No. 24-370

In the Supreme Court of the United States

VALLEY HEALTH SYSTEM, LLC, DBA DESERT SPRINGS HOSPITAL MEDICAL CENTER, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether vacatur and remand in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), is warranted to permit the court of appeals to conduct an independent interpretation of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, when the court made clear that it had already interpreted the Act de novo.

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OPINIONS BELOW

The opinions and orders of the court of appeals (Pet. App. 1a-10a, 58a-75a) are reported at 93 F.4th 1115 and 100 F.4th 994. The decisions and orders of the National Labor Relations Board (Pet. App. 11a-55a, 93a-182a) are reported at 371 N.L.R.B. No. 160 and 372 N.L.R.B. No. 33. The prior decisions of the National Labor Relations Board are reported at 368 N.L.R.B. No. 139 and 369 N.L.R.B. No. 16. The additional prior decisions of the National Labor Relations Board are not published in the Labor Law Reporter but are available at 2018 WL 4693851 and 2018 WL 4502244.

JURISDICTION

The judgments of the court of appeals (Pet. App. 1a, 76a) were entered on February 20, 2024. Petitions for rehearing en banc were denied on May 1 and May 6,

2024. Pet. App. 57a, 60a. On May 6, 2024, the court of appeals amended the opinion reported at 93 F.4th 1120 (Pet. App. 58a). On July 25, 2024, Justice Kagan extended the time to file petitions for writ of certiorari to Friday, September 28, 2024, and Friday, October 3, 2024. The petition for writs of certiorari was filed on September 30, 2024. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, "declared [it] to be the policy of the United States" to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151. As this Court has recognized, "[t]he object of the [NLRA] is industrial peace and stability." *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785 (1996) (citing 29 U.S.C. 141(b); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38 (1987)). "Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-24 (1937).

The NLRA accordingly guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and "the right to refrain from any or all of such activities." 29 U.S.C. 157. Under the Act, the "[r]epresentatives designated or selected" by "the majority" of the employees in a bargaining unit

"shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a).

Congress enacted provisions to implement those statutory guarantees in Section 8 of the Act, 29 U.S.C. 158. Section 8(a)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively" with the union representing its employees. 29 U.S.C. 158(a)(5). That statutory duty requires the employer to "meet at reasonable times and confer in good faith" with the union about the subjects listed in Section 8(d), including "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d); see *First Nat'l Maint.*, 452 U.S. at 674-675 & n.12; *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). In general, an employer violates its statutory duty to bargain under Section 8 if the employer "effects a unilateral change of an existing term or condition of employment" without first "bargaining to impasse" or reaching agreement with its employees' designated union. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991); see *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). The rights and duties under a bargaining agreement "'define the *status quo*' for purposes of" future negotiations and the statutory prohibition on unilateral changes. *Litton*, 501 U.S. at 206 (citation omitted).

Congress charged the National Labor Relations Board (Board) with enforcing the Act. 29 U.S.C. 153, 156, 160-161. For example, the Board has statutory authority "to make, amend, and rescind * * * such rules and regulations as may be necessary to carry out the [Act]," 29 U.S.C. 156; to adjudicate complaints and

"prevent any person from engaging in any unfair labor practice []listed in section 158," 29 U.S.C. 160(a); and to conduct "hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160," 29 U.S.C. 161. As this Court has explained, "[b]ecause it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" Congress's grant of authority and discretion to the Board includes the "authority to formulate rules to fill the interstices of the broad statutory provisions." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (quoting *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978)). Under the Act, the Board's authority includes discretion to implement certain rules regarding the parties' duty to bargain. See *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 378 (1998) (explaining that "[t]he Board can, of course, forthrightly and explicitly adopt * * * substantive rules of law[] as a way of furthering particular legal or policy goals" under the Act).

b. This case concerns the effect of "dues-checkoff" arrangements in "right to work" States. Under a dues-checkoff arrangement, an employer agrees to deduct and remit union dues on behalf of employees who have authorized such deductions. Pet. App. 3a. A "right to work" State is one in which an employee cannot legally be required to join a union as a condition of employment. See *id.* at 61a, 69a; Nev. Rev. Stat. § 613.250.

It is undisputed here that dues-checkoff arrangements are a mandatory subject of collective bargaining. Pet. App. 118a. The Board has determined that dues-checkoff arrangements fall within the statutory prohi-

bition against unilateral changes after a contract expires. *Lincoln Lutheran of Racine*, 362 N.L.R.B. 1655, 1662-1663 (2015); see *Local Joint Exec. Bd.* v. *NLRB*, 883 F.3d 1129, 1139-1140 (9th Cir. 2018).

Lincoln Lutheran overruled *Bethlehem Steel Co.*, 136 N.L.R.B. 1500 (1962), which had concluded that an employer does not violate the Act insofar as it unilaterally stops deducting and remitting union dues after the collective-bargaining agreement had expired. *Id.* at 1502. The collective-bargaining agreements at issue in *Bethlehem Steel* contained both (1) a dues-checkoff provision and (2) a "union security" provision —that is, a provision establishing union membership as a condition of employment and limited by the Act to the duration of a collective-bargaining agreement. *Ibid.* The Board reasoned that the dues-checkoff provisions "implemented" the "union-security provisions," and that therefore the union's right to deductions and payments under a dues-checkoff provision, "like its right to the imposition of union security," was a contractual right that "continued to exist" only "so long as the contracts remained in force." *Ibid.* Thus, the Board concluded, "when the contracts terminated, the [employer] was free of its checkoff obligations to the Union." *Ibid.* The Board has previously invoked *Bethlehem Steel* in concluding that dues-checkoff arrangements were excepted from the normal prohibition against unilateral changes after contract expiration, including in right-to-work States where union-security provisions are unenforceable under state law. See *Wilkes Tel. Membership Corp.*, 331 N.L.R.B. 823, 823 (2000); *Tampa Sheet Metal Co.*, 288 N.L.R.B. 322, 326 n.15 (1988).

Following a series of decisions, see Pet. App. 61a n.1, the Ninth Circuit rejected the view that *Bethlehem*

Steel applied in right-to-work States, *Local Joint Exec. Bd.* v. *NLRB*, 657 F.3d 865, 873-876 (2011) (*LJEB*). In *LJEB*, the court found "no justification for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of [a] union security" provision. *Id.* at 874-875. The court observed that, "in a right-to-work state," a dues-checkoff provision "does not exist to implement union security." *Id.* at 876. Under those circumstances, the court explained, "dues-checkoff is akin to any other term of employment that is a mandatory subject of bargaining." *Ibid.* Failing to adhere to a dues-checkoff provision in that context would thus constitute "an unlawful termination of a bargained benefit to employees, not merely the cessation of a provision that automatically terminated along with the [collective-bargaining agreement] and union security." *Ibid.*

In reaching those conclusions, the court of appeals "interpret[ed] the [Act]" without according any "defer[ence]" to the Board's interpretation. *LJEB*, 657 F.3d at 874 & n.8. The court also explained that "nothing in the NLRA * * * limits the duration of dues-checkoffs to the duration of a [collective-bargaining agreement] in the absence of union security." *Id.* at 875. The court reasoned that "other statutory provisions suggest" that dues-checkoff provisions would persist after contract expiration. *Ibid.* "For instance," the court added, a provision of the Labor Management Relations Act, 29 U.S.C. 141 *et seq.*, states that "a written assignment [for dues-checkoff] shall not be irrevocable . . . beyond the termination date of the applicable collective agreement." *LJEB*, 657 F.3d at 875 (quoting 29 U.S.C. 186(c)(4)) (brackets in original). The court observed that Section 186(c)(4) "would be surplusage" if a dues-

checkoff provision "automatically terminated upon the expiration of" a collective-bargaining agreement. *Ibid.*

The Board subsequently overturned its decision in *Bethlehem Steel*. See *Lincoln Lutheran*, 362 N.L.R.B. at 1656-1663. Consistent with Ninth Circuit precedent, see pp. 5-6, *supra*, the Board concluded that "an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer." *Id.* at 1663.

2. The petition for writs of certiorari arises from two charges brought by labor unions against the operators of healthcare facilities in Nevada, which is a right-to-work State. See Pet App. 3a, 30a, 60a-61a. Petitioner Valley Hospital Medical Center, Inc. (Valley Hospital), was party to a collective-bargaining agreement with Local Joint Executive Board of Las Vegas, until the agreement expired in 2016. *Id.* at 101a-102a. In addition, Valley Hospital and its co-petitioner, Valley Health System, LLC, were parties to collective-bargaining agreements covering three bargaining units represented by Service Employees International Union, Local 1107. *Id.* at 11a-12a. Those agreements also expired in 2016. *Id.* at 15a. Each agreement at issue here contained a dues-checkoff provision. *Id.* at 15a, 101a-102a. Petitioners, however, unilaterally stopped deducting and remitting union dues after the agreements expired. *Id.* at 101a.

3. The Unions filed charges with the Board, asserting that petitioners' refusal to continue deducting and remitting union dues violated Section 8 of the NLRA. Pet. App. 4a, 61a. The Board's General Counsel issued

two complaints—one against Valley Hospital, and another against both Valley Hospital and Valley Health System—alleging that petitioners' conduct constituted unfair labor practices under the Act. *Ibid.*

a. The Board initially dismissed both complaints. 368 N.L.R.B. No. 139, 2019 WL 6840790 (Dec. 16, 2019), slip op. 12; 369 N.L.R.B. No. 16, 2020 WL 526131 (Jan. 30, 2020), slip op. 3. The Board determined that petitioners' practices were not unlawful under the standard articulated in *Bethlehem Steel*. *Ibid.*

The court of appeals granted the Unions' petitions for review in both cases and remanded. *Local Joint Exec. Bd.* v. *NLRB*, 840 Fed. Appx. 134, 137-138 (9th Cir. 2020); *SEIU Local 1107* v. *NLRB*, 832 Fed. Appx. 514, 514-515 (9th Cir. 2020). The court concluded that the Board had not adequately explained its decision to apply *Bethlehem Steel*. *Ibid.*

b. On remand, the Board found that petitioners' unilateral decisions to stop deducting and remitting union dues constituted unfair labor practices. Pet. App. 11a-53a, 93a-181a. The Board explained that Section 8(a)(5) of the Act forbids an employer to unilaterally change an employee's terms and conditions of employment that are mandatory subjects of bargaining without first bargaining to impasse, that dues-checkoff deductions are undisputedly mandatory subjects of bargaining, and that there are no grounds for excepting dues-checkoff deductions from the prohibition against unilateral changes in these circumstances. *Id.* at 18a-28, 111a-129a. The Board accordingly ordered petitioners to cease and desist from unilaterally terminating the established dues-checkoff arrangements. *Id.* at 30a-35a; 154a-157a.

Member Ring dissented in the case involving both petitioners, Pet. App. 36a-53a, and Members Kaplan and Ring dissented in the case against solely petitioner Valley Hospital, *id.* at 158a-181a. As relevant here, the dissenting opinions took the view that *Bethlehem Steel* should have applied. *Id.* at 36a-37a, 161a.

The court of appeals affirmed in both cases in concurrently filed opinions. Pet. App. 60a-75a (amended opinion); *id.* at 76a-92a (original opinion); see *id.* at 1a-10a. As pertinent here, the court determined that the Board's interpretation was "permissible under the NLRA, at least as applied to parties in a right-to-work state," particularly because "[t]he Board's interpretation" of the Act "followed [the court's] own" construction. *Id.* at 70a; see *id.* at 5a-6a (incorporating same reasoning). The court emphasized that it "ha[d] already independently interpreted the NLRA to prohibit unilateral cessation of dues checkoff after the expiration of the collective bargaining agreement in a right-to-work state, and [that the court was] bound by that precedent." *Id.* at 69a n.2 (citing *LJEB*, 657 F.3d at 876).

Judge O'Scannlain, who wrote the majority opinions, specially concurred. Pet. App. 72a-75a (amended opinion). He questioned the propriety of applying judicial deference when an agency frequently "modif[ies] its legal views." *Id.* at 75a.

c. Petitioners sought rehearing en banc in both cases and asked the court of appeals to stay consideration of their petitions pending this Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). The court of appeals denied rehearing. Pet. App. 56a-60a. The court explained that petitioners "did not raise" their argument under *Loper Bright* earlier in the case, and that petitioners "instead asked [the court]

to defer to the Board's" interpretation reflected in *Bethlehem Steel*. *Id.* at 69a n.2. The court further emphasized that "the result" here "would not change" in light of *Loper Bright* because the court "ha[d] already independently interpreted the NLRA" in *LJEB*. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 8-16) that this Court should grant writs of certiorari in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). But the court of appeals made clear that *Loper Bright* has no application here: The court "ha[d] already independently interpreted the NLRA to prohibit unilateral cessation of dues checkoff after the expiration of the collective bargaining agreement in a right-to-work state." Pet. App. 69a n.2. And because the court was "bound by that precedent," the Ninth Circuit's prior independent construction of the Act controlled the outcome of petitioners' cases. *Ibid.* (citing *Local Joint Exec. Bd.* v. *NLRB*, 657 F.3d 865, 876 (9th Cir. 2011)). Thus, as the court emphasized, the "result" in this case "would not change" in view of *Loper Bright*. *Ibid.* Because the question presented depends (Pet. i.) on the incorrect premise that the decisions below "violat[e]" *Loper Bright*, that is sufficient reason to deny the petition.

In any event, the decisions of the court of appeals are correct, and they do not conflict with any decision of this Court or another court of appeals. This case would be a particularly unsuitable vehicle to address the question presented because petitioners did not timely raise the *Loper Bright* argument on which they seek review. In the proceedings below, petitioners "instead asked [the court of appeals] to defer to the Board's * * * interpretation" of the NLRA as articulated in a previous adju-

dication. Pet. App. 69a n.2. Further review is not warranted.

1. a. Petitioners seek this Court's review of the question "[w]hether the Ninth Circuit erred in deferring to the [Board]'s interpretation of the [Act] * * * in violation of this Court's recent decision in *Loper Bright*." Pet. i; see Pet. 8-16. But the decisions below do not implicate that question because they did not depend on any deference to the Board. After petitioners sought rehearing en banc and a stay pending this Court's decision in *Loper Bright*, the court of appeals made clear that *Loper Bright* "would not change" the outcome in petitioners' cases. Pet. App. 69a n.2. The court explained that it "ha[d] already independently interpreted the NLRA" more than ten years earlier, and that the "Board's interpretation" applicable to petitioners' cases simply "followed [the court's] own" view of the Act. *Id.* at 69a-70a & n.2 (citing *LJEB*, 657 F.3d at 867); see *id.* at 5a-6a.

Petitioners thus err in asserting (Pet. 10-11) that the court of appeals "would have reached a different conclusion" had it "not deferred to the [Board]'s interpretation of the NLRA and[] instead engaged in its own statutory construction analysis." Indeed, the petition does not even acknowledge that the court of appeals unequivocally rejected the premise on which petitioners seek this Court's intervention. Petitioners do not explain why this Court's review would nonetheless be appropriate, and they identify no conflict among the courts of appeals warranting this Court's review.

b. Petitioners seek to bolster their argument by suggesting (Pet. 8-10) that this Court's decision in *Loper Bright* would alter the applicable standard of review in this case. As explained above, however, the court of ap-

peals independently construed the Act. In any event, *Loper Bright* did not dictate a new standard in cases involving the Board's statutory discretion to construe the NLRA. In *Loper Bright*, the Court overruled *Chevron USA, Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), which had obligated courts to sustain permissible agency interpretations of ambiguous statutory language—a form of "binding deference" that "courts had never before applied." *Loper Bright*, 603 U.S. at 390-393 & nn.3-4; see *id.* at 390-397. But this Court emphasized that "often" a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion." *Id.* at 394; see *id.* at 404. The Court explained that such authorization exists where Congress "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme." *Id.* at 395 (citation omitted). In those contexts, a reviewing court's role is to "ensur[e] the agency has engaged in 'reasoned decision-making' within th[e] boundaries" of an otherwise "constitutional delegation[]." *Ibid.* (quoting *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015)); see *id.* at 391-392.

When this Court decided *Chevron* in 1984, it was already well established that Congress in the NLRA had "assigned to the Board the primary task of construing" the NLRA "in the course of adjudicating charges of unfair refusals to bargain." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979); see, *e.g.*, *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978) ("It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy."); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (similar); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (similar); *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957) (similar). That congres-

sional grant of authority to the Board was "clearly meant to preserve" the Board's "power further to define" and engage in "future interpretation" of the Act. *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 675 & n.14 (1981). Neither *Chevron* nor *Loper Bright* affected this Court's longstanding precedent construing the NLRA and recognizing Congress's "assign[ing] to the Board the primary task of construing" the Act in this context. *Ford Motor Co.*, 441 U.S. at 495.

2. At all events, the court of appeals properly upheld the Board's adjudication of petitioners' cases, which implicate the effect of a dues-checkoff provision in a right-to-work State.

Section 8 of the NLRA generally requires an employer "to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5); see 29 U.S.C. 158(d) (establishing a "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"). This Court has explained that those statutory obligations prohibit an employer from "effect[ing] a unilateral change of an existing term or condition of employment" on a mandatory subject of bargaining without first "bargaining to impasse" or reaching agreement with its employees' designated union. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991); see *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). And as the Ninth Circuit recognized, nothing in the Act justifies "carving out an exception to the unilateral change doctrine" for a dues-checkoff provision "in the absence of [a] union security" provision. *LJEB*, 657 F.3d at 874-875. Rather, "in a right-to-work state, where dues-checkoff does not exist to implement union security, dues-checkoff is akin

to any other term of employment that is a mandatory subject of bargaining." *Id.* at 876. In such circumstances, failing to adhere to a dues-checkoff provision would constitute "an unlawful termination of a bargained benefit to employees." *Ibid.*

Petitioners' contrary interpretation also renders other statutory language a nullity. This Court "ordinarily aim[s] to 'giv[e] effect to every clause and word of a statute.'" *Polselli* v. *IRS*, 598 U.S. 432, 441 (2023) (quoting *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011)) (second set of brackets in original). But if petitioners were correct that a dues-checkoff provision automatically terminates upon termination of a collective-bargaining agreement, see Pet. 10-15, then Congress would have had no need to provide that such a provision "shall not be irrevocable * * * beyond the termination date of the applicable collective agreement," 29 U.S.C. 186(c)(4).

3. Even assuming that the question presented would otherwise warrant this Court's review, this case would be a poor vehicle for considering it because petitioners failed to preserve the argument that they now press. Not only did petitioners fail to timely raise their argument under *Loper Bright* in the proceedings below, Pet. App. 69a n.2, but they took a position inconsistent with their argument in this Court. Contrary to their current claim that the court of appeals should not have "deferred to the [Board]'s decision" in this case, Pet. 10, petitioners "asked [that court] to defer" to the Board's reasoning in *Bethlehem Steel* and its progeny, Pet. App. 69a n.2. Petitioners thus forfeited, if not waived, the argument they press in this Court. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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