No. 23-1085

In the Supreme Court of the United States

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

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that substantial evidence supported the National Labor Relations Board's finding that antiunion animus was a motivating factor in petitioner's refusal to rehire union-affiliated former employees after a temporary closure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 85 F.4th 479. The decision and order of the National Labor Relations Board (Pet. App. 27a-48a) and the decision of the administrative law judge (Pet. App. 49a-100a) are reported at 370 N.L.R.B. No. 73.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2023. A petition for rehearing was denied on January 4, 2024 (Pet. App. 148a-149a). The petition for a writ of certiorari was filed on April 3, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.*, guarantees employees the right to "form, join,

or assist labor organizations" and to "bargain collectively through representatives of their own choosing." 29 U.S.C. 157. And it prohibits employers from engaging in unfair labor practices, including by "discriminati[ng] in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). The National Labor Relations Board (NLRB or Board) enforces the Act's prohibitions. 29 U.S.C. 160(a).

a. To determine whether an employer has engaged in antiunion discrimination under Section 158(a)(3), the Board applies the longstanding *Wright Line* causation test. See *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 400-403 (1983) (approving *Wright Line*, 251 N.L.R.B. 1083 (1980), enforcement granted, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)), abrogated on other grounds by *Director* v. *Greenwich Collieries*, 512 U.S. 267 (1994); see also *Director* v. *Greenwich Collieries*, 512 U.S. 267, 278 (1994). Under that framework, the Board has the burden of proving that protected conduct "was a substantial or a motivating factor in the" adverse employment action. *Transportation Mgmt. Corp.*, 462 U.S. at 400. Even if the Board carries its burden, the employer can "avoid being held in violation * * * by proving by a preponderance of the evidence that the [adverse action] rested on the employee's unprotected conduct as well and that the" employer would have taken the action "in any event." *Ibid.*

Unlawful motivation may be established by direct or circumstantial evidence. See, *e.g.*, *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 602 (1941) ("The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence."). Evidence of unlawful motive may

include the employer's commission of other unfair labor practices, statements suggesting an antiunion intent, false explanations for the disputed action, deviations from the employer's normal procedures, and disparate treatment of union-affiliated employees. See, *e.g.*, *Intertape Polymer Corp.*, 372 N.L.R.B. No. 133 (Aug. 25, 2023), slip op. 13, enforcement granted, *NLRB* v. *Intertape Polymer Corp.*, No. 23-1831, 2024 WL 2764160 (6th Cir. May 9, 2024).

b. The Court has long recognized that an employer unlawfully discriminates within the meaning of Section 158(a)(3) by refusing to hire job applicants because of their union affiliation. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 185-187 (1941). Consistent with *Wright Line*, the Board must determine whether "antiunion animus contributed to the decision not to hire the applicants." *FES (a Division of Thermo Power)*, 331 N.L.R.B. 9, 12 (2000), enforcement granted, 301 F.3d 83 (3d Cir. 2002); see, *e.g.*, *Progressive Elec., Inc.* v. *NLRB*, 453 F.3d 538, 547 (D.C. Cir. 2006).

As relevant here, when an employer with a unionized workforce temporarily discontinues operations and later resumes operations essentially unchanged, including by rehiring its former employees as a majority of the workforce, the union retains its representative status. See, *e.g.*, *Sterling Processing Corp.*, 291 N.L.R.B. 208, 210 (1988). As a result, an employer motivated by antiunion animus may, following a temporary closure, discriminate against union-affiliated job applicants in an effort to avoid its obligation to bargain. See, *e.g.*, *New Breed Leasing Corp.* v. *NLRB*, 111 F.3d 1460, 1466-1467 (9th Cir.), cert. denied, 522 U.S. 948 (1997).

c. An employer may challenge an unfavorable Board decision, and the Board may seek enforcement of its

order, in the courts of appeals. 29 U.S.C. 160(e) and (f). Courts review the Board's findings of discriminatory motive for substantial evidence. See 29 U.S.C. 160(e) (stating that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive"); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-491 (1951).

2. Petitioner operates the Hotel Bel-Air in Los Angeles, California, where it employed a bargaining unit of employees represented by UNITE HERE Local 11 (Union). Pet. App. 52a. On September 30, 2009, when the parties' collective-bargaining agreement expired, petitioner temporarily closed the hotel for renovations expected to last 18-24 months. *Id.* at 126a. Petitioner laid off all bargaining-unit employees but planned to restaff following the renovations. *Id.* at 4a. While the renovations were ongoing, the parties bargained over the temporary closure's effects on unit employees, including the employees' right to return to their positions when the hotel reopened. *Id.* at 127a. In July 2010, petitioner ceased bargaining and bypassed the union by directly offering severance payments to laid-off employees in exchange for the waiver of their recall rights. *Id.* at 137a.

The NLRB's General Counsel issued an unfair-labor-practice complaint against petitioner for its conduct surrounding the negotiations. The Board determined that petitioner violated Section 158(a)(1) and (5) when, without having bargained to impasse, it dealt directly with employees regarding severance. Pet. App. 118a; see *id.* at 105a-147a. The D.C. Circuit enforced the Board's order. *Id.* at 101a-104a.

3. By 2011, petitioner was preparing to restaff the hotel in anticipation of reopening. Pet. App. 54a. In July, petitioner held a three-day job fair to fill approximately 306 positions. *Id.* at 55a-56a. Petitioner set aside the first morning for interviewing former employees only, and accepted applications from the general public for the two following days. *Id.* at 56a. Advertisements for the job fair stated that it was "desirable" for applicants to have "[p]revious luxury hospitality experience," and the written job descriptions and duties for most bargaining-unit positions remained essentially the same as before the temporary closure. *Id.* at 54a-55a (citations omitted).

"At the job fair, applicants completed an initial written application that included an employment history section." Pet. App. 6a. They then "proceeded through a three-step interview process." *Ibid.* Approximately 176 former bargaining-unit employees applied for the 306 positions, and petitioner rejected 152 of them. *Id.* at 7a. It is undisputed that "the former-employee applicants 'were qualified for the open positions, and many had several prior years of positive evaluations while they worked for'" petitioner. *Ibid.*

In October 2011, petitioner reopened the hotel. Pet. App. 7a. Petitioner refused to recognize the Union as the unit employees' representative. *Ibid.* It also made numerous unilateral changes to the bargaining unit's pre-closure employment terms, including "wages, benefits, breaks, and paid time off." *Ibid.*

4. The General Counsel issued a complaint alleging that petitioner had committed unfair labor practices in connection with the reopening. Pet. App. 50a. As relevant here, the complaint alleged that petitioner had

refused to rehire unit employees because of their union affiliation in violation of Section 158(a)(1) and (3). *Ibid.*

a. After a hearing, the administrative law judge (ALJ) determined that petitioner had unlawfully "excluded a majority of former bargaining unit employees for no other reason except to avoid recognizing and bargaining with the Union." Pet. App. 80a; see *id.* at 69a-80a. Applying the *Wright Line* test, the ALJ found that petitioner's antiunion animus was "clearly evidenced" by petitioner's extensive job fair records, the testimony of its human resources manager, and petitioner's prior unfair labor practices. *Id.* at 73a; see *id.* at 69a.

The ALJ determined that the job fair was "riddled with inconsistencies and bias against former employee applicants." Pet. App. 74a. The ALJ explained that the record contained "countless examples of former employees, almost all of whom are union members, being excluded * * * either without sufficient explanation or because of a bogus explanation." *Id.* at 72a. The "clearly preposterous reasons" petitioner offered for rejecting applicants included, among other things, claims that applicants "lacked [the] minimum skill level" for jobs they had "successfully performed * * * for between 5-25 years." *Id.* at 73a. At the same time, petitioner "clearly hired less qualified, non-former employee applicants, blatantly bypassing more qualified former employee applicants." *Id.* at 75a. In the ALJ's view, petitioner invited former employees to interview on the first morning of the job fair "precisely so that [it] could distinguish them from other applicants." *Id.* at 77a.

The ALJ also relied on the testimony of Sandra Arbizu, petitioner's human resources manager. Pet. App. 71a, 76a. When asked "whether any preparations were made to deal with the Union upon reopening," Arbizu

referenced the "'preventative kind of work that we do to educate our managers so that your employees do not need a third party to speak for them.'" *Id.* at 54a-55a (citation omitted). Counsel then asked whether petitioner took "preventative measures to make sure a union doesn't need to come, or that they don't need to be represented by a Union, because those things are being taken care of?", to which Arbizu replied, "Well, yeah." *Id.* at 55a (citation omitted).

The ALJ additionally found that petitioner's prior, "unlawful efforts to obtain waivers of reinstatement rights from former employees when the [h]otel shutdown in September 2009" supported a finding of antiunion animus in the hiring process. Pet. App. 73a-74a; see *id.* at 74a n.11.

After concluding that the General Counsel had carried its prima facie burden, the ALJ rejected petitioner's affirmative defense that it would not have rehired its former employees even absent their union affiliation. Pet. App. 77a. The ALJ emphasized that many job descriptions remained "substantively identical" before and after the renovation. *Id.* at 78a. The ALJ found that "the record is replete with evidence that [petitioner] proffered no legitimate explanation for why many former Hotel unit employees, who were given initial interviews, were not advanced to the second round," or why several other former employees were excluded from consideration after that second round. *Id.* at 79a. And the ALJ further found that, even where some explanation was offered, petitioner's "reasons were preposterous and beyond belief." *Ibid.*

b. The Board affirmed. Pet. App. 27a-38a. It agreed with the ALJ's finding, "for the reasons she states," that "antiunion animus contributed to [petitioner's]

decision not to rehire the laid-off applicants." *Id.* at 29a & n.4. The Board ordered petitioner "to offer affected employees instatement and to make them whole for" losses "suffered as a result of the discrimination against them." *Id.* at 32a.*

5. a. The Ninth Circuit denied petitioner's petition for review and enforced the Board's order. Pet. App. 1a-26a.

The court of appeals held that substantial evidence supported the agency's finding that "anti-union animus was a motivating factor in [petitioner's] hiring decisions." Pet. App. 12a. The court observed that petitioner did "not meaningfully dispute the Board's analysis of [petitioner's] job fair records," and it found that petitioner's evidentiary objections to those records had been forfeited. *Id.* at 17a. The court rejected petitioner's request to draw a different inference from Arbizu's testimony than did the ALJ, emphasizing that its role was only to ask "whether the factfinder's interpretation was 'reasonable.'" *Id.* at 16a (citation omitted). And the court agreed that petitioner's prior unfair labor practices offered additional corroboration of unlawful motive, given that they were "connected and close in time to the events at issue here." *Id.* at 15a. The court explained that "asking union-affiliated employees to waive their recall rights in exchange for severance pay" confirmed petitioner's aim "to prevent union-affiliated employees from comprising a majority of the [hotel] workforce upon reopening." *Ibid.*

The court of appeals also rejected petitioner's contention that, in the aggregate, the evidence failed to

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* The Board later issued a supplemental remedial order regarding 13 employees who were initially left out of the ALJ's reinstatement order. See Pet. App. 9a n.4.

show "a causal connection between any animus and [its] decision not to rehire its union-affiliated former employees." Pet. App. 18a. Petitioner argued that the Board's decision in *Tschiggfrie Properties, Ltd.*, 368 N.L.R.B. No. 120 (Nov. 22, 2019), had imposed a heightened causation requirement. But the court noted that the Board's subsequent decision in *Intertape Polymer Corp.*, *supra*, clarified that "*Tschiggfrie* did *not* heighten or otherwise modify the General Counsel's burden." Pet. App. 18a.

The court of appeals similarly rejected petitioner's argument that the "General Counsel cannot rely on evidence of generalized animus" and "must instead introduce evidence of individualized animus, that is, animus towards certain employees because of their particular union activities or sentiments." Pet. App. 20a. The court agreed that there must be a "causal relationship" between the employer's antiunion animus and the adverse employment action. *Ibid.* (citation omitted). But it explained that, because "[w]holesale rejection of former * * * employees because they were Union members is, by its nature, equally applicable to each employee," "[r]etail proof regarding each individual would be surplusage" in that circumstance. *Ibid.* (brackets and citation omitted).

The court of appeals also upheld the Board's rejection of petitioner's affirmative defense that it would have refused to rehire its former employees regardless of their union affiliation. Pet. App. 21a-22a. The court reiterated that petitioner did "not meaningfully challenge" the Board's analysis of the job-fair records, and noted that petitioner failed to "offer employee-specific explanations for its decisions." *Id.* at 21a.

b. The court of appeals denied the petition for rehearing en banc without recorded dissent. Pet. App. 148a-149a.

ARGUMENT

Petitioner contends that the decisions below did not require any causal link between antiunion animus and petitioner's decision not to rehire its former employees. Petitioner's characterization of those decisions is incorrect. Properly understood, the court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Even if petitioner's critique had merit, this case would be a poor vehicle for resolving the question presented. The petition for a writ of certiorari should be denied.

1. The decisions below are correct. Petitioner's legal and factual critiques of those decisions are mistaken.

a. Petitioner principally contends that the Board has erred in not requiring *any* "'causal nexus'" "linking evidence of motivating animus to a specific adverse employment decision." Pet. 14; see, *e.g.*, Pet. 8 (contending that "in the present case, there *is* no evidence of animus toward *any* identified employees"). Specifically, petitioner asserts (Pet. 16-17) that the Board dispensed with any causation requirement whatsoever in *Intertape Polymer Corp.*, 372 N.L.R.B. No. 133 (Aug. 25, 2023), enforcement granted, No. 23-1831, 2024 WL 2764160 (6th Cir. May 9, 2024). Petitioner's characterization of Board precedent—and the decision in this case—is mistaken.

In *Intertape Polymer Corp.*, the Board made clear that "[u]nder *Wright Line*, the Board's task has always been 'to determine whether a causal relationship existed between employees engaging in union or other

protected activities and actions on the part of their employer which detrimentally affect such employees' employment.'" Slip op. 10 (citation omitted). And the Board reaffirmed that the General Counsel does not "necessarily satisf[y] his burden of proof under *Wright Line* by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity," without also demonstrating that the employer's animus played a motivating role in the adverse employment decision. *Id.* at 12 (citation omitted). The court of appeals correctly observed that the Board in this case "applied the causation test established in *Wright Line*" and that, "[u]nder *Wright Line*, the General Counsel must make a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." Pet. App. 12a (citation omitted).

To be sure, the Board also held in *Intertape Polymer Corp.* that "[p]roving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some *additional* showing of particularized motivating animus towards the employee's own protected activity or to *further* demonstrate some *additional*, undefined 'nexus' between the employee's protected activity and the adverse action." Slip op. 11 (citation omitted). But that was not because causation is irrelevant. Instead, because "the *Wright Line* framework 'is inherently a causation test,'" the "'identification of a causal nexus as a separate element that the General Counsel must establish to sustain his burden of proof is superfluous.'" *Id.* at 9 (quoting *Tschiggfrie Props., Ltd.*, 368 N.L.R.B. No. 120 (2019), slip op. 7).

Petitioner relatedly suggests that the agency must show "that 'particularized animus' was the 'motivating' cause" of the adverse decision. Pet. 22-23 (citation omitted). It is unclear what showing petitioner thinks is required, since it disclaims the notion that the General Counsel "must prove specific animus aimed at each particular individual," Pet. 23. Petitioner's concession makes sense. "As an illustrative example," "an employer's statement that it will fire anyone who engages in union activities, although 'general' in that it is not aimed at any particular employee, may give rise to a reasonable inference that a causal relationship exists between an employee's union activities and the employer's decision to take adverse action against the employee." *Intertape Polymer Corp.*, slip op. 10 (citation omitted). Moreover, "[a]lthough the General Counsel typically proceeds on the theory that an employer took adverse action against a particular employee to punish or discourage *that* employee's protected activity," she "may also prevail by showing that an employer took adverse action against one or more employees with the intent of discouraging or punishing union activity in its workforce generally." *Id.* at 12. Petitioner offers no reason to doubt those commonsense holdings.

b. Petitioner further contends that, even if a showing of "generalized animus" is enough, the evidence relied on by the Board does not rise to that level. Pet. 24 (capitalization and emphasis omitted). That factbound contention does not warrant this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (noting that the Court ordinarily does not grant certiorari "to review evidence and discuss specific facts"); Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 5-45 (11th ed. 2019) (observing that

"error correction * * * is outside the mainstream of the Court's functions and * * * not among the 'compelling reasons' * * * that govern the grant of certiorari") (citation omitted).

In any event, the evidence that antiunion animus was a motivating factor in petitioner's hiring decisions was "overwhelming," Pet. App. 73a, and easily clears the substantial-evidence bar. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951) ("[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (citation omitted). Petitioner improperly ignores the weight of the evidence in the aggregate, instead attempting to discredit each item of evidence individually. See 29 U.S.C. 160(e) (requiring courts to consider the record "as a whole"). But even taking each piece of evidence in isolation, petitioner's arguments lack merit.

Petitioner contends that the agency placed undue weight on the job-fair records, which petitioner argues (Pet. 27) are unreliable and do not demonstrate animus. But petitioner offers no response to the agency's finding (Pet. App. 75a-76a) that petitioner rejected numerous former employees on the ground that they "lacked minimum qualifications/skills" despite having "previously [and] successfully performed the job for which they were reapplying for more than 10 years," while "non-former employee applicants were advanced and *hired* who demonstrated minimum if any qualifications." Petitioner also complains (Pet. 29) that the court of appeals "erred by ignoring its own precedent" regarding the admission of hearsay records. Any intracircuit tension, however, would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902

(1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner further contends that the court of appeals failed to conduct "a proper 'examination and weighing'" of Arbizu's testimony. Pet. 26 (brackets and citation omitted). Petitioner notes that, when asked directly whether "the hotel was preparing to open as a non-Union hotel," Arbizu responded in the negative. Pet. 25 (citation omitted). But the agency was not required to credit Arbizu's self-serving attempt to walk back her earlier concession, see p. 7, *supra*, and the court correctly found that the ALJ's inference was "reasonable" considering the record as a whole. Pet. App. 16a (citation omitted). There is no basis for this Court's intervention in these circumstances. See *Universal Camera*, 340 U.S. at 491 (noting that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals," and "[t]his Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied").

Finally, petitioner challenges the agency's reliance on petitioner's prior unfair labor practices, arguing (Pet. 32) that the premature declaration of impasse was "highly technical in nature" and thus sheds no light on the present charges. But the earlier Board order found that petitioner violated Section 158(a)(1) and (5) by "offering severance terms directly to all bargaining unit employees, sidestepping the Union," in exchange for waiver of the employees' recall rights. Pet. App. 118a. The nature of that violation strongly suggests that petitioner, from the outset of renovations, "intended to prevent union-affiliated employees from comprising a

majority of the [hotel] workforce upon reopening." *Id.* at 15a.

2. Petitioner asserts that the decision below conflicts with decisions from other courts of appeals that have required "a nexus linking animus to the adverse employment decision at issue." Pet. 18 (capitalization omitted); see Pet. 18-21. Petitioner is mistaken.

In *Nichols Aluminum, LLC* v. *NLRB*, 797 F.3d 548 (8th Cir. 2015), the court of appeals vacated a Board order finding that an employer had improperly discharged an employee for participating in a strike. *Id.* at 550. The court found that "the Board did not hold the General Counsel to its burden of proving discriminatory animus toward [the employee's] 'protected conduct was a substantial or motivating factor in' [the employer's] decision to discharge him." *Id.* at 555. The court explained that, "[w]hile hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive." *Id.* at 554-555 (brackets and ellipsis omitted).

The Eighth Circuit's decision in *Nichols Aluminum* is fully consistent with the decision below. The court of appeals in this case did not rely on general antiunion animus standing alone, but rather found that the overall evidence was "more than enough to support an inference that anti-union animus *was a motivating factor* in [petitioner's] refusal to rehire its union-affiliated former employees." Pet. App. 18a (emphasis added); see *ibid.* (finding "a causal connection between" petitioner's antiunion "animus and [its] decision not to rehire its union-affiliated former employees"). The Board similarly had found the requisite causal connection. See *id.* at 29a

(Board affirming ALJ "for the reasons she states"); *id.* at 76a (ALJ finding that the evidence "demonstrates [petitioner's] discriminatory motives").

Next, in *AutoNation, Inc.* v. *NLRB*, 801 F.3d 767 (7th Cir. 2015), the court of appeals *affirmed* the agency's finding that an employer had unlawfully discharged an employee for his union activities. *Id.* at 774. The court explained that "[t]he rule that union activities must motivate a particular adverse employment action in order to make out a Section 8(a)(3) violation is well established; an abstract dislike of unions is insufficient." *Id.* at 775. Again, that holding is fully consistent with the decisions below in this case, which also required a causal connection between antiunion animus and the adverse employment decision.

The decision in *Stern Produce Co.* v. *NLRB*, 97 F.4th 1 (D.C. Cir. 2024), is similar. There, the court of appeals found that the agency's determination of an unfair labor practice was not supported by substantial evidence. *Id.* at 12. The court explained that "[a]n employer's '[s]imple animus' and 'general hostility' toward the union are insufficient on their own," because "*Wright Line*, after all, sets forth a 'causation test' that is designed to determine whether an employee's protected conduct was a 'motivating factor' in the employer's action." *Id.* at 12-13 (citations omitted; second set of brackets in original). Again, the decisions below reflect the same inquiry.

3. Even if the question presented warranted this Court's review, this case would be a poor vehicle for resolving it. As discussed, see p. 12, *supra*, petitioner argues that "the generalized-animus case presented by the Board's General Counsel failed to include proof of 'particularized motivating animus.'" Pet. 9 (capitalization

modified; emphasis omitted). But the ALJ found that even if "a 'particularized' showing of union animus" was required, "the General Counsel has satisfied her burden." Pet. App. 72a (citing *Tschiggfrie Properties*, *supra*); but see *Intertape Polymer Corp.*, slip op. 9 (clarifying that "[n]othing in *Tschiggfrie* changed" the governing framework). As a result, even if petitioner were to prevail on its legal argument before this Court, it likely would not be entitled to relief on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2024