No. 17-531

In the Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably determined that the Union was not equitably estopped from challenging petitioner's cessation of contributions to an employee benefits trust, after petitioner purported to invoke a contractual right of cancellation that it did not possess.

2. Whether the Board reasonably determined that petitioner committed an unfair labor practice by unilaterally implementing a new medical plan for bargaining-unit employees in the absence of impasse, economic exigency, or waiver by the Union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 855 F.3d 436. The decision and order of the National Labor Relations Board (Board) (Pet. App. 17a-28a) is reported at 361 N.L.R.B. No. 82. The Board's decision incorporates by reference its prior decision and order (Pet. App. 29a-44a), which is reported at 358 N.L.R.B. 328.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2017. A petition for rehearing was denied on July 7, 2017 (Pet. App. 105a-106a). The petition for a writ of certiorari was filed on October 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Collective bargaining is defined as 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." 29 U.S.C. 158(d).

"[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB* v. *Katz*, 369 U.S. 736, 741-745 (1962)). Because "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations," *ibid.*, this Court has recognized that "an employer's unilateral change" to such terms or conditions "frustrates the objectives of [Section 158(a)(5)] much as does a flat refusal" to negotiate, *Katz*, 369 U.S. at 743.[1] An employer's unilateral imposition of terms is unlawful even if the new terms are more favorable to bargaining

[1] "[A]n employer who violates section [158(a)(5)] also, derivatively, violates section [158(a)(1)]." *Exxon Chem. Co.* v. *NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004); cf. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 698 n.4 (1983). That is because Section 158(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157," 29 U.S.C. 158(a)(1), including the right "to bargain collectively through representatives of [employees'] own choosing," 29 U.S.C. 157.

employees than the terms previously provided or offered by the employer. See, *e.g.*, *id.* at 745 (employer violated Act by unilaterally instituting "wage increase system" that was "considerably more generous than that which had shortly theretofore been offered").

This rule against unilateral changes applies, *inter alia*, following the expiration of a collective-bargaining agreement. See *Litton*, 501 U.S. at 198. Upon expiration, the terms and conditions set forth in the expired agreement "continue in effect by operation of the NLRA" as the lawful "'status quo.'" *Id.* at 206 (citation omitted); see also *Laborers Health & Welfare Trust Fund for N. Cal.* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988) (unilateral-change doctrine requires employers "to honor the terms and conditions of an expired collective-bargaining agreement"); *Cauthorne Trucking*, 256 N.L.R.B. 721, 721 (1981) ("[H]ealth and welfare and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract."), enforced in relevant part, 691 F.2d 1023 (D.C. Cir. 1982).

An employer generally must maintain the status quo until the bargaining parties either agree on a new collective-bargaining agreement or reach a good-faith impasse in negotiations. Should the parties reach overall impasse, an employer then may "mak[e] unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Laborers Health & Welfare Trust Fund*, 484 U.S. at 544 n.5 (quoting *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967), aff'd *sub nom. American Fed. of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968)). An impasse exists only when "good-

faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful." *Monmouth Care Ctr.* v. *NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (brackets, citations, ellipsis, and internal quotation marks omitted).[2]

Absent impasse, an employer may make unilateral changes to terms of employment only in limited circumstances. As relevant here, an employer may impose a new term unilaterally if the union has clearly and unmistakably waived its right to bargain respecting that term, such as by expressly agreeing through contract that the employer may act unilaterally on that subject in the future. See *Southern Nuclear Operating Co.* v. *NLRB*, 524 F.3d 1350, 1357-1358 (D.C. Cir. 2008); see generally *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 707-709 (1983). An employer may also act unilaterally to impose a particular term if the employer carries the "heavy burden" of proving that the change is required by an "'economic exigency,'" meaning "extraordinary events which are 'an unforeseen occurrence, having a major economic effect requiring the company to take immediate action.'" *RBE Elecs. of S.D., Inc.*, 320 N.L.R.B. 80, 81 (1995) (brackets and citations omitted); see, *e.g.*, *Vincent Indus. Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000).

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[2] Impasse is determined as to negotiations as a whole, not on an issue-by-issue basis. "[I]mpasse on a single, critical issue" may justify an overall determination of impasse, however, if the party claiming impasse proves that the issue is "of such overriding importance" that "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat Co.*, 331 N.L.R.B. 1084, 1097 (2000); see also, *e.g.*, *Erie Brush & Mfg. Corp.* v. *NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012); *Wayneview Care Ctr.* v. *NLRB*, 664 F.3d 341, 349-350 (D.C. Cir. 2011).

2. a. Petitioner is a freight transportation company operating in the Pacific Northwest. A longstanding collective-bargaining relationship exists between petitioner and Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, the Union), which represent petitioner's employees in Washington, Oregon, and Idaho. Historically, those union locals have bargained jointly with petitioner in order to reach a single collective-bargaining agreement that covers all units of the Union. As relevant here, the parties' most recent collective-bargaining agreement lasted three years, from November 1, 2004, to October 31, 2007 (the 2004 CBA). Pet. App. 4a, 50a, 262a-270a.

The 2004 CBA obligated petitioner to make contributions to four "Taft-Hartley" employee benefit trusts. Pet. App. 4a, 52a, 263a-269a; cf. 29 U.S.C. 186(c)(5). Two of those trusts, the Oregon Warehouseman Trust (Oregon Trust) and the Washington Teamsters Welfare Trust (Washington Trust), provided medical and other insurance benefits to current employees in Oregon and Washington, respectively. The two remaining trusts, the Western Conference of Teamsters Pension Trust Fund (Pension Trust) and the Retiree Welfare Trust (Retiree Trust), provided retirees with pension and medical benefits. *Id.* at 52a, 263a-269a.

In November 2005, petitioner and the Union jointly executed a series of implementing "subscription agreements" or "employer-union pension certifications" (collectively, subscription agreements) for three of the trusts—the Washington, Pension, and Retiree Trusts. The language of those subscription agreements varied, but each contained a term providing that, after expiration of the 2004 CBA, the employer was permitted to cancel further contributions to the trust upon providing

five days' written notice. Pet. App. 4a-5a, 31a-32a, 52a-53a, 274a-319a. The fourth trust—the Oregon Trust—did not require a subscription agreement, and there is no evidence that such an agreement was signed (nor did the parties execute any other agreement authorizing the employer to cancel contributions upon expiration of the 2004 CBA). *Id.* at 11a-12a, 32a-34a. Petitioner made the contractually required monthly contributions to the four trusts throughout the term of the 2004 CBA, and continued to do so after the 2004 CBA expired in October 2007. *Id.* at 4a, 54a-55a.

Petitioner began negotiating with the Union for a successor collective-bargaining agreement in August 2007. When the 2004 CBA expired without a new agreement in place, negotiations continued. By September 2008, the parties were still without a successor agreement. On September 22, 2008, petitioner presented the Union with its last, best, and final offer. The Union rejected the offer and went on strike later that day. Pet. App. 4a, 53a-54a, 57a. During the strike, petitioner sought to maintain its operations. Some current employees—so-called "crossover" employees—crossed the Union's picket lines and continued working for petitioner during the strike. *Id.* at 5a, 54a.

b. Shortly after the strike began, petitioner decided to cease further monthly contributions to the four trusts. As to the three trusts for which petitioner had signed subscription agreements containing cancellation clauses (the Washington, Retiree, and Pension Trusts), petitioner sent letters to the Union and the trusts on September 23 and 26, 2008, declaring that petitioner was exercising its contractual rights to cancel further contributions. Pet. App. 4a-5a, 54a, 320a-325a. As to

the fourth trust (the Oregon Trust), petitioner was unable to locate in its files any subscription agreement that afforded it a right to cancel further trust contributions. Petitioner asked the trust's administrators if they knew whether a subscription agreement existed; the administrators stated that they were "almost sure" one did, but would "have to double check." *Id.* at 11a-12a, 33a. On September 23, petitioner sent a letter to the Union conditionally stating that "if * * * a[Subscription] Agreement containing a Notice of Intent to Cancel clause exists" for the Oregon Trust, petitioner was thereby providing its notice of intent to cancel contributions. *Id.* at 327a; see *id.* at 5a, 12a, 32a-34a, 326a-327a. Petitioner then ceased contributions to all four trusts in early October 2008, without having clear knowledge that it possessed any contractual right to cancel contributions to the Oregon Trust. *Id.* at 5a, 32a-34a.

On September 24, 2008, petitioner sent additional letters to each of the four trusts clarifying that petitioner still intended to continue trust contributions for "crossover" employees who had not joined the strike. Petitioner inquired whether the trusts would accept contributions for those crossover employees. Pet. App. 54a-55a, 333a-340a. The Washington, Retiree, and Pension Trusts each responded that they could not accommodate petitioner's request, noting that petitioner had cancelled the existing subscription agreements and explaining that the trusts would require new agreements before they could accept further contributions. *Id.* at 55a, 341a-344a, 347a-348a. The Oregon Trust also rejected petitioner's proposal to continue contributions only for crossover employees, but did not cite the lack of a valid subscription agreement in its response. *Id.* at 33a-34a, 55a-56a, 345a-346a.

On October 3, 2008, petitioner advised the Union that the trusts had refused to accept further contributions for crossover employees, and made an alternative proposal for how to address prospective benefits for crossovers. Pet. App. 5a-6a, 56a-57a, 349a-350a. For pension and retiree medical benefits, petitioner proposed to make contributions to an escrow account "pending the outcome of negotiations and the strike." *Id.* at 350a. As to medical benefits, petitioner "propose[d] to temporarily cover its crossovers * * * under its Company medical plan (during the strike), so that they do not go without coverage." *Ibid.* Petitioner indicated that "[t]his would be an interim measure pending the outcome of bargaining and of the strike." *Ibid.* The Union agreed to this interim arrangement at an October 9 bargaining session. *Id.* at 6a, 57a. During that session, and in subsequent meetings, the parties continued to negotiate regarding a successor collective-bargaining agreement, including about pensions and medical benefits. *Id.* at 57a-59a, 74a-76a.

c. On February 12, 2009, the Union made an unconditional offer to return to work. Pet. App. 6a, 59a, 374a-375a. Five days later, the Union and petitioner met to discuss the circumstances under which the striking employees would return. *Id.* at 6a, 59a. At the meeting, the parties disagreed about the legal status quo applicable to the returning strikers. Petitioner distributed a letter setting forth its view of the status quo, which petitioner asserted "include[d] the agreement reached with the Union in early October 2008." *Id.* at 272a; see *id.* at 6a, 59a-60a, 271a-273a. In particular, as to medical benefits for the returning strikers, petitioner announced that it "will cover the returning strikers under its Company Plans pending a different agreement with

the Unions on Health & Welfare. (This will allow these employees to have coverage.)" *Id.* at 272a.

The Union objected to petitioner's view of the legal status quo. See Pet. App. 6a, 60a, 376a-378a. The Union asserted that the arrangement it had accepted in October 2008 was temporary and applied only to crossover employees, not to returning strikers. The Union argued that the relevant status quo was instead reflected in the expired 2004 CBA, and asserted that adherence to that status quo required petitioner to resume its contributions to the four trusts. *Id.* at 376a-378a. The Union explained that the trusts would again accept contributions from petitioner so long as the parties executed an "interim agreement" providing for such resumption pending further bargaining with the Union. *Id.* at 377a; see *id.* at 390a-395a. The Union also attached correspondence indicating that the Washington, Pension, and Retiree Trusts would require new subscription agreements in order to implement any such interim agreement. *Id.* at 379a-381a.

The parties continued to discuss the status-quo issue in the following weeks. Petitioner adhered to its view that the status quo had changed in October 2008 and that it was therefore not required to contribute to the trusts during the pendency of further bargaining. Petitioner nonetheless offered to resume contributions to the Pension Trust, but insisted (for "cash flow" reasons) that returning strikers receive health benefits through the Company medical plan rather than through the trusts. Pet. App. 62a, 242a-243a. The Union rejected that proposal, maintaining that petitioner was required to resume contributions to all four trusts. The parties failed to reach agreement on medical benefits for the returning strikers, and when the strikers returned to

work on February 26, 2009, petitioner applied the Company medical plan to all of the returning employees. *Id.* at 6a, 62a-63a, 384a-389a.

3. a. On March 13, 2009, the Union filed charges with the Board asserting that petitioner had committed unfair labor practices. The Board's General Counsel subsequently issued a fourth amended consolidated complaint alleging, as relevant here, that petitioner had violated the NLRA, 29 U.S.C. 158(a)(5) and (1), both by unilaterally ceasing contributions to the four trusts and by unilaterally implementing the Company medical plan for bargaining-unit employees. Pet. App. 46a-47a.

Following a hearing, an administrative law judge (ALJ) sustained the complaint in part and dismissed it in part. Pet. App. 45a-104a. The ALJ rejected the General Counsel's allegations that petitioner had violated the NLRA by unilaterally ceasing contributions to the four trusts in October 2008, concluding that the Union had waived its right to bargain over continued contributions by executing subscription agreements that permitted petitioner to cancel contributions upon proper notice. *Id.* at 76a-85a. The ALJ found, however, that petitioner had violated the NLRA by imposing the Company medical plan on returning strikers in February 2009. The ALJ determined that the Union had not waived its right to bargain about health benefits for the returning strikers, and further concluded that petitioner had imposed the Company medical plan on returning strikers without first achieving an impasse in negotiations. *Id.* at 85a-87a. The ALJ found that, even though the parties had been unable to reach agreement on the issue of returning strikers' medical benefits, that

single-issue disagreement did not justify unilateral implementation of petitioner's proposal in the absence of overall impasse. *Id.* at 59a-62a, 74a-76a, 86a.

b. Petitioner and the Union each sought further review, and in 2012, the Board affirmed in part and reversed in part. Pet. App. 29a-44a. As relevant here, the Board upheld the ALJ's determination that petitioner had violated Sections 158(a)(5) and (1) of the NLRA by unilaterally implementing the Company medical plan for returning strikers in February 2009. *Id.* at 31a. The Board also upheld the ALJ's dismissal of allegations that petitioner had unlawfully cancelled contributions to the three trusts with subscription agreements, concluding that the Union, by signing those agreements, had waived its right to bargain regarding further contributions to those trusts. *Id.* at 31a-32a.

The Board reversed, however, insofar as the ALJ found that the Union waived its right to bargain concerning further contributions to the Oregon Trust. Pet. App. 32a-34a. The Board concluded that there was no evidence that any subscription agreement existed for the Oregon Trust such as would have provided petitioner with a contractual right of cancellation. The Board also rejected petitioner's contention that the Union should be equitably estopped from arguing that such a subscription agreement did not exist. The Board observed that petitioner itself had been aware from the outset of "confusion concerning whether a [subscription agreement] existed for the Oregon Trust," and found that petitioner had "acted at its peril" by ceasing contributions "based on cancellation language that it was not certain even existed." *Id.* at 34a.

c. Petitioner and the Union each sought review of the Board's decision and order in the court of appeals,

and the Board cross-applied for enforcement. While those proceedings were pending, this Court issued its decision in *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated the recess appointments of two members of the Board panel that had issued the 2012 decision and order. The court of appeals then vacated the Board's decision and remanded the matter for further proceedings.

In 2014, a properly constituted panel of the Board conducted de novo review and issued a new decision and order expressly agreeing with, and incorporating by reference, the Board's prior 2012 decision. Pet. App. 17a-28a. Petitioner and the Union again petitioned for review in the court of appeals, and the Board cross-applied for enforcement.

4. The court of appeals denied the petitions for review and enforced the Board's order. Pet. App. 1a-16a. As relevant here, the court rejected petitioner's contention that the Union should be estopped from contesting the existence of a subscription agreement for the Oregon Trust, as well as petitioner's argument that its unilateral imposition of the Company medical plan on returning strikers was justified by economic exigency.[3]

a. With respect to the Oregon Trust, the court of appeals began by holding that the Union had not waived its right to bargain respecting further trust contributions because petitioner had failed to show that it possessed any contractual right of cancellation. The court

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[3] The court of appeals also rejected the Union's argument that it had not knowingly waived its right to bargain with respect to petitioner's continued contributions to the three trusts that were governed by subscription agreements containing contractual rights of cancellation. Pet. App. 7a-11a. The Union has not sought this Court's review of that holding.

explained that, although the ALJ had "apparently inferred the existence of a subscription agreement for the [Oregon Trust] based on the existence of subscription agreements for the other three trusts," substantial evidence supported the Board's contrary finding that no such agreement had ever been signed. Pet. App. 11a. The court noted that petitioner's own September 23, 2008 letter, which purported to give notice of cancellation only if a subscription agreement existed, "confirm[ed] the speculative nature" of petitioner's belief in the existence of such an agreement. *Id.* at 12a; cf. *id.* at 326a-327a.

The court of appeals also held that the "Board reasonably rejected [petitioner's] argument that the Union was estopped from challenging the existence" of a subscription agreement for the Oregon Trust. Pet. App. 13a. The court observed that the record contained no "affirmative evidence" that the Union ever "informed [petitioner] that [a] subscription agreement existed," such as might have justified petitioner's reliance on the Union's conduct as a basis for cancelling contributions. *Ibid.*[4] The court further explained that, although the Union had not immediately challenged petitioner's cessation of contributions to the Oregon Trust on the specific basis that no subscription agreement existed for that Trust, the Union "*did* challenge [petitioner's] cancellation of contributions to all four trusts less than a month after the strike ended when it filed unfair labor charges." *Id.* at 14a (emphasis added). The court thus

[4] The court of appeals also affirmed the Board's finding that "there was no evidence that a 'mutual mistake' prevented the Union from challenging" petitioner's cessation of contributions. Pet. App. 14a-15a.

concluded that there was "no history of Union acquiescence or an element of surprise" that reasonably would have misled petitioner about the Union's position on the lawfulness of petitioner's conduct. *Ibid.*

b. The court of appeals also affirmed the Board's determination that petitioner had violated the NLRA by unilaterally imposing the Company medical plan on returning strikers. Pet. App. 15a-16a. The court rejected petitioner's argument that the October 2008 agreement on benefits for *crossovers* established the relevant status quo for *returning strikers*, explaining that "the agreement on crossover employees during the strike was temporary and that [petitioner] itself described it as an 'interim measure pending the outcome of bargaining and of the strike.'" *Id.* at 15a (quoting *id.* at 350a). The court also held that the Board properly rejected petitioner's arguments that implementation of the Company medical plan was justified because the parties had reached an impasse or because petitioner "faced an economic exigency." *Id.* at 16a. The court concluded that the Board "could properly reject [petitioner's] position that an economic exigency authorized it to act unilaterally," inasmuch as petitioner "failed to show that it faced an economic exigency that posed a 'heavy burden' and 'require[d] prompt implementation' to justify its conduct at the end of the strike." *Ibid.* (quoting *Vincent Indus. Plastics*, 209 F.3d at 734) (brackets in original).

c. The court of appeals denied rehearing en banc. Pet. App. 105a-106a.

ARGUMENT

Petitioner renews its contention (Pet. 29-34) that the Union should be estopped from asserting that petitioner lacked a contractual right to cease payments to the Oregon Trust, and further contends (Pet. 19-28)

that petitioner's unilateral implementation of the Company medical plan for returning strikers was justified by "economic exigency." The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals, and petitioner's fact-bound challenges do not warrant this Court's review.

1. The court of appeals correctly rejected petitioner's contention that the Union should be estopped from challenging the existence of petitioner's purported contractual right to cancel further contributions to the Oregon Trust.

a. An employer commits an unfair labor practice under the NLRA if it "effects a unilateral change of an existing term or condition of employment" without first "bargaining to impasse." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB* v. *Katz*, 369 U.S. 736, 741-745 (1962)); see 29 U.S.C. 157, 158(a)(5) and (1). An employer may impose a new term unilaterally, however, if the union has clearly and unmistakably waived its right to bargain respecting that term, such as by expressly agreeing that the employer may act unilaterally on that subject in the future. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 707-709 (1983); *Southern Nuclear Operating Co.* v. *NLRB*, 524 F.3d 1350, 1357-1358 (D.C. Cir. 2008).

As the Board determined—and as petitioner apparently does not now dispute—petitioner and the Union did not sign a subscription agreement (or any other agreement) that gave petitioner a right to cancel further contributions to the Oregon Trust after expiration of the 2004 CBA. Accordingly, the Union never waived its right to bargain concerning further contributions to the Oregon Trust. Instead, petitioner remained obligated by law to continue its contributions to the Oregon

Trust, in accordance with the terms of the expired 2004 CBA, unless and until petitioner and the Union reached either a new agreement or a good-faith impasse. See *Litton*, 501 U.S. at 198, 206-207 (explaining that the terms and conditions of an expired agreement "continue in effect by operation of the NLRA" as the legal "'status quo'") (citation omitted). Petitioner's failure to adhere to that status quo violated Sections 158(a)(5) and (1) of the NLRA.

The court of appeals properly rejected petitioner's contention that the Union was equitably estopped from challenging petitioner's violation. As the court explained, the Union did not represent to petitioner that a "subscription agreement existed" for the Oregon Trust. Nor did petitioner demonstrate any "history of Union acquiescence" to petitioner's assertion that it was entitled to cancel further trust contributions. Pet. App. 13a, 14a. To the contrary, the Union filed charges with the Board in early 2009 "challeng[ing] [petitioner's] cancellation of contributions to all four trusts." *Id.* at 14a; see *id.* at 388a (Feb. 26, 2009 letter) ("The Union will, of course, seek redress for all of the Company's breaches of law through the appropriate channels."). In these circumstances, the Board reasonably determined that the Union's failure to assert the lack of a subscription agreement as an additional and independent basis for challenging petitioner's cancellation of contributions to the Oregon Trust did not demonstrate the Union's agreement that a contractual agreement existed that afforded petitioner a right to cancel future contributions. *Id.* at 13a-14a.

Moreover, petitioner's own September 23, 2008 notice that it was ceasing further contributions to the Oregon Trust expressly contemplated the possibility that

petitioner possessed no such contractual right of cancellation. See Pet. App. 327a (stating that "[w]e are not certain whether [petitioner] has a subscription agreement with the [Oregon Trust] which contains a Notice to Cancel provision," but declaring that "if such an Agreement containing a Notice of Intent to Cancel clause exists," petitioner was thereby providing notice of cancellation).[5] Petitioner thus acted, not in reliance on any representations by the Union, but rather in full awareness that it may be suspending contributions absent any contractual right to do so. *Id.* at 34a.

b. Petitioner argues (Pet. 29-34) that the court of appeals' application of settled principles of estoppel law should have yielded a different outcome, but none of its arguments is persuasive.

Petitioner asserts (Pet. 29) that it "operated under the assumption that a Subscription Agreement existed for the Oregon Trust" and complains (Pet. 8) that the Union never endeavored to disabuse it of that understanding. But petitioner ceased its contributions to the Oregon Trust without requesting that the Union confirm whether a subscription agreement existed. And to the extent petitioner suggests that it somehow relied on the Union's failure thereafter to assert the non-existence of a contractual right of cancellation, petitioner fails to explain why any such reliance would be reasonable or why it would retroactively justify petitioner's cancellation. See, *e.g.*, *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001) (requiring, as precondition for estoppel, that a party show that it "reasonably relie[d]

[5] By contrast, petitioner's unconditional cancellation letters to the other three trusts manifested its certainty regarding the existence of subscription agreements for those trusts. Pet. App. 5a, 12a, 33a-34a, 320a-327a.

upon" the other party's misrepresentation). Petitioner also seeks (Pet. 13) to justify its conduct based on statements made by third parties (the Oregon Trust's administrators), but the responses actually given by those administrators to petitioner's inquiries, see Pet. App. 11a-12a, 32a-34a, were not definitive and only further underscore that petitioner "acted at its peril" in purporting to invoke a right of cancellation that it was not sure it possessed, *id.* at 34a; see *ibid.* ("When [petitioner] ceased its contributions to the Oregon fund pursuant to its conditional cancellation notice, it acted without having clear knowledge of its contractual authority to do so.").

Contrary to petitioner's contention (Pet. 30), the court of appeals did not dispute the general principle that an opposing party's "silence, inaction, [or] acquiescence" may in some instances support a claim of estoppel. Rather, the court held that the Board had reasonably concluded, on the facts of this case, that the Union's failure to assert that no subscription agreement existed for the Oregon Trust did not reasonably justify petitioner in the belief that such an agreement had been signed and in cancelling further contributions on that basis. Petitioner's hypothesis that the court of appeals believed that estoppel requires proof of "affirmative representation[s]" (Pet. 31) is disproven by the court of appeals' reliance on its finding that there was "no history of Union acquiescence" or "element of surprise in the Union's position" as to the lawfulness of petitioner's conduct. Pet. App. 14a.[6]

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[6] The court of appeals' discussion of Board precedent further demonstrates the court's understanding that, in certain cases, a bargaining party's silence may well convey a representation supporting estoppel. See Pet. App. 13a-14a. As the court noted, the union in *Manitowoc Ice, Inc.*, 344 N.L.R.B. 1222 (2005), was estopped from

Petitioner's assertion (Pet. 29) that the court of appeals "appl[ied] a standard applicable in cases involving governmental agencies" is erroneous for much the same reasons. The court at no time purported to impose any "heightened" burden on petitioner. And the decisions involving governmental parties that petitioner suggests (Pet. 29-30) that the court must have erroneously applied—*Heckler* v. *Community Health Servs.*, 467 U.S. 51, 60 (1984); *Graham* v. *SEC*, 222 F.3d 994, 1007 n.24 (D.C. Cir. 2000); and *ATC Petroleum, Inc.* v. *Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988)—were nowhere cited in the court of appeals' opinion, notwithstanding that petitioner itself had cited and relied upon those decisions in its briefing below. See Pet. C.A. Br. 27.

c. Contrary to petitioner's assertions (Pet. 29-34), there is no conflict between the court of appeals' ruling on the estoppel issue and any decision of this Court or of another court of appeals. As petitioner acknowledges (Pet. 32-33), it is well-established in this Court and

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challenging the employer's change to a profit-sharing plan after the union "repeatedly raised the issue of profit-sharing during negotiations, the employer had repeatedly rejected the union's proposal * * * , and the union had ultimately agreed to a collective bargaining agreement that did not address the profit-sharing plan." Pet. App. 13a. Here, "[b]y contrast, no evidence exists * * * that the Union discussed and 'bargained away' its interest in maintaining contributions to the [Oregon Trust]." *Ibid.* Similarly, in *Lehigh Portland Cement Co.*, 286 N.L.R.B. 1366 (1987), and *Alpha Associates*, 344 N.L.R.B. 782 (2005), employers were estopped from challenging the representative authority of particular unions after recognizing and dealing with those unions for a period of time, thereby conveying that bargaining relationships had been established. Unlike the estopped parties in those cases, the Union here "*did* challenge [petitioner's] cancellation of contributions to all four trusts," and maintained that petitioner "violated the Act when it ceased to make [those] contributions." Pet. App. 14a (emphasis added).

throughout the circuits, including in the court of appeals below, that a party's silence or acquiescence can support a finding of equitable estoppel in appropriate cases. See, *e.g.*, *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1880); *Mabus* v. *General Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011); *Kosakow*, 274 F.3d at 726; *Louis Werner Saw Mill Co.* v. *Helvering*, 96 F.2d 539, 542 (D.C. Cir. 1938); see also Restatement (Second) of Torts § 894 (1979) cmt. e ("Under [certain] conditions silence has the legal effect of a misrepresentation."). As explained, the court of appeals' determination that "no history of Union acquiescence" existed that would support a finding of estoppel in this case reflects its awareness of that principle. Pet. App. 14a. Petitioner's disagreement with that factual determination, which is supported by substantial evidence, affords no basis for this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

2. The court of appeals also correctly concluded that petitioner's unilateral imposition of its Company medical plan on returning strikers was not justified by economic exigency.

a. As explained (see pp. 3-4, *supra*), upon expiration of a collective-bargaining agreement, an employer generally may not change the existing terms or conditions of employment without first bargaining to impasse. See *Litton*, 501 U.S. at 198; *Katz*, 369 U.S. at 741-745. An employer may act unilaterally to impose a particular term, however, if it carries the "'heavy burden'" of proving both that an "economic exigency" requires "prompt implementation" of that term and also that "'the exigency was caused by external events, was beyond the

employer's control, or was not reasonably foreseeable.'" *Vincent Indus. Plastics, Inc.* v. *NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (quoting *RBE Elecs. of S.D., Inc.*, 320 N.L.R.B. 80, 81-82 (1995)). The economic-exigency exception is thus "limited only to those exigencies in which time is of the essence and which demand prompt action." *RBE Elecs.*, 320 N.L.R.B. at 82.

The court of appeals correctly applied these principles in upholding the Board's decision. The court acknowledged that "in some cases economic exigency may justify an employer's unilateral change," but found that "this is not one of them." Pet. App. 15a. The court explained that the Board had "properly * * * f[ound] that [petitioner] failed to show that it faced an economic exigency that posed a 'heavy burden' and 'require[d] prompt implementation' to justify its conduct at the end of the strike." *Id.* at 16a (quoting *Vincent Indus. Plastics*, 209 F.3d at 734).

Petitioner's contrary assertions lack merit. Petitioner urges (Pet. 21, 25) that imposing its Company medical plan on returning strikers was the only means available to ensure that employees would promptly obtain health insurance upon returning to work. To the extent petitioner believed it essential to its business that petitioner immediately resume paying for employees' medical benefits, petitioner ignores that it could have accomplished that purpose by signing an agreement with the Union to provisionally restore petitioner's contributions to the Washington and Oregon Trusts pending further bargaining, consistent with the terms of the expired 2004 CBA.

Petitioner similarly fails to show that a need to impose the Company medical plan on returning strikers was caused by external events beyond its control or was

not reasonably foreseeable. See *Vincent Indus. Plastics*, 209 F.3d at 734; *RBE Elecs.*, 320 N.L.R.B. at 82. The record instead shows that petitioner decided, of its own volition, to cancel all contributions to the trusts when its employees went on strike in September 2008—an act that necessarily resulted in the termination of employees' extant healthcare benefits. Any perceived exigency in restoring those benefits to returning strikers in February 2009 was thus a problem of petitioner's own making.

The fact that returning strikers may not have immediately gained health insurance coverage absent petitioner's imposition of the Company medical plan, cf. Pet. 25, does not excuse petitioner's unilateral action. Employee healthcare benefits are indisputably subject to mandatory bargaining. See, *e.g.*, *Comau, Inc.* v. *NLRB*, 671 F.3d 1232, 1237 n.8 (D.C. Cir. 2012); *Long Island Head Start Child Dev. Servs.* v. *NLRB*, 460 F.3d 254, 258 (2d Cir. 2006); Pet. App. 3a. And an employer's unilateral action on a subject of mandatory bargaining may violate the NLRA even if that action is thought to be favorable to bargaining-unit employees, whether in the short term or otherwise.[7] See, *e.g.*, *Katz*, 369 U.S. at 745. To be sure, in some cases, a union may ultimately decide that it finds the unilaterally imposed benefits to be acceptable. But that is why the Board crafted its remedy here to direct petitioner to "rescind the health care plan it unilaterally implemented on February 26, 2009" if, and only if, the Union "request[s]" that

[7] Whether petitioner's unilateral action should be so understood is hardly clear. The term that petitioner unilaterally imposed—the Company medical plan—was also a feature of petitioner's last, best, and final offer from September 2008, which the Union rejected when it went on strike. See C.A. App. 977-979, 1025-1029.

relief. Pet. App. 19a n.2, 21a. Petitioner thus cannot excuse its violation of the NLRA on the theory that it was doing its employees a favor.

b. Contrary to petitioner's assertions (Pet. 26-28), there is currently no disagreement among the courts of appeals "over the test for demonstrating 'economic exigency'" warranting this Court's review. Numerous circuits have adopted or applied the Board's articulation of the economic-exigency doctrine set forth in *RBE Electronics*, which requires both a compelling economic need and one that is beyond the employer's control or was not reasonably foreseeable. See *Quality Health Servs. of P.R., Inc.* v. *NLRB*, 873 F.3d 375, 387-388 (1st Cir. 2017); *Cibao Meat Prods., Inc.* v. *NLRB*, 547 F.3d 336, 340 (2d Cir. 2008); *Pleasantview Nursing Home, Inc.* v. *NLRB*, 351 F.3d 747, 756 (6th Cir. 2003); *NLRB* v. *Brede, Inc.*, 315 F.3d 906, 910 (8th Cir. 2003); *Public Serv. Co.* v. *NLRB*, 318 F.3d 1173, 1181 (10th Cir. 2003); *Vincent Indus. Plastics*, 209 F.3d at 734.

Petitioner asserts (Pet. 27-28) that the Eleventh Circuit has adopted a different standard, citing *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 739 (1998), cert. denied, 525 U.S. 1067 (1999), but that assertion does not withstand scrutiny. In *Triple A*, the court of appeals summarily rejected an employer's argument that "its economic situation justified [its] unfair labor practices." *Id.* at 739. In so doing, the court stated that "[a] situation of economic necessity requires either a showing of 'extenuating circumstances' or a 'compelling business justification.'" *Ibid.* (quoting *Winn-Dixie Stores, Inc.*, 243 N.L.R.B. 972, 974 n.9 (1979)).

Based on that sentence, petitioner posits that future Eleventh Circuit panels will apply a rule that an em-

ployer may prove an economic exigency by showing *either* a compelling need *or* a circumstance that is beyond the employer's control or not reasonably foreseeable, whereas employers in other circuits must prove both elements. But *Triple A* relied upon Board precedent that predated *RBE Electronics*, and nothing in the court's decision suggests that the Eleventh Circuit will not adopt *RBE Electronics* when presented with the opportunity. In fact, although petitioner contends (Pet. 27-28) that the First Circuit also follows petitioner's preferred test, pointing to a 1999 decision that cited *Triple A* in passing, see *Visiting Nurse Servs. of W. Mass., Inc.* v. *NLRB*, 177 F.3d 52, 56 (1st Cir.), cert. denied, 528 U.S. 1074 (2000),[8] the First Circuit has since applied the Board's formulation of the economic-exigency test as articulated in *RBE Electronics*. See *Quality Health Servs.*, 873 F.3d at 387-388. Nothing in *Triple A* would prevent the Eleventh Circuit from similarly joining in this consensus in a future appropriate case. Cf. *National Cable & Television Commc'ns Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) ("[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation * * * displaces a conflicting agency construction").

In any event, petitioner cannot even show that it would benefit from the standard it favors. Petitioner here has shown *neither* "extenuating circumstances" *nor* a "compelling business justification" (Pet. 27) for its decision unilaterally to impose the Company medical plan on returning strikers. See Pet. App. 16a, 19a n.2.

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[8] The employer in *Visiting Nurse Services* did not claim any economic exigency, so the First Circuit's citation to the economic-exigency standard stated in *Triple A* was dicta. 177 F.3d at 56.

This case thus offers no occasion for this Court to consider "what to do about healthcare benefits for returning strikers," Pet. 20, or to evaluate the permissibility of other kinds of "interim measures," Pet. 20, 25, under factual circumstances different from those here.

There is also no merit to petitioner's suggestion (Pet. 25) that the decisions below "depart[ed] from [the Board's] own precedent." In *Mail Contractors of America, Inc.*, 346 N.L.R.B. 164 (2005), the Board found that the impending expiration date for a terminated healthcare plan created an economic exigency under the circumstances of that case, but it did not hold that the absence of healthcare coverage will always qualify as an economic exigency. *Id.* at 164 n.1, 175.[9] And the economic-exigency doctrine was not the basis of the Board's decision in *Electrical South, Inc.*, 327 N.L.R.B. 270, 271 (1998), which allowed implementation of a stop-gap healthcare plan after the parties reached impasse in a negotiation that was confined to that subject. Unlike here, the parties in *Electrical South* had expressly agreed to separate the healthcare negotiation from other contract negotiations.

c. Petitioner alternatively seeks review of its assertion (Pet. ii, 35-38) that imposing the Company medical plan on returning strikers was justified as an implementation of the status quo as purportedly revised in October 2008. That claim, which rests on the assertion that the court of appeals erred factually in determining what

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[9] In *Mail Contractors*, the employer had lawfully discontinued its existing, companywide healthcare plan, and fixed the termination date for that plan, *before* it recognized the union as the representative of employees in a particular location, and thus before it incurred any bargaining obligation with respect to their terms of employment. 346 N.L.R.B. at 175.

"the record showed" as to scope of the parties' October 2008 agreement, Pet. 36, is not of the kind that ordinarily warrants this Court's review. See Sup. Ct. R. 10.

In any event, petitioner's argument is plainly incorrect. As the court of appeals explained, the record demonstrates that petitioner's October 2008 agreement with the Union was "temporary" and applied only to "crossover employees * * * 'pending the outcome of bargaining and of the strike,'" and thus did not govern benefits for returning strikers. Pet. App. 15a (citation omitted). Petitioner's argument that the October 2008 agreement extended to all unit employees, rather than merely to crossovers, is not only contradicted by the text of petitioner's October 2008 letter, see *id.* at 350a (proposing temporary arrangement for "crossovers"), but is also inconsistent with the trial testimony of petitioner's own lead negotiator. See, *e.g.*, C.A. App. 455-456, 534-535 (acknowledging that the parties' discussions in October 2008 were about "crossovers," not "returning strikers"). The court of appeals thus correctly upheld the Board's affirmance of the ALJ's determination that the October 2008 agreement "applied only to crossover employees during the pendency of the strike." Pet. App. 77a; see *id.* at 15a, 31a, 86a.

Petitioner does not seek this Court's review (cf. Pet. i-ii) of the question whether petitioner's imposition of the Company medical plan was justified on the basis that it followed good-faith bargaining resulting in an impasse. But to the extent petitioner suggests (Pet. 7, 21, 35) that an "impasse" existed on the subject of returning strikers' benefits, that suggestion is erroneous. As the Board found, the evidence established that the parties had not exhausted negotiations on that issue. Pet.

App. 86a. In any event, even assuming a deadlock specifically on the issue of medical coverage for returning strikers, that deadlock would not justify unilateral action absent either overall impasse in negotiations or a showing that that single issue was of such overriding importance that it frustrated the progress of further negotiations. See *Wayneview Care Ctr.* v. *NLRB*, 664 F.3d 341, 349-350 (D.C. Cir. 2011); *CalMat Co.*, 331 N.L.R.B. 1084, 1097 (2000). Petitioner has not made either showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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