No. 25-1192

In the Supreme Court of the United States

PG PUBLISHING COMPANY, INC. DBA PITTSBURGH POST-GAZETTE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the National Labor Relations Board's finding that petitioner failed to bargain in good faith in violation of 29 U.S.C. 158(a)(5) and (1).

2. Whether the standard of review applied by the court of appeals was consistent with *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024).

3. Whether the court of appeals correctly declined to address petitioner's challenge to a portion of the Board's remedial order because petitioner failed to raise the issue before the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is available at 2025 WL 3142083. The decision and order of the National Labor Relations Board (Pet. App. 15a-120a) is reported at 373 N.L.R.B. No. 93.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2025. A petition for rehearing was denied on January 14, 2026 (Pet. App. 121a-122a). The petition for a writ of certiorari was filed on April 14, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, "encourag[es] the practice and procedure of collective bargaining" between labor and management to resolve "industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U.S.C. 151. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Section 8 prohibits employers from engaging in certain "unfair labor practice[s]," including "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in" Section 7, 29 U.S.C. 158(a)(1), or "refus[ing] to bargain collectively with the representatives of [their] employees," 29 U.S.C. 158(a)(5).

The statutory duty to bargain requires employers and unions to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). The duty to bargain "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960). The duty also prohibits employers from "effect[ing] a unilateral change of an existing term or condition of employment" if the parties have not first "bargain[ed] to impasse." *Litton Financial Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991).

The National Labor Relations Board enforces the prohibition on unfair labor practices. 29 U.S.C. 160(a). When a charge is filed with the Board alleging that an employer or labor union has engaged in an unfair labor practice, a regional director will investigate the charge and, "if the charge appears to have merit, the director institutes a formal action against the offending party by issuing an administrative complaint." *Starbucks Corp.* v. *McKinney*, 602 U.S. 339, 343 (2024) (brackets and quotation marks omitted). An administrative law judge (ALJ) adjudicates the complaint, followed by the Board itself. *Ibid*; see 29 U.S.C. 160(b) and (c); 29 C.F.R. 101.10-101.12. After the Board issues its final order, an aggrieved party may seek judicial review—and the Board may seek enforcement—in a federal court of appeals. 29 U.S.C. 160(e) and (f). The NLRA provides that, on review, the Board's findings of fact "shall be conclusive" "if supported by substantial evidence." 29 U.S.C. 160(e).

2. Petitioner publishes print and electronic editions of the Pittsburgh Post-Gazette, a newspaper in Pittsburgh, Pennsylvania. Pet. App. 33a. For decades, the Newspaper Guild of Pittsburgh/CWA Local 38061 (the Guild) has been the exclusive collective-bargaining representative of a unit of editorial-department employees. *Id.* at 30a, 33a. The parties' most recent collective-bargaining agreement was effective from October 15, 2014 through March 31, 2017. *Id.* at 34a.

Petitioner and the Guild began bargaining for a successor agreement in March 2017. Pet. App. 35a. From the outset, petitioner's proposals sought concessions including the exclusive and unrestricted ability to assign bargaining-unit work to employees outside the bargaining unit or to independent contractors; unilateral control over work hours; an expanded no-strike clause; increased discretion over layoffs and recalls; and the replacement of employees' existing union-sponsored healthcare plan with a company-run plan that would give petitioner the "right to change or terminate the healthcare plan at its discretion." *Id.* at 36a-37a.

Petitioner and the Guild met on numerous occasions over the next two years. Pet. App. 38a. Although they exchanged proposals on a variety of terms and conditions of employment, petitioner continued to seek significant concessions similar to its initial proposal and the parties remained unable to reach an agreement. *Id.* at 38a-54a. On August 6, 2019, petitioner presented the Guild with a "best offer" contract proposal, which "reflected [petitioner's] prior offers on most issues." *Id.* at 4a. The Guild presented a counterproposal on September 6, but the parties did not review the entire proposal during that bargaining session. *Ibid.* Following the meeting, the Guild filed a charge with the Board alleging that petitioner had engaged in an unfair labor practice by failing to bargain in good faith. *Id.* at 4a-5a.

The parties met again in February 2020, but still failed to reach an agreement. Pet. App. 5a. The next planned meeting was cancelled due to the COVID-19 pandemic. *Ibid.* In May 2020, petitioner sent the Guild a written response to its September 2019 proposal, but the Guild did not reply. *Ibid.* In June 2020, petitioner sent a letter to the Guild conveying its "last, best, and final offer," which generally reflected the terms offered in August 2019. *Ibid.* The parties then exchanged letters in which they disagreed about whether they had reached a bargaining impasse. *Ibid.* The Guild expressed its view that no impasse had been reached because the parties had not yet fully discussed the Guild's September 2019 proposal. *Id.* at 64a-65a.

On July 27, 2020, petitioner declared impasse and unilaterally implemented terms and conditions of employment. Pet. App. 5a. Most of the implemented terms were the same as those in petitioner's final offer, but "some were better for employees." *Ibid.* The Guild thereafter filed a second unfair-labor-practice charge against petitioner. *Ibid.*

3. Following an investigation, the Board's regional director issued a complaint against petitioner. Pet. App. 6a. After a hearing, an ALJ issued a decision finding, as relevant here, that petitioner had committed unfair labor practices by failing to bargain in good faith and by unilaterally implementing changes to terms and conditions of employment after prematurely declaring an impasse. *Id.* at 74a-92a.

With respect to the failure to bargain in good faith, the ALJ determined that petitioner had "presented proposals that, viewed as a whole, evidence an intent not to reach an agreement" and also "prematurely declared impasse." Pet. App. 76a-77a. The ALJ highlighted several proposals within petitioner's last, best offer, reasoning that, "in combination," they "would authorize [petitioner] to make unilateral changes to a broad range of significant terms and conditions of employment," which is "at odds with the basic concept of a collective-bargaining agreement." *Id.* at 80a, 82a. For example, the proposals would enable petitioner to unilaterally subcontract work and "assign[ ] bargaining unit work to employees outside of the bargaining unit"; afford petitioner "complete discretion" over hours of work; allow petitioner to "unilaterally alter or scale back its bargaining unit employees' healthcare"; and grant petitioner discretion over layoffs and recalls in a manner that would result in the Guild "los[ing] any meaningful way to monitor or enforce the layoff/recall provisions in the contract." *Id.* at 80a-81a.

The ALJ found that, by proposing to provide petitioner with the unilateral ability to alter numerous, significant terms and conditions of employment during the contract term, petitioner "failed to bargain in good faith." Pet. App. 82a. Petitioner's proposals, "taken [as] a whole, would leave the union and the employees it represents with substantially fewer rights than provided by law without a contract," because they would eliminate the Guild's statutory right—even absent a contract—to prior notice and bargaining over changes or modifications in significant terms and conditions of employment. *Ibid.* The ALJ explained that the proposals "effectively sought the discretion to limit the [Guild's] jurisdiction (via subcontracting and assigning bargaining unit work to nonunit employees) and remove the [Guild] from representing bargaining unit members interests concerning" various terms and conditions of employment. *Ibid.*

The ALJ also credited as evidence of bad-faith bargaining that petitioner "prematurely declared impasse." Pet. App. 84a. That premature declaration, in combination with petitioner's bargaining proposals "viewed as a whole," showed that petitioner failed to bargain in good faith. *Ibid.* The ALJ explained that "[t]he question of whether an impasse exists" depends on "several factors, including: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations." *Id.* at 86a. In finding that petitioner's impasse declaration was premature, the ALJ relied on his conclusions with respect to petitioner's bad-faith bargaining, as well as his view that "neither party could have reasonably believed that they were at the end of their rope." *Id.* at

88a. At the time petitioner declared an impasse, the ALJ explained, the parties "had not yet finished discussing the [Guild's] contract proposal from September 2019," and "did not have a bargaining session to discuss [petitioner's] last, best, and final offer" or "the additional updated proposals that [petitioner] used when it declared impasse and unilaterally implemented terms and conditions of employment." *Id.* at 88a-89a. The ALJ also noted that by "implementing terms and conditions of employment that differed" from petitioner's last, best, and final offer, petitioner "demonstrated that it had room to move from what it characterized as its last, best and final offer * * * and thus demonstrated that the parties were not at impasse." *Id.* at 89a n.30. The ALJ found that those factors "outweigh the fact that negotiations were lengthy and the fact that the parties' disagreement centered around critical issues." *Id.* at 91a.

Relatedly, the ALJ concluded that petitioner had unilaterally imposed terms and conditions of employment on the bargaining unit after prematurely declaring an impasse. Pet. App. 85a-92a. Those terms and conditions differed from the status quo under the prior contract, including by giving the company the exclusive right to assign bargaining-unit work to managers, declining to guarantee any specified hours of work per day or per week, expanding a no-strike clause, and changing the health plan for bargaining-unit employees. *Id.* at 36a-37a, 64a, 68a. While most of the terms and conditions newly imposed were those that petitioner had proposed in its last, best, and final offer, petitioner included several modifications to its proposals, including some that, as noted, were more favorable to the Guild's members. *Id.* at 68a-70a. For example, petitioner deleted language stating that it could "modify or change" its short-term disability policy "on the same basis as non-represented employees of the [c]ompany." *Id.* at 69a. Petitioner also "deleted the phrase 'in the [c]ompany's discretion' that followed a sentence stating that an employee who could be dismissed by the introduction of new or modified equipment * * * may be afforded the opportunity to transfer to other available positions." *Id.* at 69a-70a. And petitioner removed language allowing the company to "amend[ ], change[ ], replace[ ], or terminate[ ]" company health, dental, vision, and life insurance plans "at the [c]ompany's sole discretion." *Id.* at 70a.

Among other remedies, the ALJ ordered petitioner to "meet with the [Guild] at reasonable times and bargain in good faith" and, on request from the Guild, to "rescind the unlawful unilateral changes and put into effect the corresponding terms and conditions of employment set forth in the collective-bargaining agreement that expired on March 31, 2017." Pet. App. 99a, 108a. The ALJ further ordered petitioner to "make its employees whole for any loss of earnings and other benefits that resulted from its unlawful unilateral changes" and to "compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes," consistent with the Board's decision authorizing such a remedy in *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022), enforcement denied on other grounds, 102 F.4th 727 (5th Cir. 2024). Pet. App. 99a-100a.

4. The Board affirmed the ALJ's rulings, findings, and conclusions, and adopted the ALJ's remedial order with slight modifications. Pet. App. 15a-21a. In affirming the ALJ's finding that petitioner prematurely declared a bargaining impasse, the Board noted that it would reach that same conclusion "even absent [peti-

tioner's] failure and refusal to bargain in good faith with the [Guild] during the negotiations for the successor collective-bargaining agreement." *Id.* at 16a n.1. The Board found sufficient support for the conclusion that petitioner prematurely declared an impasse based on: (1) the parties' written communications, which "reflected substantive movement" in proposals from the Guild and petitioner "that had not been discussed"; (2) the Guild's "attempt[s] to schedule further bargaining"; and (3) the fact that petitioner "implemented terms that differed from its final offer, thus demonstrating that it had additional room to move from what it had previously termed its 'final' negotiating positions." *Id.* at 16a-17a n.1.

5. a. Petitioner sought review of the Board's order in the court of appeals, and the Board cross-applied for enforcement. The Board also filed a motion for temporary relief under 29 U.S.C. 160(e), asking the court to enjoin petitioner to comply with certain aspects of the Board's order during the court's review. C.A. Doc. 21, at 1 (Dec. 20, 2024).[1] The court granted the Board's injunction motion in relevant part. C.A. Doc. 57 (Mar. 24, 2025). Petitioner sought en banc review of the injunction order and filed a motion seeking clarification, both of which the court denied. C.A. Doc. 69 (Apr. 29, 2025).

b. The court of appeals denied the petition for review and enforced the Board's order in an unpublished, non-precedential decision. Pet. App. 1a-14a.

The court of appeals first held that the Board did not err in finding that petitioner committed an unfair labor practice by bargaining in bad faith. Pet. App. 8a-9a. The court found that "[s]ubstantial evidence supports" the Board's finding because petitioner's "proposals *as a whole*

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[1] All citations to court of appeals documents are from 24-2788 C.A. Docket (filed Sept. 25, 2025).

would have required the Guild to cede to [petitioner] the most fundamental of employment terms." *Ibid.* The court explained 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." *Id.* at 8a. The court considered such an inference warranted on the record in this case, given that, on employment terms such as subcontracting, hours, and healthcare, "Guild members would have been afforded more rights working without a contract than by accepting all of [petitioner's] proposals." *Id.* at 9a.

The court of appeals next held that the Board did not err in finding that petitioner improperly declared a bargaining impasse. Pet. App. 9a-11a. The court based that conclusion on the "substantial evidence in the record that [petitioner] bargained in bad faith," as well as the "[s]ubstantial evidence" that petitioner declared an impasse at a time when "neither party would have been warranted in assuming that further bargaining would be futile." *Id.* at 10a.

Turning to the remedy, the court of appeals held that it could not consider petitioner's challenge to the Board's order requiring petitioner to make employees whole for direct or foreseeable pecuniary harms stemming from petitioner's unfair labor practices, because petitioner "did not preserve its argument with respect to the Board's Thryv remedy." Pet. App. 13a. The court explained that Section 10(e) of the Act prohibits a court from considering any "objection that has not been urged before the Board," absent "extraordinary circumstances." *Id.* at 12a (quoting 29 U.S.C. 160(e)). And in this case, the court found, petitioner had failed to "place the Board on adequate notice of the basis for its objection," where it "[m]erely quot[ed] the remedy from the text of the ALJ's order, without expounding on the rationale for the objection." *Id.* at 13a. The court further explained that circuit precedent "decided after the ALJ's decision" that held the *Thryv* remedy exceeded the Board's authority did not excuse petitioner's failure to preserve the issue, because "[n]othing prevented [petitioner] from raising its argument against the *Thryv* remedy before the Board." *Id.* at 13a-14a n.5.

6. a. Following issuance of the court of appeals' merits decision, petitioner filed a motion to stay the court's injunction order pending its petition for en banc review of the merits decision. C.A. Doc. 108 (Nov. 19, 2025). The court denied the motion. C.A. Doc. 111 (Nov. 24, 2025). Petitioner then moved for panel rehearing and rehearing en banc of that denial, C.A. Doc. 112 (Dec. 1, 2025), which the panel denied, C.A. Doc. 113 (Dec. 8, 2025).

Petitioner then filed an emergency application with this Court seeking a stay of the court of appeals' March 2025 order pending further review of the court's merits opinion. See No. 25A725 (filed Dec. 19, 2025). The Court denied the emergency application. 2026 WL 40384.

b. On December 24, 2025, petitioner filed a petition for rehearing en banc of the merits decision. C.A. Doc. 116. The court of appeals denied the petition. Pet. App. 121a-122a.

ARGUMENT

Petitioner challenges (Pet. 7-29) the court of appeals' conclusion that petitioner failed to bargain in good faith, the standard of review that the court purportedly applied, and the Board's remedial authority. None of those issues warrants further review of the court's unpublished, non-precedential opinion in this case. On the merits, the court correctly rejected petitioner's claim that a bad-faith finding cannot be based solely on inferences drawn from the content of the specific bargaining proposals at issue here, which would have made the Guild's members worse off than if there was no contract at all. The decision below does not conflict with that of any other court of appeals, and the case is a bad vehicle because the Board's bad-faith determination was based on additional evidence beyond the mere contents of petitioner's proposals. On the standard of review, petitioner's complaint (Pet. 18) that the court "failed to cite *Loper Bright*" is irrelevant, because the court applied the statutory substantial-evidence standard to the Board's factual findings and reviewed questions of law de novo. And on the remedy, the court rightly declined to address petitioner's challenge to a portion of the Board's remedial order because petitioner failed adequately to raise the question before the Board—a fact-bound forfeiture holding that does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner first contends (Pet. 7-17) that the court of appeals erred in upholding the Board's determination that it failed to bargain in good faith. The court correctly rejected petitioner's contention that there is a categorical rule against finding bad faith based on the contents of bargaining proposals alone. That conclusion is consistent with the holdings of other courts of appeals. And regardless, the question is immaterial here, because the Board's bad-faith finding rests on more than just the contents of petitioner's proposals.

a. Although the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," the parties must bargain "in good faith." 29 U.S.C. 158(d). That obligation "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960). By contrast, the essence of bad-faith bargaining is "conduct designed to frustrate the possibility of arriving at any agreement." *District Hospital Partners, L.P.* v. *NLRB*, 141 F.4th 1279, 1290 (D.C. Cir. 2025) (quotation marks omitted). Because the "Board should not pass upon the desirability of the substantive terms of labor agreements," the Board may not conclude that any particular proposal is, "*per se*, an unfair labor practice." *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 408-409 (1952). Courts nevertheless view "the facts of each case" to determine whether an employer is making proposals that, as a whole, "will lead to evasion of an employer's duty to bargain collectively as to 'rates of pay, wages, hours and conditions of employment.'" *Id.* at 409; see *District Hospital*, 141 F.4th at 1290-1291.

That is the factual assessment the court of appeals undertook here. The court did not treat any of petitioner's proposals as "*per se*" unlawful. *American Nat'l Ins.*, 343 U.S. at 409. Instead, it held that the "combination" of petitioner's proposals "*as a whole*" evidenced bad faith because those proposals "required the Guild to cede to [petitioner] the most fundamental of employment terms." Pet. App. 9a. Because "Guild members would have been afforded more rights working without a contract than by accepting all of [petitioner's] proposals," *ibid.*, petitioner's insistence on those proposals did not evince "a desire to reach ultimate agreement," *Insurance Agents' Int'l Union*, 361 U.S. at 485.

Petitioner errs in contending (Pet. 10-11) that there is a categorical rule against finding bad faith based solely on the substantive contents of an employer's bargaining proposals. Petitioner identifies no decision of this Court requiring additional evidence of bad faith in all circumstances. While this Court has admonished against treating any particular proposal as *per se* unlawful based on its substantive undesirability, that does not foreclose finding that a combination of proposals would make the employees worse off than if there were no collective-bargaining agreement at all, supporting an inference that the employer is not trying in good faith to reach an agreement.

b. Petitioner contends (Pet. 13-15) that the decision below conflicts with that of other courts of appeals. That is incorrect.

Like the Third Circuit below, other courts of appeals have upheld the Board's bad-faith determinations based on proposals that, when considered as a whole, would leave employees worse off than if there were no contract at all. See, *e.g.*, *Public Serv. Co.* v. *NLRB*, 318 F.3d 1173, 1178 (10th Cir. 2003) (upholding bad-faith determination where employer "insist[ed] throughout negotiations on proposals undermining the [u]nion's representational function," and finding that determination consistent with the view that the Board may not "condemn [a company] merely for bargaining for certain proposals"); *NLRB* v. *A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 877 (11th Cir.) (upholding bad-faith determination where company "insisted on unilateral control over virtually all significant terms and conditions of employment," which "would have left the [u]nion and the employees with substantially fewer rights and less protection than they would have had if they had relied solely upon the [u]nion's certification"), cert. denied, 469 U.S. 1035 (1984); *NLRB* v. *Wright Motors, Inc.*, 603 F.2d 604, 608 n.5 (7th Cir. 1979) (upholding bad-faith determination where employer's proposals "would have put the employees in a far worse position with the [u]nion than without it" and would have "damaged the [u]nion's ability to function as the employees' bargaining representative").

Petitioner asserts (Pet. 15 n.4) that in some of those cases, the courts of appeals mentioned other conduct in the course of holding that an employer's proposals demonstrated bad faith. But those courts did not indicate that the additional conduct was necessary to their holdings. In *Public Service Co.*, the Tenth Circuit's analysis focused on the inferences drawn from bargaining positions and included only a footnote suggesting other conduct provided "further support[ ]" for the bad-faith conclusion it had already reached. 318 F.3d at 1177 n.3. And in *Wright Motors*, the Seventh Circuit inferred bad faith based on the bargaining proposals and cited the employer's failure to "defend its extreme proposals" during the course of the case to distinguish the facts from a prior case in which the employer had demonstrated at trial that the proposals at issue were common in other collective bargaining agreements. 603 F.2d at 609-610. Confirming that the proposals formed the basis of its bad-faith determination, the court expressly stated that "[s]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to." *Id.* at 609.

Petitioner fares no better in asserting that the decision below is in conflict with decisions from the D.C. and Ninth Circuits. Pet. 12-13. The court of appeals here directly relied on D.C. Circuit precedent in support of its holding. Pet. App. 8a (citing *District Hospital*, 141 F.4th at 1294). In *District Hospital*, as in this case, the court upheld a finding of bad-faith bargaining where the employer insisted upon proposals that "'would leave employees with substantially fewer rights and less protection' than they would enjoy under the Act in the absence of a contract." 141 F.4th at 1290. The "cumulative effect" of those proposals, like petitioner's, "would strip the [u]nion's representational role to such a degree as to nearly nullify it" by "effectively exclud[ing the union] from meaningful participation in the bargaining process." *Id.* at 1291.

Petitioner claims (Pet. 15) that *District Hospital* is distinguishable because the court there relied on "evidence of bad faith away from the bargaining table." But while the court mentioned the employer's efforts to decertify the union and cancel bargaining sessions when describing the factual background, *District Hospital*, 141 F.4th at 1287, it did not discuss those facts at all in the analysis. The court thus did not rely on those facts as a basis for upholding the Board's finding of bad faith, much less hold that they are essential to such a finding. *Id.* at 1291-1294. Nor can petitioner differentiate this case from *District Hospital* by asserting that the proposals there "were designed to undermine the union's representational capacity." Pet. 15. The court of appeals here similarly concluded that the combination of petitioner's proposals would "encroach on the Guild's jurisdiction" and give the company "unilateral control" over "fundamental" employment terms. Pet. App. 9a.

The other D.C. Circuit cases petitioner cites are not to the contrary. See Pet. 12. In *Cincinnati Newspaper Guild, Local 9* v. *NLRB*, 938 F.2d 284 (D.C. Cir. 1991), the court held that an employer may not treat "a particular bargaining position" as "an unfair labor practice per se." *Id.* at 288. The court found that the employer did not bargain in bad faith when it sought greater control over one aspect of pay but, unlike here, "did not propose to strip the [u]nion of its collective bargaining function" altogether on that or other issues. *Id.* at 290. And the court distinguished the facts in that case from a situation in which the employer insisted on proposals that "would have deprived the employees of their right to have their representative bargain for them over a mandatory subject" of bargaining. *Id.* at 289.

NLRB v. *McClatchy Newspapers, Inc. Publisher of The Sacramento Bee*, 964 F.2d 1153 (D.C. Cir. 1992) (per curiam), is even further afield. In that case, the employer "bargain[ed] in good faith to impasse," and Judge Edwards' concurring opinion simply cited *Cincinnati Newspaper*'s holding regarding the proper analysis of an employer's bargaining position. *Id.* at 1154, 1164. And the court in *Teamsters Local Union No. 515* v. *NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S. 1053 (1991), upheld the Board's good-faith determination while recognizing that "[a]n inference of bad faith from substantive terms of a proposal" may be drawn, though it "always must be drawn with caution." *Id.* at 726.

Petitioner likewise errs (Pet. 12-13) in characterizing Ninth Circuit caselaw as contrary to the court of appeals' decision. Like the Third Circuit below, the Ninth Circuit has recognized that "under the NLRA an employer cannot insist on provisions that would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members." *Frankl ex rel. NLRB* v. *HTH Corp.*, 693 F.3d 1051, 1059 (9th Cir. 2012) (quotation marks omitted).

While petitioner cites (Pet. 12-13) cases requiring evidence in addition to the bargaining position, none of those cases involved proposals that the Ninth Circuit concluded would strip the union of its representational role in the way the Third Circuit here found petitioner's proposals would. See *NLRB* v. *Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1346-1347 (1978); *K-Mart Corp.* v. *NLRB*, 626 F.2d 704, 707 (1980); *Seattle-First Nat'l Bank* v. *NLRB*, 638 F.2d 1221, 1226 (1981). Petitioner thus identifies no court of appeals decision that has rejected a bad-faith-bargaining finding by the Board in circumstances in which the court concludes that the company has insisted upon proposals that would leave employees with fewer rights than no contract at all.

c. In any event, this case would be an unsuitable vehicle for considering the question presented because the Board did not rely solely on inferences drawn from petitioner's proposals in finding bad faith. Instead, the Board also found evidence of bad faith in petitioner's premature declaration of a bargaining impasse and unilateral imposition of new terms and conditions of employment—including petitioner's imposition of terms more favorable to the Guild than its purportedly "best and final" offer. Pet. App. 84a, 89a. And contrary to petitioner's suggestion (Pet. 9), the Board made clear that it would have found a lack of impasse based on such evidence "even absent" the other evidence of petitioner's "failure and refusal to bargain in good faith." Pet. App. 16a n.1. While the court of appeals relied in part on its bad-faith holding in affirming the Board's impasse determination, see *id.* at 10a, there is no indication that the court would have rejected the Board's conclusion that the impasse determination could stand independently—and could further support the bad-faith determination. Because the premature declaration of an impasse provides additional evidence of petitioner's bad faith, the Board's decision could stand regardless of whether the court erred in relying on inferences drawn from the bargaining proposals as a whole.

2. Petitioner next contends (Pet. 17-21) that the court of appeals' standard of review ran afoul of *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). But the court did not identify ambiguous statutory language and defer to the Board's interpretation of it. The court instead reviewed the Board's finding of bad-faith bargaining for substantial evidence, and subjected questions of law to de novo review. Pet. App. 7a. This case thus does not implicate any question regarding deference to the Board's statutory interpretations; and regardless, petitioner fails to identify a circuit conflict on that question.

a. In *Loper Bright*, this Court held that federal courts must "exercise independent judgment in determining the meaning of statutory provisions," rather than deferring to agency interpretations of ambiguous statutory language. 603 U.S. at 394. But that decision does not address review of agencies' factual findings, nor does it apply "'when a particular statute' mandates deferential review or otherwise 'delegates authority to an agency consistent with constitutional limits.'" *Urias-Orellana* v. *Bondi*, 607 U.S. 537, 550 n.6 (2026) (quoting *Loper Bright*, 603 U.S. at 413).

Consistent with *Loper Bright*, the court of appeals explained that it "exercise[s] plenary review over questions of law and the Board's application of legal precepts." Pet. App. 7a. And consistent with the NLRA, the court further explained that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Ibid.* (quoting 29 U.S.C. 160(e)).

In assessing the Board's bad-faith determination, the court of appeals considered petitioner's arguments that the Board was incorrect to infer that petitioner bargained in bad faith and concluded that "[s]ubstantial evidence supports" that "finding." Pet. App. 8a. That approach was correct. A finding of bad-faith bargaining consists of "drawing inferences from the conduct of the parties," *Insurance Agents' Int'l Union*, 361 U.S. at 498, as to their "state of mind," *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring in part and dissenting in part). "The appropriate inferences to be drawn from what is often confused and tangled testimony" about the "raw facts" concerning the parties' negotiations "makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation." *Ibid.* Accordingly, courts routinely apply substantial-evidence review to the Board's bad-faith-bargaining determinations. See, *e.g.*, *Coreslab Structures (Tulsa), Inc.* v. *NLRB*, 100 F.4th 1123, 1140 (10th Cir. 2024); *Carey Salt Co.* v. *NLRB*, 736 F.3d 405, 416 (5th Cir. 2013); *Eastern Maine Med. Ctr.* v. *NLRB*, 658 F.2d 1, 13 (1st Cir. 1981); *Queen Mary Rests. Corp.* v. *NLRB*, 560 F.2d 403, 407 (9th Cir. 1977). Cf. *Urias-Orellana*, 607 U.S. at 549 (applying substantial-evidence review to an immigration judge's application of the legal standard for "persecution" to the findings of fact).

When the court of appeals then turned to petitioner's contention that the NLRA bars bad-faith findings based on the "substance of the employer's proposals," Pet. App. 9a, the court did not purport to defer to the Board's interpretation of the NLRA. Instead, the court rejected the argument on its own terms, concluding that [n]one of the cases [petitioner] cites" supported the categorical legal rule that petitioner "attempt[ed] to create." *Ibid.* That analysis is consistent with the "plenary review over questions of law" that the court indicated it was undertaking. *Id.* at 7a.

Petitioner nevertheless contends that the court of appeals disregarded *Loper Bright* because the court cited a pre-*Loper Bright* case for the proposition that the court exercises plenary review of questions of law, Pet. 18 n.5, and because the court stated that its "review of orders of the Board is highly deferential," Pet. 18 (quoting Pet. App. 7a). But petitioner does not dispute that the quoted portion of the pre-*Loper Bright* precedent correctly sets forth the plenary standard of review of legal questions. And because the substantial-evidence standard is applicable to the type of questions at issue in this case, the court did not err in asserting that its review was deferential. Regardless, petitioner does not point to any instance in which the court deferred to the Board's legal interpretations, as opposed to the inferences the Board drew when applying the well-settled "good faith" standard to the facts before it.

b. Petitioner also fails to identify a relevant circuit conflict. Following *Loper Bright*, courts have continued to review the Board's bad-faith determinations for substantial evidence. See, *e.g.*, *ExxonMobil Research & Eng'g Co.* v. *NLRB*, 132 F.4th 337, 351 (5th Cir. 2025); *Troutbrook Co. LLC* v. *NLRB*, 107 F.4th 994, 1000-1001 (D.C. Cir. 2024). None of the cases petitioner cites involved that issue. See Pet. 20-21.

Moreover, the cases petitioner cites involving post-*Loper Bright* review of Board actions in other contexts do not indicate the existence of a circuit conflict. Petitioner alleges that several circuits "have straightforwardly applied *Loper Bright*[ ]" to the Board's statutory interpretation, Pet. 20, and points to only a single D.C. Circuit opinion in which the court stated that review of Board decisions would be deferential, Pet. 21 (citing *Hospital de la Concepcion* v. *NLRB*, 106 F.4th 69, 76 (2024)). But in that case, the court did not resolve any disputed question of statutory interpretation. Rather, the decision largely turned on the interpretation of the relevant collective-bargaining agreement—an issue that the court reviewed "*de novo*, applying 'ordinary principles of contract law.'" *Hospital de la Concepcion*, 106 F.4th at 76; see *id.* at 76-80. Petitioner thus fails to show that any court of appeals has declined to apply *Loper Bright* to the Board's interpretation of the NLRA.

3. Petitioner finally asks (Pet. 22-25) the Court to grant certiorari to determine whether the Board has statutory and constitutional authority to require compensation for foreseeable pecuniary harms stemming from unfair labor practices pursuant to *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022), enforcement denied on other grounds, 102 F.4th 727 (5th Cir. 2024). The court of appeals correctly declined to consider that question because petitioner failed adequately to raise it before the Board. Pet. App. 12a-13a. And there would be no basis for the Court to grant certiorari on the validity of the *Thryv* remedy in petitioner's case arising from the Third Circuit, which has adopted the very holding petitioner favors in a different case that *did* reach the merits of the issue. See *NLRB* v. *Starbucks Corp.*, 125 F.4th 78, 95 (2024) (rejecting the *Thryv* remedy as beyond Board's statutory authority).

As the court of appeals explained (Pet. App. 12a-13a), Section 10(e) of the Act provides that "[n]o 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). That provision requires that parties provide the Board with "adequate notice that [they] intend[ ] to press the specific issue" they will raise before the court. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953). A "general objection" does not suffice. *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255 (1943).

Petitioner contests (Pet. 26-28) the court of appeals' finding that it failed adequately to raise a *Thryv* challenge, but the case-specific question of whether the wording of a particular exception was sufficiently detailed to place the Board on notice does not warrant this Court's review. Anyway, the court of appeals was correct. In its entirety, petitioner's only exception related to *Thryv* was that petitioner excepted "[t]o the ALJ's remedy consistent with *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 14 (2022), that [petitioner] shall also compensate all bargaining unit employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful unilateral changes." 5 C.A. App. 213. Petitioner also excepted "[t]o the ALJ's remedy" for every remedy the ALJ recommended. *Id.* at 212-214. And in support of each of its remedial exceptions, petitioner relied on its accompanying brief. *Ibid.* But petitioner's brief stated only that petitioner "did not violate the Act" and "[t]herefore, there is no basis for any [r]emedy" at all. *Id.* at 272. That general objection to the imposition of any remedy did not put the Board on notice that petitioner was further objecting to the Board's authority, even if it found a violation of the Act, to issue the particular remedy requiring petitioner to compensate employees for foreseeable pecuniary harm. See *Seven-Up Bottling*, 344 U.S. at 350 (holding that an objection to a remedy as "contrary to, and unsupported by, the evidence and contrary to law" was "not adequate notice" to press specific objections to a back pay order).[2]

Petitioner protests (Pet. 28) that "extraordinary circumstances" excuse its failure to raise its *Thryv* challenge before the Board because petitioner filed its exceptions before any court had invalidated the *Thryv* remedy. But as the court of appeals explained, "[n]othing prevented [petitioner] from raising its argument against the *Thryv* remedy before the Board" even in the absence of circuit precedent adopting that argument. Pet. App. 14a n.5. Indeed, that is precisely what another challenger did, resulting in the Third Circuit's opinion holding that the *Thryv* remedy exceeds the Board's authority under the Act. See *Starbucks*, 125 F.4th at 95.

Nor can petitioner sidestep Section 10(e) by invoking an exception for when the Board acts "patently in excess of its authority." Pet. 28 (quoting *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 312 n.10 (1979)). That narrow exception has been applied in circumstances in which, at "the time of its initial decision," the Board "should have known" from "unambiguous circuit precedent" that it was acting beyond its authority, such that it had definitive notice of a problem regardless of a party's failure to object. *NLRB* v. *RELCO Locomotives, Inc.*, 734 F.3d 764, 797 (8th Cir. 2013). Such circumstances

[2] Petitioner suggests (Pet. 26 n.9) that this case could provide an opportunity for this Court to reconsider whether Section 10(e)'s rule is jurisdictional. But whether it is a jurisdictional rule or a claim-processing rule is immaterial in this case. Although claim-processing rules would be subject to forfeiture, they "assure relief to a party properly raising them," as the Board did here. *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam); see Gov't C.A. Br. 52-54.

did not exist in this case. While some courts of appeals subsequently rejected the *Thryv* remedy as beyond the Board's remedial authority (Pet. 23-26), no court had done so at the time the Board issued its decision in this case in September 2024. See *Starbucks*, 125 F.4th at 95-97 (first ruling on *Thryv* remedy on December 27, 2024).

This Court recently denied a petition for a writ of certiorari in which the petitioner challenged the *Thryv* remedy. *Macy's Inc.* v. *NLRB*, No. 25-627 (cert. denied June 15, 2026). The employer there raised its *Thryv* challenge to the Board, and the Ninth Circuit's opinion addressed *Thryv* on the merits. See *International Union of Operating Eng'rs, Stationary Eng'rs, Local 39* v. *NLRB*, 155 F.4th 1023, 1047-1053 (2025), cert. denied, No. 25-627 (June 15, 2026). Denial of the petition here, where the challenge to the *Thryv* remedy was not properly preserved, follows *a fortiori*.[3]

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[3] For similar reasons, the fact that the Board requested a remand in *Macy's* does not support that outcome here. The Board asked the Court to grant, vacate, and remand in *Macy's* to allow the court of appeals to voluntarily remand the case to the Board based on a change in composition of the Board and the Board's desire to consider revisiting its precedent. See Gov't Br. at 14, *Macy's Inc.* v. *NLRB*, No. 25-627 (Apr. 20, 2026). This Court declined to remand the case despite those changed circumstances; moreover, the Board here does not even request a remand because petitioner failed to preserve this issue before the Board and thus is not entitled to any relief at this point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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