No. _____

In the Supreme Court of the United States

PG PUBLISHING CO., INC. D/B/A PITTSBURGH POST-GAZETTE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND NEWSPAPER GUILD OF PITTSBURGH/CWA LOCAL 38061,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Act permits a finding that an employer has bargained in bad faith based solely on the substance of the company's proposals on mandatory subjects of collective bargaining, without evidence of any bad-faith behavior away from the bargaining table.

2. Whether the Third Circuit's "highly deferential" review of the National Labor Relations Board's interpretation of its statutory authority, which conflicts with the decisions of other courts of appeals, violates this Court's holding in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024), that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."

3. Whether the National Labor Relations Board has the statutory or constitutional authority to order an employer to pay consequential damages that employees incur as a result of an unfair labor practice.

PARTIES TO THE PROCEEDING

Petitioner is PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette. It was Petitioner/Cross-Respondent below.

Respondents are the National Labor Relations Board and Newspaper Guild of Pittsburgh/CWA Local 38061. They were Respondent/Cross-Petitioner and Intervenor below, respectively.

CORPORATE DISCLOSURE STATEMENT

Petitioner PG Publishing Co., Inc. is a privately held company. Its parent company is Block Communications, Inc., a privately held company. No publicly held company owns more than 10% of the stock of either PG Publishing Co., Inc. or Block Communications, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *PG Publishing Company d/b/a Pittsburgh Post-Gazette v. National Labor Relations Board*, Nos. 24-2788, 24-3057, 2025 WL 3142083 (3d Cir. Nov. 10, 2025), appended at App. 1a–14a.
- *PG Publishing Company d/b/a Pittsburgh Post-Gazette*, Cases 06-CA-248017, 06-CA-263791, 06-CA-269346, 373 NLRB No. 93 (Sept. 20, 2024), appended at App. 15a–120a.
- *PG Publishing Company d/b/a Pittsburgh Post-Gazette*, Cases 06-CA-248017, 06-CA-263791, 06-CA-269346 (N.L.R.B. Div. Judges Jan. 26, 2023), reproduced in the NLRB order at App. 30a–120a.

This Court previously denied Petitioner's application for a stay of the Third Circuit's temporary injunction in *PG Publishing Co., Inc. v. NLRB*, No. 25A725, 2026 WL 40384 (Jan. 7, 2026). Petitioner is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

It is a bedrock principle of American labor law that the government does not judge the substantive terms of collective bargaining proposals. As long as the process is fair, employers and unions are free to propose—and to agree to or not—whatever terms and conditions of employment they see fit. This principle is enshrined in the text of the National Labor Relations Act (NLRA), which makes clear that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). And for more than 70 years, this Court has enforced the rule that the National Labor Relations Board (NLRB), which is tasked with enforcing the Act, "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 404 (1952).

The decisions below violate that basic principle. Here, the Board determined that petitioner PG Publishing Co., Inc. (the Post-Gazette) engaged in bad-faith bargaining and unfair labor practices during three-and-a-half years of collective bargaining with its newsroom union. It did not identify any misconduct that tainted the bargaining process: no union-busting, no deception, no refusal to meet.

Rather, the Board based its finding solely on its disapproval of the *substance* of the Post-Gazette's bargaining proposals, which were designed to give the newspaper the flexibility it needed to transition to an all-digital format following a period of severe financial losses. Concluding that those proposals would leave the union and its employees with "fewer rights" than provided by law without a contract, it inferred bad faith without any evidence of misconduct away from the bargaining table. And the Third Circuit affirmed that conclusion.

That ruling not only contravenes the statutory text and this Court's guidance; it also conflicts with the bright-line rule adopted by the D.C. and Ninth Circuits. Those circuits hold that while a court may look to the substance of bargaining proposals in determining bad faith, it may not make such a finding based *solely* on a party's bargaining position. Rather, there must be additional evidence of bad-faith behavior beyond the substantive proposals. Especially given the NLRB's increasing reliance on its "fewer rights" theory, this Court should intervene to resolve this division among the courts of appeals.

The Third Circuit compounded its error by expressly applying a "highly deferential" standard of review in affirming the Board's order. Less than two years ago, this Court handed down *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which ended four decades of *Chevron* deference to agency interpretations of their governing statutes. Under *Loper Bright*, a court must use its independent judgment to determine the best reading of ambiguous statutory language, rather than deferring to the agency's interpretation. Most courts of appeals—including the Fourth, Fifth, Sixth, and Tenth Circuits—have straightforwardly applied *Loper Bright* to their review of NLRB orders. But the Third Circuit has previously questioned whether *Loper Bright* applies at all to interpretations by the Board. And with this decision, it has made clear that it intends to continue deferring despite the Court's instruction. That puts the Third Circuit on the short end of another circuit split that deserves the Court's attention.

Finally, the Third Circuit's approval of the Board's award of consequential damages against the Post-Gazette implicates a third circuit split. Three courts of appeals have squarely held, contra the decision here, that such an award is both unauthorized by the NLRA and

constitutionally dubious without a jury trial. The Ninth Circuit is the only other court of appeals to uphold the consequential damages remedy, doing so over vigorous dissents. That decision is the subject of a separate petition for certiorari pending before the Court. This well-developed split provides another reason to grant certiorari here, whether the Court intends to use this case to resolve the split or simply to hold the matter pending a grant in Ninth Circuit petition.

OPINIONS BELOW

The court of appeals' decision below is unreported and is available at 2026 WL 40384. It is reproduced at App. 1a–14a. The order of the NLRB is reported at 373 NLRB No. 93 and reproduced at App. 15a–120a. The Board's order includes the text of the administrative law judge (ALJ)'s decision at App. 30a–120a.

JURISDICTION

The court of appeals entered judgment on November 10, 2025. App. 2a. A timely petition for rehearing was denied on January 14, 2026. App. 121a–122a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions, including selected parts of the NLRA, are reproduced at App. 123a–124a.

STATEMENT OF THE CASE

1. The NLRA prohibits employers and unions from engaging in certain "unfair labor practices"; the NLRB is charged with enforcing that prohibition. 29 U.S.C. §§ 158(a), (b); 160(a). Section 8(d) of the Act imposes mutual obligations on employers and unions to bargain "in good faith" with respect to "wages, hours, and other terms and conditions of employment." *Id.* § 158(d). Although the

Act does not compel agreement, a refusal to bargain collectively constitutes an unfair labor practice. *See id.* § 158(a)(5).

If the agency receives a credible complaint, it can initiate "adjudicatory proceedings within the agency, first before an administrative law judge, and then before the Board itself." *Starbucks Corp. v. McKinney*, 602 U.S. 339, 343 (2024). The Board cannot independently enforce its own orders. Rather, "[a] federal court of appeals may review the Board's final order, if an aggrieved party seeks judicial review or if the Board seeks enforcement of its order." *Ibid.* (citations omitted).

2. This case arises from an order of the NLRB finding that the Post-Gazette engaged in unfair labor practices in bargaining with Respondent Newspaper Guild of Pittsburgh/CWA Local 38061 (the Guild), which represents employees in the editorial department of the Post-Gazette's newsroom.

Petitioner publishes the *Pittsburgh Post-Gazette*, a venerable Pittsburgh institution with roots that reach back to our nation's founding. Its predecessor, the *Pittsburgh Gazette*, printed its first issue on July 29, 1786—America's first newspaper published west of the Alleghanies. The newspaper has won multiple Pulitzer Prizes and has served its community with exemplary journalism. But labor unrest has roiled the paper, and the current media climate—including a nationwide shift to digital platforms—placed its continued viability at risk.

When the previous collective bargaining agreement between the Post-Gazette and the Guild expired in 2017, the parties began bargaining for a successor agreement. Those negotiations spanned three-and-a-half years and 24 bargaining sessions. App. 70a n.21, 76a. From the outset, the Post-Gazette made clear that the newspaper had been

operating at a substantial loss and needed flexibility to transition to an all-digital format. App. 36a, 56–57a. Given the sharp decline in demand for print media—from 2005 to 2021, about 2,200 American local print newspapers were shuttered[1]—the Post-Gazette believed that this transformation was the only way it could viably continue to provide journalism to the community.

By the summer of 2020, bargaining was deadlocked. That March, the Guild had canceled a scheduled bargaining session and indicated that it would not schedule any future meetings until the coronavirus pandemic had been completely arrested. App. 5a, 61a–62a. In July 2020, the Post-Gazette concluded that the parties were at a lawful impasse and, on July 27, implemented portions of its last, best, and final bargaining proposal. App. 5a, 65a–67a. That included implementing new rules for subcontracting work to stringer correspondents, additional control over work hours, and moving the Guild-represented employees from a separately administered health insurance plan to the company's own self-insured plan, which already covered the Post-Gazette's non-union employees and newspaper employees in other bargaining units represented by different unions. App. 68a–70a.

3. In April 2022, the NLRB filed an administrative complaint alleging, among other things, that the Post-Gazette bargained in bad faith by "insisting upon proposals that are predictably unacceptable to the Union," prematurely declaring impasse, and unilaterally implementing some of its bargaining proposals. CA3 Dkt. 33-1 at JA0166–81.

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[1] *See* Margaret Sullivan, *What Happens to Democracy When Local Journalism Dries Up?* Wash. Post Magazine (Nov. 30, 2021), https://www.washingtonpost.com/magazine/2021/11/30/margaret-sullivan-the-local-news-crisis/.

The ALJ concluded that the Post-Gazette had engaged in bad faith bargaining because it had "prematurely declared impasse and made a combination of contract proposals in its final offer that demonstrate an intent to frustrate arriving at an agreement." App. 84a. Specifically, he determined that an "inference of bad faith" was appropriate because the Post-Gazette's "proposals, taken a whole, would leave the union and the employees it represents with substantially fewer rights than provided by law without a contract." App. 82a. That determination rested entirely on the *substance* of the Post-Gazette's bargaining proposals; the ALJ did not identify any independent conduct by the paper that evidenced bad faith. App. 84a.

The ALJ ordered the Post-Gazette to restore the terms and conditions of employment set forth in the Guild's expired CBA and to provide backpay (including withheld contractual benefits) to the Guild employees. App. 97a. Citing the Board's holding in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the ALJ also ordered the newspaper to "compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes." App. 100a.

The Board affirmed the ALJ's decision. It concluded that the Post-Gazette had engaged in unfair labor practices because it had prematurely declared impasse and because its bargaining position "insisted on provisions . . . that left the Union with fewer rights and less protection than provided by law without a contract." App. 20a.

4. The Post-Gazette petitioned the Third Circuit for review. The court of appeals, applying a "highly deferential" standard of review to the Board's order, affirmed the agency's ruling that the Post-Gazette had violated the NLRA by prematurely declaring impasse and by failing to bargain in good faith. App. 7a. Specifically, the panel

determined the Post-Gazette violated the Act because the Company's bargaining proposals would have left the Guild employees with "fewer rights than the law would provide them without a contract." App. 8a–9a. The court concluded that the newspaper's proposals as to wages, subcontracting, healthcare, and related topics taken "*as a whole* would have required the Guild to cede to PG Publishing the most fundamental of employment terms." *Ibid.* (emphasis in original). The Third Circuit did not identify any bad-faith conduct by the Post Gazette apart from the substance of its bargaining proposals. The panel also rejected the Post-Gazette's argument that recent binding Third Circuit precedent precluded the *Thryv* consequential damages remedy, concluding that it lacked jurisdiction to consider the argument because the Post-Gazette had failed to raise it adequately before the Board. App. 12a–13a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Holding that a Court May Find Bad Faith Based Solely on the Substance of a Party's Bargaining Proposals Conflicts with the NLRA's Text, this Court's Interpretation, and D.C. and Ninth Circuit Precedent.

The Third Circuit's decision, like the Board's ruling before it, concluded that the Post-Gazette bargained in bad faith based solely on the substance of the company's bargaining proposals on mandatory subjects of bargaining.[2] That holding is inconsistent with the language and

[2] In collective bargaining under the NRLA, there are three categories of bargaining subjects: mandatory, nonmandatory, and illegal. The collective bargaining obligations that the NLRA imposes on employers and unions—including the duty to bargain in good faith—apply only to mandatory subjects of bargaining. *See* 29 U.S.C. § 158(a)(5), (b)(3), (d). The bargaining proposals at issue in this case all concerned the mandatory subjects of "wages, hours, and other terms and

policy of the NLRA, with this Court's precedent, and with the D.C. and Ninth Circuit's long-standing rule that an "employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence." *Cincinnati Newspaper Guild, Loc. 9 v. NLRB*, 938 F.2d 284, 289 (D.C. Cir. 1991); *see also NLRB v. Pac. Grinding Wheel Co.*, 572 F.2d 1343, 1349 (9th Cir. 1978).

1. The decisions below based their findings of bad-faith bargaining wholly on the Post-Gazette's substantive bargaining positions.

Based on an extensive evidentiary record, the ALJ found that the Post-Gazette had fully explained the reasons for its proposals. App. 76a. And he failed to identify any behavior by the Post-Gazette away from the bargaining table that would evidence bad faith. App. 84a.

Rather, the ALJ expressly based his finding of bad faith entirely on the *substance* of the Post-Gazette's bargaining proposals on mandatory subjects of bargaining. Specifically, he cited a set of proposals designed to enable the Post-Gazette to transition to all-digital publication by: (1) allowing it to subcontract or reassign bargaining unit work to employees outside the bargaining unit, including by receiving news content from outside sources; (2) granting it additional discretion over employees' work hours; (3) moving covered employees from a separately-administered health insurance plan to the company's self-insured plan, which already covered the paper's non-union employees and employees represented by unions in other bargaining units; and (4) permitting it to consider factors other than seniority in future layoffs. App 80a–81a. The

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conditions of employment." 29 U.S.C. § 158(d). *See generally NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348–49 (1958).

ALJ concluded that "[a]n inference of bad faith is appropriate" because the Post-Gazette's proposals, "taken [as] a whole, would leave the union . . . with substantially fewer rights than provided by law without a contract." App. 82a.

The Board's opinion affirming the ALJ similarly relied solely on the newspaper's bargaining proposals, holding that the Post-Gazette violated the NRLA because it "insisted on provisions that left the Union with fewer rights and less protection than provided by law without a contract." App. 20a.

The Third Circuit panel essentially adopted the agency's analysis, concluding that "[w]here the employer's proposals leave the union members with substantially fewer rights than the law would provide them without a contract, an inference of bad faith may be appropriate." App. 8a. And it found bad faith in this case based solely on the fact that the Post-Gazette's "proposals *as a whole* would have required the Guild to cede to [the Post-Gazette] the most fundamental of employment terms." App. 8a–9a. (emphasis in original). Like the Board, the court of appeals identified no conduct away from the bargaining table that suggested bad faith.

This faulty reasoning also infected the Third Circuit's holding that the Post-Gazette improperly declared impasse. App. 9a–11a. As the panel acknowledged, the Board "leaned heavily on [the Post-Gazette's] bad faith" in bargaining in "finding impasse was prematurely declared"—even though "other factors (such as the length of negotiations and the fact that the parties' disagreement concerned the most important issues)" weighed against the Board's finding of improper impasse. App. 11a. The Third Circuit compounded this problem by itself "according special weight" to the Post-Gazette's purported bad faith,

based solely on the substance of its bargaining proposals, in affirming the finding of premature impasse. *Ibid.*

2. The Third Circuit's singular reliance on the substance of the Post-Gazette's bargaining proposals runs counter to both the language and policy of the NLRA and this Court's long-standing precedent.

"The NLRA is about process and process alone. It creates a sphere of bargaining—in which both sides have a mutual obligation to deal fairly—without expressing any preference as to the substantive agreements the parties should reach." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 491 (2015). Because the "Board should not pass upon the desirability of the substantive terms of labor arrangements," the Board may not conclude that any particular proposal is, "*per se*, an unfair labor practice." *Am. Nat'l Ins. Co.*, 343 U.S. at 408–09.

Specifically, Section 8(d) of the NLRA makes clear that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Congress added this language to the NLRA by the Taft-Hartley Act of 1947 in "an attempt . . . to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 487 (1960). As this Court explained:

> The object of [the] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . [A]greement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own view of a desirable settlement.

H. K. Porter Co. v. NLRB, 397 U.S. 99, 103–04 (1970); *see also*, *e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984) (policy of the NLRA "is to protect the process of labor negotiations, not to impose particular results on the parties"); *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 219 (1979) (noting that Section 8(d) "ma[de] crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement"); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 287 (1972) ("This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will."); *Am. Nat. Ins.*, 343 U.S. at 404 ("the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements").

The purpose of Section 8(d) will be defeated if the Board can find a violation of the Act based solely on the substance of a party's bargaining position. That would be regulating the terms and conditions of employment. As one court of appeals put it: "In finding a violation of the obligation to bargain in good faith based exclusively on contract proposals the Board is in effect doing that which it is prohibited from doing: sitting in judgment upon the substantive terms of a proposed collective bargaining agreement." *Seattle-First Nat. Bank v. NLRB*, 638 F.2d 1221, 1227 (9th Cir. 1981).

That is precisely what the Board—and the Third Circuit—did here. They looked solely at the substance of the Post-Gazette's proposals on mandatory subjects of bargaining and judged them insufficiently protective of the Guild-represented employees. The NLRA properly assigns that power to the participants in collective bargaining, not to the government.

3. The Third Circuit's holding is not only inconsistent with the language and purpose of Section 8(d) and this Court's guidance. It also specifically conflicts with the long-standing rule adopted by the D.C. and Ninth Circuits that, while a court may consider the substance of bargaining proposals in determining bad faith, it may not make such a finding based *solely* on a party's bargaining position. Rather, it must point to "additional evidence" of bad-faith behavior away from the bargaining table.

The D.C. Circuit has emphasized its "repeated teaching" that "an employer's bargaining position is not itself bad faith but only evidence of bad faith, so that a finding of bad faith bargaining must be bolstered by additional evidence." *Cincinnati Newspaper Guild*, 938 F.2d at 289; *see also*, *e.g.*, *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1164 (D.C. Cir. 1992) ("the Board may not find a bad-faith refusal to agree solely by looking to the employer's bargaining position"); *Teamsters Local Union No. 515 v. NLRB,* 906 F.2d 719, 727 (D.C. Cir. 1990) ("Adamant insistence on a bargaining position . . . is not itself a refusal to bargain in good faith."). Relying on this Court's guidance in *American National* and *H. K. Porter*, the D.C. Circuit concluded that the NLRA "precludes almost any argument that a particular bargaining position constitutes an unfair labor practice per se." *Cincinnati Newspaper Guild*, 938 F.2d at 288.

The Ninth Circuit has similarly concluded that "while the bargaining position may provide evidence of bad faith, there must be additional substantial evidence to support the finding." *K-Mart Corp. v. NLRB*, 626 F.2d 704, 706 (9th Cir. 1980); *see also*, *e.g.*, *Seattle-First Nat.*, 638 F.2d at 1226 ("While this court has sanctioned the Board's consideration of the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract, inferences drawn

from those proposals are not alone sufficient to support a finding of a violation of the obligation to bargain in good faith.") (citation omitted); *Pac. Grinding Wheel*, 572 F.2d at 1349 ("[W]e can consider the regressive nature of the wage proposals made by the company and the dropping of existing terms favorable to the union. However, there must be additional evidence before we can accept the Board's inference that the company failed to bargain in good faith."); *Overstreet ex rel. NLRB v. W. Pro. Hockey League, Inc.*, No. CV090591PHXROS, 2009 WL 2905554, at *3 (D. Ariz. Sept. 4, 2009) ("While the content of bargaining proposals may infer bad faith, such evidence, without more, is insufficient to sustain a finding of bad faith.").

This case presents a straightforward circuit split on a central issue of labor law that this Court should resolve. The Third Circuit held that the Board may infer bad faith solely from the substance of an employer's bargaining positions, at least when those positions would leave union members with fewer rights than they would have by law without a contract or when the proposals would cede to the employer the "most fundamental" bargaining terms. App. 9a. The D.C. and Ninth Circuits, in contrast, recognize that an employer's bargaining position may be *relevant* to the question of bad faith, but cannot establish bad faith *by itself*; something more is needed. Reversing the Third Circuit's overreach and adopting the bright-line rule applied by the D.C. and Ninth Circuits would protect against a court "impos[ing] its own view" of the appropriate terms and conditions of employment. *H. K. Porter*, 397 U.S. at 104.

4. Contrary to the suggestion of the court below, the Post-Gazette does not seek "to create a rule that the substance of the employer's proposals can never evince bad faith bargaining." App. 9a. Quite the opposite: We agree that a party's proposals can be *relevant evidence* of bad

faith when considered as one piece of the totality of the circumstances, as most courts recognize. But they cannot, contra the Third Circuit's holding, be *sufficient evidence* of bad faith with nothing more.

Lower courts—including those in the D.C. and Ninth Circuits—regularly look to the content of bargaining proposals as one factor among many in evaluating good faith.[3] And, in recent years, the Board has increasingly inferred bad faith from the substance of bargaining proposals, particularly where (as it found here) the proposal leaves union members with "fewer rights and less protection than provided by law without a contract." *See*, *e.g.*, *District Hosp. Partners, L.P.*, 373 NLRB No. 55, at 7 (2024); *Altura Comm'ns Sols., LLC*, 369 NLRB No. 85, at 7 (2020). But even in those cases, lower courts and the Board have not relied *solely* on the substance of the employer's bargaining proposals, as the Third Circuit did here. That dubious innovation—which the Board is likely to press in other cases, given its success below—represents a break from this Court's precedent and that of its sister circuits.

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[3] *See*, *e.g.*, *Altura Commc'n Sols., LLC v. NLRB*, 848 F. App'x 344, 345 (9th Cir. 2021) ("The NLRB properly considered the totality of the parties' conduct, including, but not limited to, the contract proposals."); *Carey Salt Co. v. NLRB*, 736 F.3d 405, 412 (5th Cir. 2013) ("To assess the Board's finding of a lack of good faith, we must 'examine the totality of the employer's conduct, both at and away from the bargaining table.' "); *Pub. Serv. Co. of Okla. v. NLRB*, 318 F.3d 1173, 1177 (10th Cir. 2003) ("in determining good faith, the Board should examine the totality of the circumstances, including the substantive terms of proposals"); *see also 10 Roads Express*, 372 NLRB No. 105, at 3–4 (2023) ("To determine whether a party has violated its duty to bargain in good faith, the Board 'looks to the totality of the circumstances in which the bargaining took place.' Based on those circumstances, it must be decided whether the employer engaged in hard but lawful bargaining or crossed the line and unlawfully frustrated the possibility of arriving at any agreement.") (citation omitted).

For example, the Third Circuit cited the D.C. Circuit's recent opinion in the *District Hospital* enforcement action to support its conclusion that "[w]here the employer's proposals leave the union members with substantially fewer rights than the law would provide them without a contract, an inference of bad faith may be appropriate." App. 8a. (citing *District Hosp. Partners, L.P. v. NLRB*, 141 F.4th 1279 (D.C. Cir. 2025)). But *District Hospital*, in keeping with the D.C. Circuit's rule, did not find bad faith solely based on the content of the employer's bargaining proposals. It also found (1) that there was evidence of bad faith away from the bargaining table, and (2) that the proposals at issue were designed to undermine the union's representational capacity. Specifically, the employer "withdrew recognition from the Union via email, canceled all scheduled bargaining sessions, and informed employees that they would now be part of a 'non-union team.'" *District Hosp.*, 141 F.4th at 1287. Further, the employer proposed eliminating grievance arbitration—a condition that would have directly undermined the union's ability to represent its members. *Id.* at 1288. In contrast, the Post-Gazette's proposals concerned only operational needs and there are no allegations that it engaged in bad faith behavior away from the bargaining table.[4]

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[4] The other cases cited by the Third Circuit, App. 8a, are similarly inapposite. In both *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1103 (1st Cir. 1981), and *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990), the courts held that the employers *had* bargained in good faith, emphasizing that "[a]damant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith." (each quoting *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1072 (5th Cir. 1971)). And other cases which have considered the substance of bargaining proposals as part of the totality of the evidence involved conduct away from the bargaining table that supported a finding of bad-faith bargaining. *See*, *e.g.*, *Pub. Serv. Co. of Okla.*, 318 F.3d at 1177

5. Because the Board's and the Third Circuit's bad-faith findings involve no allegations of misconduct away from the bargaining table and rest solely on the substance of the newspaper's bargaining proposals, this case provides a prime opportunity for the Court to resolve the circuit split and to reaffirm that the NLRA does not permit government intervention to regulate of the terms and conditions of employment, as the NLRB and the Third Circuit did here.

This Court's intervention is especially necessary given the Board's increasing reliance on the "fewer rights" theory and its stated policy of refusing to follow adverse precedent from the courts of appeals. *See D.L. Baker, Inc.*, 351 NLRB 515, 529 n.42 (2007) ("The Board generally applies its 'nonacquiescence policy' . . . and instructs its

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n.3 (finding evidence of bad faith bargaining based on employer's proposals and "an e-mail to its employees during the bargaining period aimed at obtaining a 'decertification election to remove the Union as collective-bargaining representative.' "); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 995 (9th Cir. 1992) (same based on the employer's refusal to compromise "and the unwillingness to schedule long or frequent meetings"); *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609–10 (7th Cir. 1979) (same based on employer's refusal to provide to provide rationale for its bargaining proposals or to make any economic proposals); *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48–50 (2d Cir. 1974) (same based on employer's regressive bargaining proposals, unilateral transfer of employees, unilateral increases in pay, and demands that union agree to not organize other employees); *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972) (same based on employer's refusal to sign a contract after the union accepted all its proposals and demand for a seven-day contract); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134–37 (1st Cir. 1953) (same based on employer failing to provide rationale for its proposals, delaying bargaining, and publicly blaming the Board for refusing to give wage increases); *Altura*, 369 NLRB No. 85, at 6, 43 (same based on employer's refusal to meet at reasonable times and insistence on arbitration provision that stripped the union of its ability to challenge potential violations of the collective bargaining agreement).

administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court."). Without uniform guidance from this Court, even employers in circuits that require additional evidence may be forced—as the Post-Gazette was here—to defend themselves in multi-year NLRB proceedings triggered by the Board's impermissible view of their bargaining proposals.

II. The Third Circuit's Deference to the Board Conflicts with this Court's Holding in *Loper Bright* and with the Approach of Other Circuits.

The Third Circuit's erroneous holding that the Post-Gazette bargained in bad faith based solely on the substance of the company's bargaining proposals is exacerbated by the fact that, in reaching that determination, the panel disregarded the sea change in judicial review of agency action brought by this Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). In *Loper Bright*, the Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and jettisoned *Chevron*'s standard that a court must uphold an agency's interpretation of ambiguous statutory language as long as it is "reasonable." Instead, it instructed courts to use their "independent judgment" to determine the "best reading of the statute" using "all relevant interpretive tools." *Loper Bright*, 603 U.S. at 394, 400. By abandoning independent statutory interpretation in favor of deference to the Board, the court below contravened *Loper Bright* and deepened a growing circuit split as to whether the command of "independent judgment" applies to interpretations by the NLRB.

1. In *Loper Bright*, the Court held that:

> Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help form that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because the statute is ambiguous.

603 U.S. at 412–13.

The Third Circuit failed to cite *Loper Bright* and entirely disregarded its instruction. It began its legal analysis by emphasizing that its "review of orders of the Board is highly deferential." App. 7a (quoting *Trimm Assocs., Inc. v. NLRB*, 351 F.3d 99, 102 (3d Cir. 2003)).[5] And it deferred to the Board's statutory interpretation and

[5] The panel opinion also includes a boilerplate statement that it "exercise[s] plenary review over questions of law and the Board's application of legal precepts." App. 7a (quoting *Spectacor Mgmt. Grp. v. NLRB*, 320 F.3d 385, 390 (3d Cir. 2003)). But a review of its authority makes clear that the panel was not embracing *Loper Bright*-style independent judgment. Indeed, the very next sentence in *Spectacor Management*, on which the panel relied, states that "[f]or the Board to prevail, 'it need not show its construction is the *best* way to read the statute;' rather we must respect the Board's judgment as long as it is reasonable." 320 F.3d at 390 (quoting *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 409 (1996) (emphasis in original). That is a reiteration of the overruled *Chevron* standard, and precisely the opposite of the Court's now-controlling instruction in *Loper Bright. Cf. Holly Farms*, 517 U.S. at 413 (O'Connor, J., dissenting) (criticizing majority for applying "*Chevron* deference . . . to a Board construction of the statute that effectively redacts one of the statute's operative clauses").

precedent without using its independent judgment to determine the best reading of the NLRA using the traditional tools of statutory interpretation—essentially adopting the Board's position on, among other things, the proper standard for determining if an employer is bargaining in good faith under Section 8 of the Act. *See* App. 8a–9a.

As discussed above, the text of Section 8(d) expressly provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Had the Third Circuit faithfully applied this Court's direction on statutory interpretation, it would have recognized that the substance of the Post-Gazette's bargaining proposals, standing alone, could not support the finding of bad faith.

2. The Third Circuit's failure to apply *Loper Bright* to the Board's interpretation of the NLRA also implicates a circuit split that has sowed confusion among the courts of appeals.

A year before its decision in this case, the Third Circuit noted this confusion when it considered whether an employer's unilateral decision to end "hazard pay" that it had paid out during the COVID-19 pandemic was a mandatory subject of bargaining. *Alaris Health at Boulevard East v. NLRB*, 123 F.4th 107, 120–23 (3d Cir. 2024). In agreeing with the Board's conclusion that it was a mandatory subject, the court opined that it was "somewhat of an open question" as to whether the traditional deference it afforded the Board's interpretation of the NLRA "survive[d]" the decision in *Loper Bright*. *Id.* at 120–21. The court posited that "[i]t would appear to us . . . that judicial deference to the Board's classifications of the 'terms and conditions of employment' under the [NLRA] is distinct from *Chevron* deference, as the Supreme Court's decisions

developing that deference to the Board predate *Chevron*." *Ibid.*

Ultimately, the *Alaris* court "[did] not decide whether deference to the Board's designation of mandatory bargaining subjects under [the NLRA] survives the Supreme Court's rejection of *Chevron*," reasoning that "[e]ven on *de novo* review," it would "reach the same conclusion as the Board." *Id.* at 121. *See also Miller Plastic Prods. Inc v. NLRB*, 141 F.4th 492, 503 (3d Cir. 2025) (noting that "*Loper Bright* did not necessarily displace our earlier precedents merely because they were guided by *Chevron*," but declining to decide the question).

Other circuits have straightforwardly applied *Loper Bright's* "no deference" standard to the Board's interpretation of the NLRA. The Sixth Circuit concluded that "[w]e do not defer to the NLRB's interpretation of the NLRA but exercise independent judgment in deciding whether an agency acted within its statutory authority." *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 528 (6th Cir. 2024) (citations omitted). Similarly, the Fifth Circuit held that "we do not simply defer to an agency's interpretation of 'ambiguous' provisions of their enabling acts," but rather "use traditional tools of statutory interpretation." *Hudson Inst. of Process Rsch. Inc. v. NLRB*, 117 F.4th 692, 700 (5th Cir. 2024) (citations omitted). The Tenth Circuit concluded that after *Loper Bright,* "deference is no longer owed to "the Board's interpretation of the NLRA." *3484, Inc. v. NLRB*, 137 F.4th 1093, 1103–04 (10th Cir. 2025). And the Fourth Circuit confirmed that because "the *interpretation* of a statute like the NLRA is 'exclusively a judicial function,'" it "afford[s] the NLRB's interpretation deference only to the extent that the agency's opinion has the 'power to persuade.'" *Garten Trucking LC v. NLRB*,

139 F.4th 269, 276 (4th Cir. 2025) (emphasis in original; citation omitted).[6]

On the other side, the D.C. Circuit, in a decision handed down shortly after *Loper Bright*, continued to hold that it would "review Board decisions with a 'very high degree of deference,' " setting them aside only when the Board "departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence." *Hosp. de la Concepcion v. NLRB*, 106 F.4th 69, 76 (D.C. Cir. 2024) (citations omitted); *see also District Hosp.*, 141 F.4th at 1289 (declining to address employer's argument that *Loper Bright* prohibited deference to Board's "construction of the duty to bargain in 'good-faith' imposed by the NLRA" because employer had raised argument "only vaguely").

With the decision below, the Third Circuit appears to have joined the short end of this lopsided split. Given the division among the courts of appeals, as well as the confusion expressed in cases like *Alaris* and *Miller*, this case offers a vehicle for the Court to resolve the split and to confirm that *Loper Bright's* no-deference standard applies to the NLRB.

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[6] The Fifth and Tenth Circuits further opined that *Loper Bright* did not "call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." *3484, Inc.*, 137 F.4th at 1104 (quoting *Loper Bright*, 603 U.S. at 412); *see also Hudson*, 117 F.4th at 700.

III. The Panel Below's Affirmance of the NLRB's Award of Consequential Damages Puts It on the Wrong Side of a Well-Developed Circuit Split.

The decision below implicates an additional circuit split worth of the Court's attention: Whether the NLRB may award consequential damages for "foreseeable pecuniary harms" traceable to an unfair labor practice.

1. The Board's order, which the Third Circuit affirmed, ordered the Post-Gazette to "compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes" in their terms of employment. App. 23a. The award followed the Board's announcement in *Thryv, Inc.*, that "that in all cases in which our standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice" 372 NLRB No. 22, at 6 (2022), *review granted and vacated in part*, 102 F.4th 727 (5th Cir. 2024) (emphasis in original). That relief, the Board held, included such things as "interest and late fees on credit cards," "penalties if [an employee] must make early withdrawals from [a] retirement account," "increased . . . childcare costs," and "other costs [incurred] to make ends meet." 372 NLRB No. 22, at 9, 15.

The announcement of the so-called *Thryv* remedy broke with 90 years of the agency's practice. Before *Thryv*, it had always been understood that the Board's remedies were limited to equitable relief, not legal damages. And for good reason: The NLRA authorizes the Board, on finding a violation, to "issue . . . an order requiring [the employer] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of [the Act]"—all classical equitable remedies. 29 U.S.C. §160(c). Consequential damages, in contrast, are a legal remedy, and therefore outside of the Board's statutory authority. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) ("Money damages are, of course, the classic form of *legal* relief.") (emphasis in original).

The *Thryv* remedy also raises serious constitutional questions. As this Court recently confirmed, the Seventh Amendment requires a jury trial before an agency may award money damages for statutory claims that are "legal in nature." *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024) (holding that SEC's claim for civil monetary penalties triggered Seventh Amendment right to jury trial). And consequential damages—as opposed to restitution or backpay—are legal, not equitable, in nature. If the Board wants to recover money damages, then the Post-Gazette was entitled to a jury trial.

2. Impelled by these concerns, courts of appeals in three circuits have struck down the *Thryv* remedy. Each of those cases involved the same formulation of damages for "direct or foreseeable pecuniary harms" at issue here. In *Hiran Management, Inc. v. NLRB*, 157 F.4th 719 (5th Cir. 2025), the Fifth Circuit reasoned that the NRLA "limits the NLRB to ordering certain equitable remedies," while the "[t]he articulation of 'foreseeable pecuniary harms' in *Thryv* is a form of legal damages." *Id.* at 725, 728. The court therefore concluded that "the *Thryv* remedy goes beyond the text of the NLRA" and "exceeds the NLRB's authority." *Id.* at 728, 729.

The Sixth Circuit, in a lengthy and well-reasoned opinion, likewise concluded that the plain language of the Act "limit[s] the realm of possible remedies to those primarily equitable in nature." *NLRB v. Starbucks Corp.*, 159

F.4th 455, 469 (6th Cir. 2025). The *Thryv* remedy, in contrast, "reflects legal relief amounting to money damages, to which a jury trial right attaches." *Id.* at 474. Because the *Thryv* remedy "lack[ed] statutory authority and raise[d] serious constitutional questions," the court of appeals vacated the Board's award of consequential money damages. *Id.* at 482.

Finally, the Third Circuit—in a decision handed down after this appeal was filed but before the panel issued its merits decision—agreed that "[t]he NLRA . . . limits the Board's remedial authority to equitable, not legal, relief." *NLRB v. Starbucks Corp.*, 125 F.4th 78, 95 (3d Cir. 2024).[7] And it held that the Board's grant of "broad compensatory relief" pursuant to the *Thryv* remedy "exceeds its authority under the NLRA." *Id.* at 97.

The Ninth Circuit stands alone on the other side of the split. In *International Union of Operating Engineers, Stationary Engineers, Local 39 v. NLRB*, 155 F.4th 1023 (9th Cir. 2025), a divided panel concluded that "*Thryv*'s make-whole framework is valid when the remedies are equitable and 'only actual losses [are] made good.' " *Id.* at 1046 (alteration in original). It therefore upheld the Board's award of consequential damages, at least insofar as it was "sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Ibid.* (emphasis in original; citation omitted).

In dissent, Judge Bumatay argued that "foreseeable or consequential damages are fundamentally at odds with

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[7] The panel below declined to follow *Starbucks* based on its finding that the Post-Gazette waived its remedial argument by not properly raising it before the Board. App. 12a–13a. As discussed below, that finding was plainly incorrect and, in any case, is no barrier to the review sought here.

'equitable relief.'" *Id.* at 1056 (Bumatay, J., dissenting) (citation omitted). And he charged that the majority opinion, by "slapping [on] the label that . . . foreseeable damages [must] be 'equitable,'" had "le[ft] the Board with a wide array of costs it may impose under *Thryv*" that would violate the NLRA and implicate the Seventh Amendment. *Ibid.* Six judges dissented from the Ninth Circuit's denial of en banc review. The dissenters, noting that the panel's decision "conflicts with every other circuit court and judge to have considered this question," would have held that the *Thryv* remedy was "unauthorized by statute and forbidden by the Seventh Amendment." *Id.* at 1072 (Nelson, J., dissenting from denial of rehearing en banc).

The lawfulness of the *Thryv* remedy thus presents a clear and well-developed—if lopsided—circuit split that deserves resolution by this Court. A prompt resolution is especially necessary given that the Board has stated its intention to continue to apply *Thryv* even in the face of adverse rulings from the courts of appeals.[8] Indeed, the Ninth Circuit's decision is itself the subject of a pending petition for certiorari. *Macy's, Inc. v. NLRB*, No. 25-627 (filed Nov. 26, 2025). In light of the plain language of the NLRA, the constitutional concern that the *Thryv* remedy violates the Seventh Amendment's jury-trial guarantee, and the weight and persuasiveness of the circuit court authority, the Court should grant certiorari here—whether it intends to use this case as a vehicle to resolve the split, or simply to hold the matter pending a grant in another case presenting this question.

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[8] *See Airgas, USA, LLC*, 373 NLRB No. 102, at 1 n.2 (2024) (noting that the "the Board's decision [in *Thryv*] would remain valid Board precedent under the Board's long-established policy of nonacquiescence in adverse appellate court decisions").

3. The Post-Gazette acknowledges that the Third Circuit panel declined to reach the merits of its argument on the *Thryv* remedy—despite recent, binding circuit precedent foreclosing that remedy—and instead held that the paper had forfeited the argument by not raising it before the Board. App. 12a–13a. The panel concluded that it "lack[ed] jurisdiction under Section 10(e) of the Act to disturb this part of the Order." App. 12a.[9] That finding, which was plainly incorrect, should not weigh against granting the review sought here.

The Board entered its order directing the payment of consequential damages on September 20, 2024. Three months later, as discussed above, the Third Circuit issued its decision in *Starbucks*, holding that such a remedy was

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[9] More than four decades ago, this Court described Section 10(e)'s administrative exhaustion requirement as jurisdictional. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). Because *Woelke* is binding precedent, no circuit split has developed regarding its continued vitality. But a growing "chorus of courts" has recently commented on "the doubt surrounding [Section 10(e)'s] jurisdictional effect in light of recent Supreme Court precedent." *NLRB v. All-Service Plumbing & Maint., Inc.*, 138 F.4th 889, 898–99 n.3 (5th Cir. 2025). *See ibid.* ("The Supreme Court has instructed us . . . to read some of its older jurisdictional precedents to instead embrace claims-processing rules."); *Sysco Grand Rapids, LLC v. NLRB*, 825 F. App'x 348, 356–57 (6th Cir. 2020) ("The Supreme Court . . . has repeatedly warned us to disregard drive-by jurisdictional rulings that use the label without discussion. . . . *Woelke* appears to be such a drive-by.") (cleaned up; citation omitted); *Quickway Transp., Inc. v. NRLB*, 117 F.4th 789, 825 (6th Cir. 2024) (Murphy, J., concurring in the judgment) ("I would not read the exhaustion mandate as jurisdictional."); *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 299 (3d Cir. 2024) (Krause, J., concurring) ("it is not clear that Section 10(e)'s exhaustion requirement is properly considered jurisdictional at all"); *see also Trader Joe's Co. v. NLRB*, 167 F.4th 766, 803 (5th Cir. 2026) (Oldham, J., dissenting) ("*Woelke* does not dictate whether § 10(e)'s exhaustion requirement is jurisdictional."). If the Court is inclined to reconsider *Woelke*, this case offers a vehicle.

outside the Board's statutory authority. 125 F.4th at 95. That decision was binding on the Third Circuit panel in this case, which was pending when *Starbucks* was handed down. In its opening brief before the merits panel, the Post-Gazette, relying on *Starbucks*, argued that the Board lacked the authority to issue a *Thryv* remedy. CA3 Dkt. 32, at 41–42. The panel, however, refused to follow *Starbucks*. Rather, it found that the Post Gazette had waived the argument because it had "failed to place the Board on adequate notice of the basis for its objection to the so-called *Thryv* remedy." App. 13a.

That finding was incorrect. As the panel acknowledged, App. 13a, the Post-Gazette did object to the application of the *Thryv* remedy in its statement of exceptions to the ALJ's decision, which it filed with the Board on March 23, 2023:

> Exception 293. To the ALJ's remedy consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), that Respondent shall also compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes. . . .

CA3 Dkt. 34, at APPX0213. That was enough to put the Board on notice of the Post-Gazette's objection under Section 10(e), which simply provides that "no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e); *see also New Concepts*, 94 F.4th at 280 ("A matter which is 'included in exceptions . . .' is thereby preserved.") (citing 29 C.F.R. § 102.46(f)).

As the Fifth Circuit explained—in the very decision that denied (on other grounds) the Board's petition to

enforce its original *Thryv* order—Section 10(e) "does not require employers to put an issue before the Board with pristine clarity" in order to preserve it for appellate review. *Thryv, Inc. v. NLRB*, 102 F.4th 727, 746 (5th Cir. 2024); *see also AllService Plumbing*, 138 F.4th at 897–98 ("Appellants need not conjure any 'magic words' to raise an issue, but simply need to launch the appropriate argument.") (citation omitted). Thus, a general objection to "the ALJ's Remedy" has been held sufficient to preserve an argument that specific remedial relief was improper. *Sysco,* 825 F. App'x at 357–58.

Finally, even if the Post-Gazette failed to provide sufficient notice of its *Thryv* objection, that should not preclude appellate review. The NLRA expressly allows such a failure to "be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The Post-Gazette filed its exceptions with the Board more than a year-and-a-half before the Third Circuit decided *Starbucks* and, indeed, before *any* court had invalidated the *Thryv* remedy. If the subsequent issuance of binding, first-impression circuit precedent holding that a particular remedy exceeds the Board's statutory authority is not an extraordinary circumstance, then it is difficult to imagine what would be. *See*, *e.g.*, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979) (recognizing exception to Section 10(e) when "the Board determination at issue is patently in excess of its authority"); *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016) (extraordinary circumstances exist when the Board issues remedies that "are patently *ultra vires*"); *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 460 (1st Cir. 2005) ("Notwithstanding the mandate of section 10(e), the court of appeals retains residual jurisdiction to consider a first-time challenge to a remedy on the ground that the remedy is obviously beyond the Board's authority."); *3484, Inc.*, 137 F.4th at 1116 (Eid, J.,

concurring in part and dissenting in part) ("Section 10(e) of the NLRA generally bars our jurisdiction to consider an issue that a party failed to first raise before the Board. But even in such a circumstance, we may still exercise jurisdiction where the Board acts outside the scope of its authority.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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