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,

Respondent.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for writs of certiorari remains accurate.

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The Ninth Circuit sustained the National Labor Relations Board's rulings based expressly on deference to the agency's interpretation of a federal statute. That approach is irreconcilable with *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), which did away with deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and made clear that courts should construe statutes for themselves—not outsource that responsibility to the Executive. The Ninth Circuit lacked the benefit of *Loper Bright*—because it refused petitioners' request to await this Court's then-imminent decision. It thus now falls to this Court to set aside the court of appeals' erroneous judgments.

Far from diminishing the need for this Court's intervention, the Board's resistance to review cements it. The Board's principal tack is to deny that the decisions below have anything to do with deference. The plain terms of the Ninth Circuit's opinions refute that implausible description. The Board's contrary account rests on a footnote the court added when amending one of its opinions that hypothesized how the court would rule absent deference. But that belated backfilling changes nothing about the court of appeals' explicitly deference-driven reasoning, which the court left undisturbed. And in any event it provides no basis to presuppose that the Ninth Circuit would actually reach the same result without deference. The footnote simply cites a prior panel decision, which at most would bind a future three-judge panel but *not* the en banc court. The en banc court had no occasion to consider the underlying statutory issue without deference because, at the time it acted on petitioners' rehearing petition, *Chevron* still controlled. That the Board tries to evade review by disguising the decisions below is further confirmation that they should be set aside.

The Board's revisionist reading is irrelevant, moreover, because the agency promptly gives the game away. Despite insisting that deference played no role below, the Board contends that *its* entitlement to *Chevron*-style deference in construing its organic statute was unaltered by *Loper Bright*. That contention cannot be squared with this Court's decision, which repudiated the premises that underlay *Chevron* for all agencies, the NLRB included. Although *Loper Bright* preserved Congress's ability to confer policymaking discretion, it leaves no room for giving an agency the final say on the correct interpretation of a federal statute.

More troubling still, the Board's argument reveals that it still does not accept *Loper Bright* and seeks to preserve *Chevron* by another name. The Board thus opposes review not because the Ninth Circuit's reliance on deference was harmless, but because it will be *helpful* to the agency going forward. Its submission shows that, unless and until checked by this Court, this agency (and likely others) will continue invoking *Chevron* in sheep's clothing. This Court should reject that gambit and make clear that *Loper Bright* brooks no agency-specific exceptions.

The simplest disposition is summary vacatur of the decisions below, with explicit instructions that *Chevron*-style deference to the Board's statutory interpretations is impermissible under *Loper Bright*. Alternatively, the Court should set the case for argument. Either way, the petition should be granted.

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER THE BOARD'S INTERPRETATION OF THE NLRA IS ENTITLED TO DEFERENCE

A. The Ninth Circuit explicitly relied on binding deference to the Board's interpretations of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* Pet. App. 6a, 68a-70a. But that mode of deference is squarely foreclosed by *Loper Bright*, so the decisions below must be set aside. The Board principally seeks to avoid review by rewriting those rulings, asserting that "they did not depend on any deference to the Board." Br. in Opp. 11. That assertion is untenable.

The Ninth Circuit stated expressly that it was relying on deference to the Board's reading of the NLRA. The court first recited the doctrine of deference that it applied: The Board's reading controls so long as it re-

flects "a permissible interpretation of the NLRA." Pet. App. 68a. The court explained that "[t]he Board's interpretation of the NLRA is permissible so long as it is not 'manifestly contrary' to the NLRA," *id.* at 70a (citation omitted)—a deferential standard if ever one existed. And it held that the deference thus described was implicated here "[b]ecause the NLRA is ambiguous regarding dues checkoff," so the court would "defer to the Board's interpretation 'as long as it is rational and consistent with the Act.'" *Id.* at 68a-69a (citations omitted); see *id.* at 69a (citing Ninth Circuit precedent that in turn cited *Chevron*, *supra*). That deference-based rationale was hardly a surprise: It was precisely the standard that the Board had advocated. See, *e.g.*, 22-1804 Resp. C.A. Br. 10, 30-37.

B. The Board now posits a completely different justification for the decisions below, contending that they have nothing to do with deference. The Board cites (Br. in Opp. 11) a footnote the panel added in amending one of its opinions stating that, "*if* we interpreted the statute ourselves, the result would not change." Pet. App. 69a n.2 (emphasis added). But that below-the-line dictum does not alter the explicit deference-based rationale of the court's decisions, which it left intact.

Even on its own terms, moreover, the panel's added footnote provides no basis to ignore the court's express and (after *Loper Bright*) erroneous reliance on deference. The panel stated that, absent deference, it would have been bound by a prior three-judge panel decision adopting the Board's current view on when dues-checkoff duties expire. Pet. App. 69a n.2. But that prior decision would not bind the en banc court. The Board's conjecture (Br. in Opp. 11) that eliminating deference could not make a difference here is thus unfounded.

The en banc court never had occasion to pass on that underlying statutory issue. Petitioners sought rehearing en banc, but the court of appeals denied their petition before *Loper Bright* was decided, when *Chevron* still controlled. (Petitioners had also asked the Ninth Circuit to await *Loper Bright*, 22-1804 Pet. C.A. Reh'g Pet. 3-7, but the court declined, Pet. App. 59a, 69a n.2—depriving itself of the benefit of this Court's impending direction.) At that time, whether the Board interpretation of the NLRA to which the panel had deferred embodied the "single, best meaning" of the statute (*Loper Bright*, 603 U.S. at 400) was academic. The Board should not be permitted to insulate a deference-driven victory from review based on the happenstance that this Court decided *Loper Bright* after the court of appeals denied rehearing en banc but before petitioners sought review in this Court.

C. How the court of appeals will ultimately resolve the underlying statutory issue on remand without the distorting effect of deference has no bearing on the question now before this Court: whether the Ninth Circuit erred by according *Chevron* deference to the Board's reading of the NLRA. As a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court need not and should not attempt to *pre*view how further proceedings will unfold simply to conclude that court of appeals should not have applied deference and must decide the issue de novo.

In all events, the Board certainly has not shown that the dues-checkoff issue is foreordained in its favor. The Board itself maintained the opposite position for half a century. Pet. App. 72a (O'Scannlain, J., specially concurring) ("For 49 years, an employer could unilaterally cease dues checkoff after the applicable collective

bargaining agreement expired."). And that prior, longstanding Board position is sound. See Pet. 10-15.

The relevant NLRA provision makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). This Court has held that an employer can violate that provision by unilaterally changing a term or condition of employment without bargaining to impasse—for some terms, even after the parties' contract expires. See *Litton Financial Printing Division* v. *NLRB*, 501 U.S. 190, 198-199, 206-207 (1991). But as the Board formerly explained, that is not true of every term—particularly those like dues-checkoff provisions that are "created by," and cannot even exist before the formation of, the contract. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962); see Pet. 12-15.

In response, the Board recites conclusions from the prior Ninth Circuit decision the panel mentioned. Br. in Opp. 13-14 (citing *Local Joint Executive Board* v. *NLRB*, 657 F.3d 865, 874-876 (2011)). Its only further support is that Congress specifically provided that dues-checkoff provisions "shall not be irrevocable . . . beyond the termination date of the" contract. *Id.* at 14 (quoting 29 U.S.C. § 186(c)(4)). But that if anything undercuts the Board's position by making clear that dues-checkoff obligations are *not* eternal.

The Court should not leave standing rulings that expressly applied deference based on self-serving Board speculation that the court below would endorse the agency's latest swerve. It should vacate so that court can decide the issue de novo. See *Hospital Menonita de Guayama, Inc.* v. *NLRB*, No. 24-138 (Dec. 16, 2024) (granting, vacating, and remanding in same posture).

II. THE BOARD'S DEFENSE OF *CHEVRON* DEFERENCE IN DISGUISE SHOULD BE REJECTED

The Board's effort to distance the decisions below from *Chevron* is ultimately misdirection because the agency swiftly pivots to advocating robust deference to the Board's interpretations of the NLRA. Br. in Opp. 11-13. The Board asserts that it is exempt from *Loper Bright* altogether. *Id.* at 13. That assertion is startling and only underscores the need for this Court's intervention. Denying review in the face of that contention would likely embolden the agency (and others) to continue demanding deference—simply swapping the *Chevron* label for a parochial, agency-specific alias.

The Board's position that deference to the NLRB was not "affected" by *Loper Bright* (Br. in Opp. 13) is also wrong. It urges that *Loper Bright* acknowledged that Congress can (within constitutional limits) grant an agency "a degree of discretion" and that exercises of such discretion (within judicially identified boundaries) are reviewed under the "reasoned decision-making" standard. *Id.* at 12 (quoting *Loper Bright*, 603 U.S. at 394-395, in turn citing, *inter alia*, *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)). But the Board cites no NLRA provision conferring that kind of discretion. And such policymaking or factfinding discretion is far removed from the deference the Ninth Circuit accorded and the Board seeks: "'power further to define' and engage in 'future *interpretation*' of the Act." *Id.* at 13 (emphasis added; citation omitted); see Pet. App. 70a (holding that court must defer to "the Board's *interpretation*" of the NLRA "so long as it is not manifestly contrary to the [Act]" (emphasis added; internal quotation marks omitted)).

The Board points instead to decisions of this Court before and after *Chevron* positing that "Congress in the NLRA had 'assigned to the Board the primary task of construing' the NLRA." Br. in Opp. 12 (quoting *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979), and collecting cases). But those decisions likewise do not rest on any NLRA provision expressly delegating the kind of discretion *Loper Bright* contemplated. Rather, to the extent those cases accorded deference akin to *Chevron*, they are bottomed on the same fiction as *Chevron*: the "presumption" that "statutory ambiguities are implicit delegations to agencies." 603 U.S. at 399. The cases the Board collects inferred an implied delegation to the Board to decide what the Act means from the NLRA's use of "general prohibitory language," *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (quoting *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500 (1978), in turn quoting *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945)), and from terms the NLRA itself "did not purport to define," *Ford Motor Co.*, 441 U.S. at 495; see, *e.g.*, *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (treating Act's "general provisions" as "giv[ing] the Board a question to answer," and "the courts will give respect to that answer" (internal quotation marks omitted)); *NLRB* v. *Truck Drivers Union*, 353 U.S. 87, 96 n.28 (1957) (stating that "[t]here is an area plainly covered by the language of the Act and an area no less plainly without it" and that Congress left the area in between—*i.e.* where it is ambiguous—to the Board (citation omitted)).

Loper Bright flatly rejected that fictional premise: "[A]n ambiguity is simply not a delegation of law-interpreting power." 603 U.S. at 399 (citation omitted). The Court (echoing *Chevron* itself) explained that "am-

biguities may result from an inability on the part of Congress to squarely answer the question at hand." *Ibid.* *Loper Bright* squarely held that Congress's "inability" to resolve an issue does *not* "necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question." *Ibid.* But that too-complicated-for-Congress rationale is precisely how some of the Board's cited cases justified treating opaque, general statutory language as implicitly authorizing the Board to define the Act's scope. See, *e.g.*, *Truck Drivers*, 353 U.S. at 96 n.28 ("Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." (citation omitted)).

The Board thus seeks to revive the same deference *Loper Bright* repudiated—at least for itself. But *Chevron* did not establish deference only for the Environmental Protection Agency. This Court invoked *Chevron*'s disproven, defunct premises in prior cases involving the Board—and many agencies besides. By the same token, *Loper Bright* did not dismantle deference only for the National Marine Fisheries Service, whose rule was at issue. Litigants should not have to fight agency-by-agency to eliminate deference that never properly belonged to the Executive. The Board's defense of agency-specific enclaves of *Chevron* equivalents undermines *Loper Bright*'s core tenet that ultimate responsibility for interpreting federal statutes rests with the Judiciary, not the Executive. Far from providing a reason to deny review, the Board's bold defense of NLRB deference thus only highlights the importance of granting review here.

III. THE BOARD'S ASSERTED VEHICLE CONCERNS PROVIDE NO REASON TO DENY REVIEW

The Board's fallback arguments against review are insubstantial. It suggests (Br. in Opp. 14) that petitioners "failed to preserve" any argument regarding the question presented by failing to raise it soon enough. But the question presented concerns whether *Loper Bright*, which postdated all of the proceedings below, forecloses deference to the Board's interpretations of the NLRA on the dues-checkoff issue. In the lower courts, petitioners and the courts were bound by then-controlling precedents, including *Chevron* and its NLRB equivalents. In fairness to the Ninth Circuit, it could not ignore those precedents in anticipation that they would soon be overturned. See, *e.g.*, *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). Moreover, petitioners' rehearing petition asked the court of appeals to await *Loper Bright*, but the court declined.

The Board further suggests that petitioners "waived" their argument based on *Loper Bright* by urging the Ninth Circuit "'to defer' to the Board's reasoning in" *Bethlehem Steel*. Br. in Opp. 14 (quoting Pet. App. 69a n.2). But petitioners have argued all along that that interpretation, which prevailed for 49 years, should still control because it is "*correct* as a matter of law" and reflects "the *most* reasonable" reading of the statute. 22-1804 Pet. C.A. Br. 7, 12, 14 (emphases added; capitalization altered). That petitioners also argued that *Bethlehem Steel* deserved deference under then-current precedent, *e.g.*, *id.* at 25, simply reflected the state of existing law. And in seeking rehearing petitioners reiterated that, if *Chevron* were overturned and deference to the Board were eliminated, "[a] *de novo* statutory construction analysis"

would yield petitioners' reading. 22-1804 Pet. C.A. Reh'g Pet. 13; see *id.* at 7-13.

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The question presented here was asked and answered in *Loper Bright*: Courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." 603 U.S. at 412. They thus cannot defer to a putatively "'permissible' interpretation" tendered by an agency "that is not the one the court * * * concludes is best" because, "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Id.* at 400. The court of appeals, applying pre-*Loper Bright* law, upheld the Board's interpretation as "permissible" because it is not "'manifestly contrary' to the NLRA." Pet. App. 70a (citation omitted). That conclusion contravenes *Loper Bright* and cannot stand.

The petition for writs of certiorari should be granted. The rulings below should be summarily vacated with instructions that the Board's interpretations of the NLRA are not entitled to controlling deference. Alternatively, the Court should set the case for argument to address that question.

Respectfully submitted.

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