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

REPLY BRIEF

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INTRODUCTION

The Government defends the Fourth Circuit's decision as a routine application of the work-preservation defense to unlawful secondary boycotts. It is anything but that. The Board's unprecedented expansion of the work-preservation defense eviscerates Congress's prohibition of secondary boycotts, conflicts with decisions of other courts of appeals and this Court, licenses significant harm to important State investments in southeast regional ports and the nation's supply chains, and defies common sense. This Court should grant review.

ARGUMENT

1. The Government seeks to diminish the obvious conflict between the Fourth Circuit's decision and flatly inconsistent holdings in the D.C. and Ninth Circuits.

First, the Government argues that *ILWU Local 8* v. *NLRB*, 705 F. App'x 1 (D.C. Cir. 2017) (per curiam); *ILWU Local 8* v. *NLRB*, 705 F. App'x 3 (D.C. Cir. 2017) (per curiam); and *Hooks ex rel. NLRB* v. *ILWU*, 544 F. App'x 657 (9th Cir. 2013) (collectively, "the ILWU cases") can be distinguished. It claims ILWU sought to obtain specific work—reefer jobs—at the Port of Portland that ILWU members performed at other West Coast Ports under ILWU's master contract with the Pacific Maritime Association ("PMA"), while here ILA sought to preserve jobs across the East Coast. Gov't Opp. 13-14.

This is wishful thinking: In the ILWU cases, ILWU members had performed the reefer jobs at virtually all West Coast ports, but had *never* done so at Portland where government employees had always performed

the reefer work. ILWU claimed it could lawfully coerce the Port's operator (ICTSI) and maritime carriers to make the Port fire its employees and use ILWU members for the reefer work. ILWU made *exactly the same argument* that ILA makes here, asserting that its members performed this work at other ports across the coast under the PMA agreement and therefore that its coercion of ICTSI and the carriers was work preservation for the coastwide unit.

The D.C. and Ninth Circuits affirmed the Board's rejection of those work-preservation arguments. See Petition 19-20. And, like ILA here, ILWU argued that maritime carriers controlled the work at-issue because carriers could call at other ports. Again, the courts of appeals rejected the argument which the Board and the Fourth Circuit accepted here. See *Hooks*, 544 F. App'x at 658 ("ILWU's argument regarding the shipping carriers' ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the 'right to control the assignment of the work' at this port") (quoting *NLRB* v. *Loc. 638, Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507, 537 (1977) ("*Pipefitters*")). The current Board, however, has "abandon[ed] precedent and tilt[ed] the playing field in favor of unions, while ignoring statutory directives to the contrary." Chamber of Commerce *Amicus* 4.

Second, the Government argues that in the ILWU cases, ILWU and PMA "had specifically carved out certain ports and certain terminals from the coastwide unit," while there is "'no indication that the parties intended to carve out' specific ports, such as the Port of Charleston." Gov't Opp. 14-15. Again, the Government is just plain wrong. ILA members have *never* performed the lift-equipment work at Charleston, Savannah, or other southeast regional ports, and this reality

has long been specifically recognized, including in Section 7 of the ILA-USMX Master Contract, which requires the parties to conduct a study "to convince [the hybrid labor model ports] to employ Master Contract-bargaining-unit employees." App. 55a.

Third, the Government correctly notes that the ILWU decisions are unpublished. That simply reflects their uncontroversial status (until now) and their consistency with this Court's precedent on the work-preservation doctrine. Had either the D.C. or Ninth Circuit considered the issue presented here, it would have rejected ILA's work-preservation defense.

Finally, the Government purports to distinguish *Local 32B-32J* v. *NLRB*, 68 F.3d 490, 492-93 (D.C. Cir. 1995); *Local Union 25* v. *NLRB*, 831 F.2d 1149 (1st Cir. 1987); and *Int'l Bhd. Of Elec. Workers* v. *NLRB*, 566 F.2d 348 (D.C. Cir. 1977), on the theory that the unions in those cases sought "to reach outside the contractual bargaining unit," while here ILA sought to preserve a coastwide unit. Gov't Opp. 16. That is no distinction. ILA coerced carriers not to do business with SCSPA to obtain the lift-equipment work at Charleston, jobs its members had never performed. ILA seeks to acquire, not preserve, jobs.

Unlike the Government, ILA claims (Opp. 12-14) that other D.C. and Ninth Circuit decisions support its view of the work-preservation defense. That argument cannot survive cursory review of the cases. Both *ILA* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), and *California Cartage Co.* v. *NLRB*, 822 F.2d 1203 (D.C. Cir. 1987), involve containerization and whether ILA sought to preserve work by seeking technologically *transformed* jobs—not a claim ILA can plausibly make

here.[1] *American President Lines, Ltd.* v. *ILWU*, 611 F. App'x 908 (9th Cir. 2015), supports petitioners, not the Board, because ILWA had "historically performed [the] stevedoring work" it pursued in Seward, Alaska, giving it a work-preservation object. *Id.* at 911-12. Finally, in *ILWU* v. *NLRB*, 978 F.3d 625 (9th Cir. 2020), ILWU sought work from an employer which had agreed in its collective bargaining agreement to provide ILWU members with specific jobs staffed by that employer. Here, SCSPA has no agreement with ILA. None of these cases suggests either court of appeals would endorse a work-preservation defense here.

2. The Fourth Circuit's decision cannot be reconciled with this Court's work-preservation precedent. The Government's contrary arguments cannot withstand scrutiny.

The non-textual work-preservation defense applies only if a union can show both that the work it seeks has been "traditionally performed by employees represented by the union"—*i.e.*, the bargaining unit—and that the coerced employer controls the assignment of the work in question. See *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) ("*ILA I*"); *NLRB* v. *Int'l Longshoremen's Ass'n*, 473 U.S. 61, 77 (1985) ("*ILA II*"); *Pipefitters*, 429 U.S. at 528.

Initially, the Government argues that this case is "strikingly similar" to *ILA I* and *ILA II* where this Court created the work-preservation defense. Gov't Opp. 9. That argument is absurd. Those cases addressed circumstances where "employees' traditional

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[1] *Everport Term. Servs., Inc.* v. *NLRB*, 47 F.4th 782, 794 (D.C. Cir. 2022), holds that multi-employer bargaining is lawful, which is undisputed and irrelevant here because SCSPA is not a member of any ILA bargaining unit.

work [was] displaced, or threatened with displacement, by technological innovation." *ILA I*, 447 U.S. at 505. Specifically, longshoremen had previously packed and unpacked irregular containers near ports; those jobs were eliminated by the technological innovation of containerization. This Court concluded that ILA was engaged in work preservation when it sought to acquire the new jobs handling containers because those new jobs *had functionally replaced jobs its members had performed before containerization*. Thus, *ILA I* and *II* held that where union jobs are eliminated by technological change, the union's attempt to obtain the transformed jobs for members is work preservation, even though the union is, in a sense, seeking to acquire new jobs.

These cases are not similar, let alone "strikingly similar" to this case: Here, there is no evidence of technological change causing displacement of ILA members. And ILA members have *never* performed the lift-equipment jobs at Charleston.

Next, the Government claims that the decision here is consistent—rather than in conflict—with *Pipefitters*. Gov't Opp. 12. Not so. In *Pipefitters*, a subcontractor and the union representing its employees had agreed that the subcontractor's employees would cut and thread pipe on the jobsite; the general contractor on the job, however, had purchased pre-cut, pre-threaded pipe. The union sought to coerce the subcontractor to cease doing business with the general contractor, but this Court found the union's coercion unlawful. This Court defined the work at-issue as the work at the general contractor's job site. And despite the union's contract with the subcontractor, the subcontractor had "no right to control" the pipe's cutting and threading *on the contractor's job*. 429 U.S. at 524-

28. Likewise here, although ILA has a Master Agreement with USMX, *Pipefitters* makes clear that the work at-issue is the work *at the Charleston job site* which is work that USMX carriers have no right to control.

Neither respondent addresses *Pipefitters*' teaching that, for work-preservation, the work at-issue is the work at a specific job site. The Government says only that *Pipefitters* is not analogous to this case because the subcontractor "lacked any ability to give the unionized employees the jobs they sought," while here the maritime carriers can "unilaterally give th[e] work" to longshoremen by using other ports. Gov't Opp. 12-13. This attempted distinction fails for multiple reasons.

First, as the Board Dissent highlighted, App. 99A, the subcontractor in *Pipefitters* could have chosen not to work for the contractor and taken jobs only with unionized contractors, and thus it had the kind of "control" ILA claims the carriers have here. This Court nonetheless found the union's pressure on the subcontractor unlawful.

Further, the Government's argument (Opp. 10) that maritime carriers controlled the work here because they could "choose to dock at ports that employ longshoremen" for the lift-equipment work, not "at ports that use state employees," misunderstands what it means to control the work at-issue. As the Ninth Circuit explained in rejecting this same argument in the ILWU cases, "ILWU's argument regarding the shipping carriers' ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the 'right to control the assignment of the work' at this port." *Hooks*, 544 F. App'x at 658 (quoting *Pipefitters*¸ 429 U.S. at 537). The relevant "control" is over assignment of lift-equipment jobs at Leatherman—jobs "indisputably" controlled by

SCSPA, App. 72a; see also Chamber of Commerce *Amicus* 12 ("*Pipefitters* squarely held that the job 'site,' not the general type of work a union's members '[t]raditionally' perform, sets the benchmark for the work-preservation inquiry").

The premise of the Government's distinction of *Pipefitters* is an unsupported fantasy about how the shipping industry works. "[T]he 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." S.C. Mfrs. All. *Amicus* 6; see *id.* at 7 ("cargo moves based on the origins and destination of cargo"). The record here is devoid of support for the Government's assertion that carriers unilaterally change ports without regard to their cargos' destination. To the contrary, the record shows that carriers that do not call at Leatherman instead call at other terminals using the hybrid model. Petition 17.

The implications of the Government's reading of this Court's work-preservation cases are deeply troubling. First, on the Government's view, a union may coerce an employer to cease doing business with a second employer with whom the union has a dispute, because the first employer can always purchase goods and services elsewhere and thus "control" who does the work. This would eliminate Congress's prohibition of secondary boycotts and contradict *Pipefitters*. See Ga. & Ga. Ports Auth. *Amicus* 12. The Government ignores this point.

Second, the Government argues that because ILA members perform lift-equipment jobs at *some other* East Coast locations, forcing USMX carriers to cease doing business with SCSPA in Charleston somehow "preserves" jobs elsewhere. But this Court's cases define the work at-issue for work-preservation purposes

as *historical* bargaining unit work. *Nat'l Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 630-31 (1967); *ILA I*, 447 U.S. at 507. And here the historic bargaining unit has *never* included lift-equipment jobs at Charleston, Savannah or other southeast ports. *E.g.*, App. 48a. "A union is not 'preserving' work when it is attempting to obtain work it has never done." Sens. Graham & Scott *Amicus* 9.

On the Government's logic, ILA would seek to "preserve" bargaining-unit jobs *any time* it coerces an employer signatory to the Master Contract to cease doing business with any non-signatory employer on the East Coast whose employees perform jobs ILA members perform—whether or not that non-signatory employer has *ever* been covered by the Master Contract. This is another breathtaking proposition that would gut the secondary-boycott prohibition. Unions have a work-preservation purpose only if they seek to preserve historic bargaining-unit jobs, not when they coerce bargaining-unit employers to stop doing business with employers *outside the bargaining unit*.

The Fourth Circuit's invocation of the work-preservation defense here contravenes this Court's decisions.

3. The decision below was not based on this case's alleged factual differences from the circumstances in the conflicting cases described above, as the Government wrongly asserts.

First, the Government claims that Petitioners simply disagree with the Board about the goal of ILA's lawsuit. Gov't Opp. 17. ILA brought a $300 million lawsuit against carriers based on *two calls* they made at Leatherman. The *in terrorem* effect of this lawsuit is more than sufficient to fulfill ILA Vice President Riley's threat that "[i]f there are any new terminals built, and if they are not in compliance with the [Master

Contract], the ships will not call on those facilities." App. 87a n.10. USMX carriers have ceased to call at Leatherman. The Government's argument is that unless ILA actually confesses to its unlawful objective, no inference of illegality is warranted. That argument is inconsistent with established precedent. "If one union pressures an employer who has no power over the . . . work, then that union's conduct presumptively is directed toward another (secondary) employer who does have that power." *Local 32B-32J*, 68 F.3d at 495 n.5 (citing *ILA II*, 447 U.S. at 504-05; *Pipefitters*, 429 U.S. at 521-28). ILA's "efforts to enforce its interpretation of the contract were intended not to preserve work (that it had never done), but to pressure [SCSPA] to change its labor policies." *Id.* at 495; see also *Loc. Union No. 501*, 566 F.2d at 352 (union pressure of employer with "no 'right of control'" is at least "'strong evidence,' that the union's actions are . . . 'tactically calculated to satisfy union objectives elsewhere,'") (citations omitted) (quoting *Nat'l Woodwork Mfrs.*, 386 U.S. at 644-45).

Second, the Government contends that ILA can invoke the work-preservation defense because ILA jobs *would be* displaced by use of the hybrid labor model at Leatherman. Gov't Opp. 13. Significantly, the Government does not cite the Board decision. The ALJ in this case specifically rejected that argument, and the Board did not adopt it. See App. 151a (characterizing ILA argument of diversion as "vague speculation," "without any evidentiary support"); *id.* at 152a (finding no evidence that "work might migrate from ILA-controlled ports to Charleston"). The record actually shows that ships coerced not to call at Leatherman instead called at other Charleston Terminals also using the hybrid model, *id.* at 60a, and that customers designate ports of call based on the inland destination of

cargo. *Supra* at 7. The Board's decision is *not* based on a finding that ILA jobs at other ports would be lost to Leatherman. There was no such finding.

The petition presents a conflict among the courts of appeals about the *legal* scope of the NLRA's secondary-boycott prohibition and work-preservation defense. The Fourth Circuit's legal ruling is dangerous and wrong.

4. The Government also contends that review is inappropriate because ILA's coercion took the form of a lawsuit, suggesting that finding an unfair labor practice based on a lawsuit raises First Amendment issues. Gov't Opp. 18. This is a red herring. This Court has twice already held that a lawsuit with an unlawful purpose can be an unfair labor practice. See *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 523 (2002); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 737 n. 5, 743 (1983). The Government observes that the lawsuit setting can complicate an unfair labor practice case "in some circumstances," but offers *no* explanation of why it would do so here—and the court below identified no such issue. This contrived reason to deny the petition is a make-weight.

5. Petitioners argued that the issue presented is worthy of review, relying on the importance of the federal question, the evisceration of the secondary-boycott prohibition, and the decision's practical effect on South Carolina, the Port of Charleston, and the national supply chain. The *amicus* briefs of the Governors of South Carolina and Georgia, the State of Georgia and its Port Authority, the Chamber and South Carolina manufacturers, and the two Senators from South Carolina underline the decision's real-world effects and the urgent need for review. As the *amicus* brief of Governors McMaster and Kemp highlights (at 6), ILA is using an

unlawful labor tactic to try to defeat their States' decisions about how to operate their instrumentalities for the benefit of their citizens and the regional economy.

The Government's response to the petition's demonstration that the decision has important consequences in the real world is a complete non-sequitur: It says "the secondary-boycott statute focuses on the 'object' of the union's actions, not its effects." Gov't Opp. 18. But, of course, the petition raised the concrete effects of the decision to demonstrate that the legal issue presented—the scope of the secondary-boycott prohibition—arises in a practical context of substantial importance, not to argue that those effects are part of the legal test. The Government's attempt to insinuate otherwise is disingenuous.

Nor do Petitioners' concerns "rest on the assumption that the union's suit … will succeed." Gov't Opp. 19. *Right now* Leatherman sits all but idle. USMX carriers have declined to do business there over ILA's objection and due to the *in terrorem* effect of ILA's lawsuit. And, as demonstrated above, the Fourth Circuit's gutting of the secondary-boycott rule will have consequences far beyond this case. Absent this Court's review, an important provision of the NLRA has been nullified for all sectors of the economy but most obviously for the vitally important ports of the U.S. coast. See Ga. & Ga. Ports Auth. *Amicus* 2.

CONCLUSION

This Court should grant the petition.

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