NO. 25-

In the Supreme Court of the United States

SAMSON TUG AND BARGE CO., INC.,

Petitioner,

v.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, ALASKA LONGSHORE DIVISION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a union carry its burden of proof on the work preservation defense to a secondary boycott claim by citing its members' work for any employer in the region?

2. Does Congress' "hot cargo" prohibition in 29 U.S.C. § 158(e) apply to union signatory terms interpreted within private arbitration and then imposed on non-parties?

3. Did the courts below err by creating an effective longshore exception to the 8(b)(4) and 8(e) prohibitions when the statutory text exempts only garment and construction industries?

4. Did Congress exclude from the National Labor Relations Act's secondary boycott protections those employers who rent their business premises?

PARTIES TO THE PETITION

Petitioner and Plaintiff-Appellant below

- Samson Tug and Barge Co., Inc.

Respondents and Defendants-Appellees below

- International Longshore and Warehouse Union, Alaska Longshore Division
- International Longshore and Warehouse Union, Unit 222

CORPORATE DISCLOSURE STATEMENT

Petitioner Samson Tug and Barge Co., Inc. does not have any parent entities, and no public corporation owns 10% or more of its stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 24-5730

Samson Tug and Barge Co., Inc, *Plaintiff-Appellant,* and Marine Engineers' Beneficial, AFL-CIO, *Plaintiff,* v. International Longshore and Warehouse Union, Alaska Longshore Division; International Longshore and Warehouse Union, Unit 222, *Defendants-Appellees*

Memorandum Opinion: August 22, 2025

Rehearing Denial: September 30, 2025

U.S. District Court for the District of Alaska

No. 3:20-cv-00108-TMB
No. 3:20-cv-00248-TMB

Samson Tug and Barge, Co., Inc., *Plaintiff,* v. International Longshore and Warehouse Union, Alaska Longshore Division, and ILWU, Unit 222, *Defendant*

Judgment: September 12, 2024

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The Court of Appeals for the Ninth Circuit issued its memorandum disposition on August 22, 2025. App.1a. This decision affirmed in part and denied in part the order on summary judgment of the U.S. District Court for the District of Alaska. App.5a, 7a.

JURISDICTION

On September 30, 2025 the Ninth Circuit denied a timely petition for rehearing en banc. App.96a. On December 8, 2025, the Honorable Justice Kagan extended the deadline for Samson to file this Petition until February 27, 2026. No. 25A668. This Court has jurisdiction, pursuant to 28 U.S.C. §§ 1254, 1331 and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 U.S.C. § 187
The Labor Management Relations Act

Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [29 USCS § 158(b)(4)].

(b) Whoever shall be injured in his business or property by reason or [of] any violation of section (a) may sue therefor in any district court of the United States subject to the

limitations and provisions of section 301 hereof [29 USCS § 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 158(b)(4)
The National Labor Relations Act

Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or

requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159]: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this section (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required

to recognize under this Act: *Provided, further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 158(e)

(e) Enforceability of contract or agreement to boycott any other employer; exception. It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [unenforceable] and void . . . (Garment and construction industry exception omitted.)

STATEMENT OF THE CASE

This case arose from the International Longshore and Warehouse Union, Alaska Longshore Division; and ILWU, Unit 222's (collectively "ILWU"), attempt to force a family-owned shipping company, Samson Tug and Barge Co., Inc. ("Samson"), to replace its work force with ILWU members. ILWU applied brazen coercion upon Samson's landlord to evict Samson from the property if Samson did not hire ILWU labor.

A. Petitioner's Background

Samson was founded in 1908 by the current owner's grandfather and has transported cargo throughout Alaska's waters ever since. For decades, Samson operated a cargo hub on leased property at Womens Bay on Kodiak Island (the "Womens Bay Terminal" or "LASH Dock"). Samson's employees at the Womens Bay Terminal were, and are, members of the Marine Engineers' Beneficial Association ("MEBA").

Samson has never entered into any collective bargaining agreements with ILWU. Unlike many of the employers appearing in labor precedents, Samson has not authorized any multi-employer groups to negotiate its labor agreements on its behalf. It negotiates directly with MEBA.

In 2017 Matson Navigation, the international shipping conglomerate, purchased the real property rights to the Womens Bay Terminal. Matson became Samson's landlord but conducted no cargo or shipping operations of its own at the terminal. Matson never subcontracted any work to Samson.

From 2017 to 2020 Samson continued to pay rent and used the Terminal as it did before Matson purchased the property.

ILWU learned of Matson's purchase of the LASH Dock and envisioned an opportunity to gain Samson's work, which ILWU had never performed.

ILWU knew that Samson's employees were represented by MEBA for various reasons, including by reason of the "DMZ" Agreement.

Matson's competitor American President Lines ("APL") is signatory to the AALA. For a brief period of time, ILWU represented a small number of employees who worked for APL in a "DMZ" or "neutral zone", outside of Samson's worksite.

Under this arrangement, APL's ILWU-represented members unloaded APL containers from semi-trucks within the DMZ and left them for Samson's MEBA-represented employees to remove from the DMZ and take to Samson's workplace, and place aboard Samson's barges. The process was reversed for APL cargo removed from Samson's barges for eventual transport by APL. This arrangement allowed Samson employees to unload APL cargo from Samson barges, while keeping APL compliant with the AALA. The arrangement was necessary because of APL's ownership of the cargo and Samson's ownership of the barges, not because of the particular location of the DMZ or the ownership of the underlying real estate.

The existence of the DMZ proves strict exclusion of ILWU from Samson's workplace. This was the entire point of the arrangement. Samson had universally rebuffed ILWU's top-down demands, which run afoul

of the NLRA's mandated options for unions who wish to organize a company's employees.

B. ILWU's Objective Was Clearly Acquisition of New Work at Samson's Workplace

ILWU knew full well that Matson did not have any employees nor operations at the LASH Dock. That did not matter, because it was Samson's work which ILWU wanted to acquire. ILWU had previously organized Matson through the AALA.

ILWU had long sought Samson's work throughout Alaska. As ILWU's arbitration arguments, pleadings, written demands, and deposition testimony prove, ILWU was unquestionably trying to impact Samson by coercing Matson into using its landlord status to pressure Samson into hiring ILWU-represented labor. Samson merely desired to be left alone by ILWU, and to continue employing members of MEBA.

In an April 28, 2020 10(k) proceeding, *ILWU, Alaska Longshore Div.*, 369 NLRB No. 63 (2020), ILWU unsuccessfully sought an award of Samson's Kodiak work, near the separate Womens Bay Terminal where the present dispute arose.

ILWU also filed a grievance against Matson under the AALA. ILWU argued that the AALA prohibited Matson from allowing non-ILWU labor on any property owned by Matson, including the LASH Dock. This argument was quickly rejected by the first arbitrator because Matson was merely a landlord, which lacked any control over Samson's employees.

Undeterred, ILWU utilized the AALA's appellate arbitration provision to submit the question to the Coast Arbitrator, Kagel. Once again, Samson was not

allowed to participate in the proceeding. The Coast Arbitrator ruled, without evidence, and despite 29 U.S.C. § 158(e)'s effect, that Matson was required by the AALA to ensure that only ILWU-represented employees, regardless of employer, perform work on any real property owned by Matson.

Shortly thereafter, on March 5, 2020, ILWU sent an e-mail to Samson's MEBA union trumpeting its arbitration effort and outlining three courses of action Samson and MEBA could take, all of which were harmful to Samson. Each option would significantly disrupt, alter or require the cessation of Samson's business dealings with Matson at the LASH Dock in Womens Bay.

ILWU's representative Dennis Young provided deposition testimony describing ILWU's efforts to capitalize on the Kagel Arbitration Award, including the ILWU's March 5, 2020 e-mail "offering" three routes for Samson to capitulate to ILWU's successful arbitration against Samson's landlord. He admitted that this e-mail was the result of deliberate ILWU planning.

The day prior, March 4, 2020, ILWU had met with Jennifer Tungul, Matson's (then) Director of Alaska operations, and Rick Kniazowski, a Matson executive official, to discuss "Option 3," as described in the later March 5, 2020 email. Option 3 would force Matson to cancel its lease with Samson if Samson would not "enter into a Terminal Services Agreement."

ILWU sought to have Matson put pressure on Samson to agree to pay the time-in-lieu payments to ILWU for having MEBA-represented employees perform

the cargo handling if Samson continued to refuse to hire ILWU labor.

Matson and ILWU agreed to allow Samson to continue operations at the LASH Dock, provided Samson's employees would be "subject to ILWU time cards."

On June 16, 2020, Samson was required to execute a TSA with Matson. Failure to do so would have resulted in Samson's month-to-month lease being cancelled.

The TSA allowed Samson to continue operating at the LASH Dock in Womens Bay. It required Samson to pay ILWU time-in-lieu charges, even though no ILWU workers were performing work, in addition to paying its own MEBA workforce who actually performed the Samson work. Samson could perform the work with four or five MEBA members, whereas the TSA required Samson to pay for eleven ILWU time-in-lieu phantom members for barge operations.

This TSA did not grant Matson any rights to control Samson's operations. Article IV(D) of the TSA expressly rejected any "partnership, joint venture, or agency" relationship between Matson and Samson.

After the TSA was signed, ILWU then demanded that Matson collect these "time-in-lieu" payments—payment for work that ILWU members were **not** doing—from Samson upon threat of eviction.

Samson paid nearly $750,000 to ILWU members, via Matson, for phantom "work," before Samson was able to relocate to different premises. This is exactly the type of end-run around legitimate organizing that Congress proscribed in the NLRA.

ILWU, after taking nearly $750,000 in Samson's funds in violation of the NLRA's plain text, became

even more emboldened. It was no longer satisfied with the financial windfall and insisted on Samson hiring ILWU labor. The fact that Samson's employees were already represented by MEBA was evidently not a deterrent.

In December 2020, ILWU then demanded that Matson force Samson to either leave the LASH Dock or hire ILWU-workers. ILWU demanded that Matson provide "the date that [it intended] to fully implement the Kagel [Arbitration Award] hiring ILWU to perform all work on Matson's terminal at Women's [sic] Bay." ILWU then went back to Arbitrator Kagel and demanded further rulings invalidating the TSA, despite Samson not being a party to the arbitration, and despite ILWU extracting nearly $750,000 from Samson under the TSA and the unlawful scheme.

On December 29, 2020, ILWU asked Arbitrator Kagel to direct Matson to "assign[] all cargo handling work at LASH Dock to ILWU-represented longshoremen." This was unquestionably secondary coercion because none of the employees at the LASH Dock were employed nor controlled by AALA-signatory Matson. None of Samson's work was subcontracted from Matson. They were employed by the tenant, Samson, and ILWU knew that fact. The fact of a non-ILWU signatory employing MEBA members at the LASH Dock was the entire reason that ILWU brazenly carried on its secondary activity.

On January 11, 2021, ILWU requested issuance of "an order from Arbitrator Kagel directing Matson to immediately implement your award ensuring that "[n]on-signatory employees shall not operate any cargo handling equipment [at LASH Dock] beyond an area designated and agreed by [Matson and ILWU]

and, thereby, rescind any permission granted to Samson [Tug] to 'use its own labor for terminal services under [the TSA].' Evidence of a secondary objective is rarely so clear.

On October 4, 2021, Kagel agreed with ILWU, adopting ILWU's hot cargo argument. At no point in the arbitration was Samson a party. The statutory prohibition against such agreements, 29 U.S.C. § 158(e), and their use constituting secondary coercion, 29 U.S.C. § 158(b)(4), were disregarded by the arbitrator.

C. Samson Availed Itself of the Protections Granted To It By Congress' Plain Text

Samson sued ILWU under 29 U.S.C. § 187, seeking damages caused by ILWU's unfair labor practices. Specifically, Samson alleged that ILWU violated the National Labor Relations Act's ("NLRA"), secondary boycott and hot cargo provisions. 29 U.S.C. §§ 158(b)(4)(ii)(A), (B), (D) and 158(e); 29 U.S.C. § 187.

After years of litigation the District Court granted summary judgment to ILWU. This decision, published in the Federal Supplement, 746 F.Supp.3d 701, will have far reaching consequences for employees, employers and businesses in Alaska and beyond.

The District Court held subject matter jurisdiction under 28 U.S.C. 1331, the National Labor Relations Act, 29 U.S.C. § 158, and the Labor Management Relations Act, 29 U.S.C. § 187.

REASONS FOR GRANTING THE PETITION

I. The Rulings Below Fundamentally Alter This Court's Formulation of the Work Preservation Defense and Nullify the NLRA

The National Labor Relations Act, 29 U.S.C. § 158 et al ("NLRA"), and therefore the Labor Management Relations Act, 29 U.S.C. § 187, ("LMRA"), prohibit labor organizations from coercing or threatening any business to cause them to cease doing business with an employer which the union wants to punish.

Depending on the context these unlawful schemes are referred to as "secondary boycotts," "secondary activity," or "hot cargo" agreements. All three terms are applicable to the dynamics of the underlying case.

This case carries great weight for the maritime industry and for tenant employers from all industries, due to the Ninth Circuit's complete departure from the text of the NLRA and this Court's secondary boycott precedent imposing a specific two-part test for a labor organization's work-preservation defense.

This Court has previously held that such coercion does violate the NLRA unless the union bears its burden of proof to show both of the following:

1. That the union's goal was exclusively primary; and
2. That the coercion was directed only at an employer who held the right to control the employment assignments desired by the union.

NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61, 76 (1985) ("ILA II"); *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) ("ILA I"); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 630-631 (1967).

The National Labor Relations Board has also ruled against unions' efforts to cite regional work history for other employers in defense of acquiring work from different employers within the same regional industry. *ILA Local 1248 (U.S. Naval Supply Center)*, 195 NLRB 273, 274 (1972) (contract clause cannot be "used as a shield for conduct aimed not at work preservation but at . . . work historically performed by . . . another work unit.").

Instead, the Ninth Circuit held that ownership of real property is fungible with a right to control the tenant's employment assignments. It also imposed the landlord Matson's contractual terms with strangers upon tenant Samson without any stated basis, and ignored this Court's requirements for analyzing whether the union's goals were work acquisition or work preservation.

The overarching question before the Court is whether it is an unfair labor practice under the NLRA for the ILWU to coerce a landlord into forcing its tenant to hire ILWU members for work which the ILWU membership has never performed. ILWU used a hot cargo clause as a cudgel against the landlord to exploit the landlord's general economic leverage against its tenant, Samson.

The Ninth Circuit's August 22, 2025 Memorandum disposition ("Memorandum") did not apply the plain language of the statute, disregarded this Court's precedential rulings from *ILA I*, *ILA II*, and *National*

Woodwork, and ignored the undisputed written evidence of a brazen secondary objective.

The Memorandum's core errors are reflected in the language below:

> Defendants are entitled to a complete defense as to Plaintiff's claims under the work preservation doctrine. *See NLRB v. Int'l Longshoremen's Ass'n*, 473 U.S. 61, 81-82, 105 S. Ct. 3045, 87 L. Ed. 2d 47 (1985) (holding that when the objective of an agreement and the purpose behind its enforcement is "work preservation," the union does not violate 29 U.S.C. § 158(b)(4)(B) or § 158(e)(6)); *Int'l Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 637 (9th Cir. 2020) (holding that a "valid work preservation objective provides a complete defense against alleged violations of section 8(b)(4)(D) . . . ").
>
> Here, the longshore work conducted at the Womens Bay terminal falls under the purview of the All-Alaska Longshore Agreement ("AALA") <u>because the terminal is owned by Matson Navigation Company</u>, which is an employer that is a signatory to the AALA.

Memorandum, * 2-3 (italics added).

The Memorandum conflicts with Ninth Circuit, Supreme Court, and sister circuit precedent requiring a two-step analysis of the work preservation defense, and carries implications of extraordinary significance for all employers who do not own their own premises by removing their statutory protections.

It dilutes the actual standards from this Court's precedent by substituting a "colorable claim" standard and effectively creates an "any-similar work for any employer" test which transmutes nearly all secondary objectives into primary ones. This renders the statutory text a nullity and violates this Court's authority. It upends Article III's judicial hierarchy and violates the separation of powers by nullifying the legislative branch's policy choices without a Constitutional basis to do so.

If the secondary activity prohibitions in sections 8(b) and 8(e) do not prohibit ILWU's conduct in this case, then the prohibitions don't apply to any conduct.

Meanwhile, small and mid-size businesses which rent their premises are at the mercy of abusive secondary boycotts and hot cargo arbitration interpretations decided without their input or consent.

This Court previously established a formulation of the work preservation defense. The Memorandum fails to apply it, instead assuming, based on irrelevant AALA definitions, that the union's deliberate objective was primary as work preservation against the union's own signatory, rather than secondary as work acquisition. It also fails to analyze the second mandatory element set forth in *ILA I* and *II*; whether the coerced employer had the right to control the work.

Such a ruling violates this Court's primary position atop Article III's structure. *Neal v. United States*, 516 U.S. 284, 296 (1996)("Absent those changes or compelling evidence bearing on Congress' original intent, *NLRB v. Longshoremen*, 473 U.S. 61, 84, 87 L. Ed. 2d 47, 105 S. Ct. 3045 (1985), our system demands that we adhere to our prior interpretations of statutes.").

In *ILA I* and *II* this Court taught that so long as no portion of the union's objective is acquisition of new work, incidental effects on non-signatories do not violate the NLRA. Instead, the Memorandum and other appellate cases turn *ILA I* and *II* inside-out to hold that a union's objective is not secondary if any portion of the asserted, or "colorable," goal is primary in nature.

As the ILWU's written demands, the deposition testimony, and ILWU's arbitration pleadings readily prove, the effects on Samson were the entire point, not incidental nor undesirable from the ILWU's position. In fact, if ILWU had truly not desired, exclusively, to acquire Samson's work, then ILWU's efforts would be completely irrational.

A. Any Proportion of Secondary Intent Renders the Entire Coercive Scheme Unlawful

The statute, and this Court's precedent, completely foreclose the rule applied below, where even an arguable primary purpose supposedly cures the overriding secondary objective.

This Court and the Circuits impose a mandatory two-element burden on unions who seek to use the work preservation defense:

> In *ILA I*, the Court began by reiterating a two-part test for determining whether a CBA provision constitutes a lawful work preservation agreement. The first part requires that the agreement "have as its objective the preservation of work traditionally performed by employees represented by the union." *ILA I*, 447 U.S. at 504. The second provides that "the contracting employer must have the

> power to give the employees the work in question," or rather, the "right of control." *Id.* "The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work." *Id.* at 504-05.

Int'l Longshore & Warehouse Union v. NLRB, 978 F.3d 625, 637-638 (9th Cir. 2020).

NLRB v. Int'l Longshoremen's Ass'n, 473 U.S. 61, 81-82, 105 S. Ct. 3045, 87 L. Ed. 2d 47 (1985) (*ILA II*), cited by the Memorandum below, only rebuts liability when the sole and exclusive purpose of the defendant's action was preservation of the actual work performed by the defendant union's members.

Here, the Ninth Circuit never properly considered what the work in question was, or whether that was a factual question for a jury's decision. Instead, it applied the definition that Matson and ILWU, not Samson, had agreed upon with the resulting nullification of Samson's statutory rights.

Guidance from this Court clarifies that the "work" the union seeks to preserve must be the exact work the plaintiff employer assigns. Stated another way, the Ninth Circuit was required to demand record evidence from ILWU proving that ILWU had performed Samson's bargaining unit work at the LASH Dock. Instead, the Ninth Circuit accepted the invalid substitute of similar regional work for other employers.

This Court has acknowledged that its earlier precedent approved the work preservation defense as a general concept: "We expressly noted that a different

case might be presented if a union engaged in activity "to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened . . . . " *Id.*, at 630-631 (emphasis added)." *ILA II* at 75-76.

The decisions at both levels below apply *NLRB v. Int'l Longshoremen's Ass'n (ILA II)*, 473 U.S. 61, 78 (1985), contrary to its own language: "so long as the union had no forbidden secondary purpose . . . " [unintended incidental effects do not create liability]. Here, the Ninth Circuit's substitution of any regional work history or irrelevant terms from strangers' contracts for the required precise "work" renders all secondary activity primary.

This approach violates the exclusively primary precondition for a work preservation defense. *ILA II* at 78, *supra*. That aspect of *ILA II*'s ruling is a necessary conclusion due to the long-settled statutory text. Section 8(b)(4)(ii) of the NLRA prohibits union actions which:

> threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or

> bargain with a labor organization as the representative of his employees . . . .

29 U.S.C. § 158(b)(4)(ii)(emphasis added).

Until the Memorandum, the Ninth Circuit had consistently held that a union's act of pursuing arbitration with any degree of unlawful objective would constitute a section 8(b)(4) violation regardless of whether the ILWU prevailed in that arbitration. "The Section 8(b)(4) violation occurs the moment the union pursues arbitration with *an* unlawful secondary motive —in this case, by allegedly attempting to force APL to subcontract with only those employers who will hire ILWU labor—not if or when the union succeeds in persuading the arbitrator to sustain its grievance." *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 721 F.3d 1147, 1155 (9th Cir. 2013)(italics added).

This is exactly what the ILWU did here, less than ten years later. The ILWU used coercion and a hot cargo agreement to force Matson to stop doing business with Samson because Samson did not employ ILWU members.

B. This Court's Intervention is Necessary to Reverse the Substitution of "Any Similar Work For Any Employer" for the Proper "This Bargaining Unit" Definition of "Work"

When a union has never performed the particular work in question, it cannot avail itself of a work preservation defense. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *Sheet Metal Workers Local 27 (Thomas Company)*, 321 NLRB 540 (1996); *U.S. Naval Supply Center*, 195 NLRB 273, 274 (1972).

In *National Woodwork* the Court emphasized that a union's work preservation defense fails if even one of its motivations is the acquisition of new work. This Court held that when the dispute was primary, because the jobsite carpenters did previously perform the exact work in question, neither NLRA sections 8(b)(4)(B) nor 8(e) barred the union's conduct.

Federal law has never, until now, allowed a union to ignore sections 8(b)(4) and 8(e) in the course of pursuing work its members have never performed at any point in time, and for which no contractual agreement granted the work.

In *U.S. Naval Supply Center*, the Board rejected a similar attempt by the union to acquire work. 195 NLRB 273 (1972). There the union tried to acquire work which none of its members had performed under the same theory that similar work in the same geographic area gave it a right to expand to other employers nearby. The Board soundly rejected this approach. The panel Memorandum here, however, accepts it *sub silento*.

This Court's intervention is necessary to clarify that strangers' agreements as to a union's jurisdiction cannot erase non-parties' statutory rights.

C. The Decisions Below Dilute the Statutory Standard's Plain Text Into Mere Surplusage

The NLRA prohibits the use of "threats" or "coercion" to achieve secondary objectives. 29 U.S.C. § 158(b)(4). The District Court and Ninth Circuit, however, abandoned the statutory text and language of *ILA I* and *II* in favor of a substitute "colorable claim of work preservation" defense and "substantial economic

coercion" analysis which nullifies the Congressional design.

The District Court stated "Samson has not alleged or produced evidence to substantiate any prohibited coercion within the meaning of Section 8(b)(4) beyond allegations that ILWU's grievance was coercive." 746 F.Supp.3d at 729-30. But ILWU's filing of the grievance is sufficient to show coercion. Not only can a union violate section 8(b)(4) by "advancing an improper interpretation of a contractual clause at arbitration," but the violation occurs "the moment the union pursues arbitration with an unlawful secondary motive . . . " *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1155 (9th Cir. 2013).

The District Court created an entirely new standard when it ruled that ILWU had presented a "colorable claim for lawful work preservation." 746 F.Supp.3d. at 731. But, "the relevant inquiry under §§ 8(b)(4)(B) and 8(e) is whether a union's activity is primary or secondary . . . " *ILA II*, 473 U.S. at 81. That is, the court must inquire whether the union's activity is actually primary, not whether the union has made a colorable claim its activity is primary by merely denying the claim or proving some slight primary component to its motivation.

D. The Statutory Text is Clear; The Act Prohibits Use of Coercion for Secondary Objectives Even Via Arbitration

The Decision also fails to independently review the question of whether the AALA's union signatory clause referenced by the panel is void under 29 U.S.C.

§ 158(e). It is void, and even if Samson had been a signatory, the clause would have no effect.

ILWU portrays its arbitration efforts as immune from external legal constraints, and as binding upon Samson. Neither is correct. The ILWU lost that argument in a prior case against APL: "As we read the statute, nothing in Section 303 bars an employer—whether primary or neutral—from seeking compensatory damages for a union's alleged unfair labor practice, even if that practice occurs during arbitration." *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union*, 721 F.3d 1147, 1153 (9th Cir. 2013).

It is an unfair labor practice for a union to coerce an employer to enter into a "hot cargo agreement." 29 U.S.C. § 158(b)(4). A hot cargo agreement is an agreement prohibited by 29 U.S.C. § 158(e). Section 158(e) prohibits an agreement wherein "a union and employer agree to have the employer cease handling the goods of another or cease doing business with any other person." *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60*, 721 F.3d 1147, 1152 n. 3 (9th Cir. 2013).

"The NLRB has repeatedly held that a union can violate Section 8(b)(4) by advancing an improper interpretation of a contract clause at arbitration." *Id.* at 1155. The violation occurs "the moment the union pursues arbitration with an unlawful secondary motive . . . not if or when the union succeeds in persuading the arbitrator to sustain its grievance." *Id.*

A collective bargaining agreement which states that an employer/landowner (such as Matson) must require a tenant to agree to only employ workers represented by the union that is party to the agreement

is illegal under section 8(e). *NLRB v. Hotel & Rest. Emps. & Bartenders' ILWU Local 531*, 623 F.2d 61 (9th Cir. 1980).

The Memorandum thus cannot be reconciled with any such union signatory clause precedents.

E. Judicial Creation of a Longshore Industry Exception Voids Statutory Protections and Usurps the Authority of the Legislative Branch.

Published decisions apply the work preservation defense where the union's own pre-existing work was shifted to other locations, sometimes as part of a suspected effort by a signatory employer to avoid its own bargained-for definition of the union's work. *Am. Trucking Associations, Inc. v. N.L.R.B.*, 734 F.2d 966, 978 (4th Cir. 1984), aff'd sub nom, *N.L.R.B. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 647 (1985) (stating that because shipping companies own or lease the containers, they retain the right to control the allocation of work related to the containers).

The rulings below have stricken the rationale from those cases and set them aloft untethered, effectively allowing all longshore unions to claim all industry work for any employer even where no contractual terms are relevant, the employer relaying the coercion does not control the cargo, and the union never performed the work in the plaintiff employer's workplace.

Matson did not own or lease the containers shipped by Samson, and Samson has been steadily employing MEBA members for decades; none of whom are performing any work formerly performed by ILWU members. The Ninth Circuit's effective creation

of a longshore exception to the NLRA in violation of *ILA I* and *II* should be reversed by this Court.

F. A Private Party's Chosen Contractual Definition of a Union's Jurisdiction Cannot Be Binding on a Non-Party Who in Fact Universally Rejected the Concept

This Court has held that private contracts, and their interpretation via private arbitration, cannot nullify individual rights created by Congressional statutes and policy choices. *Barrentine v. Arkansas-Best Freight Sys*., 450 U.S. 728, 740-741 (1981). The Memorandum violates this principle in drastic fashion where Samson was never a party to the AALA contract nor to the arbitration. Still, the Ninth Circuit applied the contract terms conclusively against Samson.

ILWU's approach below successfully cited precedent which relied upon contract definitions of "work" and which were irrelevant to Samson. Its appellate briefing asserted " . . . the single, coast-wide, multi-port, multi-employer longshore bargaining unit defines the scope of claimable work." Second Brief, p.36. The bargaining unit to which it refers is the one defined in the AALA, to which Samson is not bound.

The Memorandum's core error in this respect is reflected in the language below:

> Here, the longshore work conducted at the Womens Bay terminal falls under the purview of the All-Alaska Longshore Agreement ("AALA") because the terminal is owned by Matson Navigation Company, which is an employer that is a signatory to the AALA.

Memorandum, * 2-3 (italics added).

This language omits required elements of ILWU's affirmative defense, applies incorrect legal standards, and fails to recognize the factual dispute which must be resolved by a jury rather than being subsumed within assumptions and mere argument. This language also forces Samson to suffer the effects of stranger Matson's contractual promises to ILWU. It is arbitrary and capricious, and unjust, to impose a private agreement's terms on someone who never agreed to the term and has in fact universally rejected the proposition.

ILA I and *II, supra,* addressed employers who were under contractually-defined work assignment obligations which did not depend upon the union members' prior performance of that work. Here, without any contract terms between ILWU and Samson ever in place, there is no such basis for ILWU to claim the Samson work which it has never performed. ILWU's efforts, therefore, cannot rationally be construed to constitute lawful primary activity.

In Samson's context, the Memorandum effectively transforms those contract-based precedents into a longshore union's privilege to violate the NLRA and coercively acquire new work in situations where the target employer never agreed to any scope of work with the coercing union. It transforms unions into quasi-governmental agencies unchecked by the plain text of the NLRA.

G. The Plain Text of the Statute Protects All Employers, Not Only Those Who Hold Fee Title to Their Premises

The Memorandum did not analyze the second required element of a work preservation defense;

whether the primary employer, Matson, had the right to control the neutral, Samson's, work assignments. The trial court ruled that the power to evict a tenant gives a landlord the right to control who that tenant hires, in the absence of any such term in a lease agreement. 746 F.Supp.3d at 740-41. The Ninth Circuit adopted this invalid rule.

The Memorandum assigns superlative powers to contract language, above the Constitution's Due Process guarantees, above the NLRA text, and despite the *ILA I* and *II* holdings. Both the Ninth Circuit and the District Court substituted generic economic leverage in a commercial lease for the proper right-to-control test reinforced by *ILA II*.

Not only does this newly-created rule violate superseding authorities listed above, it goes far beyond the question of which rights a landlord retains in the land when leasing real property, and leaps to an assumption that a landlord gains a right to control the people who the tenant may bring onto the leased property. Unlike the land, the tenant's employees were never transferred from the landlord. Professor Prosser observed as to land leases that "[w]hen land is leased to a tenant, the law of property regards the lease as a sale of the premises for the term. . . . In the absence of an agreement to the contrary, the lessor surrenders both possession and control of the land, retaining only a reversionary interest, and he has no right even to enter the premises without the permission of the lessee." W. Prosser and W. Keeton, *Law of Torts* § 63, p. 434 (5th ed. 1984).

Legal precedent, now ensconced in the Federal Supplement, that a company can buy up property and dictate the labor relations of a tenant, will have disas-

trous repercussions for business operations throughout Alaska and the Ninth Circuit.

H. Not Only Did the District and Appellate Courts Apply Invalid Legal Tests To Streamline ILWU's Defense, They Never Analyzed The Overwhelming Factual Evidence Disproving Those New Tests

The Memorandum further erred by making factual assumptions instead of recognizing the presence of disputed issues of material fact.

The requirement for jury resolutions of factual questions is well-known: "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc*., 477 U. S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

No evidence establishes that Matson ever held the right to control Samson's employee assignments. That alone is fatal to ILWU's work preservation defense.

"The [primacy versus secondary] inquiry is often an inferential and fact-based one, at times requiring the drawing of lines "more nice than obvious." *ILA II*, *supra*, 473 U.S. at 81, quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961). *Accord Bedding, Curtain, and Drapery Workers ILWU v. NLRB*, 390 F.2d 495, 499 (2d Cir. 1968)(primary or secondary nature of union's goal is question of fact.).

Ample admissions prove that the intent of ILWU's campaign was secondary. *Curtain, and Drapery Workers ILWU v. NLRB*, 390 F.2d 495, 499 (2d Cir. 1968) ("whether the union's conduct had an improper 'object' is a question of fact; moreover, that 'object' need not be the only one."); *Del Turco v. Speedwell Design*, 623

F.Supp.2d 319, 348 (E.D.N.Y. 2009)(second element of improper "object "of § 8(b)(4)(ii)(B) claim is a question of fact).

> The determination whether the "will not handle" sentence of Rule 17 and its enforcement violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.

National Woodwork, *supra*, at 644-645. Samson's case must be remanded for trial to allow the jury to hear "all of the surrounding facts and circumstances."

The Memorandum accepts as true the factual argument that the landlord's ownership of the real property gave the landlord the authority to dictate the tenant's employee assignments and hiring practices. The record is quite clear that the opposite is true, in that the landlord's own witness testified "We [Matson] didn't control the cargo."

While the existing record thoroughly impeaches ILWU's defense, even the most concise summary proves the existence of genuine issues of material fact.

II. The District Court's Application of an Arbitrator's Decisions to Non-Party Samson Violated Samson's Due Process Rights

Samson's Constitutional due process rights were violated when the District Court applied "substantial weight" to an arbitration decision where Samson Tug was never a party nor signatory. "[T]he Court agrees

with ILWU that these findings [that ILWU previous performed work in Kodiak] should be given significant weight, particularly given Arbitrator Kagel's familiarity with the longshore industry." *Samson Tug & Barge Co. v. Int'l Longshore & Warehouse Union*, 746 F. Supp. 3d 701, 739 (D. Alaska 2024). The District Court then proceeded to explain that even absent such a finding, it would apply the AALA definition of ILWU's work against Samson, despite Samson never assenting to such a definition. Courts bear an independent duty to review arbitrators' decisions for compliance with section 8(e). *Rochester Reg'l Joint Bd.,* 692 Fed. App'x 25, 29 (2d Cir. 2017); *Marrowbone Dev. Co. v. District 17, UMW*, 147 F.3d 296, 298 (4th Cir. 1998).

Not only did the District Court fail to appreciate that the ILWU's similar work in the region is not the relevant comparator for a work preservation defense, the District Court treated the arbitrator as an expert or advisor and deferred to his ruling. This violates Article III.

> When a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the "judicial Power of the United States." Art. III, § 1. For the reasons I explain in this section, the judicial power, as originally understood, requires a court to exercise its [independent judgment] in interpreting and expounding upon the laws. * * * One of the key elements of the Federalists' arguments in support of the allocation of power to make binding interpretations of the law was that Article III judges would exercise independent judgment.

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119-120 (2015)(brackets in original) (Thomas, J., Concurring) (judicial deference to agency interpretations raises Constitutional concerns).

Samson's funds are certainly a property interest for purposes of procedural due process. *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Likewise, Samson's statutory right, 29 U.S.C. § 187, to vindicate its statutory protections, 29 U.S.C. §§ 158(b)(4), (e), from secondary activity is itself a property interest. This Court has "held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). *Accord Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988).

Given the undisputed record that Samson was not a party to the ILWU-Matson arbitration and was never bound to the AALA, it was clear error to apply preclusive effect to Arbitrator Kagel's findings:

> A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Richards*, 517 U.S., [793] at 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (internal quotation marks omitted)..

Taylor v. Sturgel, 553 U.S. 880, 892-893 (2008) (fn. 5 omitted) (citations omitted).

III. THE MEMORANDUM CONFLICTS WITH OTHER CIRCUITS

The NLRA, as interpreted by the binding *ILA I* and *II* decisions, is faithfully applied by most circuits.

A. The District of Columbia Circuit

California Cartage Co. v. NLRB, 822 F.2d 1203 (D.C. Cir. 1987), is an example of a decision which respected this Court's holding that a union's objectives are secondary if even partially intended to acquire work which that union's members did not previously perform.

> If the union's sole objective is to influence the signatory employer's labor relationship with his own employees, the employer clearly is not neutral and the agreement is primary rather than secondary. *ILA II*, 105 S. Ct. [3045] at 3057; *ILA I*, 447 U.S. [490] at 504; *National Woodwork*, 386 U.S. [612] at 645.

Cal. Cartage at 1207.

The NLRB decision underlying *Cal. Cartage* did in fact rule that the longshore agreement's amendment was an unlawful hot cargo agreement with respect to shipping containers not owned by the signatory employer. The D.C. Circuit did not disturb this rationale and only remanded for factfinding over the neutral status of the non-signatory employers. *Id.* at 1209-1210.

Matson, ILWU's contracting employer and Samson's landlord, did not own or control any of the containers that Samson transported. *Cal. Cartage* is therefore highly favorable to Samson.

The *Cal. Cartage* NLRB decision was enforced in part because the "other" worksites' shipping containers into which workers would "stuff" cargo, were owned and operated by the same employers who had assented to the contract term. *Id.* at 1209. It does not stand for the proposition that a union's contract terms with signatory employers give it the right to use secondary activity to pressure non-signatory employers. For example, if Matson agreed to use ILWU labor to stuff all of its shipping containers worldwide, it could not evade the contractual promise by moving the container elsewhere prior to stuffing them with Matson's non-ILWU labor. This is the same premises behind *ILA I* and *II*. It is irrelevant when applied to Samson, an employer which never made any commitments to ILWU.

B. The First Circuit

In *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 83 (1st Cir. 2008) (*American Steel*) , the First Circuit cited this Court's formulation of the NLRA secondary activity prohibitions:

> [T]he relevant inquiry under . . . 8(e) is whether a union's activity is primary or secondary-that is, whether the union's efforts are directed at its own employer on a topic affecting employees' wages, hours, or working conditions that the employer can control, or, instead, are directed at affecting the business relations of neutral employers and are 'tactically calculated' to achieve union objectives outside the primary employer-employee relationship.

American Steel at 83 (quoting *N.L.R.B. v. Int'l Longshoremen's Ass'n,* 473 U.S. 61, 81, 105 S. Ct. 3045, 87 L.Ed.2d 47 (1985)). Unlike the Ninth Circuit's Memorandum, the First Circuit did not dilute the "relevant inquiry" into whether the union had a "colorable claim" that it was not seeking to achieve secondary objectives, nor did it omit the statutory "coercion" threshold for a different "substantial economic coercion" standard.

C. The Fourth Circuit

Unlike the First Circuit, a violation of Supreme Court precedent and statutory text has occurred in at least one other circuit, in a published decision.

In *S.C. State Ports Auth. v. NLRB*, 75 F.4th 368 (4th Cir. 2023) (*State Ports*), the Fourth Circuit deferred to the NLRB on questions of law and fact while superficially citing *ILA I* and *II*. Based on this deference, it held that a union's objective was primary as directed at preserving rather than acquiring work.

If the Fourth Circuit had independently interpreted the NLRA under *ILA I* and *II*, rather than deferring to the Board on questions of law and fact, the union's secondary objective and statutory violation would have been readily found.

In the end, *State Ports* was limited to a union enforcing its contract against employers who had contracted with the union: "[T]he union is trying to do so by enforcing its coastwide Containerization Agreement —the Rules on Containers' direct descendant, *see* J.A. 1328 n.9—against employers that breach its terms by choosing hybrid ports for their longshore work." *State Ports* at 382. Also inapplicable to Samson Tug, the *State Ports* case involved containers owned and controlled

by signatory companies: "In *American Trucking*, [734 F.2d 966 (4th Cir. 1984)] we held that shipping companies had the "right to control the container work sought by the longshoremen" because they owned or leased the containers and controlled where they went. 734 F.2d at 978. That holding applies here." *Id*. at 383-384.

In contrast, ILWU never held any contractual relationship with Samson. ILWU applied its coercion to Matson, which never owned nor controlled the cargo which Samson transported.

ILWU is a stranger to Samson, and arrogated to itself a quasi-governmental role by coercing employers in a quest to dominate every employer in its industry without following the only permissible NLRA-sanctioned approach of bottom-up persuasion of employees via election. None of the existing container-modernization-technology precedents sanction such raiding in contradiction of the plain text of the NLRA.

This Fourth Circuit decision is also invalid under *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). *Cf. State Ports* at 378; "'We will also uphold the Board's legal interpretations if they're "rational and consistent with the Act," even if the Board's reading isn't "the best way to read the statute[]"' with *Loper Bright* at 400:

> In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. *Chevron*, 467 U. S., at 843, n. 11, 104 S. Ct. 2778, 81 L. Ed. 2d 694. It therefore makes no sense to speak of a "permissible"

> interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Loper Bright, *supra*, at 400. Had the *State Ports* panel independently adjudicated the primary versus secondary objective question, on facts decided by a jury, the opposite conclusion should have resulted. The Fourth Circuit, and all Circuits, would benefit from the corrective effect of a Supreme Court decision reinforcing the NLRA and the existing *ILA* rule statements.

D. The Sixth Circuit

In *Becker Electric Co. v. International Brotherhood of Electrical Workers, Local Union No. 212*, 927 F.2d 895 (6th Cir. 1991), the Sixth Circuit correctly applied this Court's instruction that the "work" which is either being preserved or acquired is the work done "by them," meaning the defendant union's bargaining unit. Not similar, regional, work in the industry. Where the defendant union's members have not themselves performed the work the union is seeking, the goal is secondary.

> The Supreme Court has stated that work preservation clauses are designed to preserve "for the contracting employees themselves work traditionally done by them." *NLRB v. Enterprise Ass'n of Pipefitters, Local Union No. 638*, 429 U.S. 507, 517, 51 L. Ed. 2d 1, 97 S. Ct. 891 (1977). To determine whether the work preservation clause in the instant case was lawful, the Magistrate applied a two-part test from *NLRB v. Int'l Longshoremen's*

> *Ass'n*, 447 U.S. 490, 100 S. Ct. 2305, 65 L. Ed. 2d 289 (1979) (*ILA I*): (1) the clause "must have as its objective the preservation of work traditionally performed by employees represented by the union", and (2) "the contracting employer must have the power to give the [union] employees the work in question." *Id.* at 504-05.

Becker at 897. Unlike the Ninth Circuit's Memorandum, the Sixth Circuit did not simply substitute fee title to property for the second half of the test:

> The Magistrate found that the work preservation clause stemmed from Local 212's desire to preserve work it had traditionally done which it feared was slipping away to non-union "double-breasts". The clause only addresses efforts by the primary employer to avoid the CBA by performing union jobs through other entities it controls.

Becker at 899. Matson never had a right to control Samson's operations nor employees. They are unrelated companies except for the landlord-tenant relationship. Even that was fortuitous and merely a result of the LASH Corporation selling real property to Matson.

Unlike the Local 212 members in *Becker*, the ILWU members never performed work at Samson's workplace, never lost work to Samson, and ILWU's signatory employers never controlled nor were affiliated with Samson.

The Sixth Circuit, unlike the Ninth, consistently applies both prongs of the *ILA I* and *II* precedent:

> "A secondary boycott . . . is designed to coerce third-party customers or suppliers to withhold business relations from a primary employer. The distinction between primary and secondary activity focuses on intent." *Becker Elec. Co. v. Int'l Bhd. of Elec. Workers*, 927 F.2d 895, 897-98 (6th Cir. 1991) (*per curiam*). Thus, where the principal effect of the provision is to discourage employers from outsourcing work normally performed by employees protected by the agreement, rather than coercing third parties to unionize, for example, Section 8(e) is not violated. "Whether an agreement is a lawful work preservation agreement depends on whether, under all the surrounding circumstances, the Union's objective was preservation of work for bargaining unit employees, or whether the agreement was tactically calculated to satisfy union objectives elsewhere. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *Longshoremen*, 447 U.S. at 504 (quoting *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644-45, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)).

Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24, 323 F.3d 375, 384-385 (6th Cir. 2003). In *Eisenmann Corp*. the construction industry exception and the contractual relationship between the parties dictated an outcome in favor of the union. Neither factor is present in Samson's case.

The examples above demonstrate that this Court's intervention in Samson's case will have calibrating and corrective effects across multiple Circuits beyond the Ninth.

IV. Although Unpublished, the Memorandum Carries Disruptive Weight Throughout the Ninth Circuit

The question may be fairly asked whether an unpublished Memorandum decision is capable of creating a circuit split or is worthy of this Court's limited time.

First, this question itself demonstrates why rulings which fundamentally alter Supreme Court formulations of elements of a defense, and which nullify the NLRA's text, should not be issued unpublished.

Second, even unpublished decisions are read by future litigants and jurists to predict outcomes of their potential appeals. 92.3% of Ninth Circuit Memoranda are unpublished.[1] Consequently, only a foolhardy attorney would ignore them when analyzing their client's likelihood of success.

Memorandum dispositions require oversight to protect the integrity of the Federal System. In *McDonald v. West Branch*, 466 U.S. 284 (1984), this Court granted review of an unpublished opinion where the Sixth Circuit's application of preclusive effect to arbitration jeopardized the plaintiff's due process rights to a jury trial and failed to effectuate a statutory policy. *Id*. at 290. Here, Samson's statutory and Constitutional

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[1] https://www.uscourts.gov/sites/default/files/2025-01/jb_b12_0930.2024.pdf

rights were disregarded because two strangers, ILWU and Matson, had agreed to certain terms. Both levels of judicial review below applied that arbitration and its underlying contract against Samson, despite it never assenting and never participating in the arbitration.

Although unpublished, the Memorandum still carries great weight throughout the Ninth Circuit.

Decisions issued as memoranda opinions require oversight by this Court lest they erode the supremacy of this Court and the functions it provides to the entire Article III system.

Justice Stevens has criticized the Ninth Circuit's prevalence of unpublished opinions which risk erosion of discipline and accountability. *County of Los Angeles v. Kling*, 474 U.S. 936, 938-940 (1985)(Stevens, J., dissenting). Other commentators have summarized the criticisms of unpublished memoranda as (1) creating inconsistency in case outcomes, (2) creating the potential for "stealth jurisprudence," (3) tacitly encouraging "sloppy" analysis, and (4) creating doubt about their validity. Wasby, Stephen L, *Unpublished Court of Appeals Memorandums: A Hard Look at the Process*, SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL, Vol. 14:67 at p.72 (2004).

A panel's contradiction, whether published or unpublished, of prior Ninth Circuit precedent "is terrible for predictability and the rule of law, and should have been considered en banc for this reason alone." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 701 (9th Cir. 2021) (Van Dyke, J., dissenting from denial of en banc review). When that panel decision dispenses with Supreme Court precedent, it creates even more uncertainty.

The April 12, 2006 promulgation of Federal Rule of Appellate Procedure 32.1 eliminated the concern over "secret" memoranda by authorizing the citation of post-2007 unpublished rulings. It buttresses, rather than neutralizes, the reasons why Supreme Court review of memorandum dispositions is warranted. If unpublished appellate memoranda are effectively immune from review, litigants may look to them for stronger clues as to the likely results in their future cases, rather than solely to published opinions. This is because the frequency of unpublished memoranda is far higher, and as the Memorandum below demonstrates, memorandum dispositions do not necessarily apply the binding, published, decisions. If such a trend was unchecked, the published decisions could become the theoretical law of a circuit, while the far higher number of unpublished memoranda actually guide District Courts and litigants.

If all unpublished Ninth Circuit memoranda were excluded from review as a matter of course, 92.3% of Ninth Circuit rulings would be effectively elevated as the supreme law of the circuit, subject only to potential en banc review. Rationales which might prompt the granting of certiorari in a published opinion could be safely applied in a multitude of memoranda.

Applying these considerations to the specific Memorandum here provides additional weight supporting the granting of this petition. Despite the Ninth Circuit Local Rule 36-2 criteria directing that the Memorandum should be published because it modifies multiple rules of federal law and effectively revises a statute, it was not. It is an example of a hybrid creation, containing significant impacts on the

practical state of the law yet likely to remain unreviewed due to its unpublished status.

Additionally, the District Court's decision in this matter was published in the Federal Supplement, 746 F.Supp.3d 701 (D. Alaska 2024). It is lengthy, and contains a multitude of errors modifying this Court's rule statements in direct violation of the statutory design.

CONCLUSION

The Memorandum creates a bypass around the entire Congressional legislative plan. The NLRA was the result of much Congressional toil seeking to end rampant and violent labor relations strife with an appropriate balance of competing interests.

Congress amended the NLRA periodically to adjust the extent of privileges and protections afforded to each category of stakeholder in modern industry. As explained in the precedents above, NLRA sections 8(b)(4) and 8(e) are mandatory in application. Under the new approach reflected in the Memorandum, these prohibitions are now nearly symbolic.

Rather than utilizing the lawful bottom-up organizing allowed by the NLRA, a union can simply replicate ILWU's approach here.

If the statutory prohibition against secondary activity can be sidestepped whenever a signatory landlord exists, the union can simply coerce the landlord into persuading the tenant employer into hiring the intruding union's members. Whether the victim

employer must pay for duplicate workforces or pay time-in-lieu for phantom work as Samson did, is not the union's concern.

Such a result renders the statutory text illusory, and should be corrected by this Court before its effects become any more prevalent.

Samson Tug respectfully requests that the Court grant its petition for certiorari and reinstate the plain text of the NLRA.

Respectfully submitted,

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