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 OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Since 1968 the National Right to Work Legal Defense Foundation, Inc., has been the nation's leading advocate for employees' freedom to choose or reject unionization in their workplace. Foundation staff attorneys regularly represent individual employees before this Court in cases that concern employees' right not to join or support a union. *E.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Chic. Tchrs. Union Loc. No. 1 v. Hudson*, 475 U.S. 292 (1986).

The Foundation has an interest in this case because the inevitable result of the National Labor Relations Board's and Fourth Circuit's decisions will be to deprive public-sector, non-union employees of not only their right to be free from union representation, but also of their freedom to work at their chosen place of employment in the first instance.

If those decisions are allowed to stand, non-union Ports Authority workers at the Leatherman Terminal will be fired and their work given to unionized employees of the Charleston Stevedoring Company, a private-sector employer that is signatory to an International Longshoremen's Association ("ILA") collective

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[1] Under Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief. Under Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from the amicus curiae, made any monetary contribution intended to fund the preparation or submission of this brief.

bargaining agreement. (Tr. 26).[2] Moreover, even if those displaced Ports Authority workers re-apply for their former jobs as newly-hired private-sector workers, they will likely never have the opportunity to work in those positions because the ILA's labor contracts contain exclusive hiring hall arrangements. (Tr. 152). Non-union Ports Authority workers will likely be placed at the bottom of any such hiring hall list and could not be hired ahead of the ILA's 2,000 members in Charleston.

In short, the decisions below, if affirmed, will cause grievous harm to 270 non-union Ports Authority workers and their families. (Tr. 45, 127, 271-75). The Foundation submits this brief to provide a voice for the otherwise voiceless non-union Ports Authority workers, so the Court has a clear view of the stakes involved for the workers and their families if the decisions below stand.

SUMMARY OF ARGUMENT

The NLRB's and Fourth Circuit's decisions allowing the ILA to exert secondary pressure on shippers and the Ports Authority give scant regard to the fate of 270 non-union public employees working for the Ports Authority. Yet they are the individuals most directly affected because, as a direct result of those decisions, the Ports Authority will have to terminate their employment.

The NLRB and Fourth Circuit held the ILA is entitled to the crane and lift work performed by the 270 non-union Ports Authority employees as a matter of

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[2] Tr. refers to the transcript of the hearing before the NLRB administrative law judge, held on June 9–10, 2021.

"work preservation." However, the record shows that ILA-represented workers have *never* performed this work in Charleston. In fact, this work is non-union as a matter of state law because South Carolina prohibits collective bargaining with state employees.

This simple fact should have ended the inquiry and compelled a finding that the ILA has no such "work preservation" interest. But instead of making this correct assessment and protecting the public-sector, non-union employees from the ILA's secondary tactics, the NLRB and Fourth Circuit doomed them to losing their jobs at the Leatherman Terminal. If allowed to stand, the decisions below will, in effect, punish the Ports Authority employees for not affiliating with a union.

ARGUMENT

The NLRB's and Fourth Circuit's Decisions Will Wrongfully Deprive Non-Union State Employees of Their Jobs.

1. The NLRB's and Fourth Circuit's decisions give scant regard to the fate of 270 non-union public employees who currently work for the Ports Authority. Yet they are the individuals most directly affected by those erroneous decisions because they will lose their jobs as a result. (Tr. 26).

The State of South Carolina spent over $1 billion to develop the Leatherman Terminal at the Charleston port. Phase 1 of the Leatherman Terminal included a $980 million capital expenditure financed by the Ports Authority, and the State of South Carolina

funded a $170 million dedicated access road to that terminal. (Tr. 128).

The Ports Authority owns and operates the cranes and lift equipment that service the cargo ships in Charleston. (Tr. 43–44). For decades the Ports Authority has hired and assigned its own state employees to operate that equipment, and many of those employees have held their jobs for decades. Private-sector employees represented by the ILA have *never* performed this work. (Tr. 45–46).

At present, the Ports Authority has 270 state employees operating the cranes and lift equipment. (Tr. 127). These state employees are highly compensated due to their specialized skills operating heavy cranes. Their terms and conditions of employment are established by the Ports Authority. *See* Careers, S.C. Ports, https://scspa.com/contact-us/careers/ (last visited Oct. 16, 2023). These employees have state job protections and can participate in the Public Employee Benefit Authority (PEBA). Their benefits include health, dental, vision, life, long term disability, flexible spending accounts, and health savings accounts. The Ports Authority subsidizes many of these benefits. *See* PEBA, www.peba.sc.gov (last visited Oct. 16, 2023). The Ports Authority provides employees with a wellness program that includes a wellness center, a fitness center, a walking trail, onsite galley cafeteria, health screenings, flu shots and routine physicals. Additionally, the Ports Authority employees are enrolled in either the South Carolina Retirement System (SCRS), a

traditional defined benefit pension plan, or the State Optional Retirement Program (ORP). *Id.*

In contrast to the crane and lift work performed by non-union Ports Authority employees, stevedoring work at the Charleston port is performed by private-sector workers employed by the Charleston Stevedoring Company. (Tr. 44-46, 127). This company has a collective bargaining agreement with the ILA. The stevedoring work is separate from the crane and lift work performed by the Port Authority's non-union state employees. It includes such positions as yard truck drivers who drive the containers from the crane to the stack location, employees who lash and unlash the secure mechanism that keeps the containers safe on a sea voyage, container spotters who watch for the safety of the loading and unloading operations, and people that "affix and unend" twist locks that keep containers safe on ships. (Tr. 44-45).

Although the NLRB and the Fourth Circuit held that the ILA has an entitlement to the crane and lift work performed by the 270 non-union Ports Authority employees as a matter of "work preservation," the record shows that ILA-represented workers have never performed this work. (Tr. 271-73). In fact, this work is non-union as a matter of state law because South Carolina prohibits collective bargaining with state employees. *See Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000). Even if it wanted to, the Ports Authority could not recognize the ILA as the exclusive representative of the state employees who perform crane and lift work at the Leatherman Terminal.

This simple fact should have led the NLRB and Fourth Circuit to reject the ILA's claim to have a work

preservation interest in these state jobs. *See* Pet. at 30. But instead of protecting these state employees from the ILA's unlawful secondary tactics to seize their work, the NLRB and Fourth Circuit doomed them to losing their jobs at the Leatherman Terminal simply because they are non-union state employees and must remain so under South Carolina law.

2. If the NLRB's and Fourth Circuit's decisions are not reviewed and vacated, the Leatherman Terminal will only be usable if the Ports Authority transfers the crane and lift jobs to a private company whose workers are subject to ILA representation. (Tr. 26). Under this new regime, the 270 non-union state employees who have long performed this work will lose their state jobs and have to decide whether to re-apply for those jobs as private sector, ILA-represented employees.

Even if these employees decide to re-apply for their former jobs with the unionized company that takes their work, it will be virtually impossible for them to secure those positions. ILA collective bargaining agreements usually require employers to obtain workers through hiring halls that refer employees based on seniority. Crane and lift operators who have spent years as non-union Ports Authority employees will likely find themselves at the bottom of any ILA hiring hall list behind the union's 2,000 current members. *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969) (holding new members of merged bargaining unit lawfully placed at the bottom of the seniority list); *NLRB v. Whiting Milk Corp.*, 342 F.2d 8, 9-10 (1st Cir. 1965) (holding non-union employees were lawfully placed at the bottom of a merged seniority list in a new bargaining unit).

There is no reason to believe these Ports Authority employees would even want to utilize an ILA hiring hall to secure their future employment, as hiring halls are fraught with favoritism and abuse. *See, e.g.*, *United States v. Int'l Longshoremen's Ass'n*, 460 F.2d 497 (4th Cir. 1972) (ordering union to operate a single hiring hall and institute a non-discriminatory seniority system); *Boilermakers Loc. No. 374 v. NLRB*, 852 F.2d 1353 (D.C. Cir. 1988) (holding the union operated its exclusive hiring hall in a discriminatory fashion); *see also Simms v. Loc. 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613 (5th Cir. 2016) (allowing a union to compel non-union employees to pay hiring hall fees to work, notwithstanding Mississippi's Right to Work law). Most recently, in *ILA, Local 1294 (Federal Marine Terminals, Inc.)*, 372 N.L.R.B. No. 132 (Aug. 24, 2023), the NLRB held an ILA local union had failed to refer eligible employees for jobs under the hiring hall rules, instead referring ineligible employees.

Nor is there any reason to assume the Ports Authority employees will suddenly want to get their benefits from the ILA's health and welfare plans, because such union plans have been fraught with mismanagement or corruption. *See, e.g.*, *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir. 1984) (finding trustees of a union pension fund established by a collective bargaining agreement violated numerous fiduciary obligations).

Finally, Ports Authority employees will be wary of casting their lot with the ILA for any purpose, given it is: asserting its representation over their jobs without their consent; taking away their myriad benefits as state employees; and getting them terminated from their employment without any assurances of their

ability to get their jobs back. Moreover, these employees will likely know the union's storied history of exploitation, resulting in a litany of federal prosecutions and litigation. *See, e.g., United States v. Clemente*, 640 F.2d 1069, 1072 (2d Cir. 1981) ("The linchpin of the enterprise was its control of the ILA in New York and New Jersey; with this power it was able to extort monies from shipping companies and influence their decisions regarding the allocation of ship-servicing contracts."); United States Files Racketeering Case Against the International Longshoremen's Association and Top ILA Officials, E.D.N.Y. U.S. Attorney's Office, https://www.justice.gov/archive/usao/nye/pr/2005/2005jul6.html (last visited Oct. 16, 2023); William K. Rashbaum, U.S. Suit, Claiming Mob Control, Seeks Takeover of Dock Union, N.Y. Times (Jul. 7, 2005), https://www.nytimes.com/2005/07/07/nyregion/us-suit-claiming-mob-control-seeks-takeover-of-dock-union.html; Union Dons Favor 'Ghost' Workers Over Real Ones?, Nat'l Right to Work Comm. (June 14, 2017), https://nrtwc.org/union-dons-favor-ghost-workers-real-ones/. With this longstanding history of abuse on the docks, it is understandable that the Ports Authority's crane and lift operators would rather work as non-union employees of South Carolina than under the ILA's thumb.

3. The NLRB's and Fourth Circuit's failure to enforce the NLRA's secondary boycott provisions against the ILA means these 270 employees will lose their livelihoods simply because they are not subject to the ILA's monopoly representation. In essence, these workers are being punished for exercising their right not to affiliate with a union, even as the ILA covets their jobs and stops at little to capture them.

But this sort of unionization-by-force undermines the NLRA's guarantees of employee free choice to join a union or reject it. *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985). As the D.C. Circuit eloquently recognized, "under [NLRA] Section 9(a), the rule is that the employees pick the union; the union does not pick the employees." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018). Here, in contravention of that principle, the ILA is picking the employees that will become union members performing crane and lift work at the Leatherman Terminal. As Judge Niemeyer correctly noted in his dissent, this demonstrates nothing less than an ILA "effort to coerce the South Carolina State Ports Authority to hire union workers to operate the state owned cranes." (Pet App. 32a).

In sum, the 270 non-union state employees who currently operate the Ports Authority's cranes have not picked the ILA to be their representative, and they have no reason to do so. The failure of the NLRB and Fourth Circuit to protect these non-union workers from the ILA's unlawful power grab for their jobs is a travesty that warrants this Court's review.

CONCLUSION

The Court should grant the petition.

RESPECTFULLY SUBMITTED,

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