No. 25-627

IN THE

Supreme Court of the United States

MACY'S INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that Macy's committed an unfair labor practice when it refused to reinstate workers who had ended a strike and unconditionally offered to return to work.

2. Whether this Court should grant certiorari to review the remedial approach adopted by the National Labor Relations Board in *Thryv, Inc.*, 372 NLRB No. 22 (2022), when no *Thryv* relief has been awarded in this case; when the Ninth Circuit declined to decide the legality of any particular form of relief unless and until it is awarded in yet-to-be-held compliance proceedings; when those proceedings will not result in any *Thryv* relief because the union has represented that there is no evidence to support such a remedy; and when the Board may soon abandon *Thryv* altogether.

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INTRODUCTION

Macy's refused to reinstate workers who ended a strike and unconditionally offered to return to work. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), this Court held that such a refusal is an unfair labor practice unless the employer establishes "legitimate and substantial business justifications." *Id.* at 378 (citation omitted). Here, the National Labor Relations Board (NLRB) found that the shifting and contradictory explanations Macy's offered for its conduct failed to carry that burden, and the Ninth Circuit affirmed. Neither of the petition's challenges to that decision warrant this Court's review.

First, Macy's insists that its conduct was not "inherently destructive" of employee rights because (allegedly) it did not affect collective bargaining. But *Fleetwood* makes clear that when an employer fails to justify a refusal to reinstate workers who abandon a strike, no further inquiry into "inherent destructiveness" is necessary. Macy's does not cite any decision holding otherwise. And Macy's also does not ask this Court to review the actual basis for the decision below—the factbound conclusion that Macy's failed to establish a legitimate business justification.

Second, Macy's urges this Court to consider the remedial approach the Board adopted in *Thryv, Inc.*, 372 NLRB No. 22 (2022). But that issue is effectively moot because no *Thryv* relief has been or will be awarded in this case. The Board could grant such relief only if future compliance proceedings showed that workers suffered qualifying losses. Here, the union has already told the Board that no such losses occurred. And in any event, the Board has made clear that it is likely to revisit *Thryv* in the near future. The

Court should not grant certiorari to render an advisory opinion on the availability of discretionary remedies the Board itself appears poised to reject.

The Government agrees with most of that analysis and recognizes that this case does not warrant plenary review. Gov't Br. 12-13. It nonetheless asks this Court to "grant the petition," "vacate the judgment of the court of appeals," and "remand the case with instructions to remand to the Board to allow for further consideration" in light of the anticipated overruling of *Thryv*. *Id.* at 12. Such a GVR would be both novel and unnecessary.

The Government does not cite any case where this Court has vacated an Article III court's judgment merely because an agency wished to reconsider some aspect of its decision. This case should not be the first. A GVR based on the *Thryv* issue would have no effect on "the ultimate outcome of the litigation," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), because there is no evidence to support *Thryv* relief in any event. The Government's requested GVR would thus serve only to needlessly prolong this litigation and allow Macy's to further delay reinstating workers who have been unlawfully locked out of their jobs since 2020.

The Court should simply deny the petition outright. At a minimum, it should follow its usual practice by leaving it to the Ninth Circuit to decide the proper scope of a remand to the Board after a GVR. That would allow the Ninth Circuit to remand only the *Thryv* issue without further extending the lockout or delaying reinstatement.

STATEMENT OF THE CASE

A. Legal background

1. The National Labor Relations Act (NLRA) gives employees the right to organize and to engage in "concerted activities for the purposes of collective bargaining." 29 U.S.C. § 157. It also secures "the right to strike." *Id.* § 163. Section 8(a) of the Act protects those rights by prohibiting unfair labor practices. *Id.* § 158(a). Section 8(a)(3) makes it an unfair labor practice to "discourage membership" in a union by "discrimination" in hiring, "tenure of employment," or "any term or condition of employment." *Id.* § 158(a)(3). Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the Act. *Id.* § 158(a)(1). "[A] violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

In *Fleetwood*, this Court applied Sections 8(a)(3) and (1) in the specific context at issue here: an employer's refusal to reinstate workers after they abandon a strike. The Court observed that the NLRA "provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee" unless he has "obtained regular and substantially equivalent employment." *Fleetwood*, 389 U.S. at 378 (citing 29 U.S.C. § 152(3)). The Court reasoned that when an "employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike"—a result that "clearly" is "destructive of important employee rights." *Id.* at 378, 380. "Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and

substantial business justifications,' he is guilty of an unfair labor practice." *Id.* at 378 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

The employer in *Fleetwood* failed to carry that burden. 389 U.S. at 378, 380. Accordingly, even absent proof of "antiunion motivation," the Court found a violation of Sections 8(a)(3) and (1) without any further inquiry into the effect of the employer's conduct on collective bargaining or other employee rights. *Id.* at 380; *see id.* at 381.

2. One potential justification for refusing to reinstate returning strikers is an "offensive" lockout imposed to support the employer's position in collective bargaining. That is, an employer may prohibit employees from working to "bring[] economic pressure to bear" on the union to accept the employer's proposed terms. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). To be lawful, an offensive lockout must be instituted "solely in support of a legitimate bargaining position." *Id.* at 310.

Another potential justification for refusing to reinstate strikers is a "defensive" lockout imposed to protect the employer's business from future strikes or other union conduct. Pet. App. 23. To be lawful, a defensive lockout must be "justified by an intent 'to avoid severe and unusual hardships.'" *Id.* (citation omitted).

3. When the NLRB finds that an employer has committed an unfair labor practice, it may order the employer "to cease and desist" its illegal conduct and "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).

B. The strike, the abandonment of the strike, and the lockout

This case involves a lawful strike followed by an unlawful lockout. Because Macy's has tried to justify that lockout with a series of shifting explanations, we start with some detail on the facts and the Board's reasons for discrediting the justifications Macy's offered below.

1. Macy's is a retail chain with hundreds of stores. Pet. App. 5. The International Union of Operating Engineers, Stationary Engineers, Local 39 (Local 39) represents building engineers and craftsmen working at roughly forty stores in California and Nevada. *Id.* Macy's and Local 39 have had a collective-bargaining relationship for more than twenty years; their most recent collective-bargaining agreement covered approximately 60-70 employees. *Id.* 6.

That agreement expired on August 31, 2020. Pet. App. 6. In the months leading up to that date, the parties engaged in nearly a dozen bargaining sessions without reaching a new agreement. *Id.* On August 31, Macy's presented a final offer, which the union's members voted "overwhelmingly" to reject because its proposed wages and benefits were below Local 39's established standards. *Id.* Instead, Local 39 instituted a lawful economic strike, hoping to pressure Macy's to return to the table with a better offer. *Id.*

2. The parties did not hold formal bargaining sessions after the strike began, but their negotiators were in regular communication by phone. Macy's was represented by Rose Ashmore, its Director of Labor Strategies, who had decades of experience in labor negotiations. Pet. App. 6; *see id.* 207. In early October, Ashmore notified Local 39 that the August 31 final

offer would expire on October 15. *Id.* 6. On November 9, the union asked if Macy's planned to present another offer; Ashmore responded that it did not. *Id.*

On November 25, nearly two months into the strike, Local 39 made its own offer. Pet. App. 6. Recognizing that the strike had failed to bring Macy's back to the table, Local 39 capitulated: Its offer accepted the amount of compensation in the August 31 final offer from Macy's, while allowing the union to allocate future increases between wages, pensions, and other benefits. *Id.* 258. Such provisions keep an employer's overall expenses fixed but allow a union to reduce wage increases to offset the cost of health and welfare programs for their members.

On Friday, December 4, Macy's rejected Local 39's offer. Pet. App. 7. Macy's later asserted that even though its costs would have been fixed, the union's offer somehow would have "preclud[ed] the company from efficiently planning its budget." *Id.* 260. But Macy's did not raise that concern at the time; did not request corresponding changes to the union's offer; and did not make a counteroffer. *Id.* at 7, 259-60.

Out of options, Local 39 responded later that day by notifying Ashmore that it wanted to end the dispute and was making "an unconditional offer to return our members to work immediately." Pet. App. 7. Local 39 then "ended the strike and stopped picketing." *Id.*

3. Although Local 39 abandoned the strike and sought reinstatement as authorized by the NLRA and *Fleetwood*, Macy's refused to allow workers to return to their jobs. On Saturday, December 5, Ashmore told Local 39 that Macy's simply needed time to consider the "administrative, logistical, and economic issues" posed by a return to work after a two-month strike.

Pet. App. 7. On Sunday, Ashmore again asked that workers not report to work on Monday because Macy's "won't be ready for them." *Id.* But Ashmore explicitly assured the union that "this is not a lockout." *Id.* (brackets omitted); *see id.* 261-62.

On Monday, Macy's reversed its position and announced a lockout. Ashmore told Local 39 that Macy's was "not willing to reinstate bargaining Union employees until there is an agreement in place" and asserted that "this decision is being made in support of our bargaining position." Pet. App. 8 (brackets omitted); *see id.* at 263-64 (repeating the same assertion the next day). That statement was false, because Macy's had no "bargaining position" on the table—its last offer had expired months earlier.

Macy's did not make an offer until December 10, three days after announcing the lockout and six days after Local 39 ended the strike. Pet. App. 8. That offer was substantially worse than the offer Macy's made before the strike, reducing annual wage increases by more than a third. *Id.* 267. The parties held more bargaining sessions but failed to reach an agreement despite further concessions by Local 39. *Id.* 268. The proposals from Macy's remained materially worse than its pre-strike offer. *Id.*

The parties still have not reached an agreement, and the lockout continues to this day. Pet. App. 8-9.

C. Proceedings below

1. On December 9—two days after Macy's formally announced the lockout—Local 39 filed a charge with the NLRB. Pet. App. 8. The Board issued a complaint and ordered a hearing before an Administrative Law Judge (ALJ). *Id.*

At the hearing, Macy's abandoned the justification it originally offered to Local 39—that it needed time to figure out how to bring employees back to work. Instead, Macy's tried to carry its burden under *Fleetwood* by asserting two other justifications for refusing to reinstate workers. After a lengthy hearing, the ALJ rejected both of them. Pet. App. 269-81.

First, the ALJ found that Macy's had not imposed a lawful offensive lockout because the August 31 final offer "had expired, and Macy's had not presented any other bargaining proposals." Pet. App. 270. Under longstanding Board precedent applying *Fleetwood*, the lockout could not support a legitimate bargaining position because "neither the Union nor the strikers knew" what terms they needed to accept in order to end the lockout. *Id.* 269-70 (citing *Dayton Newspapers*, 339 NLRB 650, 656 (2003)).

Second, the ALJ rejected the assertion—raised for the first time before the Board—that Macy's imposed a defensive lockout because it feared that workers would engage in "sabotage" or "misconduct." Pet. App. 271. The ALJ found that those purported concerns were not "held in good faith." *Id.* 275. Instead, they were "post-hoc excuses" offered to "justify why the lock out occurred at a time when the company did not have any bargaining proposals on the table." *Id.* 274.

The ALJ further held that Macy's did not validate a lockout that was "unlawful at its inception" by making an offer on December 10. Pet. App. 270. The ALJ explained that Macy's could escape liability for continuing the lockout only by showing that imposing the lockout without an offer on the table "had no adverse impact" on the parties' bargaining after December 10. *Id.* The ALJ found that Macy's failed to

carry that burden. *Id.* To the contrary, the ALJ noted that later negotiations indicated that the unlawful lockout "may have weakened the Union's position." *Id.*

2. The NLRB affirmed the ALJ's findings and adopted his proposed order with modifications. Pet. App. 194-201. The Board ordered Macy's to end the lockout, to reinstate the locked-out workers, and to pay backpay. *Id.* 196-97. Applying its recent decision in *Thryv*, the Board also directed Macy's to compensate workers for "any other direct or foreseeable pecuniary harms suffered as a result of the unlawful lockout." Pet. App. 197; *see id.* 195 n.2. The existence and amount of any *Thryv* remedies will be determined "in a later compliance proceeding," which has not yet been initiated. *Id.* 42; *see* 29 C.F.R. §§ 102.52-.59.

3. The Ninth Circuit enforced the Board's order. Pet. App. 1-88.

a. The Ninth Circuit held that substantial evidence supported the Board's finding that the lockout violated Sections 8(a)(3) and (1). Pet. App. 15-24. The court started with *Fleetwood*, explaining that because Macy's refused to reinstate workers after they abandoned a strike and unconditionally requested reinstatement, "Macy's 'is guilty of an unfair labor practice' unless it can show 'legitimate and substantial business justifications' for its lockout." *Id.* 15-16 (quoting *Fleetwood*, 389 U.S. at 378).

The Ninth Circuit held that the Board's finding that Macy's failed to establish such a justification was well-supported by the record. First, the court agreed with the Board that Macy's had not imposed the lockout "in support of its bargaining position." Pet. App. 19. The court emphasized that "at the time of the lockout there was *no* offer at all on the table," and thus

no bargaining position to support. *Id.* 20. Second, the Ninth Circuit found no basis for disturbing the Board's factual finding that any purported concerns about sabotage or misconduct were "post hoc excuses." *Id.* 23-24.

The Ninth Circuit also rejected the argument that Macy's had "cured the taint" of the illegal lockout by making an offer "three days after the lockout began." Pet. App. 29. The court explained that an employer can "avoid further liability" for a lockout that was unlawful at the outset only if it shows that the violation "did not adversely affect subsequent bargaining." *Id.* 30 (citation omitted). And the court found that "substantial evidence supports the ALJ's findings, as adopted by the Board, that Macy's unlawful lockout placed the Union in a weakened bargaining position." *Id.* 32.

b. The Ninth Circuit also declined to disturb the portion of the Board's order providing for make-whole relief for any harms covered by *Thryv*. Pet. App. 32-48. The court explained that the Board is authorized to require "affirmative action" that will "effectuate the policies" of the NLRA. 29 U.S.C. § 160(c); *see* Pet. App. 33. The court reasoned that, "as a general matter," an order to provide "make-whole relief" satisfies that requirement because it seeks to undo the effects of an unfair labor practice. Pet. App. 33-34.

The Ninth Circuit agreed with Macy's that the NLRA authorizes only equitable relief, not "consequential damages." Pet. App. 34. The court emphasized that "[a]ny permissible *Thryv* remedy must therefore operate like a backpay order" by "giving something akin to restitution." *Id.* 37 n.12. But the court declined to apply that standard to "permit or prohibit any specific forms of relief" because no such relief had yet been awarded. *Id.* 47. Any *Thryv*

remedies would be awarded only in a "forthcoming compliance proceeding," where "the Board must still establish" that "any make-whole relief it seeks is equitable." *Id.* 46-47. And the court made clear that in any compliance proceeding (and subsequent judicial review), Macy's would be free to raise arguments it had "forfeited" here—including its assertion that *Thryv* remedies violate the Seventh Amendment. *Id.* 44 n.15; *see id.* 32 n.10, 47.

c. Judge Bumatay dissented in part. Pet. App. 49-88. He argued that the Board erroneously found that Macy's engaged in an unfair labor practice and that *Thryv* remedies are inconsistent with the NLRA and the Seventh Amendment. *Id.*

4. The Ninth Circuit denied rehearing en banc over a dissent joined by six judges. Pet. App. 3, 89-109.

D. Local 39's disclaimer of *Thryv* remedies

On October 31, 2025, Local 39 notified the NLRB that it "has no evidence of the types of harms that would support *Thryv* remedies." App., *infra*, 2a. The union added that it "withdraws" and "waives" any claim for "any remedy that would not have been otherwise awardable in compliance proceedings under Board law as it existed before *Thryv*." *Id.* The union explained that it was expressly disclaiming such remedies in an effort to expedite reinstatement and the recovery of backpay for workers who have been "unlawfully locked out" for "almost half a decade." *Id.*

REASONS FOR DENYING THE WRIT

I. This first question presented does not warrant review.

Macy's asserts that the Ninth Circuit erred and created a circuit split by holding that the lockout was "inherently destructive of union rights." Pet. i; *see id.* 19-21. But as the Ninth Circuit recognized, this case is controlled by *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Under *Fleetwood*, an employer that refuses to reinstate striking workers violates Sections 8(a)(3) and (1) unless it establishes a legitimate and substantial business justification. The Board and the Ninth Circuit held that Macy's failed to carry that burden. *Fleetwood* makes clear that no further inquiry into "inherent destructiveness" was required. Macy's does not cite any decision, by any court, adopting a contrary approach. It also does not ask this Court to review the Ninth Circuit's factbound holding that Macy's failed to establish a business justification. And that holding was clearly correct in any event.

1. As the Government's brief explains, this Court's decision in *Fleetwood* set forth a simple rule: "[U]nless [an] employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378 (citation omitted); *see* Gov't Br. 17-18. The Ninth Circuit faithfully applied that rule, carefully considering the explanations Macy's offered and holding that "Macy's failed to meet its 'burden of showing such a legitimate justification.'" Pet. App. 24 (citation omitted).

Under *Fleetwood*, the lack of a business justification established an unfair labor practice without the need for further inquiry into the lockout's effect on

employee rights. In *Fleetwood* itself, for example, the employer's lack of a business justification resolved the case. 389 U.S. at 381. This Court did not require any additional showing of "antiunion motivation" or harm to employee rights. *Id.* at 380. Here, too, the Ninth Circuit correctly recognized that the lack of a business justification was dispositive. Pet. App. 15-16, 24.

Macy's does not even try to rebut that straightforward application of *Fleetwood*. Indeed, Macy's all but ignores this Court's on-point precedent, relegating it to a single passing citation. Pet. 20. Instead, Macy's emphasizes that under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), establishing a violation of Sections 8(a)(3) and (1) sometimes requires case-specific proof that the employer's conduct "was 'inherently destructive' of important employee rights" or that the employer acted with "antiunion motivation." *Id.* at 34; *see* Pet. 3, 19-20. But *Great Dane* did not address a lockout. *Fleetwood*, in contrast—which was issued just six months later—applied the *Great Dane* framework in this exact context. And *Fleetwood* could not have been clearer about its holding: Employees who offer to return to work after abandoning a strike have a "right" to reinstatement that "can be defeated *only* if the employer can show 'legitimate and substantial business justifications.'" *Fleetwood*, 389 U.S. at 381 (quoting *Great Dane*, 388 U.S. at 34) (emphasis added)

Ultimately, even Macy's appears to concede that dispositive point. It acknowledges that further proof of antiunion animus or inherent destructiveness would have been required only if it had "a legitimate business justification" for the lockout. Pet. 19. Here, Macy's simply failed to make that showing.

2. Macy's asserts that the Ninth Circuit's decision conflicts with decisions of the Fifth, Seventh, Eighth, and Eleventh Circuits. That is wrong. Only one of those decisions even addressed an employer's refusal to reinstate striking workers. *See Loc. 15, Int'l Bhd. of Elec. Workers v. NLRB*, 429 F.3d 651, 654-55 (7th Cir. 2005). Like the Ninth Circuit, the Seventh Circuit recognized that the employer had to establish "a 'legitimate and substantial' business justification" for the lockout. *Id.* at 657. And like the Ninth Circuit, the Seventh Circuit recognized that because the employer failed to carry that burden, there was no need to undertake any further inquiry into whether its conduct was "inherently destructive." *Id.* at 656-57.

The other decisions Macy's cites are far afield. Two did not involve lockouts at all. *See NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095, 1098 (11th Cir. 1983) (disability payments); *Elec. Mach. Co. v. NLRB*, 653 F.2d 958, 965 (5th Cir. 1981) (constructive discharge). And in the third, there was no strike and it was undisputed that "the lockout was entirely legal at its inception" because the employer had a substantial business justification; the only question was whether it acted unlawfully by hiring "temporary replacements." *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 841-43 (8th Cir. 1973). None of those decisions conflicts with the Ninth Circuit's application of *Fleetwood* to the very different facts at issue here.

3. The question presented in the petition does not encompass the Ninth Circuit's holding that Macy's failed to establish a legitimate business justification for the lockout. Pet. i. Macy's has thus forfeited any challenge to the actual basis for the decision below. *See* Sup. Ct. R. 14.1(a). That remains true despite its

attacks on the Ninth Circuit's analysis "in the text of its petition." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993).

In any event, nothing in the petition provides any reason to doubt the Ninth Circuit's case-specific conclusion that Macy's failed to justify its lockout. To the contrary, each of the rationales Macy's has offered is unpersuasive—and its shifting explanations further confirm the absence of any legitimate justification.

First, during administrative proceedings Macy's principally argued that it imposed a lockout because it was afraid workers would engage in misconduct. *See* Pet. App. 210-55, 271-80. The ALJ found that those purported concerns were "post-hoc excuses" manufactured to justify a lockout adopted for other reasons. *Id.* 274. The Ninth Circuit upheld that finding, and Macy's has now abandoned the issue. Pet. 12 n.2.

Second, Macy's asserts that the lockout was a permissible effort "to gain economic leverage." Pet. 23 (citation omitted). But to qualify as a lawful form of economic pressure, a lockout must be instituted "solely in support of a legitimate bargaining position." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965). And to satisfy that test, an employer must actually *have* a "legitimate bargaining position." That is, "the employer must inform 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); *accord Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 662 (6th Cir. 2005); *see* Gov't Br. 18. The Ninth Circuit correctly held that Macy's failed to satisfy that requirement because "there was *no* offer at all on the

table" when Macy's declared the lockout. Pet. App. 20. Macy's does not cite any decision upholding an offensive lockout imposed by an employer that did not have an offer on the table.

Third, Macy's now offers yet another justification, asserting that Local 39's end of the strike was an "unanticipated maneuver" late on a Friday and that Macy's permissibly declined to allow workers to return to work while it decided how to respond. Pet. 23-24; *see, e.g.*, Pet. i, 3-4, 9-11. That argument fails many times over. Most obviously, it is forfeited: Macy's did not raise it before either the Board or the Ninth Circuit. *See* 29 U.S.C. § 160(e) (precluding review of objections that were not "urged before the Board"); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

The petition's new justification also does not fit the facts. A need for time to consider Local 39's return-to-work offer might have justified a refusal to reinstate workers while Macy's was actually considering the offer. But Macy's did not violate the Act by "[t]aking the weekend to respond to an unanticipated offer," Pet. 3; it violated the Act by imposing an unlawful lockout on December 7, *after* senior Macy's executives had evaluated the offer, consulted "outside attorneys," and decided how to respond. Pet. App. 264-66, 281.

In any event, it strains credulity to suggest that Local 39's return-to-work offer took Macy's by surprise. Macy's was an experienced participant in labor negotiations represented by a veteran negotiator and sophisticated counsel. Months into the strike, Local 39 made an offer that capitulated to Macy's demands, and Macy's still rejected it. Macy's cannot plausibly claim to have been surprised when the union responded by

giving up—which was presumably exactly what Macy's wanted. If Macy's wished to preserve the option of a lockout, it could have responded to Local 39's offer with a counteroffer rather than a flat rejection. Or it could have reinstated or modified its withdrawn offer before announcing a lockout. But Macy's did none of those things.

Finally, Macy's insists that it cured its initial violation by making an offer a few days after declaring the lockout. Pet. 4, 24. But the Board and the Ninth Circuit rejected that argument because Macy's failed to carry its burden to "*show affirmatively*" that its violation "had no adverse impact on the subsequent collective bargaining." Pet. App. 30 (citations omitted); *see, e.g.*, *Alden Leeds*, 812 F.3d at 166. Indeed, Macy's presented "[n]o [relevant] evidence" before the Board. Pet. App. 270. And the Board added that the record suggested that the failure to reinstate workers "may have weakened the Union's position at the bargaining table." *Id.* Macy's does not even acknowledge, much less attempt to rebut, that finding.

II. This Court should not grant certiorari to review the Board's decision in *Thryv*.

Macy's also asks this Court to grant certiorari to review the remedial approach the Board adopted in *Thryv, Inc.*, 372 NLRB No. 22 (2022). But that question is academic here because Local 39 has already made clear that there is no evidence to support *Thryv* relief.

Even setting aside that fatal obstacle, the *Thryv* issue does not warrant certiorari. Macy's overstates the extent of any conflict created by the Ninth Circuit's decision, which specifically declined to decide whether any particular form of *Thryv* relief is permissible

unless and until it is actually awarded. The Ninth Circuit may never need to reach those questions because the Board appears likely to overrule *Thryv*. And this would not be an appropriate vehicle for addressing *Thryv* in any event because Macy's has forfeited its Seventh Amendment arguments.

1. There are no *Thryv* remedies at issue in this case. Any such remedies would have to be proved by the General Counsel during subsequent compliance proceedings, which would be subject to separate judicial review. Pet. App. 42-43; *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902, 904-05 (1984); 29 C.F.R. §§ 102.52-59. And the compliance proceedings in this case will not result in any award of *Thryv* remedies because Local 39 has represented to the Board that it "has no evidence of the types of harms that would support *Thryv* remedies" and has expressly "waive[d]" such remedies. App., *infra*, 2a.

Macy's objects that "it is up [to] the Board, and not the charging party, to select the appropriate remedies." Pet. 17 n.4. But that misses the point. It would be bizarre for the General Counsel to seek relief for harms to employees when the employees themselves have made clear that no such harms occurred. Such a request would be particularly far-fetched in the *Thryv* context. As *Thryv* itself recognized, the General Counsel cannot request *Thryv* relief unless employees "submit evidence to substantiate pecuniary harms for which they seek reimbursement." *Thryv*, 372 NLRB No. 22, at *18. Here, Local 39 has already made clear

that no such evidence exists—and Macy's has not argued otherwise.[1]

In short, Macy's faces no possibility of liability under *Thryv* regardless of how this Court disposes of the petition. And because this Court's resolution of the *Thryv* issue would have no effect on the ultimate outcome of this case, it would "amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

2. Even if *Thryv* remedies were possible here, the second question presented still would not warrant this Court's review for three reasons.

First, Macy's misstates the Ninth Circuit's holding. The premise of the petition is that the Ninth Circuit created a split by "upholding *Thryv* remedies." Pet. 27. In fact, the Ninth Circuit emphasized that it was "unable to permit or prohibit any specific forms of relief at this stage." Pet. App. 47. Instead, the court concluded that a decision on the validity of any relief under *Thryv* must "await the forthcoming compliance proceeding," when specific remedies—if any—would actually be awarded. *Id.*

What's more, the Ninth Circuit agreed with Macy's that *Thryv* remedies are lawful only if and to the extent they are "equitable"—indeed, the court repeated that caution at least half a dozen times. Pet. App. 29, 36 n.12, 37 n.12, 38, 44 n.15, 46. And the court observed that some forms of *Thryv* relief might fail that test and thus be "beyond the Board's remedial

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[1] Macy's asserts that Local 39's representation "contradicts the letter and spirit" of its prior filings. Pet. 17 n.4. Not so. Local 39 emphasized below that any *Thryv* remedy here "is likely to be minimal if [it exists] at all." Opp'n to Pet. for Reh'g En Banc 1.

authority." *Id.* 46. At this stage, the court held only that "there has been no showing of any actual, issued remedy that is inequitable." *Id.* 39.

Macy's observes that the Third, Fifth, and Sixth Circuits have rejected *Thryv*'s view of the Board's remedial authority. Pet. 25-27. But the Ninth Circuit emphasized that its decision is not "wholly in conflict" with the Third Circuit's approach (which was later adopted by the Fifth and Sixth Circuits). Pet. App. 36 n.12. All four circuits agree that the NLRA "limits the Board's remedial authority to equitable, not legal, relief." *NLRB v. Starbucks Corp.*, 125 F.4th 78, 97 (3d Cir. 2024); *see Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 725-26 (5th Cir. 2025); *NLRB v. Starbucks Corp.*, 159 F.4th 455, 470 (6th Cir. 2025). The other circuits held that the scope of relief contemplated by *Thryv* violates that rule; the Ninth Circuit declined to decide how the rule applies to remedies that had not been awarded. Unless and until the Ninth Circuit actually upholds a *Thryv* remedy, it is not clear whether it permits any relief that its sister circuits forbid.

Second, as the Government's brief makes clear, the Board is likely to revisit *Thryv* soon and to read it narrowly in the meantime. Gov't Br. 14-16. Two of the Board's three Members have pointedly declined to "express an opinion [on] whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act." *Performance Plumbing, LLC*, 374 NLRB No. 48, at *3 n.2 (2026). Instead, those Members have stated that they would be "open to reconsideration" of *Thryv*. *Id.* Consistent with the Board's traditional rule requiring three votes to overrule a precedent, those Members have agreed to apply *Thryv* until there is "a three-member majority

to overrule it." *Id.* Such a majority could exist as soon as the President's pending nominee is confirmed. *See* Gov't Br. 14. In the meantime, the current majority has emphasized that "the legality of any specific forms of novel relief suggested by *Thryv*" remains open to challenge before the Board "if and when they are actually sought" in compliance proceedings. *Performance Plumbing*, 374 NLRB No. 48, at *3 n.2.[2] There is no reason for this Court to grant certiorari to review an approach that the Board is likely to overrule before the Court could issue a decision.

Finally, this case would not be an appropriate vehicle for reviewing *Thryv* because Macy's relies heavily on arguments it failed to preserve. Macy's repeatedly asserts that *Thryv* "run[s] headlong into the Seventh Amendment." Pet. i; *see id.* 2, 17-18, 27, 30-33. But that challenge is doubly forfeited. Macy's "failed to raise a Seventh Amendment objection to the Board." Pet. App. 32 n.10; *see* 29 U.S.C. § 160(e). Macy's then forfeited the issue again by "fail[ing] to raise any Seventh Amendment arguments" in the Ninth Circuit until the court asked for supplemental briefing. Pet. App. 32 n.10. In light of those forfeitures, the Ninth Circuit "decline[d] to entertain" any Seventh Amendment arguments. *Id.* Macy's does not challenge that forfeiture holding. This Court should

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[2] The two-Member majority additionally suggested that, in reviewing any *Thryv* remedies awarded in future compliance proceedings, it would be guided by "Acting General Counsel Memo 25-06." *Performance Plumbing*, 374 NLRB No. 48, at *3 n.2. Adopting the approach "advocated by the [*Thryv*] dissent," that memo limits relief to "foreseeable harms that are clearly caused by the unfair labor practice." Acting General Counsel Memo 25-06, at 4 (May 16, 2025), https://perma.cc/HUM6-B238.

not grant certiorari where, as here, a petitioner seeks review based in substantial part on arguments that were not properly "presented to any lower court." *OBB Personenverkehr v. Sachs*, 577 U.S. 27, 37 (2015).[3]

III. There is no basis for a GVR.

Although the Government agrees that this case does not warrant plenary review, it asks this Court to GVR with instructions to remand to the Board in light of the likely overruling of *Thryv*. Gov't Br. 12-17. Such a GVR would be both novel and unnecessary. It would also be inequitable, prolonging a five-year lockout that the Board agrees is unlawful. Even if the Court GVRs, therefore, it should reject the Government's request to direct the Ninth Circuit to send the whole case back to the Board—a step that could delay the end of the lockout for years. Instead, the Court should adhere to its usual practice by allowing the Ninth Circuit to decide in the first instance how to proceed. That would let the Ninth Circuit consider limiting the scope of a remand to the *Thryv* issue—which is the only thing that purportedly justifies a GVR in the first place.

1. This Court has emphasized that its "GVR power should be exercised sparingly." *Lawrence v. Chater*,

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[3] The petition's forfeited Seventh Amendment arguments are wrong in any event. The Seventh Amendment applies to claims that are "legal rather than equitable." *SEC v. Jarkesy*, 603 U.S. 109, 124 (2024). Here, the Ninth Circuit agreed with Macy's that the NLRA authorizes *Thryv* remedies only if and to the extent they are "equitable." Pet. App. 29; *see supra* at 19-20. Accordingly, this is not a case like *Jarkesy*, where Congress empowered an agency to impose concededly legal relief; instead, any legal remedy that might implicate the Seventh Amendment would not be authorized by the Act to begin with.

516 U.S. 163, 173 (1996). A GVR is "potentially appropriate" only if (a) some new development establishes "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and (b) "it appears that such a redetermination may determine the ultimate outcome of the litigation." *Id.* at 167. Even then, "[w]hether a GVR order is ultimately appropriate depends further on the equities of the case." *Id.* at 167-68.

The Government does not cite any case where this Court has GVR'd merely because an agency wished to reconsider some aspect of its decision. Instead, its closest analogies are criminal cases where the Court GVR'd based on a pending Government motion to dismiss the charges outright. Gov't Br. 13. But that situation is entirely different. As the Government has explained, its power to dismiss criminal charges even after a judgment is rooted in principles of "prosecutorial discretion" codified in "Federal Rule of Criminal Procedure 48(a)." Gov't Br. at 3, *Bannon v. United States*, 2026 WL 922515 (U.S. Apr. 6, 2026) (No. 25-453) (Gov't Bannon Br.). And dismissal completely and definitively ends the litigation.

Here, in contrast, the Board is not seeking to drop its enforcement action. Nor is it confessing error. Instead, it seeks to vacate an Article III court's judgment because the Board may, at some point in the future, reconsider its position on a tertiary remedial issue. The proper criminal-law analogies are not the dismissal GVRs the Government invokes; instead, they are cases where the Government sought a GVR *without* seeking to end the prosecution or confessing error—a context where five Justices have recognized

that the Court "has no appropriate legal basis to vacate [a lower court's] judgment." *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (Kavanaugh, J., respecting the denial of certiorari); *see, e.g.*, *Coonce v. United States*, 142 S. Ct. 25 (2021).[4]

2. Even if the Court were willing to begin granting GVRs merely to facilitate agency reconsideration, this case would be an unsuitable place to start.

First, the Government does not argue that a GVR based on the Board's desire to reconsider *Thryv* would "determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. Nor could it. Again, no *Thryv* relief will be awarded in this case no matter how this Court disposes of the petition. Given Local 39's representation that there is no evidence to support *Thryv* relief and the current Board's dim view of *Thryv*, it is inconceivable that the General Counsel will seek such relief in compliance proceedings—much less that the Board will award it. The Board "therefore has no need to enlist the Judiciary, or to ask the Judiciary to depart from standard practices and procedures," to avoid granting *Thryv* relief here. *Grzegorczyk*, 142 S. Ct. at 2581 (Kavanaugh, J., respecting the denial of certiorari).

Second, the "equities of the case" counsel strongly against the Government's requested GVR. *Lawrence*,

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[4] The Government also invokes the lower courts' practice of granting agency requests for "voluntary remands." Gov't Br. 13-14. But this Court has never endorsed that practice or considered its proper bounds. And lower-court remands do not implicate the distinct considerations motivating this Court's cautious use of its GVR power, including "[r]espect for lower courts, the public interest in finality of judgments, and concern about [the Court's] own expanding certiorari docket." *Lawrence*, 516 U.S. at 174.

516 U.S. at 168. The Government notes that a remand would not prejudice Macy's and that Local 39 has disclaimed *Thryv* relief. Gov't Br. 17. But the Government ignores the obvious cost of the requested GVR: It would further delay reinstatement for workers who have been illegally locked out of their jobs for five years and counting. The Board found that lockout unlawful, the Ninth Circuit affirmed, and the Government agrees that the relevant portion of the Ninth Circuit's decision does not warrant further review. Under the circumstances, any theoretical benefits of further consideration of the *Thryv* issue do not justify the "delay and further cost entailed in a remand." *Lawrence*, 516 U.S. at 168. The Court should deny the petition, allow the Board's order to be enforced, and bring an end to the unlawful lockout.

3. If the Court does GVR, it should reject the Government's request to add "instructions to remand to the Board to allow for further consideration." Gov't Br. 12. The whole point of a GVR is to allow "further consideration by the lower court" whose decision is under review. *Lawrence*, 516 U.S. at 168. GVR orders thus typically remand based on a new development without dictating what further steps the lower court should take. Notably, the Court adhered to that practice in each of the GVR orders the Government cites, simply remanding to the relevant court of appeals without further instructions.[5]

In several of those cases, the Court rejected the Government's request that it go further and direct a

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[5] *See Bannon*, 2026 WL 922515; *Full Play Grp., S.A. v. United States*, 2026 WL 79753 (U.S. Jan. 12, 2026); *Lopez v. United States*, 2026 WL 79861 (U.S. Jan. 12, 2026); *Bronsozian v. United States*, 590 U.S. 901 (2020) (No. 19-6220).

remand "to the district court."[6] The Government offers no justification for a different result in this case—indeed, it fails to acknowledge that it is seeking a departure from the traditional form of a GVR.

A more prescriptive GVR would be particularly inappropriate here because there is no justification for the additional instruction the Government seeks. The Government asks this Court to direct the Ninth Circuit to remand the entire case to the Board. Gov't Br. 12, 17. But the purported basis for the remand concerns only the propriety of *Thryv* relief. *Id.* 12-17. The Government itself says that on remand, the Board would seek "to sever and hold any *Thryv* remedy"—suggesting that the Board intends to continue to pursue the cease-and-desist order and award of backpay the Ninth Circuit has already upheld. *Id.* at 14. But there is a far more direct path to that result: After a GVR, the Ninth Circuit could simply reinstate the non-*Thryv* portions of its decision while remanding to the Board on the *Thryv* issue alone. *See, e.g.*, *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 296 (9th Cir. 2011) (enforcing a Board order in part and remanding in part).

A *Thryv*-only remand to the Board would give the Government everything it seeks while avoiding severe prejudice to Local 39 and its members. The union would not oppose such a remand; again, it has disclaimed any *Thryv* relief and thus has no stake in preserving that aspect of the Board's decision. At a minimum, therefore, this Court should adhere to its usual practice by allowing the Ninth Circuit to consider a more limited remand in the first instance.

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[6] Gov't Bannon Br. 4; *see* Gov't Br. at 4, *Full Play & Lopez*, *supra* (Nos. 25-390 & 25-395) (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 4, 2026

APPENDIX

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APPENDIX A

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Re: Macy's Inc., Case 20-CA-270047, 372 NLRB No. 42 (2023)

Dear Regional Director & Acting General Counsel:

As the Region is aware, the 9th Circuit enforced the Board's decision and denied a Petition for Rehearing En Banc.

The Board in a footnote awarded the remedies under *Thryv, Inc.*, 372 NLRB No. 22 (2022), to the extent such harms exist.

The Charging Party is not aware of any remedies that would be encompassed within the *Thryv* concept of "other direct or foreseeable pecuniary harms

incurred as a result of the unlawful lockout. …" The Charging Party is not aware of any such remedial issues that will be presented in the compliance proceedings.

The Charging Party withdraws, waives, and foregoes any claim for any remedy that would not have been otherwise awardable in compliance proceedings under Board law as it existed before *Thryv*. The Charging Party further affirms that it withdraws, waives, and forgoes any such claim if they appear in the future.

The Charging Party is taking this action in order to expedite resolution of the compliance issues including reinstatement and any backpay owed to the 63 workers who were unlawfully locked out for now for almost half a decade. The Charging Party is not aware of any such remedies in this case and has no evidence of the types of harms that would support *Thryv* remedies. But even if there are any remedial claims which would not be covered by the law before *Thryv*, they will be so insignificant in comparison to the remaining remedies that they are not worth the expense and delay in pursuing. We are also mindful of the very limited resources of the Board. We also recognized that the Acting General Counsel withdrew the former General Counsel's Memorandum, GC Memorandum 21-06, on expanded remedies. See, GC Memorandum 25-05.

We do not believe the Region has taken any steps to begin compliance proceedings under the Board's Regulations governing compliance proceedings, and we do not believe any evidence support *Thryv* remedies has been provided to the Region. See, 29 CFR 102.54. As such, this request will not affect any

compliance work done to date and will only aid in the compliance proceedings as the Region will not have to investigate the existence of any expanded *Thryv* remedies.

To be clear Charging Party believes that *Thryv* was correctly decided and is not beyond the Board's authority as applied to some pecuniary remedies. But we have no desire to prolong the compliance proceedings here, especially as we are not aware of any such harms in this case that *Thryv* is intended to remedy. Under the circumstances of this case, Charging Party withdraws any such claims for the reasons explained above.

We have advised counsel for Macy's of this request last week and counsel has not responded with any position. We had assumed Macy's would not object since they are getting what they have requested regarding the *Thryv* remedy issue.

Upon remand to your office, please proceed accordingly and do not pursue any claims which would not have been otherwise encompassed within the Board's remedial precedent prior to *Thryv*.

Organize!

David A. Rosenfeld

David A. Rosenfeld
Bruce Harland

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