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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent International Longshoremen's Association is an unincorporated association and a labor organization. It is not a corporate entity, has no corporate parent, and has issued no stock.

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INTRODUCTION

In this case, the International Longshoremen's Association ("ILA") sued its own employers, the United States Maritime Alliance, Ltd. ("USMX") and two of its member container carriers, to enforce a no-subcontracting provision in their collective bargaining agreement (the "Master Contract") that has twice been enforced by this Court. *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980) ("*ILA I*"); *NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61 (1985) ("*ILA II*").

The members of USMX—a multiemployer association of container carriers, terminal operators, and stevedoring companies—are barred from subcontracting work outside of the bargaining unit defined by the Master Contract. Nevertheless, in 2021 some USMX carriers chose to bring containerships to the Port of Charleston's newly opened Hugh K. Leatherman, Sr. Terminal, which they knew used non-bargaining unit employees to perform Master Contract work. After examining the facts, and following this Court's precedent, the National Labor Relations Board ("Board") found no unfair labor practice when the ILA sued for contractual damages, and the Fourth Circuit agreed.

The Fourth Circuit's decision, interpreting a Master Contract that has been in existence for over sixty years, applies well settled law from this Court, and from all other courts that have considered the question. Unions may lawfully negotiate—and enforce—work preservation clauses that prohibit their employers from subcontracting work outside their bargaining units. In the context of the Master Contract, where the ILA negotiated such a

clause covering a coastwide bargaining unit stretching from Maine to Texas, it has long been held that carriers control the work within the unit and can be held to account for violating their no-subcontracting promise. The Fourth Circuit's decision is just one more case in this unbroken line of precedent and presents no valid basis for this Court's review.

Faced with the Fourth Circuit's unremarkable decision and given certain findings of fact that they could no longer dispute, Petitioners try to conjure a non-existent split in the circuits. Petitioners point to two unreported decisions from a single case, while ignoring the precedential decisions from the same circuits—and from this Court—that were expressly relied on by the Fourth Circuit. The case Petitioners raise is factually distinguishable from the situation here—and was indeed distinguished on the facts by the Fourth Circuit.

Petitioners also argue the Fourth Circuit's decision is contrary to a decision of this Court, but to do so, they ask this Court to ignore the two subsequent decisions that enforced the very contractual provisions at issue here. Petitioners also contend that this case will have a wide effect on labor relations nationwide, even though the decision simply enforces the *status quo* of the past forty years by reaffirming this Court's precedent on the ILA's multiemployer, coastwide bargaining unit. The unique facts and nature of longshore bargaining also mean that the decision affects only a single, newly built container terminal in Charleston and will have little, if any, effect on any other terminals—let alone labor relations in other industries.

In sum, the Fourth Circuit decision simply allows a lawsuit to proceed on a dispute between contracting parties. The outcome of that lawsuit will depend on the decisions of the District of New Jersey, and possibly the ability of the parties to reach a compromise. On the other hand, the governmental entities of South Carolina seek to advance their own economic interests by blocking or invalidating major provisions of a contract that has governed labor relations for multiple companies coastwide for over a half century. They should not be allowed to misapply federal labor law to cause this disruption.

STATEMENT OF THE CASE

A. Statement of Facts

The ILA incorporates by reference the statement of the facts from the Fourth Circuit decision. Pet. App. 3a-9a.

In short, the ILA filed a lawsuit against its employers to enforce the no-subcontracting clause of the Master Contract. Pet. App. 8a-9a, 59a. The Master Contract is a multiemployer, multiport, coastwide bargaining agreement that covers all longshore jobs and all containerized cargo from Maine to Texas. Pet. App. 4a, 54a.

The ILA initiated the lawsuit in April 2021 in New Jersey state court against USMX and two carrier members of USMX alleging that the defendants had breached the Master Contract's no-subcontracting clause by contracting out bargaining unit work at the newly opened Leatherman container terminal in Charleston. Pet. App. 8a-9a, 59a. While the ILA sought damages for breach of the no-subcontracting clause, both the Board

and the Fourth Circuit found the lawsuit did not ask for any injunctive relief, such as reassigning jobs to ILA-unit employees, enjoining the work of non-union employees, or barring carriers from going to Leatherman; the lawsuit did not name Petitioner South Carolina State Ports Authority ("SCSPA") at all. Pet. App. 9a, 59a. Petitioners admit as much. Pet'rs Br. 10.[1] The lawsuit has been removed to the District of New Jersey where it has been stayed pending this dispute. Pet. App. 125a.

Appendix A to the Master Contract is entitled the "Containerization Agreement," and contains the employers' promise not to "contract out" any work that belongs to the bargaining unit:

> 2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement.

* * *

1. Despite the undisputed factual record regarding the lawsuit, Petitioners repeatedly describe the ILA's lawsuit as a "union boycott." But the record shows that the ILA did not engage in any sort of boycott, strike, or slowdown at any point in Charleston. On the contrary, ILA workers have at all times handled cargo at all Charleston terminals without interruption, including at Leatherman whenever their employers' container ships docked there. And the public record shows that at least one USMX carrier, Hapag Lloyd, did not stop calling Leatherman until January 2023, almost two years after the terminal opened. Teri Errico Griffis, *SC Ports ends Saturday hours at Leatherman amid slowing calls*, Journal of Commerce (Feb. 23, 2023), https://www.joc.com/article/sc-ports-ends-saturday-hours-leatherman-amid-slowing-calls_20230223.html.

> 9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to protect against the further reduction of the work force. . . . The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement. . . . it is agreed that in place of any other damages, liquidated damages of $1,000 for each violation shall be paid to the appropriate Welfare and Pension Funds.

Pet. App. 4a-6a, 55a-57a.

Though this language is clear, it has not been consistently enforced at three southern ports that use the anomalous "hybrid" labor model: Wilmington, Charleston, and Savannah. Pet. App. 6a. Under the hybrid model, non-Master Contract workers operate the lift equipment that loads and unloads containerships, and ILA-represented employees perform the rest of the longshore work. *Id.*

SCSPA has long operated two container terminals in Charleston, both of which use the hybrid model, and USMX carriers have long docked at those terminals. Pet. App. 7a, 57a. Those terminals are not subject to the ILA's lawsuit.

However, beginning in 2012, the ILA repeatedly told USMX that the ILA had not waived the no-subcontracting clause, and, even though the ILA would continue to forbear

from enforcing the clause at the older hybrid terminals, it would consider contracting out bargaining unit work at any **new** terminal to be a breach of the Master Contract.[2] See Pet. App. 6a, 114a. Nevertheless, two USMX carriers brought containers to the new terminal after it opened, and those ships were worked by lift-equipment operators who were not in the bargaining unit. Pet. App. 8a, 59a. Accordingly, the ILA sued these carriers (and USMX) in New Jersey state court, alleging a breach of the Master Contract's no-subcontracting provisions and claiming damages. Pet. App. 8a-9a, 59a.

Soon after the ILA filed its lawsuit, at least five USMX carriers contacted SCSPA and demanded their vessel berths be reassigned from Leatherman to the older container terminals in Charleston. Pet. App. 9a. One threatened to redirect its vessels to the Port of Savannah, bypassing Charleston altogether. *Id.* SCSPA agreed to reassign the vessels. *Id.*

B. Summary of Proceedings Below

The ILA incorporates by reference the summary of earlier decisions set forth in the opinion of the Fourth Circuit. Pet. App. 9a-11a.

When this case reached the Fourth Circuit, the court framed the issue as "whether the ILA's lawsuit against USMX and its carrier members violates the

2. The ALJ made an uncontested finding that "there is no indication that the parties intended to carve out, individually or collectively, these three South Atlantic ports from the multi-port bargaining unit." Pet. App. 20a; 149a n.32.

Act." Pet. App. 13a. Relying on this Court's precedent in *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983), the court ruled that "the First Amendment protects a union's right to access the courts." *Id.* The court further recognized that Section 8(b)(4)(ii) exempts so-called "primary" activity, meaning "a union's efforts [] directed at its own employer on a topic . . . that the employer can control." *Id.* (quoting *ILA II*, 473 U.S. at 81). The court noted that work preservation is always primary. Pet. App. 14a (citing *ILA I*, 447 U.S. at 504).

Relying on this Court's decision in *ILA I*, the Circuit ruled that a union's activity must pass two tests to be considered work-preservative: "[f]irst, the activity 'must have as its objective the preservation of work traditionally performed by employees represented by the union.'" *Id.* (quoting 447 U.S. at 504). And second, the "contracting employer must have the power to give the employees the work in question" (the "right of control" test). *Id.*

First, the Fourth Circuit determined what the work was that the no-subcontracting clause sought to preserve; the court held as follows:

> Given the Court's directive to focus "on the work of the bargaining unit employees," *ILA I*, 447 U.S. at 507, we hold that the Board here rationally determined that the "work in question is the loading and unloading generally at East and Gulf Coast ports." . . . The Master Contract defines the ILA's existing work jurisdiction in similarly broad strokes. And the Contract controls "in all ports from Maine to Texas," . . . reflecting that it was "designed

> to preserve the work of ILA employees in the coast-wide bargaining unit," . . ..
>
> The Ports Authority would prefer to define the work as only the lift-equipment work at Leatherman Terminal. But that view ignores two takeaways from the *ILA* cases: (1) it focuses on "the place where work is to be done," which is "seldom relevant"; and (2) it focuses on "extra-unit effects," not the work of bargaining-unit employees. . . .
>
> It's true that "ILA-represented employees have never performed the lift-equipment work at any terminal of the Port of Charleston,"—the Board recognized as much. . . . But as the Board explained, the *ILA* cases instruct us to "look beyond the locus of a dispute and consider traditional work patterns" more broadly . . . It would defang the parties' collective-bargaining agreement to hold that the union couldn't enforce it at a new location just because no one, union or otherwise, had "historically" worked there.

Pet. App. 17a-18a (citations omitted).

With respect to the first test, the Circuit agreed with the Board that the ILA's lawsuit sought to preserve the work in question:

> The 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. . . . And the union is trying to do so by enforcing its coastwide Containerization Agreement—the Rules on Containers' direct descendant . . .—against employers that breach its terms by choosing hybrid ports for their longshore work. Though its lawsuit against USMX had the effect of diverting ships away from Leatherman, the key word is effect—and "extra-unit effects, no matter how severe, are irrelevant to the analysis." *ILA II*, 473 U.S. at 79 (cleaned up).

Pet. App. 20a-21a (citations omitted). The Circuit continued: "Like its predecessors, the Master Contract aims 'to preserve jobs against the steadily dwindling volume of cargo work.' The Leatherman Terminal contributes to that 'dwindling' by assigning to non-union workers jobs earmarked for the union by contract." Pet. App. 23a (quoting *ILA II*, 473 U.S. at 79).

With respect to the second test, relying on its own precedent in *Am. Trucking Ass'ns, Inc. v. NLRB*, 734 F.2d 966, 978 (4th Cir. 1984), aff'd sub nom. *ILA II*, 473 U.S. 61, and this Court's decisions in *ILA I,* 447 U.S. at 512, and *ILA II*, 473 U.S. 61, the Circuit found that the ILA's employers can control where they choose to bring their container cargo:

> [T]he USMX carrier-members, like the carrier-members in *ILA I* and *II*, own or lease their containers, and, therefore, determine what ports they call on, which ultimately gives the carriers the right to control who performs the lift-equipment work on their containers." . . .

> That's because "[i]n the longshore industry, containers (and other sorts of cargo) *are* the work." . . . 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.

Pet. App. 24a-25a (emphasis in original) (citations omitted).

The Fourth Circuit therefore denied SCSPA's petition for review on the 8(b)(4) claim.

ARGUMENT

I.

THERE IS NO CIRCUIT SPLIT

The Fourth Circuit's decision relied on a line of authority going back decades. In particular, the Fourth Circuit was guided by two decisions from this Court which enforced the Master Contract, *ILA I* and *ILA II*. But the court also relied on earlier decisions from its own circuit, as well as other circuits, all enforcing the Master Contract's no-subcontracting provision. *Bermuda Container Line Ltd. v. Int'l Longshoremen's Ass'n*, 192 F.3d 250, 257 (2d Cir. 1999); *Am. Trucking*, 734 F.2d at 978; *Int'l Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 913 (D.C. Cir. 1979), aff'd, *ILA I*, 447 U.S. 490. Finally, the Fourth Circuit cited persuasive precedent from the Ninth Circuit that involved an analogous longshore coastwide bargaining unit on the West Coast. *Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 639–40 (9th Cir. 2020).

Rather than engaging with the analysis of these precedential decisions, Petitioners point to two brief, unreported opinions, *Hooks ex rel. NLRB v. ILWU*, 544 F. App'x 657 (9th Cir. 2013) ("*Hooks*")[3] and *ILWU Local 8 v. NLRB*, 705 F. App'x 1 (D.C. Cir. 2017) ("*ILWU Local 8*").[4] Both of these decisions derive from the same case (the "ICTSI case") arising out of a jurisdictional dispute between the International Longshore and Warehouse Union ("ILWU")—which represents longshoremen on the West Coast—and the International Brotherhood of Electrical Workers ("IBEW"). That case involved the terminal operator's ("ICTSI's") assignment of workers to plug and unplug refrigerated containers ("reefers") at a single terminal in the Port of Portland, Oregon. Pet. App. 25a.

The ICTSI case was cited by an intervenor at the Fourth Circuit, but the court easily distinguished it on the facts.[5] Pet. App. 25a. Yet Petitioners make no attempt to argue why the Fourth Circuit's analysis is wrong. The Fourth Circuit explained as follows:

> In that case—a jurisdictional scuffle between two unions—the Board determined that the

3. In addition to being non-precedential, the three-page *Hooks* opinion was not on the merits; it involved the review of a preliminary injunction granted under Section 10(*l*) of the NLRA, which is reviewed pursuant to a deferential "abuse of discretion" standard. 544 F. App'x at 658.

4. Petitioners also reference 705 F. App'x 3, which is the D.C. Circuit's short-form denial of the ILWU's petition for review of the Board's decision in the *ILWU Local 8* proceeding.

5. Notably, Petitioners never cited—let alone discussed—the ICTSI case in their briefing before the Board.

> "work in dispute" was site-specific reefer work at one terminal in Portland. . . . One union expressly sought reassignment of the reefer work, threatening to picket the terminal operator "or take other economic action if the disputed work was not assigned to its members."
>
> ILA's lawsuit, by contrast, seeks damages from USMX and its carrier-members for breaching the Master Contract—not injunctive relief like work reassignment. We accept that USMX, like the terminal operator in *Hooks*, can't control who operates the cranes (or plugs in the reefers) at a specific terminal. But USMX and its carrier-members *can* control whether they send their containers to a terminal whose labor model doesn't comply with their contractual obligations.

Pet. App. 25a (emphasis in original) (citations omitted).

Thus, the Fourth Circuit majority did not believe that its decision represented a split with one of its sister circuits. Notably, even the lengthy dissent did not recognize any split.[6]

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6. The cited provision of the contract in the ICTSI case was **not** a no-subcontracting clause like the provision in this case. *Hooks ex rel. NLRB v. ILWU, Local 8*, 905 F. Supp. 2d 1198, 1209 (D. Or. 2012), aff'd in part and reversed in part, 544 F. App'x 657 (9th Cir. 2013) (ILWU "fail[ed] to identify any specific provision of the [West Coast CBA] that the Carriers allegedly breached by supposedly subcontracting the reefer work."). Based on a clause dealing with job assignments, the ILWU had demanded—and sought to enforce an arbitration award for—the assignment of **specific reefer jobs**

Second, even if Petitioners could show that this case involved a different legal interpretation from the ICTSI case, unpublished decisions do not constitute circuit precedent. See, e.g., D.C. Circuit Rules 36(c)(1), 36(e)(2); Ninth Circuit Rule 36-3(a); *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011) ("[U]npublished orders . . . do not constrain a panel of the court from reaching a contrary conclusion in a published opinion after full consideration of the issue."); *Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010) ("[A]n unpublished decision is not precedent for our panel."). Unpublished opinions cannot create a circuit split because either circuit is free to disregard it in the future. Still, based on these unreported decisions that have never been cited elsewhere outside of this case or the ICTSI case, Petitioners go so far as to claim that the Fourth Circuit's decision would allow "East Coast unions . . . to engage in secondary boycotts that would be illegal if conducted on the West Coast." Pet'rs Br. 21-22. Nothing could be further from the truth.

Indeed, Petitioners ignore that both the D.C. and Ninth Circuits have issued **precedential** opinions in the longshore context—some of which were cited by the Fourth Circuit—that are fully consistent with the Fourth Circuit's analysis. In an opinion that was affirmed by this Court in *ILA I*, the D.C. Circuit held that "[i]t is difficult to imagine a more forceful demonstration of control" than

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in a **specific port terminal**. *Id.* at 1201; see also *ILWU & Port of Portland*, No. JD(SF)-36-13, 2013 WL 4587186 (N.L.R.B. Aug. 28, 2013) (Regional Director defining the work in dispute in 10(k) hearing notice as the "plugging, unplugging, and monitoring of refrigerated cargo containers for ICTSI, Inc., at Terminal 6 of the Port of Portland, Portland, Oregon"). The factual record is entirely different in this case. See Pet. App. 9a, 25a, 66a.

the shippers' decision to "simply refuse[] to supply their containers to the truckers and consolidators so that the Rules would be complied with, that is, so that ILA labor would do the work if the work were to be done." *Int'l Longshoremen's Ass'n*, 613 F.2d at 913; see also *id.* at 912 n.190 (rejecting argument that carriers lacked control over work in question because offshore trucking and consolidating companies ultimately take possession of the containers, because "the shipper's power of disposal of the containers is not . . . impaired, as the shipper can simply refuse to release a container to a trucking company or consolidator."). Also, in another reported case involving the ILWU, the D.C. Circuit affirmed in relevant part the Board's determination, applying *ILA I*, that the carrier employers of the West Coast's multiemployer bargaining unit control where they bring their containers. *Cal. Cartage Co. v. NLRB*, 822 F.2d 1203 (D.C. Cir. 1987); see also *id.* at 1207 ("as is surely clear after *ILA I*, the fact that longshoremen have never previously performed work at the exact same location does not prevent" work preservation).

In a decision issued **after** *Hooks*, the Ninth Circuit ruled that the carriers control where they bring their containers. In *Am. President Lines v. ILWU*, 611 F. App'x 908, 911 (9th Cir. 2015) ("*APL*"), the carrier sued the ILWU alleging its efforts to enforce a work-preservation clause through arbitration violated Section 8(b)(4)(ii)(A), (B) and 8(e) of the NLRA. Although, like *Hooks*, this decision was unpublished, unlike *Hooks*, it was on the merits. The Ninth Circuit applied both *ILA I* and *ILA II* to hold that a carrier has the "right of control" over container-handling work because its ownership of the containers gives it control over their disposition and terms

of their release to others. 611 F. App'x at 911 (the carrier "control[s] where [its] containers go, when they go, how many go, where they go when they get there, and who takes them there").

More recently, in a **precedential** case involving the ILWU, the Ninth Circuit admonished the Board to focus its work preservation analysis on "bargaining unit members [in the ILWU coastwide unit] rather than non-unit workers currently doing the same or similar work [at the specific site of the dispute]" and faulted it for "making past performance and extra-unit effects the beginning and end of its analysis." *Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 639-40 (9th Cir. 2020) ("*Kinder Morgan*").

And in a recent precedential case in the D.C. Circuit involving the ILWU, the Circuit relied on the Ninth Circuit's *Kinder Morgan* decision to reaffirm that the ILWU bargaining unit was coastwide, and as a result, it was error for the Board to limit a unit of mechanics to a specific employer at a specific site, "given the unique [multiemployer] bargaining landscape in which [the terminal operator] was operating." *Everport Terminal Serv's, Inc., v. NLRB*, 47 F.4th 782, 794 (D.C. Cir. 2022) ("The Board has long permitted groups of employers to negotiate with their employees collectively through multiemployer bargaining units.") (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996) ("Multiemployer bargaining . . . is a well-established, important, pervasive method of collective bargaining.")).

Rather than discuss these precedential D.C. Circuit cases that enforce the Master Contract or discuss an

analogous coastwide multiemployer unit on the West Coast, the only precedential case that Petitioners point to for their alleged circuit split is a case that involves a two-person, single-employer unit at a real estate management company in Brooklyn. *Local 32B-32J Serv. Emps. Int'l Union v. NLRB*, 68 F.3d 490 (D.C. Cir. 1995). In that case, the employer had accidentally signed a form contract that incorrectly listed more job descriptions than the bargaining unit really included. The court ruled that the union could not use this error to force the employer to assign more jobs to the two-man single-employer unit. Petitioners say that this case is "indistinguishable" from the multiemployer coastwide unit of the Master Contract, but that assertion does not pass the straight-face test. See Pet'rs Br. 22.

Petitioners also fail to mention the Second Circuit's decision in *Bermuda Container Line, Ltd. v. Int'l Longshoremen's Ass'n*, 192 F.3d 250 (2d Cir. 1999) ("*BCL*"), which truly **is** indistinguishable from this case. In *BCL*, the Second Circuit held that the ILA was able to assess contractual damages against an employer who had violated the Master Contract's no-subcontracting clause by diverting container ships from the port of New York to Salem New Jersey, where the containers would be unloaded by labor from outside the bargaining unit. *Id.* at 255-58. The Second Circuit—rejecting the arguments advanced here by Petitioners—held:

> The Containerization Agreement was designed to preserve the work of ILA employees in the coast-wide bargaining unit and was directed at BCL by virtue of its status in the multi-employer bargaining association, the NYSA.

> BCL's proposed move to Salem would deplete the number of longshore jobs available to ILA workers in the port of New York and divert them to non-union labor in Salem. **This effect would directly hurt existing members of the bargaining unit, and the Container Agreement by prohibiting BCL's proposed move preserves work within the primary employment relationship.**

Id. at 257 (emphasis added).

Thus, despite Petitioners' clams, if this case had been before either the D.C. Circuit or the Ninth Circuit, they would have reached the same result as the Fourth Circuit—and the Second Circuit.[7]

II.

THE FOURTH CIRCUIT'S DECISION WAS CORRECTLY DECIDED

A. The Fourth Circuit Correctly Held that the Work Preservation Defense Must Be Assessed with Reference to the Coastwide Bargaining Unit

Petitioners cannot, and do not, challenge the adequacy of the ILA's bargaining unit. Nor can they challenge the general principle that a union can enforce a no-

7. Petitioners argue that they would have received more favorable treatment from the D.C. Circuit. Petitioners **could** have appealed the Board order to the D.C. Circuit, but evidently chose not to. See 29 U.S.C. § 160(f).

subcontracting clause against its primary employer to prevent the erosion of bargaining unit jobs. Instead, Petitioners assert that, in defining the "work at issue," the Fourth Circuit should have ignored the coastwide bargaining unit and instead focused on "the specific work, at the specific site, giving rise to the dispute." Pet'rs Br. 25. This assertion—supported only by a vague reference to *NLRB v. Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507 (1977) ("*Pipefitters*")—is categorically incorrect.

The law is **exactly** the opposite. Indeed, this Court has already expressly rejected this argument in the context of the **very same bargaining unit** at issue here in *ILA I*, 447 U.S. 490 and *ILA II*, 473 U.S. 61, cases that have been followed by every circuit court that has addressed the issue and that have explicitly distinguished *Pipefitters*.[8]

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8. Petitioners assert that *ILA I* and *ILA II* arose in a different context where longshore jobs were **recently** threatened by technological change wrought by containerization, but they do not challenge the cases' holdings or analysis. Pet. Br. 25-26. Accordingly, they have waived any contention that the cases were wrongly decided or are unworthy of *stare decisis*. Nor is there any merit to Petitioners' argument regarding the applicability of the *ILA* cases. "Neither [*ILA* case] suggests its work preservation framework should be reserved only for particularly complex cases of technological displacement." *Kinder Morgan*, 978 F.3d at 639. Moreover, as the Fourth Circuit held, "we decline to disregard history, especially where the Court has demanded a 'careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve' . . . [a]nd we see no reason why the passage of time should negate the bargain the ILA negotiated in the (aptly named) Containerization Agreement." Pet. App. 21a-22a. Petitioners do not point to any error in the Fourth Circuit's reasoning.

The Master Contract bargaining unit is coastwide and multiemployer, including not only carriers but also the terminal operators that act as service providers to the carriers. SCSPA raised objections challenging the unit before the Board,[9] but failed to raise them at the Fourth Circuit. Accordingly, to the extent that Petitioners believe that the Master Contract is exempt from the general rule allowing no-subcontracting clauses, they have failed to preserve any such argument.

The *ILA I* decision also explained precisely **why** Petitioners' position is not correct: it would make **all** work preservation arrangements unenforceable. *ILA I,* 447 U.S. at 508 ("By focusing on the work as performed . . . by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo."); see Pet. App. 18a (Petitioners' position "would defang the parties' collective bargaining agreement.").

For example, there are currently container terminals that do not employ any ILA-represented workers and are patronized by non-USMX carriers. A new such terminal could possibly open in the future. According to Petitioners' reasoning, if any USMX carriers ever decide to take their cargo from a Master Contract terminal to a non-contract terminal, then they could always do so with

9. In response, USMX filed a detailed brief recounting the history of the Master Contract's coastwide unit and explaining its acceptance by both the Board and the courts. 10-CE-271046, Answering Brief of USMX to Cross-Exceptions, Feb. 14, 2022, https://apps.nlrb.gov/link/document.aspx/09031d45836a593a.

impunity because the carriers could simply argue that ILA-represented workers had never done "the specific work, at the specific site, giving rise to the dispute." Pet'rs Br. 25. Yet this Court has held that work preservation clauses—and in particular no-subcontracting clauses—**are** lawful, so they must be enforceable. See, e.g., *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 584 (1960) ("Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators."); *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 642 (1967) (work preservation clauses are lawful) (citing *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (contracting-out clauses are mandatory subject of bargaining). And in the context of the Master Contract's bargaining unit, the no-subcontracting clause must be enforceable on a coastwide, multiemployer, multiport basis. See Pet. App. 19a.

The Fourth Circuit correctly followed this Court when defining the work at issue: "[T]he *ILA* cases instruct us to 'look beyond the locus of a dispute and consider traditional work patterns' more broadly." Pet. App. 18a. The Fourth Circuit noted that, when considering the proper unit of analysis—the ILA's coastwide bargaining unit—the "work in question is the loading and unloading generally at East and Gulf Coast ports." Pet. App. 17a, 72a. It recognized that, under the terms of the Master Contract, "the ILA (not Local 1422) is the relevant bargaining unit." 19a. And it observed that the carriers' diversion of cargo to Leatherman threatened existing jobs within this bargaining unit, insofar as "lower labor costs of hybrid-model ports could draw cargo away from fully union ports, threatening other bargaining unit jobs." *Id.* at 23a; see also *Bermuda Container Line, Ltd. v. Int'l*

Longshoremen's Ass'n, No. 97 Civ. 1257 (JFK), 1997 WL 795766, *5 (S.D.N.Y. Dec. 29, 1997).

Similarly, in *ILA II*, when examining the Master Contract, this Court approved the Board's definition of the "work at issue" as coastwide—**not** site-specific—even though that decision also discussed *Pipefitters* at some length. See *ILA II*, 473 U.S. at 74 n.12. As the D.C. Circuit held, the Court's characterization of the work in question in *Pipefitters* is "inapplicable" to the Master Contract's coastwide no-subcontracting provision. *Int'l Longshoremen's Ass'n v. NLRB*, 613 F.2d at 913 n.192.

No case stands for the proposition that traditional work patterns should be analyzed with reference to a "specific site" or "particular job site" when the work in question extends to cover workers at multiple sites or arises from a larger multiemployer work preservation agreement. Nor is *Pipefitters*—involving a single-employer bargaining unit of "about 10 to 20 steamfitters"—to the contrary. 429 U.S. at 511. In *Pipefitters*, the determination of the work at issue was not even in controversy; the focus was on the right-of-control prong of the work preservation test. *ILA I*, 447 U.S. at 509 ("Neither the Court of Appeals nor this Court [in *Pipefitters*] questioned the validity of the work preservation clause but for the fact that it was enforced against an employer who could not control the work.").

B. The Fourth Circuit Correctly Held that the Carriers Have the Right To Control The Work At Issue

Petitioners also argue that the Fourth Circuit failed to distinguish the *Pipefitters* analysis with respect to which employer has the right of control. Pet'rs Br. 24-25.

But that is not true. The Fourth Circuit **did** analyze and distinguish *Pipefitters*, and it is the Petitioners who have failed to point out any error in the Circuit's analysis. The Fourth Circuit stated:

> But that analogy [to *Pipefitters*] doesn't fit. In *Pipefitters*, the "work" was confined to cutting and threading pipes at one specific site. 429 U.S. at 529–30. The subcontractor could have walked away from the deal with the general contractor—but the union members would have gone home empty-handed too.
>
> Here, as we've discussed, the "work" is the loading and unloading of containers along the coastwide bargaining unit. And USMX's carrier-members can unilaterally give that work to union members by "simply refus[ing] to supply their containers" to ports using non-ILA labor. *Int'l Longshoremen's Ass'n v. NLRB*, 613 F.2d 890, 913 (D.C. Cir. 1979), aff'd, *ILA I*, 447 U.S. 490 (1980); *see also id.* n.192 (finding *Pipefitters* "inapplicable to the instant cases"). In other words, USMX has all the "power to settle the dispute with the union" by avoiding terminals that would violate the Master Contract. *Pipefitters*, 429 U.S. at 522.

Pet. App. 27a.

Once the work at issue was properly defined as the loading and unloading of containers within the Master Contract coastwide bargaining unit, the question of control becomes a simple one. As the Fourth Circuit succinctly

put it, it is uncontested that—in marked contrast to the subcontractor in *Pipefitters*— "USMX's carrier-members *can* unilaterally give that work to union members" by not sending their containers to non-ILA ports. Pet. App. 27a (emphasis in original).

The D.C. Circuit in *Int'l Longshoremen's Ass'n* (affirmed by this Court in *ILA I*) discussed *Pipefitters* and noted that carriers were "the coerced employers under [the] *Pipefitters*" test and they "controlled the disposition of all the containers at issue." 613 F.2d at 912. In *Am. Trucking*, as affirmed by this Court in *ILA II*, the Fourth Court observed:

> Up until the Court decided *ILA*, no one seriously contended that the [work preservation clauses of the Master Contract] violated the Act for failure to meet the "right of control" test of *Pipefitters* . . . the argument that the shipping lines do not have the right to control the container work sought by the longshoremen lacks any semblance of merit.

734 F.2d at 978.

The point of the "right-to-control" test is whether the targeted employers have the power to "settle the dispute with the union." *Pipefitters*, 429 U.S. at 522. Here, as described at length *supra*, the "dispute with the union" arose when USMX carriers chose to release containers to Leatherman, thereby subcontracting work outside their coastwide bargaining unit. *Pipefitters* instructs the Board and the courts to ask whether the USMX carriers have the "power to settle" this dispute directly by modifying

their practices. The answer to this question is clearly "yes": by releasing containers to terminals within the bargaining unit in which they participate, the carriers would unilaterally resolve the dispute without requiring any action on the part of SCSPA. Indeed, Petitioners cannot seriously argue that the ILA's carrier employers were unable to accede to the ILA's demand here, because the carriers **have** acceded by not calling at Leatherman. See Pet. App. 27a.

For these reasons, Petitioners' first "question presented"—"whether a union's lawful 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," Pet'rs Br. i, is not, in fact, presented in this case. The Fourth Circuit made no finding that USMX could "control" SCSPA's work assignments; in fact, it held the opposite. Pet. App. 25a ("We accept that USMX . . . can't control who operates the cranes . . . at a specific terminal."). Instead, the court properly held that USMX could control its **own** work assignments, and that was dispositive given its definition of the work at issue as encompassing loading and unloading containers across the entire bargaining unit.

The rest of Petitioners' arguments do not raise substantial questions appropriate for this Court's review. While Petitioners contend that there was insufficient evidence of a threat to bargaining unit jobs, the Board found the opposite, and the Fourth Circuit agreed. Pet. App. 22a-23a, 75a-76a. Accordingly, though Petitioners state that their petition raises the question of whether a secondary boycott "is shielded by the work preservation defense even when no bargaining unit jobs are threatened,"

Pet'rs Br. i, this is not the case. Though Petitioners may be dissatisfied with this factual determination, this Court does not review such issues absent an important legal question.

III.

NONE OF THE ALLEGED PRACTICAL IMPLICATIONS RAISED BY PETITIONERS OR AMICI MERIT THIS COURT'S REVIEW

A. The Fourth Circuit's Decision Allows the Lawsuit to Proceed, But It Is Far from Certain How That Lawsuit Will Be Resolved

All that the Fourth Circuit's ruling has done is to allow the ILA to proceed with its lawsuit against its employers. The ILA originally filed its complaint in state court, and defendants removed it to the District of New Jersey and then moved to dismiss. Then the parties agreed to stay the proceeding pending the Board's resolution of the charges. There are many possibilities as to what can happen next. The lawsuit may proceed, or it may be referred to an arbitrator. The ILA may or may not prevail on some or all issues, or the employers may convince a court or arbitrator that their contractual interpretation is correct.[10] There also remains the very real possibility that the bargaining parties may resolve their dispute by

10. As the Fourth Circuit noted, the carriers may hypothetically seek to raise a waiver defense in the New Jersey lawsuit based on the ILA's failure to enforce the no-subcontracting clause at other South Atlantic facilities. The Fourth Circuit properly declined to opine on the merits of any such defense, which would have to be resolved in the contract action itself. See Pet. App. 20a n.3.

means of a compromise or settlement. This is especially true because USMX and the ILA are currently engaged in renegotiating the Master Contract, which expires by its terms on September 30, 2024. Thus, the outcome of this dispute is still contingent on future events. The central concern of ripeness is whether the case involves uncertain or "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990).

B. The Decision Has No Effect on Labor-Management Relations or the Supply Chain Nationwide.

Although the outcome of the ILA's litigation remains uncertain, Petitioners assert that the Fourth Circuit's decision allowing the case to move forward will have significant impacts on labor-management relations across the country. These assertions are wholly unwarranted.

As addressed *supra*, the Fourth Circuit's decision, which applies to the unique situation of the Master Contract, breaks no new ground and instead straightforwardly reaffirms the principle that valid no-subcontracting clauses justified by a purpose to preserve bargaining unit jobs can be enforced in multiemployer bargaining units, including in the specific context of the longshore industry where such bargaining units are coastwide. It has **no** application to situations where: (1) unions have no collective bargaining relationship with a multiemployer bargaining association; (2) the collective bargaining relationship does not expressly define a single bargaining unit covering employees of all employers party to a multiemployer contract; or (3) the multiemployer contract does not expressly prohibit subcontracting work outside the bargaining unit.

Despite this limited scope, Petitioners nevertheless contend that the Fourth Circuit's decision "will vastly expand the circumstances when unions can coerce neutral employers," for instance by "invok[ing] the work preservation defense by citing *the type of work performed by union members in completely different parts of the country*." Pet'rs Br. 28-29 (emphasis in original).[11] Not so. Whether "union members" have performed similar work at other job sites is irrelevant to the work preservation inquiry, which is tied exclusively to the interests of the bargaining unit. Had the Master Contract's bargaining unit covered only the Port of Charleston, or certain facilities or employers within the Port, that ILA members in a **different** bargaining unit performed analogous work would provide the union with no defense against a charge under Section 8(b)(4) of the NLRA.

Contrary to Petitioners' alarmist assertions, the Fourth Circuit's decision has no impact on bedrock principles of labor law prohibiting secondary boycotts. The law remains clear that unions cannot invoke work performed outside of the bargaining unit to make a work preservation defense, and nothing in the Fourth Circuit's decision is to the contrary.

Similarly, it is not the case that "any company can be targeted by a union pressure campaign on the theory that it actually has effective control over the work assignments

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11. See also Chamber of Commerce *et al.* Amici Br. 12 (alleging that decision allows "unions to use pressure tactics to take away jobs from non-union workers . . . as long as any union anywhere else performs the same type of work"); *id.* at 19 (alleging that unions can pressure employers to cut business ties with non-union companies whenever they represent "*other* employees who perform the same type of work at *different* job sites") (emphasis in original).

of other companies with which it deals." Pet'rs Br. 29. As discussed *supra* at 24, the Fourth Circuit did not hold that USMX carriers have "effective control" over SCSPA's work assignments—in fact, it made clear that they did not. See Pet. App. 25a. The only "control" that the ILA needed to demonstrate was that USMX carriers could determine their **own** work assignments—specifically, whether they had the power to determine whether to subcontract work outside their bargaining unit. Enforcing USMX's contractual commitment to refrain from subcontracting work outside the bargaining unit is a far cry from opening the door for unions to pressure any company to "decide not to do business with other businesses that do not use union labor in favor of those that do." Pet'rs Br. 29. This decision does not allow a union to sue "any company" that is not also the union's employer. *Id.*

This decision involves a very fact-specific situation that is unique to a small sector of a single industry. Indeed, the fact that the Circuit split alleged by Petitioners involves three cases all involving the coastwide agreements between the two longshore unions and multiemployer associations demonstrates that this case is not of general significance to the broader labor-management community.

Petitioners also raise concern about disruption to the supply chain, but those are similarly unfounded. First, this decision enforces the *status quo* as it has existed on the East and Gulf Coast from the beginning of the Master Contract. Petitioners are the ones who seek to disrupt the contractual arrangements that have resulted in harmonious labor relations on the East Coast since the 1970s. See *ILA I*, 447 U.S. at 497-99.

The Master Contract only applies to container terminals on the East and Gulf Coast of the United States. It does not apply to the West Coast, the Great Lakes, or Puerto Rico or to marine terminals on the East and Gulf Coast that do not handle container cargo. Likewise, terminals staffed by labor other than ILA-represented labor will obviously be unaffected.

Even the hybrid model is allowed to continue as before because the ILA's interpretation of the Master Contract only applies to **new** container terminals. And there is only one such new container terminal that is built or even **planned**: Leatherman.[12] All other terminals currently operating on the East and Gulf Coasts will continue to operate as they always have.[13]

Finally, it bears repeating that any effects of work preservation on third parties are immaterial on the analysis of whether those efforts are primary activity. *ILA I*, 447 U.S. at 507 n.22 ("The effect of work preservation

12. Moreover, even if the amicus of the Georgia Ports Authority is correct, and Georgia is contemplating a new terminal in the future, if that terminal is ever built, the Fourth Circuit decision is not precedential in Georgia, and the Eleventh Circuit has not ruled on the issue.

13. Even though Leatherman has been under dispute since the spring of 2021, according to SCSPA's own annual report, last year (2022) was "the most successful fiscal year in our port's history." South Carolina Ports, *SCSPA-2022-Annual-Report-05-Digital*, https://scspa.com/scspa-2022-annual-report-05-digital/; see also David Wren, *Busy Year Equals Big Bonuses For Charleston Port Employees*, Post and Courier (Sept. 20, 2022), https://www.postandcourier.com/business/busy-year-equals-big-bonuses-for-charleston-port-employees/article_1dbd45d6-3918-11ed-b164-b76cdc87f98a.html.

agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer."); *ILA II*, 473 U.S. at 79 ("[B]y focusing on the effect that the Rules might have on 'shortstopping' truckers and 'traditional' warehousers, the Board contravened [*ILA I*'s] direction that such extra-unit effects, 'no matter how severe,' are 'irrelevant' to the analysis.").

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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