No. 25-1192

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

In its opening paragraph, the Guild downplays this petition as being about only the "amount of backpay" the Post-Gazette owes. Guild.Br.1. That is only so because the Board's overreach made it impossible for the 240-year-old newspaper to continue doing business. Its owner was compelled to divest its assets to a nonprofit entity for a nominal price after announcing that it would be shuttered. Most businesses don't even have that option. Companies facing rapidly changing markets need flexibility, including in negotiating with labor. And workers are best served by employers who can adapt instead of closing shop. Congress recognized this and enshrined in Section 8(d) of the NLRA the principle that, as long as the bargaining process is fair, it is employers and unions—not the government—who negotiate and set the terms and conditions of employment.

The Board and the Third Circuit ignored this mandate, in a break with this Court's precedent and the rulings of sister circuits. In its place, they adopted an approach where the Board judges not the fairness of the bargaining process, but the substance of the proposals. The court below did this without any independent analysis of Section 8(d), instead deferring to the Board's interpretation in violation of *Loper Bright*. And it approved the Board's order of legal damages, which three other circuits have held exceeds statutory authority. This Court should intervene.

I. The Court Should Grant Certiorari on the Section 8(d) Question to Restore Uniformity and Discourage the Board from Tipping the Scales in the Collective Bargaining Process.

1. The United States concedes, as it must, that the duty to bargain under Section 8(d) "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d); Gov't.Br.12. And it acknowl-

edges this Court's long-standing admonition that, because the "'Board should not pass upon the desirability of the substantive terms of labor agreements,'" it "may not conclude that any particular proposal is '*per se*, an unfair labor practice.'" Gov't.Br.13 (quoting *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 408–09 (1952)). Unfortunately, the legal standards that respondents urge would reduce those bedrock principles to dust.

Respondents propose four different, sometimes inconsistent, standards for how the Board may consider bargaining proposals in determining bad faith:

- Both the government and the Guild submit that the Board may find bad faith based solely on the content of proposals when those proposals would "exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment." Gov't.Br.17; Guild.Br.15.
- Both respondents, following the Third Circuit's lead, submit that the Board may find bad faith when proposals "'would leave employees with substantially fewer rights and less protection' than they would enjoy under the Act in the absence of a contract." Gov't.Br.16; Guild.Br.16.
- The Guild proposes that the Board may infer bad faith when an employer "'insist[s]' on . . . proposals throughout bargaining" and fails to make "'meaningful economic concessions' . . . in exchange for . . . broad discretion." Guild.Br.19.
- And the government—after acknowledging this Court's warning "against treating any particular proposal as *per se* unlawful based on its substantive undesirability"—nevertheless submits that the

> Board may infer bad faith based on the substance of a "combination of proposals." Gov't.Br.14.

Three things are evident from these proposed standards. First, and most important, respondents do not even attempt to ground them in the text of Section 8(d) as interpreted by this Court. Second, because they are not moored to the statute, they're a mishmash: the Board may use one standard, or another, or another, or another. And third, if taken seriously, they would vitiate the policy Congress enacted in Section 8(d): that it is not the government's role to "regulat[e] . . . the terms and conditions of employment" or to "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).

Take the "in combination" proposal. Neither the statutory text nor this Court's precedent distinguishes between a "particular proposal" and a "combination of proposals." Rather, they direct "that the Board should not pass upon the desirability of the substantive terms of labor agreements," period. *Am. Nat'l*, 343 U.S. at 408–09. And because every collective-bargaining negotiation covers myriad issues—wages, hours, health benefits, vacation, family and medical leave, workplace safety standards, and more—it would be trivially easy for the Board or a court to select two or more proposals and infer bad faith based on their disfavored content. Such a standard might pay lip service to Section 8(d) and this Court's admonitions, but it would hollow out both.

The proliferation of standards highlighted by respondents calls out for this Court's attention, and for uniformity. But whatever the announced standard, until recently few courts were willing to infer bad faith based *solely* on the substance of bargaining proposals, whether taken separately or in combination, without additional evidence of bad behavior away from the bargaining table. That has now changed.

For example, respondents rely heavily on *District Hospital Partners v. NLRB*, 141 F.4th 1279 (D.C. Cir. 2025), asserting that it found bad faith because the employer's proposals left employees with "fewer rights" than they would enjoy without a contract. Gov't.Br.15–16; Guild.Br.16–17. But *District Hospital* also involved classic union-busting: the employer withdrew recognition, canceled future bargaining sessions, and announced that employees would become part of a "non-union team." 141 F.4th at 1287. That was compelling evidence of bad faith, and it had nothing to do with the substance of any bargaining proposal.

In *Altura Communications Solutions,* 369 NLRB No. 85, at 7 (2020), the employer refused to bargain in person and imposed preconditions before meeting at all. And in *Public Service Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1177 n.3 (10th Cir. 2003), the employer pushed a "decertification election to remove the Union" during negotiations. In each case, the Board urged, and courts echoed, the "fewer rights" standard. But there was strong evidence of bad faith independent of the proposals' content.

Here, the Board took the next step and the Third Circuit followed. Respondents don't argue that there was evidence here of bad behavior away from the bargaining table (apart from a bootstrapped finding of premature impasse, discussed below). The Board and the Court found bad faith based on the *substance* of the newspaper's proposals. If this approach prevails—and the Board has increasingly pressed it—then the government will be sitting in judgment of the terms of collective bargaining agreements.

To prevent this, the Court should grant certiorari, resolve the confusion plaguing lower courts, and reaffirm the principle that employers and unions, not the Board, "control[] the settling of the terms of collective bargaining agreements." *NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477, 487 (1960). We have proposed a workable, faithful standard. Bargaining terms may be considered as part of the totality of the evidence in determining whether a party is bargaining in bad faith. But they cannot be the *only* evidence. Something more is needed. Pet.13–14. This standard accords with D.C. and Ninth Circuit precedent, in cases that have never been overruled or even questioned. *Cincinnati Newspaper Guild v. NLRB*, 938 F.2d 284, 289 (D.C. Cir. 1991); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221 (9th Cir. 1981). It provides a bright-line rule that will discourage further encroachment by the Board on the right to bargain. And it's more consistent with the text of Section 8(d) and this Court's guidance.

2. Respondents argue that the court below "also found evidence of bad faith in petitioner's premature declaration of a bargaining impasse." Gov't.Br.18; Guild.Br.19. But the administrative record shows the opposite. In finding premature impasse, the ALJ relied almost exclusively on the substance of petitioner's bargaining proposals. App.76a–84a, 88a–92a. The Third Circuit recognized that the Board had "leaned heavily on [the Post-Gazette's] bad faith" in finding premature impasse, even though "other factors (such as the length of negotiations and the fact that the parties' disagreement concerned the most important issues)" weighed against that finding. App.11a. Nevertheless, the panel "accord[ed] special weight" to the Post-Gazette's purported bad faith bargaining in affirming the impasse finding. *Ibid.*

Respondents now argue that because impasse was an "independent violation" of the NLRA, Guild.Br.19, the

Board did not find bad faith based solely on the substance of the bargaining proposals. That reasoning is entirely circular. The Board cannot find premature impasse based "heavily" on its disapproval of the substance of petitioner's bargaining proposals, and then argue that the impasse finding provides support for bad faith *independent of* those proposals. The impasse finding was inextricably tied up with the bad faith bargaining finding.[1]

In any event, the existence of a separate (if not independent) impasse finding does not bar this Court from correcting the Third Circuit's misreading of Section 8(d). The Ninth Circuit's approach in *Seattle-First National* provides a blueprint. The Board (as here) found bad faith based entirely on the substance of the employer's bargaining proposals. It also (as here) found that the employer had prematurely declared impasse "since the Bank did not bargain in good faith." 638 F.2d at 1227. After vacating the bad faith finding, the court remanded to the Board with instructions: "If, on remand, the Board decides that the Bank did not bargain in good faith, it must then address the question of whether an impasse was reached before the unilateral change in wages and working conditions. If not, there would be an independent violation of the duty to bargain in good faith." *Id.* at 1227–28. Similarly, this Court need not resolve the impasse question; it can remand it to the Third Circuit if necessary.

[1] The Board's assertion (in a footnote, without analysis) that it would have found premature impasse "even absent" bad faith bargaining, App.16a, is contradicted by the holding of the district court in a parallel case reviewing the same bargaining process. Chief Judge Bissoon, emphasizing the union's termination of negotiations in March 2020, declined to find premature impasse, concluding that "[n]othing can be achieved when one side takes their ball and goes home." *Wilson ex rel. NLRB v. PG Publ'g Co.*, No. 2:24-cv-01166-CB, 2025 WL 509305, at *11 (W.D. Pa. Feb. 13, 2025).

II. The Third Circuit Broke from Other Circuits and Violated *Loper Bright* by Improperly Deferring to the Board's Interpretation of Section 8(d).

1. Respondents contend this Court should not review the Third Circuit's contravention of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), because "the court did not identify ambiguous statutory language and defer to the Board's interpretation of it." Gov't.Br.19. Indeed, the Guild argues that "this case doesn't call for statutory interpretation" at all, and "instead turns on questions of fact." Guild.Br.20.

Not so. As explained above, the first question turns on the Third Circuit's misinterpretation of Section 8(d). The panel held that bad faith bargaining under that subsection could be established based solely on the substance of the Post-Gazette's bargaining proposals, at least when they would leave employees with "fewer rights than the law would provide them without a contract." App.8a–9a. That was statutory interpretation, not factfinding.

Moreover, it was doubly erroneous. First, it contravened Section 8(d)'s instruction 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). Second, it reached that result without conducting the independent textual analysis or applying the "relevant interpretive tools" required by *Loper Bright*. 603 U.S. at 400. It simply accepted the Board's "fewer rights" interpretation, while emphasizing the "highly deferential" nature of its review. App.7a; *compare* App.8a–9a *with* 20a, 82a. A proper analysis would have started with the text of Section 8(d), not ignored it. The court's throwaway, unheeded line of boilerplate about "plenary review" cannot change those facts.

2. This error deepens an existing conflict. The Fourth, Fifth, Sixth, and Tenth Circuits have expressly held that *Loper Bright* governs NLRB statutory interpretations. Pet.20–21. By contrast, the Third Circuit has questioned whether *Loper Bright* applies to the Board at all. *See, e.g.*, *Alaris Health at Blvd. E. v. NLRB*, 123 F.4th 107, 120–23 (3d Cir. 2024). This decision extends that error and warrants review.

3. Indeed, the Third Circuit's disregard of *Loper Bright* is so egregious that, even if this Court declines plenary review, it should consider granting, vacating, and remanding so that the panel can apply *Loper Bright*'s methodology in the first instance. As this Court explained, "[i]n an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration" and "assists the court below by flagging a particular issue that it does not appear to have fully considered"—especially where, as here, there have been "recent developments" that the court may not have "fully consider[ed]." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

III. The *Thryv* Remedy Implicates a Clear Circuit Split; this Case Is the Best Vehicle to Resolve It.

1. Neither respondent disputes the circuit split over the *Thryv* remedy or attempts to defend the Board's consequential damages award.

Instead, respondents argue that this case is a poor vehicle to resolve that split because the Third Circuit held that the Post-Gazette failed to adequately raise *Thryv* before the Board, thereby forfeiting the argument. Gov't.Br.22; Guild.Br.23 (citing 29 U.S.C. § 160(e)). That is wrong on both the facts and the law.

There is no dispute that the Post-Gazette *did* object to the award of *Thryv* damages before the Board. CA3

Dkt. 34, at APPX0213 (filing an exception to "the ALJ's remedy consistent with *Thryv*"); Gov't.Br.23 (acknowledging objection). While the Government argues that this objection was too "general" to satisfy Section 10(e), *ibid.*, the Board's own regulations provide that for a "matter" to be preserved, it need only be "included in exceptions or cross-exceptions." 29 C.F.R. § 102.46(f).

And even if petitioner's *Thryv* objection was not specific enough, that would be no bar. This Court has recognized that Section 10(e) forfeiture does not apply where "the Board determination at issue is patently in excess of its authority." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 n.10 (1979); *see also NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 316, 322 (1961). That is because when the Board has "patently traveled outside the orbit of its authority . . . there is legally speaking no order to enforce." *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946).

The government acknowledges this exception, relying solely on a split panel decision from the Eighth Circuit to argue that, even where the Board acts patently in excess of its authority, Section 10(e) may only be excused when, "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." Gov't.Br.24 (quoting *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 797 (8th Cir. 2013)).

But *RELCO* is an outlier; its heightened standard has never been adopted outside the Eighth Circuit. Other circuits follow this Court's rule as written. As one court observed in rejecting *RELCO*'s complicated gloss, "it would be passing strange" to "foreclos[e] a challenge to the Board's statutory authority because it was not raised before the Board." *Advanced Disposal Servs. E., Inc. v.*

NLRB, 820 F.3d 592, 600 (3d Cir. 2016). And courts routinely entertain challenges to the Board's statutory authority that were first raised on appeal. *See ibid.* (holding that challenge to composition of NLRB could be raised for the first time on appeal); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015); *Noel Canning v. NLRB*, 705 F.3d 490, 497–98 (D.C. Cir. 2013); *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 460 (1st Cir. 2005).

Here too, the Post-Gazette submits that the Board's *Thryv* order "was 'outside the orbit of authority' by reason of its scope." *Noel Canning*, 705 F.3d at 498 (quoting *Cheney*, 327 U.S. at 388). And three circuits have already so concluded, holding that the Board "lack[s] statutory authority" to impose legal, as opposed to equitable, remedies. *NLRB v. Starbucks Corp.*, 159 F.4th 455, 482 (6th Cir. 2025); Pet.23–24. In short, the Post-Gazette has a compelling claim that the Board's award of consequential damages "is patently in excess of its authority," and that kind of argument cannot be foreclosed by Section 10(e). *Detroit Edison*, 440 U.S. at 311 n.10.

2. Finally, the Court's recent denial of certiorari in *Macy's Inc. v. NLRB*, 2026 WL 1717973 (June 15, 2026), does not support denial here. After the *Macy's* petition was briefed, the respondent notified the Court of the Board's determination that the employees in that case "did not, in fact, suffer any 'direct or foreseeable pecuniary harms' covered by *Thryv*," rendering "the dispute over *Thryv* relief . . . 'effectively moot.' " Supp.Br. 1–2, No. 25-637 (May 29, 2026).[2]

[2] The Ninth Circuit has not yet granted the Board's request to vacate as moot its order enforcing the *Thryv* remedy. Even if it does, that would not resolve the split. Subsequent Ninth Circuit decisions reaf-

The Court's denial in *Macy's* likely reflected justiciability concerns after the Board conceded that no *Thryv* damages remained at issue. This case presents no such obstacle. The Board continues to seek *Thryv* damages here. With *Macy's* off the docket, this case is now the best vehicle for resolving the split. That counsels in favor of, not against, a grant.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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firm the *Macy's* position on *Thryv* and will remain good law even if that judgment is vacated. *NLRB v. N. Mountain Foothills Apts.*, 157 F.4th 1089, 1098–1100 (9th Cir. 2025); *Int'l Bhd. of Teamsters v. NLRB*, 2026 WL 1079297, at *10 (9th Cir. Apr. 21, 2026).