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

REPLY BRIEF FOR PETITIONER

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
29th Floor
New York, NY 10017

LAURA A. PIERSON-SCHEINBERG
DYLAN B. CARP
JACKSON LEWIS P.C.
50 California Street
9th Floor
San Francisco, CA 94111

PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN
KYLE R. EISWALD*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

(*additional counsel listed on inside cover*)
Counsel for Petitioner

May 19, 2026

M. CHRISTOPHER MOON
JACKSON LEWIS PLLC
215 South State Street Suite 760
Salt Lake City, UT 84111

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REPLY BRIEF

The United States agrees that "[t]his Court should grant the petition for a writ of certiorari." U.S.Br.12. That is understandable. The decision below falls on the wrong side of a lopsided circuit split over whether the National Labor Relations Board has the authority to order employers to compensate employees for all pecuniary harms foreseeably suffered as a consequence of unfair labor practices. *See* Pet.25-27; Chamber.Br.6-13; Former.AGs.Br.14. Absent this Court's intervention, a clear and consequential conflict in the circuits will persist.

Less understandable is the United States' request that, rather than resolve the issue that has divided the circuits itself, the Court vacate the Ninth Circuit's judgment and remand "with instructions to remand to the Board to allow for further consideration." U.S.Br.12. To be clear, Macy's agrees that the Ninth Circuit's decision should be wiped from the books and that the conflicting views of three other circuits should be definitively vindicated. But the Board lacks the power to do that, and the United States stops short of representing that the Board *will* reconsider *Thryv* on remand. The best the United States can offer is that remanding will give the Board an "opportunity to consider whether to" "reconsider[]" the issue. U.S.Br.16. But the Seventh Amendment provides rights and guarantees, not mere opportunities for executive reconsideration (until the next administration reconsiders matters yet again). This Court should vindicate the Seventh Amendment and resolve the circuit split once and for all.

That said, a GVR is the least this Court should do given the circuit split and the United States' understandable unwillingness to defend the decision below. The Union's proposed course of leaving the Ninth Circuit decision it procured and the resulting circuit split in place has nothing to recommend it. And the Union's suggestion that it will abandon a *Thryv* remedy for its members not only does not bind the Board, but is a transparent tactical retreat designed to shield the Ninth Circuit's decision from review so that the *Thryv* remedy it upholds can be revived as soon as the Board's leadership changes hands. This Court should not reward that behavior.

Instead, this Court should grant review on both questions presented in the petition. Neither the United States nor the Union defends the court of appeals' holding that Macy's engaged in "inherently destructive" conduct. *See* Pet.22-25. Rather than defend that holding, they deny it, claiming that the Ninth Circuit "did not conclude that petitioner's conduct was inherently destructive," and instead held only that Macy's failed to show a legitimate justification for its conduct. U.S.Br.17-21; Union.BIO.12-17. That would be news to the panel majority, *see* Pet.App.16-24 (holding Macy's' conduct "inherently destructive of employee rights"), the panel dissent, *see* Pet.App.80 (criticizing majority for misapplying "the exacting standard of 'inherently destructive' conduct"), and the six en banc dissenters, *see* Pet.App.94. It is also telling. When the only way respondents can defend a court of appeals' circuit-splitting decision is to rewrite it, the proper course is clear. This Court should grant review on both questions presented and reverse.

I. The Liability Holding Below Conflicts With This Court's Cases And The Decisions Of Other Circuits Correctly Applying Them.

It has been the law of the land for the better part of a century that where an employer has a legitimate business justification for its conduct, affirmative proof of anti-union animus is required to sustain a violation of Section 8(a)(1) or (3) of the NLRA, unless the employer's conduct was so "'inherently destructive' of important employee rights," *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), that "[t]he *only* reasonable inference that could be drawn" is that the employer was acting out of anti-union animus, *NLRB v. Brown*, 380 U.S. 278, 287 (1965) (emphasis added). As its name suggests, the only way to establish "inherently destructive" conduct is to show that an employer's conduct has had or will have severe and long-lasting negative effects on employees' collective-bargaining interests. *Compare, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965), *with, e.g.*, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231 (1963). The Ninth Circuit's assessment of Macy's' lockout defies this settled precedent. Indeed, the Ninth Circuit did not assess the lockout's effects on collective-bargaining rights *at all*, much less find that the effects of Macy's' one-business-day delay in responding to the Union's out-of-the-blue return-to-work offer were severe and long-lasting. *See* Pet.22-24; *see also* Pet.App.80 (Bumatay, J., dissenting) (concluding that, under this Court's caselaw, Macy's' conduct was "not even close to meeting the exacting standard of 'inherently destructive' conduct").

Perhaps that explains why neither the United States nor the Union defends the Ninth Circuit's "inherently destructive" holding. Instead, they deny there was any such holding. Respondents claim that, in finding that Macy's violated the NLRA, the Ninth Circuit merely held that Macy's failed to satisfy its threshold burden of showing a legitimate business justification for the lockout. U.S.Br.9-10, 17-21; Union.BIO.9-10, 12-13. That is revisionist history.

First, the Ninth Circuit clearly (albeit erroneously) held that Macy's violated the NLRA because it "failed to" "'declare the lockout *before or in immediate response* to'" the Union's unconditional return-to-work offer or to "inform the Union fully and clearly on the conditions necessary for employees to be reinstated." Pet.App.22 (emphasis in original) (quoting *Eads Transfer, Inc.*, 304 N.L.R.B. 711, 713 (1991)). The court repeated that (erroneous) holding in the final paragraph of its liability analysis. *See* Pet.App.24 ("In sum, ..."). That holding has nothing to do with Macy's' justification. Nor could the Ninth Circuit have ruled against Macy's on justification grounds without departing from the ALJ's findings—something the court went out of its way *not* to do. The ALJ explicitly found that Macy's locked out the employees "to gain economic leverage." Pet.App.280. And this Court has long held that locking out employees for economic leverage is a legitimate business justification. *See Am. Ship*, 380 U.S. at 318; *see also* Pet.App.78-80 (Bumatay, J., dissenting) (explaining the "legitimate economic purpose" of Macy's lockout based on undisputed facts).

Despite all that, respondents emphasize a few isolated sentences, which state that "Macy's failed to meet its 'burden of showing such a legitimate justification.'" Pet.App.24 (quoting *Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 375 (9th Cir. 1993)); *see also* Pet.App.15-16. But those isolated sentences do not undo the nine pages of analysis separating them. And all that intervening analysis was directed toward Macy's' argument that the Board misapplied the "*Great Dane* framework," Pet.App.16; *see* Pet.App.16-22, which is the framework for determining inherently destructive conduct. *See also* Macy's.CA9.Br.28-31.

Lest there be any doubt, the dissenting opinions confirm the point. Judge Bumatay criticized the majority for concluding that Macy's' lockout was inherently destructive. Pet.App.181-90; *see also* Pet.App.76-85. The majority never suggested that Judge Bumatay had misunderstood their opinion. Nor did the majority correct the six judges who leveled the same critiques in their dissental. *See* Pet.App.91, 94.

That the Ninth Circuit resolved liability on inherently destructive conduct grounds is hardly surprising. After all, respondents themselves expressly argued the case as one of inherently destructive conduct. *See, e.g.*, NLRB.CA9.Br.21-22, 28, 30 n.8; *see also* Union.CA9.Br.23. Likewise, in opposing Macy's' petition for en banc rehearing, the Board did not dispute Macy's' characterization of the liability issue as being about inherently destructive conduct, *see* CA9.No.23-124, Dkt.102 at 14-18, but instead continued to frame the case (and defend the panel majority) in those terms, CA9.No.23-124,

Dkt.116 at 7, 10 n.3. Respondents' eleventh-hour change in argument cannot save the decision below.

Respondents' misreading of the Ninth Circuit's holding defeats their efforts to deny the split. The Union claims that the decision below aligns with *Local 15, International Brotherhood of Electrical Workers v. NLRB*, 429 F.3d 651 (7th Cir. 2005), because the Seventh Circuit held that the employer there "failed to carry [its] burden" "to establish 'a legitimate and substantial business justification for the lockout.'" Union.BIO.14. As explained, however, that is a non-sequitur. And the Union does not deny that *Local 15*—unlike the Ninth Circuit—correctly recognized that employer conduct must "establish a barrier to future collective bargaining" to be "inherently destructive." 429 F.3d at 656. The Union also suggests that all these cases are so inherently factbound that an actual circuit split is impossible. But that only underscores the need for this Court's review, as strikes and lockouts are recurring phenomena, and employers and unions alike need clear guidance as to what the law permits.

The government, for its part, claims that no split exists because the Fifth Circuit in *Electric Machinery Co. v. NLRB*, 653 F.2d 958 (5th Cir. 1981), and the Eleventh Circuit in *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983), quoted an earlier Ninth Circuit opinion, *Portland Williamette Co. v. NLRB*, 534 F.2d 1331 (9th Cir. 1976), which in turn relied on the Eighth Circuit case *Inter-Collegiate Press, Graphic Arts Division v. NLRB*, 486 F.2d 837 (8th Cir. 1973). U.S.Br.19-20. But daisy-chains of quotations are no match for the actual reasoning of an

opinion. Regardless, the government misses the point: If the Ninth Circuit's decision here conflicts with this Court's precedents, decisions of other circuits, *and* previous Ninth Circuit holdings, that only strengthens the case for this Court's review.

Ultimately, the most notable thing about respondents' briefs is what they do not say. The United States offers not one word in defense of the Ninth Circuit's liability determination, however framed. To the contrary, the United States promises that even the liability issue could be considered anew by the soon-to-be-reconstituted Board. *See* U.S.Br.17. And neither brief denies that, had this case been litigated in the Fifth Circuit—where Macy's originally brought its petition—Macy's would not be subject to liability. The circuits have been inviting this Court to provide guidance on what constitutes inherently destructive conduct for decades. *See, e.g.*, *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989); *Int'l Bhd. of Boilermakers, Loc. 88 v. NLRB*, 858 F.2d 756, 762 (D.C. Cir. 1988). The Court should grant review and do so here.

II. The Ninth Circuit's Remedial Holding Conflicts With The NLRA And Decisions Of Multiple Other Circuits.

The United States concedes that a circuit split exists on the *Thryv* issue that should not be allowed to persist. U.S.Br.15-16. Moreover, subsequent Ninth Circuit decisions, *see, e.g.*, *Int'l Bhd. of Teamsters v. NLRB*, 2026 WL 1079297, at *10 (9th Cir. Apr. 21, 2026); *NLRB v. N. Mountain Foothills Apts.*, 157 F.4th 1089, 1098-1100 (9th Cir. 2025), reinforce that the Ninth Circuit has definitively blessed *Thryv*'s

remedial power-grab, despite the Union's suggestions to the contrary, *see* Union.BIO.17-19. There is no denying reality: The decision below places the Ninth Circuit on the short side of a split that cries out for this Court's resolution. Pet.25-27.

And the short side is emphatically the wrong side. Indeed, neither the United States nor the Union actually defends *Thryv* or the decision they procured. That silence is remarkable. After all, the Ninth Circuit did not bless the *Thryv* regime *sua sponte*; it endorsed the arguments that both the Board and the Union made below. In so doing, the Ninth Circuit unleashed the Board to award "consequential damages," *Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22, at 4 n.14 (2021), and "compensatory damages," *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 722 (5th Cir. 2025), while giving a green light to compel employers to pay "the prototypical form of … legal damages." *3484, Inc. v. NLRB*, 137 F.4th 1093, 1116 (10th Cir. 2025) (Eid, J., concurring in part). That is not just "patently beyond" what Congress authorized in the NLRA, *id.*, but far beyond what the Seventh Amendment permits, *NLRB v. Starbucks Corp.*, 159 F.4th 455, 474 (6th Cir. 2025).

Unable or unwilling to defend the decision below, the Union tries to downplay it. The Union contends that the decision below is reconcilable with the contrary decisions of the Third, Fifth, and Sixth Circuits, because the Ninth Circuit took the view that *Thryv* remedies *are* equitable remedies. Union.BIO.19-20. But that does not deny the circuit split; it merely explains *why* the Ninth Circuit deviated from its sister circuits. It also underscores

how far the Ninth Circuit strayed, as its (mis)conception of equitable make-whole relief exceeds a chancellor's wildest dreams. For the Ninth Circuit, *Thryv* remedies are within the Board's remedial authority because they are "designed 'solely to "restore the status quo[,]"'" and are thus "equitable in nature." Pet.App.34 n.11 (quoting *SEC v. Jarkesy*, 603 U.S. 109, 123 (2024)); *accord N. Mountain*, 157 F.4th at 1099-1100. But virtually all remedies are designed to "restore the status quo." *Jarkesy*, 603 U.S. at 123. That does not make the remedies equitable; it just makes them remedies.

The Union next reiterates its efforts to disclaim *Thryv* remedies on behalf of its members. *See, e.g.*, Union.BIO.11, 18-19. But, as Macy's has already explained, the selection of remedies is the Board's prerogative, not the Union's. *See* Pet.17 n.4 (citing *Kaumagraph Corp.*, 313 NLRB No. 82, at 2 (1994)). The Union suggests that it would be "bizarre" for the Board to issue relief the Union does not seek. But the only thing that is "bizarre" is a union foreswearing relief that promises huge windfalls for its members (and would forever shift bargaining power in favor of unions). It is not clear that the Union's purported disclaimer of such potentially valuable relief is consistent with its duties to fairly represent its current members. What is clear, though, is that this is simply a transparent effort to avoid review and preserve the Ninth Circuit decision for future use.

In the same vein, the Union suggests this is a poor vehicle to resolve the split because (it claims) Macy's forfeited a Seventh Amendment challenge. Union.BIO.21-22. That is doubly wrong. Macy's has

consistently objected to *Thryv* remedies as exceeding the Board's authority. *See, e.g.*, Macy's.CA9.Br.22, 47-52. Noting that Macy's' interpretation of the Act has the additional virtue of avoiding constitutional difficulties is not a separate claim; it is another argument in support of the claim Macy's has consistently advanced. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (waiver applies to "*claims*," not "*arguments* in support"). Indeed, there is no serious argument that the NLRA actually authorizes a remedy that can only be awarded by a jury, as no one thinks the Board has the power to convene a jury. In addition, "[t]he panel majority … functionally decid[ed] the key Seventh Amendment issue" by "conclud[ing] that Thryv remedies 'vindicate[] a public right.'" Pet.App.92 (Nelson, J., dissenting from denial of rehearing en banc). Thus, all the relevant arguments have been both pressed throughout this litigation and were passed on below.

This Court should thus grant certiorari and not allow the decision below to stand.

III. The Questions Presented Cry Out For This Court's Resolution.

The United States agrees that "[t]his Court should grant the petition." U.S.Br.12. Its favored course is a GVR—in lieu of plenary review—and for all the reasons set forth above, that is the least this Court should do. But given that the United States can only offer hope that the Board will eventually provide what the Seventh Amendment and the NLRA properly construed require, the proper course is to grant certiorari and set this case for argument next Term, so this Court can resolve the important questions this

case presents once and for all. After all, if a reconstituted Board can revisit the propriety of *Thryv* remedies, nothing will stop the next Board from reviving them. The proper interpretation of the NLRA is a question for the courts, not the Board, and should not turn on which political party controls the Board. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 401 (2024).

The limitations of the government's GVR request are evident in what the government actually promises. Although the government understandably declines to defend any aspect of the decision below, and even echoes numerous criticisms of *Thryv*, it stops short of promising that anything will definitively change if this Court remands without granting plenary review. The government has little choice but to underpromise, given the reality that "although the makeup of the NLRB has shifted with the change in presidential administrations, it is unlikely that the newly constituted NLRB will have the votes needed to overrule *Thryv* anytime soon" given that "the NLRB historically has insisted on having at least three votes in favor before it overturns one of its precedents." Chamber.Br.11. The United States' tepid representations thus reflect the simple truth that the Board's ability to overrule *Thryv* any time soon is in real doubt.

And even if the Board's composition changes enough to allow it to reverse *Thryv*, that will hardly provide a definitive construction of the NLRA. What can be reversed today can be un-reversed tomorrow—as the Board is wont to do. *See Valley Hosp. Med. Ctr., Inc. v. NLRB*, 100 F.4th 994, 1003-04 (9th Cir. 2024)

(O'Scannlain, J., specially concurring) (discussing the Board's "flip-flop problem"); *cf. Loper Bright*, 603 U.S. at 410-11. That is why the Article III courts have the responsibility to give definitive constructions to federal statutes. 603 U.S. at 384-85. The Article III courts have done so here; they are split; and the Ninth Circuit is on the short (and erroneous) side. This Court should grant plenary review and definitively fix the meaning of the NLRA once and for all.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
MATTHEW D. ROWEN
KYLE R. EISWALD*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
29th Floor
New York, NY 10017

LAURA A. PIERSON-SCHEINBERG
DYLAN B. CARP
JACKSON LEWIS P.C.
50 California Street
9th Floor
San Francisco, CA 94111

M. CHRISTOPHER MOON
JACKSON LEWIS PLLC
215 South State Street
Suite 760
Salt Lake City, UT 84111

Counsel for Petitioner

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