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**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

### A. The Board's Opposition Fails to Overcome the Fact that its Decisions on 8(a)(3) Causation Have Been Inconsistent, Causing a Split Among the Circuits.

The Board's Opposition brief fails to directly or effectively challenge the Hotel's demonstration that the Board has flip-flopped repeatedly on the question of whether particularized motivating animus—or a causal nexus, linking animus to a specific adverse employment decision—is required to be proven as a part of General Counsel's initial case. *See* Pet. 13-17. Nor does the Board's scant discussion, at Opp. 15-16, convincingly challenge the Hotel's demonstration that this inconsistency has led to a split among the circuit courts. Pet. 13-21.

The Ninth Circuit, as a consequence of its extreme deference to the Board ("*We defer to any 'reasonably defensible' interpretation of the NLRA by the Board*"; App. A, 10a-11a), accepted the Board's analysis of 8(a)(3) causation set forth in its 2023 decision in *Intertape Polymers*, 372 NLRB No. 133 (2023). App. A, 13a, 18a-20a. Notwithstanding the Board's protestations to the contrary, this formulation of causation is plainly at odds with its 2019 decision in *Tschiggfrie Properties*, 368 NLRB No. 120 (2019) (*Tschiggfrie-II)*, as well as with several earlier decisions. *See* Pet. 13-17.

Indeed, the level of deference the Ninth Circuit accorded the Board's decision in *Intertape* was wholly inappropriate in view of the Board's repeated inconsistency on this subject. This was true even before this Court's decision in *Loper Bright Enterprises v. Raimondo*, No.

22-451, 603 U.S. __ (June 28, 2024). As discussed in Hotel's contemporaneously filed **Supplemental Brief**, such deference has become more misguided today. *See* Supplemental Brief filed pursuant to Sup. Ct. Rule 15.8, addressing *Loper Bright* and its impact on this case.

In both its brief at Opp. 10-12, and in the *Intertape* decision itself, the Board seeks only to obfuscate the plain differences between *Intertape* and *Tschiggfrie-II*,[1] while also ignoring critically significant decisions between 2000 and 2014 discussed at Pet. 13-17. The Board was compelled to admit the following, however, in its brief: "*To be sure*, the Board *also* held in *Intertape Polymers* that ... particularized motivating animus ... or [a] 'nexus'" *** is "*not* required." Opp. 11 (emphasis added). In seeking to minimize this clear rejection of a meaningful causal standard, the Board's brief deploys two gambits: First, by quoting *Tschiggfrie-II* misleadingly—falsely suggesting it held that identification of a "causal nexus ... is superfluous"—and second, by once again giving effectively meaningless lip service to its oft-quoted phrase that "the *Wright Line* framework 'is inherently a causation test'." Opp. 11. These efforts do not stand up to the scrutiny of a full and fair reading of both *Intertape* and *Tschiggfrie-II*, particularly in context with the earlier decisions ignored by the Board's Opposition.

The following chronology illustrating its past politically-driven and substantive swings deserves emphasis:

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1. Notably, General Counsel asked the *Intertape* Board to "overrule" *Tschiggfrie-II*, based obviously on concern with the enhanced burden imposed by the 2019 decision. *See* Pet. 17.

- In 2002, in *In Re Gardens Mgmt*, 338 NLRB 644, 645 (2002), issued during President George W. Bush's adminstration, the Board required a "motivational link, or nexus, between the employee's protected activity and the adverse employment action." *See also Tracker Marine*, 337 NLRB 644, 646 (2002).

- In 2011 and 2014, during President Obama's administration, however, this "nexus" requirement was expressly rejected by *Mesker Door*, 357 NLRB 591 (2011), and again by *AutoNation d/b/a Libertyville Toyota*, 360 NLRB 1298 (2014). *See* Pet. 14-16.

- But then, in 2019, during President Trump's administration, the Board expressly reversed *Mesker Door* and *AutoNation*, and in tandem with these reversals held that "General Counsel was obligated to do more than introduce <u>*some*</u> evidence of animus." *Tschiggfrie-II*, slip op. 9 (emphasis in original).

The Board's Opposition brief further ignores that the Board, in deciding *Tschiggfrie-II*, was directly persuaded by reversals and criticisms from the Eighth and Seventh Circuits. *See* Pet. 18-21. *Mesker Door* and *AutoNation* were reversed by *Tschiggfrie-II* for this very reason. *Tschiggfrie-II* thus rejected the minimalist standard of animus proof proscribed by those cases, as well as that set forth in a failure-to-hire case from a 2000 Clinton-era decision, *FES, Division of Thermo Power*, 331 NLRB 9 (2000), relied upon expressly by the court below. App. A 11a-12a. *FES* requires only a showing that "antiunion

animus" somehow merely "*contributed* to the decision not to hire," but with no mention or need to show a causal or motivating nexus (emphasis added). *Id.*, quoting 331 NLRB at 12.

The Board asserts, as noted above, that *Tschiggfrie-II* declared identification of a causal nexus "superfluous." In actuality, the *Tschiggfrie-II* Board was addressing only a secondary concern—specifically, a series of Board decisions that had debated whether to apply a three or four-part test, with the "fourth part" identifying "nexus." *Tschiggfrie-II*, slip op. 9. The 2019 Board simply stated that "identification of a causal nexus as a *separate element*," or fourth element, was *not* necessary *because* "'the *ultimate inquiry*'"—under *Wright Line*—"is *whether there is a nexus between* the employee's *protected activity* and the challenged *adverse employment action*." *Tschiggfrie-II*, slip op. 10 (interim cit. omit.; emphasis added), and stated further:

> [T]he real target of criticism was the suggestion that, regardless of whether the General Counsel's initial burden was summarized as a three-part or four-part test, the General Counsel was obligated to do more than introduce *some* evidence of animus against union or other protected concerted activity.

Slip op. 9 (emphasis in original). Simply put, *Tschiggfrie-II* does not stand for the proposition that a "causal nexus" is "superfluous" and need *not* be proven.

At the center of the 2019 holding in *Tschiggfrie-II* is the requirement that antiunion animus *must motivate a particular adverse employment action*. Slip op. 9-10,

citing to the Seventh Circuit decision in *AutoNation d/b/a Libertyville Toyota*, 801 F.3d 767, 775 (7th Cir. 2015), which made clear that animus "*must motivate a particular adverse employment action*," and stating further that an "*abstract dislike of unions is insufficient*" (emphasis added).

Nevertheless, four years later, this declaration of superfluity was made explicit by *Intertape* upon its rejection of any need for General Counsel to prove a causal nexus or "particularized motivating animus," slip op. 13, thus generating the unjust result in this case—given the lower court's unduly deferential acceptance of *Intertape*. App. A, 20a.

*Tschiggfrie-II* was careful to note, however, that it was *not* holding that "General Counsel *must* produce *direct* evidence of animus," provided circumstantial evidence is adequate and is "'based on the record as a whole'." Slip op. at 11 (internal cit. omitted; emphasis added). The 2019 Board stated further that "some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden." *Id*. While not offering a bright-line test, the following contrasting examples provided by *Tschiggfrie-II* are helpful in demonstrating, first, the distance between a correctly decided 8(a)(3) ruling and the ruling in this case, and thus second, the need here for granting certiorari:

> For example, evidence that an *employer has stated* it will *fire anyone who engages in union activities*, while *undoubtedly "general"* in that it is not tied to any particular employee, may nevertheless be sufficient, under the circumstances of a particular case, to give

> rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action.
>
> In contrast, other types of circumstantial evidence—for example, an *isolated*, one-on-one *threat or interrogation* directed at someone other than the alleged discriminatee and involving someone else's protected activity—*may not be sufficient* to give rise to such an inference.

*Id.* (emphasis added).

The Board, as also noted above, relies on the oft-quoted phrase that "the *Wright Line* framework 'is inherently a causation test'." Opp. 11. Over-reliance on this notion—as if lip service alone is sufficient—has led to unworkable rulings by the Board. Notably, Board member Kaplan in a separate decision in *Intertape*, while concurring in its outcome, correctly criticized the Board majority's "failure to expressly acknowledge any *analytical outer limit* to the *generality of animus evidence*." *Intertape*, slip op. 18 (emphasis added).

*Intertape*, by rejecting the meaningful causal standard in *Garden Mgmt* and *Tschiggfrie-II*, has stripped *Wright Line* of its efficacy as a true "causation test," inasmuch as these two earlier decisions were fully consistent with *NLRB v. Transportation Management*, 462 U.S. 393, 401 (1983) (animus must be "substantial or motivating"), as modified by *Director v. Greenwich Colliers*, 512 U.S. 267, 276-78 (1994) (General Counsel has the burdens of

both production *and persuasion*). *Garden Mgmt* and *Tschiggfrie-II* are, also, fully consistent with the more recent decisions from the Eighth, Seventh and D.C. Circuits cited by Hotel. Pet. 18-21.

### B. Petitioner Asks this Court to Recognize the Facts as They Stand, Not to Reinterpret, and to Correct Legal Error in Applying an Unwarranted Causation Standard.

The Union asserts that Hotel's argument is primarily devoted to asking this Court for a different interpretation of the facts. Union Opp. 1-2. This is untrue, but moreover—as this Court has pointed out many times—*stare decisis* call for the review of not just a rule of law, but the facts to which the rule has been applied. Nowhere is this more true than under Board law. "Resolution turns to a great extent on the *precise facts* involved." *NLRB v. Burns Security Services*, 406 U.S. 272, 274 (1972) (emphasis added); see also, *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 389 (1998) ("A reviewing court must identify the conclusion and then *examine and weigh the evidence*" [emphasis added]) and *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1017, n.11 (1985) ("It is the court's proper role to analyze, *not avoid*, those facts [found by jury] in light of the applicable legal principles") (emphasis added).

The undisputed facts in this case show, beyond any serious question,[2] insufficient proof of antiunion animus,

2. The Board admits as much by its unpersuasive counter-arguments to each demonstration of the flaws in the three items discussed below, ultimately compelling the Board to plead merely for consideration of Hotel's evidence "in the aggregate." Opp. 13.

particularly when contrasted with the cases discussed and referenced in the next section. This result stems in part from *Intertape's* rejection of General Counsel's need to prove "particularized motivating animus" or causal nexus, which has led to an unworkable standard. The Ninth Circuit consequently issued an unjust decision by eschewing meaningful discussion of whether the evidence relied upon by the Board was in fact causally linked to the hiring outcome. Most glaring, in this regard, was the court's failure to address the 'unavoidable' facts in connection with the business needs of the Hotel upon reopening, along with Hotel's consequent decisions for changes to its business model, inclusive of its hiring plans and hiring criteria. *See* Pet. 4-7.

Petitioner is not asking this Court to find or interpret the facts differently. It asks for this Court to simply recognize those facts, as they stand, and to correct the legal error in relying on those facts. By holding that the unremarkable facts found by the Board added up to substantial evidence of an "intent not to have a unionized workforce when the Hotel re-opened" (*see* App. B, 71a), the Ninth Circuit erred as a matter of law and reached a result that would have been materially different in other federal circuits.

More than mere "suspicion [or] surmisal," and more than "simple animus," is needed to establish substantial evidence. *Nichols Aluminum v. NLRB*, 797 F.3d 548, 553-54 (8th Cir. 2015). Nor may the Board—by accepting a minimalist standard of animus proof—"'rely on scant evidence and inference to put themselves in position to substitute their judgment for [an employer's]'" legitimate business decisions. 797 F.3d at 552-553 (internal cit.

omitted). In the context of the present case, more was needed than the simple fact that less than a majority of former employees were hired upon re-opening. The record as a whole must be taken into account, including that which "fairly detracts" from a finding of causal animus. 797 F.3d at 553, citing to *Universal Camera v. NLRB*, 340 U.S. 474, 487-88 (1951). Courts "'must view the inherent strengths and weaknesses of the inferences drawn'." *Id.*

While the Board and the court below did point to evidence beyond the fact of this hiring outcome, their efforts were hamstrung by the thinness of General Counsel's case, seeking to prove only generalized animus. *See* Pet. 7-12. Specifically, only three highly attenuated items were identified:

- A "stray remark" made years after the fact by a low-level employee. Pet. 24-27.

- An utterly uncorroborated and "cherry-picked" critique of merely 10% of the inherently unreliable interview forms. Pet. 27-31.

- The fact that Petitioner had previously been found to have committed a highly technical violation of the NLRA when it prematurely declared an impasse following extensive union negotiations, without—however—any meaningful explication of reliance on this earlier holding by the Board (two sentences only, contrary to the dictates of federal administrative law), hobbled further by the lower court's misinterpretation of material facts. Pet. 31-35.

These three items, at best, might be cited in an attempt to prove pretext. The question of pretext under *Wright Line* arises, however, only if General Counsel has *first* established anti-union animus as a genuinely motivating factor in the adverse action.

If this were a case under Title VII of the Civil Rights Act of 1964, summary judgment would have been granted to the Hotel. A stray remark from a non-decisionmaker made years after the fact, and the occurrence of a previous technical infraction (the earlier ULP in violation of impasse analysis), are manifestly insufficient to attribute animus to the newly hired managers who independently made the 2011 hiring decisions. And the fact that a cherry-picked small sample of the interview forms seemed puzzling to the ALJ proves nothing, given especially the utter lack of corrobative avidence. *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (evidence of pretext does not eliminate the "ultimate burden of persuasion" in proving animus, imposed on plaintiff ). *See also* under the N.L.R.A, *Greenwich Colliers*, 512 U.S at 276-278 (1994) (General Counsel carries the burden of *persuasion*).

Finally, contrary to *Universal Camera*, 340 U.S. at 488, not a single one of the undisputed facts which "fairly detract" from the weight of the Board's decision, as outlined at Pet. 9-11, was weighed, or even mentioned, by the Ninth Circuit. [3]

3. The court below, as echoed by the Union's Opposition at page 4, did refer to *some* of the facts surrounding the hiring process, but emphasized only Hotel's offer of a separate interview time for former employees, agreeing with the Board that this allowed Hotel to "distinguish [them] from other applicants." App. A, 6a. This inference is remarkably weak. The offer of a separate

### C. Cases Cited by the Union Are Readily Distinguishable.

The cases cited by the Union fail to advance any of the arguments in opposition to certiorari. In *Howard Johnson Co. v. Detroit Loc. Bd. and Hotel Union*, 417 U.S. 249 (1974), no wrongdoing by the successor employer was found, even though that employer chose to hire an almost-entirely new workforce upon taking over the business. "Howard Johnson had the *right not to hire any of the former ... employees*, if it so desired," subject to the sole but obvious caveat that an employer "*may not refuse* to hire the former employees *solely because* they were union members or to avoid having to recognize the union." 417 U.S. at 261-62 and n.8 (emphasis added).

The case primarily relied upon by the Union, *U.S. Marine Corporation v. N.L.R.B.*, 944 F.2d 1305 (7th Cir. 1991), was a mass rehiring case. Similar to the Ninth Circuit's misplaced reliance on *Great Lakes Chemical v. NLRB*, 967 F.2d 624 (D.C. Cir. 1992), also a mass rehiring case,[4] the decision in *U.S. Marine* involved multiple, flagrant violations of the Act, many of which were admitted by the employer (including its violation of section 8(a)(5)), as well as (**i**) the flouting of an injunction that required bargaining with the union; (**ii**) the establishment of an employer dominated labor organization; (**iii**) attempts

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time was simply a courtesy. Moreover, Hotel was already aware, given application forms requesting past-employment history, which applicants were former employees. Most importantly, there is *no* evidence in the record of any *plan* to identify and thereby limit the number of former employees—*no mention of a quota; no running tally. See* Pet. 10.

4. Discussed, Pet. 9, 23-24 and 30.

by way of falsified claims to hide evidence that the new employer did in fact hire a majority of the former workers; and further (**iv**): "The record amply demonstrates that, from the very beginning of its negotiations with [predecessor employer] for the sale of the business, [defendant employer] made it clear that it would not deal with the Union." 944 F.2d at 1316.

The Hotel does not dispute that causal animus can be inferred from facts such as these, nor dispute such an inference from the facts found in *Great Lakes Chemical, supra* and in *NLRB v. CNN America*, 865 F.3d 740 (D.C. Cir. 2017).[5]Factual evidence of this sort and magnitude was causally linked to the mass-hiring decisions at issue in these three cases, and may therefore meet the standard for "particularized motivating," or "causal-nexus," animus.

Moreover, as Hotel has shown, Pet. 8, 22-23, while animus aimed at specific former employees can certainly constitute proof of a causal nexus in a mass-hiring 8(a)(3) case, *no such evidence is found in the present case.* The Union has nonetheless repeated the Ninth Circuit's mischaracterization, at App. A, 19a-20a, of Hotel as taking the straw-man position that such evidence *must* be shown with regard to each and every former employee. As the cases above demonstrate—*Great Lakes*, *CNN America* and *U.S. Marine*—particularized motivating animus can be shown several different ways, but has not been shown here.

5. *CNN America*, another mass rehiring case, discussed Pet. 27 and 30.

## CONCLUSION

Petitioner requests the granting of certiorari.

Respectfully submitted,

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