No. 25-627

# In the Supreme Court of the United States

MACY'S, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

## BRIEF FOR THE FEDERAL RESPONDENT


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## QUESTION PRESENTED

Whether the Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case with instructions to remand to the agency for further consideration in light of the National Labor Relations Board's request for a remand.

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## OPINIONS BELOW

The amended opinion and order of the court of appeals (Pet. App. 1-109) is reported at 155 F.4th 1023. The initial opinion of the court of appeals (Pet. App. 110-193) is reported at 127 F.4th 58. The decision and order of the National Labor Relations Board (Pet. App. 194-287) is reported at 372 N.L.R.B. No. 42.

## JURISDICTION

The judgment of the court of appeals was entered on January 21, 2025. A petition for rehearing was denied on October 21, 2025 (Pet. App. 1-3). The petition for a writ of certiorari was filed on November 26, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The National Labor Relations Act (NLRA or Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*), regulates labor relations and forbids unfair labor practices by employers and unions. The National Labor Relations Board (Board) is tasked with determining whether unfair labor practices have occurred and providing certain remedies for any such violations. See 29 U.S.C. 160(c).

Section 8(a)(3) of the Act makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). "Discouraging membership in a labor organization 'includes discouraging participation in concerted activities such as a legitimate strike.'" *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967) (ellipses omitted). Interference with the right to strike in violation of Section 8(a)(3) is also unlawful under Section 8(a)(1), 29 U.S.C. 158(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of concerted activity protected by Section 7, 29 U.S.C. 157. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

Whether an employer has violated Section 8(a)(3) "normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *Great Dane*, 388 U.S. at 33. But this Court has held that if an employer's conduct is "'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations." *Id.* at 34. If an employer's conduct has a "comparatively

slight" adverse effect on employee rights, by contrast, "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Ibid.* "[I]n either situation," the Court has explained, "the burden is upon the employer to establish that he was motivated by legitimate objectives." *Ibid.* So where an employer fails to establish a legitimate justification, a court need not "decide the degree to which the challenged conduct might have affected employee rights." *Ibid.*

The Court has recognized that "[i]f, after conclusion of [a] strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike." *Fleetwood Trailer*, 389 U.S. at 378. "Accordingly, unless the employer who refuses to reinstate strikers can show that [its] action was due to 'legitimate and substantial business justifications,' [it] is guilty of an unfair labor practice." *Ibid.* (quoting *Great Dane*, 388 U.S. at 34).

That said, "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached," it temporarily lays off—or "locks out"—its union-represented employees "for the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position." *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 301, 318 (1965). But the Board has held that, in order for such a lockout to be lawful, the employer must clearly and fully inform the union of its bargaining position in a timely manner. *Dayton Newspapers, Inc.*, 339 N.L.R.B. 650, 656 (2003), enforced in relevant part, 402 F.3d 651 (6th Cir. 2005). Such notification ensures that "the membership, through its control of union policy, could end the dispute and ter-

minate the lockout at any time simply by agreeing to the employers' terms and returning to work on a regular basis." *NLRB* v. *Brown*, 380 U.S. 278, 289 (1965). Under the foregoing principles, if striking workers unconditionally offer to return to work, but the employer instead locks them out without informing them of its bargaining position so that the strikers can "knowingly reevaluate their position and decide whether to accept the employer's terms," that conduct supports a finding that the employer is discriminating against strikers in violation of Section 8(a)(3) and (1) of the Act. *Eads Transfer, Inc.* v. *NLRB*, 989 F.2d 373, 376 (9th Cir. 1993); see *Fleetwood Trailer*, 389 U.S. at 378-380.

2. Once the Board determines that an unfair labor practice has occurred, Section 10(c) of the Act provides that the Board shall issue a "cease and desist" order and further grants the Board discretionary authority to remedy the violation by ordering a respondent to "take such affirmative action[,] including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. 29 U.S.C. 160(c); see *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 215-216 (1964).

When the Board determines that a respondent has committed an unfair labor practice, it will issue a written decision setting forth its findings and an order directing the respondent to take appropriate remedial actions. 29 U.SC. 160(c). At this initial liability stage, the Board's normal practice is to include "general" language in its remedial orders, while deferring to subsequent compliance proceedings any more detailed factual questions necessary to "tailor[ ] the remedy to suit the individual circumstances" of each case. *Sure-Tan,*

*Inc.* v. *NLRB*, 467 U.S. 883, 902 (1984) (noting longstanding judicial approval of Board's bifurcated proceedings).

In *Thryv, Inc.*, 372 N.L.R.B. No. 22 (2022), enforcement denied on other grounds, 102 F.4th 727 (5th Cir. 2024), the Board "revisit[ed] and clarif[ied]" its "existing practice of ordering relief that ensures affected employees are made whole for the consequences of [an employer's] unlawful conduct," slip op. 6. The Board concluded that "in all cases in which [its] standard remedy would include an order for make-whole relief, the Board will expressly order that the [employer] compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the [employer's] unfair labor practice." *Ibid.* (emphasis omitted). The Board listed potential examples of such pecuniary harms, including "out-of-pocket medical expenses, credit card debt, or other costs [incurred] simply in order to make ends meet." *Id.* at 9. The Board viewed that remedy as "grounded squarely in [its] statutory authority," which "clearly allows for remedies beyond reinstatement and backpay." *Id.* at 10-11. And the Board concluded that the remedy "does not implicate the Seventh Amendment," based on this Court's holding that "an NLRB statutory proceeding 'is one unknown to the common law.'" *Ibid.* (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937)).

3. Under the NLRA, the Board's orders are not self-executing. Rather, "[t]o secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938); see 29 U.S.C. 160(e) (authorizing the Board to petition for enforcement of its orders). Until the Board takes that step and its "order has been affirmed by the appropriate Circuit Court of Appeals, no

penalty accrues for disobeying it." *Myers*, 303 U.S. at 48. "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought" may also petition for review of such order in the appropriate court of appeals. 29 U.S.C. 160(f).

4. a. Petitioner operates retail stores across the United States. Pet. App. 5. For more than 20 years, the International Union of Operating Engineers, Stationary Engineers, Local 39 (Union) has represented a unit of 60 to 70 building engineers and craftsmen who perform carpentry, painting, maintenance, and repair work at dozens of petitioner's stores in California and Nevada. *Id.* at 5-6. The most recent collective-bargaining agreement between the parties was effective through August 31, 2020. *Id.* at 6.

The parties began negotiations for a successor agreement in July 2020. Pet. App. 6. On August 31, petitioner made a final offer as to wages and pensions. Shortly thereafter, the Union rejected that offer and unit employees went on strike. *Ibid.* Petitioner withdrew its final offer on October 15. *Ibid.*

On November 25, 2020, the Union submitted a wage-and-pension proposal that would cost the same amount as petitioner's final offer. Pet. App. 7; *id.* at 258. On Friday, December 4, petitioner rejected that proposal. *Id.* at 7. The Union responded by email the same day, expressing surprise and disappointment. *Ibid.*; see *id.* at 260. The Union wrote that it did not want the dispute to continue and tendered "an unconditional offer to return our members to work immediately." *Id.* at 7. The Union ended the strike and picketing ceased. *Ibid.*

That evening, petitioner wrote the Union that it needed to discuss the return-to-work offer "with all necessary partners," and would respond by close of busi-

ness on Monday, December 7. Pet. App. 7. Meanwhile, petitioner asked, "please do not have the members report to work yet." *Ibid.* The Union immediately replied: "[D]oes this mean you are locking them out till Monday?" *Ibid.* Petitioner responded the following day, explaining that it needed until close of business Monday to evaluate "administrative, logistical, and economic issues" related to the return-to-work offer. *Ibid.* On Sunday, December 6, the Union replied that unit employees would show up for work on Monday morning unless they were locked out. *Ibid.* In response, petitioner repeated that employees should not return on Monday. Petitioner stated: "[T]his is not a lockout but we won't be ready for them." *Id.* at 7-8.

On Monday, December 7, some employees attempted to report for work, but petitioner turned them away. Pet. App. 8. Later that day, petitioner announced that it was imposing a lockout. *Ibid.* Petitioner told the Union that it was "not willing to reinstate bargaining employees until there is an agreement in place" and that the "decision is being made in support of [petitioner's] bargaining position." *Ibid.* At that time, petitioner had no bargaining proposal on the table. *Id.* at 6.

The parties engaged in a bargaining session three days later, on December 10. Pet. App. 8. Petitioner made a proposal with wage increases that were lower than those in its final offer. *Ibid.* The Union countered, offering to cap wages at the rates originally proposed in the final offer. *Ibid.* The parties did not reach an agreement, and petitioner continued to lock out the employees. *Id.* at 8-9.

b. The Union filed unfair-labor-practice charges, and the Board's General Counsel issued a complaint alleging that petitioner unlawfully locked out Union mem-

bers after they made an unconditional return-to-work offer. Pet. App. 8.

An administrative law judge (ALJ) issued a decision and recommended order finding that petitioner committed the violation as alleged. Pet. App. 202-287. Before the ALJ, petitioner asserted two business justifications for its lockout: (1) that it feared union misconduct and sabotage; and (2) that the lockout was in support of its bargaining position. The ALJ rejected both asserted justifications. *Id.* at 269-271. With respect to misconduct, the ALJ declined to credit the testimony of petitioner's witnesses and instead found that fears of misconduct and sabotage were "post-hoc excuses." *Id.* at 274. As for the claim that the lockout was in support of petitioner's bargaining position, the ALJ applied Board precedent holding that "for a 'lockout to be lawful, the union must be informed on a timely basis of the employer's demands so that the union can evaluate whether to accept them and prevent the lockout.'" *Id.* at 269 (quoting *Alden Leeds, Inc.*, 357 N.L.R.B. 84, 93 (2011), enforced, 812 F.3d 159 (D.C. Cir. 2016)). Under Board precedent, a lockout that does not comply with that rule is not a legitimate justification for refusing to reinstate strikers. *Id.* at 269-270 (citing *Dayton Newspapers*, 339 N.L.R.B. at 656). The ALJ concluded that petitioner had not timely informed the Union of its bargaining position because at the time of the lockout, petitioner had not presented the Union with "any new contract offers or bargaining proposals." *Id.* at 269.

The ALJ further rejected petitioner's argument that its unlawful lockout was cured when petitioner made a wage proposal days after refusing to reinstate the employees. Pet. App. 270. The ALJ reasoned that a "lockout unlawful at its inception retains its initial taint of

illegality until it is terminated and the affected employees are made whole." *Ibid.* (quoting *Alden Leeds*, 357 N.L.R.B. at 84 n.3). Accordingly, the ALJ recommended a remedial order requiring petitioner to offer reinstatement to employees it had unlawfully locked out and make them whole for losses of pay and benefits they may have suffered because of the lockout. *Id.* at 281-283.

On review, the Board rejected petitioner's exceptions and the Union's cross-exceptions, affirmed the ALJ's findings and conclusions with minor modification, and adopted the recommended order as modified. Pet. App. 194-201. The Board substituted the newly standardized make-whole language it had adopted in *Thryv*. *Id*. at 195 n.2. The order thus directed petitioner to "[m]ake the locked-out employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout." *Id.* at 197.

5. The court of appeals denied petitions for review filed by petitioner and by the Union (which sought additional remedies), and granted the Board's petition for full enforcement of its order. Pet. App. 1-48. The court subsequently denied a petition for rehearing en banc and amended its opinion. *Id.* at 2-3. This brief cites and discusses the amended opinions.

a. On the merits, the court of appeals held that substantial evidence supported the Board's finding that petitioner violated Section 8(a)(3) and (1) by failing to reinstate strikers who offered unconditionally to return to work. Pet. App. 15-24. The court concluded that, under this Court's precedent, an employer who refuses to reinstate strikers after the conclusion of a strike "'is guilty of an unfair labor practice' unless it can show 'legitimate and substantial business justifications' for its

lockout." *Id.* at 15-16 (quoting *Fleetwood Trailer*, 389 U.S. at 378). And the court rejected petitioner's argument that the Board had failed to apply that framework. *Id.* at 16-17.

The court of appeals further held that "substantial evidence supports" the Board's findings that petitioner failed to make a showing that it had a legitimate and substantial business justification for the lockout. Pet. App. 16; see *id.* at 18-24. The court upheld the Board's findings that petitioner's purported concerns with union misconduct and sabotage were "post-hoc excuses." *Id.* at 23; see *id.* at 23-24. And the court likewise rejected petitioner's assertion that it had shown the lockout was in furtherance of its bargaining position, reasoning that, at the time of the lockout, there was no offer on the table. *Id.* at 18-23.

The court of appeals also rejected the argument that petitioner had cured the lockout's unlawfulness by making a proposal three days after the lockout began. Pet. App. 29-32. The court concluded that petitioner's offer "neither terminated the lockout nor made the affected employees whole." *Id.* at 30.

Turning to the remedy, the court of appeals held that the Board's inclusion of the standardized language adopted in *Thryv* directing petitioner to make employees whole for direct or foreseeable pecuniary harms resulting from the unfair labor practices did not on its face exceed the Board's statutory authority. Pet. App. 32-48. The court acknowledged that the Board "is not authorized to award 'consequential damages.'" *Id.* at 34. But the court viewed the remedy as "'fall[ing] within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for' [petitioner's] unlawful lockout."

*Id.* at 43. The court declined to entertain the contention that such remedy violated the Seventh Amendment, viewing the argument as forfeited and waived. *Id.* at 32 n.10, 45-47. And the court also concluded that, prior to a compliance proceeding, it is too early to definitively "permit or prohibit any specific forms of relief" that *Thryv* may authorize. *Id.* at 47. The court noted that petitioner would have the right to obtain further judicial review of any specific monetary relief ordered following such a compliance proceeding, including by raising statutory or constitutional arguments that it failed to preserve on review of the Board's initial order. *Id.* at 44 n.15; see *id.* at 47-48.

b. Judge Bumatay dissented from the panel opinion both on the merits and the remedy. Pet. App. 49-109. In his view, petitioner's lockout "served a legitimate economic purpose" and its conduct was not "inherently destructive." *Id.* at 78; see *id.* at 78-87. Judge Bumatay concluded that petitioner's "taking a mere two business days to formulate and communicate a new, detailed offer can't be viewed as anti-union animus." *Id.* at 81-82. He also would have held that the standardized make-whole language announced in *Thryv* is categorically beyond the Board's authority. *Id.* at 54-76. Judge Bumatay viewed the Board's statutory authority as limited to equitable remedies and viewed the *Thryv* remedy as having "a compensatory—rather than restitutionary—purpose" that exceeded the statutory authorization. *Id.* at 60; see *id.* at 58-66. And because he viewed the *Thryv* remedy as awarding "consequential or foreseeable damages" rather than equitable restitution, Judge Bumatay likewise concluded that the remedy would "raise serious constitutional doubt under the Seventh Amendment." *Id.* at 66, 68; see *id.* at 66-76.

c. The court of appeals denied rehearing en banc. Pet. App. 2-3. Judge Nelson issued an opinion dissenting from the denial of rehearing en banc, joined by Judges Callahan, Ikuta, Lee, Bumatay, and VanDyke. *Id.* at 89-109. For substantially the same reasons as set forth by Judge Bumatay, the dissenters disagreed with the panel majority's analysis of the merits and the remedy. *Ibid.*

**DISCUSSION**

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to remand to the Board to allow for further consideration. Petitioner primarily challenges (Pet. i, 1-2, 25-31) the lawfulness of the Board's *Thryv* remedy. But since issuing the order in this case and petitioning for enforcement, the Board's composition has changed, with two new members confirmed and an additional nomination pending. The two newly confirmed members of the Board have expressed interest in reconsidering the *Thryv* remedy, and the Board does not wish to pursue its petition to enforce the existing order before doing so. The Court should allow such reconsideration to occur, which may moot any question regarding the *Thryv* remedy.

Petitioner's additional challenge (Pet. 19-25) to the Board's liability finding does not warrant a different result. Contrary to petitioner's contention, this case presents no question as to the definition of "inherently destructive" conduct under *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), because the court of appeals affirmed the Board's determination that petitioner had not established a legitimate and substantial business justification for refusing to reinstate strikers. Although petitioner contests the merits of that determi-

nation, it identifies no circuit conflict on that fact-bound question, which does not warrant this Court's review in this case. Regardless, if the case is remanded to the Board for further consideration, the Board will have the opportunity to reassess liability as well as remedy.

1. The Court should grant, vacate, and remand (GVR) this case with instructions to remand to the Board for further consideration. The Court has "broad power" to vacate "'any judgment, decree, or order'" of a lower court brought before it for review and to remand for proceedings "'as may be just under the circumstances.'" *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. 2106). This Court has accordingly "GVR'd in light of a wide range of developments," including agency "reinterpretations of federal statutes" and "changed factual circumstances." *Id.* at 166-167.

For example, in several previous cases, including earlier this term, this Court has granted the Solicitor General's request to GVR to allow the government to dismiss a criminal enforcement action. See, *e.g.*, *Bannon* v. *United States*, No. 25-453 (Apr. 6, 2026); *Full Play Group, S.A.* v. *United States*, No. 25-390 (Jan. 12, 2026); *Lopez* v. *United States*, No. 25-396 (Jan. 12, 2026); *Bronsozian* v. *United States*, 590 U.S. 901 (2020). Courts of appeals have also regularly granted agency requests for voluntary remands where an agency expresses a desire to "give further consideration to the matters addressed in the [agency's] orders." *Southwestern Bell Tel. Co.* v. *FCC*, 10 F.3d 892, 896 (D.C. Cir. 1993), cert. denied, 512 U.S. 1204 (1994); see *SKF USA Inc.* v. *United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("[E]ven if there are no intervening events, the agency may request a remand (without confessing er-

ror) in order to reconsider its previous position."). Courts of appeals have granted such requests based on an agency's desire to reconsider even after its action has been upheld on judicial review, see *SKF USA*, 254 F.3d at 1026-1027, 1030, and even where intervenors opposed remand and wished to defend the agency decision, see *Alabama Envtl. Council* v. *Administrator*, 711 F.3d 1277, 1284 (11th Cir. 2013).

Such a course is appropriate in this case. Since the Board petitioned to enforce its order and the court of appeals issued its decision, the makeup of the Board has changed significantly. Two out of the three sitting Board members have noted that "[t]hey would be open to reconsideration" of whether the *Thryv* remedies are "permissible under the Act," once there is a "three-member majority" that could "overrule" that precedent consistent with Board practice. *Performance Plumbing LLC*, 374 N.L.R.B. No. 48 (2026), slip op. 2 n.2. It is very likely that there will be a three-member majority willing to at least reconsider *Thryv* before this Court could resolve the merits of this case, as the President has now nominated an additional Board member.* Accordingly, the Board does not wish to pursue its petition at this time and is seeking a voluntary remand in this case. On remand, the General Counsel intends to urge the Board to sever and hold any *Thryv* remedy in this case until such time as the Board is willing to reconsider that issue.

Once a new Board member is confirmed, the Board will have an opportunity to consider the analysis raised

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* See White House, *Nominations and Withdrawal Sent to the Senate* (April. 13, 2026), https://www.whitehouse.gov/presidential-actions/2026/04/nominations-sent-to-the-senate-6df5/ (nominating James Macy to be a Board member).

(Pet. 25-31) by the dissents below and the other courts of appeals that have rejected the *Thryv* remedy. See Pet. App. 54-76, 94-109; *NLRB* v. *Starbucks Corp.*, 125 F.4th 78, 94-97 (3d Cir. 2024); *Hiran Mgmt., Inc.* v. *NLRB*, 157 F.4th 719, 725-729 (5th Cir. 2025); *NLRB* v. *Starbucks, Corp.*, 159 F.4th 455, 467-482 (6th Cir. 2025).

Those decisions have reasoned that the Act limits the Board's remedial powers to equitable relief, based on Section 10(c)'s pairing of negative "cease and desist" orders with "affirmative action including reinstatement of employees with or without back pay." 29 U.S.C. 160(c); see *Starbucks*, 159 F.4th at 470 (explaining that the phrase "affirmative action" has "a well-established meaning associated with the function or effect of traditional equitable remedies"); *Hiran Mgmt.*, 157 F.4th at 725-726 (similar). They have also compared Section 10(c) to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which includes a remedial provision modeled on Section 10(c). 42 U.S.C. 2000e-5(g)(1); see *Starbucks*, 159 F.4th at 472; *Hiran Mgmt.*, 157 F.4th at 726-727. Those courts have noted that the Title VII provision authorizes courts to order "affirmative action," including reinstatement, backpay or "*any other equitable relief* as the court deems appropriate." *Starbucks*, 159 F.4th at 472 (quoting 42 U.S.C. 2000e-5(g)(1)). After this Court held that the Title VII provision does not authorize compensatory damages, see *United States* v. *Burke*, 504 U.S. 229, 238 (1992), Congress amended Title VII to expressly permit such compensatory remedies in certain circumstances, see *Starbucks*, 159 F.4th at 472 (citing 42 U.S.C. 1981a(c)), but no similar change has been made to the NLRA. The lower courts have further rejected "attempts to characterize the *Thryv* remedy as equitable," distinguishing it from *restitutionary* make-

whole remedies like backpay. *Hiran Mgmt.*, 157 F.4th at 728; see *id.* at 725-728; *Starbucks*, 159 F.4th at 472-475; *Starbucks*, 125 F.4th at 96-97. And they have questioned the remedy's constitutionality under the Seventh Amendment in light of this Court's decision in *SEC* v. *Jarkesy*, 603 U.S. 109 (2024). See *Starbucks*, 159 F.4th at 474. The Board did not consider those arguments in *Thryv* and has requested a remand to allow it to do so, as an exercise of its remedial discretion under Section 10(c). 29 U.S.C. 160(c); see *Shepard* v. *NLRB*, 459 U.S. 344, 352 (1983) ("[N]othing in the language or structure of the Act * * * requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice").

The Board has often reconsidered its policies in light of intervening judicial guidance. See, *e.g.*, *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348, 1350-1353 (2007) (modifying approach to certain make-whole relief based on judicial opinion holding that prior approach exceeded Board's statutory authority); *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 496-497 (1984) (restoring longstanding definition of concerted activity following judicial skepticism of intervening policy change). The Board should be given the opportunity to consider whether to do so here. It would not be a prudent use of this Court's resources to grant certiorari at this stage—based on a lopsided circuit split, concerning a discretionary remedy, that may soon be moot. And that is especially so because, under the NLRA, the Board's order in this case becomes enforceable only if the Board successfully petitions to enforce it, see pp. 5-6, *supra*, and the Board does not wish to pursue its enforcement petition before undertaking such reconsideration, cf., *e.g.*, *Bannon*, *supra*.

Nor would a voluntary remand harm petitioner. In imposing the *Thryv* remedy, the Board deferred to later compliance proceedings the question of whether "direct or foreseeable pecuniary harms" actually exist in this case. *Thryv, Inc.*, 372 N.L.R.B. No. 22 (2022), enforcement denied on other grounds, 102 F.4th 727 (5th Cir. 2024), slip op. 12-14. At petitioner's request, the court of appeals stayed its mandate pending certiorari, see Pet. 16, such that no compliance proceeding has been initiated. Thus, petitioner has not been required to make any payments to which it has objected and would not have to do so before the Board completes its reconsideration on remand. As for the Union, petitioner notes that the Union "sent a letter to the Board's general counsel purporting to forgo [*Thryv*] remedies for its membership." Pet. 17 n.4.

2. Petitioner's separate challenge to the Board's liability finding does not counsel against the requested GVR. Petitioner contends (Pet. 19-25) that the court of appeals departed from the precedent of this Court and other courts of appeals in holding that petitioner's lockout of striking Union members was inherently destructive. But that contention misreads the court of appeals' decision, which did not conclude that petitioner's conduct was inherently destructive and therefore does not implicate the question presented as framed by the petition. Nor does the court of appeals' decision on the fact-bound question it actually decided implicate any disagreement among the circuits. And in any event, once the case is remanded, the Board will have the opportunity to reassess the merits of the charge in addition to the remedy.

a. Under this Court's precedent, an employer violates Section 8(a)(3) and (1) of the Act by failing, absent

a legitimate and substantial business justification, to reinstate striking workers who offer unconditionally to return to work. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Regardless of whether the employer's conduct was "'inherently destructive' of important employee rights" or had a "'comparatively slight'" adverse effect, "the burden is upon the employer to establish that he was motivated by legitimate objectives." *Great Dane Trailers*, 388 U.S. at 34. Where an employer does not provide a legitimate and substantial business justification, "it is not necessary for [the court] to decide the degree to which the challenged conduct might have affected employee rights." *Ibid.*

Applying those principles, the court of appeals here did not address whether petitioner's lockout was inherently destructive. Instead, the court upheld the Board's conclusion that petitioner had "failed to meet its 'burden of showing such a legitimate justification.'" Pet. App. 24. Under Board precedent, the employer must clearly and fully inform the union of its bargaining demands in a timely manner in order for the lockout to be lawful. *Dayton Newspapers, Inc.*, 339 N.L.R.B. 650, 656 (2003), enforced in relevant part, 402 F.3d 651 (6th Cir. 2005). And here, the court held that substantial evidence supported the Board's conclusion that petitioner's lockout did not constitute a legitimate reason for refusing to reinstate those employees because petitioner had no bargaining demands on the table at the time of the lockout. Pet. App. 18-24.

b. There is no disagreement among the courts of appeals on the lockout standards the court below applied. Every court to address the issue has agreed that, in order for an employer to lawfully lock employees out in support of a bargaining position, "the employer must in-

form the union in a clear and timely manner of its demands so that the union has a fair opportunity to evaluate whether to accept the employer's proposal and avoid a lockout." *Alden Leeds, Inc.* v. *NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016); see *Dayton Newspapers, Inc.* v. *NLRB*, 402 F.3d 651, 662-663 (6th Cir. 2005) (employer who "failed to provide the Union with information about how it could end the lockout" violated Section 8(a)(3) and (1) by "fail[ing] to reinstate striking workers without showing a legitimate and substantial business justification"); *NLRB* v. *Dawn Trucking Inc.*, 751 Fed. Appx. 35, 37-38 (2d Cir. 2018) (holding that any lockout "would have been unlawful" because the employer "did not inform the union in advance" of its demands); cf. *Local 15, Int'l Bhd. of Elec. Workers* v. *NLRB*, 429 F.3d 651, 661 (7th Cir. 2005) (rejecting argument that the employer established legitimate and substantial justification for partial lockout merely because employer believed that tactic to be in its best interest), cert. denied, 549 U.S. 810 (2006).

Petitioner does not address that consistent line of precedent. Instead, petitioner argues that there is a circuit split regarding what constitutes "inherently destructive" conduct. Pet. 20-25. Even if such a split existed, this case would not implicate it. The court of appeals here did not decide whether petitioner's conduct fell within that category because the court instead concluded that petitioner had failed to provide a legitimate and substantial business justification and thus petitioner's conduct was unlawful even if its effects were comparatively slight. See Pet. App. 24.

Regardless, petitioner does not demonstrate the existence of a circuit conflict. Indeed, the cases petitioner invokes indicate circuit consensus. The Fifth Circuit

case petitioner cites (Pet. 21) as deviating from the Ninth Circuit in fact relied on Ninth Circuit precedent for the proposition that "inherently destructive activity was that which has 'far reaching effects which would hinder future bargaining.'" *Electric Mach. Co.* v. *NLRB*, 653 F.2d 958, 966 (5th Cir. 1981) (quoting *Portland Willamette Co.* v. *NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)). The Ninth Circuit, in turn, relied on petitioner's Eighth Circuit case (Pet. 21), for the same principle. *Portland Willamette*, 534 F.2d at 1334 (citing *Inter-Collegiate Press, Graphic Arts Div.* v. *NLRB*, 486 F.2d 837, 845 (8th Cir. 1973), cert. denied, 416 U.S. 938 (1974)); see *NLRB* v. *Sherwin-Williams Co.*, 714 F.2d 1095, 1101 (11th Cir. 1983) (quoting *Portland Willamette*, 534 F.2d at 1334 and *Inter-Collegiate Press*, 486 F.2d at 845).

c. Accordingly, the liability question that the court of appeals actually decided is whether petitioner made a showing that its lockout was supported by legitimate and substantial business justifications. Pet. App. 15-24. The court concluded that petitioner had not done so because, "at the time of the lockout there was *no* offer at all on the table," and petitioner took a few days to provide a proposal after the Union unilaterally ended its strike on a Friday evening. *Id.* at 20, 22. The court further held that petitioner failed to cure the taint of its lockout when it tendered its proposal because that proposal "neither terminated the lockout nor made the affected employees whole." *Id.* at 30.

Petitioner's merits arguments essentially contest the court of appeals' conclusion as to the legitimacy of its business justification. Petitioner asserts that its response was "eminently reasonable," involved "minimal delay," and did not harm locked-out employees. Pet. 22; see Pet. 22-24. The dissents likewise viewed the Board's

decision as an overly stringent application of Board precedent requiring timely notification of a bargaining proposal to render a lockout lawful, Pet. App. 78-85 (Bumatay, J., dissenting), and emphasized that petitioner "offered a counterproposal three workdays after an unexpected offer to return to work," *Id.* at 94 (Nelson, J., dissenting from the denial of rehearing en banc). But petitioner does not identify any circuit conflict on the fact-bound questions presented: in these unusual circumstances, whether petitioner's conduct was untimely under the Board's precedents and whether the lockout constituted discrimination against, or interference with, strikers that is unlawful under Sections 8(a)(3) and (1) of the Act. Any disagreement with the court of appeals' conclusion does not warrant this Court's review in this case. And in all events, remanding the case to the Board for further consideration would give the Board the opportunity to assess the liability objections raised by petitioner and the dissents.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded with instructions to remand to the Board to allow for further consideration.

Respectfully submitted.

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