No. 23-325

In The Supreme Court of the United States

SOUTH CAROLINA STATE PORTS AUTHORITY, et al.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE STATE OF GEORGIA AND THE GEORGIA PORTS AUTHORITY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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.

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INTERESTS OF AMICI CURIAE[1]

The Georgia Ports Authority was created by the State of Georgia and empowered to develop and improve Georgia's harbors and seaports and to foster and stimulate the shipment of freight and commerce. O.C.G.A. § 52-2-1 *et seq*. The Authority has provided efficient and productive port facilities and has created jobs and business opportunities which benefit Georgia and the entire southeastern United States. The ports and harbors under its control contribute billions of dollars to Georgia's economy and support hundreds of thousands of jobs throughout the State and the southeast. The Authority has requested approval to expand and build a new 395-acre terminal that will allow it to move an additional two million containers per year through the Port of Savannah.

But that plan, and the potential for billions of investment dollars, was jeopardized by the Fourth Circuit's erroneous decision below. As a driving force of the southeastern economy and critical link in the nation's supply chain, the Authority has a substantial interest in protecting its ability to determine the labor models best suited to operate ports under its control. For years, the Authority has used a hybrid employment model in which non-union, state employees operate certain cranes and other lifting equipment essential for the loading and unloading of cargo ships at the Port of Savannah, while union members perform other longshore

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[1] Counsel for Petitioners and Respondents received timely notice of *amici's* intent to file this brief. *See* Rule 37.2.

work. This model, which is nearly identical to that used by South Carolina, was severely undermined by the Fourth Circuit's holding, which permitted the union to effectuate a secondary boycott in order to acquire *new* jobs at South Carolina's recently opened Leatherman Terminal.

If the Fourth Circuit's decision stands, the same union is certain to induce similar boycotts when the Authority opens its newest Savannah terminal. If successful—and allowed by federal courts—such secondary boycotts would not only upend a model that has served the Authority and Georgia (along with South Carolina) for decades, it could greatly reduce the Authority's shipping and cargo capacity and substantially limit imports and exports throughout the southeast. The Authority and the State of Georgia therefore have a considerable interest in the questions presented in the South Carolina State Ports Authority's petition for writ of certiorari. The Authority and the State of Georgia request the petition be granted.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a labor union's ability to threaten *shippers* as a way of forcing *ports* to hire and employ only union labor. For decades, the law has prohibited this type of activity—a "secondary boycott"—except for the narrow exception where the primary objective of the labor union is the preservation of *existing* work. But the Fourth Circuit's decision eradicates the once-clear distinction between work

preservation and acquisition of *new* work by permitting the union to institute a secondary boycott designed to obtain jobs that were historically performed by *non-union employees* at South Carolina's other terminals. The decision is contrary to law and could have far-reaching consequences for the Authority, the State of Georgia, and the larger economy of the southeastern United States.

This Court should grant certiorari for two reasons. *First*, the Fourth Circuit's decision has jeopardized the Authority's plans to expand and build a new terminal at the Port of Savannah. That expansion has the potential to bring thousands of jobs and billions of dollars of investment to Georgia and the southeast, and any problems or delays in opening the new terminal are likely to have a nation-wide impact given the Port of Savannah's significance. Operations of this significance require years of planning and long time horizons. If this Court declines to correct the Fourth Circuit's decision, Georgia's outlook for this massive outlay of capital will be greatly uncertain.

Second, the Fourth Circuit's decision greatly unsettles the law in this area. The decision elides the clear distinction between work preservation and work acquisition under the National Labor Relations Act and effectively overturns the Act's ban on secondary boycotts. It threatens not only Georgia's ability to operate new ports but any employer's ability to create new jobs without the risk of unfair and illegal secondary boycotts. The Court should grant the petition and correct the Fourth Circuit's erroneous decision.

ARGUMENT

I. The questions presented are of utmost importance to the Authority and the State of Georgia.

The Authority is a crucial component of Georgia's, and the nation's, economy, playing a vital role in fostering international trade, expanding new industries, and driving job creation throughout the southeast. A centerpiece of the region's economic development, the Authority is a primary catalyst for the growth of jobs, tax revenues, and commerce. In 2022 alone, ports operated by the Authority directly and indirectly supported over 560,000 jobs in Georgia, contributed $59 billion to the State's GDP, and spurred the collection of over $11 billion in local, state, and federal tax revenue.[2] Deepwater ports, like the Port of Savannah, are one of Georgia's strongest economic engines. The ports support transportation, manufacturing, wholesale distribution centers, and agriculture.

The outstanding performance of Georgia's deepwater ports is largely the result of strategic investments in port facilities by the State of Georgia over many years. The Port of Savannah is the highest-volume container port in the United States for export,[3] and the

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[2] *2022 Annual Report* 4, Georgia Ports (2022), https://gaports.dcatalog.com/v/FY22-Annual-Report/?page=4.

[3] *Savannah 2023 Economic Trends Report* 55, Savannah Area Chamber of Commerce (2023), https://www.savannahchamber.com/economic-development/the-ports.

third-busiest port in overall volume.[4] It is comprised of two deepwater terminals: the Garden City Terminal, which is now the largest single-container terminal in the western hemisphere, and the Ocean Terminal.[5] The Garden City Terminal moved over twenty-one percent of all east coast container trade, and twelve percent of all U.S. containerized exports, in the 2022 fiscal year.[6] In 2022, the Port of Savannah handled nearly six million twenty-foot-equivalent container units, an increase of over eight percent from the previous record-breaking capacity year of 2021.[7] In fact, the volume of containerized cargo to be handled by the Authority and its ports is projected to increase by more than 106% from 2021 through 2030.[8]

To sustain the economic success and enormously beneficial impact on the region, the Authority and the State of Georgia have invested significant resources in expanding the capabilities of the Port of Savannah, making it the fastest-growing container port in the United States over the last fifteen years.[9] These efforts include the construction of new docks at the Garden

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[4] Adam Van Brimmer, *Savannah's Port Files Plans for Huge Expansion*, Atlanta Journal Constitution (Oct. 5, 2023), https://www.ajc.com/politics/georgia-plans-a-third-cargo-container-terminal-for-busy-port-of-savannah/A7HR3RR5OBHVHBAWZ3EX72BCRU/.

[5] Savannah Area Chamber of Commerce, *Savannah 2023 Economic Trends Report* at 55.

[6] *Id*.

[7] *Id.*

[8] *Id.* at 32.

[9] *Id.* at 31.

City Terminal that increase vessel capacity and the modernization of Ocean Terminal to more efficiently handle a higher volume of containers.[10] Even more significantly, the Authority has already applied to the U.S. Army Corps of Engineers for a new, 395-acre terminal along the Savannah River.[11]

Construction on the third terminal is scheduled to begin in 2026 and finish in 2030.[12] The terminal will boost the port's capacity by 3.5 million twenty-foot-equivalent units, which is the standard measurement in the container shipping industry.[13] This expansion, representing an almost two-billion-dollar investment,[14] is necessary for the Port of Savannah to expand existing shipping capacity and economic activity, and sustain continued growth.[15]

Importantly, the Authority plans to use state employees at the new terminal, applying the same hybrid model that it has historically and successfully used at

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[10] *GPA unveils major expansions*, Georgia Ports (Feb. 4, 2020), https://gaports.com/press-releases/gpa-unveils-major-expansions.

[11] Van Brimmer, *Savannah's Port Files Plans for Huge Expansion*.

[12] *Id.*

[13] Savannah Area Chamber of Commerce, *Savannah 2023 Economic Trends Report* at 31.

[14] Katie Nussbaum, *Ga Ports plans new container port on Hutchison Island*, Savannah Morning News (Sept. 12, 2019), https://Savannahnow.com/story/business/2019/09/12/Georgia-ports-authority-announces-plans-for-new-container-port-on-hutchison-island/2801267007/.

[15] Van Brimmer, *Savannah's Port Files Plans for Huge Expansion*.

Savannah's other terminals. Under the hybrid model, the Authority's cranes are operated and maintained by non-union state employees. These employees are employees of the Authority itself and receive the benefits and salaries of state employees. Other jobs at the terminal, including the moving of containers after being unloaded, are handled by union employees.

The Fourth Circuit's decision would devastate the Authority's ability to operate new terminals under the appropriate labor model of its choosing and threaten Georgia's investment in the Port of Savannah. Given the new terminal's scale and cost, it is critical that the Court decide this case, lest the Authority's new port stand idle like South Carolina's Leatherman Terminal. The Authority cannot afford a similar situation at the Port of Savannah's new multi-billion-dollar terminal.

The Authority has internally analyzed the potential cost of eliminating the hybrid model and using union labor exclusively. Given the extra costs of higher salaries and benefits, required training, and the increased legal risks, the Authority estimates that hiring entirely union workers would result in lost revenues and increased costs totaling nearly $600 million in just the *first year* of the new terminal's operation. Alternatively, if the Authority initially hired state employees under the current hybrid model (as South Carolina did) but were later forced to convert them to union members, the total impact in lost revenues and increased costs would be nearly $450 million in the first year. Either way, the cost is significant and would

likely force the Authority to alter the scope and scale of its planned new terminal.

II. The Fourth Circuit's decision upends decades of clear federal labor law.

The decision below not only threatens the Authority's plans for a new port in Savannah, it also threatens to undermine labor law more generally. The union sued the United States Maritime Alliance—the South Carolina State Ports Authority's most important customer—to implement a boycott of South Carolina's new Leatherman Terminal. The lawsuit's clear purpose was to obtain *new* union positions at the Leatherman Terminal. The Fourth Circuit's decision, allowing the union to coerce Maritime Alliance carriers to cease calling at the Leatherman Terminal, has effectively lifted the NLRA's ban on secondary boycotts by destroying any meaningful distinction between work preservation and work acquisition. The decision opens the door for unions in the Fourth Circuit to use illegal pressure tactics in innumerable industries, and it will support their efforts to do the same elsewhere, unless this Court corrects the problem now.

1. The Fourth Circuit's decision all but rejects the long-standing distinction between work preservation and work acquisition.

The Fourth Circuit's decision casts aside the long-standing, clear distinction between work preservation and work acquisition under the NLRA. By

misconstruing the judicially created "work preservation" exception, the Fourth Circuit broadened the circumstances in which unions can engage in previously unlawful pressure campaigns, seeking work acquisition from non-union jobs rather than preserving work traditionally done with union labor. Other states, including Georgia, are now exposed to the same economic coercion.

The Fourth Circuit correctly acknowledged that union employees had never performed lift-equipment work at the Port of Charleston. Pet. App. 18a. But the court then improperly relied on this Court's containerization decisions involving *technological* change to conclude that the union's coercive acts sought to preserve traditional union work, when, in reality, the union plainly sought to acquire new work in a port that it admittedly never performed previously. Pet. App. 22a–23a. It is axiomatic that work *never performed* cannot be *preserved*.

The Fourth Circuit's overbroad definition of work preservation is contradicted by this Court's prior cases. Under this Court's work-preservation analysis, the defense applies only if the union can show that the work it seeks has been performed traditionally by union employees. *See NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 76–77 (1985); *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach., and Gen. Pipefitters, Local Union No. 638* (*Pipefitters*), 429 U.S. 507, 510 (1977). The union failed to meet that burden.

But the Fourth Circuit incorrectly accepted the union's proffered excuse that the union's action was an attempt to preserve the work of union-represented employees at *other* ports on the East Coast, not simply at the Port of Charleston. Pet. App. 20a. As Judge Niemeyer noted in dissent, union officials testified that they wanted to "have all of the work . . . that is performed by nonbargaining workers to be brought under the [union] jurisdiction." Pet. App. 50a. Thus, the union clearly communicated that South Carolina could avoid the trouble its lawsuit against Maritime Alliance was causing by allowing union workers to perform new work at the Leatherman Terminal—the very definition of a secondary boycott.

If the union's secondary pressure was justified in order to keep operations in *other* ports from affecting the work levels in East Coast ports with different labor models, the ban on secondary boycotts is virtually nonexistent. A union can *always* claim that it is trying to "maintain" work at *other* locations by not allowing nonunion labor at a given location. If allowed to stand, this ruling would give the union virtually unlimited ability to conduct secondary boycotts directed at any East Coast port, including Savannah.

This Court should make clear that the exercise of such wide-ranging power—directed at neutral third parties—is inconsistent with the NLRA. Endorsing the union's conduct here invites a similar attack on Savannah's new port and could force the Authority to change its efficient, long-standing historical labor model.

2. The Fourth Circuit's decision undermines the ban on secondary boycotts.

The Fourth Circuit's decision threatens established law in other ways as well. For example: a union asserting the work-preservation defense must show that the object of its economic pressure had the "right to control" the work at issue. *See Carpenters, Local 112* (*Summit Valley Indus.*), 217 N.L.R.B. 902 (1975); *see also NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980). The Fourth Circuit held that the Maritime Alliance had this right to control because its members could decide which port to patronize. Pet. App. 24a. But this analysis confused "right to control" with "ability to boycott." A customer which is subject to secondary pressure can affect the business of the entity with which the union has its real dispute by giving in to the union and boycotting the union's real target. However, to conclude that this satisfies the "right to control" test for the work-preservation defense completely misses the mark and would vitiate entirely the ban on secondary boycotts.

The Fourth Circuit's interpretation also misreads this Court's ruling on the work-preservation exception in *Pipefitters*. There, the union had undertaken activities to force a subcontractor to cease doing business with a general contractor and thus to force the general contractor to cease doing business with a manufacturer of climate control units. *Id.* at 511. This Court stated: "the issue is whether 'an object' of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by [the statute], the

resolution of which in turn depends on whether the product boycott was 'addressed to the labor relations of the [subcontractor] . . . vis a vis his *own* employees.'" *Id*. at 528 (emphasis added) (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967)). Thus, it is control of labor relations, not control of the quantity of work provided, that determines the control issue under the work-preservation defense.

Here, the union's actions are not in any way "addressed to the labor relations [of the Maritime Alliance] . . . vis a vis [its] own employees." *Pipefitters*, 429 U.S. at 511. In fact, unless this Court corrects the decision below, a secondary boycott will be justified whenever the pressured entity could choose to cease doing business with the ultimate target of union coercion. Again, that would cover almost every secondary boycott, if not all of them. The Court should rectify the Fourth Circuit's misunderstanding.

CONCLUSION

For the reasons set out above, this Court should grant the petition.

Respectfully submitted,

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