No. 17-770

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

ICTSI's claim alleges that ILWU and PMA violated the antitrust laws by conspiring to seize for ILWU members work performed for decades by public employees of the Port of Portland ("Port"), which was not signatory to the ILWU-PMA labor contract. As part of that conspiracy to expand the ILWU-PMA bargaining unit, ICTSI alleged that ILWU violated the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, by engaging in work slowdowns and other tactics to coerce ICTSI to force the Port to relinquish its control over the disputed work. The National Labor Relations Board ("NLRB") agreed that ILWU's conduct violated Section 8(b)(4)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(B), and the D.C. Circuit enforced the NLRB's orders.[1] The PMA joined in applying coercion by threatening fines of $50,000 per day against ICTSI unless it somehow forced the Port to assign the work to ILWU, work that ICTSI did not control.

The consequences of the PMA-ILWU conspiracy and ILWU's unlawful secondary conduct were devastating to the Port, ICTSI and the region, leading to the eventual shutdown of the only container terminal in Oregon. Yet, the Ninth Circuit held that the nonstatutory labor exemption shields this conspiracy from antitrust scrutiny. This holding cannot be reconciled with this Court's precedent; it also creates a conflict with other circuits and is wrong.

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[1] *See 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).

The opposition brief seeks to distract this Court from the pure question of law presented here by claiming that all circuits agree on the relevant legal test and that ICTSI challenges only the application of that test here. Respondent is wrong. ICTSI agrees that the nonstatutory labor exemption from the antitrust laws applies "where unions pursue a legitimate labor objective." Opp. 1. But the legal issue here is whether a union-employer agreement to engage in secondary conduct that violates the NLRA and does not involve a mandatory subject of bargaining can ever be characterized as pursuit of a "legitimate labor objective." The court below held, as a matter of law, that such conduct is immune. Neither this Court nor the other courts of appeals would agree. As the Petition shows (17-23), the Ninth Circuit's view—that a union-employer agreement to employ unlawful tactics is immune from antitrust liability—contravenes this Court's precedent. The Court crafted this exemption to harmonize antitrust and labor law; it makes no sense to interpret it to protect union-employer agreements that violate labor law and policy.

Moreover, the Second and Third Circuits do not embrace the Ninth Circuit's position. Contrary to respondent, these courts would not have dismissed ICTSI's antitrust claim. *See* Pet. 24-27 & n.7. On facts strikingly similar to those alleged here, the Second Circuit held "that work expansion—as opposed to preservation—is *not* a traditionally mandatory subject of collective bargaining or a legitimate goal for the purposes of determining whether the nonstatutory exemption shields particular conduct from antitrust scrutiny." *Conn. Ironworkers Employer's Ass'n v. New England Reg'l Council of Carpenters*, 869 F.3d 92, 108 (2d Cir. 2017) ("*Connecticut Ironworkers*") (emphasis in original).

Finally, this case is an excellent vehicle to resolve the question presented. As a matter of law, the court below held that the nonstatutory labor exemption shields respondent from ICTSI's claim, despite allegations of unlawful, unprotected conduct in violation of Section 8(e), 29 U.S.C. §158(e), and Section 8(b)(4)(B) of the NLRA. There is no factual dispute. Respondent tries to muddy the water by arguing that its collective bargaining agreement with ILWU furthers a legitimate work preservation objective, which is a mandatory subject of bargaining. But ICTSI does not challenge the work preservation provision in the PMA-ILWU agreement as it applies to signatory employers that control the work sought to be preserved. Instead, ICTSI challenges the additional unlawful Coast Labor Relations Committee agreement between PMA and ILWU, which sought to extend the work preservation provisions of the master agreement in an unlawful manner. This additional agreement sought to coerce ICTSI, which had no right to control the disputed work, into forcing the Port—which was *not* a signatory to the PMA-ILWU agreement—to relinquish control of that work and permit ILWU members to perform it in lieu of the Port's unionized electricians.

ARGUMENT

I. THIS COURT HAS *NEVER* APPROVED APPLICATION OF THE NONSTATUTORY EXEMPTION TO DEFENDANTS ENGAGED IN CONDUCT UNLAWFUL UNDER THE NLRA.

This Court's precedent makes clear that defendants that receive the benefit of nonstatutory immunity from the antitrust laws must be engaged in conduct that is lawful and protected—not prohibited—by the NLRA. Indeed, in *Kaiser Steel Corp. v. Mullins*, 455

U.S. 72 (1982) ("*Kaiser Steel*"), the Court stated that in order "to determine whether the agreement [between the employer and union] was immune from the antitrust laws," it was "*necessary*" to determine the legality of the conduct under federal labor law. *Id.* at 85 (citing *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) ("*Connell*") (emphasis added)). Respondent fails to cite *Kaiser Steel* in its opposition, let alone explain away this statement.

Similarly, in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 238 (1996), the Court tied application of the exemption to a determination that the conduct at issue was legal and protected under federal labor law, as the court below recognized. App. 80a-81a. Respondent speculates that a finding of legality is required for employer-only actions, but not for joint employer-union actions, Opp. 20-21. This Court has never hinted at such a distinction, and it cannot be reconciled with the purpose of the exemption "to give effect to federal labor laws and policies" and not to countenance their violation. *Brown*, 518 U.S. at 237.

Respondent further notes that *Brown* did not *expressly hold* that legality was necessary for the exemption to apply, Opp. 21, n.4. But respondent overlooks the much more significant fact that this Court has *never* applied the nonstatutory exemption to conduct that violates federal labor law. Nor has the Court ever suggested that the exemption would embrace such conduct. Instead, in *Connell*, this Court found that an agreement that violated Section 8(e) of the NLRA was not entitled to nonstatutory immunity; and the Court's decisions in *Kaiser Steel* and *Brown* also strongly support the conclusion that legality under federal labor law is required. *See* Pet. 20-23; *see also*

Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (conditioning bargaining on non-mandatory subject constituted an unfair labor practice unprotected by the nonstatutory immunity).

II. THE COURTS OF APPEALS ARE DIVIDED.

Respondent asserts that (1) the circuits are not divided on the issue presented, (2) the outcome here would have been the same under the legal tests employed by other circuits; and (3) any split is stale. Opp. 7-11, 18-19. Respondent is wrong on all counts.

1. Respondent concedes that the "balancing test" applied by the Second Circuit (and by implication the Third Circuit) differs from the three-part *Mackey* test[2] applied by the Ninth Circuit here. Opp. 8. But it incorrectly claims that the differences in the circuits' tests are immaterial and do not affect outcomes. Opp. 18-19.

In determining whether a defendant is entitled to the benefit of the nonstatutory exemption, both the Second and Third Circuits require that the conduct at issue be lawful under federal labor law. As set forth above, this position is required by this Court's cases. *See* Pet. 20-23; *supra* at 3-4. The Second Circuit states, for example, that the defendant's actions must "further goals that are protected by national labor law." *Connecticut Ironworkers*, 869 F.3d at 106; *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*"). In holding that a defendant's

[2] *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976)

conduct was not protected, the Third Circuit explained that its actions were "condemned by national labor policy" and would not serve a "legitimate union interest." *Consolidated Express, Inc. v. NY Shipping Ass'n*, 602 F.2d 494, 518 (3d Cir. 1979), *vacated on other grounds, Int'l Longshoremen's Ass'n v. Consolidated Express, Inc.*, 448 U.S. 902 (1980) ("*Conex*"). In these circuits, conduct that violates the NLRA or does not further its purposes is not shielded from antitrust liability by the nonstatutory exemption.

Plainly, not all violations of the NLRA in general, and Sections 8(b)(4)(B) and 8(e) in particular, give rise to an antitrust suit. But defendants that violate the antitrust laws through an agreement or conduct that also violates the NLRA may not use the nonstatutory exemption as a shield from antitrust liability. As the Second Circuit stated, the test for application of the nonstatutory exemption "balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the *first point of reference*." *Local 210*, 844 F.2d at 79 (emphasis added).

Alone among the circuits, the Ninth Circuit has concluded otherwise, expressly rejecting any requirement that the conduct at issue be lawful under national labor law. *See* App. 79a (joint employer-union conduct is within the nonstatutory immunity even though it violates labor law); *Richards v. Nielson Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987) (same). The substantive requirements of the legal tests for nonstatutory antitrust immunity employed by the Second and Third Circuits, on the one hand, and the Ninth Circuit on the other, are fundamentally different.

2. The differences between the tests employed by the circuits also lead to different outcomes in cases

where antitrust defendants have violated the NLRA.[3] Respondent claims that "the petition contains no argument that petitioner would have fared differently under the Second Circuit's test." Opp. 18. In fact, the petition (p. 25) states "[h]ad the Second Circuit's analysis been applied to this case, the Ninth Circuit would have reached a different conclusion." Even a cursory analysis of *Connecticut Ironworkers* illustrates this reality. There, as here, the plaintiff alleged that the defendant union sought not to lawfully preserve bargaining unit work, but instead to unlawfully "expand" its bargaining unit and obtain "work traditionally assigned" to members of another union. *Id.* at 96. As in this case, the antitrust defendant interposed the nonstatutory immunity, which the district court found applicable. *Id.* Reversing, the Second Circuit held 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 the nonstatutory exemption shields particular conduct from antitrust scrutiny." *Id.* at 108 (emphasis in original).

Plainly, if employed here, the Second Circuit's legal analysis would lead to the conclusion that the nonstatutory exemption does not apply. The fact that, in *Connecticut Ironworkers*, the Second Circuit remanded so the lower court could determine whether the defendant union was acting to expand its jurisdiction does not alter its legal holding. Here, of course, the D.C. Circuit has already held that ILWU engaged in an unlawful secondary boycott and was not acting for a

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[3] In some cases, of course, this issue does not arise because the antitrust plaintiff makes no contention that the labor laws were violated. *See, e.g.*, *Phoenix Elec. Co. v. Nat'l Elec. Contrs. Ass'n*, 81 F.3d 858 (9th Cir. 1996).

lawful work preservation purpose. *See supra* n.1. Thus, here, the claim could not be dismissed.

3. Finally, the circuit split here is not stale. Both this case and the Second Circuit's decision in *Connecticut Ironworkers* were decided in 2017. In both cases, the parties seek this Court's review. *New England Regional Council of Carpenters v. Connecticut Ironworkers Employers Ass'n*, No. 17-933 (pet. filed December 22, 2017). Respondent cites previous denials of petitions on this question. These denials lack precedential value, but do show that the issue is important and regularly recurs, and thus merits this Court's attention.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO DECIDE THE PURE LEGAL ISSUE POSED.

Respondent seeks to evade review with several meritless arguments that this case is not a good vehicle to resolve the question presented. Opp. 23-25.

First, respondent suggests that there is some doubt whether the conduct at issue violated the NLRA. Opp. 3. In fact, multiple decisions by the NLRB, a federal district court, the Ninth Circuit and the D.C. Circuit hold that ILWU's attempts to seize work performed by unionized employees of the Port, a non-signatory to the ILWU-PMA contract, was unlawful secondary conduct that violated the NLRA. *See* Pet. 25-26. As the D.C. Circuit stated in affirming the NLRB's finding, "ILWU labor practices targeted against ICTSI, the shipping carriers, or any other neutral party to pressure the Port to re-assign the dockside reefer work were unlawful secondary boycotts targeting an employer that did not have the right to control the work." *ILWU*

v. NLRB, No. 15-1344, 2017 U.S. App. LEXIS 22181 at *3.

Second, respondent fails to accept the procedural posture of this case. Here, the district court and the Ninth Circuit were resolving a motion to dismiss; they therefore assumed that defendants violated the labor laws and nonetheless granted defendants immunity under the antitrust exemption as a matter of law. Indeed, the district court permitted the PMA and ILWU to file their motion to dismiss on the express condition that they *not contest* the existence of these violations. *See Int'l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 932 F. Supp. 2d 1181, 1203 (D. Or. 2013).

Accordingly, respondent's contention that this Court would need to "resolve several predicate issues not reached by the Ninth Circuit—including the complex, factbound issue whether the agreement is, in fact, illegal" (Opp. 3) is wrong. The petition poses a pure legal issue: whether an agreement between ILWU and PMA to seize work performed by employees of an employer outside the multi-employer bargaining unit through conduct that violates the NLRA is entitled, as a matter of law, to the protection of the nonstatutory exemption from the antitrust laws.

Third, respondent correctly claims that in order to obtain the shield of the nonstatutory exemption, an employer-union agreement must concern a mandatory subject of bargaining, but then incorrectly argues that the dispute here involves only the factbound question whether the unlawful agreement alleged to violate the antitrust laws involves a mandatory subject. Opp. 20. There are two problems with respondent's argument.

Initially, there is no dispute that, as a general matter, work preservation is a mandatory subject of bargaining between employers and unions that represent their workers. But it is equally clear that it is unlawful for employers and unions to enter into an agreement to coerce neutral employers in order to *expand* the union's bargaining unit to employees of nonsignatory employers. Here, the PMA-ILWU agreement includes a work preservation clause that may lawfully govern the relationship of its *signatories* as to work controlled by them. But when ILWU and PMA agreed to seek to expand their collective bargaining agreement to include employees of nonsignatory employers such as the Port, and to do so by unlawful secondary conduct directed against employers that did not control the work at issue, that agreement did *not* involve a mandatory subject of bargaining and thus cannot be shielded by the nonstatutory labor exemption.[4]

Moreover, and relatedly, respondent repeatedly mischaracterizes the "agreement" against which ICTSI levels its antitrust claims. Opp. 11-12. Again, the work-preservation provision contained in the ILWU-PMA collective bargaining agreement may constitute a lawful agreement between ILWU and PMA employers, so long as it is solely applied within the multi-employer bargaining unit and a PMA member controls the work sought to be preserved. However, ICTSI has alleged that ILWU and PMA entered into a *separate*

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[4] Thus, the Ninth Circuit failed to understand the legal consequences of the NLRA violations in this case. As the Third Circuit stated, a violation of 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." *Conex*, 602 F.2d at 513.

agreement, the Coast Labor Relations Committee agreement, to impose those same provisions on employers not signatory to that contract, such as the Port, to expand their bargaining unit. Pet. 7. ICTSI further alleged that, to accomplish this end, ILWU engaged in an unlawful and coercive secondary boycott against ICTSI, which did not control the work claimed by ILWU. Pet. 8. It is that separate agreement that ICTSI attacks on antitrust grounds, and that agreement is not protected from the antitrust laws by the nonstatutory exemption. ILWU and PMA's purpose and strategy to expand the work preservation provisions beyond the bargaining unit to nonsignatory employers and to do so by coercing ICTSI, an employer with no power to control the disputed work are flatly unlawful under the NLRA.

Finally, respondent contends that the fact that this case involves an appeal under Federal Rule of Civil Procedure 54(b) renders it a poor vehicle. Opp. 24. The district court issued a Rule 54(b) judgment for review of its dismissal of ICTSI's antitrust claim for efficiency reasons. It determined that the antitrust appeal would likely be resolved before trial of the other claims in the case (which were stayed pending resolution of ICTSI's unfair labor practice charges against ILWU), and that, if its dismissal of the antitrust claim were reversed, the court could then try the antitrust and other stayed claims together. *See Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 2014 U.S. Dist. LEXIS 195298, *3 (D. Or. June 3, 2014). Put differently, the court allowed a Rule 54(b) appeal precisely because its dismissal of the ICTSI's antitrust claim raises an important and clear-cut issue of law fundamental to the further processing of the case. Its decision to do so provides no support for respondent's vehicle arguments.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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