No. 23-1059

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA STATE PORTS AUTHORITY,
Petitioner,

THE STATE OF SOUTH CAROLINA; UNITED STATES MARITIME ALLIANCE, LTD.,
Intervenors for Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1422; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
Intervenors for Respondent.

On Petition for Review of an Order of the
National Labor Relations Board

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SOUTH CAROLINA CHAMBER OF COMMERCE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE SOUTH CAROLINA MANUFACTURERS' ALLIANCE IN SUPPORT OF PETITIONER SOUTH CAROLINA STATE PORTS AUTHORITY

Anthony J. Dick
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-7679

Brian West Easley
Courtney L. Burks
JONES DAY
90 S. Seventh Street, Ste. 4950
Minneapolis, MN 55419
(612) 217-8800

Counsel for Amici Curiae
[Additional Counsel Listed on Inside Cover]

Stephanie A. Maloney
Tyler S. Badgley
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

Erica Klenicki
Michael A. Tilghman II
NAM Legal Center
733 Tenth Street, NW
Suite 700
Washington, DC 20001
(202) 637-3177

Counsel for Amicus Curiae
National Association of Manufacturers

M. Dawes Cooke, Jr.
John W. Fletcher
BARNWELL WHALEY PATTERSON & HELMS, LLC
211 King Street, Suite 300
Charleston SC 29401
(843) 577-7700

Counsel for Amicus Curiae *South Carolina Manufacturers' Alliance*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rules 26.1(a)(2)(A) and (a)(2)(C), *Amici Curiae* each certify that they have no parent corporations and no publicly held corporation has ten percent or more greater ownership in them.

Under Local Rule 26.1(a)(2)(B), *Amici Curiae* each certify that they are unaware of any publicly held corporation or similarly situated legal entity that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that all current parties have consented to the filing of this brief in support of the Petitioner South Carolina State Ports Authority. In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except the *Amici Curiae*, their counsel and/or their members contributed money to fund the preparation or submission of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have an interest in the critical protection afforded by the "secondary boycott" provisions in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, which make it unlawful for a union to entangle "neutral" parties in labor disputes involving other employers. A proper and effective application of that prohibition is essential to the free flow of commerce.

The South Carolina Chamber of Commerce (the "State Chamber") is a not-for-profit, statewide organization with a purpose to represent the interests of South Carolina's business community. The State Chamber's mission is to serve as the leading voice for business in South Carolina with a vision of making South Carolina's economy the most vibrant in the United States, creating opportunity and prosperity for all.

The State Chamber's membership is comprised of businesses from across the state and across industries, from startups and family-owned businesses to multi-national enterprises—all of whom call South Carolina home. The State Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development and growth, and routinely participates in state and federal litigation as an amicus. The State Chamber has a keen interest in defending and promoting the state's right-to-work status.

The State Chamber's member companies rely on the efficient and reliable movement of goods to and from the South Carolina State Ports Authority, as they look to remain competitive in a global marketplace and recognize the crucial role the SCSPA plays as an economic engine for the entire Southeastern United States.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The South Carolina Manufacturers' Alliance ("SCMA") is a tax-exempt organization under section 501(c)(6) of the Internal Revenue Code and is the only South Carolina statewide association dedicated exclusively to the interests of manufacturers. SCMA has served as the manufacturing industry's government liaison in the state for over one hundred years. Its membership ranges from small businesses to global operations, spanning numerous industry sectors. SCMA's goal is to be the voice of manufacturers to the state's legislative and regulatory branches, as well as to promote and preserve the economic health of South Carolina manufacturers by seeking positive action in state government. SCMA emphasizes that maintaining strong manufacturing industries will foster and promote the strength of South Carolina's economy. There are more than 6,000 manufacturing facilities in the state. The manufacturing sector employs, directly or indirectly, more than 700,000 individuals, accounting for approximately 30% of all South Carolina jobs.

Amici submit this brief in support of Petitioner South Carolina State Ports Authority to illustrate how the underlying opinion of the National Labor Relations Board undermines the statutory purposes of the NLRA and erodes the protection against unlawful secondary boycott activities.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Breaking with precedent, the National Labor Relations Board ("NLRB") blessed a secondary boycott that the International Longshoreman Association ("ILA") used in an effort to tighten its grip on container work at ports on the east coast. In holding that the ILA's pressure tactics were lawful primary activity rather than an unlawful secondary boycott, the NLRB ignored the plain language and clear purpose of the NLRA. The Act is explicit. Section 8(b)(4) of the NLRA makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce" with the goal of forcing that person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B). That is exactly what happened here: The ILA coerced a group of shipping carriers to cease doing business at the Port of Charleston unless the port authority acceded to the union's separate demands. As the dissenting Board member explained, "[y]ou could not ask for a more classic case of unlawful secondary pressure." JA1341 (dissent of Member Ring).

This case is part of a pattern. The current Board is making a concerted effort to abandon precedent to tilt the playing field in favor of unions, while ignoring statutory directives to balance the rights and responsibilities of unions and employers. *See, e.g.*, *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023) (holding that the NLRA prohibits offering settlement terms including standard confidentiality and non-disparagement clauses commonly used for decades); *Thryv, Inc.*, 372 N.L.R.B.

No. 22 (2022) (allowing, for the first time, recovery of consequential damages in unfair labor practice cases for any "direct and foreseeable" financial harms); *Tesla, Inc.*, 370 N.L.R.B. No. 88 (2021) (ignoring sixty years of precedent by prohibiting commonplace workplace dress codes and uniform policies that limit but do not ban the display of union insignia); *Cf.* Memorandum GC 21-04, NLRB General Counsel (Aug. 12, 2021), and Memorandum GC 23-04, NLRB General Counsel (Mar. 20, 2023) (identifying numerous precedents the NLRB General Counsel intends to challenge).

As relevant here, a longstanding part of the balance struck by the NLRA is the principle, recognized by Congress and enforced by the courts, that unions cannot deploy pressure tactics against neutral companies with whom they have no direct dispute to extract concessions from other employers. In this case, the Board distorted the NLRA in ways that will have dramatic consequences for both the law of secondary boycotts and the broader national economy. Indeed, as a result of the Board's erroneous decision, the new state-of-the-art Leatherman Terminal at the Port of Charleston is lying dormant, with no carriers willing to deposit their cargo there, at precisely the time when the nation's supply chain is most in need of additional capacity. That stark result is at odds not only with common sense, but also with the law. This Court should not enforce the Board's decision.

ARGUMENT

An overriding objective of the NLRA is to "minimize industrial strife" and to "eliminate … substantial obstructions to the free flow of commerce." 29 U.S.C. § 151. As a result, the ban on secondary boycotts has long been a feature of American labor law. This case involves unlawful secondary boycotting that plainly violates the NLRA, as made clear by decades of precedent from the NLRB, the Supreme Court, and this Court. Yet the Board sharply departed from precedent here. Instead, it held that the carriers—not the South Carolina State Ports Authority ("SCSPA")—"controlled" the jobs at issue because they could choose to call at different ports that use union labor.

The Board's decision eviscerates the ban on secondary boycotts. After all, a company that is targeted by a union pressure campaign can almost *always* choose to refuse to do business with other companies in favor of those that are more favorable to union labor. But the law has never before allowed this type of defense to a secondary-boycott charge. The Board's radical shift in this direction continues its recent trend of ignoring precedent in ways that is both inconsistent with the NLRA and contrary to employer interests. This decision is inflicting immediate harm on South Carolina and the Port of Charleston, and threatening serious consequences for the nation's supply chain. In other words, the Board is enabling the very harms that the NLRA is meant to prevent. Its decision cannot stand.

I. The Board's Decision Eviscerates the Ban on Secondary Boycotts.

The NLRA prohibits secondary boycotts. The statute makes it unlawful to "threaten, coerce, or restrain any person engaged in commerce" with the objective of "forcing" that person "to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii); *see also id.* § 158(e) (prohibiting the use of "any contract or agreement" to achieve the same end). Here, the ILA has done exactly that: It has filed a lawsuit against a group of shipping carriers seeking $300 million in damages to force them to stop doing business at the new Leatherman Terminal of the Port of Charleston. The avowed theory of the lawsuit is that the carriers should stop calling at the Leatherman Terminal because the SCSPA, which runs the Terminal, is adhering to its longstanding practice of using non-union state employees to perform lift-equipment work there. The union's conduct is thus a classic secondary boycott: It is coercing the carriers to stop doing business at the Terminal unless a different party—the SCSPA—accedes to the union's demands to hire more union workers.

In the proceedings below, the Administrative Law Judge recognized that the union's conduct was flatly illegal. JA1354–55. But the Board reversed that decision, upholding the union's pressure campaign under the so-called "work preservation" defense. JA1332–33. In reaching that result, the Board badly misapplied the law in a way that guts the NLRA's prohibition on secondary boycotts.

The Supreme Court has laid out a two-part test to determine if a union pressure campaign is authorized under the work-preservation defense: First, the union "must have as its objective the *preservation* of work traditionally performed by employees represented by the union." *NLRB v. Int'l Longshoremen's Ass'n*, 447 U.S. 490, 504 (1980) ("*ILA I*") (emphasis added). In other words, while the union may seek to preserve its members' jobs, it cannot pressure an employer to award its members *new* jobs that they have not previously performed. And second, the employer targeted by the union's pressure tactics must actually "have the power to give the employees the work in question." *Id.* The union cannot target one employer as a way of indirectly coercing the hiring decisions of a *different* employer. If the union fails either prong of this test, then its conduct is prohibited.[1]

Applying that test here should have been easy. The ILA's members have never performed lift-equipment work at the Port of Charleston, and the carriers targeted by the ILA have no control over who is assigned that work. But instead of following that simple path, the Board distorted both prongs of the law to favor the union.

[1] It makes no difference if an unlawful pressure campaign is carried out through a lawsuit that would otherwise be permissible under a bargaining agreement. *See Sheet Metal Workers, Loc. Union No. 91 v. NLRB*, 905 F.2d 417, 424 (D.C. Cir. 1990) ("It is well established that the otherwise lawful exercise of rights afforded by a collective bargaining agreement can become unlawful when aimed at securing an objective proscribed by section 8(b)(4)."); *Int'l Ass'n of Bridge Structural & Ornamental Iron Workers, AFL-CIO*, 328 N.L.R.B. 934, 935 (1999) (lawsuits cannot have "an objective that is illegal under Section 8(e) of the Act").

A. The Board's Decision Blurs the Critical Line Between Work Preservation and Acquisition.

Under longstanding precedent, the purpose of the ILA's pressure campaign against the carriers was clearly not to preserve its members' jobs at the Port of Charleston, but instead to acquire new jobs that its members had never before performed at the Port. In reaching a contrary result, the Board badly scrambled the distinction between work preservation and work acquisition. The result of this conflation will be to dramatically increase the range of circumstances when unions are allowed to engage in pressure campaigns—wielding them not as a shield to preserve their own jobs, but as a sword to take away the jobs of non-union members.

The distinction between work preservation and work acquisition is clear and longstanding. The proper inquiry looks to the traditional division of work between union and non-union members *at the particular job site in question*. As this Court has explained, "in determining whether [the union seeks to] preserve[] or acquire[] work, the analysis must focus on the work of the local employees and not those elsewhere." *Marrowbone Dev. Co. v. Dist. 17, United Mine Workers of Am.*, 147 F.3d 296, 303 (4th Cir. 1998) (citing *ILA I*, 447 U.S. at 507). This Court has specifically rejected the notion that a union can seek to acquire jobs at one site just because it represents employees who perform the same type of work "at other [job] sites." *Id*. at 299. Rather, the jobs preserved must be those performed by "the pool of [union] employees" in "the *local* bargaining unit." *Id*. at 303 (emphasis added).

The NLRB's previous decisions have honored this basic point. *See, e.g.*, *Longshoremen Loc. 1291 (Holt Cargo Sys.)*, 309 N.L.R.B. 1283, 1286 (1992) ("With the exception of one brief period 20 years ago . . . the Union has never performed this work *at the Terminal*. Its claim that it was entitled to preserve its work is unavailing, because it performed no work that was capable of preserving." (emphasis added)); *Teamsters Loc. 610 (Kutis Funeral Home)*, 309 N.L.R.B. 1204, 1206 (1992) (the existence of jobs performed by union members outside the local union "do not establish a work-preservation interest"). Thus, if a union wants to justify its conduct by asserting a purpose of job preservation, it must show that its members have traditionally performed the jobs in question at the location in question.

Applying that local-job-site principle here, this case is straightforward. As the ALJ correctly found, union members have never performed lift-equipment work at the Port of Charleston. JA0929. Instead, for nearly five decades, the Port has operated under a "hybrid" model where some *other* work has been handled by union members, but lift-equipment work has been consistently handled by state employees who are not union members. *Id*. As a result, the ILA's effort to have lift-equipment jobs taken away from non-union state employees and reassigned to union members at the Port of Charleston is plainly an aggressive play for job *acquisition*, not job *preservation*.

The NLRB did not disagree with the ALJ's findings that non-union members have always performed the relevant lift-equipment work at the Port of Charleston. JA1327. Instead, the Board held as a matter of law that the ILA's pressure campaign was properly aimed at work preservation because the ILA represents other members at *different* ports who perform the same type of work. The Board reasoned that the ILA's collective-bargaining agreements "cover coast-wide units," applying to terminals in all ports "from Maine to Texas," including some ports where lift-equipment work is performed by union members. JA1331. Thus, the Board held that by insisting on union members taking the new lift-equipment jobs at the Port of Charleston, the union really was just *preserving* the general type of union work at issue by attempting to "stop expansion of the hybrid work model." JA1332.

By adopting that rationale, the Board defied this Court's decision in *Marrowbone* and eviscerated the distinction between work preservation and work acquisition. *Marrowbone* made clear that the inquiry turns on the "employee history" at the particular "work-site" in question. 147 F.3d at 303. It looks to the "individual work history" of "the pool of employees out of which the local bargaining unit was formed." *Id*. In holding that work preservation can be established by looking to the type of work performed by union members in completely different parts of the country, the Board gave a green light for unions to use pressure tactics to take away jobs from non-union members in places where they have long worked.

B. The Board's Decision Nullifies the Requirement of Employer Control over Work Assignments.

The Board's decision is even more radical in how it construed the second prong of the work-preservation defense. Under the second prong, a union must show that the targeted employer actually has "the power to give [union] employees the work in question." *ILA I*, 447 U.S. at 504. This captures the core purpose of the ban on secondary boycotts, which is to prevent unions from targeting a neutral company "in order to obtain work [from a different employer] that the [neutral company] has no power to assign." *NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Loc. Union No. 638*, 429 U.S. 507, 521 (1977).

As this Court has recognized, this type of secondary pressure is hostile to the free flow of commerce because it "tends to enlarge the primary labor dispute between the union and the 'unfair' employer by involving neutral employers in the controversy, thereby magnifying the disruptive effects of the altercation on the economy." *Marrowbone*, 147 F.3d at 301 (quoting David M. Ebel, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 Mich. L. Rev. 1176, 1177 (1964)). Moreover, it is "inequitable for a union to be able to force a neutral party to exit a profitable relationship for reasons extrinsic to the employer's relationship with that party." *Id.* (citing *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386

U.S. 612, 624–27 (1967); S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2382–84).

In *Pipefitters*, the Supreme Court recognized that the Board had followed the power-to-assign test "at least since 1958." 429 U.S. at 525. In that year, the Board held that a union violated the NLRA by mounting a pressure campaign against its employer, a subcontractor, that was "powerless" to give the union additional work that the union sought to obtain from the general contractor. *Id*. (citing *Deangulo, Clifton (York Corp.)*, 121 N.L.R.B. 676 (1958)).

A similar situation arose in *Pipefitters* itself. There, a subcontractor had agreed with its union that it would have its employees cut and thread pipe at the job site. *Id*. at 512. The general contractor at the site, however, decided to purchase pre-cut and pre-threaded pipe for the job. *Id*. The subcontractor's union objected to having the cutting and threading work taken away. *Id*. at 512–13. Its members thus refused to handle pre-cut and pre-threaded pipe, effectively pressuring the subcontractor to stop working with the general contractor. *Id*. The Supreme Court held that this "refusal to handle" was an unlawful secondary boycott of the subcontractor, because the subcontractor had no right to control the cutting and threading work at issue. *See id*. at 524–28. It was entirely up to the contractor what type of pipe it would purchase for the job. And that the subcontractor could have simply refused to work with the general contractor—and instead work only for

contractors who would not use uncut and unthreaded pipe—was irrelevant to the inquiry. *Id.*

In the present case, the Board once again defied precedent and eviscerated the "power to assign" test. The Board held that the freight carriers were fair game to be targeted by the union's pressure tactics even though the carriers have *no control whatsoever* over whether union workers are assigned lift-equipment work at the Port of Charleston. Indeed, the Board acknowledged that "SCSPA has sole authority to decide . . . who performs loading and unloading work at [port] terminals using state-owned lift equipment." JA1332. But nevertheless, the Board held that the carriers effectively do have control over the assignment of the work in question, because they "have the authority to bypass the Port of Charleston and call on *other ports* where ILA-represented employees perform all loading and unloading work." *Id.* (emphasis added).

This reasoning conflates the ability to choose a service provider with the actual right to control which workers the service provider may employ. As a result, it directly contradicts *Pipefitters* and guts the "power to assign" test. After all, a neutral company targeted by a union pressure campaign can almost *always* decide to refuse to do business with service providers that do not use union labor, in favor of those that do. If that were enough to show that the neutral company has the "power

to assign" the work in question, then the test would virtually always be met. Secondary boycotts then would be presumptively lawful, instead of unlawful.

Other circuits have recognized this problem and rejected the exact same conflation. *See, e.g*, *Hooks ex rel. NLRB v. Int'l Longshore & Warehouse Union*, 544 F. App'x 657, 658 (9th Cir. 2013) (the "argument regarding the shipping carriers['] ability to bypass the Port conflates the carriers' control over their containers with the legal question of whether they have the 'right to control' the assignment of the work" at the port); *Int'l Longshore & Warehouse Union v. NLRB*, 705 F. App'x 1, 3 (D.C. Cir. 2017) (enforcing the NLRB's decision that "labor practices targeted against . . . the shipping carriers, or any other neutral party to pressure the Port to re-assign the dockside reefer work [to union members] were unlawful secondary boycotts targeting an employer that did not have the right to control the work"); *Loc. Union No. 25, A/W Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 831 F.2d 1149, 1152 (1st Cir. 1987) (union engaged in unlawful secondary activity by targeting subcontractor to pressure the contractor to favor union jobs, when the contractor "alone possessed and exercised the right to control the work").

If the Board's contrary decision is allowed to stand, it means that any company can be targeted by a union pressure campaign on the theory that it actually has effective control over the work assignments of *other companies* it deals with—

companies that the union wants to employ its members. That opens the door to exactly the type of secondary boycott activity—and all of the attendant economic harms—that Congress sought to avoid by enacting Sections 8(b)(4)(ii) and 8(e) of the NLRA.

II. The Board's Decision Will Distort the Law and Damage the Economy.

As demonstrated above, the Board's decision in this case radically transforms the law of secondary boycotts under the NLRA. Under the correct approach, which the Board itself previously followed, the "work preservation" inquiry served to ensure that secondary boycotts could not happen. Union pressure campaigns were allowed only as *defensive* tactics targeting employers who had the power to assign away jobs that union members were already performing at a particular job site. But under the Board's new approach, unions can target companies with no power to assign the jobs at issue, even if the union's members have never performed the jobs at the site in question. If that approach were accepted it would turn the NLRA upside down, converting the clear statutory *ban* on secondary boycott activity into a presumptive *authorization*. The consequences for the law and the national economy would be dire.

A. The Board's Decision Undermines Congress's Clear Intent.

In essence, the Board's decision seeks to roll back the clock to Depression-era economics by reauthorizing a specific form of union misconduct that Congress has already squarely considered and rejected. Prior to the enactment of Section

8(b)(4), the ban on secondary boycotts was temporarily lifted in 1932 under the Norris-LaGuardia Act, which "abolished . . . the distinction between primary activity . . . and secondary activity." *Nat'l Woodwork*, 386 U.S. at 623. In the wake of that change, it was widely recognized that the resulting "[l]abor abuses of the broad immunity granted by the Norris-LaGuardia Act" negatively affected commerce. *Id.*; *see also* H.R. Rep. No. 80-245, at 95 (1947) (Minority Report) ("No one can deny that labor unions have engaged in some activities that are so clearly unjustifiable that this Congress can and should legislate against them immediately."). As a direct result, Congress enacted Section 8(b)(4) to reinstate the ban on secondary activity targeting neutral employers.

The current ban on secondary boycotts thus represents Congress's codified view of the correct "balance to be struck" between the right of labor to organize and require the primary employer to bargain, and the need to prevent the type of "[l]abor abuses" that had targeted neutral parties and restricted the free flow of goods in commerce. *Nat'l Woodwork*, 386 U.S. at 619, 623. As the Supreme Court has explained, secondary boycotts are prohibited due to their "significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 624 (1975). Indeed, allowing a union to target a neutral company with pressure tactics to extract

concessions from a different employer has a "substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id*. at 625.

The Board's decision here undermines Congress's choice to ban secondary boycotts in two clear respects. First, the entire point of the ban is that a union seeking to obtain work from one employer should not be able to pressure a *different* employer (with no power to assign the work in question) as an indirect way of achieving its demands. But that is exactly what the Board's decision allows. While paying lip service to the "power to assign work" test under *Pipefitters*, it says that an employer has the power to assign work at a company whenever it could choose to refuse to do business with that company in favor of a different company that employs union labor. *Supra* pp. 12–16. In practice, that logic has the inevitable effect of blessing the exact type of secondary boycott Section 8(b)(4) was designed to prevent.

Second, the Board's decision impermissibly expands the permissible use of union pressure campaigns, by allowing not only defensive tactics to *preserve* union jobs, but also to offensive tactics to *acquire* new ones. Under the long-established approach, unions could not pressure an employer to award work at a job site that union members had never previously performed. But under the Board's new departure from clear precedent, unions can do exactly that if they represent *other* employees who perform the same type of work at *different* job sites. That declares

open season on non-union jobs, allowing them to be directly targeted by hard-knuckle union tactics. It also raises the stakes dramatically for representation fights at every job site, as a union representing employees in one place would give it leverage to coercively acquire the same type of work at other sites.

None of this is consistent with the balance Congress struck under the NLRA, which is supposed to limit unions' objectives to preserving jobs that union members actually hold by negotiating directly with the employer. The Board's decision ignores that balance, making *other* employers and *other* jobs collateral damage.

B. The Board's Decision Threatens the State and National Economy.

The economic and competitive harm flowing from the Board's decision has already been felt in the Port of Charleston and the state of South Carolina, and if not remedied it will inflict lasting harm on the nation's supply chain.

South Carolina's ports drive significant economic growth, not only in the state of South Carolina, but throughout the entire southeast region of the United States. In 2019, an economic impact study of the SCSPA showed that "[t]he total economic impact resulting from all activities associated with the SCSPA on the state of South Carolina is estimated to be approximately $63.4 billion." Dr. Joseph C. Von Nessen, *The Economic Impact of the South Carolina Ports Authority: A Statewide and Regional Analysis*, University of South Carolina Moore School of Business, at 3 (Oct. 2019), https://scspa.com/wp-content/uploads/full-scpa-economic-impact-

study-2019.pdf. And an additional $12.0 billion is generated through business transactions outside of South Carolina that require the use of South Carolina port facilities. *Id.* at 4. Moreover, the "economic ripple effect" caused by the expenditures of the SCSPA and port users "yields a statewide employment multiplier of 2.4," meaning that "for every 10 jobs that are directly supported by SCSPA port operations or port users, an additional 14 jobs are created elsewhere in South Carolina." *Id.* at 4, 13–15.

Increasing activity at the Port of Charleston is necessary to build on South Carolina's competitive advantage and drive economic growth for the southeastern United States. But development of new terminals requires significant investments, as demonstrated by South Carolina's over $1.5 billion invested in the Leatherman Terminal. JA1327. This investment in economic development is wasted if carriers cease doing business at the Terminal. And additional jobs—including jobs for ILA union members and state employees at the Port of Charleston, as well as jobs that would be created through the Port's "economic ripple effect"—will not be created if the Leatherman Terminal lies dormant.

Here, the ILA's conduct has resulted in the Leatherman Terminal sitting idle, as carriers have been deterred from bringing their cargo into the Terminal due to the threat of hundreds of millions of dollars in damages that the union is threatening through its punitive lawsuit. By scaring the carriers away from the Terminal, the

union has thus effectively frustrated the significant investment that South Carolina has made in the Port to spark economic development in the state and the region. It has also prevented job growth for both the ILA's members and others throughout the state of South Carolina.

Moreover, the fact that the ILA's actions are occurring in a time of unprecedented disruption in the global supply chain in major United States ports compounds the harm to American consumers. As recognized by Federal Maritime Commissioner Louis E. Sola, the harm caused by significant underutilization of the Leatherman Terminal will impact our nation's economy and the global supply chain. Letter of Commissioner Sola to President Joe Biden (June 24, 2022), https://www.fmc.gov/letter-of-commissioner-sola-to-president-joe-biden-2/ (explaining that "the excessive backlog of vessels in one major port creates a domino effect in all others across the country"). The delays caused by carriers' refusal to use the Leatherman Terminal without fear of litigation by the ILA "contributes to the delay in the import and export of needed commodities and contributes to the general level of Co2 emissions as ships loiter at sea awaiting an opening at the pier." *Id.* ("With every additional vessel queued up at sea waiting for a berth, Americans suffer with empty shelfs and higher prices."). Potential for labor-driven disruption as a result of the ongoing International Longshoremen and Warehouse Union labor negotiations on the West Coast has already driven shippers to divert traffic to ports

on the East Coast,[2] making these already vital ports even more critical to maintaining our nation's supply chain integrity. Artificially reducing capacity through the authorization of ILA's conduct adds further strain to our already strained supply chains.

The Board erred in authorizing the ILA's conduct. It not only misapplied controlling precedent, but also ignored the totality of the circumstances surrounding the ILA's conduct and harm it caused to competition and the broader economy—the precise type of harms Sections 8(b)(4)(ii) and 8(e) are intended to prevent. If the Board's decision is enforced and its flawed analysis is applied in future matters, both the economy and consumers will suffer significant harm.

CONCLUSION

For the reasons explained, the Court should not enforce the NLRB's decision, and hold that the ILA's lawsuit against USMX and its carrier members violates NLRA Section 8(b)(4)(ii) and Section 8(e).

---

[2] *See, e.g.*, Paul Berger, *Labor Tensions Rise in Stalled West Coast Port Contract Talks*, Wall Street Journal (Mar. 20, 2023), https://www.wsj.com/articles/labor-tensions-rise-in-stalled-west-coast-port-contract-talks-cb031b7c; Paul Berger, *California Long Ruled U.S. Shipping. Importers Are Drifting East*, Wall Street Journal (Dec. 14, 2022), https://www.wsj.com/articles/california-long-ruled-u-s-shipping-importers-are-drifting-east-11670648425?mod=article_inline.

April 7, 2023

Respectfully submitted,

/s/ Anthony J. Dick

Anthony J. Dick
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-7679
ajdick@jonesday.com

Brian West Easley
Courtney L. Burks
JONES DAY
90 S. Seventh Street, Ste. 4950
Minneapolis, MN 55419
(612) 217-8845
beasley@jonesday.com
cburks@jonesday.com

Counsel for Amici Curiae

Stephanie A. Maloney
Tyler S. Badgley
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

Erica Klenicki
Michael A. Tilghman II
NAM Legal Center
733 Tenth Street, NW
Suite 700
Washington, DC 20001
(202) 637-3177

Counsel for Amicus Curiae *National Association of Manufacturers*

M. Dawes Cooke, Jr.
John W. Fletcher
BARNWELL WHALEY
PATTERSON & HELMS, LLC
211 King Street, Suite 300
Charleston SC 29401
(843) 577-7700

Counsel for Amicus Curiae *South Carolina Manufacturers' Alliance*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a) because it contains 5,419 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Anthony J. Dick
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on April 7, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Anthony J. Dick
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1059 Caption: South Carolina State Ports Authority v. NLRB

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America, South Carolina Chamber of Commerce,
(name of party/amicus)

National Association of Manufacturers, South Carolina Manufacturers' Alliance

who is Amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Anthony J. Dick Date: April 7, 2023

Counsel for: Amici

Print to PDF for Filing