No. 23-1085

IN THE
Supreme Court of the United States

KAVA HOLDINGS LLC, DBA HOTEL BEL-AIR,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITE HERE LOCAL 11,
Respondents.

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

BRIEF OF RESPONDENT UNITE HERE LOCAL 11 IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Petitioner Kava Holdings LLC dba Hotel Bel-Air withdrew recognition from UNITE HERE Local 11 in 2011, when it reopened following a temporary shutdown for remodeling. The Hotel claimed it had the right to do so because it had replaced a majority of its former unionized workforce with new employees hired off the street.

The National Labor Relations Board held, however, that the Hotel had violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), by discriminatorily denying reemployment to its unionized employees. It based this conclusion on its review of the Agency Record in this case, consisting of the testimony of 36 witnesses and nearly 200 exhibits, including the extensive notes and other records created during the Hotel's interview process.

The Board also held that the Hotel had violated Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), by withdrawing recognition from Local 11 following this temporary closure because the Hotel's unionized employees had a reasonable expectancy of recall when the Hotel reopened.

The Ninth Circuit upheld both aspects of the Board's decision. The Hotel has petitioned for review, however, only concerning the first issue, identifying the following question presented:

In a case involving alleged refusals to hire based on anti-union animus under Section 8(a)(3), may the Board rely solely on "generalized" animus, when such evidence is not causally connected to the specific hiring decisions at issue?

LIST OF PARTIES

The Petitioner is Kava Holdings LLC dba Hotel Bel-Air. The Respondents are the National Labor Relations Board and UNITE HERE Local 11, which intervened in both the Board proceedings and on review of the Board's decision by the Ninth Circuit.

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INTRODUCTION

Petitioner claims that this Court needs to grant certiorari to resolve a purported split between the circuits as to whether the National Labor Relations Board may find an 8(a)(3) violation based on merely "generalized" anti-union animus without a showing that this animus played a role in the specific employment decisions found to be discriminatory. The problem with the Hotel's framing of this question is that it rests on a plainly false premise, because the Board never took the extreme position that the Petitioner claims it did.

On the contrary, the Administrative Law Judge and the Board both held that the Hotel's anti-union animus was a motivating factor in its failure to hire the majority of bargaining unit employees it interviewed before reopening. They based this conclusion on a wealth of evidence: the "inconsistent, nonsensical and patently false justifications" offered by the Hotel for rejecting 152 out of 176 job applications by bargaining unit employees while hiring facially less qualified—and sometimes unqualified—applicants off the street, along with the Hotel's history of trying to oust the Union by eliminating its unionized workforce and its admission that it planned on preventing its new workforce from unionizing. The Hotel's claim that the Board did not find any nexus between the Hotel's anti-union animus and its discriminatory refusal to hire its former staff is simply false: its own words and actions supplied that nexus.

The Hotel goes on to devote the major part of its Petition to attempting to minimize the evidence on which the Board relied and arguing how it could be interpreted differently. Those arguments only show, however, why certiorari should ***not*** be granted in this case.

As the Court stated in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951), this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other." *Id.* at 503. That policy makes even more sense today, with the explosion of litigation in every Circuit. There is no compelling reason to give the Petitioner a forum to resurrect claims that the Administrative Law Judge, the Board and the Ninth Circuit each found unpersuasive.

There is, moreover, no split between the circuits that could justify a grant of certiorari in this case. The decisions from other circuits cited by the Hotel to establish this supposed split all involved claims of discrimination against individual workers based on their individual union activities—not discrimination against an entire of group of workers based on their association with the Union. What was relevant in those individual cases is entirely beside the point in this case involving "wholesale discrimination" against all of the Hotel's employees represented by the Union who sought to return to work.

And even if there were an actual circuit split on this issue, this case would still not be an appropriate vehicle for resolving it, for the simple reason that the Board has established the sort of nexus between animus and illegal acts that the Hotel says is necessary in every Section 8(a)(3) case. Furthermore, as the Ninth Circuit noted, the Hotel had the opportunity to try to prove that it had lawful reasons for not hiring any of these individual bargaining unit employees, but failed to do so. There is no reason to grant certiorari only to end up in the same place where we started.

This Court has historically limited its discretionary jurisdiction to "meaningful litigation," *The Monrosa v.*

Carbon Black Export, Inc., 359 U.S. 180, 184 (1959), and avoided deciding questions of law, even important ones, in cases where that decision would have no practical impact. In this case there are no important issues meriting review, but, even if there were, the Petitioner would still lose on remand. The Court should deny the Hotel's Petition.

STATEMENT OF THE CASE

Local 11 relies on and incorporates by reference the NLRB's Statement of the Case.

REASONS FOR DENYING THE PETITION

A. The Hotel's Petition Rests on a Mischaracterization of the Board's Decision

The Hotel argues that the NLRB relied on evidence of merely generalized anti-union animus on its part, with no effort to establish a nexus between that animus and its refusal to recall the vast majority of its bargaining unit employees. The Administrative Law Judge's, NLRB's and Ninth Circuit's decisions show that the Hotel's claim is simply false.

The Administrative Law Judge dealt with this issue in depth. She found that the Hotel repeatedly rejected bargaining unit employees' applications for no discernible reason (370 NLRB No. 73, slip opinion at 11, 13), or for reasons that were preposterous on their face (*Id.*, slip opinion at 13), or for reasons that were patently false. (*Id.*, slip opinion at 12). She contrasted that evidence with the Hotel's hiring of applicants with minimal qualifications, rejecting, to take one example, an employee with five years job experience as a busboy at the Hotel because he "did not possess the minimum experience/skill requirements for the position," while

hiring other applicants for that position who had little or no experience and who, in the words of the interviewer, "needed training." (*Id.*, slip opinion at 13)

As the ALJ pointed out, this combination of the Hotel's "baseless, unreasonable, [and] contrived" justifications, rejections of dozens of applicants for no discernible reason whatsoever, and plainly inconsistent reasons for rejecting bargaining unit applicants while hiring inexperienced applicants off the street provided all the evidence necessary to find that anti-union animus drove the Hotel's refusal to hire these employees. (*Id.*, slip opinion at 12) The ALJ found further support for that finding in the Hotel's earlier efforts to rid itself of its unionized workforce (*Id.*, slip opinion at 12, n.11), the Hotel's separate scheduling of interviews of bargaining unit members in order to make it possible to identify them throughout the interview process (*Id.*, slip opinion at 8), and the admission by an HR manager that the Hotel planned on preventing its new workforce from unionizing. (*Id.*, slip opinion at 8) Finally, the ALJ considered the sheer number of bargaining unit employees whom the Hotel rejected—152 out of 176—as further evidence.

The Board affirmed the ALJ's findings and adopted her analysis—with one exception, electing not to rely on that disparity between the number of bargaining unit employees who applied for their old jobs (176) and the number hired (24). (*Id.*, slip opinion at 1, n.4) The Board found, in agreement with the ALJ, that the Hotel's actions and statements during the hiring process itself established the nexus between its anti-union animus and its refusal to hire these employees.

The Ninth Circuit likewise held that this evidence—Kava's prior unfair labor practices, HR manager Arbizu's testimony, job fair records showing disparate

treatment, and the Board's finding of pretext—was "more than substantial evidence of Kava's generalized animus against former employees based on their union affiliation" and that this animus was a motivating factor in Kava's decision not to hire the union-affiliated former employees. *Kava Holdings, LLC v. NLRB*, 85 F.4th 479, 490-91 (9th Cir. 2023). The Ninth Circuit correctly approached this question as it would in any other case in which anti-union motivation was at issue, by reviewing the factual underpinnings of the Board's holdings under the substantial evidence standard. There is nothing in its decision, or the Board's, that requires review by this Court.

Congress did not, in any event, intend this Court to undertake review of every such run-of-the-mill dispute over application of the law to the facts of a particular case; that work is reserved for the Courts of Appeals. *Pittsburgh S.S. Co.*, 340 U.S. at 502. Granting certiorari would be both unnecessary and a mistake.

B. No Actual Circuit Split Exists

Kava insists, however, that the National Labor Relations Act requires more than what the Board held: according to the Hotel, in order to find that an employer has violated Section 8(a)(3) of the Act the Board must find that the employer was driven by anti-union animus directed at each particular employee because of that employee's individual actions. That is not and never has been the law.

On the contrary, the Hotel's distinction between "generalized" and "individualized" animus is completely specious. The Act has from its beginnings prohibited both discrimination against a group of employees based on their mere association with a union—what the D.C. Circuit in *Great Lakes Chem. Corp. v. NLRB*,

967 F.2d 624, 628 (D.C. Cir. 1992) labeled "wholesale discrimination"—as well as "retail discrimination" that singles out particular employees based on their individual union activities.[1]

This Court has, in fact, held that the sort of wholesale discrimination that the Hotel practiced in this case violates the Act. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 261 n.8 (1974) (successor employer violates the Act if it "refuse[s] to hire the employees of his predecessor . . . to avoid having to recognize the union"); *accord*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40-41 (1987). The Hotel's insistence that all Section 8(a)(3) cases must be treated as individual discrimination cases is simply wrong as a matter of law.

The courts have recognized, moreover, that these wholesale discrimination cases call for different evidentiary and substantive approaches. As the Seventh Circuit held, in another refusal to hire/union avoidance case:

> U.S. Marine argues that, because the ALJ heard testimony from only twelve of the thirty-four former Chrysler employees involved in this case, it would be unfair to uphold the Board's determination that all of the former Chrysler employees would have been hired. However, U.S. Marine's unlawful conduct created any uncertainty concerning whether substantially all of the former Chrysler employees would have been hired. Because the company

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[1] This form of discrimination, in fact, long predated the passage of the Act. As Justice Frankfurter noted in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941), "The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations."

> may not be permitted to benefit from its discriminatory activities, such uncertainty must be resolved against U.S. Marine.

U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1321 (7th Cir. 1991). Similarly, the Board in this case did not need to examine the records for each of the 152 bargaining unit employees whom the Hotel rejected in order to conclude that it had discriminated against them.

None of the other Circuits' decisions cited by the Hotel have applied the Hotel's extreme and ahistorical argument to a "wholesale discrimination" case. On the contrary, each of those cases concerned the firing, suspension or other discipline of an individual worker,[2] not the sort of wholesale discrimination that the Hotel committed in this case against a group of employees because they had been part of the bargaining unit before the shutdown.

Those courts' concern with establishment of a nexus between the employer's general anti-union animus and its treatment of an individual worker made sense in those cases, which were pure "retail discrimination" cases. That same requirement for proof of individualized nexus in a "wholesale discrimination" case, on the other hand, not only makes no logical sense, but would effectively immunize the most harmful forms of group discrimination by requiring evidence on an issue—the employer's individualized animus to-

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[2] *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015) (one striker out of more than 100 fired for subsequent workplace incident with strikebreaking coworker); *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015) (upholding Board's finding of 8(a)(3) violation in case of suspension of individual worker suspected of promoting the union); *Stern Produce Co. v. NLRB*, 97 F.4th 1 (D.C. Cir. 2024) (written warning given to individual accused of harassing coworker).

ward particular discriminatees—that is simply irrelevant in a "wholesale discrimination" case.

Once we account for the difference between those types of cases it becomes clear that there is simply no split between the Circuits that could support certiorari in this case. The question in both "wholesale" and "retail discrimination" cases is the same: is there substantial evidence to support the General Counsel's claims and the Board's findings? The fact that different courts have proposed different approaches in cases involving different claims and types of evidence hardly creates a split between the circuits, much less one calling for review by this Court. The Hotel's Petition should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for certiorari filed by Kava Holdings LLC dba Hotel Bel-Air.

Respectfully submitted,

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