No. 17-770

In The Supreme Court of the United States

ICTSI OREGON, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHORE and WAREHOUSE UNION, et al.,

Respondents.

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

BRIEF IN OPPOSITION

JONATHAN C. FRITTS
JUDD E. STONE
JAMES D. NELSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

CLIFFORD D. SETHNESS
THOMAS M. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue, Suite 2209
Los Angeles, California 90071

Counsel for Respondent Pacific Maritime Association

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001
allyson.ho@morganlewis.com

DATE: January 26, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Ninth Circuit correctly applied a well-established labor exemption to hold that the collective bargaining agreement and joint activity of the Pacific Maritime Association and the International Longshore and Warehouse Union are exempt from the antitrust laws.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Petitioner asks this Court to review a factbound application of a well-established exemption from the antitrust laws for labor disputes. App. 58a-85a (O'Scannlain, J.). Per this Court's instructions, the circuits have long recognized that the "national labor policy favoring free and private collective bargaining," *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 236 (1996), requires space for unions and employers to pursue labor-related goals without the "judicial use of antitrust law to resolve labor disputes." *Id*. at 236-37. The circuits have therefore applied consistent principles in uniformly holding that where unions pursue a legitimate labor objective, the antitrust laws do not apply. *Conn. Ironworkers Emp'rs Ass'n* v. *New England Reg'l Council of Carpenters*, 869 F.3d 92, 97 (2d Cir. 2017); *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, then-J.).[1]

Petitioner plainly disagrees with the Ninth Circuit over whether the exemption applies on the particular facts here—i.e., whether the union was, in fact, pursuing a legitimate labor objective. But that factbound

---

[1] There are two primary labor exemptions—"statutory" and "nonstatutory." App. 72a & n.9. The statutory labor exemption applies only where unions act unilaterally and does not shield collective bargaining agreements from antitrust liability. *United States* v. *Hutcheson*, 312 U.S. 219, 231-32 (1941). This petition involves only the "nonstatutory exemption," which provides immunity to "some union-employer agreements." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

disagreement does not merit this Court's review for at least three reasons.

First, the Ninth Circuit's decision in this case neither creates nor implicates a circuit split. Although petitioner correctly asserts (at 23) that the Second and Ninth Circuits have adopted different formulations of the test for the exemption, any difference is not implicated in this case. That split—which this Court has declined several times to resolve—involves whether the factors of the test are required elements or a balancing test. There is no disagreement, however, about the factors themselves—including the primary effects of the collective bargaining agreement, the legitimacy of the labor goals pursued by respondents, and the mandatory subject matter of the bargain. See App. 73a-78a; *Local 210, Laborers' Int'l Union of N. Am.* v. *Labor Relations Div. of Associated Gen. Contractors of Am.* (*Local 210*), 844 F.2d 69, 79-80 (2d Cir. 1988). At most, the Second Circuit sometimes looks at its approach as a balancing test, rather than a three-element rule—but petitioner offers no reason to believe that any such difference would have led to a different result in this case.

Second, the Ninth Circuit's decision is entirely consistent with this Court's precedents. Petitioner's contrary claim (at 17) reflects at most disagreement with the Ninth Circuit's balancing of the relevant factors in this particular case, not any divergence between the Ninth Circuit and this Court. That may be why the petition hardly engages with the Ninth

Circuit's legal analysis—which closely tracks this Court's decisions.

Third, petitioner's somber predictions of dire consequences (at 28) are vastly overblown. The legal analysis applied in this case has been applied for decades with no trace of the antitrust harms petitioner predicts (at 17). And this case would be a poor vehicle in all events, as it would require this Court to resolve several predicate issues not reached by the Ninth Circuit—including the complex, factbound issue whether the agreement is, in fact, illegal. Certiorari should be denied.

1. Petitioner ICTSI Oregon, Inc. is a member of respondent Pacific Maritime Association (PMA), "a multi-employer collective bargaining association representing many types of maritime employers who hire" longshoremen and other types of dockworkers. App. 59a-60a. These workers handle cargo and perform related functions at marine terminals, where cargo is loaded and unloaded from seagoing vessels. *Ibid*. On behalf of its members, PMA entered into a collective bargaining agreement with respondent the International Longshore and Warehouse Union (ILWU), which represents the longshoremen and other kinds of dockworkers that PMA members employ. *Ibid.* As parties to the collective bargaining agreement, PMA and the ILWU agreed that the ILWU longshoremen would perform PMA members' "reefer" work—work involving managing and monitoring refrigerated shipping containers—at almost every West Coast container terminal, including the one at issue here. *Ibid.*

2. ICTSI joined PMA in 2011, agreeing to be bound by the ILWU-PMA collective bargaining agreement. App. 7a. Soon after, ICTSI began operating Terminal 6 at the Port of Portland, and the ILWU sought to perform the reefer work at the terminal per the collective bargaining agreement. App. 59a-60a; Pet. at 5. ICTSI refused to assign the work to the ILWU, arguing that its lease with the Port disabled it from assigning the work at all, let alone away from another union, the International Brotherhood of Electrical Workers (IBEW). Pet. at 5, 7. Per the ILWU-PMA agreement, a committee met in May 2012 to resolve the disputed work assignment arising from ICTSI's purportedly contradictory contractual obligations, and it subsequently ordered ICTSI to assign the work to the ILWU. ICTSI refused. *Ibid*. The ILWU sought and eventually prevailed in arbitration; ICTSI continued to refuse, despite a potential $50,000 daily fine. App. 61a. After losing in arbitration, ICTSI filed an unfair labor practice charge with the National Labor Relations Board to resolve the work-assignment dispute between the unions. *Ibid.*

3. While the Board's decision was pending, the ILWU and PMA sought an order from the district court requiring ICTSI to comply with the committee's decision to assign the work to the ILWU. App. 61a. ICTSI counterclaimed, alleging *inter alia* that the ILWU and PMA violated Sections 1 and 2 of the Sherman Act by agreeing to assign reefer work to the ILWU and by attempting to enforce that agreement. App. 61a-62a. ICTSI argued that the agreement—to which ICTSI

was also a party—gave the ILWU a monopoly over longshoremen work in West Coast ports and that both PMA and the ILWU committed "various illegal anti-competitive acts" to enforce that agreement. App. 62a & n.2.

4. The district court stayed most of the parties' claims pending the Board's resolution of the underlying labor dispute. But the district court granted the ILWU's and PMA's joint motion to dismiss ICTSI's antitrust counterclaims. App. 63a.

The district court concluded that a shared monopoly claim between a union and employer is "not viable under Section 2 of the Sherman Act and that the alleged anticompetitive conduct was immunized from antitrust law under the *Noerr-Pennington* doctrine, the statutory labor exemption, and the nonstatutory labor exemption." *Ibid.* The district court then granted ICTSI's motion for entry of a partial final judgment under Federal Rule of Civil Procedure 54(b), dismissing ICTSI's antitrust counterclaim—while all other issues remained stayed. *Ibid.* (The Board eventually preferred ICTSI's lease with the Port over ICTSI's agreement with the ILWU and therefore determined that the ILWU unlawfully pressured ICTSI to assign the reefer work to longshoremen. *Int'l Longshore & Warehouse Union*, 363 NLRB No. 12 (Sept. 24, 2015).)

5. Aware of the Board's decision, the Ninth Circuit affirmed in a unanimous opinion by Judge O'Scannlain, joined by Judges Clifton and Nguyen. Judge O'Scannlain's opinion first articulated the

"*Mackey* test" for determining the exemption's scope, a test derived from the Eighth Circuit's decision in *Mackey* v. *National Football League*, 543 F.2d 606, 614 (8th Cir. 1976), and adopted by the Ninth Circuit in *Continental Maritime of San Francisco, Inc.* v. *Pacific Coast Metal Trades District Council*, 817 F.2d 1391 (9th Cir. 1987). App. 73a. The opinion highlighted the three requirements for the exemption to apply: "(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 collective bargaining." *Phoenix Elec. Co.* v. *Nat'l Elec. Contractors Ass'n*, 81 F.3d 858, 861 (9th Cir. 1996).

Petitioner argued that the second prong of the test was not satisfied here because an agreement cannot concern "mandatory subjects of collective bargaining" if it later proves to violate the labor laws. App. 74a. The Ninth Circuit disagreed, relying on then-Judge Kennedy's opinion in *Richards*, 810 F.2d at 904. App. 75a-78a.

As *Richards* explained, "[e]ven if [certain] conduct were a violation of the labor law, [if] it would bear such a close and substantial economic relation to a union's legitimate [ends] that it falls well within the purpose and coverage of the exemption," then it may still qualify. App. 75a (quoting *Richards*, 810 F.2d at 904). Because conduct that violates labor law falls outside the exemption only when it does not pursue legitimate

ends and poses "anticompetitive risks *other than* those related to a reduction in competitive advantages based on differential wages or working conditions," not all illegal conduct is barred from immunity. App. 75a-76a (emphasis added) (quoting *Richards*, 810 F.2d at 906).

Applying the *Mackey* three-factor test, the Ninth Circuit ultimately concluded that the exemption applied because (1) "the alleged conduct primarily affects the parties to the agreement [since] ICTSI is a member of PMA and a party to the CBA"; (2) "the alleged anticompetitive agreement * * * concerns a mandatory subject of collective bargaining," namely "work assignments"; and (3) the activity "was the result of a bona fide, arm's-length agreement." App. 82a-83a. The Ninth Circuit therefore affirmed the district court's decision that "the nonstatutory exemption shields the alleged" conduct "of ILWU and PMA from antitrust scrutiny." App. 84a-85a.

REASONS FOR DENYING CERTIORARI

I. The Ninth Circuit's Decision Neither Creates Nor Deepens Any Split Implicated By This Case.

The petition correctly asserts (at 23) that the Second and Ninth Circuits apply different formulations of the test for determining when the labor exemption should apply. That divergence, however, goes back decades, and this Court has recently and repeatedly denied petitions raising the same or substantially the

same question—likely because any difference is more theoretical than real, reflecting the application of essentially the same legal standard to different facts and circumstances. But even assuming the existence of a (stale) split, it is not implicated in this case, making it a poor vehicle in all events.

A. This Case Presents No Conflict For This Court To Resolve.

Petitioner's assertion (at 23) of a split arises from the Ninth Circuit's acceptance of the Eighth Circuit's *Mackey* test and the Second Circuit's rejection of that test in favor of its own formulation, also substantially followed by the Third Circuit. Pet. at 26 (Third Circuit has endorsed a formulation "similar to that of the Second Circuit"). This "disagreement," however, is more theoretical than real—which may be why this Court has repeatedly declined to consider it. The two "tests" ask essentially the same question: whether the relevant agreement bears a close relationship to a legitimate labor-law goal. The most that can be said for petitioner's claim to a circuit split is that the Ninth Circuit's *Mackey* test involves a three-element requirement, whereas the Second Circuit views its test as a "balancing test"—not the bright-line rule disqualifying all illegal actions petitioner portrays it to be (at 23). See *Clarett* v. *Nat'l Football League*, 369 F.3d 124, 133-34 (2d Cir. 2004) (citing *Local 210*, 844 F.2d at 80 n.2). Either way, the legal inquiry is substantially the same—and intensely factbound.

Petitioner's assertion of a conflict (at 16, 23) rests on its view that the Ninth Circuit "rejected th[e] framework" of limiting the exemption to agreements that "further goals that are protected by national labor law and are within the scope of traditionally mandatory subjects of collective bargaining." But the Ninth Circuit considers exactly that in applying the *Mackey* test. App. 75a-78a. In doing so, the Ninth Circuit determines whether an agreement restraining trade is shielded from antitrust law by asking (1) whether it "primarily affects the parties to the agreement" or others, (2) whether "the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining," and (3) whether the bargaining itself was bona fide and "arm's length." *Phoenix Elec.*, 81 F.3d at 861.

The Ninth Circuit has also clarified—in *Richards*, 810 F.2d at 904-06, and again below, App. 75a-76a—that anticompetitive union-employer activity is only immune from antitrust laws if it involves the pursuit of legitimate labor ends and the resulting harms follow naturally from loss of competition over wages and working conditions. Ninth Circuit case law is clear: a collective bargaining agreement must pursue legitimate labor ends and inflict certain antitrust injury as a consequence of those ends to qualify for exemption under *Mackey*. *Ibid.*

The Second Circuit's analysis turns on the same inquiries. Under *Local 210*, 844 F.2d at 79-80, the Second Circuit considers two primary factors: "First, 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." *Id.* at 79. "Second, the agreement must not impose a 'direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions [that results from collective bargaining agreements].'" *Id.* at 79-80 (alterations in original) (quoting *Connell*, 421 U.S. at 625).

The analysis is largely the same in the Third Circuit, which asks whether the anticompetitive "[r]estraints operat[e]" to "eliminate competition in the labor market" and whether the activity in question services legitimate "objectives" or goals. *Altemose Constr. Co.* v. *Bldg. & Constr. Trades Council of Phila. & Vicinity*, 751 F.2d 653, 659-60 (3d Cir. 1985). That court has also emphasized the importance that the activity in question serve a "legitimate union interest." *Consol. Express, Inc.* v. *N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), vacated and remanded on other grounds, *Int'l Longshoremen's Ass'n* v. *Consol. Express, Inc.*, 448 U.S. 902 (1980).

Whatever the differences in terminology, both formulations of the test ask substantially the same questions: whether the restraint of trade arises because workers have acted collectively to negotiate their working conditions, and whether the increased costs resulting are in some part those that the labor laws contemplate—higher wages, better working conditions, job security, and the like for the bargaining-unit

workers. A labor agreement violating the antitrust laws to pursue these legitimate labor-law goals need not fear antitrust scrutiny. *Local 210*, 844 F.2d at 79-80.

1. As petitioner essentially concedes (at 3), both formulations of the test share the prong requiring an agreement to be "within the scope of traditionally mandatory subject matters of collective bargaining." *Local 210*, 844 F.2d at 79. Indeed, the two formulations of the test mirror each other virtually word-for-word in this respect. See App. 73a-74a (asking whether "the alleged agreement concern[s] a mandatory subject of collective bargaining"). Petitioner agrees (at 3) that both formulations capture the same thing with this prong, including "wages, hours, [and] working conditions."

Of course, petitioner disagrees (at 3, 20) with the Ninth Circuit's application of that prong in this case when the court concluded that "the alleged anticompetitive agreement between ILWU and PMA giving rise to the[ir] Joint Activity concerns [the] mandatory subject of * * * work assignments." App. 83a. Petitioner appears to assume that an agreement on a "mandatory" subject of bargaining (e.g., work assignments) turns into one on an "illegal" subject if it is found to have been applied unlawfully. See App. 74a. But petitioner's position conflates two familiar concepts: (i) inherent illegality, and (ii) illegality only in particular circumstances.

A price-fixing cartel, for example, is inherently illegal. *N. Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). But a private association's safety-standards regime may be permissible when based on objective merits, but unlawful if exercised by biased members to drive a particular product from the market. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988). Similarly, a prior restraint prohibiting a given speaker from expressing a political message is illegal in itself. *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam). But a city's prohibition on demonstrations in public parks may be unlawful only if specifically enforced against only one political party. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791-92 (1989). And an agreement between an employer and a union to engage in a secondary boycott is illegal on its face, 29 U.S.C. § 158(e), while a union's effort to enforce the otherwise-lawful terms of a labor agreement may be unlawful only if those terms are applied in a way that would result in a secondary boycott. 29 U.S.C. § 158(b)(4)(ii)(B).

Petitioner provides no support for its counterintuitive argument conflating these two concepts (e.g., at 20), and does not seem to contemplate that activity by a labor union and employer later found to violate the NLRA may still require an affirmative answer to the question whether the collective bargaining agreement "concerns" a traditional labor-negotiations subject. See Pet. at 23. At most, petitioner objects to how the Ninth Circuit applied this prong, which is the same in both formulations of the test—namely, whether the

collective bargaining agreement at issue pursued a subject typically sought through collective bargaining.

2. Both the Second and Ninth Circuits also look to the nature of the anticompetitive harm resulting from the challenged agreement and activity. This inquiry—ignored by petitioner when articulating the Second Circuit's formulation of the test—is equally relevant in both circuits. App. 77a-78a.

Petitioner twice describes the Second Circuit's test as stating that an agreement "must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects," Pet. at 16, 23 (quoting *Local 210*, 844 F.2d at 79), but does not include the "[s]econd" requirement of the test—the nature of the anticompetitive harm. *Local 210*, 844 F.2d at 79-80. In fact, petitioner implies (at 16), in an attempt to show the circuits are split, that the Ninth Circuit's focus (at App. 77a) on the nature of the anticompetitive effects of the relevant conduct demonstrates a *difference* between the circuits.

Not so. The Second Circuit focuses on those effects in performing exactly the same inquiry that the Ninth Circuit conducted below in determining whether the anticompetitive harms would "follow naturally from the elimination of competition over wages and working conditions." App. 77a-78a (quoting *Connell*, 421 U.S. at 625); *Local 210*, 844 F.2d at 80 (quoting same). Not only is both circuits' inquiry into the "actual and potential anticompetitive effects of the agreement" in line with this Court's decisions, see *Richards*, 810 F.2d at

906, but it also hews closely to the *Mackey* test's first prong's focus on the "primar[]y [e]ffects" of the anti-competitive restraint. *Mackey*, 543 F.2d at 614. Once again, the circuits focus on the same question—petitioner merely disagrees with the answer it yielded in this particular case.

3. Likewise, contrary to petitioner's arguments (at 23-24), both the Second and Ninth Circuits ask whether the activity in question is in pursuit of legitimate labor goals.

Petitioner relies heavily on the Second Circuit's requirement that an exempt agreement must "further goals that are protected by national labor law." Pet. at 16, 23 (quoting *Local 210*, 844 F.2d at 79). As the Second Circuit recently explained, these protected goals must be "legitimate labor goals." *Conn. Ironworkers*, 869 F.3d at 97. But the Ninth Circuit does not disagree. It too requires a "legitimate central purpose" rooted in national labor policy, such as an attempt to secure work or improve "wages and working conditions." *Richards*, 810 F.2d at 904-05 (Kennedy, J.); see also *Cal. ex rel. Harris* v. *Safeway*, 651 F.3d 1118, 1131 (9th Cir. 2011) (en banc) (asking whether an agreement was either "approved or *regulated by* labor law" (emphasis added)).

Thus, both circuits require an exempt agreement to "further legitimate labor goals." The difference, if any, is that the Ninth Circuit has explained that some actions later determined to violate the labor laws may still have been undertaken to pursue legitimate goals,

Richards, 810 F.2d at 906, while the Second Circuit has not yet addressed that specific question. Petitioner asserts (at 23-24) that the Second Circuit's labor-goals requirement includes only actions lawful under labor law, but provides no authority for that assertion. Indeed, the Second Circuit in *Connecticut Ironworkers* made clear that the legitimacy inquiry should focus on how the agreement is "primarily used," recognizing that the legitimacy of the *primary* function is what matters—even if some illegal activity results. 869 F.3d at 108. But as then-Judge Kennedy explained in *Richards*, and as the Ninth Circuit reiterated in this case, legitimate goals are not always vitiated by subsequent illegal activities. *Richards*, 810 F.2d at 905-06; App. 75a-76a.

Moreover, although the petition does not acknowledge it, both the Second and Ninth Circuits look not only to the legitimacy of the labor goals implicated by the activity in question, but also to the anticompetitive effects of that activity. *Richards*, 810 F.2d at 904-06; *Local 210*, 844 F.2d at 79-80. Petitioner's argument (at 23) that "the Ninth Circuit does not examine whether the agreement or conduct at issue 'furthers the goals that are protected by national labor law'" is undercut by the fact that then-Judge Kennedy in *Richards*, 810 F.2d at 904-05, and Judge O'Scannlain in this case, App. 75a, 78a, asked precisely that question. Indeed, *Richards* specifically "recognize[d] that in some cases a violation of labor laws may involve conduct whose consequences are so far-reaching that it falls outside the exemption." 810 F.2d at 906.

The petition's suggestion that the nature of the goals and conduct at issue play no role in the Ninth Circuit's analysis is thus mistaken. The legitimacy of the labor goals and the "consequences" of the related activity—just like in *Connell*, 421 U.S. at 618, 623—remain paramount in the Ninth Circuit's analysis. At most, the Ninth Circuit has determined that the legitimate-goals requirement does not disqualify all activity later found illegal, while the Second Circuit—conducting substantially the same inquiry—has not yet definitively answered the question.[2]

Perhaps the Second Circuit—or another circuit—will one day address the question and create a conflict. Until then, no real conflict exists and this Court's review is unwarranted. The Second and Ninth Circuits focus on the same inquiry—whether the goals sought

---

[2] Another pending petition for a writ of certiorari makes largely the same argument petitioner does here: that the Second Circuit's statement in *Connecticut Ironworkers* that the labor activity must have a legitimate labor purpose and involve a mandatory subject of collective bargaining *necessarily* means that *all* illegal activity is disqualified from the exemption. See Petition for Writ of Certiorari, *New England Reg'l Council of Carpenters* v. *Conn. Ironworkers Emp'rs Ass'n*, No. 17-933, at 27-28 (citing *Conn. Ironworkers*, 869 F.3d at 108). But that is not necessarily the case. The Ninth Circuit looks to legitimacy and mandatory subjects of collective bargaining just like the Second Circuit. See App. 78a, 82a-83a. Then-Judge Kennedy and Judge O'Scannlain have both concluded for the Ninth Circuit that *some* illegal activity may still qualify under both of those tests. *Richards*, 810 F.2d at 904-05; App. 75a, 78a. That the specific activity in *Connecticut Ironworkers* may not qualify as a legitimate goal or a mandatory subject of bargaining does not implicate any disagreement here. See 869 F.3d at 109 (remanding for further factual development).

by an agreement or actions supporting that agreement are *legitimate* labor goals and whether their effects would be wholly unrelated to labor policy. That the terminology of the analysis may differ, or that the analysis may lead to different results based on different facts, provides no basis for this Court's review.

What is more, the legal inquiry is itself intensely factbound under either formulation of the test. As the Ninth Circuit explained below, the result in any given case is attributable to factual distinctions between the specific *goals* and *effects* of the anticompetitive activities in different cases. App. 78a (explaining that the goals and effects at issue here are protected by the exemption). So too with the Second and Third Circuit cases cited in the petition (at 23-27). The recent case that purportedly highlights the circuit split, Pet. at 24 (citing *Conn. Ironworkers*, 869 F.3d at 107), itself noted the need for case-specific analysis and remanded the case for more factual development of the question whether the clauses at issue were being used to "further a[ ] legitimate labor goal." *Conn. Ironworkers*, 869 F.3d at 108 (noting the existing record was "insufficient" to make that determination). The Second Circuit's opinion in *Local 210* similarly emphasized the factbound nature of courts' inquiries into the goals and effects of union anticompetitive activity. 844 F.2d at 80-81. And the Third Circuit has also noted that courts must inquire into "the labor parties' objectives" or goals in each particular case. *Altemose Constr. Co.*, 751 F.2d at 659-60 (remanding for more factual development). That courts might reach different conclusions

about whether different agreements and different activities further legitimate goals for purposes of the exemption does not amount to a conflict that requires this Court's attention.

B. Any Difference Between The Second And Ninth Circuits Is Not Implicated Here.

Aside from conjecture that the Second Circuit would deem all agreements in violation of labor law as outside the exemption (Pet. 24-25), the petition contains no argument that petitioner would have fared differently under the Second Circuit's test.

After all, the Ninth Circuit concluded that the collective bargaining agreement satisfies all three of the Second Circuit's balancing-test factors. See App. 78a, 82a-83a. First, the Ninth Circuit concluded that the agreement and activity primarily affected the parties to the agreement and concerned the mandatory bargaining subject of work assignments, App. 82a-83a, and thus involved "legitimate goals of organizing workers and standardizing working conditions." App. 78a (quoting *Connell*, 421 U.S. at 624-25); *Local 210*, 844 F.2d at 79 (requiring the agreement to "further goals that are protected by national labor law"). Second, the Ninth Circuit determined that the agreement dealt with a mandatory subject of bargaining. App. 83a; *Local 210*, 844 F.2d at 79 (requiring "mandatory subjects of collective bargaining"). And third, the Ninth Circuit concluded that it would lead only to anticompetitive harms following "naturally from the elimination of

competition over wages and working conditions." App. 78a (quoting *Connell*, 421 U.S. at 624-25); *Local 210*, 844 F.2d at 79-80 (quoting *Connell* for same inquiry).

Petitioner's argument is not that the Second Circuit would have balanced the Ninth Circuit's factors differently; it is that the Second Circuit would have made different determinations for each factor. But that is a request for error correction, and one that does not implicate the only way in which the Second Circuit's test could possibly differ from the Ninth's—i.e., as a balancing test—so any possible difference between the circuits is not implicated here. This Court's review is unwarranted for that reason, too.

II. The Ninth Circuit's Decision Is Consistent With This Court's Cases And Correct Besides.

Petitioner posits a conflict with this Court's cases that boils down to an argument that the Ninth Circuit's decision is wrong on the merits. See Pet. at 17-23. But there is no conflict with this Court's cases to resolve, and no error in the Ninth Circuit's decision to correct.

If anything, petitioner's merits argument highlights the absence of any conflict. Petitioner forthrightly acknowledges (at 21) that it relies on inferences it finds "[i]mplicit in the Court's holding[s]." At most, then, any conflict is merely "implicit"—not the type of express disagreement that this Court typically grants review to resolve. At bottom, petitioner's real complaint is that this Court has not yet adopted the rule

petitioner seeks. See Pet. at 18-22 (discussing this Court's cases).

It is petitioner's merits disagreement with the Ninth Circuit—not any conflict with this Court's cases—that is truly at issue here. Petitioner asserts that the purpose of the collective bargaining agreement and joint activities was *not* "to achieve goals that * * * involve mandatory subjects of bargaining (wages, hours and terms and conditions of employment)." Pet. at 18. But the Ninth Circuit came to precisely the opposite conclusion. App. 78a. Indeed, the petition's characterization of the joint activities as "work expansion" (at 24-25, 30) further confirms the existence of a merits disagreement with the Ninth Circuit—not a conflict with this Court's cases. In deciding that this case concerns the mandatory bargaining subject of "work assignments," App. 83a, the Ninth Circuit did not break from this Court's "implicit" guidance—it simply reached a factbound conclusion with which petitioner disagrees.

That reality is reflected in the petition's cursory analysis of Judge O'Scannlain's thoughtful discussion of this Court's cases. The petition asserts without citation (at 22) that the opinion's distinction between employer-only decisions (discussed by this Court in *Brown*) and agreements between employers and unions (at issue here) "makes no difference."[3] But aside

[3] Judge O'Scannlain's opinion acknowledged that *Brown*'s conclusion that the exemption applies to actions taken exclusively by employers was driven, in part, by the fact that those actions were legal under labor law. App. 81a. After finding a relevant

from having no basis in this Court's decisions to claim that the Ninth Circuit departed from them in drawing such a distinction, it certainly "makes [some] sense" (Pet. 22) to treat labor decisions by employers *against* unions differently than labor decisions made jointly by employers *with* unions—especially given the main purpose of immunity here is to protect the "collective bargaining process" from the application of antitrust law. *Brown*, 518 U.S. at 234. Indeed, that is likely why the exemption existed for over 30 years before this Court extended it to employer-only actions. See *id.* at 243-44.[4]

In all events, this Court has never held that legality under federal labor law is a necessary condition for the exemption—so the Ninth Circuit could not have departed from this Court's cases in rejecting petitioner's preferred rule. Nor did the Ninth Circuit's departure

---

difference between employer-only collusion and collusion among employers and unions representing the employees, however, the Ninth Circuit correctly concluded that nothing in *Brown*'s reasoning requires *all* actions to be legal to qualify for the exemption. *Ibid.*

[4] Petitioner argues (at 22) that *Brown* called the *Mackey* test into question, but the Ninth Circuit correctly rejected that argument. *Brown* involved a straightforward application of several *Mackey* factors to the new area of employer-only action. *Brown*, 518 U.S. at 250 (pointing to *Mackey* test prongs of mandatory subjects of collective negotiation and actions concerning parties to the negotiation, and requiring the conduct to "gr[o]w out of" the collective negotiation process). While *Brown* also noted the employer actions were legal under labor law, App. 80a-81a, the Court never suggested, much less held, that legality was necessary for the exemption to apply—or even that the factor need be *considered* in the union-employer joint activity context. App. 81a-82a.

diverge from this Court's precedent in any other way. To the contrary, the Ninth Circuit's application of the *Mackey* test correctly implemented this Court's holdings. That test relies on principles articulated by this Court as far back as *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965): (1) a collective bargaining agreement cannot be solely directed at entities not party to the agreement, *id.* at 665; *Mackey*, 543 F.2d at 614; (2) the agreement must concern mandatory collective bargaining subjects like "wages"; and (3) it must be a bona fide collective bargaining agreement. *Pennington*, 381 U.S. at 664; *Mackey*, 543 F.2d at 614. Likewise, this Court in *Amalgamated Meat Cutters & Butcher Workmen* v. *Jewel Tea Co.* emphasized the same requirements—an agreement that must (1) pursue "labor union policies," not the interests of outside groups; (2) regard mandatory subjects of collective bargaining; and (3) result from "bona fide, arm's-length bargaining." 381 U.S. 676, 689-90 (1965); see also Pet. at 3.

This Court's decision in *Connell* is to the same effect. There, this Court focused on the inquiries underlying the first and second *Mackey* prongs when it refused to apply the exemption to an agreement that (1) directly restrained the whole business market and "indiscriminately excluded nonunion subcontractors," (2) even though the competitive advantage was not derived from a mandatory subject of collective bargaining. *Connell*, 421 U.S. at 623. *Connell* further considered an additional factor also recognized by *Mackey* and applied by both the Ninth and Second Circuits:

that the anticompetitive harm must "follow naturally from elimination of competition over wages and working conditions." *Id.* at 635. And this Court in *Brown* reiterated substantially the same three factors in extending immunity to employer actions. 518 U.S. at 250 (requiring mandatory subjects of collective negotiation and actions concerning parties to the negotiation, in addition to noting that the employer actions were legal).

The *Mackey* test is thus entirely consistent with this Court's cases, and the Ninth Circuit's factbound application of it in this case is correct and creates no conflict for this Court to resolve.

III. Any Split Is Stale And This Case Is A Poor Vehicle For Resolving It.

Petitioner warns (at 28) that if permitted to stand, the Ninth Circuit's decision in this case "will disrupt antitrust law and expand application of the nonstatutory labor exemption" and thereby "undermine[] the purposes of both antitrust and labor policy." But the Ninth Circuit decided the question presented 30 years ago in *Richards*, which the panel straightforwardly applied in this case. There is no reason to think disruption will now occur, some 30 years after *Richards* and 40 years after the first purported disagreement among the circuits on the required-elements versus balancing-test approach. See Pet. at 26 (citing a 1979 Third Circuit case "endors[ing] a position similar to that of

the Second Circuit"); Pet. at 24 (citing the Eighth Circuit's 1976 decision in *Mackey*).

Moreover, this Court has recently and repeatedly denied petitions raising the same or substantially the same question—not implicated here—concerning the required element versus balancing factor disagreement between the Second and Ninth Circuits—including a Second Circuit case upon which petitioner relies. Pet. at 24 (citing *Clarett*, 369 F.3d at 133); see also *Prime Healthcare Servs., Inc.* v. *SEIU*, No. 15-1448, at 23 (U.S. 2016), cert. denied, 136 S. Ct. 2532 (2016); *Clarett* v. *Nat'l Football League*, No. 04-910, at 5, 14 (U.S. 2004), cert. denied, 544 U.S. 961 (2005); *Grinnell Corp.* v. *Road Sprinkler Fitters Local Union No. 669*, No. 97-2040, at 19-25 (U.S. 1998), cert. denied, 525 U.S. 825 (1998). There is no reason a different result should obtain here.[5]

In all events, this case is a poor vehicle for resolving any disagreement or uncertainty. For one thing, this appeal arose from a disputed partial final judgment under Rule 54(b) that left the merits of the predicate labor-law issues unresolved. As a result, this Court would have to resolve those issues—including the legality of the collective bargaining agreement—

---

[5] The *Clarett* petitioner argued that the Second Circuit's test was actually more *lenient* than the *Mackey* test—predicting that the Second Circuit would immunize *more* activity from antitrust scrutiny than circuits following *Mackey*. Petition for Writ of Certiorari, *Clarett*, No. 04-910, at 10-14. Petitioner's argument here (e.g., Pet. at 28) that the Second Circuit is more *strict* merely highlights the lack of any clean split.

in the first instance for petitioner to prevail. For another thing, as the Board put it, this case involves the "highly complex and very technical labor dispute," *Int'l Longshore & Warehouse Union*, 363 NLRB No. 12 (Sept. 24, 2015), about whether the Port or petitioner (or both) have control over the reefer work at Terminal 6. See Pet. at 5-7; App. 59a-61a. This case therefore presents several splitless, factbound issues that would need to be taken up before this Court can resolve the question presented. Certiorari is unwarranted for that reason, as well.

CONCLUSION

The petition for writ of certiorari should be denied.

January 26, 2018

Respectfully submitted,

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001
allyson.ho@morganlewis.com

JONATHAN C. FRITTS
JUDD E. STONE
JAMES D. NELSON
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

CLIFFORD D. SETHNESS
THOMAS M. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Avenue,
22nd Floor
Los Angeles, California 90071

Counsel for Respondent
Pacific Maritime Association