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.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(ii)(B), by suing an employer for breaching a provision of the parties' collective-bargaining agreement prohibiting the employer from contracting out covered work to persons outside the collective-bargaining unit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 75 F.4th 368. The decision and order of the National Labor Relations Board (Pet. App. 52a-101a) is reported at 372 NLRB No. 36. The decision of the administrative law judge (Pet. App. 102a-157a) is not reported but is available at 2021 WL 4243159.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2023. The petition for a writ of certiorari was filed on September 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, defines certain types of conduct by unions and employers as unfair labor practices. See 29 U.S.C. 158. It empowers the National Labor Relations Board (Board) to order unions and employers to cease and desist from such conduct. See 29 U.S.C. 160.

Section 8(b)(4) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce" if "an object thereof is * * * forcing or requiring any person * * * to cease doing business with any other person." 29 U.S.C. 158(b)(4)(ii)(B). This Court has read Section 8(b)(4) in light of labor law's longstanding distinction between "primary" and "secondary" activity. See *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 621-628 (1967). In a "primary" activity, a union applies direct economic pressure to an employer with whom it has a labor dispute. See *id.* at 622-623. In a "secondary" activity, by contrast, a union seeks to compel a third party to stop doing business with the employer, thus putting indirect economic pressure on the employer to yield to the union's demands. See *id.* at 626 n.16. This Court has repeatedly explained that Section 8(b)(4) forbids only secondary union activity and that a union charged with violating Section 8(b)(4) may defend itself by showing that it acted with primary objectives. See, *e.g.*, *NLRB* v. *International Longshoremen's Ass'n*, 473 U.S. 61, 81 (1985) (*ILA II*); *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) (*ILA I*); *National Woodwork Mfrs. Ass'n*, 386 U.S. at 621-628; *Electrical Workers* v. *NLRB*, 366 U.S. 667, 672 (1961); *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686 (1951).

This Court has developed "evidentiary mechanisms" that enable the Board and the courts to determine "whether a union's activity is primary or secondary—that is, whether the union's efforts are directed at its own employer * * * or, instead, * * * are 'tactically calculated' to achieve union objectives [elsewhere]." *ILA II*, 473 U.S. at 81 (citation omitted). One such mechanism is the work-preservation doctrine. See *ILA I*, 447 U.S. at 503-513. Under that doctrine, a collective-bargaining agreement (or an attempt to enforce it) does not violate Section 8(b)(4) if (1) the agreement "ha[s] as its objective the preservation of work traditionally performed by employees represented by the union," and (2) the contracting employer has "the power to give the employees the work in question." *Id.* at 504. The first prong reflects the understanding that pressuring an employer to preserve employees' jobs is a routine form of "primary" union activity. *Ibid.* The second prong reflects the understanding that, "if the * * * employer has no power to assign the work, it is reasonable to infer that the [union activity] has a secondary objective, that is, to influence whoever does have such power over the work." *Id.* at 504-505.

2. This case arises out of a labor dispute in the longshore industry—*i.e.*, the business of loading cargo on and unloading cargo from ships. Respondent United States Maritime Alliance (Alliance) is an association of shipping carriers and other maritime companies. Pet. App. 4a. Respondent International Longshoremen's Association (ILA) is a labor union that represents longshoremen and other maritime workers in a single bargaining unit that spans the East and Gulf coasts. *Ibid.*

The Alliance and the ILA have entered into a collective-bargaining agreement. Pet. App. 4a. The

agreement includes provisions addressing the use of shipping containers—large metal receptacles that hold cargo and that can be moved between ships and trucks without being opened. *Id.* at 3a. Because containers eliminate the need to load and unload cargo piece by piece, they reduce costs for shipping companies, but threaten the jobs of longshoremen. *Ibid.* "As one might expect, the [use of containers] has been a hotly disputed topic of collective bargaining" in the longshore industry. *ILA I*, 447 U.S. at 496.

The agreement between the Alliance and the ILA acknowledges the increasing use of containers to transport cargo, but seeks to protect longshoremen in the bargaining unit from the resulting loss of work. Pet. App. 4a. In particular, it recognizes that longshoremen have "historically" performed certain types of work related to containers, including "the loading and discharging of containers on and off ships," "the loading and discharging of cargo into and out of containers," and "the maintenance and repair of containers" at ports. *Id.* at 5a (citation omitted). It states that the carriers will "employ employees covered by [the master contract] to perform such work" and will "not contract out any [such] work." *Ibid.* (citation omitted). Those provisions "are to be rigidly enforced in order to protect against the further reduction of the work force." *Id.* at 5a-6a (citation omitted).

3. Petitioners are the State of South Carolina and the South Carolina State Ports Authority (Ports Authority), a state agency that operates the Port of Charleston. Pet. App. 7a. The Port of Charleston has historically used a "hybrid labor model"—meaning that non-union state employees operate the cranes that lift containers on and off ships, while ILA longshoremen

perform other longshore work. *Ibid.* In 2020, the Ports Authority announced plans to open a new terminal—the Leatherman Terminal—and to operate it on the same hybrid labor model. *Id.* at 7a-8a.

In 2021, two carriers, both of which were members of the Alliance, sent ships to the new terminal. Pet. App. 8a. The union responded by suing the Alliance and the carriers in New Jersey Superior Court. *Id.* at 8a-9a; see Compl. at 1-12, *International Longshoremen's Ass'n* v. *Hapag-Lloyd AG*, No. ESX-L-32321-21 (N.J. Super. Ct. Apr. 22, 2021). The union alleged, among other things, that the Alliance and the carriers had violated the collective-bargaining agreement's provisions requiring them to use longshoremen in the bargaining unit for longshore work and prohibiting them from contracting out such work. Pet. App. 9a. The union sought damages for breach of contract. *Ibid.*

The defendants later removed the union's suit to the United States District Court for the District of New Jersey. Pet. App. 88a; see Notice of Removal at 1-9, *International Longshoremen's Ass'n* v. *Hapag-Lloyd AG*, No. 21-cv-10740 (May 5, 2021). The federal court has since stayed that suit pending the resolution of this separate case. Pet. App. 88a n.11.

4. In response to the ILA's suit, petitioners and the Alliance filed unfair-labor-practice charges against the ILA with the Board. Pet. App. 8a-9a. Petitioners and the Alliance claimed that the ILA's suit against the Alliance and the carriers violated Section 8(b)(4) of the NLRA because it had an unlawful secondary objective: forcing the Alliance and its member carriers to stop doing business with the Ports Authority in order to pressure the Ports Authority to change the labor model used at the new terminal. *Id.* at 125a-126a. The union, in

turn, invoked the work-preservation doctrine, arguing that the suit constituted a lawful effort to preserve the work performed by longshoremen in the bargaining unit. *Id.* at 126a.

The Board's General Counsel issued a complaint based on the charges. Pet. App. 59a. An administrative law judge (ALJ) then issued a recommended decision in which he determined that the ILA's suit violated Section 8(b)(4). *Id.* at 102a-157a. The ALJ identified the work at issue in this case as "container work at the Leatherman Terminal." *Id.* at 152a. Because longshoremen in the bargaining unit had not previously performed that work at that terminal, he concluded that the suit was not aimed at preserving work traditionally performed by the longshoremen. *Id.* at 152a-153a. The ALJ instead characterized the suit's objective as "work acquisition, not work preservation," and concluded that the work-preservation doctrine could not shield it. *Id.* at 153a.

The Board rejected the ALJ's findings regarding the suit's objective and issued a final decision dismissing the complaint against the ILA. Pet. App. 52a-101a. The Board explained that the ALJ had "assessed the scope of unit work too narrowly." *Id.* at 70a. Given that "the collective-bargaining agreements in issue cover coast-wide units," the Board defined the work at issue to encompass longshore work throughout the East and Gulf coasts, not just container work at the Leatherman Terminal. *Id.* at 71a. On that premise, the Board found that the union's suit fit within the work-preservation doctrine. *Id.* at 70a-76a. Applying the doctrine's first prong, the Board found that the union was "seeking to preserve the traditional work and the jobs of unit employees in the face of the technological advances affect-

ing the coastal units." *Id.* at 71a. Turning to the second prong, the Board found that the Alliance and its members had "sufficient control over the work in question": They could determine which workers would load or unload their ships by deciding at which ports to call. *Id.* at 72a. The Board accordingly concluded that "this case encompasses a straightforward primary dispute between ILA and [the Alliance's] carrier members rather than an attempt by ILA to exert unlawful secondary pressure on [the Alliance's] carrier members to cease doing business with [petitioners]." Pet. App. 75a.

One member of the Board dissented in part. Pet. App. 77a-101a. Like the ALJ, he defined the relevant work as container work at the Leatherman Terminal, not longshore work across the East and Gulf coasts. *Id.* at 95a. Starting from that premise, he concluded that the union had failed to satisfy the work-preservation test. *Id.* at 95a-97a.

5. The Fourth Circuit denied petitioners' petition for review. Pet. App. 1a-51a. The court explained that its review of the Board's decision was "'limited'": The Board's factual findings were conclusive if "supported by substantial evidence," and its legal interpretations were conclusive if they were "'rational and consistent with the Act.'" *Id.* at 12a (citations omitted). Applying those deferential standards, the court sustained the Board's determination that the work-preservation doctrine shielded the union's suit. *Id.* at 15a-27a.

The court of appeals determined that the Board had permissibly defined the work in dispute as "loading and unloading generally at East and Gulf Coast ports." Pet. App. 17a-18a (citation omitted). Starting then with the work-preservation test's first prong, the court upheld the Board's finding that the suit aimed to preserve work

traditionally performed by members of the bargaining unit. *Id.* at 20a-24a. The court observed that the use of shipping containers had resulted in a "'steadily dwindling volume of cargo work,'" that the "Leatherman Terminal contributes to that 'dwindling' by assigning to non-union workers jobs earmarked for the union by contract," and that the union's effort to enforce its containerization agreement sought to avert such threats to "bargaining-unit jobs." *Id.* at 23a (citation omitted). Turning to the work-preservation test's second prong, the court upheld the Board's finding that the Alliance and the carriers had "the 'right to control' the relevant work's assignment." *Id.* at 24a (citation omitted). The court noted that the Alliance and the carriers could "unilaterally give [the disputed] work to union members by 'simply refusing to supply their containers' to ports using non-ILA labor." *Id.* at 27a (citation omitted).

Judge Niemeyer dissented in part. Pet. App. 32a-51a. He defined the work in dispute as confined to operating cranes at the Port of Charleston. *Id.* at 44a-45a. He assumed, for the sake of argument, that the suit satisfied the first prong of the work-preservation test, but concluded that it did not satisfy the second, because the Alliance and its members could not control who operates cranes at the Port of Charleston. *Id.* at 47a-50a.

ARGUMENT

Petitioners contend (Pet. 19-31) that the court of appeals erred in sustaining the Board's determination that the ILA's suit against the Alliance and the carriers was protected by the work-preservation doctrine. The court's highly fact-bound decision is correct and does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should be denied.

1. This Court has previously applied Section 8(b)(4) and the work-preservation doctrine in two cases involving the same industry, the same union, and the same type of union activity as this case. See *NLRB* v. *International Longshoremen's Ass'n*, 473 U.S. 61 (1985) (*ILA II*); *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (*ILA I*). In those cases, the ILA and shipping companies had entered into collective-bargaining agreements in which the companies promised to use only longshoremen in the coastwide bargaining unit to pack and unpack containers near ports. See *ILA I*, 447 U.S. at 498. The companies, however, then contracted with third parties that used non-union labor to perform that work. See *id.* at 500. The union attempted to enforce the collective-bargaining agreements, prompting the third parties to file unfair-labor-practice charges. *Id.* at 500-501. This Court applied the work-preservation doctrine and held that the union's attempt to enforce the agreement complied with Section 8(b)(4). See *ILA II*, 473 U.S. at 81-82.

The union activity in this case is strikingly similar to the union activity in *ILA I* and *ILA II*. Whereas those cases involved union action against employers who had allowed workers other than longshoremen to pack and unpack containers, this case involves a union suit against employers who had allowed workers other than longshoremen to move containers on and off their ships. Just as the work-preservation doctrine shielded the former activity, so too it shields the latter.

"In applying the work preservation doctrine, the first and most basic question is: What is the 'work' that the agreement allegedly seeks to preserve?" *ILA I*, 447 U.S. at 505. In answering that question, the Board and then the reviewing court "must focus on the work of the

bargaining unit employees." *Id.* at 507. In this case, the court of appeals correctly upheld the Board's finding that, because the bargaining unit consists of longshoremen across the East and Gulf Coasts, the work at issue consists of "loading and unloading generally at East and Gulf Coast ports." Pet. App. 11a (citation omitted).

The court of appeals also correctly upheld the Board's finding that the objective of the union's suit was "the preservation of work traditionally performed by employees" in the bargaining unit. *ILA I*, 447 U.S. at 504. As the Alliance's agreement with the union states, longshoremen have "historically" performed the work of "loading and discharging containers on and off ships." Pet. App. 5a (citation omitted). When a carrier chooses to dock at a port where state employees load and discharge containers, rather than a port where longshoremen do so, it reduces the work available to longshoremen elsewhere on the coast, potentially "threatening * * * bargaining-unit jobs." *Id.* at 23a. The Board reasonably concluded that the union's suit here aims to avert that threat to the employees' jobs.

In addition, the court of appeals correctly upheld the Board's finding that the Alliance and the carriers had "the power to give the employees the work in question." *ILA I*, 447 U.S. at 504. The Alliance's carrier-members can decide where to dock. Pet. App. 27a. If they choose to dock at ports that employ longshoremen to move containers on and off ships, longshoremen will have more work; if they choose to dock at ports that use state employees for that purpose, longshoremen will have less work. The Alliance and its members can thus directly determine how much work will be available for the longshoremen to perform. "It is difficult to imagine a more

forceful demonstration of control." *Ibid.* (citation omitted).

Finally, in applying the work-preservation doctrine, it "must not be forgotten" that the ultimate inquiry is "whether a union's activity is primary or secondary—that is, whether the union's efforts are directed at its own employer * * * or, instead, are directed at affecting the business relations of [third parties]." *ILA II*, 473 U.S. at 81. The work-preservation doctrine is an evidentiary tool that helps the Board resolve that factual issue of union objective. *Ibid.* Here, the union contends that its efforts are directed at influencing the conduct of its own employers: the union seeks to compel carriers to use the ports that maximize work for longshoremen. Petitioners, in contrast, contend that the union's efforts are directed at influencing the conduct of the Ports Authority: in petitioners' view, the union seeks to compel carriers to avoid the Leatherman Terminal in order to indirectly pressure the Ports Authority to change the labor model used at that terminal. Applying the work-preservation test, the Board resolved that factual dispute about the union's objectives in the union's favor. See Pet. App. 70a (conducting an "analysis of ILA's objective") (capitalization altered; emphasis omitted). Congress has entrusted the resolution of such factual issues to the Board, and its "determinations are, of course, entitled to deference." *ILA I*, 447 U.S. at 511; see 29 U.S.C. 160(e) (providing that the Board's factual findings are "conclusive" "if supported by substantial evidence").

2. Petitioners advance several contrary arguments. None has merit.

To begin, petitioners err in arguing (Pet. 24) that the work in dispute here consists of operating cranes at the

Leatherman Terminal, rather than longshore work across the East and Gulf Coasts. That narrow view of the work conflicts with this Court's decisions in *ILA I* and *ILA II*. There, the Court defined the work at issue as "longshore work" generally, not as longshore work at a specific site. *ILA II*, 473 U.S. at 78. It explained that any application of the work-preservation doctrine must "focus on the work of the bargaining unit employees." *ILA I*, 447 U.S. at 507; see *ILA II*, 473 U.S. at 63-64. And it specifically stated that "the place where work is to be done * * * is seldom relevant to the definition of the work itself." *ILA II*, 473 U.S. at 77. The Court's analysis thus supports the Board's definition, upheld by the court of appeals, Pet. App. 17a, of the relevant work in this case—and forecloses petitioners' myopic focus on work patterns at a specific terminal in a specific port.

Petitioners err in arguing (Pet. 24-25) that the decision below conflicts with this Court's decision in *NLRB* v. *Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters*, 429 U.S. 507 (1977) (*Pipefitters*). In that case, the Court held that the work-preservation doctrine did not shield a union's picketing of a subcontractor at a construction site, because the subcontractor lacked the power to assign the work at issue. *Id.* at 521-528; see *id.* at 513 ("[T]he union's object was in reality to influence [the general contractor] by exerting pressure on [a subcontractor], an employer who had no power to award work to the union."). But as the court of appeals explained, this case differs from *Pipefitters*. See Pet. App. 26a-27a. The subcontractor in *Pipefitters* lacked any ability to give the unionized employees the jobs they sought. "The subcontractor could have walked away from the deal with the general contractor—but the un-

ion members would have gone home empty-handed too." *Ibid.* In contrast, the carriers here *can* "unilaterally give th[e] work" to longshoremen: They can simply use ports that rely on longshoremen rather than state employees to move containers on and off ships. *Ibid.*

Finally, petitioners err in asserting (Pet. 26) that the work-preservation doctrine does not apply in this case because "[n]o ILA job is displaced or threatened by Leatherman." To the contrary, "the lower labor costs" at the Leatherman Terminal threaten to "draw cargo away from fully union ports," thereby imperiling the jobs of longshoremen at those other ports. Pet. App. 23a. The Act permits the union to enforce a collective-bargaining agreement through which it seeks to meet that threat.

3. Contrary to petitioners' suggestion (Pet. 19-23), the decision below does not conflict with the decisions of any other court of appeals.

Petitioners principally rely (Pet. 19-22) on a series of non-precedential decisions from the Ninth and D.C. Circuits in a long-running labor dispute about work involving refrigerated containers at a terminal in the Port of Portland, Oregon. See *Internationaal Longshore & Warehouse Union* v. *NLRB*, 705 Fed. Appx. 3 (D.C. Cir. 2017) (*ILWU II*) (per curiam); *International Longshore & Warehouse Union* v. *NLRB*, 705 Fed. Appx. 1 (D.C. Cir. 2017) (*ILWU I*) (per curiam); *Hooks ex rel. NLRB* v. *International Longshore & Warehouse Union*, 544 Fed. Appx. 657 (9th Cir. 2013). Petitioners argue (Pet. 20) that, in applying the work-preservation test to that dispute, the courts in those cases focused on "who controlled the * * * work at Portland, not on the coast generally"—an approach that (they assert) conflicts

with the approach taken by the court of appeals in this case.

Petitioners, however, ignore material factual distinctions between this case and the cases on which they rely. In the cases petitioners cite, the union used various tactics against shipping carriers and the terminal operator at the Port of Portland—such as stopping work, threatening picketing, and filing grievances—for the express purpose of obtaining a reassignment of work at that particular port. See *Hooks ex rel. NLRB* v. *International Longshore & Warehouse Union*, 905 F. Supp. 2d 1198, 1208-1209 (D. Or. 2012), aff'd in part, and remanded, 544 Fed. Appx. 657 (9th Cir. 2013); *International Longshore & Warehouse Union*, 363 N.L.R.B. 121, 123, 132-142 (2015) (*ILWU*), enforced, 705 Fed. Appx. 3 (D.C. Cir. 2017); see also Pet. App. 25a (explaining that the union "expressly sought reassignment of the * * * work" at a specific port). Given that the union's express aim was to obtain work only at a particular port, the Ninth and D.C. Circuits understandably focused on the work at that port. In this case, by contrast, the union seeks to preserve work across the East and Gulf Coasts, not simply to obtain the reassignment of work at a specific port. See Pet. App. 25a. The difference in "the 'work' that the agreement allegedly seeks to preserve," *ILA I*, 447 U.S. at 505, explains the difference in legal analysis.

In addition, the union and the employers in those cases had specifically carved out certain ports and certain terminals from the coastwide unit. See *ILWU*, 363 N.L.R.B. at 131, 143. In this case, by contrast, there is "no indication the parties intended to carve out" specific ports, such as the Port of Charleston, "from th[at]

multi-port bargaining unit." Pet. App. 20a (citation omitted).

The cases on which petitioners rely also arose in meaningfully different procedural postures. In those cases, the agency determined that particular conduct violated Section 8(b)(4) of the NLRA, and courts deferred to those determinations. See *ILWU II*, 705 Fed. Appx. at 4 ("Most of petitioners' arguments for review seek to have us redetermine factual questions and the conclusive determination made by the Board."); *ILWU I*, 705 Fed. Appx. at 3 ("The petitioners' remaining arguments * * * seek to have us redetermine factual questions and the conclusive determination made by the Board."); *Hooks*, 544 Fed. Appx. at 658 (treating an ALJ decision that had not yet been reviewed by the Board as a "useful benchmark" for assessing the agency's likelihood of success on the merits) (citation omitted). But here, the agency has determined that the conduct at issue does *not* violate Section 8(b)(4). See Pet. App. 15a. Petitioners' cases thus show, at most, that the Board could reasonably reach different outcomes on what petitioners maintain are similar factual records; they do not show a circuit conflict.

In all events, the decisions on which petitioners rely are unpublished and thus would not bind the Ninth and D.C. Circuits. See 9th Cir. Local R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent."); D.C. Cir. Local R. 36(e)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."). The Ninth Circuit decision on which they rely also involved the issuance of a preliminary injunction; accordingly, the court simply considered the agency's likelihood of success on the merits without definitively

resolving the merits. See *Hooks*, 544 Fed. Appx. at 658-659; see also *East Bay Sanctuary Covenant* v. *Biden*, 993 F.3d 640, 661 (9th Cir. 2021) ("We discuss the merits in 'likelihood terms' and exercise restraint in assessing the merits[.] * * * Such a predictive analysis should not, and does not, forever decide the merits of the parties' claims.") (citations omitted). Any conflict with those decisions thus would not warrant this Court's review.

Petitioners cite (Pet. 22-23) three further court of appeals cases, but none of them conflicts with the decision below. In one case, the D.C. Circuit determined that the work-preservation doctrine could not justify union activity that was not designed to protect "bargaining unit work," but was instead designed "to reach outside the contractual bargaining unit." *Local 32B-32J* v. *NLRB*, 68 F.3d 490, 495 & n.4 (1995). The union activity here, in contrast, was "designed to preserve the work of ILA employees in the coast-wide bargaining unit." Pet. App. 18a (citation omitted). In two other cases, courts of appeals determined that union activities had improperly targeted subcontractors that lacked the ability to assign the work in question. See *Local Union No. 25* v. *NLRB*, 831 F.2d 1149, 1152 (1st Cir. 1987); *International Bhd. of Elec. Workers* v. *NLRB*, 566 F.2d 348, 352 (D.C. Cir. 1977). In contrast, the court of appeals in this case upheld the Board's finding that the Alliance and the carriers did have the ability to give the work in question to union members by using other ports. See Pet. App. 27a.

4. Three additional considerations confirm that this case does not warrant this Court's review. First, the case boils down to a factual dispute about the union's objectives: The union maintains that its suit sought to

influence only the Alliance's and the carriers' decisions about where to direct their ships, but petitioners argue that the suit sought (indirectly) to influence the Ports Authority's decisions about what labor model to use at its new terminal. The work-preservation doctrine is an "evidentiary mechanism[]" that enables the Board to resolve such a factual dispute. *ILA II*, 473 U.S. at 81. The application of that evidentiary tool to a particular case is necessarily "fact-based." *Ibid.* Petitioners' disagreement with the Board's and the court of appeals' resolution of those fact-intensive questions does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Second, petitioners rely on aspects of the ILA's contract with the Alliance that are not properly at issue here. Specifically, they argue (Pet. 7-10) that Article VII, Section 7, of the contract aims to influence the labor model used at ports. But as the court of appeals observed, the union's suit against the Alliance and the carriers relied exclusively on other provisions of the contract; the union's complaint "didn't mention" Article VII, Section 7. Pet. App. 9a. And while petitioners did bring a separate unfair-labor-practice charge based on Article VII, Section 7, the ALJ, the Board, and the court all rejected that claim. See *id.* at 27a-30a. Petitioners have not sought review of that aspect of the court's decision.

Third, petitioners contend (Pet. 18) that the union committed an unfair labor practice, not by striking or

picketing, but simply by "fil[ing] a lawsuit." As the court of appeals and the Board noted, an unfair-labor-practice charge based on the filing of a suit raises special First Amendment issues. See Pet. App. 13a, 64a. The First Amendment protects the right "to petition the government for a redress of grievances," U.S. Const. Amend. I, and a suit is a "petition" within the meaning of that guarantee, see *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 387 (2011) (citation omitted). Accordingly, a claim that a party committed an unfair labor practice simply by filing suit can, at least in some circumstances, raise serious First Amendment concerns. See *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 528-533 (2002); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983). That constitutional overlay could complicate this Court's review of the labor-law issues presented by the petition for a writ of certiorari.

5. Petitioners argue (Pet. 29-31) that the decision below warrants review because of its economic effects on southern ports and on South Carolina. But the secondary-boycott statute focuses on the "object" of the union's actions, not its effects. 29 U.S.C. 158(b)(4)(ii)(B). This Court has long recognized that work-preservation agreements will at times necessarily—and lawfully—produce significant economic effects for third parties. See, *e.g.*, *ILA II*, 473 U.S. at 79 ("[E]ffects, 'no matter how severe,' are 'irrelevant' to the analysis.") (citation omitted); *Pipefitters*, 429 U.S. at 529 n.16 ("Some disruption of business relationships is the necessary consequence of the purest form of primary activity."); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 627 (1967) ("[H]owever severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective."). Pe-

titioners' policy arguments about the asserted economic consequences of the union's suit accordingly do not justify this Court's review. Cf. Pet. App. 23a n.5 ("[I]t's 'not our function as a court of review to weigh the economic cost' of a collective bargaining agreement.") (citation omitted).

In addition, petitioners' economic predictions rest on the assumption that the union's suit against the Alliance and the carriers will succeed. But the union's suit may fail. The federal court that is hearing the union's suit has not yet determined whether the union's contract claims are meritorious or whether the Alliance and the carriers have valid federal-law defenses to those claims. Uncertainty about the outcome of the union's suit provides an additional reason to deny review here.*

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* In resolving this case, the court of appeals afforded deference to "the Board's legal interpretations," Pet. App. 12a, consistent with this Court's longstanding precedent, see, *e.g.*, *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). This Court is currently considering whether to overrule its holding in *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that courts owe deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. See *Loper Bright Enters.* v. *Raimondo*, cert. granted (No. 22-451) (oral argument scheduled for Jan. 17, 2024) and *Relentless, Inc.* v. *Department of Commerce*, cert. granted (No. 22-1219) (oral argument scheduled for Jan. 17, 2024). Petitioners, however, do not challenge the court of appeals' deference to the Board's legal interpretations, do not argue that the resolution of *Loper Bright* and *Relentless* could affect the outcome of this case, and do not ask the Court to hold the petition for a writ of certiorari pending its decisions in those cases. The Court should accordingly deny rather than hold the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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