No. 23-

IN THE

Supreme Court of the United States

SOUTH CAROLINA STATE PORTS AUTHORITY, AND STATE OF SOUTH CAROLINA,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To increase pressure on an employer with whom it has a labor dispute (a "primary" employer), a union sometimes decides to coerce or threaten "secondary" employers to stop doing business with the primary employer. This union tactic is called a secondary boycott. In the National Labor Relations Act, Congress outlawed this "dangerous practice of unions," which expands industrial conflicts by involving neutral employers in union disputes with primary employers. *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 627 (1967).

Here, the International Longshoremen's Association ("ILA") has a dispute with the South Carolina State Ports Authority ("SCSPA") over lift-equipment jobs at the Port of Charleston's new Leatherman Terminal. SCSPA uses state employees not represented by ILA for these jobs, as it has for decades at Charleston's other terminals. ILA wants these jobs for its members. To get them, ILA filed a $300 million lawsuit, *not* against SCSPA, but against maritime carriers that called at Leatherman. In conflict with decisions of other courts of appeals and this Court, the Fourth Circuit shielded ILA's unlawful secondary boycott behind the judicially-created "work preservation" defense, eviscerating the NLRA's prohibition of this tactic. The questions presented are:

1. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense because the targeted secondary employer could choose to take its business elsewhere and, in that way, can "control" the primary employer's work assignments.

2. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense even when no bargaining unit jobs are threatened.

RULE 14.1(B) STATEMENT OF PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Fourth Circuit:

1. South Carolina State Ports Authority, Petitioner

2. The National Labor Relations Board, Respondent

3. United States Maritime Alliance, Ltd., Intervenor for Petitioner

4. State of South Carolina, Intervenor for Petitioner

5. International Longshoremen's Association; and International Longshoremen's Association Local 1422, Intervenors for Respondent

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner State of South Carolina and Petitioner South Carolina State Ports Authority are public entities. They do not have parent corporations or any stock.

RELATED PROCEEDINGS

There are no related proceedings under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners State of South Carolina and South Carolina State Ports Authority ("SCSPA") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *South Carolina State Ports Authority* v. *National Labor Relations Board*, 75 F.4th 368 (4th Cir. 2023). App. 1a-51a. The decision and order of the National Labor Relations Board is reported at 372 N.L.R.B. No. 36 (Dec. 16, 2022). App. 52a-101a.

JURISDICTION

The Fourth Circuit entered its judgment on July 28, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B), provides:

It shall be an unfair labor practice for a labor organization or its agents—

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any

other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of [section 9]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

INTRODUCTION

In this case, the Fourth Circuit gutted a critically important provision of the National Labor Relations Act ("NLRA")—its ban of secondary boycotts, which are union efforts to involve neutral or "secondary" employers in their labor disputes with "primary" employers "through pressure calculated to induce them to cease doing business with the primary employer." *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 624 (1967). Congress was concerned about this "'dangerous practice of unions'" which "widen[s] industrial conflict by creating coercive pressures on neutral employers . . . ." App. 48a (Niemeyer, J., dissenting) (quoting *Nat'l Woodwork*, 386 U.S. at 627). By outlawing secondary boycotts, Congress sought to confine disputes between a union and an employer to that relationship, and to prohibit unions from pressuring other employers as leverage in their disputes with primary employers.

This case presents a classic secondary boycott. It involves a dispute between the South Carolina State Ports Authority ("SCSPA"), which operates the Port of Charleston for the State, and the International Longshoremen's Association ("ILA"). ILA has a collective bargaining agreement with the United States Maritime Association ("USMX"). SCSPA is not and never

has been a USMX member; its employees are not ILA members; and it does not have an agreement with ILA. For decades, SCSPA has used state employees to operate the State-owned lift-equipment at the Port, while ILA members performed the rest of the longshore work. But in 2021, when SCSPA opened the Port's Leatherman Terminal in Charleston using the same hybrid labor model, ILA filed a $300 million lawsuit, *not against SCSPA*, but against the maritime carriers—USMX members—who called at that terminal. ILA's lawsuit thus drew the maritime carriers into a dispute "not their own." *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1965). It sought to coerce the carriers (the secondary employers) to stop calling at Leatherman to pressure SCSPA (the primary employer) to use ILA members to fill *all* longshore jobs there, including jobs state employees have performed for more than 50 years. "You could not ask for a more classic case of unlawful secondary pressure." App. 101a.

This unlawful tactic has worked: Leatherman sits largely idle, and the State's investment in the Port and regional economy is wasting. ILA obviously hopes that the refusal of carriers to use Leatherman will cause the SCSPA to change its employment practices.

The Fourth Circuit, however, concluded that ILA's secondary boycott did not violate the NLRA, invoking this Court's "work preservation" defense over a powerful dissent from Judge Niemeyer. That decision conflicts with decisions of numerous courts of appeals, including the D.C. and Ninth Circuits, which in virtually identical circumstances concluded that the International Longshore Workers' Union ("ILWU")—the West Coast counterpart to the ILA—was engaged in "work

acquisition," not "work preservation," and thus violated the secondary-boycott prohibition. The practical consequences of this split are stark: unions on the East Coast can now engage in conduct that is illegal on the West Coast.

The Fourth Circuit's decision also cannot be reconciled with this Court's work-preservation precedent. This Court has instructed that the defense applies only if the union can show *both* that the work it seeks has been "traditionally performed by employees represented by the union"–*i.e.*, the bargaining unit—and that the coerced employer controls the assignment of the work in question. See *NLRB* v. *Int'l Longshoremen's Ass'n*, 473 U.S. 61, 77 (1985) ("*ILA II*"). Here, ILA's lawsuit against USMX carriers "sought to acquire work that [ILA members] never had and that [USMX carriers] had no power to give it." *NLRB* v. *Loc. 638, Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507, 528 n.16 (1977) ("*Pipefitters*").

The Fourth Circuit's decision rested on incorrect determinations on both prongs. First, the court claimed that ILA's lawsuit sought to preserve bargaining-unit work because ILA represents a coastwide bargaining unit and its members perform all longshore jobs at some other East and Gulf Coast ports. The court speculated that because maritime carriers can decide which ports to use, they could simply choose to call only at ports using ILA members for all work. But as this Court's decision in *Pipefitters* makes clear, the focus of the secondary-boycott prohibition is the work at-issue *in the dispute between the union and the primary employer*. Here, the question is who controls the assignment of the non-union lift-equipment work at Leatherman, not the lift-equipment work at other East and Gulf Coast ports. That work in South Carolina is

not and *has never been done* by any ILA bargaining unit.

Second, contrary to the Fourth Circuit's holding, maritime carriers do not "control" the assignment of work at ports on the theory that they can bypass an intended port of call. As the Ninth Circuit correctly held, ILA's "argument regarding the shipping carriers' ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the '"right to control" the assignment of the work' at this Port." *Hooks ex rel. NLRB* v. *ILWU*, 544 F. App'x 657, 658 (9th Cir. 2013) (quoting *Pipefitters*¸ 429 U.S. at 537). As Judge Niemeyer put it, the Fourth Circuit's contrary decision "fl[ies] in the face of controlling Supreme Court precedent" that the "touchstone" is whether the union's coercive conduct "is addressed *to the labor relations of the contracting employer vis-à-vis his own employees*." App. 49a (quoting *ILA I*, 447 U.S. at 504) (emphasis supplied)). Because USMX carriers had "no power to assign the work," as this Court has held is required by the NLRA to justify coercive union action, ILA's action was unlawful. *Id.* (emphasis omitted).

The court of appeals cloaked its distortion of the work-preservation defense behind this Court's "containerization" decisions–cases from decades ago applying the work-preservation defense in the immediate aftermath of shipping containers, a revolutionary innovation that made shipping "substantially more economical" and cost some longshoremen their jobs. See *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 494 (1980) ("*ILA I*"). But that is not the issue presented here, where the jobs at issue have been the same for decades. "Containerization" is not a magic wand to

wave and make a violation of section 8(b)(4)(ii)(B) disappear.

The Fourth Circuit's decision eviscerates the NLRA's secondary-boycott prohibition. This Court has held that secondary boycotts are prohibited due to their "significant adverse effects on the market and on consumers." *Connell Constr. Co.* v. *Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 624 (1975). Yet, in the lower court's view, a union may virtually always coerce an employer to cease doing business with another employer with whom the union has a dispute, because the first employer can simply purchase goods and services elsewhere and thus "control" who does the work. This would *eliminate* Congress's prohibition of secondary boycotts, making the exception subsume the rule, and contradict *Pipefitters*.

This significant legal issue is presented to this Court in a context with profound practical implications. A $1.5 billion investment by the State of South Carolina in infrastructure crucial to the State and the regional economy, and thus to the U.S. supply chain, sits all-but idle. USMX carriers will not call at Leatherman and risk exposure to more punitive lawsuits. SCSPA forewent *en banc* review and is filing this petition early due to the urgency and importance of this issue to the State and regional economies. The court of appeals' decision creates a conflict among the courts of appeals, contravenes this Court's precedent, and nullifies a provision of the NLRA that Congress enacted to protect the economy from a particularly damaging form of labor action. The petition should be granted.

STATEMENT OF THE CASE

A. Statement Of Facts

ILA and its Local 1422 represent longshoremen at the Port of Charleston, South Carolina. App. 57a. USMX is a multi-employer association of maritime container carriers, terminal operators, and port associations. App. 54a. Its members are responsible for the transportation and handling of cargo shipped to and from U.S. ports, including the Port of Charleston. *Id.* It represents maritime carriers, stevedoring companies, and others in negotiating and administering collective bargaining agreements with ILA and its local unions. *Id.*

ILA and USMX (but not SCSPA) have long been parties to a Master Contract that covers numerous employees at ports along the East and Gulf Coasts of the United States. Article VII, Section 7 of the ILA-USMX Master Contract provides, *inter alia*, that USMX will "formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees." App. 55a (quoting Master Contract, Art. VII, Section 7).

An appendix to the Master Contract includes a "Containerization Agreement" in which the parties "recognize the existing work jurisdiction of ILA employees covered by their agreements with the ILA over all container work which historically has been performed by longshoreman and all other ILA crafts at container waterfront facilities." App. 55a-56a (quoting Containerization Agreement).

SCSPA is an instrumentality of the State of South Carolina. App. 57a. It has operated the Port of Charleston for roughly 80 years. SCSPA enters into contracts with numerous USMX carriers to provide services at the Port's waterfront container-handling facilities. Neither the State of South Carolina nor SCSPA has ever been party to a Master Contract or any other ILA agreement covering the Port. *Id.* Indeed, in 1969, the South Carolina legislature passed a Concurrent Resolution stating that there is "no constitutional or statutory authority permitting the State, its subdivisions, agencies or institutions to bargain collectively with their employees." McNair Resol. H 1636, 98th Gen. Assemb., 1st Sess., 1969 S.C. S.J. 826 (Apr. 30, 1969).

In operating the Port of Charleston, accordingly, SCSPA has since its inception used what is known as a hybrid model for labor. App. 57a. SCSPA uses state employees to "operate state-owned lift equipment to load and unload container ships that call at" the Port's Terminals. *Id.* "ILA-represented employees perform the remainder of the longshore work at the [P]ort." *Id.* Overall, "[t]here are approximately 270 state employees and over 2,000 ILA members working on the terminals at the Port of Charleston." App. 114a. This same hybrid model is also used at the ports in Savannah, Georgia, and Wilmington, North Carolina. App. 6a.

ILA has long asserted that the purpose of Article VII, Section 7 of the Master Contract is to "contain the hybrid operating model to those existing terminals where it was used," and to forbid USMX carrier-members to "call on any new terminal where the container work

was not all performed by ILA unit members, regardless of the port." App. 116a-117a. ILA Vice President Kenny Riley is quoted in a 2020 book as stating:

> The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there . . . if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities."

App. 119a (quoting *Kenny Riley and Black Union Labor Power in the Port of Charleston*).

In 2020, after years of planning, permitting, investment and construction, SCSPA added the Hugh K. Leatherman, Sr. Terminal to two existing terminals. App. 57a. SCSPA stated that Leatherman would operate under the hybrid model used at the Port's other terminals. App. 58a.

In response, USMX's Chief Executive Officer notified SCSPA's President and Chief Executive Officer: "[P]ursuant to Article VII, Section 7(b) of the [Master Contract] . . . USMX employer-members may be prohibited from using the new facility being developed . . . at [the Port] if the work at that facility is not performed by Master Contract bargaining-unit employees." App. 58a. Other USMX carrier-members sent similar letters to SCSPA. *Id.*

Although USMX, SCSPA, ILA and State representatives met regularly, they were unable to reach agreement to avoid the threatened unlawful boycott of Leatherman. App. 58a. During a January 2021 meeting, ILA Vice-President Riley "stated [that] ILA and

Local 1422 were interested in consuming all the jobs at the Leatherman Terminal." App. 122a.

In January 2021, the State of South Carolina and SCSPA filed with the NLRB unfair labor practice charges against ILA, its Local 1422, and USMX, asserting that Article VII, Section 7 of the Master Contract violated section 8(e) of the NLRA. App. 8a.[1] On March 18, 2021, ILA, Local 1422, and USMX agreed in writing not to enforce Section 7(b) of the Master Contract until the resolution of the unfair labor practice charges. App. 59a n.7.

On March 30, 2021, SCSPA began operations at Leatherman using the same hybrid labor model employed at other Charleston terminals. App. 8a. On April 9, USMX carrier Hapag-Lloyd called at the new Terminal. App. 59a. Two weeks later, ILA filed a lawsuit against USMX and Hapag-Lloyd in New Jersey state court. App. 8a-9a. And, when USMX carrier member Orient Overseas Container Line Ltd. called at Leatherman, ILA added it to the lawsuit. App. 59a.

In that lawsuit, ILA alleged that USMX and its carrier-members breached the Master Contract and portions of the Containerization Agreement and committed other torts by calling at Leatherman. App. 9a. As amended, the complaint seeks $300 million in damages, plus attorneys' fees, interest, and costs. *Id.*

In response, the State, SCSPA, and USMX filed a second set of unfair labor practice charges with the Board, this time alleging violations of sections 8(b)(4)(ii)(A) and (B) and 8(e), on the ground that ILA's lawsuit coerces USMX and its members to cease doing

[1] The Fourth Circuit affirmed the Board's decision that the Master Contract did not violate section 8(e) of the NLRA on its face. Petitioners do not seek review of that ruling.

business at Leatherman in order to force SCSPA to use ILA-represented employees to perform the lift-equipment work that has always been performed by state employees. App. 9a, 59a.

After the ILA lawsuit, at least five additional USMX members contacted SCSPA demanding that they be assigned to the Wando Terminal in Charleston, not the Leatherman Terminal. App. 9a. One of these carriers threatened to redirect its vessels to the Port of Savannah if assigned to Leatherman. *Id.* Within the month, USMX carriers ceased calling at Leatherman. *Id.*

B. Rulings

1. ALJ Decision

The ALJ found that ILA's lawsuit was a sword to achieve its unlawful secondary objective—the acquisition of work at Leatherman—in violation of sections 8(b)(4)(ii)(A) and (B) and 8(e) of the NLRA.

The ALJ first concluded that in this case "there is no evidence of any actual or anticipated threat to unit work, only vague speculation." App. 151a. He explained that evidence showed "Charleston is primarily a regional port," and that there was no evidence that "work might migrate from ILA-controlled ports to Charleston." App. 151a, 152a.

The ALJ then found that "[w]hat is *not* lacking is the evidence of ILA's desire to obtain all the container work at the Leatherman Terminal, as well as at any future container-handling facilities." App. 152a. After describing the evidence, the ALJ found that "ILA's object for its lawsuit against USMX and its carrier-members was work acquisition, not work preservation," and further that "ILA filed its lawsuit with the object of forcing USMX and its carrier-members to agree that facially valid provisions [of the Master Contract and

Containerization Agreement] prohibited them from calling on the Leatherman Terminal unless bargaining-unit employees performed all container work, including the lift-equipment work, in violation of Section 8(b)(4)(ii)(A) and 8(e)." App. 153a.

2. The Board Decision

The Board reversed. It found that the lawsuit did not seek to acquire work at the Port, but instead had a "lawful work preservation" objective. App. 65a.

The Board concluded that the collective bargaining agreement covered a coast-wide unit, and that ILA was "seeking to preserve the traditional work and the jobs of unit employees in the face of the technological advances affecting the coastal units, including such changes as at the new Leatherman Terminal." App. 71a.

The Board also found that USMX and its members "have sufficient control over the work in question—the loading or unloading of containers they own or lease"—for ILA to invoke the work-preservation doctrine. App. 72a. The Board acknowledged that "SCSPA has sole authority to decide which terminals at the Port of Charleston USMX carriers call on, as well as who performs loading and unloading work at those terminals using state-owned lift equipment . . . ." *Id.* But the Board nonetheless believed that because USMX carrier-members "have the authority to bypass the Port of Charleston and call on other ports where ILA-represented employees perform all loading and unloading work," that ability gives USMX and its carrier-members "the right to control who performs loading and unloading work of their containers." App. 72a, 73a.

Finally, the Board stated that "[t]o the extent that a showing of job loss or threat thereof is required, it has

been satisfied by the history of containerization and its effect on the number of longshoremen." App. 75a.

3. Board Dissent

Member Ring dissented. He first observed that "SCSPA is not, and never has been, a party to the Master Contract (or any other labor agreement) with the ILA. And despite the ILA's contractual claim to all container work along the East and Gulf Coasts, for nearly 50 years the SCSPA, with the ILA's acquiescence, has used a 'hybrid' operating model at the Port's North Charleston and Wando Welch Terminals." App. 77a. He thus concluded that "even assuming arguendo that the ILA's lawsuit has as its objective the preservation of work traditionally performed by the ILA . . ., the work in question is the operation of the lift-equipment work at the Leatherman Terminal, and USMX and its carrier-members do not have the power to give that work to ILA-represented employees." App. 79a-80a.

The dissent rejected the Board's conclusion that USMX carriers had control over the work because they could have chosen to call at other ports, rather than at Charleston, stating:

> to find the ILA's lawsuit lawful because a carrier may "bypass" a port where, and because, the SCSPA controls the lift-equipment work and assigns it to state employees is just another way of saying that the lawsuit is lawful because the carrier may cease doing business at that port. But the gravamen of the 8(b)(4)(ii)(B) allegation at issue here is precisely that the ILA, in bringing its lawsuit, has that very object—*i.e.*, an object of foreign carriers to cease doing business with the SCSPA. In effect, my colleagues find the ILA's lawsuit lawful to the extent it succeeds in accomplishing its unlawful object!

App. 98a-99a.

Further, Member Ring explained that the Board's decision was at odds with this Court's decision in *Pipe-fitters*. He explained that the subcontractor in that case could have declined the job at issue and worked only on projects where the general contractor did not require it to install pre-cut and pre-threaded pipe, and instead used union-represented employees to cut and thread the pipe. But "the subcontractor in *Pipefitters* was found *not* to have the right to control the work in question," and thus the union's pressure on the sub-contractor was secondary and unlawful because the union's real or primary dispute was with the general contractor. App. 99a. The dissent concluded that this precisely mirrors the situation here.

Finally, Member Ring rejected the Board's conclusion that the ILA was seeking "to preserve the traditional work of its members 'in the face of technological advances.'" App. 100a. Here, there was no technological advance that requires "a creative definition of the work in question in order to preserve a union's traditional work." *Id.*

As Member Ring concluded, "You could not ask for a more classic case of unlawful secondary pressure." App. 101a.

4. The Fourth Circuit's Decision

As the court of appeals recognized, a union lawsuit constitutes an unfair labor practice only if it is baseless or "has an objective that is illegal under federal law," *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 737 n.5 (1983). In this case, ILA's lawsuit indisputably coerced USMX carriers to cease doing business at Leatherman. The question was whether ILA nonetheless carried its burden to show that it was entitled to the

work-preservation defense this Court established. App. 14a & n.1. The court of appeals concluded that ILA had shown both that it sought to preserve work "traditionally performed by employees represented by the union," and that USMX carriers had a right to control the work in question. App. 14a.

After reciting the history of containerization in the maritime industry, the court first decided that the work at issue is not the lift-equipment work at the Port of Charleston, but "the loading and unloading [of containers] generally at East and Gulf ports," App. 17a. The court recognized that "ILA-represented employees have never performed the lift-equipment work at any terminal at the Port of Charleston." App. 18a. But, the court concluded, based on the Supreme Court's containerization decisions involving technological change, that it should "'look beyond the locus of a dispute and consider traditional work patterns' more broadly." *Id.* (citation omitted).

Next, the court found that "although this case arose some 40 years after the *ILA* [containerization] cases," ILA is "still 'seeking to preserve the traditional work of unit employees in the face of the technological advances affecting the coastal units,' including at Leatherman terminal." App. 20a (citation omitted). It concluded that ILA was doing so by enforcing the Containerization Agreement "against employers that breach its terms by choosing hybrid ports for their longshore work." App. 21a. In so ruling, the court of appeals never specified any technological advances allegedly necessitating ILA's lawsuits.

The court also rejected SCSPA's argument that ILA's lawsuits are unlawful because the right to control work assignments at Leatherman lies with SCSPA, not with USMX carriers. Like the NLRB, it

concluded that USMX carriers have the power to "control whether they send their containers to a terminal whose labor" is represented by ILA. App. 25a. See App. 27a ("USMX carrier-members can unilaterally give that work to union members" by refusing to call at ports that do not exclusively use ILA labor). And it rejected the argument that this Court's decision in *Pipefitters* precludes that result.

5. Judge Niemeyer's Dissent

In dissent, Judge Niemeyer explained that Section 8(b) prohibits unions "from engaging in secondary activities whose object is to force one employer [here, the Maritime Alliance] to cease doing business with another [here, the Ports Authority]." App. 33a-34a (quoting *ILA I*, 447 U.S. at 503). He concluded that ILA had not shown that it was entitled to the work-preservation defense; first, because the object of its lawsuit against USMX carriers was work acquisition, not work preservation; and, second, because ILA's lawsuit sought to coerce USMX carriers who had no "right of control" over the lift-equipment work at Charleston.

First, Judge Niemeyer explained that the majority's conclusion that ILA intended to preserve the loading and unloading work at East and Gulf Coasts generally was "fundamentally flawed because it fails to focus on the work performed by the relevant bargaining unit, Local 1422, as required." App. 34a (citing *ILA I*, 447 U.S. at 507). He observed that "[w]hile ILA workers do *generally* operate the cranes in East Coast and Gulf Coast Ports, . . . the undisputed facts of record show a longstanding exception to that generalization—they have *never* operated cranes in the Ports of Charleston, Wilmington, and Savannah, each of which has *always* operated with a hybrid division of labor." App. 34a-35a (emphasis in original). "ILA's effort to bring about

change in the Port of Charleston to eliminate the hybrid model in favor of 100% ILA work was clearly an effort *to acquire* work, which, as it was attempted, was illegal, and not the lawful effort *to preserve* work . . . ." App. 35a.

Further, Judge Niemeyer explained, the record shows that "ILA faced no loss or threatened loss of work in the Port of Charleston from the opening of the new Terminal" and no loss or threatened "loss of work at any other port on the East Coast or Gulf Coast." App. 35a. The dissent rejected the majority's reliance on the containerization cases, saying, "without any apparent logic, both the NLRB and the majority . . . describe the ILA's impetus in this case as being the loss of traditional work performed by union workers emanating from the containerization of cargo in the 1950s." App. 44a. "[T]here is no factual or logical basis to conclude that the ILA's effort to obtain the crane-operating work at the new terminal . . . is an effort to preserve work lost by containerization." *Id.*

Judge Niemeyer also rejected the conclusion that USMX carriers "had the right of control over the crane-operating work in the Port of Charleston," because they "have discretion as to where their ships call, and thus they can . . . offload ships at ports staffed solely by ILA workers." App. 47a-48a. He said, "ILA's coercing [USMX's] members to exercise this power is precisely what § 8(b) prohibits as an illegal secondary boycott." App. 48a. "Rather than dealing with the Ports Authority directly with respect to the work that the Ports Authority controls, the ILA brought pressure against the Port Authority's customers in an attempt to coerce the Ports Authority. This is secondary activity and is illegal." *Id.*

As the dissent highlighted, it was "undisputed" that lift-equipment operators at the Port "are employees of the Ports Authority, hired and paid by it. Neither those employees nor the Ports Authority are under any contract with the ILA with respect to crane-operating work." App. 48a. They therefore are neither USMX carriers "nor under their control, as required for the ILA's action to be lawful." *Id.*

Judge Niemeyer therefore concluded that ILA had failed to show a valid work-preservation defense for its coercion of USMX carriers to cease doing business at Leatherman, and that its conduct was illegal secondary pressure in violation of section 8(b)(4)(ii)(B).

REASONS FOR GRANTING THE PETITION

Where, as here, a union files a lawsuit that "has an objective that is illegal under" the NLRA, that action constitutes an unfair labor practice. *Bill Johnson's Rests.*, 461 U.S. at 737 n.5. See also *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 526 (2002). ILA's lawsuit plainly had an unlawful object: coercing USMX and its carrier-members to cease doing business at Leatherman Terminal.

ILA's coercion of USMX carriers to cease calling at Leatherman to force SCSPA to use ILA members for all longshore jobs at that Terminal violates the plain terms of section 8(b)(4)(ii)(B). The court of appeals has endorsed an NLRB overreach that is inconsistent with Congress's text and purpose and that conflicts with decisions of other courts of appeals and of this Court. The decision's devastating effect on the NLRA's prohibition of secondary boycotts presents an important issue of federal labor policy on which the federal courts should be uniform. And the issue arises in a compelling con-

text where South Carolina's major infrastructure investment is threatened and ILA's actions weaken the nation's supply chain. This Court should grant review.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS.

The Fourth Circuit's decision—that ILA's coercion of USMX carriers to cease doing business at Leatherman fell within the work-preservation exception to the prohibition of secondary boycotts—is flatly inconsistent with decisions of the D.C. and Ninth Circuits involving indistinguishable circumstances. Nor can it be reconciled with the decisions of numerous courts of appeals applying the work-preservation defense.

In *ILWU Local 8* v. *NLRB*, 705 F. App'x 1 (D.C. Cir. 2017) (per curiam), and *ILWU Local 8* v. *NLRB*, 705 F. App'x 3 (D.C. Cir. 2017) (per curiam), the D.C. Circuit concluded that ILWU had engaged in an unlawful secondary boycott. Under its master contract with the Pacific Maritime Association ("PMA"), ILWU members perform virtually all longshore jobs at West Coast ports, including operating large refrigerated containers called "reefers." At Terminal 6 of the Port of Portland, however, *state employees* had long performed the reefer work. ILWU members at Terminal 6 engaged in work stoppages and slowdowns unloading and loading containers, so that PMA carriers would stop calling at Terminal 6. ILWU's goal was to coerce Terminal 6's operator (ICTSI) to make the Port fire the state employees and use ILA members for the reefer work.

In both cases, ILWU, like ILA here, argued that its conduct was "work preservation," not a secondary boycott. It claimed that its master contract was a coastwide agreement, that its members performed reefer work at *other* West Coast ports, and thus that it was

preserving bargaining unit jobs. The Board and the D.C. Circuit rejected those arguments, recognizing that (i) the relevant question was who controlled the reefer work at Portland, not on the coast generally; (ii) the Port of Portland controlled that work; (iii) the carriers' ability to call at a different port was irrelevant; and therefore (iv) ILWU's coercion of the port operator and carriers to force the Port to terminate state employees and use ILWU members for reefer work was unlawful secondary activity. See *ILWU*, 705 F. App'x at 3 ("labor practices targeted against . . . the shipping carriers . . . to pressure the Port to re-assign the dockside reefer work [to ILWU members] were unlawful secondary boycotts targeting an employer [the carriers] that did not have the right to control the work") (enforcing *Int'l Longshore and Warehouse Union*, 363 N.L.R.B. No. 12 (Sept. 24, 2015)); see also *ILWU Local 8*, 705 F. App'x at 4 (enforcing *Int'l Longshore and Warehouse Union*, 363 N.L.R.B. No. 47 (Nov. 30, 2015)).

The Ninth Circuit and district courts in that circuit have also addressed this ILWU conduct and concluded that it constituted an unlawful secondary boycott. When ILWU commenced its coercive work actions at Terminal 6, the port operator not only filed unfair labor practice charges, but also instituted a lawsuit seeking damages for ILWU's unlawful secondary boycott. In two separate proceedings, the federal district court entered preliminary injunctions against ILWU, prohibiting it from continuing to engage in work stoppages, slowdowns, and the filing of grievances against ICTSI and its carrier customers. As the district court explained, "because the Carriers have no power to assign the [work at issue] to ILWU members, [ILWU's] grievances are tactically calculated to pressure the Carriers to cease doing business with the Port." See

Hooks ex rel. NLRB v. *ILWU*, 905 F. Supp. 2d 1198, 1212 (D. Or. 2012), *aff'd in part and vacated in part*, 544 F. App'x 657 (9th Cir. 2013); *Hooks ex rel. NLRB* v. *Int'l Longshore and Warehouse Union*, Case No. 3:12-cv-01088-SI (D. Or. July 19, 2012), Dkt. 50 (same).

On appeal, the Ninth Circuit held that the Board would likely succeed in establishing that ILWU was engaged in an unlawful secondary boycott, and that ILWU was not entitled to the work preservation defense. The court of appeals agreed that the Port of Portland likely "controls the disputed work," because it retained that control when it leased Terminal 6 to the port operator. *Hooks ex rel. NLRB* v. *ILWU*, 544 F. App'x at 658. The court also *rejected* ILWU's argument that shipping carriers controlled the assignment of the reefer work at Terminal 6, explaining: "ILWU's argument regarding the shipping carriers' ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the 'right to control the assignment of the work' at this port." *Id.* (quoting *Pipefitters*, 429 U.S. at 537) (internal quotation marks omitted).

Had either the D.C. or Ninth Circuit considered the issue before the Fourth Circuit, it would have rejected ILA's work preservation defense. Both courts would have concluded that ILA's coercion of maritime carriers to cease calling at Leatherman was an unlawful secondary boycott and that ILA was not entitled to the work-preservation defense because maritime carriers do not control the assignment of the loading and unloading of their containers simply because they could call at a different port. East Coast unions should not be allowed to engage in secondary boycotts that would

be illegal if conducted on the West Coast. The Court should intervene.

This case is also indistinguishable from *Local 32B-32J Service Employees International Union* v. *NLRB*, 68 F.3d 490, 492-93 (D.C. Cir. 1995). There, a union represented a superintendent and porter employed by a contractor (Nevins) in a building; but Nevins subcontracted *the cleaning work* at the building to another entity, Golden, with which the union had a dispute. The union objected and pressured Nevins to cease doing business with Golden, claiming that the union's members were entitled to the cleaning work. *Id.* at 493.

The court rejected that argument. It first observed that Nevins had "always used outside, independent contractors for that task." *Id.* at 494. It then explained that the union sought to "illegally extend [its] contract [with Nevin] to reach outside the contractual bargaining unit" to Golden's employees. *Id.* at 495 (citing *Pipefitters*, 429 U.S. at 517-18). Further, the court explained, "[i]f one union pressures an employer who has no power over the . . . work, then that union's conduct presumptively is directed toward another (secondary) employer who does have that power." *Id.* at 495 n.5 (citing *ILA II*, 447 U.S. at 504-05; *Pipefitters*, 429 U.S. at 521-28). "In sum," the court concluded, "the [union's] efforts to enforce its interpretation of the contract [with Nevin] were intended *not* to preserve work (*that it had never done*), but to pressure Golden to change its labor policies." *Id.* at 495 (emphases supplied).

The parallels are striking. Just as the union members in *Local 32-B* had never done the cleaning work for Nevin, ILA members have "never meaningfully done" the lift-equipment work at Charleston. In fact,

they have never done it, period. Thus, the work-preservation defense "does not excuse the [union's] conduct [here because] its application . . . would illegally extend the [ILA-USMX] contract to reach outside the contractual bargaining unit" and influence the assignment of work that USMX carriers do not control. *Id.* See also *Loc. Union No. 25, A/W Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* v. *NLRB*, 831 F.2d 1149, 1152 (1st Cir. 1987) (union's targeting of subcontractor to pressure contractor who "alone possessed and exercised the right to control the work" was unlawful secondary action); *Int'l Bhd. of Elec. Workers, Loc. Union No. 501* v. *NLRB*, 566 F.2d 348, 352 (D.C. Cir. 1977) (where a union pressured an employer with "no 'right of control,'" there is at least "'strong evidence,' that the union's actions are . . . 'tactically calculated to satisfy union objectives elsewhere,' and are thus prohibited secondary activity") (citations omitted) (quoting *Nat'l Woodwork Mfrs.*, 386 U.S. at 644-45).

In sum, other courts of appeals plainly would have rejected ILA's work-preservation defense here. This Court should grant the petition to resolve the conflict.

II. THE FOURTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS.

The Fourth Circuit nodded—barely—at this Court's test for determining whether conduct is lawful work preservation, but its decision contravenes it. A union may not invoke the work-preservation defense as a sword wielded "to reach out *to monopolize jobs or acquire new job tasks* when their own jobs are not threatened" by the employer being coerced. *Nat'l Woodwork Mfrs.*, 386 U.S. at 630-31 (emphasis supplied). See also *ILA I*, 447 U.S. at 507. And the union may not coerce

employers where the "work sought by the union [is] not under [that employer's] control." *Pipefitters*, 429 U.S. at 521-22 (citing *Nat'l Woodwork Mfrs.*, 386 U.S. at 616-17). Here, ILA's lawsuit sought to leverage USMX carriers to influence work assignments at Leatherman—work not included in any ILA bargaining unit and not controlled by USMX carriers.

The Fourth Circuit, like the Board, sought to evade this Court's decisions by defining the work at-issue not as the lift-equipment jobs at Leatherman, but as "the loading and unloading generally at East and Gulf Coast ports." App. 17a. The court observed that the Master Contract establishes a coastwide, multi-port bargaining unit, and decided that, although ILA-represented employees have never done lift-equipment work at Charleston, they have done it across the coastwide unit. The court thus defined the work at-issue based *not* on traditional bargaining-unit work at the Port of Charleston, but on such work *elsewhere*.

This approach to defining the work at-issue, however, is irreconcilable with, and thus foreclosed by, *Pipefitters*. There, although it was undisputed that union members "[t]raditionally" performed the cutting-and-threading work that was the subject of the union's boycott, 429 U.S. at 512, this Court did not define the work at-issue at that level of generality. Instead, it focused on the cutting-and-threading work *at the specific worksite, in the specific relationship, giving rise to the dispute*. The Court found the union's boycott unlawful because it was "uncontrovertible that the [cutting and threading] work *at this site* could not be secured by pressure on [the signatory employer] alone and that the union's work objectives could not be obtained without exerting pressure on [the secondary employer] as well." *Id.* at 530 (emphasis supplied).

Pipefitters teaches that the work at-issue must be defined in terms of the specific work, at the specific site, giving rise to the dispute. This is consistent with Congress's focus on confining labor disputes to the particular employer and union involved. Here, under that framework, the work at-issue is the lift-equipment jobs at the Port, which ILA-represented employees have never performed and thus ILA cannot seek to preserve.

The Fourth Circuit also failed to distinguish *Pipefitters*' analysis of which employer had the "right to control" assignment of the work at-issue. As the dissenting opinion highlighted, App. 42a, the subcontractor in *Pipefitters* could have chosen not to work for the contractor; but the Supreme Court nonetheless found the union's pressure unlawful because the subcontractor had "no right to control" the pipe's cutting and threading. 429 U.S. at 524-28.

Like the subcontractor there, USMX and its members could have decided not to contract with SCSPA, rather than accept the hybrid division of labor. But that possibility is irrelevant to the legal question here—it "conflates" the question of control over containers with control over the relevant work assignment, as the Ninth Circuit held. See *supra* at 5. SCSPA controls the assignment of the lift-equipment work; that is the work at-issue; and ILA's coercion of USMX and its carrier-members to cease doing business with SCSPA to obtain the lift-equipment work for ILA-represented employees is secondary and unlawful under this Court's analysis in *Pipefitters*.

The court of appeals' decision also distorts and contradicts this Court's *ILA* decisions. The *ILA* work-preservation cases cited by the Fourth Circuit arose in the context of the "container revolution," involving cir-

cumstances "when employees' *traditional* work is displaced, or threatened with displacement, by technological innovation." *ILA I*, 447 U.S. at 494, 505 (emphasis supplied). That event occurred many decades ago, when maritime carriers developed the technology that led to containerization, which in turn led to the elimination of many longshore jobs involving the loading and unloading of cargo and the stuffing and unstuffing of irregular containers with goods. This Court's *ILA* cases extended the language of the NLRA to support the proposition that, when union jobs are eliminated by technological change, unions' secondary attempts to obtain for their members the transformed work that replaces the eliminated jobs constitutes lawful work preservation, not work acquisition.

This case, however, does not involve any technological change at Leatherman that eliminated or transformed jobs. Jobs at Leatherman are the same as those at other terminals and have not changed in decades. ILA members have never performed the lift-equipment work at the Port, SCSPA has never been a USMX member, and State employees have never been in the ILA-USMX bargaining unit. No ILA job is displaced or threatened by Leatherman; indeed, ILA members will hold jobs at Leatherman in the same proportion as at other Charleston Terminals. ILA simply seeks to expand its bargaining unit by coercing USMX members—who do not control job assignment at Leatherman—to cease calling at Leatherman.

In addition, this Court's *ILA* cases instruct that, to determine whether the work preservation defense applies in the face of technological change, "[i]dentification of the work at issue . . . requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the

agreement seeks to accomplish that result under the changed circumstances created by the technological advance." This cautious approach is designed to ensure that the work-preservation agreement "seeks no more than to preserve the work of bargaining unit members." *ILA I*, 447 U.S. at 507. The court of appeals invoked the *ILA* cases, but its decision is devoid of any such careful analysis. And, this Court has stated, where the "method of doing the work" has not changed, the issue of work-preservation will be determined by whether the union members "had always done" the work at issue. *Id.* at 505. As Judge Niemeyer's dissent highlights, the court of appeals ignored this instruction.

The court of appeals' decision cannot be reconciled with this Court's decisions. It defeats the purposes of the secondary-boycott prohibition and the work-preservation defense; and its interpretation and application of section 8(b)(4)(B) both distort and nullify this Court's precedent.

III. THE QUESTION PRESENTED IS IMPORTANT, AND THE FOURTH CIRCUIT'S DECISION WILL HAVE DAMAGING CONSEQUENCES FOR THE LAW, THE STATE, AND THE REGIONAL ECONOMY.

If the Fourth Circuit's decision stands, it will severely damage an important federal law. Congress enacted the secondary boycott prohibition to prevent "labor abuses" that target neutral parties. *Nat'l Woodwork Mfrs.*, 386 U.S. at 623-24. Secondary boycotts have "significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals." *Connell Constr. Co.*, 421 U.S. at 624. The Fourth Circuit's decision expands the work-preserva-

tion defense so that it guts the secondary boycott prohibition, undermines the purposes of the NLRA, and creates arbitrary disparities in the treatment of unions and employers across the economy. There are several reasons this is so.

First, a conflict in the courts of appeals about the scope and application of the secondary boycott prohibition inherently disrupts Congress's desired uniformity the administration of the NLRA. See, *e.g.*, *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978) (granting certiorari to resolve a conflict on the meaning of an important federal statute). That disruption is particularly harmful where, as here, the decision is inconsistent with this Court's delineation of the scope of the secondary boycott prohibition and the work preservation defense.

This conflict is important not only with respect to cases arising under the NLRA; it also significantly affects the scope of the non-statutory labor exemption to the antitrust laws. Such cases—and the union's immunity from antitrust liability—often turn on whether the union's conduct is a secondary boycott. See, *e.g.*, *Connell Constr. Co.*, 421 U.S. at 625 (concluding that a union-employer agreement was an illegal hot cargo agreement under section 8(e) of the NLRA and thus not within the non-statutory labor exemption). See also *Conn. Ironworkers Emp.'s Ass'n* v. *New England Reg'l Council of Carpenters*, 869 F.3d 92, 99-100 (2d Cir. 2017); *Loc. 210, Laborers' Int'l Union of N. Am.* v. *Lab. Rels. Div. Associated Gen. Contractors of Am., N.Y.S. Chapter, Inc.*, 844 F.2d 69, 79 (2d Cir. 1988).

Second, the court of appeals' decision will vastly expand the circumstances when unions can coerce neutral employers—not to shield the jobs of unit members, but to *take away* the jobs of non-union employees of

different employers. Here, the Fourth Circuit has held, under the banner of work-preservation, that ILA can coerce signatories to the Master Contract to cease doing business with *any* non-signatory employer on the East Coast whose employees do jobs ILA members perform at some other locations. If a union can invoke the work-preservation defense by citing *the type of work performed by union members in completely different parts of the country*, then unions can engage in coercion of neutral employers to take away jobs from non-union employees in places where they have long worked. That is not the law. This Court has instructed that the work-preservation defense exists to allow a bargaining unit to "preserve" jobs in that unit, not to acquire jobs outside the unit. *See supra* at 4.

In addition, as explained above, the Fourth Circuit held that maritime carriers "control" the assignment of the lift-equipment jobs for the cargo on their vessels because they have the power to call only at ports that use ILA labor. See *supra* at 5. The Fourth Circuit fails to recognize the logical consequence of its position, which is that any company can be targeted by a union pressure campaign on the theory that it actually has effective control over the work assignments of other companies with which it deals. A neutral company targeted by union coercion can virtually *always* decide not to do business with other businesses that do not use union labor in favor of those that do. On that theory, all union coercion of such employers constitutes work preservation, and secondary boycotts are always lawful. Again, this is a breathtaking proposition. It would eviscerate the secondary boycott prohibition seeking to ban this very tactic.

Third, the maritime setting of this case is an additional reason to grant the petition. Both ILA and

ILWU claim coastwide units and, under the Fourth Circuit's decision, will assert their right to claim all jobs that union members fill at any port along both coasts, including from employers who have never been in a bargaining unit and who assign work at ports to their own employees. Several southern ports have used the hybrid model for decades; they are in the cross-hairs of the unions, and the assumptions on which they have been doing business are threatened. This is no exaggeration; ILWU drove port operator ICTSI out of business in Portland in order to acquire just two reefer jobs there. The State of South Carolina must either change its laws precluding the State from engaging in collective bargaining or face an indefinite boycott of its new terminal by virtually all maritime carriers. Ports along both coasts are critical to the national economy and the supply chain. Allowing coastal unions to monopolize all longshore jobs at all ports because they are parties to master contracts covering these jobs for *bargaining unit* employers at some ports is precisely the opposite of what Congress intended when it enacted section 8(b)(4)(ii)(B). Labor disputes, unrest, and work disruptions will inevitably follow union efforts to monopolize. This Court needs to step in now.

The Fourth Circuit's decision expands the work-preservation defense beyond what Congress or this Court has authorized. It will unleash a uniquely harmful kind of labor action—one that Congress expressly prohibited.

Finally, the practical implications of the Fourth Circuit's decision are devastating. South Carolina ports drive economic growth in South Carolina and the southeast region. Joseph C. Von Nessen, Univ. of S.C.,

The Economic Impact of the South Carolina Ports Authority: A Statewide and Regional Analysis (Oct. 2019), https://scspa.com/wp-content/uploads/full-scpa-economic-impact-study-2019.pdf. South Carolina invested $1.5 billion in Leatherman to bolster the State's and region's supply chain and to support their continued economic vitality. As a result of ILA's lawsuit, however, the Terminal now is all but idle; the State's investment is not returning economic benefits. The State, its people, and the region are losing out on the benefits Leatherman should generate. Even ILA members are losing out because nearly 90% of the new jobs at Leatherman would be filled by ILA members. *Supra* at 8. As stated above, petitioners did not seek *en banc* review in the Fourth Circuit and are filing this petition early because ILA's action is daily harming South Carolina and the region.

* * *

The Fourth Circuit's decision nullifies the secondary boycott prohibition, conflicts with decisions of other Circuits, contravenes this Court's precedent, and is inflicting substantial damage on South Carolina and the region served by the Port of Charleston. This Court should step in.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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