No. 24-651

In the Supreme Court of the United States

QUICKWAY TRANSPORTATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The court of appeals held that substantial evidence supported the National Labor Relations Board's determinations that petitioner unlawfully closed one of its facilities to retaliate against employees who had unionized in that facility and to chill union organizing at its other facilities, and did so without bargaining with the employees' union, in violation of Sections 8(a)(3) and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3) and (5). Petitioner now seeks review of two issues that it did not present to the Board and forfeited before the court of appeals. The questions presented are:

1. Whether the NLRA's bar on judicial review of objections not urged before the Board, 29 U.S.C. 160(e), precludes this Court's consideration of petitioner's challenges.

2. Whether a partial closing motivated by anti-union animus and an intent to chill union organizing gives rise to a duty to bargain under Section 8(a)(5) of the NLRA.

3. Whether the Board impermissibly relied on expression protected under Section 8(c) of the NLRA, 29 U.S.C. 158(c), in finding that petitioner acted with anti-union animus and an intent to chill union organizing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 117 F.4th 789. The decision and order of the National Labor Relations Board (Pet. App. 63a-230a) is reported at 372 N.L.R.B. No. 127. The decision of the administrative law judge (Pet. App. 231a-266a) is not published but is available at 2022 WL 44453.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-62a) was entered on September 11, 2024. The petition for a writ of certiorari was filed on December 6, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (NLRA or Act), guarantees employees "the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Congress implemented those statutory guarantees in Section 8 of the NLRA, 29 U.S.C. 158. Section 8(a)(3) forbids "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). 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). The statutory duty to bargain requires the employer to "meet at reasonable times and confer in good faith" with the union "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d).

This case involves the application of those NLRA provisions when an employer closes a portion, but not all, of its business. In *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), this Court held that an employer's closure of its "entire business" does not constitute anti-union discrimination under Section 8(a)(3) even if motivated by anti-union animus. *Id.* at 272-274. The Court explained, however, that its holding regarding total closures does not apply to situations where the employer closes part of a business for anti-union reasons—because a "discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining

employees." *Id.* at 274-275; see *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 682 (1981) (explaining that Section 8(a)(3) "prohibits partial closings motivated by antiunion animus").

The *Darlington* Court accordingly held that a partial closure motivated by anti-union animus constitutes discrimination under Section 8(a)(3) if certain conditions are met. 380 U.S. at 275-276. Specifically, a Section 8(a)(3) violation will be found if the employer "(1) ha[s] an interest in another business * * * of sufficient substantiality to give promise of [the employer] reaping a benefit from the discouragement of unionization in that business; (2) act[s] to close their plant with the purpose of producing such a result; and (3) occup[ies] a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities." *Ibid.*

While *Darlington* dealt with partial closures in the context of anti-union discrimination under Section 8(a)(3), *First National Maintenance*, *supra*, addressed partial closures in the context of an employer's Section 8(a)(5) bargaining obligation. There, the Court held that an employer was not obligated to bargain over a decision "whether to shut down part of its business purely for economic reasons." *First Nat'l Maint.*, 452 U.S. at 686. The Court found no duty to bargain over the partial-closure decision in that case because the decision "had as its focus only the economic profitability" of the operation, which was "a concern under these facts wholly apart from the employment relationship." *Id.* at 677. The Court emphasized, however, that the "sole purpose" of the employer in that case "was to reduce its economic

loss," and the union had made "no claim of antiunion animus" in connection with the partial closure. *Id.* at 687.

2. Petitioner is a commercial motor carrier that offers inbound and outbound trucking services throughout the country. Pet. App. 4a. Petitioner's facilities included a terminal in Louisville, Kentucky that serviced a distribution center (also located in Louisville) for Kroger grocery stores. *Ibid.* In June 2019, petitioner's drivers at the Louisville terminal began to organize with General Drivers, Warehousemen, and Helpers Local 89 (the Union). *Id.* at 5a. The response of petitioner's management to those organizing activities included telling employees that "[i]f this place goes union, [CEO] Bill Prevost will shut it down," that employees would probably lose their jobs, and that petitioner would cease making contributions to the employee stock ownership plan; asking an employee for a list of union supporters; photographing employees' personal vehicles that had union stickers; and threatening legal action against a driver who filed charges with the NLRB. *Id.* at 5a-7a (first set of brackets in original).

In June 2020, the Louisville drivers voted for union representation. Pet. App. 7a-8a. On November 19, 2020, the parties began negotiating for a collective-bargaining agreement. *Id.* at 9a. On December 6, petitioner's drivers voted to authorize a strike if the Union found it necessary. *Id.* at 10a. The next day, two local news stations asked Kroger about information the stations had received from an unidentified source about a possible strike, and Kroger forwarded the inquiries to petitioner. *Ibid.* Petitioner did not contact the Union about the accuracy of the strike information. *Id.* at 11a. On December 9, petitioner withdrew from its agreement with Kroger to service the Louisville distribution center and ceased

operations at petitioner's Louisville facility effective 11:00 p.m. that day. *Ibid.* Petitioner informed the Union of the decision at 9:56 p.m. *Id.* at 12a. At 11:00 p.m., petitioner texted and emailed notices to employees about the cessation of operations and told them not to report to work. *Ibid.*

3. In December 2020 and February 2021, the Union and several employees filed charges with the Board, contending that petitioner had committed unfair labor practices. Pet. App. 231a-232a. The Board's General Counsel issued a complaint alleging, as relevant here, that petitioner violated Section 8(a)(3) of the NLRA by ceasing operations and discharging employees in Louisville because they voted to unionize, and violated Section 8(a)(5) of the NLRA by failing to bargain over the decision to partially cease operations. *Id.* at 232a.

After a hearing, the administrative law judge (ALJ) recommended dismissing the Section 8(a)(3) and 8(a)(5) charges in the complaint. Pet. App. 232a, 234a-258a. Although the ALJ concluded that petitioner was motivated by anti-union animus in ceasing its operations at the Louisville facility, the ALJ found that petitioner did not have an intent to chill organizing activity at its other facilities, as required by *Darlington*. *Id.* at 255a-258a.

4. On review, the Board held that petitioner violated Section 8(a)(3) and Section 8(a)(5) in closing the Louisville facility. Pet. App. 63a-173a.[1]

a. With respect to the Section 8(a)(3) violation, the Board agreed with the ALJ's finding that petitioner's decision to close the Louisville facility was motivated by anti-union animus. Pet. App. 90a-96a. The Board relied

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[1] The Board also found other violations that the court of appeals upheld and that are not challenged in the petition for a writ of certiorari. Pet. App. 67a, 133a-151a; see *id.* at 31a-35a.

on petitioner's "numerous instances of coercive conduct" in response to the organizing campaign at that facility, including threatening, interrogating, and surveilling employees about their union activities. *Id.* at 90a-92a. The Board further found that petitioner "signaled its willingness to violate the Act to thwart the drivers' union activities" by seeking to hire labor-relations companies (*i.e.*, "union busters") that petitioner believed could take actions to undermine the unionization effort that petitioner itself could not do. *Id.* at 92a. The Board also relied on the timing of the Louisville closure, which occurred a few weeks after the parties' first bargaining session. *Id.* at 93a-94a.

The Board additionally found, in disagreement with the ALJ, that petitioner closed the Louisville facility with an intent to chill unionization at its other facilities. Pet. App. 98a-108a, 151a. The Board cited evidence that petitioner was concerned about organizing activity at those other facilities, including an email that petitioner received from a former Louisville employee about organizing activity at petitioner's Hebron, Kentucky facility, and an email from a labor-relations company reminding petitioner that its employees in Indianapolis could soon petition for a union election. *Id.* at 100a-101a. In addition, the Board relied on evidence that petitioner's vice president had ordered drivers from petitioner's Murfreesboro, Tennessee facility to stop coming to the Kroger distribution center in Louisville so that the Louisville union would not "infect [petitioner's] Murfreesboro fleet." *Id.* at 101a.

In further support of its intent-to-chill finding, the Board pointed to evidence that petitioner knew employees at its other terminals would learn of the cessation of operations at the Louisville facility. Pet. App. 104a-

105a. The Board relied on the facilities' proximity to one another, as well as evidence that petitioner's non-Louisville employees regularly came to the Kroger distribution center in Louisville or worked with Louisville drivers, and evidence that petitioner had in fact ordered drivers from another facility to come to Louisville the day after the closure to pick up trailers. *Id.* at 103a-106a.

The Board rejected as pretextual petitioner's claim that the Louisville closure was instead motivated solely by economic concerns related to a possible strike. Pet. App. 108a-120a. The Board found that petitioner's purported concern about its potential economic liability to Kroger for the ramifications of a strike was based on a series of unsupported assumptions. *Id.* at 109a-116a.

b. The Board held that petitioner also violated Section 8(a)(5) by failing to bargain with the Union over the decision to close the Louisville facility. Pet. App. 130a-132a. The Board reiterated its finding that petitioner did not decide to close the facility "for purely economic reasons"—which would have brought the partial closure within the holding of *First National Maintenance*—but instead ceased operations "for antiunion reasons and to chill unionism at its other terminals." *Id.* at 131a. And the Board explained that under its precedent, when a partial-closure decision "is motivated by antiunion reasons in violation of Section 8(a)(3), that decision is not exempt from a bargaining obligation under *First National Maintenance*" because "'[d]iscrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision.'" *Ibid.* (quoting *Delta Carbonate, Inc.*, 307 N.L.R.B. 118, 122 (1992)) (brackets in original).

c. As a remedy for the Section 8(a)(3) and Section 8(a)(5) violations, the Board ordered petitioner to restore its business operations at the Louisville facility within a reasonable period of time. Pet. App. 151a-158a; see *id.* at 152a-156a (determining that doing so would not be unduly burdensome). The Board also ordered petitioner to reinstate the discharged employees to the extent that their services are needed to perform the work that petitioner is able to retain at the Louisville facility after a good-faith effort. *Id.* at 156a-158a.

5. The court of appeals enforced the Board's order in full. Pet. App. 1a-48a.

a. The court of appeals upheld the Board's finding that petitioner discriminated against the employees in the Louisville facility to discourage union membership. Pet. App. 16a-27a. The court determined that substantial evidence in the record supported the Board's finding that petitioner's closure of the Louisville facility was motivated by anti-union animus and a purpose of chilling organizing activity at petitioner's other facilities. *Id.* at 19a-27a. Like the Board, the court found evidence of anti-union animus in petitioner's threatening, interrogating, and surveilling employees about their union activities; the timing of the closure; and petitioner's failure to consider alternatives to closure or to investigate the accuracy of the reports of a possible strike. *Id.* at 19a-22a. And the court upheld the Board's finding that petitioner acted with an intent to chill unionization at its other facilities, noting the evidence regarding the proximity between the Louisville facility and petitioners' other facilities, the common management between petitioner's facilities, and petitioner's negative reaction to information about potential union efforts involving its drivers at other facilities. *Id.* at 22a-25a.

b. The court of appeals additionally held that substantial evidence supported the Board's finding of a Section 8(a)(5) bargaining violation. Pet. App. 27a-29a. The court stated that "[a] partial-closing decision motivated by anti-union animus is * * * subject to an obligation to bargain" because such a decision falls "outside *First National*'s reach." *Id.* at 28a. Reiterating that the record supported the Board's finding that petitioner ceased its Louisville operations based on anti-union motivations, the court concluded that because the "partial-closure decision was discriminatorily motivated * * *, [petitioner's] failure to bargain over that decision violated Section 8(a)(5)." *Id.* at 29a.

c. Judge Murphy concurred in the judgment. Pet. App. 49a-60a. He agreed with the majority's rejection of all of petitioner's challenges to the Board's order. *Id.* at 49a. He explained that before the court of appeals, petitioner "chose to argue primarily over the facts" and "accepted the validity of the Board's legal views about what the relevant statutes require." *Ibid.* As a result, Judge Murphy explained, the court "need only *assume* these legal views to resolve this case." *Ibid.* And he noted that this was true with respect to the issue whether Section 8(a)(5)'s bargaining obligation extends to partial closings driven by anti-union animus; "[petitioner's] briefing chose *not* to challenge the Board's legal interpretation of *First National Maintenance*," instead "challeng[ing] only the Board's factual finding that [petitioner] closed the Louisville terminal for antiunion reasons." *Id.* at 53a. Accordingly, Judge Murphy believed that the court could "save the validity of the Board's reading of *First National Maintenance* for another time." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-31) that this Court should grant certiorari to decide whether a partial closing motivated by anti-union animus gives rise to a duty to bargain under Section 8(a)(5). Petitioner further contends (Pet. 31-38) that this Court should review whether the Board's findings that petitioner acted with anti-union animus and a purpose to chill union activity relied on protected expression in violation of Section 8(c) of the NLRA, 29 U.S.C. 158(c). Neither issue is properly before the Court because petitioner did not raise, or did not timely raise, those challenges before the Board or the court of appeals. Reviewing those issues now would contravene not only this Court's traditional rule against considering questions not pressed or passed upon below, but also the NLRA's bar on judicial review of objections not urged before the Board, 29 U.S.C. 160(e). The petition for a writ of certiorari should be denied.

1. Petitioner argues (Pet. 15-31) that under Section 8(a)(5) of the NLRA, an employer has no duty to bargain over a partial-closure decision even if the closure is motivated by anti-union animus. Petitioner further argues (Pet. 14-15) that this conclusion follows from this Court's decisions in *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), and *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981).

Petitioner is mistaken. This Court's decision in *Darlington* established that a partial closing motivated by anti-union animus and a purpose of chilling union organizing in the rest of the employer's business constitutes impermissible discrimination in violation of Section 8(a)(3) of the NLRA. See 380 U.S. at 275-276; see also

pp. 3-4, *supra*. And while *First National Maintenance* determined that an employer has no duty to bargain when it "shut[s] down part of its business purely for economic reasons," 452 U.S. at 686, the Court emphasized "the limits" of that holding and specifically noted that "the union made no claim of antiunion animus" in that case, *id.* at 687. Because "[d]iscrimination on the basis of union animus" in violation of Section 8(a)(3) "cannot constitute a lawful entrepreneurial decision," a partial closing stemming from such a motivation falls outside of *First National Maintenance*'s domain. Pet. App. 131a (quoting *Delta Carbonate, Inc.*, 307 N.L.R.B. 118, 122 (1992)) (brackets in original).

Regardless, petitioner has not preserved its argument to the contrary for this Court's review. Before the Board and the court of appeals, petitioner contested whether its partial closing was in fact motivated by antiunion animus and an intent to chill union activity, not the legal question whether the presence of such motivations could ever give rise to a Section 8(a)(5) bargaining obligation. Petitioner now asserts (Pet. 12 n.5), citing pages of its briefing before the Board and the court of appeals, that it "has at all times maintained that the closing decision was non-bargainable under *First National Maintenance* regardless of motivation." But in none of those cited pages did petitioner develop a meaningful argument to that effect. Instead, in the cited portion of its brief before the Board, petitioner focused on contesting the sufficiency of the evidence showing petitioner's intent to chill union activity.[2] And in the cited

[2] See Pet. App. 299a-300a ("The only motive that matters in this case is whether [petitioner's] motive in closing its Louisville terminal was to chill unionism at its other terminals. * * * The ALJ

portion of its court-of-appeals brief, petitioner reiterated, consistent with the facts of *First National Maintenance*, that an "entrepreneurial decision to cease operations" is not actionable, Pet. App. 308a, before going on to contest the Board's factual findings regarding petitioner's particular motivations in this case.[3]

Indeed, Judge Murphy explicitly noted petitioner's forfeiture in his concurrence: he observed that "[petitioner's] briefing chose *not* to challenge the Board's legal interpretation of *First National Maintenance*," instead "challeng[ing] only the Board's factual finding that [petitioner] closed the Louisville terminal for anti-union reasons." Pet. App. 53a. And as a result, Judge Murphy explained, the court of appeals had not directly resolved the legal question. *Ibid.*

Petitioner's failure to properly raise its first question presented before the Board or the court of appeals forecloses its consideration before this Court. Under Section 10(e) of the NLRA, "[n]o objection that has not been urged before the Board * * * shall be considered by the court" absent "extraordinary circumstances." 29 U.S.C.

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correctly found that chilling unionism was not [petitioner's] motive * * * ."); *id.* at 304a (same).

[3] See Pet. App. 309a ("The Board majority recognized, as it must, that a *First National Maintenance* decision is non-bargainable. * * * Through stacked inferences, however, the majority concocted a theory that [petitioner's] Decision was not motivated by the potential catastrophic financial consequences the Company faced * * * but rather [petitioner] was motivated by union animus, a purported desire to avoid bargaining with Local 89, and to chill union activities elsewhere."); *id.* at 310a ("The record evidence conclusively demonstrates that [petitioner's] Decision was motivated solely by the pending risk of drastic financial consequences [of a strike] * * * , and is exactly the type of decision contemplated under *First National Maintenance*.").

160(e); see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (refusing to consider an issue due to the Section 10(e) bar); see also *EEOC* v. *Federal Labor Relations Agency*, 476 U.S. 19, 23 (1986) (per curiam). Petitioner does not acknowledge its forfeiture, let alone make a showing of extraordinary circumstances permitting this Court to disregard it. At a minimum, the potential application of Section 10(e) would be an antecedent question that could prevent this Court from reaching petitioner's question presented.

Even putting aside the statutory judicial-review bar, this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Where "issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them" in the first instance. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). And as with the Section 10(e) bar, petitioner presents no reason for this Court to disregard its "traditional rule" against granting certiorari when "'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

Certiorari is unwarranted for the further reason that review of petitioner's first question presented may have little practical impact in this case. Before this Court, petitioner appears to take issue only with the Board's remedial order to restore operations at the Louisville facility and reinstate the discharged employees to the extent that their services are needed. See Pet. 12-13 (mentioning only this remedy); see also Pet. App. 151a-158a. But even if petitioner were correct that its failure to bargain over the Louisville closure did not violate Section 8(a)(5), petitioner does not dispute that such a closure can constitute anti-union discrimination in violation

of Section 8(a)(3). See pp. 2-3, 10-11, *supra*.[4] And the Board's restoration and reinstatement remedy can be sustained based on the Section 8(a)(3) violation alone. See Pet. App. 152a (Board noting that when an employer has unlawfully closed its facility "for discriminatory reasons," the Board's "'usual practice'" is to order restoration of operations (citation omitted)); *NLRB* v. *Taylor Mach. Prods., Inc.*, 136 F.3d 507, 516 (6th Cir. 1998) (observing that "a restoration order 'typically is the appropriate remedy for a discriminatorily motivated change in operations'" (citation omitted)); see also, *e.g.*, *George Lithograph Co.*, 204 NLRB 431, 432 (1973) (ordering restoration as a remedy for Section 8(a)(3) partial-closure violation). As a result, even if the issue were properly before the Court, resolution of petitioner's question presented regarding Section 8(a)(5) would likely not impact that aspect of the Board's remedial order.

2. Petitioner additionally contends (Pet. 31-38) that the Board's reliance on certain evidence to find that petitioner acted with anti-union animus and intent to chill union activity ran afoul of Section 8(c) of the NLRA. Section 8(c) provides that "[t]he expressing of any views, argument, or opinion, * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c). Review of petitioner's second contention is not warranted either.

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[4] Petitioner challenges the court of appeals' ruling on the Section 8(a)(3) violation only on the ground that the Board purportedly relied on evidence of petitioner's protected expression in violation of Section 8(c), 29 U.S.C. 158(c). As discussed below, that contention lacks merit. See pp. 15-17, *infra*.

Once again, petitioner urged no such argument before the Board, which means that Section 10(e) is a barrier to its consideration now. See 29 U.S.C. 160(e); see also pp. 12-13, *supra*. Similarly, before the court of appeals, petitioner failed to raise a Section 8(c) challenge with respect to the findings of Section 8(a)(3) and Section 8(a)(5) violations until its reply brief. See Pet. App. 324a-328a. In its opening brief, petitioner mentioned Section 8(c) only in connection with a separate violation, under Section 8(a)(1) of the NLRA, involving petitioner's coercive interrogation of employees. See *id.* at 319a-320a. As a result, the court did not address the distinct Section 8(c) argument petitioner presses now. See *Island Creek Coal Co.* v. *Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (explaining that the court "will treat an argument as forfeited when it was not raised in the opening brief" (citation and internal quotation marks omitted)); see also Pet. 13 (acknowledging that the court did not address this argument). Again, petitioner offers no sound reason for this Court to take the unusual step of reviewing an issue that petitioner did not preserve and that the court of appeals accordingly did not pass upon.

The nature of petitioner's claim of error is also unclear. Petitioner primarily argues (*e.g.*, Pet. 36) that statements falling within Section 8(c)'s scope cannot be used as evidence of anti-union animus supporting a finding of unlawful motive. But petitioner elsewhere acknowledges (Pet. 37) that the Board agrees on that point. In *United Site Services of California, Inc.*, 369 N.L.R.B. No. 137, 2020 WL 4366381 (July 29, 2020), the Board held that "Sec[tion] 8(c) protects [an employer's] right to express its opposition to unionization and prohibits relying on that expression as evidence of an unfair labor

practice." 2020 WL 4366381, at *18 n.68. And the Board disclaimed a past practice of "rel[ying] upon noncoercive statements of opposition to unions or unionization as evidence of antiunion animus in support of unfair labor practice findings." *Ibid.* Petitioner points to nothing in the Board's decision in this case suggesting that the Board diverged from that rule here. Any past disagreement between the Board and courts of appeals on that point (see Pet. 32-33, 36) is accordingly irrelevant.[5]

To the extent petitioner is instead asserting a case-specific argument that the Board should have treated particular pieces of evidence as falling within Section 8(c)'s scope, such a fact-bound claim of error would not warrant this Court's review even if it were preserved. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (the Court ordinarily does not "grant * * * certiorari to review evidence and discuss specific facts"). Moreover, petitioner fails to make clear what specific evidence it believes the Board and the court of appeals should not have considered. Petitioner contends that the decisions below relied on what it calls "lawful, intra-management communications." Pet. 14-15. But petitioner does not specify what those communications were, nor explain why they qualify as "[t]he expressing of any views, argument, or opinion" "contain[ing] no

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[5] Petitioner notes (Pet. 35-37) that in a case before the NLRB's decision in *United Site Services*, the Sixth Circuit stated that speech falling within Section 8(c)'s scope may be considered as "background" in making a determination of animus. *NLRB* v. *Vemco, Inc.*, 989 F.2d 1468, 1474 (1993). Petitioner suggests (Pet. 37) that in the decision below, the court of appeals may have "implicitly applied" *Vemco*'s past understanding of Section 8(c). That speculation is unfounded. As petitioner elsewhere acknowledges (Pet. 13), the court simply did not address the Section 8(c) argument petitioner raises here—presumably because the argument was forfeited.

threat of reprisal." 29 U.S.C. 158(c). It is not sufficient for petitioner to "mention" an argument "in the most skeletal way, leaving the [C]ourt to do counsel's work." *New York Rehab. Care Mgmt., LLC* v. *NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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