No. 17-___

IN THE

Supreme Court of the United States

ICTSI OREGON, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION and PACIFIC MARITIME ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner ICTSI Oregon, Inc. ("ICTSI") alleged that Respondents International Longshore and Warehouse Union and Pacific Maritime Association violated the antitrust laws by conspiring to expand their collective bargaining unit to seize work historically performed by employees of a non-signatory employer through unlawful secondary conduct that violates the National Labor Relations Act ("NLRA"). The Ninth Circuit accepted these allegations as true, but held that ICTSI's antitrust claim was nonetheless barred by the nonstatutory labor exemption from antitrust liability. The question presented is:

Whether a claim that parties to a collective bargaining agreement have violated the antitrust laws by conspiring to seize work controlled by employers outside the bargaining unit through coercion that violates Sections 8(b)(4)(B) and 8(e) of the NLRA is barred as a matter of law by application of the nonstatutory labor exemption.

RULE 14.1(b) STATEMENT OF PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. ICTSI Oregon, Inc., Defendant-Counterclaim Plaintiff/Appellant

2. International Longshore and Warehouse Union, Plaintiff-Counterclaim Defendant/Appellee

3. Pacific Maritime Association, Plaintiff-Counterclaim Defendant/Appellee

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner ICTSI Oregon, Inc. is an Oregon corporation. ICTSI Oregon, Inc.'s parent corporation is International Container Terminal Services, Inc. International Container Terminal Services, Inc., a publicly traded company on the Manila, Philippines stock exchange, owns 10 percent or more of ICTSI Oregon, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

ICTSI Oregon, Inc. ("ICTSI") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported at *Int'l Longshore and Warehouse Union v. ICTSI Or., Inc.*, 15 F. Supp. 3d 1075 (D. Or. 2014). App. 1a. The Ninth Circuit's opinion affirming the judgment of the district court is reported at *Int'l Longshore and Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178 (9th Cir. 2017). App. 58a.

JURISDICTION

The Ninth Circuit entered its judgment on July 24, 2017. On October 12, 2017, Justice Anthony M. Kennedy granted ICTSI's Application for Extension of Time to File a Petition for Certiorari from October 23, 2017 to November 22, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented involves the intersection of federal antitrust and labor law. Relevant statutory provisions include Section 1 of the Sherman Act, 15 U.S.C. § 1, App. 198a, Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B), App. 198a, and Section 8(e) of the National Labor Relations Act, App. 199a.

INTRODUCTION

Petitioner, ICTSI was the operator of the Port of Portland's ("Port") container terminal on the Columbia

River known as Terminal 6. This case arises out of coordinated pressure brought on ICTSI to force the Port to stop using its own electricians and instead to use members of the International Longshore and Warehouse Union ("ILWU"). The effect of that pressure on ICTSI's operations at Terminal 6 was economically devastating. In its counterclaim in this case, ICTSI alleged that ILWU and the Pacific Maritime Association's ("PMA") agreement to coerce this outcome violated the antitrust laws. Specifically, it claimed that ILWU and PMA conspired to expand their collective bargaining unit, *not* to further legitimate goals of collective bargaining about mandatory subjects of bargaining (such as protecting wages), but instead to seize work that for 37 years had been performed by other union-represented employees of the Port, which was *not* signatory to the ILWU-PMA labor contract.

ICTSI alleged that, as part of that conspiracy, ILWU unlawfully attempted to coerce ICTSI, a neutral party, to force the Port to assign this work through work stoppages, slowdowns, phony safety claims, the filing of grievances, and other actions. ICTSI further alleged that PMA agreed with ILWU to pressure ICTSI by, among other things, threatening ruinous fines of $50,000 per day if ICTSI did not comply with the joint demands of ILWU and PMA to ensure assignment of the disputed work to ILWU members.

The Ninth Circuit, however, held that this conspiracy was protected from antitrust scrutiny by the nonstatutory labor exemption from the antitrust laws. This Court developed the nonstatutory exemption to reconcile the inherent tension between the "central aim of our antitrust laws [which] is to promote competition" and "the central aim of collective bar-

gaining [which] is to reduce or eliminate competition for labor in order to strengthen the bargaining power of workers." *Connecticut Ironworkers Employer's Ass'n v. New England Reg'l Council of Carpenters*, 869 F.3d 92, 99-100 (2d Cir. Aug. 2017) ("*Connecticut Ironworkers*"). But, in a long line of precedent, this Court has made clear that the nonstatutory exemption shields an agreement between a union and an employer *only* if it is the result of bona fide, arm's length bargaining regarding a mandatory subject of bargaining (*i.e.*, wages, hours, working conditions) under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* ("NLRA"). *See Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965). Plainly, unions and employers are *not* exempt from the antitrust laws when they agree to seize work outside the bargaining unit in violation of Section 8(e) of the NLRA, 29 U.S.C. § 158(e). Such an agreement does not involve a mandatory subject of bargaining. Nor is a union exempt from the antitrust laws when it engages in unlawful, coercive secondary conduct to enforce such an agreement in violation of Section 8(b)(4)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(B).

The Ninth Circuit's contrary holding thus contravenes this Court's precedent. Not surprisingly, it also conflicts with decisions of other courts of appeals about the scope of the nonstatutory exemption, particularly the Second Circuit's recent decision in *Connecticut Ironworkers*. Finally, as this case reveals, expanding the scope of the nonstatutory labor exemption to protect conduct unlawful under the NLRA has the potential to shield union-employer agreements that cause tremendous damage to the economy and impose significant human cost. In this case, the alleged conduct caused shipping lines that previously called on Terminal 6 to bypass the terminal and divert to

other West Coast ports, reducing the number of ships and containers loading and off-loading in Portland and harming both ICTSI and members of the general public relying on the container terminal's efficient operation.

STATEMENT OF THE CASE

A. Factual Background

ILWU is a labor union that represents longshore workers, longshore mechanics, and marine clerks "employed by waterfront companies who are members of PMA, at all West Coast ports including Portland, Oregon." App. 5a-6a. ILWU has over 14,000 registered members and thousands more "casual" workers. App. 188a. PMA is a multiemployer collective bargaining association of approximately 70 stevedores, terminal operators, marine equipment companies and ocean carriers, which is governed by a Board of Directors, consisting of certain of its members. App. 188a-189a.

For decades, ILWU and PMA have negotiated successive collective bargaining agreements. App. 189a. ILWU and PMA are currently parties to the Pacific Coast Longshore Contract Document ("PCLCD"), a collective bargaining agreement covering commercial ports along the West Coast, which governs the terms and conditions of employment of longshore workers employed by PMA members. App. 6a. By its terms, the PCLCD does not apply to employers who are not PMA members. App. 129a. The PCLCD is administered by a Coast Labor Relations Committee ("CLRC"), comprised of ILWU and PMA representatives. App. 139a.

ICTSI began operating Terminal 6 at the Port in 2011 pursuant to a 25-year lease with the Port.

App. 7a. ICTSI was not a PMA member when it entered into this lease, and thus did not operate under the PCLCD. *Id.* Prior to 2011, the Port had operated Terminal 6 for almost 40 years, and the Port's IBEW-represented electricians had always performed the plugging, unplugging and servicing of the refrigerated containers known as reefers (hereafter "the Disputed Work"). App. 7a, 189a. ICTSI's lease with the Port contained provisions that required ICTSI to respect the IBEW-represented electricians' jobs and prohibited ICTSI from interfering with their continued performance of the Disputed Work. App. 169a.[1] Thus, Port electricians continued to do that work after ICTSI began operating the facility. App. 7a.

In March 2012, ILWU began to demand that ICTSI assign the Disputed Work to ILWU members. *Id.* Citing its lease, ICTSI informed the ILWU that it was unable to accede to the ILWU's demands. App. 169a. In response, ILWU and PMA embarked on a joint campaign to coerce ICTSI to require the Port to assign the Disputed Work to ILWU members. This joint campaign forms the basis of ICTSI's antitrust claim.

B. ICTSI's Antitrust Claim

On June 13, 2012, ILWU and PMA jointly filed this case against ICTSI seeking to compel ICTSI to assign the Disputed Work to ILWU members. App. 110a. On December 17, 2012, ICTSI filed a counterclaim alleging, *inter alia*, that ILWU and PMA conspired to violate the antitrust laws. App. 179a, 187a-194a. ICTSI alleged that the relevant market is the loading and unloading of freight and related ancillary services

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[1] *See International Longshore and Warehouse Union*, 363 N.L.R.B. No. 12 (Sept. 24, 2015) (providing additional detail regarding ICTSI's lease with the Port).

to and from the dockside point of rest for marine oceangoing cargo on West Coast ports and/or the submarket of the Portland, Oregon metropolitan area. App. 188a. West Coast ports are crucial gateways to America's global trade routes, including those to Asia and the Pacific, and annually handle over 50 percent of the nation's containerized imports and exports, with an annual value of over $300 billion dollars. *Id.* Among the related services within this market are maintenance and repair services to stevedoring equipment, including containers. App. 188a-190a. ICTSI alleged that ILWU and PMA had a joint objective to monopolize this lucrative market and sought to exclude competition within this market, to boycott third parties, and to raise prices to consumers to supra-competitive levels. App. 189a.

ICTSI further alleged that ILWU and PMA have taken significant actions in the last few years to extend their monopoly to obtain control over maintenance and repair work performed by non-PMA employers, which employ workers represented by unions other than the ILWU. *Id*. The extension of the ILWU/PMA monopoly over the relevant market is in PMA's financial interest because PMA collects fees from members for each hour worked by longshoremen, but does not collect fees when work is performed by employees who are members of the other unions employed by non-PMA members. App. 189a-190a.

As part of their efforts to extend their monopoly, ILWU and PMA entered into an agreement in 2008, the intent of which was to expand their control over maintenance and repair services at West Coast ports. App. 189a. "In 2008, the PCLCD included for the first time a provision that maintenance and repair work, including the [Disputed Work] at issue in this case, be

performed by ILWU-represented employees." App. 6a. The ILWU/PMA agreement exempted PMA members from this expansion of jurisdiction only if that member previously was party to a direct labor agreement with another labor union to perform maintenance and repair work. *Id*. Of course, this agreement did not protect non-PMA members such as the Port.

As noted above, the Port, which was not a PMA member, controlled assignment of the Disputed Work, and did not assign that work to ILWU members. PMA and ILWU thus embarked on a campaign in May and June of 2012 to coerce *ICTSI*—the Port operator—to force the Port to assign the Disputed Work to ILWU members. This campaign was accomplished by various means, including, *inter alia*, those set forth below.

First, ILWU and PMA jointly held a CLRC meeting on or about May 23, 2012 without advance notice to ICTSI and without affording ICTSI any opportunity to participate. App. 190a. The participants at the meeting, including the PMA members, had a conflict of interest and were biased against ICTSI and the Port. App. 185a. They refused to recognize that ICTSI lacked control over the Disputed Work and that the Port had the exclusive right to assign it. Instead, at this meeting, ILWU and PMA agreed to order ICTSI to assign the Disputed Work to ILWU members. App. 185a, 190a. ILWU and PMA then commenced this case and jointly sought to enforce this CLRC agreement in the district court. App. 190a.

Second, ILWU encouraged and directed PMA to fine and/or expel ICTSI from membership in PMA unless ICTSI assigned the Disputed Work to ILWU members. *Id*. PMA agreed, and threatened ICTSI with ruinous fines of $50,000 *per day* and/or expulsion unless ICTSI immediately assigned the work to ILWU members. *Id.*

Third, a PMA Board member and high-level executive of one of ICTSI's customers, Michael Radak, threatened, and ultimately caused his company, Hanjin, to bypass Terminal 6, unless ICTSI accepted the demands of ILWU and PMA to assign the Disputed Work to ILWU members. App. 191a.

Fourth, ILWU and its members engaged in work slowdowns, work stoppages, safety gimmicks, hard-timing, filing of grievances and arbitration demands, and other similar coercive conduct with the object of pressuring ICTSI, a neutral employer with regards to the Disputed Work, so that ICTSI would induce the Port to relinquish control over that work. App. 191a. As a result of these actions, the NLRB ruled in two separate decisions that ILWU violated Section 8(b)(4)(B) of the Act. *International Longshore and Warehouse Union*, 363 N.L.R.B. No. 47 (Nov. 30, 2015); *International Longshore and Warehouse Union*, 363 N.L.R.B. No. 12 (Sept. 24, 2015).[2]

ICTSI alleged that these ILWU efforts to coerce the Port to reassign the Disputed Work within the relevant market were but one example of similar coercive ILWU conduct along the West Coast since 2008. Similar ILWU actions occurred in San Diego, California, Coos Bay, Oregon, and Longview, Washington. App. 192a.

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[2] ILWU filed petitions for review and the NLRB filed cross-applications for enforcement in these cases with the United States Court of Appeals for the District of Columbia Circuit. On November 6, 2017, the D.C. Circuit denied the ILWU's petitions and granted the Board's petitions for enforcement. *ILWU v. NLRB*, No. 15-1443, 2017 U.S. App. LEXIS 22182 (D.C. Cir. Nov. 6, 2017); *ILWU v. NLRB*, No. 15-1344, 2017 U.S. App. LEXIS 22181 (D.C. Cir. Nov. 6, 2017).

ICTSI alleged that ILWU and PMA engaged in these actions "for the purpose of expanding the jurisdiction of the ILWU; to benefit Board and general members of PMA; and not for the purpose of leveling wages, hours or working conditions." App. 193a. The effect of their conduct was to, among other things, reduce and injure competition (1) between Terminal 6 and other West Coast container terminals; and (2) between non-PMA contractors employing IBEW or other non-ILWU labor and other terminal operators and/or marine equipment repair companies, including PMA members. *Id.* Such a reduction or injury to competition damaged the public by reducing the number of vessels and containers loading and off-loading in Portland; increasing the cost of and delaying shipments; and eliminating efficient competitors from the marketplace. *Id.*

C. District Court Proceedings

As noted above, in June 2012, ILWU and PMA jointly initiated this case against ICTSI in the U.S. District Court for the District of Oregon, seeking to enforce the CLRC decision and a resulting labor arbitration award, which directed ICTSI to assign the Disputed Work to ILWU members. App. 110a. The district court possessed jurisdiction under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. ICTSI filed four counterclaims in response, including a claim to vacate the CLRC decision and arbitration award, a claim against ILWU for unlawful secondary conduct under Section 303 of the LMRA, 29 U.S.C. § 187, an antitrust claim against both ILWU and PMA under the Sherman Act, 15 U.S.C. § 1, and a breach of fiduciary duty claim against PMA. App. 186a-196a.

Shortly before this case was filed, ICTSI filed unfair labor practice charges with the NLRB, alleging that

ILWU had engaged in unlawful secondary activity. After the Regional Director of the NLRB found merit to these charges, in separate proceedings, the district court entered two preliminary injunctions against ILWU, prohibiting it from continuing to engage in work stoppages, slowdowns, and the filing of grievances against ICTSI and its customers (the ocean carriers that called on Terminal 6). *Hooks ex rel. NLRB v. Int'l Longshore and Warehouse Union*, 905 F. Supp. 2d 1198 (D. Or 2012), *aff'd in part and reversed in part*, 544 Fed. Appx. 657 (9th Cir. Sept. 9, 2013); *Hooks ex rel. NLRB v. Int'l Longshore and Warehouse Union*, Case No. 3:12-cv-01088-SI, Dkt. 50 (D. Or. July 19, 2012).[3] In addition, the NLRB issued a Section 10(k) decision, 29 U.S.C. § 160(k), awarding the Disputed Work to the Port's IBEW-represented electricians. *Int'l Bhd. Of Electrical Workers*, 358 NLRB No. 102 (Aug. 12, 2012).[4]

In light of these separate NLRB-related proceedings, the district court handling this case stayed both the Section 301 claim and ICTSI's counterclaims, including its antitrust counterclaim, until the NLRB cases were completed. *Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 932 F. Supp. 2d 1181, 1186, 1196-1203 (D. Or. 2013). However, the district court

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[3] The district court later found ILWU in contempt of court for its failure to cease its slowdown and other coercive secondary activities in compliance with the court's July 19, 2012 preliminary injunction. *Hooks ex rel. NLRB v. Int'l Longshore and Warehouse Union*, 72 F. Supp. 3d 1168 (D. Or. 2014).

[4] The Board later vacated this § 10(k) decision on its own motion in June 2017, presumably because of concerns whether the Board possessed jurisdiction. *See PMA v. NLRB*, 827 F.3d 1203, 1208-10 (9th Cir. 2016) (discussing possible jurisdictional flaw where a public employer is involved in the jurisdictional dispute).

permitted ILWU and PMA to file a motion to dismiss ICTSI's antitrust counterclaim "so long as that motion is not premised on issues before the NLRB in the related actions." *Id.* at 1203.

ILWU and PMA thereafter filed a motion to dismiss ICTSI's antitrust counterclaim. The district court granted that motion. First, the court held that ICTSI could not make an antitrust claim against ILWU and PMA based on their filing of federal lawsuits to compel ICTSI to transfer the Disputed Work to ILWU because these court filings were immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. App. 9a-11a. Second, the court held that the statutory labor exemption from antitrust liability protected actions that ILWU engaged in *by itself*. App. 11a-14a. Third, and critically here, the court held that the nonstatutory labor exemption from antitrust liability shielded the joint activity by ILWU and PMA. App. 14a-25a. Finally, the court held that ICTSI's allegations of a conspiracy to create a "shared monopoly" in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, failed to state a claim. App. 28a.

With regards to the nonstatutory exemption, the district court applied the three-part test adopted by the Eighth Circuit in *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) ("*Mackey*"). App. 15a. Under this test, parties to a labor "agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's-length bargaining." *See Phoenix Elec. Co. v.*

Nat'l Elec. Contrs. Ass'n, 81 F.3d 858, 861 (9th Cir. 1996) (describing *Mackey* test).

The district court found that all three prongs of the test were satisfied. It ruled that the restraint at issue primarily affected PMA members and that non-PMA members, including the Port, were not bound; that the agreement related to a mandatory subject of bargaining, namely work assignments or, alternatively, work preservation; and that the agreement was the product of bona fide arm's-length collective bargaining. App. 20a-25a.

In holding that the nonstatutory exemption applied, the district court rejected ICTSI's argument that *Brown v. Pro Football Inc.*, 518 U.S. 231, 237 (1996) ("*Brown*"), altered the *Mackey* test "and added the requirement that in order to obtain the benefit of the nonstatutory exemption, the conduct at issue must not violate labor law." App. 16a. The district court stated that, "[w]ithout a clear indication from the Supreme Court or the Ninth Circuit," it would not interpret *Brown* as "creating potential antitrust liability for union-employer agreements solely because the conduct also might create liability under labor law." App. 19a.

D. The Ninth Circuit's Decision

After the district court dismissed ICTSI's antitrust claim, ICTSI moved for entry of a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b). The district court granted ICTSI's motion and dismissed ICTSI's antitrust claim with prejudice. App. 64a. ICTSI appealed to the Ninth Circuit, which possessed jurisdiction under 28 U.S.C. § 1291.

The Ninth Circuit affirmed the district court's dismissal of ICTSI's antitrust claim solely on the ground that the nonstatutory exemption from anti-

trust liability applied. After first ruling that the federal court lawsuits brought by ILWU and PMA were not "objectively baseless" and were hence immunized from antitrust liability by the *Noerr-Pennington* doctrine, the Ninth Circuit turned to the central issue whether ILWU and PMA's *joint conduct* was "immunized from antitrust liability under Section 1 of the Sherman Act because of the nonstatutory labor exemption, even though such activity allegedly includes actions by ILWU and PMA that violate labor law." App. 71a-72a. In deciding this issue, the Ninth Circuit focused primarily on the second prong of the *Mackey* test, whether the alleged agreement concerns a mandatory subject of bargaining. App. 74a. The court acknowledged that "[a] cursory glance at Supreme Court precedent would seem to suggest that ICTSI's contention that an illegal agreement always fails the *Mackey* test is correct," but rejected ICTSI's contention based almost entirely on its decision in *Richards v. Neilson Freight Lines*, 810 F.2d 898 (9th Cir. 1987). App. 74a-75a.

In *Richards*, plaintiff, a non-union trucking company, alleged that the union conspired with numerous union-signatory trucking companies to cease doing business with it in furtherance of the union's goal to organize plaintiff's employees and reduce "wage-based competition in the less-than-truckload trucking industry." 810 F.2d at 905. Then-Judge Kennedy, writing for the court, concluded that "[e]ven if such conduct were a violation of the labor law, it would bear such a close and substantial economic relation to a union's legitimate [ends] that it falls well within the purpose and the coverage of the exemption from antitrust liability." *Id.* at 904. Relying on this statement, the Ninth Circuit concluded "that agreements violating § 8(e) would fall outside the nonstatutory exemption

only when the alleged agreements 'pose actual or potentially anticompetitive risks other than those related to a reduction in competitive advantages based on differential wages or working conditions.'" App. 75a-76a (quoting *Richards*.)

Applying this standard, the Ninth Circuit found that "the situation in this case is very analogous to *Richards*" even though "the work sought by ILWU is currently being performed by another union, IBEW, instead of non-unionized workers." App. 77a-78a. The court concluded that the joint activity alleged by ICTSI "to violate § 8(e) has the purpose of gaining the reefer work at Terminal 6 for ILWU by suppressing competition" and expanding the ILWU/PMA bargaining unit at the expense of third-party bargaining units "so that ILWU gains a monopoly, supported by PMA, over various types of West Coast port work." App. 77a. However, the court stated, "[e]ven if the ends of the allegedly illegal Joint Activity were achieved, the result would be that ICTSI replaced IBEW reefer workers with ILWU reefer workers at Terminal 6," and thus the "relevant market in which competition would be reduced is the labor market—specifically, the ability of other labor unions to compete against ILWU for this kind of work." App. 77a. The court thus concluded that "[a]ny harms flowing from suppressing competition among labor unions in the instant case" were related to a reduction in "competitive advantages based on differential wages or working conditions." *Id*.

The court rejected ICTSI's contention that "illegal conduct is not a mandatory subject of collective bargaining" for purposes of the second prong of the *Mackey* test. App. 79a. The court again relied on *Richards* for the proposition that "illegal agreements

still satisfy prong two of the *Mackey* test if such agreements concern mandatory subjects of collective bargaining." *Id*. Construing the allegedly illegal agreement in this case as one that "concerned work assignments within the bargaining unit of the West Coast," the court concluded that it involved a mandatory subject of bargaining. App. 83a.

The court also rejected ICTSI's contention that this Court's decision in *Brown* necessarily held that the nonstatutory labor exemption does not shield conduct that violates the NLRA. In so doing, the court recognized that *Brown* "specifically tied its conclusion" that the nonstatutory exemption applied to the legality of the alleged conduct under federal labor law. App. 81a. However, the court concluded that while "tying the holding of *Brown* to labor law's approval seems to make sense" in the context of the employer-only collusion at issue there, it would not make sense regarding "an agreement formed with the input of both management and labor." *Id*.

REASONS FOR GRANTING THE PETITION

This Court has recognized the inherent tension between the nation's antitrust and labor policies since Congress passed the Sherman Act in 1890. *See*, *e.g.*, *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Electrical Workers*, 325 U.S. 797, 801-07 (1945). In response to this tension, this Court developed "an implicit antitrust exemption that applies where needed to make the collective bargaining process work." *Brown*, 518 U.S. at 233.[5] However, the question

[5] The statutory labor exemption protects only unilateral union action; thus, it does not protect collective bargaining activity and agreements from the antitrust laws. *See United States v. Hutcheson*, 312 U.S. 219, 231 (1941).

whether this implicit or implied nonstatutory exemption from antitrust liability applies in a given case has proven a complex and vexing one. This case involves an issue this Court has not *expressly* decided: whether an employer and union can enter into and enforce an agreement to engage in conduct that is inimical to federal labor policy and violates the NLRA, and nonetheless be protected from scrutiny under the antitrust laws by the nonstatutory labor exemption.

As we now show, the logic of this Court's decisions shows that such conduct cannot be so shielded. Analysis of this Court's precedent, including its most recent decision construing the exemption, *Brown*, leads inexorably to the conclusion that conduct which is illegal under federal labor law is *not* sheltered by the nonstatutory exemption. Guided by this Court's precedent, the Second and Third Circuits have confined application of the nonstatutory labor exemption to agreements that "further goals that are *protected by national labor law* and that are *within the scope of traditionally mandatory subjects of collective bargaining*." *Local 210, Laborers' Int'l Union of North America v. Labor Relations Div. of Associated General Contractors of America, N.Y.S. Chapter Inc.*, 844 F.2d 69, 79 (2d Cir. 1988) ("*Local 210*") (emphasis supplied).

The Ninth Circuit rejected this framework. Under the test applied by the Ninth Circuit, there is no inquiry into whether the agreement being enforced by the parties "further[s] goals that are protected by national labor law." Instead, conduct illegal under federal labor law is protected by the nonstatutory exemption, so long as the substantial anticompetitive effects of the conduct follow naturally from the elimination of competition over wages and working conditions. App. 77a.

The Ninth Circuit's contravention of the logic of this Court's precedents and its direct conflict with the Second Circuit's test for, and application of, the nonstatutory immunity, is not merely of academic interest. The Ninth Circuit's application of the nonstatutory immunity permits labor unions and employers to cause substantial anticompetitive effects by seeking to expand their agreed-upon bargaining unit and obtain work controlled by non-signatory employers by means doubly unlawful under federal law. Such conduct can have devastating effects, as in this case where the ocean carriers calling on Terminal 6 bypassed Portland in favor of other West Coast ports, suppressing competition and causing substantial damage to both ICTSI and the entire Columbia River region.

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS

The Ninth Circuit recognized that a "[a] cursory glance at Supreme Court precedent would seem to suggest that ICTSI's contention that an illegal agreement always fails the *Mackey* test is correct," and thus is not entitled to the protection of the nonstatutory exemption. App. 74a. But the court then wrongly concluded that a detailed review would lead to a different result. App. 75a-81a. In fact, the logic of this Court's prior decisions compels the conclusion that joint employer-union agreements that violate the NLRA, particularly unlawful secondary activity to enforce such agreements, are not protected by the nonstatutory labor exemption from the antitrust laws.

The nonstatutory exemption from the antitrust laws "recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining

to take place some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." *Brown*, 518 U.S. at 237. *See also United Mine Workers v. Pennington*, 381 U.S. 657 (1965). To be sure, the exemption includes "some union-employer agreements," *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975), but *not all*. Contrary to the Ninth Circuit, this Court has made clear that employer-union agreements to engage in conduct that violates the NLRA in order to achieve goals that do not involve mandatory subjects of bargaining (wages, hours and terms and conditions of employment) are not entitled to the protection of the nonstatutory exemption.

In *Pennington*, for example, the union and a multi-employer association of large coal operators agreed that the union would impose the wage provision and other terms of their collective bargaining agreement on small coal operators "regardless of their ability to pay." *Id.* at 664. The union argued that, "since such an agreement concerned wage standards, it is exempt from the antitrust laws." *Id.* This Court held that some agreements between unions and business groups were immune from antitrust liability, such as an agreement to impose generally applicable wage scales as a means of eliminating "competition based on wages among the employers *in the bargaining unit*." *Id.* (emphasis added.) In addition, a union could "as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." *Id.*

However, the Court stated that labor agreements are not automatically exempt "simply because the negotiations involve a compulsory subject of bargain-

ing, regardless of the subject or the form or content of the agreement." *Id.* at 664-65. Instead, "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 665. That limit was reached when unions and employers sought "to bargain about the wages, hours and working conditions of *other* bargaining units or to attempt to settle these matters for the entire industry" or to "proscribe labor standards outside the bargaining unit." *Id.* at 666, 668 (emphasis added). *See also Allen Bradley Co.*, 325 U.S. at 810 (a union loses its statutory immunity when it acts "in combination with business groups" to monopolize a product market).

On the same day it decided *Pennington*, the Court decided *Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965) ("*Jewel Tea*"). In *Jewel Tea*, a union and multi-employer association entered into an agreement limiting the working hours of its members. *Id.* at 679. One of the members of the association objected and filed suit under the Sherman Act. *Id.* at 680-81. The Court found that this agreement addressed mandatory subjects of bargaining which "weigh[ed] heavily in favor of antitrust exemption on these subjects." *Id.* at 689. It concluded that the union's effort to obtain a working-hours restriction "through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id*. at 689-90. But, the Court explained, conditioning "bargaining upon discussions of a nonmandatory subject" constituted an unfair labor practice, and an agreement concerning such a subject

would *not* be immune from antitrust liability "by reason of the labor exemption." *Id*. at 689. Put differently, the agreement was protected because it involved a mandatory subject of bargaining and was lawful under the NLRA.

In *Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975), the Court revisited the "limited nonstatutory exemption from antitrust sanctions." Connell was a general contractor that subcontracted its plumbing and mechanical work to third parties pursuant to competitive bids. The union demanded that Connell execute an agreement that limited subcontracting to companies that were signatories to a collective bargaining agreement with the union. Connell refused, the union picketed, and Connell executed the agreement in the face of this pressure. It then brought suit under the Sherman Act. *Id.* at 619-21. The union argued that its agreement with Connell was protected by the nonstatutory immunity and was a lawful "hot cargo" agreement under the construction proviso to Section 8(e). *Id.* at 626. The union also argued that, even if the agreement was illegal under Section 8(e), plaintiff's exclusive remedy was under labor law.

This Court held that the agreement "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." *Id.* at 623. Most relevant here, the Court also ruled that Congress did not "preclude antitrust suits based on the 'hot cargo' agreements that it outlawed in 1959." *Id.* at 634. The Court thus concluded that the agreement was illegal under

Section 8(e) and was unprotected by the nonstatutory exemption. *Id.* at 635.

Implicit in the Court's holding in *Connell* was a recognition that an agreement unlawful under federal labor law is not shielded by the nonstatutory exemption. Indeed, the Court so interpreted *Connell* in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) ("*Kaiser Steel*"). There, an employer being sued for delinquent contributions to a benefit plan defended on the ground that the agreement calling for payment violated both Section 8(e) and the Sherman Act. *Id.* at 74. In judging the adequacy of this defense, the Court interpreted *Connell* as holding that, because the agreement at issue was illegal under Section 8(e), "the agreement was subject to the antitrust laws." *Id.* at 85. The Court further stated: "In *Connell*, we decided the § 8(e) issue in the first instance. It was *necessary to do so to determine whether the agreement was immune from the antitrust laws*." *Id.* (emphasis added). The only reasonable conclusion to be drawn from this statement is that an agreement violating Section 8(e) is not entitled to the nonstatutory exemption.

The importance placed by this Court on the legality of conduct for which shelter is sought under the nonstatutory immunity reached its apex in *Brown*. In that case, NFL owners sought to fix and determine wage levels for developmental squad members. Their negotiations with the players' union resulted in impasse and the club owners implemented their final offer. *Brown*, 518 U.S. at 234-35. The union filed an antitrust case, alleging that the conduct of the owners constituted price fixing in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. *Id.* at 235. The owners relied on the nonstatutory exemption, contending that the price restraint arose, not from a collective

bargaining agreement, but rather from the collective bargaining process. The Court stated:

> The implicit ("nonstatutory") exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is and is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.

Id. at 236-37. The Court recognized that the employers' conduct was lawful under the NLRA and concluded: "We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. *On that assumption, we conclude that the exemption applies*." *Id.* at 238 (emphasis added).

The Ninth Circuit recognized in this case that *Brown* "contains numerous references tying the Supreme Court's holding to approval of the alleged conduct in labor law cases." App. 80a-81a. But the court of appeals refused to follow that fact to its logical conclusion. Instead, it distinguished *Brown* as involving "employer-only collusion" which "logically presents a greater risk of cartel-generating activity that harms the interests of labor than an agreement formed with the input of both management and labor." App. 81a.

That distinction makes no difference. The purpose of the nonstatutory labor exemption is to harmonize antitrust law and federal labor policy. It makes no sense—and does not further this purpose—to grant immunity from antitrust scrutiny to conduct that *violates* the NLRA and federal labor policy. The Ninth

Circuit's expansion of the nonstatutory exemption to conduct that violates the NLRA and does not involve a mandatory subject of bargaining cannot be reconciled with this Court's precedents, including *Connell*, *Kaiser Steel*, and *Brown*. Conduct that is illegal under federal labor law cannot be shielded by the nonstatutory immunity.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH OTHER CIRCUIT COURTS OF APPEALS, PARTICULARLY A RECENT SECOND CIRCUIT DECISION

The Ninth Circuit stands alone in holding that a union-employer agreement that violates Section 8(e) and secondary conduct seeking to enforce such an agreement that violates Section 8(b)(4)(B) can be sheltered from antitrust scrutiny by the nonstatutory exemption. Other circuit courts have reached conflicting conclusions and, like this Court's decision in *Brown*, have tied application of the nonstatutory exemption to the legality of the defendants' conduct under federal labor law.

This difference in position is apparent even in the tests applied by the circuits to determine the applicability of the exemption. In the Second Circuit, in assessing the applicability of the nonstatutory exemption, courts require, *inter alia*, that "the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining." *Local 210*, 844 F.2d at 79. In contrast, the Ninth Circuit does not examine whether the agreement or conduct at issue "further[s] goals that are protected by national labor law." *Id.* *See also Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987) (adopting

three-part test from Eighth Circuit's decision in *Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976)).[6] This failure led to the Ninth Circuit's error here—shielding conduct that contravenes the NLRA's purposes.

The significance of this omission is illustrated by the Second Circuit's decision in *Connecticut Ironworkers*. In that case, the defendant union attempted to enforce a restrictive subcontracting clause against the plaintiff employers. The Second Circuit first examined whether the agreement furthered goals protected by national labor law. 869 F.3d at 107. Citing its decision in *Local 210* and this Court's decision in *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964), the court stated that "[r]estrictive subcontracting clauses are protected from application of the antitrust laws *only* to the extent that they work in service of work preservation or another legitimate labor goal." *Id.* (emphasis added). Critically, however, the court held that when such clauses are used to secure new work that historically belonged to another union, they were not protected. Thus, the court explained:

> [O]ur precedents have held that "preserv[ing] work traditionally performed by a union for a particular employer" relates to the "terms and conditions of employment" and is therefore a traditionally mandatory subject of collective bargaining. By extension, we hold here that work expansion—as opposed to preservation—is *not* a traditionally mandatory subject of collective bargaining or legitimate goal for the purposes of determining whether

[6] The Second Circuit has expressly rejected the *Mackey* test. *Connecticut Ironworkers*, 869 F.3d at 106, n. 72; *Clarett v. National Football League*, 369 F.3d 124, 133 (2d Cir. 2004).

> the nonstatutory exemption shields particular conduct from antitrust scrutiny.

Id. at 108 (citations omitted; emphasis in original). Because the record was "insufficient to determine whether or not these subcontracting clauses were in fact being used to preserve work, prevent jobsite friction, improve the wages, enhance working conditions, or further another legitimate labor goal; or whether the clauses were used for work *expansion*," the court reversed the grant of summary judgment to the union, and remanded the case for further proceedings consistent with its holding. *Id.* (emphasis in original).[7]

Had the Second Circuit's analysis been applied to this case, the Ninth Circuit would have reached a different conclusion. All tribunals that have reviewed the facts of this case have held that the ILWU sought to *expand* its collective bargaining agreement to seize work controlled by an employer outside the bargaining

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[7] Other cases from the Second Circuit similarly find that conduct violating federal labor law does not qualify for the nonstatutory exemption. *See, e.g., Sheet Metal Div. v. Local 38 of the Sheet Metal Workers Int'l Ass'n*, 208 F.3d 18, 26-27 (2d Cir. 2000) ("the question under the Sherman Act is analogous to the question under the NLRA: whether the Clause is a valid work preservation clause under *National Woodwork* or whether it is an impermissible restraint of trade under *Allen Bradley*"); *Home Box Office, Inc. v. Directors Guild of America*, 531 F. Supp. 578, 604 (S.D. N.Y. 1982) ("The nonstatutory exemption, as interpreted by the Second Circuit, protects the terms of collective bargaining agreements if those terms were agreed to at arm's length, apply only within the bargaining unit, and so concern legitimate union interests that they are sanctioned by labor law."); *Cool Wind Ventilation Corp. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 28*, 139 F. Supp. 2d 319, 327 (E.D.N.Y. 2001) (violation of Section 8(e) as was alleged in *Connell* states an antitrust claim).

unit and did so by engaging in unlawful coercive secondary conduct. *See, e.g.*, *ILWU v. NLRB*, No. 15-1443, 2017 U.S. App. LEXIS 22182 (D.C. Cir. Nov. 6, 2017); *ILWU v. NLRB*, No. 15-1344, 2017 U.S. App. LEXIS 22181 (D.C. Cir. Nov. 6, 2017); *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 544 Fed. Appx. 657 (9th Cir. Sept. 30, 2013); *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 905 F. Supp. 2d 1198, 1211 (D. Or. 2012); *International Longshore and Warehouse Union*, 363 N.L.R.B. No. 47 (Nov. 30, 2015); *International Longshore and Warehouse Union*, 363 N.L.R.B. No. 12 (Sept. 24, 2015). Such conduct is not eligible for the shield of the nonstatutory exemption.

The Third Circuit has endorsed a position similar to that of the Second Circuit: that conduct violating federal labor law is unprotected by the nonstatutory exemption. In *Consolidated Express, Inc. v. NY Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, *Int'l Longshoremen's Ass'n v. Consolidated Express, Inc.*, 448 U.S. 902 (1980) ("*Conex*"), the Third Circuit stated that it was faced "with the question whether a contract or combination, which has been adjudicated to be a violation of the prohibition in § 8(e) against contracts calling for secondary boycotts, can nevertheless be held to be within the nonstatutory antitrust exemption because it was negotiated as a part of a collective bargaining agreement." *Id.* at 512. The Third Circuit held that an NLRB decision that the agreement violates section 8(e) "*foreclose[s]* the argument that the object of the agreement ultimately reached is a mandatory subject of collective bargaining, for an agreement that violates

§ 8(e) cannot meet that standard." *Id.* at 513 (emphasis added).[8] And, because the activity was "condemned by national labor policy," it could not serve a "legitimate union interest." *Id.* at 518.

Conex was subsequently vacated and remanded by this Court on other grounds. However, the case's holding that the nonstatutory exemption does not shelter conduct that violates federal labor law has been followed by that court. *See Altemose Constr. Co. v. Bldg. & Constr. Trades Council of Phil.*, 751 F.2d 653, 659, 662 (3d Cir. 1985) (if a labor law violation is found, the Supreme Court's decision in *Connell* "precludes application of a nonstatutory exemption to the antitrust laws"); *Feather v. United Mine Workers*, 711 F.2d 530, 542 (3d Cir. 1983) (holding that an antitrust plaintiff established a prima facie case "by showing that he had been injured in his business or property by 'a collective bargaining agreement, or conduct taken pursuant to it, [which] has been shown to be illegal under federal labor law.'").

In sum, the Ninth Circuit's decision clearly conflicts with decisions from the Second and Third Circuits, and this Court should grant the petition to resolve that conflict.[9]

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[8] The NLRB has long held that a demand for an unlawful provision is not a mandatory subject of bargaining. *National Maritime Union*, 78 N.L.R.B. 971, 981-82 (1948), *enf'd NLRB v. National Maritime Union*, 175 F.2d 888 (2d Cir. 1949).

[9] The Ninth Circuit's decision also arguably conflicts with decisions of the First Circuit. In *American Steel Erectors, Inc. v. Local Union 7*, 932 F. Supp. 2d 240, 245 (D. Mass. 2013), the district court stated: "Local 7 concedes (as it must) that the four agreements the jury found to constitute illegal section 8(e) agreements are not protected by the nonstatutory exemption." On appeal, the First Circuit did not question or disturb this

III. THE QUESTION PRESENTED IS IMPORTANT AND, IF THE NINTH CIRCUIT'S DECISION STANDS, IT WILL HAVE DAMAGING CONSEQUENCES

If it stands, the Ninth Circuit's decision will disrupt antitrust law and expand the application of the nonstatutory labor exemption in a way that undermines the purposes of both antitrust and labor policy.

First, this Court has recognized "the importance of uniform interpretation of the antitrust law." *See*, *e.g.*, *Tidewater Oil Co. v. United States*, 409 U.S. 151, 156 (1972). A conflict in the courts of appeals about the scope of this significant exemption inherently disrupts Congress's desired uniformity. That disruption is particularly harmful where, as here, the decision is inconsistent with this Court's delineation of the scope of the exemption.

Second, the Ninth Circuit counter-intuitively held that, even assuming Sections 8(e) and 8(b)(4)(B) of the NLRA were *violated*—as the D.C. Circuit has now confirmed—the ILWU/PMA agreement is exempt from antitrust scrutiny *under an immunity designed to protect federal labor policy*. The Ninth Circuit reasoned that the parties' agreement is immune because it generally involves the subject of work assignments, which is a mandatory subject of bargaining. App. 83a. But this holding makes no sense here, where the work assignments involve jobs *outside of the bargaining unit*, which plainly are *not* a mandatory subject of bargaining. In essence, the Ninth Circuit is saying that a parties' agreement to a facially valid work assignment or work preservation clause in a

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portion of the district court's opinion. *American Steel Erectors, Inc. v. Local Union 7*, 815 F.3d 43 (1st Cir. 2016).

collective bargaining agreement immunizes all of the parties' actions pursuant to that agreement, even when the parties unlawfully act to apply it to employers outside the bargaining unit. Moreover, that is true, the Ninth Circuit found, even when those actions constitute coercive secondary conduct in violation of Section 8(e) of the NLRA or the union engages in a secondary boycott to enforce the illegal agreement. All of these consequences would result from interpreting an exemption designed to protect and harmonize labor and antitrust law to protect conduct that *violates* labor law. *See Brown*, 518 U.S. at 237 (purpose of the nonstatutory exemption is to reconcile conflicts between the national antitrust policy of protecting competition and the national labor policy of encouraging collective bargaining).

This decision thus works a substantial expansion of the nonstatutory labor immunity beyond what the Supreme Court has ever authorized.[10] Where, as here, the conduct of the antitrust defendants undermines federal labor policy, the purpose of the exemption is not met by immunizing the defendants' unlawful conduct.[11]

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[10] Indeed, the Sixth Circuit has described the Ninth Circuit's *Richards* case, the basis for the ruling here, as "go[ing] to the extreme in protecting union activity * * *." *In Re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 466 (6th Cir. 1992).

[11] Nor can the Ninth Circuit's decision be supported by claiming that the restraint challenged here acted only on the labor market and not the general business market. ICTSI alleged that the conduct of ILWU and PMA was "undertaken for the purpose of expanding the jurisdiction of the ILWU; to benefit Board and general members of PMA, and *not for the purpose of leveling wages, hours or working conditions*." App. 193a (emphasis added). ICTSI also alleged that the effect of this conduct was to, among other things, reduce and injure

Expanding the nonstatutory exemption to shield conduct that is illegal under federal labor law would encourage unions and employers, particularly those in multi-employer bargaining units, to enter into collusive agreements unlawfully intended to expand the scope of the bargaining unit and drive non-signatory employers out of business to the financial advantage of both parties and to the detriment of competition. Although there are labor law remedies providing for monetary damages available against labor unions for such unlawful secondary conduct under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, there are no similar damage remedies against employers, who should not be exempt from antitrust liability in this setting.[12]

Encouraging such collusive actions injures competition and has significant economic effects. Here, the turmoil engendered by the ILWU's attempted seizure of work from an employer outside the ILWU-PMA bargaining unit caused the cessation of container activity at a significant West Coast port, leading not only to harm to ICTSI, the terminal operator, but to increased costs to shippers, delayed shipments and damage to perishable commodities. App. 193a.

In crafting the nonstatutory labor exemption from antitrust liability, this Court's precedents demonstrate

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competition in the business market between (1) Terminal 6 and other West Coast container terminals; and (2) between non-PMA contractors employing IBEW or other non-ILWU labor and other terminal operators and/or marine equipment repair companies, including PMA members. *Id.* On a motion to dismiss, these allegations had to be accepted as true.

[12] Moreover, the labor law remedy under § 303 does not allow recovery of attorney fees or treble damages as does the Sherman Act remedy.

that granting the shield of the exemption depends on the legality under federal labor law of the defendant's conduct. The Second and Third Circuits recognize that principle. To protect the harmonizing exemption it has crafted and prevent the damage the Ninth Circuit's rule will inflict on federal antitrust and labor policy, this Court should resolve the circuit split engendered by the Ninth Circuit's decision and clarify the narrow contours of the nonstatutory exemption.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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