DAVIS GRIMM PAYNE & MARRA

Attorneys at Law
701 FIFTH AVENUE, SUITE 4040
SEATTLE, WA 98104
(206) 447-0182 (Phone)
(206) 622-9927 (Fax)
www.dgpmlaw.com

JOHN M. PAYNE
JOSEPH G. MARRA
CHRISTOPHER L. HILGENFELD
SELENA C. SMITH
BRIAN P. LUNDGREN

ERIK M. LAIHO
MARGARET M. DAVIS
AMY C. PLENEFISCH (Of Counsel)
WILLIAM T. GRIMM (Of Counsel)
JOSEPH L. DAVIS (Retired)

January 3, 2018

Sent Via Federal Express

Honorable Chief Justice John G. Roberts Jr.
c/o Scott S. Harris, Esq., Chief Clerk
United States Supreme Court
1 First St. NE
Washington, DC 20543

Re: Application for Stay of Mandate
Oak Harbor Freight Lines, Inc. v. National Labor Relations Board, No. 17-531

Honorable Chief Justice Roberts,

Enclosed is Petitioner Oak Harbor Freight Lines, Inc.'s *Application for Stay of Mandate Pending Resolution of Appeal* pursuant to 28 U.S.C. § 2101(f), Sup. Ct. R. 22, 23, and this Court's June 27, 2017 Order.

This Application is timely because Oak Harbor filed its Motion to Stay the United States Court of Appeals for the District of Columbia Circuit's mandate on July 13, 2017. The Court of Appeals denied Oak Harbor's Motion to Stay the Mandate on August 10, 2017. The Court of Appeals issued the mandate in this case on August 16, 2017. Oak Harbor filed its Petition for a Writ of Certiorari on October 4, 2017 and the Petition has not been ruled upon by this Court.

As provided in the enclosed Application, Oak Harbor respectfully requests this Court grant Oak Harbor's Application and stay the Court of Appeals' mandate in this case.

Sincerely,

Selena C. Smith
Counsel of Record for Oak Harbor Freight Lines, Inc.

Enclosure

No. 17-531

In the Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Application for Stay from the
United States Court of Appeals for the District of Columbia Circuit

APPLICATION FOR STAY OF MANDATE PENDING RESOLUTION OF APPEAL

SELENA C. SMITH, ESQ.
COUNSEL OF RECORD
JOHN M. PAYNE, ESQ.
DAVIS GRIMM PAYNE & MARRA
701 FIFTH AVENUE, SUITE 4040
SEATTLE, WASHINGTON 98104
(206) 447-0182
SSMITH@DAVISGRIMMPAYNE.COM

COUNSEL FOR PETITIONER

PETER KIRSANOW, ESQ.
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
200 PUBLIC SQUARE,
SUITE 2300
CLEVELAND, OH 44114
(216) 363-4481

COUNSEL FOR PETITIONER

JANUARY 3, 2018

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INTRODUCTION

Pursuant to Rules 22 and 23 of the United States Supreme Court, and 28 U.S.C. § 2101(f) Petitioner Oak Harbor Freight Lines, Inc. ("Oak Harbor" or "Company") respectfully requests that this Court stay the United States Court of Appeals for the District of Columbia Circuit's mandate pending resolution of Oak Harbor's Petition for a Writ of Certiorari with the United States Supreme Court. There is a likelihood that irreparable harm will result if this stay is denied, the equities favor a stay, and there is more than a "fair prospect" that this Court will reverse the Court of Appeals' judgment.

JURISDICTION

This Court has jurisdiction to enter a stay of the Court of Appeals' mandate pending resolution of Oak Harbor's appeal. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23(2). The Court may stay the mandate in any case where the judgment is subject to review by the United States Supreme Court. 28 U.S.C. § 2101(f).

The decision of the Court of Appeals was entered on May 2, 2017. Oak Harbor filed a petition for rehearing *en banc* with the Court of Appeals on June 14, 2017. Oak Harbor's petition for rehearing *en banc* was denied on July 7, 2017. Oak Harbor filed its Motion to Stay the Court of Appeals' mandate on July 13, 2017. The Court of Appeals denied Oak Harbor's Motion to Stay the Mandate on August 10, 2017. (Declaration of Selena C. Smith, Exhibit 1; Order,

Exhibit 2,). The Court of Appeals issued the mandate in this case on August 16, 2017. (Mandate, Exhibit 3,). Oak Harbor filed its Petition for Writ of Certiorari on October 4, 2017. ("Petition", Exhibit 4 - with corporate disclosure statement.).

This Court has jurisdiction to grant Oak Harbor's Petition pursuant to 28 U.S.C. § 1254(1). Therefore, this Court has jurisdiction to stay the mandate because this case is subject to review by this Court. 28 U.S.C. § 2101(f).

BACKGROUND

The procedural history and relevant background facts of this case are outlined in Oak Harbor's Petition filed on October 4, 2017 and placed on the docket on October 10, 2017 as No. 17-531. (Exhibit 4, pp. 7-18). In sum, Oak Harbor's Petition respectfully requests review of the United States Court of Appeals for the District of Columbia Circuit's decision denying Oak Harbor's Petition for Review on May 2, 2017. The Court of Appeals erroneously affirmed the National Labor Relations Board's ("Board") conclusion that Oak Harbor violated Sections 8(a)(1) and (5) of the National Labor Relations Act by unilaterally ceasing benefits contributions to a Union Trust Fund and by unilaterally applying its medical plan to returning strikers. A capsule summary of the relevant background facts is provided below.

Oak Harbor was a party to a collective bargaining agreement with Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, "the Union"). (Exhibit 4, pp. 12-13). The parties' collective

bargaining agreement required Oak Harbor to contribute to employee benefit plans, including health and welfare and pension. The Trust Funds that administered these benefit plans required the parties to sign Subscription Agreements. Each Subscription Agreement required Oak Harbor to make contributions to the benefit plan until Oak Harbor announced its intent to cancel pursuant to the Subscription Agreement's specific terms.

On September 23, 2008, Oak Harbor announced its intent to cancel four Subscription Agreements consistent with the cancellation provisions in the Subscription Agreements. (Exhibit 4, pp. 12-13). Oak Harbor believed that a Subscription Agreement also existed for a fourth Union Trust Fund (the "Oregon Trust"), although Oak Harbor could not verify the existence of the Subscription Agreement for the Oregon Trust. (*Id.*, p. 13). The Oregon Trust's administrators communicated that they believed they had an executed Subscription Agreement on file for the Oregon Trust, as well. (*Id.*). The Oregon Trust administrators were also responsible for administering the other Union Trust Funds at issue in this case. (*Id.*). The Union also acted in conformance with the parties' understanding and belief that an Oregon Trust Subscription Agreement existed, containing a benefits cancellation provision. (*Id.*, pp. 13-14). Following Oak Harbor's cancellation of the Subscription Agreements for all four Trust Funds, the Trust Funds refused to accept contributions for bargaining unit employees. (*Id.*).

In February, 2009, following a strike, Oak Harbor bargained in good faith with the Union over interim healthcare benefits for returning strikers, pending the outcome of full labor agreement negotiations. (Exhibit 4, pp. 16-17). Following impasse on this subject, Oak Harbor applied the Company medical plan to the returning strikers so that they would have medical coverage. (*Id.*, pp. 17-18). Oak Harbor has maintained its position that this constituted the "status quo" arrangement of the parties. (*Id.*).

The Union later contested (1) Oak Harbor's cancellation of contributions to the Trust Funds (including the Oregon Trust), and (2) Oak Harbor's implementation of the Company medical plan, among other issues. (Exhibit 4, p. 10). The Board accordingly instituted the alleged unfair labor practice charges that are the subject of this proceeding. (*Id.*). The Board partially ruled in favor of Oak Harbor, concluding that Oak Harbor validly cancelled its contributions to the Trust Funds where there was a signed Subscription Agreement. (*Id.*). However, the Board also ruled that Oak Harbor's cancellation of contributions to the Oregon Trust was not proper because no Subscription Agreement existed (despite the conduct of the parties evidencing otherwise). (*Id.*). The Board also ruled that Oak Harbor's implementation of its Company medical plan was not proper. (*Id.*). The Court of Appeals for the District of Columbia Circuit affirmed the Board's decision. (*Id.*, at p. 11).

While Oak Harbor's Petition seeking review of these important issues is pending, the Board is currently advancing compliance proceedings. (Exhibit 1, ¶ 3). However, as a result of these compliance proceedings, Oak Harbor could be compelled to pay millions of dollars to the Oregon Trust and individual employees and former employees. (*Id.*, ¶¶ 4-5). Should Oak Harbor submit these payments, it is unlikely to receive these payments back if the Court reverses the Court of Appeals. As a result, Oak Harbor would likely be irreparably injured. Therefore, Oak Harbor files the instant Application to Stay the Court of Appeals' Mandate.

REASONS FOR GRANTING THE STAY

The Rules of the Supreme Court of the United States provide that a "party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment."[1] Sup. Ct. R. 23.2, 28 U.S.C. §2101(f). Except "in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 23.3. Oak Harbor has met all requirements for requesting a stay prior to the instant Application. Oak Harbor filed its Motion to Stay the Court of Appeals' mandate on July 13, 2017. The Court of Appeals denied Oak Harbor's Motion to Stay the

[1] Should this Court grant Oak Harbor's Application, the Court of Appeals for the District of Columbia Circuit, must (to the extent required) recall its mandate to comply with the Supreme Court's Order staying this case. *Calderon v. Thompson*, 523 U.S. 538, 549, 118 S.Ct. 1489 (1998)("the courts of appeals are recognized to have an inherent power to recall their mandates.").

Mandate on August 10, 2017. (Exhibit 2). The Court of Appeals issued the mandate in this case on August 16, 2017. (Exhibit 3).

The Rules of the Supreme Court also provide that "[a] stay may be granted by a Justice as permitted by law." Sup. Ct. R. 23.1. Under the law, in order to obtain a stay pending this Court's review, an applicant must show "a likelihood that irreparable harm will result from the denial of a stay," that the "equities" and "weigh[ing] [of] relative harms" favor a stay, and a "fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705 (2010). These standards are readily satisfied in this case.

A. Irreparable Harm Will Result from the Denial of a Stay and the Equities Favor the Issuance of a Stay.

The primary consideration this Court uses to determine if a stay is appropriate is whether "irreparable harm to an applicant is likely to result if the request for a stay is denied," and "the 'balance of equities' – to the parties and to the public – favors the issuance of a stay." *In re Roche*, 448 U.S. 1312, 1314, 101 S.Ct. 4, 5-6 (1980). These same criteria support an issuance of a stay of the Court of Appeals' mandate in the present case.

Oak Harbor will suffer irreparable harm if this Court denies its request to stay the mandate. The mandate in this case may require Oak Harbor to pay millions of dollars to well over two hundred individual employees and to the Oregon Trust. (Exhibit 1, ¶ 4). On September 25, 2014, an account executive for

the Oregon Trust's administrator declared, under penalty of perjury, that the sum of outstanding contributions allegedly owed at that time was approximately $17,202,292. (Declaration of Mark Coles, Exhibit 5). In addition, the outstanding payments are not limited to the Oregon Trust, but likely will need to be distributed to well over a hundred individuals. (Exhibit 1, ¶ 5). The administrative burden of compiling information and potentially distributing payments to well over a hundred individuals is overly burdensome.

This Court has issued stays of mandates pending resolution of appeal under circumstances similar to Oak Harbor's case. In *Ledbetter v. Baldwin*, Justice Powell held that a stay of a mandate was appropriate due to the "significant possibility that the [Supreme Court] will reverse the lower court's decision" and the irreparable harm the state would suffer in complying with the decision altering the requirements for state plans distributing grants to families. 479 U.S. 1309, 1310, 107 S.Ct. 635, 636-37 (1986) (Powell, J. in chambers). Justice Powell found the appellant would suffer irreparable harm for two reasons. First, the appellant would "bear administrative costs of changing its system to comply" with the court's order. *Id.* Such costs could not be recovered once the Supreme Court reversed the lower court. *Id.* Second, the disputed payments made to the individuals were also unlikely to be recovered by the state following a successful appeal. *Id.* Justice Powell weighed the state's potential irreparable harm against the argument by the intended recipients that they

would be deprived of disputed payments if a stay were issued. *Id.* at 1311. Justice Powell found the state's asserted inability to recover payments made to the recipients outweighed the possible delay in payments to those recipients. *Id.* Therefore, a stay of the judgment was required.

Similarly, in *Heckler v. Turner*, Justice Rehnquist found that a stay was appropriate given the likelihood of success on the merits and the likely irreparable injury to the appellant. 468 U.S. 1305, 1307-08, 105 S.Ct. 2 (1984) (Rehnquist, J., in chambers). Under the lower court's order, the appellant was required to change the amount paid to recipients of government funds. *Id.* Justice Rehnquist found that "it is extremely unlikely that the [government] would be able to recover funds improperly paid out [totaling an additional $2.6 million per month]." *Id.* at 1308. The alleged harm to the recipients who would not be paid during the pendency of a stay did not outweigh the appellant's interests in being likely unable to recover the same amount. *Id.* Therefore, Justice Rehnquist issued the stay pending resolution of the appeal. *Id.*

Consistent with this Court's precedent, should the mandate not be stayed and this Court later reverses the Court of Appeals' decision, Oak Harbor is unlikely to be repaid the millions of dollars distributed to numerous individuals. Attempting to recuperate such funds would pose an administrative and logistical impossibility for Oak Harbor. Moreover, any interest these individuals or the Oregon Trust have in receiving the funds before this Court has the opportunity

to rule on these issues is outweighed by Oak Harbor's interest in avoiding the loss of millions of dollars which may not be recoverable.

Finally, the "balance of equities" favors a stay in this case. There is no harm in maintaining the status quo until this Court issues a decision. The facts of this case date back to 2008 and 2009. The parties have litigated the disputes at issue here since 2010. A stay in this case while Oak Harbor's Petition is resolved will not harm any interested party. Additionally, there would be no harm to the public if this Court issues a stay. However, Oak Harbor will suffer irreparable harm unless a stay is granted.

B. There is a "Fair Prospect" that a Majority of the Court Will Reverse the Judgment Below.

The "fair prospect" test asks whether a "plausible arguments exist for reversing the decision below and that there is at least a fair prospect that a majority of the Court may vote to do so." *California v. Am. Stores Co.*, 492 U.S. 1301, 1306, 110 S. Ct. 1 (1989). There is more than a "fair prospect that a majority of the Court will vote to reverse" the Court of Appeals' decision in this case given the important issues raised in Oak Harbor's Petition and the Court of Appeals' erroneously legal rulings. *Hollingsworth*, 558 U.S. at 190. Oak Harbor's Petition is attached to this Application. (Exhibit 4). However, for your convenience, a summary of each main argument raised in the Petition is provided below.

1. Oak Harbor's Petition for a Writ of Certiorari Raises Important Questions of Federal Law Concerning Healthcare Coverage that Compel Reversal by this Court.

Oak Harbor's Petition for a Writ of Certiorari raises important questions of federal law concerning employee healthcare coverage that should be decided by this Court. (Exhibit 4, pp. 19-21). Thus, there is a more than a "fair prospect" that a majority of this Court will reverse the judgment below.

A key issue on review in this case is when an employer may lawfully implement healthcare coverage to employees represented by a union, pending the outcome of full labor agreement negotiations. Federal labor law recognizes that matters of such "overriding importance" may arise in the midst of ongoing contract negotiations, which require immediate action. *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005). The imminent loss of healthcare coverage is one such matter of "overriding importance." An employer does not violate the National Labor Relations Act in such circumstances, even in the absence of an impasse in overall contract negotiations. *Id.* Instead, Board law allows an employer to address such "economic exigencies" when the employer provides adequate notice to the union and an opportunity to bargain. *RBE Electronics*, 320 NLRB 80, 81-82 (1995). That is what Oak Harbor did in this case.

The importance of healthcare coverage is well recognized on the national stage. Healthcare issues remain front and center nationally as Congress continues to debate potential changes to existing healthcare law. The issue of employee healthcare is of crucial significance, extending well beyond the parties to this instant proceeding.

As set out in Oak Harbor's Petition, Oak Harbor implemented a Company medical plan for returning strikers in February 2009, which was necessary to avoid a lapse in healthcare coverage. (Exhibit 4, pp. 16-18). This constituted an "economic exigency" under the law. (*Id.*, pp. 21-29). The Court of Appeals concluded that continued healthcare coverage was not of such "overriding importance" to justify implementation. (*Id.*, p. 21). The Court's Decision is contrary to existing law concerning "economic exigencies," which permit an employer to implement healthcare coverage for employees as Oak Harbor did in this case.

Supreme Court resolution of employer rights and obligations related to the implementation of healthcare coverage for bargaining unit employees is warranted. Moreover, given the national importance of the issue of healthcare coverage, there is more than a "plausible argument" and "fair prospect" that the judgment in this case will be reversed. Thus, a stay of the mandate is appropriate in this case.

2. Oak Harbor's Petition for a Writ of Certiorari Raises Important Questions of Federal Law Concerning Claims of Equitable Estoppel that Compel Reversal of the Court of Appeals' Decision.

In addition to the healthcare issue noted above, the Court of Appeals' Decision rejected Oak Harbor's equitable estoppel arguments – which are based on the fact that both Oak Harbor and the Union acted as if the Oregon Trust was subject to a Subscription Agreement – on the grounds that Oak Harbor had not presented "affirmative evidence that the Union had informed Oak Harbor that the Subscription Agreement existed." (Exhibit 4, p. 29). Contrary to the Court of Appeals' Decision, a claim of equitable estoppel under federal common law does not require an affirmative statement upon which Oak Harbor must have relied to its detriment.

In requiring an affirmative representation, the Court of Appeals' decision appears to apply a standard applicable in cases involving governmental agencies. In particular, the Court of Appeals has required a "definite representation" or "affirmative misconduct" upon which a party detrimentally relied when seeking to estop the government. *See Heckler v. Community Health Servs.*, 467 U.S. 51, 60, 104 S.Ct. 2218 (1984)); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988).

Given the Court of Appeals' departure from this precedent and the creation of a heightened standard contrary to the law, there is certainly more

than a "plausible argument" and "fair prospect" that the judgment in this case will be reversed.

3. The Circuit Court of Appeals' Decision to Rubber-Stamp the Board's Unlawful Alteration of the Parties' Temporary Benefits Agreement Compels Reversal of the Judgment Below.

There is a "fair prospect" that the Circuit Court of Appeals' affirmation of the Board's decision that exceeded its statutory authority will be reversed by this Court. A stay of the mandate in this case is appropriate.

In this case, Oak Harbor and the Union expressly agreed to an interim benefits arrangement, pending the outcome of both the strike and full labor agreement negotiations. (Exhibit 4, p. 35). Oak Harbor and the Union agreed that they would temporarily cover employees under the Company medical plan pending the *outcome of* the strike and *full contract negotiations*. (*Id.*). In enforcing the Board's order, the Court of Appeals claimed the record showed, "that the agreement on crossover employees during the strike was temporary and that Oak Harbor itself described it as an 'interim measure pending the outcome of bargaining and of the strike.'" (*Id.*, p. 36). The Court of Appeals ignored the clear language of the parties' agreement: that the Company medical plan continue "pending the outcome of bargaining" – not just for the duration of the strike. (*Id.*, pp. 35-36.) The Board's decision, rubber-stamped by the Court of Appeals, impermissibly exceeded its statutory authority by altering the parties' agreement. (*Id.*, p. 37). Such abuse of the Board's statutory authority

must be reviewed and reversed by this Court because the Board cannot compel or rewrite the specific terms of agreements between the parties. *See* Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d).

In Oak Harbor's case, the Board and the Court of Appeals were compelled to simply follow the binding agreement reached between the parties, rather than alter the terms of the agreement to limit its duration to the strike. The Board's contrary decision, improperly upheld by the Court of Appeals, conflicts with Supreme Court precedent and exceeds the Board's statutory authority. Therefore, there is more than a "plausible argument" and "fair prospect" that this Court will reverse the Board's improper attempt to exceed its statutory authority.

IV. CONCLUSION

For all of the above-stated reasons, Oak Harbor respectfully requests that this Court grant its Application to Stay the Mandate.

Respectfully submitted,

SELENA C. SMITH, ESQ.
COUNSEL OF RECORD FOR PETITIONER
DAVIS GRIMM PAYNE & MARRA
701 FIFTH AVENUE, SUITE 4040
SEATTLE, WASHINGTON 98104
(206) 447-0182
SSMITH@DAVISGRIMMPAYNE.COM

JANUARY 3, 2018

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EXHIBIT 1

No. 17-531

In the Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

DECLARATION OF SELENA C. SMITH IN SUPPORT OF PETITIONER'S APPLICATION FOR STAY OF MANDATE PENDING RESOLUTION OF APPEAL

I, Selena, C. Smith, hereby declare as follows:

1. I am over the age of eighteen (18) and am competent to testify about the matters contained herein.

2. I am the counsel of record for Petitioner Oak Harbor Freight Lines, Inc. ("Oak Harbor") in the above-captioned matter.

3. The National Labor Relations Board ("Board") instituted compliance proceedings following the United States Court of Appeals for the District of Columbia Circuit's Mandate in Case No. 14-1226.

4. As part of these compliance proceedings, the Board is requesting that Oak Harbor provide the name, address, phone number, social security number, email address, position, and detailed medical and employment information for each employee who would have received benefits under the Oregon Warehouseman Trust ("Oregon Trust") since February 26, 2009. The Board's request includes payroll records, health services, dates for health services, and all hours worked for each employee. This involves well over 200 individuals.

5. The Board is requiring that Oak Harbor "make whole" each and every employee who would have received benefits under the Oregon Trust. This includes a requirement that Oak Harbor provide direct payments to well over 200 individuals for medical expenses that would have been covered under the Oregon Trust to satisfy the "make-whole" remedy.

6. Attached as **Exhibit 2** to Petitioner's "Application for Stay of Mandate Pending Resolution of Appeal" is a true and correct copy of the United States Court of Appeals for the District of Columbia Circuit's Decision Denying Oak Harbor's Motion to Stay the Mandate.

7. Attached as **Exhibit 3** to Petitioner's "Application for Stay of Mandate Pending Resolution of Appeal" is a true and correct copy of the United States Court of Appeals for the District of Columbia Circuit's Mandate for Case No. 14-1226.

8. Attached as **Exhibit 4** to Petitioner's "Application for Stay of Mandate Pending Resolution of Appeal" is a true and correct copy of Oak Harbor's "Petition for Writ of Certiorari" filed in this Court on October 4, 2017.

9. Attached as **Exhibit 5** to Petitioner's "Application for Stay of Mandate Pending Resolution of Appeal" is a true and correct copy of the September 25, 2014, Declaration of Mark T. Coles. At the time of the Declaration, Mr. Coles was an account executive for Northwest Administrators, the administrator of the Oregon Trust. Mr. Coles declared that the outstanding sum of contributions allegedly owed to the Oregon Trust was approximately $17,202,292.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of January, 2018, in Seattle, Washington.

Selena C. Smith

EXHIBIT 2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1226 **September Term, 2016**

NLRB-19CA031797

Filed On: August 10, 2017

Oak Harbor Freight Lines, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Teamsters 174 and Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962,

Intervenors

Consolidated with 14-1273, 15-1002

BEFORE: Garland, Chief Judge; Rogers, Circuit Judge; and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's motion for stay of mandate pending filing of petition for writ of certiorari, the responses thereto, and the reply, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

EXHIBIT 3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1226 **September Term, 2016**

NLRB-19CA031797

Filed On: August 16, 2017 [1688947]

Oak Harbor Freight Lines, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Teamsters 174 and Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962,

Intervenors

Consolidated with 14-1273, 15-1002

MANDATE

In accordance with the judgment of May 2, 2017, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Link to the judgment filed May 2, 2017

EXHIBIT 4

No. 17-_____

In the Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

—v—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

SELENA C. SMITH, ESQ.
COUNSEL OF RECORD
JOHN M. PAYNE, ESQ.
DAVIS GRIMM PAYNE & MARRA
701 FIFTH AVENUE, SUITE 4040
SEATTLE, WA 98104
(206) 447-0182
SSMITH@DAVISGRIMMPAYNE.COM

PETER KIRSANOW, ESQ.
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
200 PUBLIC SQUARE,
SUITE 2300
CLEVELAND, OH 44114
(216) 363-4481

OCTOBER 4, 2017 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Following the commencement of a strike by Teamsters 174, et al., Oak Harbor Freight Lines, Inc. cancelled contributions to four Union Trust Funds in accordance with the Trust Funds' Subscription Agreements. Oak Harbor Freight Lines, Inc. and Teamsters 174, et al. subsequently reached an agreement on healthcare benefits pending the outcome of the strike and full contract bargaining. After the strike ended, Oak Harbor Freight Lines, Inc. placed returning strikers into its Company medical plan on an interim basis to avoid the "economic exigency" of a loss of healthcare coverage. Stated another way, Oak Harbor Freight Lines, Inc. applied the status quo of the interim healthcare agreement.

The decisions below held that Oak Harbor Freight Lines, Inc. lawfully ceased contributing to three of the four Union Trust Funds. However, the decisions below concluded that Oak Harbor Freight Lines, Inc. violated the National Labor Relations Act by ceasing contributions to the fourth Trust Fund and by unilaterally implementing its Company medical plan for returning strikers.

This case presents the following questions for review by the Supreme Court of the United States:

1. Under the legal principles of economic exigencies, may an employer implement a temporary medical plan, pending the resolution of a full labor agreement, and following good-faith bargaining on the subject?

2. Under the legal principles of equitable estoppel, should a party be estopped from challenging a

position, when such challenge is inconsistent with its prior silence and acceptance of certain facts?

3. Did the National Labor Relations Board exceed its statutory authority by imposing its own interpretation of an agreement inconsistent with the parties' express terms?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Oak Harbor Freight Lines, Inc., a for-profit closely-held corporation organized under the laws of the State of Washington. Oak Harbor Freight Lines, Inc. operates a multi-state transportation, delivery and logistics service business. Oak Harbor Freight Lines, Inc. has no corporate parents and no publicly-held corporation owns more than 10% or more of Oak Harbor Freight Lines, Inc.'s stock.

The Respondent is the National Labor Relations Board.

The International Brotherhood of Teamsters, Local Teamsters Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 were Intervenors in the proceeding before the United States Court of Appeals for the District of Columbia Circuit.

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JUDICIAL RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner Oak Harbor Freight Lines, Inc. respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 2, 2017.

OPINIONS BELOW

The May 2, 2017 opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") is reported as *Oak Harbor Freight Lines, Inc. v. National Labor Relations Board*, 855 F.3d 436 (D.C. Cir. 2017). The October 31, 2014 final decision and order of the National Labor Relations Board ("NLRB" or "Board") is reported at 361 NLRB No. 82 (October 31, 2014). The NLRB's October 31, 2014 final decision and order incorporates by reference the NLRB's May 16, 2012 decision and order, reported at 358 NLRB No. 41 (May 16, 2012).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on May 2, 2017. Oak Harbor Freight Lines, Inc. filed a petition for rehearing *en banc* with the Court of Appeals on June 14, 2017. Oak Harbor Freight Lines, Inc.'s petition for rehearing *en banc* was denied on

July 7, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

- 28 U.S.C. § 1254(1)

  Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

  (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

- 29 U.S.C. § 158(a)(1), (a)(5), and (d); Sections 8(a)(5), (a)(1), and (d) of the National Labor Relations Act

  (a) Unfair labor practices by employer

  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;

  [. . .]

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

  [. . .]

  (d) Obligation to bargain collectively

  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 . . . .

- 29 U.S.C. § 160(a), (e)-(f)

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the detective of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[. . .]

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evi-

dence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

- 29 U.S.C. § 185;
  Section 301 of the Labor Management Relations Act

  (a) Venue, amount, and citizenship

  Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

amount in controversy or without regard to the citizenship of the parties . . . .

STATEMENT OF THE CASE

This case presents important questions of federal law concerning the interactions between employers and unions. Supreme Court review is compelled here to resolve important legal questions which have been decided in a way that conflict with Supreme Court precedent and to resolve a circuit split concerning existing labor law principles.

The Board in this case concluded that Oak Harbor Freight Lines, Inc. ("Oak Harbor" or "the Company") violated Sections 8(a)(5) and (1) of the National Labor Relations Act by unilaterally ceasing benefits contributions to a Union Trust Fund and by unilaterally applying its Company medical plan to returning strikers. The Court of Appeals affirmed the Board's decision.

Contrary to the conclusions of the Board and the Court of Appeals, federal labor law on "economic exigencies" permitted Oak Harbor's placement of returning strikers in its Company medical plan. Oak Harbor bargained in good faith with Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, "the Union") over interim healthcare benefits for returning strikers, pending the outcome of full labor agreement negotiations. Following impasse on this subject, Oak Harbor applied the Company medical plan to the returning strikers

so that they would have medical coverage. The Board's and the Court of Appeals' decisions rejected the legal principles of "economic exigencies," which permit employers to implement interim measures pending the resolution of full contract negotiations. This issue presents an important question of federal law concerning bargaining obligations and an employer's ability to implement time-sensitive proposals while ongoing contract negotiations continue. This issue additionally highlights a circuit split among the federal Courts of Appeals concerning the elements of "economic exigency," warranting Supreme Court review. Supreme Court Rule 10(a). Furthermore, the question presented here concerning "economic exigency" has not been, but should be, settled by this Court. Supreme Court Rule 10(c).

The Board's and the Court of Appeals' decisions further contradict Supreme Court precedent on the legal principles of "equitable estoppel." In the instant case, Oak Harbor announced its intent to cancel a Subscription Agreement, which Oak Harbor reasonably believed was in existence. Oak Harbor's understanding was that the Subscription Agreement contained a cancellation provision, which permitted it to cease contributing to a Union Trust Fund (the "Oregon Trust").

The Union also acted in conformance with the parties' understanding and belief that an Oregon Trust Subscription Agreement existed, containing a benefits cancellation provision. Not once during the timeframe at issue did the Union proclaim that the Subscription Agreement did not exist. Not once did the Union assert that Oak Harbor's cancellation of

Oregon Trust contributions was void due to the lack of a Subscription Agreement cancellation clause. In fact, the Union demanded that Oak Harbor sign new Subscription Agreements and a new Interim Labor Agreement at the conclusion of the strike to reinstate benefits contributions. The Union did not challenge the existence of the Oregon Trust Subscription Agreement until long after Oak Harbor cancelled contributions. The Union instead acted consistently with its own understanding and belief that the Subscription Agreement existed. Despite these facts, the Board and the Court of Appeals rejected Oak Harbor's arguments that the Union should be estopped from belatedly challenging the existence of the Oregon Subscription Agreement. In so holding, the Court of Appeals applied an incorrect standard for assessing equitable estoppel. The Court of Appeals' decision conflicts with relevant decisions of this Court and compels Supreme Court review. Supreme Court Rule 10(c).

Supreme Court review is further warranted in this case because the Board exceeded its statutory authority in its interpretation of an agreement reached between the parties in October 2008. The Court of Appeals rubber-stamped the Board's improper alteration of the parties' temporary benefits agreement. The parties expressly agreed to an interim benefits arrangement, pending the outcome of both the strike and full labor agreement negotiations. Instead of enforcing this agreement, the Board impermissibly substituted its own interpretation of the agreement to limit its duration to the strike. The Board's and the Court of Appeals' decisions contradict relevant Supreme Court precedent on this important subject. Supreme Court review is,

therefore, necessary in accordance with Supreme Court Rule 10(c).

A. Procedural History.

The General Counsel issued a consolidated complaint in the underlying Board proceeding on June 29, 2009. Oak Harbor was named as the Respondent in the NLRB proceedings below. The complaint was amended multiple times. On May 24, 2010, Counsel for the General Counsel issued its fourth amended complaint, and the Regional Director for Region 19 of the NLRB issued a notice of hearing.

A trial was held in this matter from July 6 to 20, 2010, in Seattle, Washington. The Administrative Law Judge ("ALJ") issued a decision on January 5, 2011 (App.45a-104a). The parties subsequently filed exceptions and cross-exceptions with the NLRB.

On May 16, 2012, the NLRB issued a decision and order (358 NLRB No. 41) (App.29a-44a). That decision and order was the subject of review proceedings before the Court of Appeals and was ultimately remanded to the NLRB on August 1, 2014. (D.C. Circuit Case Nos. 12-1226, 12-1358, and 12-1360).

On October 31, 2014, the Board issued the final decision and order on review in this proceeding (361 NLRB No. 82) (the Board's "decision"), which incorporated by reference its May 16, 2012 decision (358 NLRB No. 41) (App.17a-28a). On November 4, 2014, Oak Harbor timely filed a petition for review of the Board's decision with the Court of Appeals. The National Labor Relations Act ("the Act" or "NLRA") sets no time limit for petitions for review. On November 4, 2014, the Teamsters Union Local 174, et al.,

filed a petition for review in the United States Court of Appeals for the Ninth Circuit involving the same underlying Board decision.

On December 19, 2014, the Ninth Circuit transferred the Union's petition for review to the D.C. Circuit Court of Appeals pursuant to an order of the United States Judicial Panel on Multidistrict Litigation. (Doc. Nos. 1524800, 1526524.) On January 5, 2015, the NLRB filed a cross-application for enforcement of its decision. The Court of Appeals consolidated these related cases by orders dated December 10, 2014 and January 13, 2015.

The NLRB had jurisdiction over the underlying unfair labor practice charges pursuant to 29 U.S.C. § 160(a). The Court of Appeals had jurisdiction over the consolidated cases pursuant to 29 U.S.C. § 160(e)-(f).

The Court of Appeals issued its decision in this matter on May 2, 2017. Oak Harbor files this petition for a writ of certiorari in accordance with 28 U.S.C. § 1254(1). The background facts of this matter are set forth below.

B. Background Facts.

1. The Expired Labor Agreement and Inception of the Strike.

Oak Harbor is a freight transportation company located in the Pacific Northwest. Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, "the Union") represent Oak Harbor employees in Washington, Oregon, and Idaho. (App.262a-263a). The last collective bargaining agree-

ment between Oak Harbor and the Union expired on October 31, 2007. (App.262a, 270a).

In August 2007, Oak Harbor and the Union began negotiating a successor labor agreement. (App.152a). However, despite approximately 30 bargaining sessions, including 2 pre-strike mediation sessions, the parties still had no agreement over a year later. (App.152a-153a). Oak Harbor hand-delivered a last best and final offer to the Union on September 22, 2008. *Id.* The Union struck later that same day. (App.153a).

2. The Cancellation of Benefits Contributions, and the Trust Funds' Refusal to Accept Contributions after September 30, 2008.

The expired labor agreement contained Taft-Hartley benefit plans for the Western Conference of Teamsters Pension Trust, the Washington Teamsters Welfare Trust, the Oregon Warehouseman's Teamsters Trust ("Oregon Trust"), and the Washington Retirees Welfare Trust (collectively referred to as the "Trust Funds"). (App.263a-269a).

At least three of the above-referenced Union Trust Funds required the Union, Oak Harbor, and the Union Trust Funds to sign Subscription Agreements[1] containing various contractual payment promises and a cancellation provision. (App.274a-319a). The Subscription Agreements, executed by Oak Harbor, the Union, and the Union Trust Funds, permitted either Oak Harbor or the Union to terminate

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[1] The term "Subscription Agreement" used in this petition is also used to refer to the Employer-Union Certification required by the Western Conference of Teamsters Pension Trust.

contributions to the Trust Funds upon contract expiration and five days' written notice. (App.277a, 281a-282a, 287a-288a, 295a-296a, 304a-305a, 313a-314a). Following the commencement of the Union's strike, Oak Harbor exercised its right to cease contributing to the Union Trust Funds consistent with the cancellation provision in the parties' Subscription Agreements. (App.320a-327a). Both the Board and the Court of Appeals concluded that Oak Harbor lawfully ceased contributing to three Union Trust Funds, but not with respect to the Oregon Trust.

At the time it sent its cancellation notices to the Union and the four Union Trust Funds, Oak Harbor was unable to verify the existence of a signed Subscription Agreement for the Oregon Trust. (App.213a-216a, 258a-259a). The Union and Oak Harbor had negotiated into the Oregon Trust in 1995. (App.328a-332a). Oak Harbor believed it had executed a Subscription Agreement for the Oregon Trust, as it had done for the three other Union Trust Funds. (App.213a-216a, 258a-259a, 274a-319a). The Oregon Trust's administrators said they believed they had an executed Subscription Agreement on file for the Oregon Trust, as well. (App.154a-156a). (The Oregon Trust's administrators were also responsible for administering the other three Union Trust Funds. (App.107a-108a, 154a).) The Union also never proclaimed that Oak Harbor was mistaken concerning the existence of the Oregon Trust Subscription Agreement. (App.109a-112a, 134a-138a, 143a-150a, 156a-210a, 224a-254a, 271a-273a, 349a-373a, 376a-395a).

Following September 2008, each of the four Union Trust Funds refused to accept contributions for bar-

gaining unit employees because Oak Harbor had cancelled the Subscription Agreements (including the Oregon Trust). (App.212a-213a, 215a-218a, 320a-327a, 333a-348a). The Union was fully aware of the Trust Funds' (including the Oregon Trust's) refusal to accept contributions following Oak Harbor's cancellation notices. Oak Harbor and the Union discussed this fact on several occasions: in Oak Harbor's October 3, 2008 memorandum to the Union (App.349a-351a); in FMCS mediation on October 9, 2008 (App. 156a-159a); in October and November 2008 correspondence (App.352a-373a); in the parties' February 17, 2009 meeting (App.162a-171a); in February 2009 correspondence (App.376a-395a); and in several telephone conversations between Union representatives and Employer representatives in February 2009 (App.109a-112a, 135a-138a, 163a-210a, 224a-254a). Not once did the Union proclaim that no Oregon Subscription Agreement existed, despite having numerous opportunities to do so. *Id.*[2]

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[2] The first time Oak Harbor heard that no Subscription Agreement was required for the Oregon Trust was at the July 2010 hearing in this matter. The Board's and the Court of Appeals' decisions that the Oregon Trust did not require a Subscription Agreement were based upon Administrator Mark Coles' July 2010 testimony that the Oregon Trust could accept contributions without a Subscription Agreement and without a new labor agreement. (App.139a-143a). However, the Board and the Court of Appeals inexplicably ignored the critical part of Coles' testimony: that the Oregon Trust could accept contributions without a Subscription Agreement if the ALJ issued an order requiring Oak Harbor to contribute to the Trust. (*Id.*) Moreover, this decision was made only one week before the trial in this matter. (App.139a-141a).

3. October–December 2008: Negotiations Regarding Benefits During the Strike.

In response to the Trust Funds' refusal to accept contributions, Oak Harbor and the Union negotiated an interim benefits arrangement during the strike, pending the outcome of the strike and full contract negotiations. (App.156a-159a, 349a-351a, 369a-373a). In October 2008, Oak Harbor and the Union agreed to the following interim benefits arrangement: (1) place the pension contributions in an Oak Harbor escrow account on behalf of crossovers[3]; (2) temporarily cover crossovers under the Company medical plan; and (3) place retirees trust contributions in an Oak Harbor escrow account. (App.349a-351a). The parties agreed this would be a temporary arrangement, pending the outcome of overall contract negotiations and the strike. (App.59a-60a, 156a-159a, 349a-351a, 369a-373a).

In December 2008, the Oregon Trust's attorney sought clarification from Oak Harbor about health and welfare contributions made on behalf of four employees whom the Oregon Trust's attorney believed were crossover employees. (App.215a-216a). The Oregon Trust claimed those employees should be covered under the Company medical plan, not the Oregon Trust. *Id.* No Oregon Trust representative asserted that Oak Harbor's cancellation of an Oregon Subscription Agreement was void due to the lack of such an agreement. (App.214a-218a, 345a-346a). No Oregon Trust representative asserted that the Oregon Trust would

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[3] *I.e.*, bargaining unit employees who crossed the picket line to work during the strike.

accept contributions. *Id.* In fact, the Oregon Trust took the opposite position – it refused to accept contributions. *Id.*

4. **February 2009: End of the Strike and Post-Strike Negotiations Regarding Benefits for Returning Strikers.**

On February 12, 2009, the Union sent Oak Harbor a letter stating that the strike was ending, and the Union was making an unconditional offer to return to work. (App.374a-375a).

On February 17, 2009, the Union and Oak Harbor representatives met to discuss the strikers' orderly return to work. (App.161a-171a, 228a-235a). At the meeting, Oak Harbor proposed to the Union that the parties maintain the status quo for returning strikers' benefits contributions. (App.271a-273a) Oak Harbor reminded the Union that the Trust Funds were still not accepting contributions for hours compensated after September 30, 2008. *Id.* Thus, Oak Harbor proposed that the parties continue: (1) escrowing pension contributions; (2) escrowing retirees' health and welfare contributions; and (3) covering the returning strikers under the Company medical plan. *Id.*

The Union was displeased. The Union expected Oak Harbor to sign new Subscription Agreements and to initiate contributions back into the Union Trust Funds. (App.223a-224a, 237a-239a). The February 17, 2009 meeting ended with the Union proclaiming that its return was "in neutral." (App.171a, 235a). The strikers did not return to work until February 26, 2009. (App.211a).

A new development occurred on February 18, 2009. The Union Trust Funds conditioned their acceptance of new contributions upon the Union's and Oak Harbor's execution of: (1) new Subscription Agreements and (2) a new Interim Labor Agreement to support the underlying Subscription Agreements. (App. 376a-381a). (The Subscription Agreements required the existence of a valid underlying labor agreement.) The Union therefore demanded that Oak Harbor sign new Subscription Agreements and an Interim Labor Agreement to reinstate contributions to the Union Trust Funds. (App.176a, 183a-194a, 202a-203a, 243a -251a, 376a-381a, 390a-395a).

Presented with these facts, Oak Harbor bargained in good faith with the Union regarding a temporary benefits arrangement for the returning strikers – as it had done with respect to the crossover employees in October 2008. (App.108a-133a, 176a, 183a-194a, 202a -203a, 243a-251a, 376a-381a, 390a-395a). Oak Harbor even proposed an alternative, middle-ground offer to the Union (Union pension, Company medical, and escrow retirees' health and welfare) in an effort to reach an agreement prior to the strikers' return to work. (App.186a-188a, 192a-193a, 203a). This middle ground was flatly rejected. Instead, the Union maintained a hardline stance, demanding that Oak Harbor sign its Interim Labor Agreement and new Subscription Agreements. (App.176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a). No agreement was reached. The Union was unwilling to negotiate further. (App.203a).

By the time the strikers returned to work on February 26, 2009, Oak Harbor and Union represent-

atives had discussed the benefits issue by telephone on seven separate occasions. (App.108a-133a, 175a-203a, 241a-254a, 376a-381a, 390a-395a). The parties bargained over benefits for returning strikers to no avail. *Id.* The parties acknowledged and understood that they would continue to bargain healthcare benefits in overall contract negotiations. (App.135a-137a, 189a-190a, 197a-198a, 224a-227a, 242a-254a, 271a-273a, 349a-351a, 376a-378a, 387a-389a, 390a-395a). However, the parties were unable to reach an interim agreement for the returning strikers' medical coverage, pending the outcome of full contract negotiations. *Id.* To avoid a loss of healthcare coverage for the returning strikers, while full contract negotiations continued, Oak Harbor applied the status quo of Company medical benefits to the returning strikers. (App.210a-211a, 220a-223a, 254a-257a, 260a, 271a-273a, 384a-386a). The Union later filed unfair labor practice charges with the Board, which included the matters before this Court.

REASONS FOR GRANTING THE WRIT

A. SUPREME COURT REVIEW IS NECESSARY TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LABOR LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. SUPREME COURT REVIEW IS FURTHER COMPELLED TO RESOLVE A CIRCUIT SPLIT CONCERNING "ECONOMIC EXIGENCIES."

1. This Case Presents an Important Question of Federal Law Concerning Healthcare Coverage and Bargaining Obligations.

Supreme Court review is compelled here to resolve an important question in federal labor law. Namely, under what circumstances an employer may lawfully implement a time-sensitive matter for employees represented by a union, pending the outcome of full labor agreement negotiations. Supreme Court review is necessary to provide employers and unions nationwide, clear guidance on parties' bargaining obligations and implementation rights when time-sensitive matters must be addressed prior to the completion of full contract negotiations.

The question presented here is of great importance to parties in bargaining relationships, and is especially relevant in circumstances when bargaining does not result in swift agreement nor complete impasse. It is bargaining unit employees who suffer the consequences when their employers and unions are engaged in protracted contract negotiations. Supreme Court review

is necessary to affirm an avenue for implementing interim measures pending the outcome of full contract negotiations. This case presents a prime opportunity to address parties' bargaining obligations when facing "economic exigencies." The question at issue here has not been, but should be, decided by this Court for all of the reasons set forth below.

2. The Subject Matter of Continued Healthcare Coverage is of Significant National Importance.

At the heart of the dispute in the Oak Harbor case was medical coverage. In particular, what to do about healthcare benefits for returning strikers until the parties reached an overall labor agreement. The importance of healthcare coverage is well recognized on the national stage. Congress has enacted several laws to ensure healthcare coverage is available to employees, who might otherwise be without such coverage. Examples include: the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2614 (requiring employers to maintain employees' healthcare coverage for duration of FMLA leave); the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1162-1163 (providing for continuation of healthcare coverage to employees following qualifying events, such as employment separation); the Patient Protection and Affordable Care Act ("ACA"), 26 U.S.C. § 4980H (mandating that employers provide healthcare coverage to employees or face tax penalties). Healthcare issues remain front and center on the national stage as Congress continues to debate potential changes to existing healthcare law. The issue of healthcare coverage is of crucial significance, extending well beyond the parties to the instant proceeding.

In this case, Oak Harbor implemented a Company medical plan for returning strikers in February 2009, which was necessary to avoid a lapse in healthcare coverage. (App.210a-211a, 220a-223a, 271a-273a, 384a-386a). Prior to placing returning strikers in the Company medical plan, Oak Harbor bargained with the Union in good faith until the parties reached impasse on this subject. (App.109a-112a, 135a-138a, 163a-210a). The Court of Appeals concluded that continued healthcare coverage was not of such "overriding importance" to justify implementation. (App. 16a). Instead, the Court of Appeals' and the Board's decisions would leave employees without healthcare coverage until a full labor agreement is reached, rather than permit an employer to implement a temporary healthcare plan following impasse on this subject. It is difficult to imagine what bargaining subject could be of greater significance than a time-sensitive effort to avoid a complete absence of healthcare coverage.

3. The Imminent Loss of Healthcare Coverage was a Time-Sensitive Bargaining Issue Warranting Implementation Pending Full Contract Negotiations. This was an "Economic Exigency."

In general, an employer engaged in bargaining with a union may not take unilateral action absent impasse in overall contract negotiations. *Bottom Line Enters.*, 302 NLRB 373, 373-74 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994). "A bargaining impasse – which justifies an employer's unilateral implementation of new terms and conditions of employment – occurs when 'good faith negotiations have exhausted the

prospects of concluding an agreement' . . . leading both parties to believe that they are 'at the end of their rope.'" *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002) (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.*, 395 F.2d 622 (D.C. Cir. 1968); *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.*, 836 F.2d 289 (7th Cir. 1987)).

However, exceptions to the general rules apply. Relevant to the instant proceeding is the exception involving "economic exigencies." Federal labor law recognizes that such matters of "overriding importance" may arise in the midst of ongoing contract negotiations, which require prompt action – such as the imminent loss of healthcare coverage. *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005). An employer does not violate the National Labor Relations Act by implementing healthcare coverage in such circumstances, even in the absence of an impasse in overall contract negotiations. *Id.* Rather, the law permits an employer to address such "economic exigencies" by providing the union with adequate notice and an opportunity to bargain – even in the midst of ongoing, full contract negotiations. *RBE Electronics*, 320 NLRB 80, 81-82 (1995). As the Board has explained:

> [T]here are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* [302 NLRB 373 (1991)] exception. Thus, in *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), a case predating *Bottom Line*, the adminis-

trative law judge acknowledged that when negotiations for a contract are ongoing, matters may arise where the exigencies of a situation require prompt action for which bargaining is appropriate. The judge noted that in these and other related circumstances, "management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining." *Dixon*, 211 NLRB at 244. When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole should not apply. Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

RBE Electronics, 320 NLRB 80, 81-82 (1995) (emphasis added).

The NLRB has previously found that a lapse in healthcare coverage satisfies this "economic exigency" exception to the general requirement that parties bargain to impasse on full contract negotiations prior to implementation of a single issue. *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005) (the Board found an economic exigency permitted the employer to implement a new healthcare plan to avoid a lapse in coverage, pending the outcome of full contract negotiations); *Electrical South, Inc.*, 327 NLRB 270, 270-71 (1998) (the Board held that the employer did not violate the Act by implementing an interim health insurance plan in the midst of ongoing contract negotiations to avoid an imminent lapse in health insurance).

Despite this precedent, both the Board and the Court of Appeals arbitrarily rejected Oak Harbor's economic exigency arguments. The Board and the Court of Appeals' decisions beg the question: Under what circumstances may an employer implement an interim, time-sensitive proposal pending the outcome of full contract negotiations?

This is not a matter of an employer trying to circumvent its collective bargaining obligations. To the contrary in the instant case, Oak Harbor and the Union fully understood that healthcare coverage remained a negotiable subject in full contract bargaining. The problem was that the parties were not any closer to a full labor agreement after the strike ended than they were before the strike began. Knowing that a full labor agreement would not be in

place by the time the strikers returned to work, Oak Harbor bargained in good faith with the Union over the returning strikers' benefits. Oak Harbor was willing to meet the Union in the middle on an interim measure pending the outcome of the parties' full contract negotiations. The Union refused to negotiate.

The Board and the Court of Appeals concluded that Oak Harbor should have let its employees go without medical coverage. Oak Harbor strongly disagrees that the law should require a lapse in coverage rather than a temporary benefits arrangement when the bargaining parties fail to reach agreement within a certain timeframe. Interim measures should be favored, not prohibited, in such circumstances.

These circumstances are not unique to Oak Harbor. Employers and unions nationwide would benefit from Supreme Court review of this case to expound upon parties' bargaining obligations and implementation rights in the face of time-sensitive matters arising in the midst of ongoing contract negotiations. The NLRB has held that exceptions exist under federal labor law to the general rules prohibiting unilateral implementation absent full contract impasse (*e.g.*, "economic exigencies"). However, the Board's departure from its own precedent (*Mail Contractors of America, supra*) in the instant proceeding, rubber-stamped by the Court of Appeals, directly undercuts the existence of this labor law principle.

The realities of bargaining between employers and unions include necessary resolution of time-

sensitive matters prior to full contract agreement or impasse. Rather than promote bargaining in good faith on important, time-sensitive interim measures, the Board and the Court of Appeals' decisions would have employers instead rush to impasse in full contract negotiations in order to implement a single, interim measure. Such an outcome is wholly inconsistent with labor law principles designed to promote labor peace and collective bargaining. This Court should review this case to uphold good-faith bargaining principles in the face of "economic exigencies." Compelling reasons exist here for granting Oak Harbor's writ of certiorari to resolve this important matter in accordance with Supreme Court Rule 10(c).

4. Supreme Court Review is Further Necessary to Resolve a Circuit Split in Defining "Economic Exigency."

The Court of Appeals' decision additionally highlights a circuit split concerning this important matter compelling Supreme Court review. Federal Circuit Courts of Appeals disagree over the test for demonstrating "economic exigency." The D.C., Second, Sixth, and Tenth Circuits follow one test, while the First and Eleventh Circuits use another test for "economic exigency." Resolution by this Court is necessary to definitively resolve this circuit split and end the confusion concerning this important matter.

The D.C., Second, Sixth, and Tenth Circuits utilize a two-part test, requiring the employer to prove the following to demonstrate "economic exigency": (1) that compelling business justifications require prompt action, and (2) the exigent circumstances were beyond the employer's control, caused by external events, or

not reasonably foreseeable. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) ("[a]n economic exigency must be a 'heavy burden' and must require prompt implementation . . . [t]he employer must additionally demonstrate that 'the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.'"); *Cibao Meat Prod., Inc. v. NLRB*, 547 F.3d 336, 340 (2d Cir. 2008) ("economic exigency" only available under "circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action . . . "and the circumstances must present "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action."); *Pleasantview Nursing Home, Inc. v. NLRB* is instructive. 351 F.3d 747, 755-56 (6th Cir. 2003) ("economic exigency" requires a "compelling business justification," requiring "prompt action" and "caused by external events, . . . beyond the employer's control, or . . . not reasonably foreseeable."); *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1181 (10th Cir. 2003) ("economic exigency" applied only when "time is of the essence," and "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.").

The Courts of Appeals for the First and Eleventh Circuits use a different test to determine if the "economic exigency" exception has been met. These Circuit Courts merely require the employer demonstrate either "extenuating circumstances" or "a compelling business justification." *See, e.g., NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 734 (11th Cir. 1998), *cert. denied*, 525 U.S. 1067, 119 S.Ct. 795, 142

L.Ed.2d 657 (1999) (articulating the standard as requiring "either a showing of extenuating circumstances or a compelling business justification." *Id.* (internal quotation marks omitted) (emphasis added); *Visiting Nurse Servs. of W. Massachusetts, Inc. v. NLRB*, 177 F.3d 52, 56 (1st Cir. 1999) (citing *NLRB v. Triple A Fire Protection, Inc.* for "economic exigency" test).

In contrast to the D.C., Second, Sixth, and Tenth Circuits, the First and Eleventh Circuits do not require that the employer show both "extenuating circumstances" and a "compelling business justification." Demonstrating either is sufficient to meet the "economic exigency" test in the First and Eleventh Circuits.

A definitive test established by the Supreme Court is necessary to bring uniformity and to eliminate confusion concerning when "economic exigencies" permit an employer to implement a time-sensitive condition of employment pending the outcome of full contract negotiations. Supreme Court Rule 10(a).

B. THE COURT OF APPEALS' DECISION REQUIRING AN AFFIRMATIVE ASSERTION TO APPLY "EQUITABLE ESTOPPEL" CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT. THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT QUESTION OF THE REQUIRED ELEMENTS OF ESTOPPEL COMPELLING REVIEW.

1. **The Court of Appeals' Decision Warrants this Court's Review, as it Conflicts with Relevant Supreme Court Precedent.**

Supreme Court review is also compelled because the Court of Appeals decided an important federal question concerning estoppel in a way that conflicts with Supreme Court precedent. Supreme Court Rule 10(c). The Court of Appeals' decision rejected Oak Harbor's equitable estoppel arguments – which are based on the fact that both Oak Harbor and the Union operated under the assumption that a Subscription Agreement existed for the Oregon Trust – on the grounds that Oak Harbor had not presented "affirmative evidence that the Union had informed Oak Harbor that the subscription agreement existed." (App.13a).

In requiring an affirmative representation, the Court of Appeals' decision appears to apply a standard applicable in cases involving governmental agencies. For example, the D.C. Circuit Court of Appeals has required a "definite representation" or "affirmative misconduct" upon which a party detrimentally relied when seeking to estop the government. *See, e.g., Graham v. S.E.C.*, 222 F.3d 994, 1007 n.24 (D.C. Cir. 2000) (recognizing that a heightened standard for analyzing estoppel claims is required when a litigant

is seeking to estop the government) (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 60, 104 S.Ct. 2218 (1984)); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (similar).

However, contrary to the Court of Appeals' decision, a claim of equitable estoppel under federal common law does not require an affirmative statement upon which Oak Harbor must have relied to its detriment. In requiring such a statement, the Court of Appeals' decision created a conflict with the decisions of this Court and other Circuit Courts of Appeals.

The Supreme Court has consistently held that conduct, silence, inaction, and acquiescence may all form the basis of an estoppel claim, so long as the other party relied to its detriment. The Supreme Court stated as early as 1879 that:

> The law upon the subject [concerning equitable estoppel] is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden.

Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (1879) (holding that a former owner of land was estopped from later claiming the same land after his conduct led another to sell the land). *See, also*, *Boston & M. R. R. v. Hooker*, 233 U.S. 97, 145, 58 L. Ed. 868 (1914) ("Estoppel *in pais* presupposes an actual fault or a culpable silence"). The Supreme Court has affirmed this long-standing precedent as recently as 2013. *See*, *Heimeshoff v. Hartford Life & Acc. Ins.*

Co., 134 S.Ct. 604, 615, 187 L. Ed.2d 529 (2013) ("If the administrator's conduct causes a participant to miss the deadline for judicial review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense.").

Supreme Court precedent is clear that silence and conduct can form the basis of equitable estoppel. An affirmative assertion is not required.

In Oak Harbor's case, the Court of Appeals should have followed Supreme Court precedent. The Court of Appeals should have estopped the Union from taking a position contrary to its earlier conduct, silence, or acquiescence, upon which Oak Harbor relied to its detriment. Not once during the strike did the Union deny the existence of the Oregon Subscription Agreement. Not once during negotiations in 2009 concerning returning strikers' medical coverage did the Union assert that no Subscription Agreement existed for the Oregon Trust. The Union remained unjustifiably silent when it should have spoken. The Union made no distinction between the Oregon Trust and the other three Union Trust Funds. Instead, the Union demanded that Oak Harbor execute an Interim Labor Agreement addressing benefits for both Washington and Oregon Teamsters members. The Union's conduct evinced its understanding and belief, shared by Oak Harbor, that Oak Harbor had effectively cancelled an Oregon Trust Subscription Agreement.

By requiring an affirmative representation, the Court of Appeals' holding altered the elements of estoppel in contravention of Supreme Court precedent. The principles of equitable estoppel have far-reaching implications for parties in bargaining and contractual

relationships. Courts should not condone a party's failure to raise a purported challenge in a timely manner to the detriment of the other party. Instead, federal courts should encourage fair dealing between parties in bargaining and contractual relationships. This includes barring legal claims based on facts in direct contradiction of a claimant's prior conduct (*i.e.*, equitable estoppel). Supreme Court review is compelled here in accordance with Supreme Court Rule 10(c).

2. The Court of Appeals' Decision Additionally Conflicts with the Law of its Sister Circuits and its Own Precedent.

The D.C. Circuit Court of Appeals' decision in this matter also conflicts with the equitable estoppel principles established in other Circuit Courts of Appeals. Black letter law, recognized by court after court, is that affirmative oral statements are not necessary to demonstrate equitable estoppel. *E.g.*, *Mabus v. Gen. Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011) ("[e]quitable estoppel requires: '(1) misleading conduct, which may include not only statements and actions but silence and inaction . . . .'" (internal citations omitted); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 726 (2nd Cir. 2001) ("we hold that a party may be estopped where that party makes a definite misrepresentation (or, in the present case, a misrepresentation by silence . . . .")); *Lovell Mfg., a Div. of Patterson-Erie Corp. v. Exp.-Imp. Bank of U.S.*, 777 F.2d 894, 898 (3d Cir. 1985) ("[e]stoppel requires 1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; . . . .") (internal citations omitted); *N.Y. Trust Co. v. Watts-Ritter & Co.*, 57

F.2d 1012, 1014-15 (4th Cir. 1932) ("'Where a person . . . remains inactive for a considerable time, or by his conduct induces another to believe that he will not question a transaction, and that other, relying on such attitude, incurs material expenses, such person is estopped from impeaching the transaction to the other's prejudice'") (internal citation omitted) (emphasis added); *In re Varat Enterprises*, 81 F.3d 1310, 1318 (4th Cir. 1996) (" . . . [Defendant] reasonably relied upon [plaintiff's] silence and passivity in withdrawing its own objection . . . ."); *Nat'l Am. Ins. Co. of California v. Certain Underwriters at Lloyd's London*, 93 F.3d 529, 540 (9th Cir. 1996) ("'The object of equitable estoppel is to 'prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so.'") (internal citations omitted); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 706 (9th Cir. 1989) ("[a] party, by his action or inaction, may cause another to act to his detriment"); *Crane Co. v. James McHugh Sons*, 108 F.2d 55, 59 (10th Cir. 1939) ("[s]ilence under circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred").

The D.C. Circuit Court of Appeals also failed to follow its own precedent that holds a party may be estopped from challenging another party's position by engaging in conduct demonstrating acquiescence (through inaction, silence, or otherwise). *Louis Werner Saw Mill Co. v. Helvering*, 96 F.2d 539, 542 (D.C. Cir. 1938) (when a party "does what amounts to a recogni-

tion of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under belief that the transaction has been recognized, there is acquiescence . . . .") (internal citations omitted); *Parker v. Sager*, 174 F.2d 657, 661 (D.C. Cir. 1949) (essential elements of equitable estoppel include "'[c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert. . . .'") (quoting 19 Am. Jur., Estoppel, § 42).

Not surprisingly, the National Labor Relations Board also recognizes that a party's conduct or silence may estop it from asserting a claim when another party reasonably relied on such conduct or silence to its detriment. *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1223 (2005) (citing *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961)); *see also Speidel Corp.*, 120 NLRB 733, 741 (1958) (Board found silence to constitute acquiescence and waiver where union failed to challenge the employer's asserted interpretation of a bargaining proposal).

The D.C. Circuit Court of Appeals' decision now creates a circuit split concerning the necessary elements of an equitable estoppel claim. Review of this matter is compelled to resolve this circuit split in defining estoppel. Supreme Court Rule 10(a).

C. SUPREME COURT REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS' AND THE BOARD'S DECISIONS CONTRADICT SUPREME COURT PRECEDENT AND ARE OUTSIDE THE AUTHORITY GRANTED TO THE BOARD.

Throughout the events at issue and the legal proceedings to date, Oak Harbor has maintained that its placement of the returning strikers into the Company medical plan, as of February 26, 2009, was the appropriate application of the "status quo." (App.108a-133a, 175a-203a, 241a-254a, 271a-273a, 376a-381a, 390a-395a). The Union has disputed Oak Harbor's understanding of the "status quo." *Id.* As discussed previously in this petition, the parties bargained at length in February 2009 over the disputed "status quo" and what to do about benefits for the returning strikers, pending the outcome of full contract negotiations. Oak Harbor maintains that it fully satisfied its legal obligations to bargain in good faith with the Union over the returning strikers' benefits. Oak Harbor further maintains that it lawfully placed the returning strikers in the Company medical plan following impasse on this issue. (*See* Oak Harbor's healthcare economic exigency arguments above.) However, the same result – that Oak Harbor lawfully placed returning strikers in its Company medical plan – should have been affirmed by the Court of Appeals as a lawful continuation of the parties' October 2008 bargained-for agreement. In other words, as a lawful continuation of the "status quo."

Oak Harbor and the Union agreed that they would temporarily cover employees under the Company

medical plan pending the outcome of the strike and full contract negotiations. (App.156a-159a, 349a-373a). In enforcing the Board's order, the Court of Appeals claimed the record showed, "that the agreement on crossover employees during the strike was temporary and that Oak Harbor itself described it as an 'interim measure pending the outcome of bargaining and of the strike.'" (App.15a-16a). The Court of Appeals ignored the clear language of the parties' agreement: that the Company medical plan continue "pending the outcome of bargaining" – not just for the duration of the strike. The Board's decision, rubber-stamped by the Court of Appeals, impermissibly exceeded its statutory authority by altering the parties' October 2008 agreement. Such abuse of the Board's statutory authority must be reviewed and reversed by this Court.

The Board cannot compel or rewrite the specific terms of agreements between the parties. *See* Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d). Under the National Labor Relations Act, the Board is empowered to remedy unfair labor practices and "oversee and referee" interactions between the parties. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08, 90 S.Ct. 821, 25 L. Ed. 2d 146 (1970). The Board's authority is limited by Congress. *See id.* In its role as "referee," the Board is required to "leav[e] the results of the contest to the bargaining strengths of the parties . . . " rather than compel the parties to reach any specific agreement. *Id.* at 108.

"Agreements" between the parties do not need to be signed collective bargaining agreements to be enforceable in the labor law context. The Supreme Court, in interpreting Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185, expounded on the definition of what constitutes a binding agreement between a labor organization and an employer to those that are "significant to the maintenance of labor peace between them." *Retail Clerks Int'l Assoc., Local 128, 633 v. Lion Dry Goods*, 369 U.S. 17, 28, 82 S.Ct. 541, 7 L.Ed.2d 503 (1962). In *Retail Clerks*, the Supreme Court broadly defined what constitutes an agreement or contract in the labor law context. 369 U.S. at 28. In that case, the Supreme Court determined that a strike settlement agreement between the union and the employer was a binding agreement under applicable labor law. *Id.*

In Oak Harbor's case, the October 2008 agreement reached between Oak Harbor and the Union is a binding agreement. The parties evidenced their agreement through an exchange of written correspondence and verbal communications. (App.156a-159a, 349a-373a). The parties' agreement was intended to provide medical coverage for bargaining unit workers pending the outcome of full contract negotiations. As the Supreme Court has provided, "federal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can be best obtained only in that way." *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448, 455, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Here, the Board and the Court of Appeals should have simply followed the binding agreement reached between the parties, rather than alter the terms of the agreement to limit its duration to the strike. The Board's contrary decision, improperly upheld by the Court of Appeals, conflicts with Supreme Court precedent and exceeds its statutory authority. Supreme

Court review is necessary to address the Board's improper attempt to exceed its statutory authority.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

SELENA C. SMITH, ESQ.
COUNSEL OF RECORD
JOHN M. PAYNE, ESQ.
DAVIS GRIMM PAYNE & MARRA
701 FIFTH AVENUE, SUITE 4040
SEATTLE, WA 98104
(206) 447-0182
SSMITH@DAVISGRIMMPAYNE.COM

PETER KIRSANOW, ESQ.
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
200 PUBLIC SQUARE,
SUITE 2300
CLEVELAND, OH 44114
(216) 363-4481

COUNSEL FOR PETITIONER

OCTOBER 4, 2017

EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAK HARBOR FREIGHT LINES, INC, and TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 and TEAMSTERS LOCAL 174.	Case Nos. 19-CA-031797 19-CA-031827 19-CA-031865 19-CA-032030 19-CA-032031 19-CA-031526 19-CA-031536 19-CA-031538 19-CA-031886

DECLARATION OF MARK T. COLES IN SUPPORT OF MOTION TO INTERVENE BY TEAMSTERS 206 EMPLOYERS TRUST

I, Mark T. Coles, hereby declare as follows:

1. I am an account executive for Northwest Administrators, Inc., the administrator of Teamsters 206 Employers Trust ("the Trust"). I have custody of the records of the Trust.

2. Based on those records, the amount of contributions that should have been paid by Oak Harbor Freight Lines, Inc., to the Trust under the health care plan in effect when Oak Harbor unilaterally discontinued contributions, for the period from February 26, 2009 through the end of 2014 is approximately $17,202,292.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25 day of September, 2014, in Seattle, Washington.

Mark T. Coles

MILLER NASH LLP
ATTORNEYS AT LAW
T. (503) 224-5858 | F. (503) 224-0155
3400 U.S. BANCORP TOWER
111 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204