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

BRIEF OF *AMICI CURIAE* GOVERNOR HENRY MCMASTER AND GOVERNOR BRIAN KEMP IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense because the targeted secondary employer could choose to take its business elsewhere and, in that way, can "control" the primary employer's work assignments.

2. Whether a union's unlawful secondary boycott is shielded by the work-preservation defense even when no bargaining unit jobs are threatened.

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INTERESTS OF *AMICI CURIAE*

Henry McMaster is the Governor of the State of South Carolina, and Brian Kemp is the Governor of the State of Georgia. Both Governors have multiple, important interests in this case.[1]

As a general matter, Governor McMaster is the State of South Carolina's "supreme executive authority," S.C. Const. art. IV, § 1, and he has sworn to "preserve, protect, and defend" both the South Carolina Constitution and the United States Constitution, *id.* art. VI, § 5, and to "take care that the laws be faithfully executed," *id.* art. IV, § 15. Governor Kemp has the similar responsibility to exercise "chief executive powers," Ga. Const. art. V, § 2, and has taken a similar oath, O.C.G.A. § 45-12-4.

More specifically, both Governors play an important role with the leadership of the ports in their State. Governor McMaster appoints (and has the authority to remove) all voting members of the South Carolina State Ports Authority's ("SCSPA") Board of Directors. *See* S.C. Code Ann. § 54-3-20(A); *id.* § 1-3-240(C)(1)(n). Likewise, Governor Kemp appoints the members of the board of the Georgia Ports Authority ("GPA"). *See* O.C.G.A. § 52-2-5. These ports are critical to securing both States' prosperity and to

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief, in whole or in part, and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2, *amici curiae* timely notified counsel of record for all parties of *amici curiae*'s intent to file this brief.

facilitating state and regional economic growth, which both Governor McMaster and Governor Kemp have prioritized on behalf of the over 15 million constituents they collectively represent.

Since Governor McMaster took office in January 2017, South Carolina has announced almost 750 economic-development projects, collectively accounting for more than $34 billion in investment in the State and representing more than 83,000 new jobs. The state-of-the-art Hugh K. Leatherman Terminal in Charleston—in which the State has already invested more than $1.5 billion—is a critical part of South Carolina's economic-development portfolio.

Georgia has experienced similar success during Governor Kemp's tenure, much of which is likewise dependent on Georgia's ports. Since Governor Kemp assumed office in 2019, the State of Georgia, in conjunction with community leaders and private-sector partners, has worked on 1,736 project-development locations, resulting in over $69 billion in economic investments and the creation of more than 163,000 new jobs for hard-working Georgians.

INTRODUCTION AND SUMMARY OF ARGUMENT

Governor McMaster and Governor Kemp are ultimately responsible for two of the ten busiest ports in the country. For decades, both SCSPA and GPA have used a hybrid labor model.

Under this division of labor, International Longshoremen's Association ("ILA") members perform the majority of the longshore work at the state-owned

ports, while nonunionized state employees operate state-owned lift equipment to load and unload containers from the ships that call at the ports' terminals and to lift containers from trucks and stack them in the ports' holding areas for pickup. Pet. App. 57a. Despite the fact that both SCSPA and GPA have operated their respective terminals under this hybrid division of labor for 50 years, "[t]he ILA, which represents longshoremen on the East Coast and Gulf Coast, has long wanted to displace the port[s'] state employees with union workers." Pet. App. 37a.

Against the settled expectations associated with this labor model and in recognition that SCSPA needed to expand its facilities to keep pace with growing demand, the State of South Carolina—through its elected representatives—authorized and directed SCSPA in 2002 to take certain "required actions" to begin the process of locating, permitting, and constructing "new terminal facilities on the west bank of the Cooper River" at the Port of Charleston on the old Charleston Navy Base, which had closed in 1996. 2002 S.C. Acts No. 256, § 2(A). The terminal—later named the Hugh K. Leatherman Terminal, in honor of the long-time Port champion and former President *Pro Tempore* of the South Carolina Senate—soon became the only permitted container terminal under construction on the East or Gulf Coasts. This new terminal was anticipated to increase SCSPA's total container volume capacity by 50%.

But, it turns out, after the State worked on this project for 20 years and invested more than $1.5 billion in this new terminal and related infrastructure, the ILA decided that it would let United States

Maritime Alliance ("USMX") member carriers call at the Leatherman Terminal only if SCSPA took the unprecedented step of replacing the hard-working state employees operating the state-owned lift equipment with ILA members. In other words, anticipating USMX's response, and attempting to dictate SCSPA's decisions and coercively conscript state jobs and state assets into union service, the ILA indirectly threatened SCSPA: "If you buil[t] it, they won't come." *Cf. Field of Dreams* (Gordon Company 1989).

By employing a now judicially sanctioned secondary boycott, the ILA forced shipping lines to stop calling at the Leatherman Terminal, which "has all but shut down" that billion-dollar project. David Wren, *Port of Charleston Sees Cargo Pullback as Economic Uncertainties Rise*, Post & Courier (Mar. 20, 2023), https://tinyurl.com/ye8uwzeb. Thus, few of the goals South Carolina strategically set out to achieve with the Leatherman Terminal have been realized.

These goals were developed with a broad geoeconomic picture in mind. For example, the Panama Canal completed a $5.4 billion expansion in 2016, enabling the largest (Post-Panamax) ships in the world to pass through the Canal. In conjunction with construction of the Leatherman Terminal, SCSPA utilized state and federal funds to deepen the Charleston Harbor to 52 feet, making it the deepest harbor on the East Coast and enabling these Post-Panamax ships to call on the Port at any time, and at any tide.

Georgia, meanwhile, has witnessed tremendous growth at the Port of Savannah, which has been the fastest-growing container port in the country over the past two decades. In addition to expanding its current

terminals, GPA has applied to the U.S. Army Corps of Engineers to build a third terminal on Hutchinson Island across from the existing terminals.

Unless this Court grants SCSPA's petition and corrects the Fourth Circuit's mistake, South Carolina will not be able put its $1.5 billion investment to use fully unless it caves to the ILA's indirect demands, allows the ILA to "consum[e] all the jobs at the Leatherman Terminal," Pet. App. 122a, and abandons the State's longstanding decisions about how it will operate its ports and how it will guarantee South Carolinians the right to work free from union coercion. Georgia faces the same challenges with its port-expansion plans. This Court should grant certiorari and prevent the ILA (and other unions) from utilizing legally flawed tactics to dictate state action and restrain regional commerce.

ARGUMENT

I. The Fourth Circuit's decision creates a roadmap for unions to erode the equal dignity and sovereignty of the States.

For at least a century and a half, this Court has made clear that "[t]he several States are of equal dignity and authority" under the Constitution. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). This dignity and authority includes "a very extensive portion of active sovereignty," *The Federalist No. 45*, p. 286 (J. Madison) (C. Rossiter & C. Kelser eds. 2003), which the States may use "to structure themselves as they wish," *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022), and to "determine[e their] own public policy," *Terrace v. Thompson*, 263 U.S. 197, 217 (1923).

South Carolina and Georgia have exercised this sovereign authority in choosing how to operate their ports. South Carolina created SCSPA as "an instrumentality of the State." S.C. Code Ann. § 54-3-130. The State established SCSPA in 1942 to "acquire, construct, equip, maintain, develop, and improve" South Carolina's "harbors or seaports and of their port facilities" and to "foster and stimulate the shipment of freight and commerce through" these terminals. 1942 S.C. Acts No. 626, § 2 (codified at S.C. Code § 54-13(2) (1952)). The General Assembly gave SCSPA broad authority to accomplish these goals, including building and operating "wharves, docks, . . . piers, . . . other structures." *Id.* § 3 (codified at S.C. Code § 54-14(3) (1952)). SCSPA continues to enjoy a similar mission and powers today. *See* S.C. Code Ann. §§ 54-3-130(3); 54-3-140(3). Georgia has taken a parallel approach with GPA, which is an analogous "instrumentality of the State," O.C.G.A. § 52-2-4, charged with owning and operating the State's ports, *id.* § 52-2-9(6), and "foster[ing] and stimulat[ing] the shipment of freight and commerce through such ports," *id.* § 52-2-9(18). !

When it comes to SCSPA operating the facilities at the Port of Charleston, even the NLRB acknowledged how long South Carolina has used the current labor model. "For nearly 50 years, SCSPA has operated the Port of Charleston using a hybrid division of labor in which nonunionized state employees operate state-owned lift equipment to load and unload container ships that call at the port's two terminals" and that "[s]tate employees also lift the containers from trucks and stack them in the port's holding area to await pickup." Pet. App. 57a. The Port of Savannah uses the same labor model. Pet. App. 6a.

It makes sense that South Carolina and Georgia would assign these important lift-equipment jobs to state employees. These state-owned cranes—many of which cost more than $10 million each—soar more than 150 feet in the air and stretch out hundreds of feet over the harbor to do the most essential work at any port. *See* SCSPA, *SC Ports Board Approves $69.5 Million Crane Purchase* (Oct. 30, 2017), https://tinyurl.com/mtvp2te3. To operate these state-of-the-art assets, the lift-equipment employees must work rapidly yet precisely, moving and maneuvering nearly one container per minute on or off ships and trucks. Being a lift operator requires hundreds of hours of training and great skill, which SCSPA can directly oversee and manage under the current labor model.

Maintaining these critical jobs for its own employees and avoiding the prospect of union interference is fully within s State's "extraordinarily wide latitude . . . [to] create[e] various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *cf.* S.C. Code Ann. § 30-4-20(a) (including SCSPA in a list of the State's political subdivisions). South Carolina has chosen to operate its ports through SCSPA, and SCSPA has determined to "operate" the ports with this particular labor model, S.C. Code Ann. § 54-3-140(3), just as GPA has decided to do, O.C.G.A. § 52-2-9(6).

The way that these state entities operate their ports is in line with the States' longstanding public policy. For almost 70 years, it has been the "the public policy of [South Carolina] that the right of persons to work must not be denied or abridged because of

membership or nonmembership in a labor union or labor organization." S.C. Code Ann. § 41-7-10; *see also* 1954 S.C. Acts No. 652, § 1. Thus, no one can be forced to be a member of a union as a condition of employment. *See id.* § 41-7-30(1). The same is true in Georgia. *See* O.C.G.A. § 34-6-21(a). In fact, denying or interfering with the right to work in either State can result in both criminal penalties and civil liability.[2] *See* S.C. Code Ann. § 41-7-80 (misdemeanor punishable by between ten and 30 days in prison and a $1,000–$10,000 fine); *id.* § 41-7-100(1) (civil fine of up to $10,000); O.C.G.A. § 34-6-28 (misdemeanor penalties for employers or labor organizations); *id.* § 34-6-27 (injunctive relief and costs, attorneys' fees, and damages).

Yet, by blessing the ILA's indirect threats and secondary boycott, the Fourth Circuit has gifted unions a roadmap for circumventing a State's chosen structure and established public policy. In doing so, the Fourth Circuit elevated the significance of a union's (overbroad) bargaining unit above a State's sovereign interests and subjected States to coercive control from beyond their borders. Now, all a union has to do is have a member do a job in one union-friendly State. Then, the union can start trying to acquire that same job at a different site in a less union-friendly State by claiming that the union is merely trying to preserve work performed elsewhere. At that point, all that's left is for the NLRB to determine that the appropriate bargaining unit is the entire East and Gulf

[2] In addition to these legal reasons, SCSPA also had a good practical reason for planning to use the hybrid labor model at the Leatherman Terminal: That model had been successful for decades at the Port of Charleston's other terminals.

Coasts, supposing every worker in this half of the country "share[s] a 'community of interest.'"[3] *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *see* Pet. App. 54a (NLRB decision). With this single bargaining unit, the union may employ a "classic" secondary boycott that is (at least under the Fourth Circuit's logic) protected by the work-preservation defense. Pet. App. 101a; *see also* Pet. App. 9a (noting that one shipping line threatened to redirect its vessel if SCSPA did not reassign the vessel away from the Leatherman Terminal).

What unions will achieve through this strategy is not only their own economic goals but also the defeating of States' plans for how their political subdivisions will operate and States' public policies favoring right-to-work laws. They will be able to do so by using other States' more union-friendly policies, combined with a twisted reading of the National Labor Relations Act, to foist those union-friendly policies onto States that don't want them. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those

[3] To put it mildly, that purported community of interest is quite larger and broader in scope than the ones this Court encounters in other contexts. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 20–21 (2023) (discussing communities of interest in reapportionment).

services. Americans have debated the pros and cons for many decades . . . .").

Although less direct than some assaults on a State's equal dignity and sovereignty, *see, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019) (attempt to hale one State's agency into another State's courts), the result will be the same (albeit potentially more significant): State A will get to alter the public policy and override the structure of State B. The Constitution does not permit that result.

II. This case has far-reaching consequences for South Carolina and Georgia.

The real-world consequences of this case bolster the conclusion that the Court should grant SCSPA's petition.

A. The States have invested significantly and strategically in their ports.

From both a financial and a temporal perspective, South Carolina and Georgia have dedicated substantial resources to their ports—investments premised on the expectation of continuing to use the hybrid labor model.

In South Carolina, the new Leatherman Terminal at the center of this dispute was almost two decades in the making. The General Assembly directed SCSPA to begin "the permitting process to locate new terminal facilities on the west bank of the Cooper River" in 2002. 2002 S.C. Acts No. 256, § 2. This, of course, was before any of the provisions in the Master

Contract between the ILA and USMX in dispute here ever went into effect. *See* Pet. App. 6a.

Over the next 20 years, South Carolina spent more than $1 billion to complete the first phase of this project, and the Leatherman Terminal became the first new container terminal opened in the United States in more than a decade. *See* SCSPA, *SC Ports Opens State-of-the-Art Hugh K. Leatherman Terminal* (Apr. 9, 2021), https://tinyurl.com/4n2uu968. In fact, just building the Leatherman Terminal on part of the former Navy base in North Charleston was a major undertaking. The site preparation alone involved driving more than 6,300 miles of wick drains at the site (to draw out water) and barging in more than six million yards of sand and crushed rock (to create a flat, even surface for construction). *Id.* The State constructed new roads, utilities, and buildings along with the wharf, as well as a 47-acre container yard. *Id.* SCSPA purchased and installed five new ship-to-shore cranes, which have a lift height of 169 feet and a reach of 227 feet. *Id.*

But it's not just the Leatherman Terminal itself. The State has also devoted substantial resources to additional, related infrastructure projects. One is the Port Access Road, which connected the Leatherman Terminal directly to I-26 at a cost of $373 million in state funds. This aspect of the project involved modifying two existing Interstate exits and building a three-level flyover interchange. *See* Lane Construction Corp., *Port Access Road, SC* (last accessed Sept. 27, 2023), https://tinyurl.com/mr2vzkdy. This new road and additional interchange now allow trucks to avoid (and avoid contributing to) traffic in an already

congested portion of the Charleston metropolitan area and proceed quickly up I-26 to their destinations. South Carolina is also in the midst of an aggressive program to expand interstate capacity along I-26 to accommodate the anticipated increase in container volume from the Leatherman Terminal and to account for regional growth. *See, e.g.*, Melissa Rademaker, *State Officials Announce I-26 Widening in Berkeley and Dorchester Counties*, Live 5 WCSC (Oct. 11, 2022 8:18 PM), https://tinyurl.com/2sjmhy4a (discussing a $320 million state appropriation to speed up the widening of I-26).

And there is the Navy Base Intermodal Facility, which is under construction and scheduled to open in 2025. This "critical project" was specifically designed to "resolve[] the last remaining competitive disadvantage" for the Port of Charleston by providing near-dock rail for the Leatherman Terminal and connecting it to Class I railroads operated by CSX Transportation and Norfolk Southern. SCSPA, *SC Ports Developing Near-Dock Rail at the Port of Charleston* (Oct. 17, 2022), https://tinyurl.com/3kyww678. Located about a mile from the Leatherman Terminal, the Navy Base Intermodal Facility will use nearly 80,000 feet of track to move containers from the Terminal to the railyard on a dedicated rail line and, once at the facility, to load them on trains by rail-mounted gantry cranes. *Id.* One intermodal train will be able to carry as much cargo as 280 trucks, thereby further reducing traffic in the Charleston area and more efficiently moving cargo. *See* Palmetto Railways, *Navy Base Intermodal Facility: Project Overview* (last accessed Sept. 27, 2023), https://tinyurl.com/2n3263tv. Since 2021, the General Assembly has appropriated over $500 million for this

component of the project and related operations. *See* 2021 S.C. Acts No. 94, Part 1B, § 118.18(B)(2) (appropriating $200 million to SCSPA for this project and an inner-harbor barge operation); 2022 S.C. Acts No. 239, Part 1B, § 118.18(B)(68) (appropriating an additional $350 million for these projects).

Georgia has likewise been investing in the Port of Savannah. GPA acquired 145 contiguous acres to that Port in 2020. *See* GPA, *GPA Unveils Major Expansions* (June 16, 2020), https://tinyurl.com/236ht69a. GPA also recently purchased eight new ship-to-shore cranes and completed dock construction at the Garden City Terminal, which can now serve four 16,000-twenty-equivalent-unit ("TEU") vessels and up to seven vessels at the same time. *See* GPA, *GPA Prepares for the Future, Adds Inland Rail Connectivity* (Sept. 26, 2023), https://tinyurl.com/bdd6zr37. In addition to renovating and expanding its existing terminals, GPA is in the process of permitting construction of a new terminal on Hutchinson Island, which will ultimately have a capacity of at least 2.5 million TEUs. *See* GPA, *GPA Unveils Major Expansions*. All told, GPA anticipates spending $4.5 billion on capacity-building projects over the next dozen years. GPA, *2022 Annual Report*, at 6 (2022), https://tinyurl.com/49a2ejbh.

B. These ports are critical to the States' economies and infrastructures.

These port-related investments are vital components of both States' economies and key contributors to their continued economic growth. For South Carolina, its ports have an $86.7 billion annual economic impact and support (directly or indirectly) one out of

nine jobs in the State. *See* SCSPA, *2023 Economic Impact of the South Carolina Ports Authority*, at 4 (Sept. 2023). https://tinyurl.com/4acjy3uf. Georgia's ports also have a massive impact, adding $59 billion to the State's GDP, supporting more than 560,000 jobs, and generating more than $11 billion in tax revenue. *See* GPA, *2022 Annual Report*, at 4.

In South Carolina, the investment in the Leatherman Terminal and related projects was essential for at least two reasons. *First*, it expanded the capacity of the Port of Charleston. The Leatherman Terminal added 700,000 TEUs of throughput capacity to the Port. *See* SCSPA, *SC Ports Opens State-of-the-Art Hugh K. Leatherman Terminal*. Given the Port's continued growth, increasing container capacity—and utilizing that capacity—was (and is) important for SCSPA and the State to maintain existing economic activity and sustain continued supply-chain development.

Second, the Leatherman Terminal was designed not only to account for the Port of Charleston's success and future economic opportunities but also to address related logistical challenges for the Charleston metropolitan area and the over 800,000 South Carolinians who call the region home. For instance, the Wando Welch Terminal, which currently handles the vast majority of the Port's container traffic, is located along the Wando River in Mount Pleasant (the State's fourth most populous municipality) and accessible by a single road, with no direct rail connection. When ships call at the Wando Welch Terminal, the trucks that carry the containers on the next leg of their journey are required to use Long Point Road in Mount

Pleasant to access I-526, the Terminal's main interstate connection. Yet, I-526 is already over capacity, handling approximately 7,600 truck trips daily along an often-congested route for commercial and commuter traffic, which includes bridges over two rivers and requires traversing portions of the State's most (Charleston) and third-most (North Charleston) populous municipalities.

Unfortunately, the ILA's coercive tactics have needlessly exacerbated these issues and South Carolina's strategic plans for addressing them. But for the ILA's secondary boycott, many of these trips to and from the Wando Welch Terminal could originate in North Charleston at the Leatherman Terminal, where infrastructure is already in place to mitigate these impacts. Unlike the Wando Welch Terminal, the Leatherman Terminal is a multimodal facility with direct access to I-26 via the Port Access Road, which, unlike Long Point Road in Mount Pleasant, is an elevated roadway that was designed to moderate community impacts by separating truck traffic from the streets and neighborhoods adjoining the Leatherman Terminal. Plus, the Leatherman Terminal is also connected to the Navy Base Intermodal Facility, which will serve both CSX and Norfolk Southern.

Absent correction by this Court, the Fourth Circuit's authorization of indirect union coercion threatens to disrupt similar infrastructure investments and economic-development initiatives in Georgia.

* * *

Permitting unions to threaten and thwart decades of state investment strategies will chill

infrastructure maintenance and enhancement, stifle economic development, and disincentivize supply-chain improvements. The Court should not condone the ILA's coercive tactics, which make long-term strategic planning and economic investment more difficult for States, and it should correct the Fourth Circuit's decision, which allows unions to erect indirect blockades designed only to frustrate the regional and national supply chain and further union goals.

III. The Fourth Circuit's decision drastically and illogically expands what constitutes work "traditionally done" by union members.

SCSPA is correct: The Court should grant certiorari here because of the significant federal questions raised. The Governors won't repeat any of SCSPA's compelling arguments for granting the petition. One issue, however, warrants highlighting because, in many instances, it will effectively be dispositive of the case: how to define the work "traditionally done" by union members.

The National Labor Relations Act prohibits a labor union from "forcing or requiring any person . . . to cease doing business with another person." 29 U.S.C. § 158(b)(4)(ii)(B); *see also NLRB v. Int'l Longshoremen's Ass'n* ("*ILA I*"), 447 U.S. 490, 491 (1980). This ban on secondary boycotts does not necessarily prohibit otherwise lawful "work preservation agreements," as "their enforcement may constitute protected primary goals."[4] *NLRB v. Int'l Longshoremen's*

[4] To some degree, this Court's jurisprudence regarding the work-preservation defense is tainted by the fact that it was born

Ass'n ("*ILA II*"), 473 U.S. 61, 79 (1985). But asserting a work-preservation defense simply protects "for the contracting employees themselves work traditionally done by them." *ILA I*, 447 U.S. at 504. Conduct aimed at "acquir[ing] new job tasks," however, presents "a different case." *ILA II*, 473 U.S. at 75–76. Thus, the line between "work preservation" and "work acquisition" is critical in determining whether a union has violated the Act.

To draw that line, a court must necessarily determine what work that union employees have "traditionally done." *ILA I*, 447 U.S. at 504. This task requires a more exacting review when members of the bargaining unit work at more than one location.[5]

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in "a time when the Court's statutory interpretation decisions sometimes paid less attention to the actual text of the statute than to its legislative history." *Allen*, 599 U.S. at 103 (Alito, J., dissenting). For instance, in *National Woodwork Manufacturers Ass'n v. NLRB*, this Court stated that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." 386 U.S. 612, 619 (1967); *see also ILA II*, 473 U.S. at 90–91 (Rehnquist, J., dissenting) (criticizing *National Woodwork* for not adhering to the statutory text). Although Petitioners seek review of a discrete question, the Court should revisit whether this line of cases is faithful to the statutory text.

[5] The Fourth Circuit relied heavily on *ILA I* and its discussion of technological advances and work preservation, *see, e.g.*, Pet. App. 16a–17a, but the question raised here is not one of technological changes because the division of work between union members and state employees at the Port of Charleston has been the same for decades, *see* Pet. App. 44a (Niemeyer, J., dissenting) ("Both of the first two terminals in the Port of Charleston, as well as the new terminal, handle containerized cargo, and the division of labor has always been that state employees operate the state-owned cranes, and the union workers perform the other longshore work."). Instead, the real question here is whether work

Members at one location may do some jobs that members at another location do not perform (or, as here, have never performed). So, for purposes of the relevant work-preservation-or-work-acquisition analysis, should a court look generally at what members do anywhere, so that if any employee at a single location does a job (somewhere), that is considered work "traditionally done" by all union members (everywhere)? Or should a court look specifically at what jobs members perform at each location, so that work is "traditionally done" by the bargaining unit only if members have historically done particular jobs at a particular location?[6]

Here, the Fourth Circuit took the general approach. That court agreed with the NLRB that the "work in question is the loading and unloading generally at East and Gulf Coast ports." Pet. App. 17a. Never mind that ILA members have *never* operated the lift equipment to load and unload container ships at the Port of Charleston (or at the ports in Savannah, Georgia and Wilmington, North Carolina). *See id.* at 34a–35a. For the Fourth Circuit, as long as ILA members at *some* port operated the lifts to load and unload the ships, that was work traditionally done by the

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done by union members at other ports can serve as the basis for asserting the work-preservation defense at the Port of Charleston, where state employees have continuously, and exclusively, performed that work.

[6] An alternative way to frame this issue is to focus on the bargaining unit. Is that unit the entire union membership, from Maine to Texas? Or is it the local group at each port? This way of asking the question still gets to the central issue of whether a court should look at the work done by union members at a single location or by union members at every location.

union members that the union could seek to preserve at *any* port.

Judge Niemeyer, on the other hand, advocated for the opposite approach to the "traditionally done" question. Relying on Fourth Circuit precedent that cited *ILA I*, Judge Niemeyer explained that "regardless of whether the agreement is national in scope, in determining whether it preserves or acquires work, the analysis must focus on the work of the local employees and not those elsewhere." Pet. App. 43a.

Judge Niemeyer's position is the better one. It captures what work the union's members have actually performed and the historical practice of how work has been divided between union and nonunion labor. In other words, this approach accounts for the work that was truly "traditionally done" by the union—which is, after all, the only work unions may protect by asserting the work-preservation defense. *See ILA I*, 447 U.S. at 504; *see also NLRB. v. Enter. Ass'n of Steam Pipefitters*, 429 U.S. 507, 530 (1977) (focusing on "the work at this site," rather than by the union generally).

Such specificity already exists in other areas of this Court's jurisprudence. Take, for instance, qualified immunity. When determining if a right is clearly established, that "right must be defined with specificity" and not "at a high level of generality." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019). Were specificity in defining the right not required, "[p]laintiffs would be able to convert the rule of qualified immunity that [the Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

Anderson v. Creighton, 483 U.S. 635, 639 (1987). After all, generally speaking, "freedom of speech" and "the right . . . to be secure . . . against unreasonable searches and seizures" have been clearly established for virtually all of our Nation's history. U.S. Const. amends. I, IV.

The same logic applies here. If work "traditionally done" extended to any work performed by any union member at any other location, the definition of "traditionally done" would become so diluted that unions (or their umbrella organizations) with tens of thousands of members could lay claim to new work in new locations under the banner of preservation, despite only a fraction of a percent of their members having ever done such jobs elsewhere. In fact, taken to its foreseeable extreme, under the Fourth Circuit's overbroad view of work "traditionally done," there might be no more work left for (at least large) unions to acquire because work "traditionally done" by that union would already reach virtually any work being done by anyone (anywhere), provided that someone in the union has done that work (somewhere).

Put another way, this definition would open the door for unions to obtain at the courthouse what they could not secure at the negotiating table (from parties not present at that table) and upend the balance Congress struck between employers and employees in the National Labor Relations Act. Absent correction, the potential implications of the Fourth Circuit's decision are not limited to ports and the ILA. Other unions across the country can (and will) weaponize the Fourth Circuit's decision, deploy its reasoning to other industries and jurisdictions, and employ a similar

strategy to "consum[e]" jobs their members have never "traditionally" performed in a particular location. Pet. App. 122a.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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