No. 23-325

In The
Supreme Court of the United States

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

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 SOUTH CAROLINA MANUFACTURERS ALLIANCE, GEORGIA ASSOCIATION OF MANUFACTURERS, MISSISSIPPI MANUFACTURERS ASSOCIATION, AND WEST VIRGINIA MANUFACTURERS ASSOCIATION 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 South Carolina Manufacturers Alliance ("SCMA") is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code and is the only South Carolina statewide association dedicated exclusively to the interests of manufacturers. SCMA has served as the manufacturing industry's government liaison in the state for over one hundred years. Its membership ranges from small businesses to global operations, spanning numerous industry sectors. SCMA's goal is to be the voice of manufacturers to the state's legislative and regulatory branches, as well as to promote and preserve the economic health of South Carolina manufacturers by seeking positive action in state government. SCMA emphasizes that maintaining strong manufacturing industries will foster and promote the strength of South Carolina's economy. There are more than 6,000 manufacturing facilities in the state. The manufacturing sector employs, directly or indirectly, more than 700,000 individuals, accounting for approximately 30% of all South Carolina jobs.

The Georgia Association of Manufacturers ("GAM") was founded in 1900 and is the only trade group in the state of Georgia exclusively dedicated to manufacturers. As Georgia's manufacturing's association of record,

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[1] *Amici* submit this brief under Sup. Ct. R. 37.2. *Amici* provided all counsel of record timely notice of their intent to file this brief. In accordance with Sup. Ct. R. 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and no counsel for a party, nor any party, made a monetary contribution intended to fund the preparation or submission of the brief.

its primary role is advocating for issues that affect the state's manufacturers. GAM's membership employs approximately half of Georgia's manufacturing workforce.

The Mississippi Manufacturers Association ("MMA") was founded in 1951 to advance the interests of manufacturers, and has since become the clear and united voice of industry in the state. Representing thousands of manufacturers, processors and distributors, MMA is an unrelenting advocate for Mississippi's manufacturing community and acts as a central source of information and assistance in industrial management.

The West Virginia Manufacturers Association ("WVMA") was founded in 1915 to advance the interests of the state's manufacturing industry through policy development and advocacy. WVMA has more than 200 member companies that represent its diverse manufacturing industries.

SCMA, GAM, MMA, and WVMA represent members who move significant cargo volumes across the docks of Southeastern ports. Disputes that create port accessibility and reliability issues have significant economic consequences for association members. As a result, SCMA, GAM, MMA, and WVMA members have a keen interest in this case, as the current Fourth Circuit decision misunderstands the business and commercial aspects of international cargo transit in such a

way that its holding creates significant opportunities to disrupt international trade.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the scope of a judicially created exception to the National Labor Relations Act's ("NLRA's") ban on secondary boycotts. 29 U.S.C. § 158(b)(4)(ii)(B). The exception is called the "work preservation doctrine." *NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 61, 63 (1985) ("*ILA II*") (internal quotation marks omitted). The Fourth Circuit decision below construed the doctrine in a way that is utterly divorced from economic reality and contrary to decisions of this Court and other courts. This Court's review is needed.

The work preservation doctrine allows a union to boycott an employer if (1) the union's sole object is to preserve work for its members and (2) the targeted employer controls the work that the union seeks to preserve. *ILA II*, 473 U.S. at 76–77. The doctrine reflects the Court's view that Congress intended technological changes that threaten the loss of union members' work to be accommodated through the collective bargaining process. *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 505 (1980) ("*ILA I*"); *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640–41 (1967).

This brief focuses on the second prong of the work preservation doctrine, the "right of control" test. *ILA I*,

447 U.S. at 504. The Court has said that the purpose of the test is to distinguish "primary" union activity, which is lawful, from "secondary" union activity, which is not. See *id.* at 504–05; *ILA II*, 473 U.S. at 76 n.16. The reasoning behind the test goes like this. If union pressure designed to acquire work for its members is brought to bear upon an employer, Employer *A*, who cannot control that work, one can infer that the union's real target is the employer who *can* control the work, Employer *B*. *NLRB v. Loc. 638, Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507, 521–22, 527 n.15 (1977). The union pressure on Employer *A*, the employer who lacks control, is therefore secondary, and hence unlawful.

That is exactly what is happening here. The union in this case is the International Longshoremen's Association ("ILA"). The ILA is suing a multi-employer association, the United States Maritime Alliance ("USMX")—together with two of its members who are maritime carriers—in a state court for $300 million. App. 9a. The ILA's lawsuit is secondary, and hence unlawful under the NLRA, because its object is to obtain work for ILA members—namely, work operating state-owned lift equipment at the Port of Charleston's Leatherman Terminal—that USMX and its carrier-members do not control. The work is controlled instead by the South Carolina State Ports Authority, for it is the actual employer of the employees who operate the lift equipment at the Leatherman Terminal. *Id.* at 32a.

The Fourth Circuit below, however, believed that USMX and its carrier-members control the lift-equipment work because they control whether their

container ships call on the Port of Charleston or go instead to some other port. The court reasoned:

> If no ships dock at a terminal, there's no longshore work to be done there. So where USMX's carrier-members choose to send their ships is the whole ballgame.

Id. at 25a. This simplistic reasoning does not reflect economic reality, as discussed in Point 1 below. Nor can the reasoning be reconciled with this Court's decisions, as discussed in Point 2.

ARGUMENT

I. The Reality Is That the Choice of Port Depends on Multiple Decision Makers and on the Economics of Transportation, Especially Inland Transportation.

The Fourth Circuit below erred at the very first step in analyzing the ILA's work preservation defense. The court adopted the Board's broad view of the work that the ILA seeks, through its lawsuit, to acquire for its members. Under that view, the work at issue applies to "all container work historically performed by ILA members 'in all ports from Maine to Texas.'" App. 15a (quoting Board's decision). This "coastwide" (App. 24a) application of the work at issue is flawed for the reasons discussed in the Petition. Pet. 4–5, 20–21, 23–25.

More to the point of this *Amicus* brief, the Fourth Circuit's application of the work at issue—all container work jobs—infects the analysis of who controls the work. See *ILA I*, 447 U.S. at 512 n.27. The Fourth Circuit's coastwide view of the work caused it to treat containers of cargo as fungible, without regard to the contents of the particular containers. In reality, the choice of port for a particular container depends largely on the source, origin, destination, and owner of its contents, meaning that carriers have no control over who performs the work on-terminal.

A maritime carrier does not unilaterally choose the port to which a particular container is delivered; therefore, it cannot control a port's employment decisions under the Fourth Circuit's analysis. The maritime carrier's choice to call a port necessarily involves the beneficial cargo owner (BCO) whose cargo is in that container and economic considerations for the overall transport. The BCO often contracts directly with carriers for the loading or discharge of their cargo. For larger manufacturers and BCOs this is typically undertaken with a request for proposals from carriers. The proposals are often based on "port pairs," meaning a port of loading and a port of discharge.

For example, an automobile manufacturer in South Carolina may require a carrier to have a route between the Port of Bremerhaven in Germany and the Port of Charleston. This requirement is often driven by market considerations such as inland transportation costs, which may be negotiated by the BCO directly with a trucking company, rail provider, or port. In other

words, the BCOs and the market for inland transportation drive much of the carrier decisions on ports of call, and the carrier has just as little authority to dictate a port's operating model. And once a carrier contracts with a BCO for a specific port pair and port of call, it is contractually committed to those port calls. It cannot simply "bypass" the contractually agreed upon port, as the Fourth Circuit believed. App. 11a, 24a.

The reality of the situation is borne out by the record in this case. The former CEO of the SCSPA testified that "cargo moves based on the origins and destination of cargo." Joint Appendix, *South Carolina State Ports Auth. v. NLRB*, 75 F.4th 368, *pet. for cert. filed* (U.S. No. 23-325, docketed Sept. 28, 2023), Doc. 63:1 at 144. He explained, "[C]ustomers . . . use the Port of Charleston, for example, . . . due to the fact that it's more proximate to where they need the cargo or where they produce the cargo than any other port." *Id*.

The ALJ endorsed that understanding. The ALJ rejected the ILA's argument that, if the Leatherman Terminal were allowed to use non-union lift-equipment operators, cargo would flow to the Port of Charleston because of the lower costs of the hybrid model. App. 151a–52a. The ALJ found that the ILA's argument was "without any evidentiary support." *Id*. at 151a. The argument rested, the ALJ found, only on the "supposition" that "discretionary cargo"—i.e., "cargo that can move to one or more ports based upon inland economics"—"might migrate from ILA-controlled ports to Charleston." *Id.* at 152 & n.34. The ALJ concluded that this supposition did not establish that Charleston's

hybrid model would actually create a threat to unit jobs. *Id*. at 152a.

Indeed, the very concept of "discretionary cargo" (*id.*) reflects that much cargo is nondiscretionary—i.e., there is little or no choice about the port to which it must be delivered, given "inland economics." *Id.* at 152a n.34. That explains why it is sheerly speculative whether much if any cargo would bypass other ports and go instead to Charleston to take advantage of its (lower cost) hybrid label model. So too, there is little chance that much cargo could bypass Charleston for other ports in order to avoid the hybrid model (because of its use of some non-union labor). As SCSPA's former CEO testified and the ALJ understood, cargo generally goes into and out of the Charleston port—or into or out of some other port—based on the particular inland destination and on the BCO of the particular cargo. The record thus reflects the reality that the containers might be fungible, but their contents are not.

The ILA has recognized this reality in a proceeding before the Federal Maritime Commission ("FMC"). *International Longshoremen's Ass'n v. Gateway Terminals, LLC et al*., FMC No. 22-12 (Compl. Filed Apr. 1, 2022) ("*ILA v. Gateway*").[2] In that proceeding, the ILA argues that two joint ventures acting in concert—one at the Port of Charleston, the other at the Port of Savannah, Georgia—"have established a monopoly over marine terminal operations for containerized cargo in Savannah and Charleston." First Am. Verified Compl., *ILA v. Gateway*, Docket Entry 10, Attachment at 17,

[2] https://www2.fmc.gov/readingroom/proceeding/22-12/.

¶ 89. As a result, the ILA alleges, "[C]ommon carriers and shippers who need to ship container[s] through ports in the southeastern United States are forced to deal with either a single marine terminal operator that has a monopoly in Savannah and/or another single marine terminal operator that has a monopoly in Charleston." *Id*. at 18, ¶ 91.

In particular, according to ILA's complaint in the FMC proceeding, the common carriers and shippers "are forced to accept the rates demanded by the monopoly created by the joint ventures in either port." *Id.* at 18, ¶ 92. And most important for the present case is the ILA's allegation about the common carriers' and shippers' practical inability to avoid these monopolistic rates by bypassing these ports:

> The only way to avoid the rates would be to refuse to utilize the ports of Charleston or Savannah. However, *avoiding those ports is simply not commercially feasible for many shippers* and carriers who must ship containers through the southeastern United States, given that Savannah and Charleston are the two ports with the greatest cargo capacity by far in the southeastern United States.

Id. at 18, ¶ 93 (emphasis added). The ILA thus acknowledges that commercial feasibility generally controls the ports at which carriers must call.

In theory, carriers could bypass the ports dictated by commercial reality and the needs of the BCOs, but only for much more costly alternatives. In reality, the carriers' influence over the port to which their

containers are delivered is constrained by customer preference and economic reality—which the ILA acknowledged in the FMC proceeding. The Board and the Fourth Circuit ignored this reality in holding that USMX carrier-members control the work—the lifting of the containers at the port—at issue in this case. Because *Amici* must operate in this reality, they support the Petition's request for this Court's review.

II. The Fourth Circuit's Analysis of the Control Issue Conflicts with Decisions of this Court and Other Courts.

The Fourth Circuit believed that its broad definition of the work at issue, and its corresponding analysis of the control issue, have support in this Court's containerization cases. App. 20a–24a. But just as the Fourth Circuit's analysis of the control issue ignores economic reality, its reliance on the containerization cases ignores the specific issues that the Court addressed in those cases and the context in which the cases arose. Instead of the containerization cases, this Court's decisions in *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. Local 638, Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507 (1977), are the main precedents governing the present case.

The containerization cases are *ILA I*, 447 U.S. 490, and *ILA II*, 473 U.S. 61. The cases addressed the "Rules on Containers," which were "collectively bargained-for guidelines requiring marine shipping companies to

allow some of the large cargo containers that they own or lease to be loaded or unloaded by longshoremen at the pier." *ILA II*, 473 U.S. at 63. The Rules were challenged on the ground that their objective was not to preserve longshoremen's work but instead to acquire off-pier work that longshoremen did not do and had never done. *ILA I*, 447 U.S. at 508. The union involved in negotiating the Rules, the ILA, defended them under the work preservation doctrine. *Id.* at 504–05.

The Board initially held that the Rules "did not preserve traditional work opportunities for employees represented by the union, but sought instead to acquire work that they had not previously performed." *Id*. at 493. The Board therefore invalidated the Rules as unlawful secondary activity. *Id.* at 502–03.

In *ILA I*, the Court rejected the Board's conclusion that the traditional work of longshoremen occurred at the pier, whereas the work at issue in that case was the loading and unloading of containers at off-pier locations by non-longshoremen. *ILA I*, 447 U.S. at 505–11; see also *ILA II*, 473 U.S. at 63, 76–77. The Court held that in a complex case like the one before it, identifying the work at issue required a "careful analysis" of "all the surrounding circumstances," and it remanded the case to the Board for it to define the work at issue under a "proper understanding" of the concept. *ILA I*, 447 U.S. at 507, 511 (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644 (1967)). The Court itself did not determine the work at issue in *ILA I*, nor did it determine who controlled that work. *ILA I*, 447 U.S. at 511 ("We emphasize that neither our decision nor that

of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained.").

On remand, the Board determined that the work at issue "was simply 'the work of loading and unloading containers.'" *ILA II*, 473 U.S. at 77 n.17 (quoting Board's decision). And the Board held that the maritime carriers controlled that work "by virtue of their ownership or leasing control of the containers." *Id.* at 74 n.12. The Fourth Circuit upheld both the Board's definition of the work at issue and the Board's determination of the control issue. *Id*. at 72, 74 n.12.

In *ILA II*, the Court did not squarely rule on the Board's broad definition of the work at issue or its view that the maritime carriers controlled this work. The Court discussed the Board's definition of the work at issue in a footnote. *Id.* at 77 n.17. The Court said that the Board's definition of the work at issue as "the work of loading and unloading containers" "more accurately describes the *work* in controversy" than the Board's description of the work elsewhere in its decision, as involving loading and unloading containers within fifty miles of the port. *Id.* (emphasis in original). The latter description, the Court said, referred to "the precise means used to secure [that work] in the collective-bargaining agreement at issue." *Id*. The Court's statement reflected that the Rules generally acquired for longshoremen only loading and unloading of containers that occurred within fifty miles of the ports. *Id.* at 65–66.

Critically, however, the Board's definition of the work at issue was not before the Court in *ILA II*. Although multiple parties had petitioned for certiorari in *ILA II*, the Court granted only the petition filed by the Board. *Id.* at 73. That petition "limit[ed] [the Court's] inquiry to the alleged unlawfulness of the Rules with regard to 'shortstopping' truckers and 'traditional' warehousers." *Id*. Since the Board's definition of the work at issue was not squarely before the Court in ILA II, it is not surprising that the Court addressed the matter only in a footnote. *Id.* at 77 n.17.

Nor was the issue of control squarely before the Court. The Court took note of the ALJ's finding that "the marine shipping companies have the right to control the work in question because they own or lease the containers themselves," and that the Board and court of appeals had approved that finding "as supported by substantial evidence." *Id.* at 70 n.10 (internal quotation marks omitted). But the Court expressly stated that this finding was "not at issue here." *Id.* Although the Court appeared to accept the finding in a later footnote, the Court did so only to explain why its precedent on the control issue was "not directly implicated in this case." *Id*. at 74 n.12 (discussing *NLRB v. Loc. 638, Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507 (1977)).

In sum, the Court in the containerization cases did not rule on the Board's broad definition of the work at issue or its determination of the control issue (or on the Fourth Circuit's upholding of those aspects of the Board's decision).

Yet here, the Fourth Circuit was "guided by" those cases in reviewing the Board's definition of the work at issue. App. 16a. And as the Fourth Circuit recognized, its determination of the control issue "turn[ed] on how [it] define[d] the work." *Id.* at 24a. To its credit, the Fourth Circuit did not rely directly on this Court's containerization decisions in holding that the maritime carriers controlled the work at issue by virtue of their ownership or control over the leasing of containers. Rather, the Fourth Circuit cited its own 1984 decision. *Id*. (citing *Am. Trucking Ass'ns, Inc. v. NLRB*, 734 F.2d 966, 978 (4th Cir. 1984), *aff'd*, 473 U.S. 61 (1985)). It bears repeating that this Court did not review that aspect of the Fourth Circuit's decision, and that it rests on a description of the work at issue that ignores economic reality.

More fundamentally, the Fourth Circuit's reliance on the containerization cases ignores the historical context in which they were decided. They were decided in the immediate aftermath of "the container revolution." *ILA I*, 447 U.S. at 494. That revolution threatened the work of longshoremen throughout the industry, and labor-management struggles over it had led to multiple lengthy strikes. *Id*. at 497. The Rules on Containers addressed this "hotly disputed topic" on a coastwide basis. *Id.* at 496. The Court seemed to think the Rules were reasonable. It repeatedly emphasized that under the Rules, "the ILA ha[d] given up some 80% of all containerized cargo work." *ILA II*, 473 U.S. at 84; see also *id.* at 66 ("As we noted in *ILA I*: 'The practical effect of the Rules is that some 80% of

containers pass over the piers intact. . . .") (quoting *ILA I*, 447 U.S. at 499). And in the Court's view the Rules "represent[ed] a negotiated compromise of a volatile problem bearing directly on the well-being of our national economy." *ILA II*, 473 U.S. at 84.

The present case does not involve a revolutionary innovation in transportation technology that affects the work of longshoremen everywhere. It involves the opening of a new terminal in the Port of Charleston. The union action challenged is not the enforcement of a negotiated set of rules applicable coastwide. It is a $300 million lawsuit against an employer association and two carrier-members who called upon the new terminal. In this starkly different setting, this Court's decisions in the containerization cases cannot be wrenched out of their historical context and mechanically applied here, as the Fourth Circuit has done.

Indeed, this Court warned against such an acontextual understanding of its decisions in the containerization cases. The Court in *ILA I* rejected the claim that upholding the Rules on Containers would allow the ILA to "follow containers around the country and assert the right to stuff and strip them far inland." *ILA I*, 447 U.S. at 510 n.24. The Court said that this understanding of the result of its decisions upholding the Rules was "groundless." Yet under the Fourth Circuit's reading of *ILA I* and *ILA II*, the ILA can follow containers to every port on the East Gulf coasts and monopolize all longshore jobs at those ports. Other lower courts have correctly rejected that understanding of this Court's decisions. See Pet. 19–23.

As the Petition explains (at 23–27), the main decisions of this Court that govern the present case are *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. Local 638, Enterprise Ass'n of Steam Pipefitters*, 429 U.S. 507 (1977). This Court's review is necessary to confirm the correct reading of its precedent and thereby limit the potential use of what Congress considered to be a highly dangerous labor practice.[3] *National Woodwork*, 386 U.S. at 627.

[3] As NLRB Member Ring pointed out in his dissent, the NLRB majority and by extension the Fourth Circuit have essentially held that unlawful conduct becomes lawful if it is successful. As he explained:

> [T]o 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 . . . allegation at issue here is precisely that the ILA, in bringing its lawsuit, has that very object—i.e., an object of forcing 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. 99a.

CONCLUSION

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

Respectfully submitted,

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