch-for-ripple-effects-from-uaw-strike-88c17372.

disruption that favors the short-term interests of unions.

The Fourth Circuit erred in authorizing the ILA's conduct. It not only misapplied controlling precedent, but also ignored the totality of the circumstances surrounding the ILA's conduct and harm it caused to competition and the broader economy—the precise type of harms Sections 8(b)(4)(ii) and 8(e) are intended to prevent. If the Fourth Circuit's decision remains standing and its flawed analysis is applied in future cases, both the economy and consumers will suffer significant harm.

CONCLUSION

For the reasons explained, the Court should grant certiorari, and hold that the ILA's lawsuit against USMX and its carrier members violates NLRA Section 8(b)(4)(ii) and Section 8(e).

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