No. 25-697

IN THE
Supreme Court of the United States

LAS VEGAS SUN, INC.,
Petitioner,

v.

SHELDON ADELSON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

DAVID R. SINGER
AMY M. GALLEGOS
JENNER & BLOCK LLP
515 S. Flower St, Ste. 3300
Los Angeles, CA 90071

GABRIEL GILLETT
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

RICHARD L. STONE
850 Devon Avenue
Los Angeles, CA 90024

MICHAEL J. GAYAN
Claggett & Sykes Law Firm
4101 Meadows Lane, Ste. 100
Las Vegas, NV 89107

IAN HEATH GERSHENGORN
Counsel of Record
JONATHAN J. MARSHALL
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

J. RANDALL JONES
MONA KAVEH
KEMP JONES LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169

QUESTIONS PRESENTED

Petitioner's Question Presented (Pet. i) conflates two questions and omits two others.

The questions come to this Court in an appeal that deals with the Newspaper Preservation Act (NPA), Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804). The NPA governs "joint newspaper operating arrangements" or "joint operating arrangements" (JOAs), which are agreements that allow two or more competing print newspapers to consolidate operations and coordinate business activities to try to reduce the chance one or more of them will go out of business. The NPA defines a JOA as "any contract, agreement, . . . or other arrangement" among newspapers "pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of" an enumerated list of production, marketing, and distribution activities. 15 U.S.C. § 1802(2).

For JOAs formed after the NPA's enactment in 1970, the NPA requires prior written consent from the U.S. Attorney General. Section 4(b) of the NPA states that "[i]t shall be unlawful for any person to enter into, perform, or enforce a [post-1970 JOA] . . . except with the [Attorney General's] prior written consent." 15 U.S.C. § 1803(b).

This case concerns a JOA between owners of newspapers in the Las Vegas market. The JOA was entered into in 2005 between petitioner (the entity that publishes the *Las Vegas Sun*) and an entity that previously published the *Las Vegas Review-Journal*, which now is

published by an entity related to some of the respondents. It is undisputed that the Attorney General did not provide written consent (or any approval at all) for the 2005 JOA, though the Attorney General did provide consent for a 1989 JOA under which the newspapers previously operated. This JOA is currently the last JOA in existence, and no newspapers have formed a JOA in a new market in more than 35 years.

The questions presented are:

1. Whether the mandate in Section 4(b) of the NPA stating that "[i]t shall be unlawful" to "enter into, perform, or enforce" a post-1970 JOA without Attorney General approval (15 U.S.C. § 1803(b)) means that a post-1970 JOA that did not receive Attorney General approval is unlawful.

2. Whether the parties' unapproved 2005 JOA would be completely excluded from the substantive restrictions of the NPA in the event it is declared to be an amendment to a 1989 JOA between the parties' that had been approved by the Attorney General.

3. In the event agreements that are amendments to prior JOAs that received Attorney General approval are exempt from the substantive restrictions of the NPA, whether the 2005 JOA—which substantially changed the competitive consequences of the parties' arrangement—was a mere amendment rather than a new agreement.

4. Whether, as the Ninth Circuit correctly concluded, there is appellate jurisdiction over this appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents are Las Vegas Review-Journal, Inc., News+Media Capital Group, LLC, Estate of Sheldon Adelson, Patrick Dumont, and Interface Operations, LLC d/b/a Adfam.

Las Vegas Review-Journal, Inc., is a nongovernmental, privately held corporate party. Las Vegas Review-Journal, Inc. is a wholly owned subsidiary of News+Media Capital Group, LLC. No publicly held corporation owns more than 10% of Las Vegas Review-Journal, Inc.'s stock. News+Media Capital Group, LLC is a wholly owned subsidiary of Orchid Flower LLC. No publicly held corporation owns more than 10% of News+Media Capital Group, LLC's stock. Interface Operations, LLC d/b/a Adfam is a nongovernmental, privately held corporate party. No publicly held corporation owns more than 10% of Interface Operations, LLC d/b/a Adfam's stock.

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INTRODUCTION

In the more than fifty-five-year history of the Newspaper Preservation Act (NPA), Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-1804), the issues petitioner claims are implicated by the petition have in petitioner's own telling generated only *one* published appellate opinion (and only three appellate opinions in total) prior to this case. That number will stay where it is: as of the beginning of 2026, this is the *last* surviving JOA in the nation. In fact, no newspapers have formed a JOA in a new market in over 35 years. As Petitioner Las Vegas Sun, Inc. (the Sun), acknowledges, "JOAs are an endangered species." Pet. 27. That reality means that were this Court to grant review, its ruling would have significance in no cases, present or future, other than this one.

None of this is surprising in light of the digital revolution in media since the NPA's passage. Long before the dawn of the internet, Congress enacted the NPA to govern arrangements between competing newspapers that seek to combine print and back-office operations in order to save the one of them that is a failing newspaper. The statute calls these arrangements "joint newspaper operating arrangements" or "joint operating arrangements," and they are typically (and herein) referred to as "JOAs." Under certain circumstances, the NPA provides antitrust immunity to the newspapers that enter into these agreements.

Today, decades later, readers have access to a vast trove of news sources and a diversity of views and viewpoints, including (for those in Las Vegas and elsewhere) the digital product the Sun produces, which includes the

contents of the *Sun* print section, and, as the Sun touts, much more. The Sun's digital operations and their contribution to the marketplace of ideas are not part of this litigation.

Even putting aside that this case arises under a statute at the very end of its useful life, this case is a poor candidate for the Court's review. *First*, although the Sun purports to present a single question, *see* Pet. i, that framing amalgamates two distinct questions, which were briefed and resolved separately below. The first question is whether, when Congress wrote in Section 4(b) of the NPA that "it shall be unlawful" to "enter into, perform, or enforce" a JOA without the written consent of the Attorney General, the NPA means an unapproved JOA is, as the statute says, unlawful, or whether instead such a JOA merely lacks antitrust immunity and thus might be lawful. The second question is whether the characterization of a JOA as "amended" exempts it from Section 4(b)'s preapproval requirement and the consequences of non-approval. The Sun's petition blurs these clear lines.

Second, whether jumbled into a single question or taken separately on their own terms, there is no meaningful split of authority. For one thing, the petition identifies just one published decision in conflict with the decision below (and it is only even arguably in conflict with regard to the first question): *Newspaper Guild v. Levi*, 539 F.2d 755 (D.C. Cir. 1976), which upheld an agency construction of the NPA that the Ninth Circuit here rejected. But tension between the two decisions is no cause for this Court's concern. As the Ninth Circuit observed, *Newspaper Guild* was decided in an era of

statutory interpretation when (1) clear statutory text often was put aside as courts wandered through legislative history to assess perceived congressional purpose, and (2) courts generally deferred to agencies' constructions of statutes. That is not how statutory interpretation works anymore. There is no need for this Court to grant certiorari to confirm what all Circuits (exemplified by the Ninth Circuit below) now understand: text is paramount in statutory-interpretation disputes.

As to the second question, which relates to the application of the NPA to amendments of JOAs, there is no conflict at all. The only prior case the petition identifies discussing amended JOAs is the Sixth Circuit's unpublished decision in *Mahaffey v. Detroit Newspaper Agency*, 166 F.3d 1214 (Table), 1998 WL 739902 (6th Cir. 1998). But, as the Ninth Circuit correctly observed, *Mahaffey* resolved a question not presented here. Pet. App. 33a n.7. There simply is no split.

Third, with no practical importance to these issues and no meaningful split, the petition principally presents a request for error correction. However, the Ninth Circuit's unanimous opinion correctly resolved both issues raised by the petition by straightforwardly applying the NPA's clear text. Notably, the petition offers no serious argument to the contrary.

With respect to the first issue, the text could not be clearer. Section 4(b) of the NPA governs JOAs not already in effect when the NPA became law on July 24, 1970. *See* 15 U.S.C. § 1803(b). That provision affords antitrust immunity to such JOAs if the Attorney General provides "prior written consent." *Ibid.* Without this preapproval, Section 4(b) declares that "[i]t shall be

unlawful for any person to enter into, perform, or enforce" such a JOA. *Ibid.* This text supports just one meaning: when Congress wrote that a JOA without Attorney General preapproval "shall be unlawful," Congress meant that a JOA without Attorney General preapproval "shall be unlawful."

The Sun argues that the phrase "shall be unlawful" actually means "may be lawful." The Sun has no textual theory to support that position. In fact, the Sun criticizes the decision below for relying too much on the NPA's text and not enough on "legislative history and other indicators." Pet. 23. Though *Newspaper Guild*, the Sun's preferred case analyzing this issue, relied principally on legislative history, that approach is no longer consistent with this Court's precedent. The Ninth Circuit got it right.

The second issue implicated by the petition is equally clear. The parties here received written consent for a JOA in 1989, but later entered into a new JOA in 2005, which terminated the preexisting JOA and overhauled its terms, all without the Attorney General's consent. The Sun contends that the 2005 JOA—and, indeed, every amended post-1970 JOA—is entirely outside the statutory scheme that requires Attorney General consent. However, again, as the Ninth Circuit correctly concluded, the NPA's text refutes that position. An amended agreement is still a "contract, agreement, . . . or other arrangement" and, thus, covered by the statutory definition of a JOA. 15 U.S.C. § 1802(2). The text of Section 4(b) makes no special rule for amended JOAs; if an arrangement meets the statutory definition, then it is "unlawful" absent Attorney General consent,

regardless of whether the parties previously had a JOA. *Id.* § 1803(b). This clear text makes perfect sense. Under the Sun's atextual reading, parties to an approved agreement could simply "amend" it in a way that radically changed the agreement's impact on competition without any Attorney General review at all.

Fourth, this case is a particularly inappropriate one in which to address how the NPA applies to "amendments," because the 2005 JOA is plainly a new agreement, not a mere amendment. The 2005 JOA expressly terminated the 1989 agreement, and it substantially rewrote the arrangement in ways that materially change its competitive implications, including merging the subscriber bases of the two newspapers and agreeing not to compete in particular geographic areas.

Finally, the case arrives at this Court in an awkward posture. The Review-Journal appealed the denial of its motion to dissolve a stipulated-to injunction. In the court of appeals, the Sun argued that appellate jurisdiction is lacking because (1) the district court's order denying the Review-Journal's motion is not appealable and (2) the Review-Journal lacks standing to appeal. Although the Ninth Circuit correctly rejected these arguments and the petition does not mention them, they are jurisdictional and unwaivable. Granting review at this interlocutory stage would thus embroil the Court in these threshold jurisdictional disputes, making this a poor vehicle for addressing the other questions presented.

The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. The first newspaper joint operating arrangement was formed in 1933 in Albuquerque, New Mexico. *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1287 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989). As of 1966, there were 22 JOAs in effect nationwide. *Ibid.* By that time, however, the Department of Justice (DOJ) was investigating these arrangements for violating federal antitrust law. *Ibid.* In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), this Court upheld a verdict finding that the Tucson, Arizona, agreement violated the Sherman and Clayton Acts. *Id.* at 133-136. Concern about what that ruling portended for other joint operating arrangements led to the enactment of the NPA in 1970. *See Newspaper Guild v. Levi*, 539 F.2d at 763 (Tamm, J., dissenting).

2. The NPA defines "joint newspaper operating arrangement" (as well as the synonymous term "joint operating arrangement," *see* Pet. App. 23a-24a) to mean any "contract, agreement, joint venture . . . , or other arrangement entered into by two or more newspaper owners." NPA, § 3(2), 84 Stat. at 466 (codified at 15 U.S.C. § 1802(2)). An arrangement is a JOA subject to the NPA if it satisfies two main criteria. First, the arrangement must be one under which "joint or common production facilities are established or operated." *Ibid.* Second, "joint or unified action [must be] taken or agreed to be taken" with respect to at least one enumerated activity

relating to printing, marketing, circulation, and back-office operations. *Ibid.*[1]

The NPA then creates two separate rules, one for JOAs already in existence at the time of the statute's enactment and one for those arising later.[2] For pre-1970 JOAs, the NPA declares, "[i]t shall not be unlawful under any antitrust law" to "perform, enforce, renew, or amend" any JOA "entered into prior to the effective date of th[e] Act," so long as the JOA satisfied certain conditions when it was "first entered into," § 4(a), 84 Stat. at 467 (codified at 15 U.S.C. § 1803(a)) (including that no more than one of the newspapers involved was "[un]likely to remain or become a financially sound publication"). Section 4(a) also requires that the terms of renewals of or amendments to pre-1970 JOAs be filed with DOJ and that any amendments not add new newspapers to the arrangement. *Ibid.*

The NPA's rule for post-1970 JOAs is more stringent. Section 4(b) of the NPA provides, "[i]t shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, … except with the prior

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[1] A proviso to the definition of JOA requires that arrangements maintain separateness of the newspapers' editorial and reportorial staffs and independence of their editorial policies. NPA § 3(2), 84 Stat. at 466.

[2] For simplicity, this brief refers to JOAs "entered into prior to the effective date of [the NPA]," § 4(a), 84 Stat. at 467, as "pre-1970 JOAs," and those "not already in effect" at the time of the NPA's enactment, § 4(b), 84 Stat. at 467, as "post-1970 JOAs." The precise cutoff date is July 24, 1970. *See* 15 U.S.C. § 1803(a). It is undisputed that the parties here had no JOA before 1989. *See* Pet. 10-11; Pet. App. 6a-7a.

written consent of the Attorney General." NPA § 4(b), 84 Stat. at 467 (codified at 15 U.S.C. § 1803(b)). Before providing that preapproval, the Attorney General must determine that either all or all but one of the newspapers involved are "failing," and that the approval would effectuate the NPA's enacted policy and purpose. *Ibid.*[3]

3. In 1970s-era regulations implementing the NPA, DOJ took the position that the NPA "does not require that all [JOAs] obtain the prior written consent of the Attorney General." 28 C.F.R. § 48.1; *see* Newspaper Preservation Act Regulations, 39 Fed. Reg. 7, 7 (Jan. 2, 1974); *accord* 15 U.S.C. § 1803(a). Instead, DOJ interpreted the NPA to "provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so." 28 C.F.R. § 48.2. Most relevant here, DOJ interpreted Section 4(b) of the NPA to provide that if newspapers entered into post-1970 JOAs without preapproval, those arrangements would "remain fully subject to the antitrust laws," but would not necessarily be unlawful. 28 C.F.R. § 48.1. In *Newspaper Guild*, a sharply divided D.C. Circuit panel held that this regulation was consistent with the NPA. 539 F.2d at 758-61. Judge Tamm dissented, accusing the majority of ignoring "the choice Congress actually made," *id.* at 761 (Tamm, J., dissenting), as reflected in the "language of the Act," *id.* at 762 (Tamm, J., dissenting). *See id.* at 761-67 (Tamm, J., dissenting). Apart from the

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[3] The NPA defines "failing newspaper" as one "in probable danger of financial failure," § 3(5), 84 Stat. at 466, a more dire prognosis than Section 4(a)'s requirement that the newspaper be unlikely to stay "financially sound," § 4(a), 84 Stat. at 467.

decision below, there has been no other published Circuit opinion interpreting this aspect of the regulations.

B. Factual Background

1. By 1989, the Sun was on the verge of financial collapse. Pet. App. 7a. That year, in an effort to save the Sun's failing paper, the Review-Journal agreed to enter into a JOA with the Sun. *Id.* at 6a-7a. Pursuant to Section 4(b) of the NPA, the 1989 JOA was approved by Attorney General Thornburgh. *Id.* at 6a-8a.

Under the 1989 JOA, the Sun and the Review-Journal pooled their profits, and the Review-Journal supported the Sun by providing direct cash payments and by handling all back-office operations, Pet. 10; Pet. App. 7a, 37a, but the two newspapers maintained distinct circulation. In particular, the Review-Journal's ownership took responsibility for advertising, printing, and managing the joint operations for the newspapers. Pet. 10; Pet. App. 7a. The *Review-Journal* was published as a morning paper; the *Sun* was published as an afternoon paper; and the two had separate subscriber bases. *Id.*

2. In 2005, to resolve the growing number of disputes that had arisen under the 1989 JOA and in light of changed newspaper industry economics, the parties executed a new JOA that substantially changed the competitive impact of the deal. Pet. App. 8a. Under the 2005 JOA, the two newspapers would no longer compete for subscribers. Rather, the *Sun* would cease to be circulated as a standalone newspaper and instead the Review-Journal agreed to distribute it as a 6-to-10-page insert within the *Review-Journal* newspaper. *Ibid.* The parties also newly agreed, among other things, not to

publish any additional daily newspapers in Southern Nevada. 3 C.A. ER 487. Although the parties labeled the 2005 JOA an "amended and restated agreement," the 2005 JOA expressly terminated the 1989 JOA and released the parties from any obligations and claims arising from their prior agreement. *Id.* at 487-88.

The 2005 JOA also overhauled the financial arrangement between the ownership groups. For instance, under the 1989 JOA, the Sun received a fixed percentage of profits; under the 2005 arrangement, the Sun receives an annual payment based on a complex formula. Pet. App. 7a-8a. The 2005 JOA also added the Review-Journal's affiliate newspapers to the profit-sharing pool. 3 C.A. ER 482, 498-501. In addition, while the 1989 JOA allocated funds for news and editorial expenses, the 2005 JOA states that each newspaper bears its own editorial costs and establishes its own budget. *Id.* at 479; *see* 4 C.A. ER 677-79.

The parties did not obtain the Attorney General's prior written consent before entering into the 2005 JOA.[4] Instead, the parties submitted the agreement to DOJ pursuant to the regulation (28 C.F.R. § 48.16) that governs filing the terms of renewals or amendments of *pre-1970* JOAs under NPA Section 4(a). Pet. App. 8a-9a.[5] DOJ investigated the 2005 JOA for several years

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[4] Respondents did not yet have any involvement with the Review-Journal and had no involvement in forming the 2005 JOA.

[5] Section 48.16 governs the "renewal of or an amendment to the terms of an existing arrangement." 28 C.F.R. § 48.16. The applicable regulations define "existing arrangement" to mean a JOA "entered into before July 24, 1970," *id.* § 48.2(d). Therefore, the parties' 1989 JOA was not an "existing arrangement" under the regulations.

but ultimately took no action. *Id.* at 9a. In its 2008 no-action letter, DOJ declined to give Attorney General consent to the arrangement, instead informing the parties that the Antitrust Division had "closed its investigation," but its decision "was not based on a conclusion that the 2005 amendments to the parties' [JOA] are protected by the antitrust immunity afforded by the [NPA]." 3 C.A. ER 427; *see* Pet. App. 9a. The letter stated that the parties' conduct pursuant to the 2005 JOA "remain[ed] subject to antitrust scrutiny." 3 C.A. ER 427; *see* Pet. App. 9a.

3. In 2015, the Review-Journal underwent two ownership changes, ultimately being purchased by an entity related to members of the Adelson family, who are longtime residents of Las Vegas (the entity is one of the respondents, here). 3 C.A. ER 410. By that point, the relationship between the two newspaper companies had soured, leading to contentious arbitrations and state-court litigation related to accounting for profit sharing and other issues. Pet. App. 9a.

In 2019, the Review-Journal obtained leave from the Nevada state court to assert counterclaims against the Sun for the Sun's material breaches of the 2005 JOA, which could be grounds for terminating the agreement. *Ibid.*

In response, the Sun (which had initiated the state-court action) filed this suit in federal court, seeking to stop the Review-Journal from pursuing its state-court counterclaim to terminate the 2005 JOA. Pet. App. 9a-10a.

C. Procedural History

1. In this federal suit, the Sun argued that the Review-Journal's actions not only breached the contract, but also violated federal antitrust law. Pet. App. 9a-10a. The Sun sought an injunction that would, *inter alia*, prohibit the Review-Journal from taking steps to terminate the 2005 JOA. Pet. App. 10a. The Review-Journal stipulated to the entry of a preliminary injunction that would "maintain the status quo" while also preserving the parties' respective rights and arguments. D. Ct. Doc. 13, ¶ 7 (Oct. 9, 2019) (Stipulation); *see* Pet. App. 10a. In October 2019, the district court entered an order under which the Review-Journal would "'continue to perform under the 2005 JOA,' and . . . agreed to 'refrain from taking any non-judicial steps to terminate the 2005 JOA until after the entry of final judgment by a court of competent jurisdiction permitting such termination.'" Pet. App. 10a (quoting Stipulation ¶ 7).

Because the complaint alleged that DOJ had "permitted" the 2005 JOA under the NPA, the district court allowed the case to go to discovery without resolving whether the 2005 JOA was unlawful. *See* Pet. App. 11a.

2. In the years that followed, no evidence was produced showing that the Attorney General had provided "prior written consent," 15 U.S.C. § 1803(b), to the 2005 JOA, and it is now undisputed that, contrary to the allegations the Sun made, the Attorney General did not do so, *see* Pet. 12. In June 2023, the Review-Journal moved for dissolution of the stipulated preliminary injunction on the ground that, given the lack of preapproval, Section 4(b) of the NPA made performance or enforcement of the 2005 JOA "unlawful." Pet. App. 11a. The Review-

Journal also sought summary judgment on the same issue.

The district court granted summary judgment to the Sun on this issue and denied the Review-Journal's motion to dissolve the injunction. Pet. App. 52a-60a. The court interpreted Section 4(b) of the NPA to govern only the initial JOA between two parties, but not amended JOAs. In the district court's view, amended post-1970 JOAs are JOAs "already in effect" (the phrase used in Section 4(b) to refer to pre-1970 JOAs) and thus do not require prior written consent. 15 U.S.C. § 1803(b); *see* Pet. App. 55a-56a. Instead, the court concluded that amendments to all JOAs—whether the JOA to be amended was entered into before or after the NPA's enactment—are governed by Section 4(a)'s more lenient notice requirement. Pet. App. at 56a. In addition, the district court deemed the 2005 JOA to be an amended JOA (subject, under the district court's pronouncement, to Section 4(a)), rather than a new JOA (which even under the district court's rationale would be subject to Section 4(b)). *Id.* at 57a-60a.

The district court went yet further: it held that, even if the 2005 JOA were a new JOA, it would not be unlawful, despite the plain language of the NPA. *See* Pet. App. 60a. As the district court saw it, "unlawful" does not mean "unlawful." According to the district court, even if Section 4(b) governed, the "absence of the Attorney General's signature may expose the parties to antitrust liability but does not invalidate the JOA or render i[t] unlawful or unenforceable." *Ibid.*

3. The Review-Journal appealed to the Ninth Circuit, challenging all three of the district court's

conclusions. The Review-Journal explained that (1) the district court was wrong that Section 4(b) merely offers antitrust immunity but does not provide that unapproved JOAs are unlawful, C.A. Appellants' Br. at 53-57; (2) Section 4(b)'s consent requirement applies to all post-1970 arrangements meeting the statutory definition of a JOA, regardless of whether they are "new" or "amended," *id.* at 34-48; and (3) in any event, the 2005 JOA was a *new* JOA and not a mere amendment, *id.* at 49-52.

In its response, the Sun pressed two objections to appellate jurisdiction. First, it argued that the Ninth Circuit lacked appellate jurisdiction to review the district court's order under *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), because (in the Sun's view) the Review-Journal had failed to demonstrate irreparable harm. C.A. Appellee's Br. 24-29. Second, the Sun argued that the Review-Journal lacked standing to appeal the denial of its motion because it was insufficiently aggrieved by the district court's order. *Id.* at 29-30.[6]

As to the merits, the Sun made three arguments relevant to this petition. First, the Sun agreed with the district court that the failure to obtain Attorney General consent did not render the 2005 JOA unlawful, notwithstanding Congress's use of the term "unlawful." *See* C.A. Appellee's Br. 51-56. Second, the Sun maintained that agreements to amend post-1970 JOAs were not

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[6] The Sun additionally argued that the district court lacked authority to modify the injunction because of insufficient change in the circumstances. C.A. Appellee's Br. 30-33. The court of appeals rejected that argument, Pet. App. 15a n.2, and the Sun does not pursue it here. It is thus waived.

subject to Attorney General review *at all*. *Id.* at 36-47. Third, the Sun argued the 2005 Agreement was a mere amendment, rather than a new agreement. *Id.* at 48-50.

4. The Ninth Circuit unanimously reversed. Pet. App. 1a-34a.

a. The Ninth Circuit first concluded it had appellate jurisdiction to review the district court's order. Pet. App. 12a-15a. The court explained that the denial of the Review-Journal's motion to dissolve the preliminary injunction "'f[ell] squarely within the language of [28 U.S.C. §] 1292(a)(1),'" and the court "therefore ha[d] jurisdiction over the[] appeal without the need for any further showing." Pet. App. 13a (quoting *Nat. Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1101 (9th Cir. 2016)). Under Ninth Circuit precedent, the court noted, the need to show irreparable harm under *Carson* applies "only to non-injunctive orders that are claimed to have the practical effect of denying an injunction." *Id.* at 13a-14a (internal quotation marks omitted). The Ninth Circuit likewise concluded that its precedent foreclosed the Sun's argument that the Review-Journal lacked appellate standing. *Id.* at 14a-15a.

b. On the merits, the court of appeals first held that if Section 4(b) governed, then the 2005 JOA was necessarily unlawful. Pet. App. 16a-22a. The court acknowledged that the D.C. Circuit's divided decision in *Newspaper Guild* a half-century earlier had upheld a regulation providing that failure to obtain Attorney General consent "merely meant that the parties lacked any antitrust exemption under the NPA" but did not render the JOA unlawful. *Id.* at 17a (citing 539 F.2d at 760-761). However, the Ninth Circuit "reject[ed] this

reading as squarely foreclosed by the plain language of the statute." *Ibid.*; *see id.* at 17a-21a.

The court of appeals further held that the 2005 JOA was governed by Section 4(b) of the NPA. Pet. App. 22a-33a. As the court explained, that would be the case "if the 2005 JOA counts as '[1] a joint operating arrangement, [2] not already in effect.'" *Id.* at 16a (alterations in original); *see id.* at 22a.

The court examined the NPA's definition of a "joint operating arrangement" and found that the 2005 JOA qualified, rejecting the Sun's argument that the parties' "common production facilities" were both "established" and "operated" under the 1989 JOA, not the 2005 JOA. 15 U.S.C. § 1802(2); *see* Pet. App. 24a-25a.[7] The court further held that Section 4(b)'s reference to JOAs "not already in effect" referred to JOAs not in effect as of the enactment of the NPA, a conclusion it deemed "unmistakabl[e]" under the statutory text. Pet. App. at 26a; *see id.* at 26a-33a. Thus, because the 2005 JOA postdated the NPA's enactment, it was subject to Section 4(b)'s preapproval requirement. *Id.* at 33a.[8]

Having determined that (1) the 2005 JOA was governed by Section 4(b) and (2) the parties had not

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[7] The court of appeals explained that although the NPA defines the term "joint *newspaper* operating arrangement," 15 U.S.C. § 1802(2) (emphasis added), whereas Section 4(b) uses the term "joint operating arrangement" *simpliciter*, *id.* § 1803(b), statutory context makes clear that the two terms are synonymous. Pet. App. 23a-24a. The Sun does not contest that conclusion here.

[8] The Ninth Circuit thus did not decide whether the 2005 JOA was a new agreement or an amended agreement. *See* Pet. App. 32a-33a.

obtained the Attorney General's consent, the Ninth Circuit concluded that "the 2005 JOA is unlawful and unenforceable." Pet. App. 33a. On that basis, the court held that the preliminary injunction should have been dissolved. *Id.* at 33a-34a.

5. The court of appeals denied rehearing, with no judge requesting a vote of the full court. Pet. App. 102a-103a.

REASONS FOR DENYING THE PETITION

The Sun purports to identify an important split of authority warranting this Court's review. However, review is not warranted here.

For starters, the question presented has no legal consequence outside of this litigation. The 2005 JOA is the last remaining JOA in the United States, and no JOA has been formed in a new market since 1990. That is no surprise, as the digital revolution in the decades since Congress enacted the NPA has rendered mergers of local print newspapers largely irrelevant and entirely unnecessary for news publishers like the Sun to maintain their voice. Questions about the proper construction of the NPA are therefore unlikely ever to arise again.

As for the Sun's purported circuit split, there is nothing worthy of this Court's attention. The only precedential opinion addressing (half of) the question the Sun presents is *Newspaper Guild v. Levi*, 539 F.2d 755 (D.C. Cir. 1976). *Newspaper Guild* is a 50-year-old ruling reflecting "wholesale disregard of the statutory text[, an approach that] is a 'relic from a bygone era of statutory construction' that . . . is flatly contrary to current Supreme Court authority," Pet. App. 20a-21a (quoting

Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 436-37 (2019) (citation omitted)), and which arose in an era in which agency deference, not plain text, ruled the day, *see id.* at 21a-22a. As for the question whether Section 4(b) applies to "amendments," there is no circuit split at all; moreover, that portion of the question presented is irrelevant, because the 2005 JOA is not an amendment, but is instead a new agreement.

The Ninth Circuit's decision is also correct. The NPA declares unequivocally that post-1970 JOAs "shall be unlawful" unless the Attorney General provides prior written consent. 15 U.S.C. § 1803(b). And the 2005 JOA plainly falls within that rule of illegality, as it satisfies the NPA's definition of a JOA. The Sun offers no coherent response to these straightforward textual arguments.

Nor is this case a clean vehicle for resolving the question presented. The Sun argued in the Ninth Circuit that the court lacked jurisdiction and that the Review-Journal lacks standing to pursue this interlocutory appeal. Although the Ninth Circuit properly rejected the Sun's arguments, they remain a part of the case this Court would be unable to overlook.

This Court should deny review.

I. THERE IS NO SPLIT OF AUTHORITY THAT WARRANTS THIS COURT'S REVIEW.

A. The Question Presented Is Unimportant Because the Newspaper Preservation Act Is Moribund.

This case concerns newspaper JOAs, which the Sun acknowledges (Pet. 27) are an "endangered species." That is an understatement. In truth, JOAs are all but extinct.

1. When Congress enacted the NPA in 1970 on the heels of this Court's decision in *Citizen Publishing*, there were at least 22 JOAs operating. *See Mich. Citizens*, 868 F.2d at 1287. In addition, of course, print media was far more important in that pre-internet era. Today, JOAs are a thing of the past: when the Ninth Circuit issued the decision below, the JOA at issue here was one of just *two* remaining nationwide. The other involved an arrangement between Detroit newspapers. *See id.* at 1288-89.[9]

Now, even that lone other JOA is gone. Since the Sun filed its petition, the Detroit JOA has dissolved, leaving this Las Vegas JOA the only JOA remaining in the entire United States.[10] Of course, the NPA remains

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[9] *See also* Dustin Walsh, *Can Detroit's 2 Daily Newspapers Survive Independently?*, Crain's Detroit Bus. (June 17, 2025), https://www.crainsdetroit.com/media/can-detroit-news-and-detroit-free-press-survive-independently.

[10] *See* David Eggert & Dustin Walsh, *Bound Together for 36 Years, Detroit's 2 Daily Newspapers Go Their Separate Ways*, Crain's Detroit Bus. (Dec. 26, 2025), https://www.crainsdetroit.com/media-

on the books, but no JOA has been formed in a new market since the York, Pennsylvania JOA in 1990.[11] A ruling in this case would impact no one other than the parties to this case. And, no future disputes are likely to arise under the statute, rendering any tension between the D.C. Circuit and the Ninth Circuit irrelevant.

2. The Sun makes two arguments for why this NPA dispute deserves this Court's attention even though the NPA applies only to this JOA. Neither is sound.

First, the Sun warns (Pet. 27-28) that if it is no longer able to continue its print publication, Nevadans will lose access to "competing editorial viewpoints that are critical to an informed democracy." Pet. 27. No one questions the importance of access to multiple viewpoints, but removing a short insert from the *Review-Journal* print publication will not deprive anyone of meaningful access to news and opinion. Regardless of the outcome of this case, the Sun will persist as an online publication; nothing in the record suggests that the Sun's website is

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marketing/detroit-news-free-press-split-joint-operating-agreement-ends; Neal Rubin, *Detroit Free Press, Detroit News to End Joint Operating Agreement at End of 2025*, Detroit Free Press (updated June 16, 2025), https://www.freep.com/story/news/local/michigan/2025/06/16/detroit-free-press-news-joint-operating-agreement/84226824007.

[11] *See* Andrew Backover, *York's 2 Dailies Target Different Audiences*, Denver Newspaper Bus. (July 23, 2000), https://extras.denverpost.com/business/joa0723a.htm; Joe Strupp, *Papers Swapped in York, Pa.*, Editor & Publisher (May 5, 2004), https://www.editorandpublisher.com/stories/papers-swapped-in-york-pa,107800.

in danger.[12] Additionally, of course, Nevadans will still have access—via television, radio, internet, apps, streaming and even print—to countless sources of news and opinion from a vast array of sources other than the parties here.[13]

The Sun further claims (Pet. 28-29) the decision below warrants review because it "generically invalidated an unknown number of the DOJ NPA regulations," leaving the newspaper industry to "guess[] which regulations still apply and which do not." Pet. 28. That is wrong The Ninth Circuit did not purport to vacate any regulations (DOJ was not even a party), and it disagreed with DOJ's reasoning only as to 28 C.F.R. § 48.1, the regulation upheld in *Newspaper Guild*. More to the point, even if an unknown number of NPA regulations were invalidated, that would be of no practical significance since these regulations, like the statute they implement, are largely a dead letter.

B. There Is No Meaningful Split.

The Sun suggests (Pet. 19-22) the decision below resolved the question the Sun presents differently from three prior cases—the D.C. Circuit's decision in *Newspaper Guild* and two unpublished decisions of the Sixth Circuit. In reality, none of these cases addressed the

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[12] *See* Las Vegas Sun, https://lasvegassun.com (last visited Jan. 12, 2026).

[13] The Sun complains (Pet. 14) it "sacrificed its own publishing capability" in reliance on a relationship with the Review-Journal. In reality, the *Sun* would have folded without the Review-Journal's agreeing to take on the time, effort, and cost of carrying it, so the Sun cannot be heard to complain of reliance interests.

composite question the petition presents (Pet. i). Two of the cases (*Newspaper Guild* and *News Weekly*) addressed whether JOAs governed by Section 4(b) of the NPA are unlawful if they do not receive written consent from the Attorney General, without discussing amended JOAs at all. The third (*Mahaffey*) decided a question related to amendments distinct from the question presented here. Any conflict on these issues, whether the questions are correctly analyzed separately or awkwardly considered in a bundle, is unworthy of this Court's review.

1. a. In *Newspaper Guild*, the D.C. Circuit upheld a DOJ regulation providing that post-1970 JOAs without Attorney General preapproval are not unlawful. 539 F.2d at 758-61. The Sun notes (Pet. 19-20) that the decision below departed from *Newspaper Guild*. However, the Ninth Circuit's disagreement with *Newspaper Guild* does not warrant this Court's attention. While *Newspaper Guild* upheld DOJ's construction of the NPA, *see* 539 F.2d at 755-56, the D.C. Circuit's approach in doing so a half-century ago is entirely out of step with current law.

Rather than engage with Section 4(b)'s text, the *Newspaper Guild* majority's analysis focused on drafting history, committee reports, and floor statements. *See* 539 F.2d at 757-60. The majority believed itself free to disregard what a "rigidly literal reading of [the text] undeniably provides," *id.* at 757, because the majority was "unable to locate statements [in the legislative history]," *id.* at 760, confirming what the text said. Despite that plain text, the D.C. Circuit rejected the notion that the NPA made unlawful certain JOAs that might have been lawful prior to the enactment of the NPA, because

the majority "found no evidence in the record or, . . . in any public debate indicating" Congress desired that result. *Id.* at 760.

Newspaper Guild's approach to statutory interpretation is a "relic" of that time. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436-37 (2019). As the *Newspaper Guild* dissent noted, the majority "rejected a plain meaning rule which forbids consideration of legislative history when the language of the statute is clear and unambiguous." 539 F.2d at 762 n.1 (Tamm, J., dissenting). That is not how statutory interpretation works today. *See, e.g.*, *Bostock v. Clayton County*, 590 U.S. 644, 674 (2020) ("legislative history can never defeat unambiguous statutory text . .."); *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 36-37 (2016) ("because the meaning of the [statutory] text and structure is 'plain and unambiguous, we need not . . . consider the legislative history'" (quoting *Whitfield v. United States*, 543 U.S. 209, 215 (2005))).

Similarly, *Newspaper Guild* arose when courts deferred to agency statutory constructions, and the question of deference played an important role in the D.C. Circuit's decision-making. *See* 539 F.2d at 761-62 (Tamm, J., dissenting). Such deference, too, is of a bygone era. Pet. App. 21a-22a (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)).

Given *Newspaper Guild*'s focus on legislative history—and its express disregard for the NPA's text—it is inconceivable that any other Circuit would find its analysis persuasive. Today, consistent with this Court's directions, all federal courts are forbidden to look beyond unambiguous statutory text. Additionally,

deference to agency interpretations is no more. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391-92 (2024).

Given this Court's clear commands in the years since *Newspaper Guild*, it is highly questionable whether even the *D.C. Circuit itself* would follow *Newspaper Guild* today, particularly now that the Ninth Circuit has rejected the 1976 panel majority's analysis. To the extent *Newspaper Guild* is precedent, it hangs by the slightest of threads. That sort of "conflict" does not merit review.

b. The Sun also claims (Pet. 21) that the decision below conflicts with *News Weekly Systems, Inc. v. Chattanooga News-Free Press*, 986 F.2d 1422 (Table), 1993 WL 47197 (6th Cir. 1993). *News Weekly* offers no help for petitioner. For starters, as an unpublished decision, *News Weekly* is not precedent even within the Sixth Circuit, *see* 6th Cir. R. 32.1(b); indeed, it had never been cited in any judicial decision before this case. The decision also contains no independent analysis of the NPA; it simply notes the holding of *Newspaper Guild* and accepts it, observing that the appellant had made no effort to explain why the D.C. Circuit was wrong. *News Weekly*, 1993 WL 47197, at *2 (citing *Newspaper Guild*, 539 F.2d at 760). *News Weekly* thus adds nothing to *Newspaper Guild*.

2. The Ninth Circuit held that if an arrangement meets the NPA's definition of a JOA, then it is subject to Section 4(b) regardless of whether it is an "amendment." Pet. App. 22a-33a. The Sun argues (Pet. 21-22) that this conclusion conflicts with the Sixth Circuit's unpublished decision in *Mahaffey*. It does not.

Preliminarily, like *News Weekly*, *Mahaffey* is unpublished and thus not precedential. *See* 6th Cir. R. 32.1(b). Indeed, aside from the decisions in this case, *Mahaffey* has been cited only *once* by *any* court—and that was twenty years ago, by an out-of-circuit district court, for a proposition unrelated to the NPA. *See Rosenthal Collins Grp., LLC v. Trading Techs. Int'l, Inc.*, No. 05-cv-4088, 2005 WL 3557947, at *5 (N.D. Ill. Dec. 26, 2005).

On the merits, the Sun is wrong that *Mahaffey* is inconsistent with the decision below. *See* Pet. App. 33a n.7 (distinguishing *Mahaffey*). *Mahaffey* involved the now-defunct Detroit JOA. 1998 WL 739902, at *1. The newspapers had obtained the Attorney General's consent for their initial, post-1970 JOA. However, their JOA "did not address the contingency of a strike" that might make it impossible to issue two separate newspapers each weekday, *ibid.*, so the parties later appended a new provision to their JOA, under which a joint publication was authorized in the event of a strike. *Ibid.*

The appellants in *Mahaffey* argued that the newspapers' "failure to seek and obtain approval of the amendment stripped even the original [JOA] of antitrust immunity." 1998 WL 739902, at *2. The panel rejected that argument, since it "s[aw] no reason to suppose that Congress intended previously-approved agreements to be stripped of all protection if amended by the addition of provisions." *Ibid.* That was *Mahaffey*'s sole holding: merely *adding* a new provision (without Attorney General consent) to a previously approved JOA did not expunge the approval of the JOA's extant provisions.

The question *Mahaffey* resolved is not presented here. This case involves newspapers that terminated and *replaced* their prior agreement with a new JOA containing materially different provisions without obtaining approval. *See* pp. 9-11, *supra*. Whereas in *Mahaffey*, the bulk of the contracting parties' joint operations were undertaken pursuant to the initial, approved JOA, here the critical operations (and virtually all operations at issue in the litigation) take place pursuant to the provisions of the new, *unapproved* 2005 JOA.

Indeed, with respect to the implications of operating pursuant to unapproved amendments—the issue here—*Mahaffey* "expressly declined to decide that issue," Pet. App. 33a n.7, because the appellants lacked standing to challenge it, *id.* (citing 1998 WL 739902, at *2). Thus, the decision below and the unpublished *Mahaffey* decision resolved different issues relating to amended JOAs, and the decisions thus do not conflict.

II. THE DECISION BELOW IS CORRECT.

With no meaningful split of authority and no realistic chance its question presented will ever recur, the Sun's pitch for this Court's review devolves into a plea for pure error correction. The Ninth Circuit, however, properly resolved the issues presented. Notably, the Sun offers no meaningful argument to the contrary.

A. Section 4(b) of the Newspaper Preservation Act Provides That Unapproved JOAs Are "Unlawful."

The Ninth Circuit held that a post-1970 JOA that does not receive the Attorney General's "prior written consent" is "unlawful." 15 U.S.C. § 1803(b); *see* Pet. App.

15a-22a. The court rejected the Sun's contrary interpretation of Section 4(b) of the NPA that an unapproved post-1970 JOA may be lawful as "squarely foreclosed by the plain language of the statute." Pet. App. 17a. The court's conclusion was correct.

1. As the court of appeals observed, the language of Section 4(b) is "clear and unequivocal." Pet. App. 18a. That language plainly states, "[i]t shall be unlawful . . . to enter into, perform, or enforce" a post-1970 JOA "except with the prior written consent of the Attorney General." 15 U.S.C. § 1803(b). If there is no prior written consent, then the arrangement is simply "unlawful."

As the court of appeals further noted, this conclusion is buttressed by the differences in language between Section 4(b) and Section 4(a), which governs JOAs already in force at the time of the NPA's enactment. *See* Pet. App. 18a-20a. Section 4(a) states, "[i]t shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend" *pre*-1970 JOAs meeting certain criteria. 15 U.S.C. § 1803(a) (emphasis added). Had Congress chosen to repeat the Section 4(a) language in Section 4(b), that language would govern post-1970 JOAs just as the Sun proposes: the Attorney General's preapproval would afford antitrust immunity, and "the lack of such prior approval would simply mean that this *exemption* from the antitrust laws would not apply." Pet. App. 18a. Congress's choice to use distinct language in Section 4(b) must be respected. *See Henson v. Santander Consumer USA, Inc.*, 582 U.S. 79, 85-86(2017).

2. For its part, the Sun musters no textual argument to support its position that the phrase "[i]t shall be unlawful" does not mean "it shall be unlawful," but rather

means "it does not have immunity from antitrust laws, but may or may not be unlawful." Instead of providing textual analysis, the Sun criticizes (Pet. 22-24) the Ninth Circuit for not "consider[ing] legislative history and other indicators." Pet. 23.

The Sun fails to justify that anachronistic interpretive maneuver here. It notes (Pet. 22-23) the Ninth Circuit's recognition that the NPA uses the terms "joint operating arrangement" and "joint newspaper operating arrangement" interchangeably, *see* Pet. App. 23a-24a, suggesting this imprecise drafting justifies a wide-ranging foray into legislative history. But the Ninth Circuit found no *ambiguity* in the statute resulting from this imprecision. Pet. App. 23a-24a. More importantly, the Ninth Circuit likewise found no ambiguity *in the operative language of Section 4(b)*. *Id.* at 17a-22a. Imprecision in one part of statute is not license for jettisoning the entirety of the statute's text.

The Ninth Circuit correctly rejected the legislative-history-focused analysis applied in *Newspaper Guild*. Pet. App. 20a-21a. As the Ninth Circuit explained, the D.C. Circuit's approach reflected a "wholesale disregard of the statutory text" and a "'casual disregard of the rules of statutory interpretation,'" making *Newspaper Guild* a "'relic from a "bygone era of statutory construction"' that 'inappropriately resort[ed] to legislative history' in lieu of 'the statute's text and structure.'" *Ibid.* (alteration in original) (quoting *Food Mktg.*, 588 U.S. at 436-37 (citation omitted)). With text as the proper

lodestar, the resolution to this issue is not debatable—and the Sun does not seriously debate it.[14]

B. The 2005 JOA Is Governed by Section 4(b) of the Newspaper Preservation Act.

1. As the court of appeals explained, the question in this case is whether "the 2005 JOA counts as '[1] a joint operating agreement, [2] not already in effect.'" Pet. App. 16a (alterations in original) (quoting 15 U.S.C. § 1803(b)). If it does, then Section 4(b) applies. *See* Pet. App. 16a, 22a.

The 2005 JOA easily meets the NPA's definition of a JOA. As the Ninth Circuit noted, it "is plainly a 'contract, agreement, . . . or other arrangement,' and it was indisputably 'entered into by two or more newspaper owners for the publication of two or more newspaper publications.'" Pet. App. 25a (alteration in original) (quoting 15 U.S.C. § 1802(2)). It is equally clear that "joint or common production facilities are established *or operated*" pursuant to the 2005 JOA. 15 U.S.C. § 1802(2) (emphasis added). For the past two decades, all of the newspapers' joint "operat[ions]" have been undertaken pursuant to new provisions that the Attorney General never approved—including their change from selling separate newspapers with separate subscriber bases to selling a joint print product with a single set of subscribers. *See* Pet. App. 25a; pp. 9-10, *supra*. Finally, under

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[14] Curiously, while the Sun asserts (Pet. 23) that "legislative history and other indicators" should have been consulted, it fails to explain why consulting them would compel a different result. Thus, even if this Court were to grant review, it is unclear what arguments the Sun would make or whether they are properly preserved.

the 2005 JOA, "joint or unified action is taken or agreed to be taken with respect to" at least one of the items in the JOA definition's enumerated list: "printing; time, method, and field of publication; allocation of production facilities; distribution; [etc.]" 15 U.S.C. § 1802(2). In fact, under the 2005 JOA, the parties agreed to joint or unified action for *each* item in that enumerated list (pursuant to terms different from those in the 1989 JOA). The 2005 JOA is thus a joint operating arrangement.

It is true that, before 2005, the parties operated pursuant to a 1989 agreement that also met the statutory definition of a JOA, but that is irrelevant. Neither the NPA's definition of JOA nor Section 4(b) makes any distinction between arrangements involving parties that previously had a JOA and those involving parties that did not. The only question is whether the parties seek to "enter into, perform, or enforce" an arrangement that meets the statutory definition of a JOA. 15 U.S.C. § 1803(b).

2. The Sun argues (Pet. 24-26) that the NPA as a whole and Section 4(b) in particular have nothing to say about amendments to post-1970 JOAs, neither affording them immunity nor condemning them as unlawful. The Sun principally grounds that view in Section 4(b)'s reference to JOAs "not already in effect," a phrase the Sun asserts refers to JOAs between parties that had not previously been parties to another JOA. No court of appeals has ever adopted this view, and the view is plainly mistaken.

a. The NPA's text and structure make clear that Section 4(a) governs pre-1970 JOAs and Section 4(b) governs post-1970 JOAs. Start with the text. The term

"already in effect" is, as the Ninth Circuit said, "unmistakably," Pet. App. 26a, a reference to JOAs formed prior to the enactment of the NPA: "a JOA adopted before the NPA is one that is 'already in effect,' and a JOA entered into after the NPA, even if it amends a prior JOA, is one that is 'not already in effect.'" *Ibid.*

The NPA leaves no doubt on that score. Section 4(a) states that it "shall not be unlawful" to take certain actions related to JOAs "entered into prior to the effective date of th[e] Act." NPA, § 4(a), 84 Stat. at 467. Using parallel form, Section 4(b) states that it "shall be unlawful" to take similar actions related to JOAs "not already in effect" without Attorney General consent. § 4(b), 84 Stat. at 467. It is thus apparent that Section 4(b)'s temporal focus is similarly on the NPA's effective date, thus covering all JOAs not covered by Section 4(a).

Moreover, the Sun's preferred scheme, in which amended post-1970 JOAs are ignored by the NPA altogether, is at war with the NPA's structure. As Section 4(a)'s proviso makes clear, Congress knew that JOAs could be renewed or amended. Even under Section 4(a)'s more lenient regime for pre-1970 JOAs, Congress still required the terms of amendments to be filed with DOJ. *See* 15 U.S.C. § 1803(a). It would make no sense, then, under the stricter regime governing post-1970 JOAs, for Congress to have intended for amendments to those JOAs to be entirely unregulated, permitted to go into effect without being subject to Section 4(b)'s ban on unapproved JOAs and without even a requirement (like the one in Section 4(a)) to inform DOJ that the previously approved terms have been jettisoned. Congress

could not have intended for its post-1970 regime to be so easily circumvented.[15]

b. The Sun's lone other "textual" argument (Pet. 25) to support its interpretation of the phrase "not already in effect" relates to the captions of Section 4(a) and Section 4(b). The Sun observes that Section 4(a)'s caption "says that it applies to JOAs 'entered into prior to July 24, 1970,'" whereas Section 4(b)'s caption "says that it applies to 'future joint operating arrangements,' *i.e.*, after July 24, 1970." *Ibid.* (first quoting 15 U.S.C. § 1803(a); and then quoting *id.* § 1803(b)). Thus, in the Sun's view, Section 4(b) is *already* limited by its caption to post-1970 JOAs, so when the *text* of Section 4(b) refers to JOAs "not already in effect," that must be a *further* limitation to *new* post-1970 JOAs.

This convoluted argument fails for two reasons. First, even where captions are relevant, they merely characterize the text of a provision generally rather than add independent substance. *See Lawson v. FMR LLC*, 571 U.S. 429, 446-47 (2014). So, to the extent Section 4(b)'s caption is relevant, it supports the Review-Journal's position: Section 4(b)'s reference to JOAs "not already in effect" means "future [*i.e.*, post-1970] joint operating arrangements," just as the caption states. 15 U.S.C. § 1803(b).

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[15] Recognizing that Congress could not have intended that result, the district court held that *all* amendments to existing JOAs, whether post-1970 JOAs or pre-1970 JOAs, are governed by Section 4(a). *See* 15 U.S.C. § 1803(a); Pet. App. 56a-58a. The Ninth Circuit properly rejected that holding. *See* Pet. App. 26a-30a. The Sun did not defend the district court's position in the Ninth Circuit and does not defend it here.

Regardless, the captions are *not* relevant because they are not part of the NPA as enacted. In the *Statutes at Large*, Section 4 in its entirety is simply captioned "antitrust exemption." § 4, 84 Stat. at 467. The captions for Sections 4(a) and (b) "are merely editorial additions" made by the compilers of the U.S. Code when codifying Title 15, which have not been "enacted into positive law." Pet. App. 31a n.5 (quotation marks omitted); *see* 2 U.S.C. § 285b(3).[16]

c. Citing "public policy" concerns, the Sun suggests (Pet. 26) it would be strange if Congress required parties seeking to amend their JOAs to repeat the cumbersome Attorney General approval process. Of course, any purported administrative burden is no basis to avoid the NPA's clear text. But there is also no reason that the approval process for amended JOAs must be particularly cumbersome. DOJ could easily promulgate regulations allowing for a streamlined process, allowing the Attorney General to quickly readopt determinations she (or her predecessors) have already made while focusing the Section 4(b) inquiry on the changes to the JOA that are likely to raise new antitrust concerns.

d. Even if the Sun's interpretation of Section 4(b) were to be accepted, the Sun still would not prevail, because the 2005 JOA is not a mere amendment to the 1989 JOA, but is instead an entirely new agreement (and thus

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[16] Below, the Review-Journal made an argument based on the caption of Section 4(b)'s subsections as codified in the U.S. Code; the Ninth Circuit rejected that argument, noting that the captions in Title 15 are not law. Pet. App. 30a n.5. To repeat, though, if the captions were relevant, they would support the Review-Journal's position.

would have been an agreement "not already in effect" even under the Sun's definition).

As explained above, the 2005 JOA terminated the 1989 JOA and replaced many of the material aspects of the prior arrangement, including several of great importance to any antitrust assessment. *See* pp. 9-11, *supra*. To the extent the parties continue to "perform . . . or enforce" a JOA today, they are performing and enforcing the 2005 JOA; indeed, the 1989 JOA was terminated. The 2005 JOA is in every meaningful sense a "new" JOA.

III. THE POSTURE OF THE APPEAL MAKES THIS CASE A POOR VEHICLE.

Cementing the overwhelming case against further review, this case is a poor vehicle due to questions of appellate jurisdiction arising from the interlocutory nature of the appeal.

The Review-Journal appealed the denial of its motion to dissolve a stipulated preliminary injunction. Pet. App. 12a. In response to an order of the court of appeals, the Sun argued that the court lacked appellate jurisdiction over the case, asserting the district court's order was not appealable under 28 U.S.C. § 1292(a)(1) and that the Review-Journal lacked appellate standing. Pet. App. 12a.

Though the Sun does not address the jurisdictional issues in its petition, and though the Ninth Circuit correctly resolved those issues in the Review-Journal's favor, the issues go to this Court's jurisdiction and are not waivable. Accordingly, if this Court grants certiorari, it will be forced to confront these threshold jurisdictional

concerns. These issues occupied a significant portion of the parties' briefing in the Ninth Circuit, and the Ninth Circuit expended energy examining the applicability of this Court's decision in *Carson v. American Brands*, 450 U.S. 79 (1981). *See* Pet. App. 12a-15a. This Court would not escape the same fate were it to grant review now, before final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID R. SINGER
AMY M. GALLEGOS
JENNER & BLOCK LLP
515 S. Flower Street,
Suite 3300
Los Angeles, CA 90071

GABRIEL GILLETT
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654

RICHARD L. STONE
850 Devon Avenue
Los Angeles, CA 90024

MICHAEL J. GAYAN
Claggett & Sykes Law Firm
4101 Meadows Lane, Ste. 100
Las Vegas, NV 89107

IAN HEATH GERSHENGORN
Counsel of Record
JONATHAN J. MARSHALL
JENNER & BLOCK LLP
1099 New York Avenue, NW,
Suite 900
Washington, DC 20001
(202) 639-6000
igershengorn@jenner.com

J. RANDALL JONES
MONA KAVEH
KEMP JONES LLP
3800 Howard Hughes
Parkway, 17th Floor
Las Vegas, NV 89169