No. 23-1085

IN THE

Supreme Court of the United States

KAVA HOLDINGS, LLC, DBA HOTEL BEL-AIR,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AS PERMITTED BY SUPREME COURT RULE 15.8

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AS PERMITTED BY SUPREME COURT RULE 15.8

A. This Court's Recent Decision in *Loper Bright Enterprises v Raimondo.*

Pursuant to Supreme Court Rule 15.8, "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."

Only a few weeks ago and well after the present Petition was filed, this Court reaffirmed the federal courts' traditional obligation to interpret statutory language, and abrogated the "*Chevron* [*U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)] deference" standard: "[C]ourts need not and under the A[dministrative] P[rocedures] A[ct] <u>*may not*</u> defer to an agency interpretation of the law simply because a statute is ambiguous." Loper *Bright Enterprises v. Raimondo*, No. 22-451, 603 U.S. __ (June 28, 2024), slip op. at 35 (emphasis added). It is for the courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.*, slip op. at 14, quoting 5 U.S.C. § 706.

B. The Ninth Circuit Incorrectly Applied an Extremely Deferential Standard of Review on a Matter Calling for Interpretation of a Federal Agency Statute, and for this Additional Reason Certiorari Should Be Granted.

In the present case, the Ninth Circuit explicitly adopted an extraordinarily deferential standard with respect to the NLRB's flawed decision: "We defer to any 'reasonably defensible' interpretation of the NLRA by the Board." App. A, 10a-11a. This Court's decision in *Loper Bright* shines a glaring light on this extreme deference, highlighting the Ninth Circuit's abdication of its obligation to render its own interpretation of a federal statute, *i.e.* the National Labor Relations Act.

The NLRA provides that proof of an "unfair labor practice" by an employer, under 29 U.S.C. §158(a)(3), requires evidence that an employer acted "by *discrimination* in regard to *hire or tenure of employment* or *any term or condition of employment* to encourage or discourage membership in any labor organization." (emphasis added). Thus, courts must *require* the Board to demand and provide proof of such "discrimination"—*i.e.*, that the antiunion animus driving the discrimination was causally linked to and motivated the specific employment loss in "hire or tenure . . . or [of] any term or condition of employment." Simply deferring to only the Board's most recent (and politically entwined) statement as to how 8(a)(3) causation may be shown—as the court below did here, by its adoption of the Board's 2023 decision in *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023)—falls far short of the courts' obligation.

On this basis alone, given this highly deferential standard of review on a matter of statutory interpretation, certiorari should be granted. In addition, see argument and authority in the Petition at pages 13-24, and in the Reply brief at section A: This Court should reject the Ninth Circuit's adoption of *Intertape*, and adopt instead the better-reasoned causal standard set forth by the Eighth, Seventh, and D.C. Circuits, and by earlier Board decisions, requiring actual evidence of intentional, causally linked discrimination based on union affiliation or protected activities.

The Board's constant, politically based flip-flopping on crucial interpretations of the NLRA should have precluded the Ninth Circuit's extreme deference to its conclusions in this case, *see* Pet. 13-17 and 36-37, and would have justified certiorari even prior to *Loper Bright*. The Board has not used its supposed labor expertise to reach its decisions based on a fair reading of the NLRA. Instead, the tenor of its decisions fluctuates according to the political party of the majority of its members. The Board has gone back and forth so many times on the issue of how much evidence is required to prove a violation of Section 8(a)(3), that it can find support in its own decisions for almost any position it finds expedient at the time.

As one of the judges of the Ninth Circuit (not involved in the present-case decision) has observed, the Board "veers violently left and right, a windsock in political gusts," and "frequently changes its mind, seesawing back and forth between statutory interpretations depending on its political composition, leaving workers, employers, and unions in the lurch." *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1003-04 (9th Cir. 2024) (O'Scannlain,

concurring). Nor has this obvious fact escaped the notice of some Board members themselves: "In some areas of labor-law doctrine, to be sure, the Board's 'policy oscillation' has been notable." *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 37 (2019) (McFerran, dissenting); *see also Valley Hosp. Med. Ctr., Inc.*, 371 NLRB No. 160, slip op. at *23 (2022) (Board majority noting that "today's decision [regarding dues checkoff requirements] represents a change in Board policy that has oscillated repeatedly in recent years.").

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Should the Court nevertheless decline to grant certiorari, the Court may wish to consider the alternative of vacating the judgment and remanding the case to the Ninth Circuit for reconsideration in light of this Court's decision in *Loper Bright*, and thus require that court to engage in the statutory interpretation that federal courts are expected to accomplish, which should include consideration of holdings by its sister circuits that have been far less inclined toward such blind deference.

CONCLUSION

For the reasons stated above and in the Hotel's Petition and Reply, certiorari should be granted.

Respectfully submitted,

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