No. 24-138

In the Supreme Court of the United States

HOSPITAL MENONITA DE GUAYAMA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

The National Labor Relations Board's successor-bar doctrine states that an incumbent union enjoys an irrebuttable presumption of majority support for a reasonable period of time, not to exceed 12 months, following a successor employer's voluntary recognition of the union as the collective-bargaining representative of its employees. The question presented is:

Whether the court of appeals correctly upheld the Board's application of that doctrine in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 94 F.4th 1. The decision and order of the National Labor Relations Board (Pet. App. 45-158) is reported at 371 N.L.R.B. No. 108. An earlier decision and order of the administrative law judge is reported at 2019 WL 2354716.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37-38) was entered on February 27, 2024. A petition for rehearing and rehearing en banc was denied on May 7, 2024 (Pet. App. 41). The petition for a writ of certiorari was filed on August 5, 2024. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, "declared [it] to be the policy of the United States" to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Ibid.* As this Court has recognized, "[t]he object of the [NLRA] is industrial peace and stability." *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785 (1996) (citing 29 U.S.C. 141(b) and *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38 (1987)). "Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-24 (1937).

The NLRA accordingly guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and "the right to refrain from any or all of such activities." 29 U.S.C. 157. Under the Act, the "[r]epresentatives designated or selected" by "the majority" of the employees in a bargaining unit "shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a).

Congress enacted provisions to implement those statutory guarantees in Section 8 of the Act, 29 U.SC. 158. Section 8(a)(5) makes it an unfair labor practice for

an employer to "refuse to bargain collectively" with the union representing its employees. 29 U.S.C. 158(a)(5). That statutory duty requires the employer to "meet at reasonable times and confer in good faith" with the union about the subjects in Section 8(d), including "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d); see *First Nat'l Maint.*, 452 U.S. at 674-675 & n.12; *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964).

Congress charged the National Labor Relations Board (NLRB or Board) with enforcing the Act. 29 U.S.C. 153, 156, 160-161. In doing so, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); see *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979) (explaining that "Congress assigned to the Board the primary task of construing" the Act "in the course of adjudicating charges of unfair refusals to bargain"). In light of Congress's grant of discretion to the Board, this Court "has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990); see *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (recognizing the Board's "special function of applying the general provisions of the Act to the complexities of industrial life") (citation omitted).

The Court has further explained that "[b]ecause it is to the Board that Congress entrusted the task of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms," the grant of authority

and discretion to the Board includes the "authority to formulate rules to fill the interstices of the broad statutory provisions." *Curtin Matheson*, 494 U.S. at 786 (quoting *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978)) (internal quotation marks omitted). The Board's authority includes discretion to implement certain presumptions limiting an employer's ability to withdraw its recognition of a union as the representative of its employees. See *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 378 (1998) (explaining that "[t]he Board can, of course, forthrightly and explicitly adopt * * * substantive rules of law[] as a way of furthering particular legal or policy goals" under the Act).

Given the Board's "considerable authority to interpret the provisions of the NLRA," *Fall River*, 482 U.S. at 42, this Court has consistently explained that it "will uphold a Board rule as long as it is rational and consistent with the Act," *Curtin Matheson*, 494 U.S. at 787 (citing *Fall River*, 482 U.S. at 42; *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 350 (1978); *Charles D. Bonanno Linen Serv., Inc.* v. *NLRB*, 454 U.S. 404, 413, 418 (1982)).

b. This case concerns a presumption known as the "successor bar" doctrine. See *UGL-UNICCO Serv. Co.*, 357 N.L.R.B. 801, 801 (2011). In its current form, the doctrine provides that when a successor employer voluntarily recognizes an incumbent union, the union enjoys a conclusive presumption of majority support for a "reasonable period" of bargaining. *Ibid.* The Board has defined a "reasonable period" as between six and 12 months from the date on which the successor employer recognized the union. *Id.* at 809. As the Board has explained, that temporary presumption "promote[s] a

primary goal of the [NLRA] by stabilizing labor-management relationships and so promoting collective bargaining, without interfering with the freedom of employees to periodically select a new representative or reject representation." *Id.* at 801.

The Board has recognized a presumption of majority support in the successor context since at least 1975. See *Southern Mouldings, Inc.*, 219 N.L.R.B. 119 (1975). At times, the presumption of majority support for the union has been conclusive; at other times, the presumption has been rebuttable. Pet. App. 6-11 (discussing history of the presumption). Since 2011, the Board has treated the presumption as irrebuttable during the temporary period in which it applies. *UGL-UNICCO*, 357 N.L.R.B. at 806-807.

2. Petitioner, a corporation with operations in Puerto Rico, purchased the assets of Hospital San Lucas Guayama in 2017. Pet. App. 11. At the time, five bargaining units of hospital employees were represented by Unidad Laboral de Enfermeras (OS) y Empleados de la Salud (the Union). *Id.* at 3, 12. Petitioner voluntarily recognized the Union shortly after it acquired the hospital. *Id.* at 13.

Soon thereafter, petitioner awarded bonuses to employees without bargaining with the Union, and later refused the Union's request to bargain. Pet. App. 13-14. Petitioner also purported to withdraw recognition from the Union and asserted that a majority of employees in each bargaining unit no longer desired representation. *Id.* at 14-15. Without negotiating with the Union, petitioner then changed the workers' terms and conditions of employment, including their benefits, wages, and rules of conduct. *Id.* at 15-16. Petitioner also de-

clined the Union's requests for information relevant to its bargaining with petitioner. *Id.* at 16.

3. In 2018, the Union filed charges with the Board, asserting that petitioner had committed unfair labor practices. The Board's General Counsel issued a complaint alleging that petitioner's conduct violated Section 8 of the NLRA, 29 U.S.C. 158, by failing and refusing to bargain with the Union, by unilaterally changing employees' terms and conditions of employment, and by failing to respond to the Union's requests for information relevant to its bargaining duties. Pet. App. 47.

Following a hearing, an administrative law judge (ALJ) sustained the complaint in relevant part. Pet. App. 123-158. The ALJ concluded that petitioner violated the Act because the "withdrawal of recognition of the Union for all five units ran afoul of the successor bar rule" and because petitioner had "failed and refused to bargain with the Union thereafter." *Id.* at 143. The ALJ also found that petitioner had unlawfully failed to furnish bargaining-related information to the Union. *Ibid.* The ALJ likewise rejected petitioner's argument that the conclusive presumption in the successor bar should be overturned. *Ibid.*

4. The Board affirmed. Pet. App. 45-118. As pertinent here, it upheld the ALJ's conclusions that petitioner had committed unfair labor practices, in violation of 29 U.S.C. 158. Pet. App. 49-50, 54-56. The Board likewise rejected petitioner's assertion that the conclusive presumption of majority support should be "replace[d]" with a "rebuttable" presumption. *Id.* at 56. The Board explained that it had already addressed materially similar arguments in its 2011 decision reinstating the presumption's conclusive nature, *id.* at 57-61, noted that the presumption had been upheld by the only

court of appeals to have considered it in its current form, *id.* at 61-62 (citing *NLRB* v. *Lily Transp. Corp.*, 853 F.3d 31 (1st Cir. 2017) (Souter, J.)), and explained that the conclusive—but temporary—presumption advanced the NLRA's purpose better than petitioner's alternative proposal of a rebuttable presumption, *id.* at 63-70; see *UGL-UNICCO*, 357 N.L.R.B. at 806-807. The Board ordered petitioner to bargain with the Union. *Id.* at 73-78.

One member of the Board dissented. Pet. App. 79-118. In the dissent's view, the successor bar should be rebuttable.

5. The court of appeals denied petitioner's request for review and enforced the Board's order. Pet. App. 1-36.

The court of appeals rejected petitioner's contention that the Board had failed to sufficiently explain its 2011 decision to treat the successor bar as a conclusive presumption. Pet. App. 24-29. The court determined that the Board had "permissibly changed" the presumption through reasoned decision-making, and that the presumption was a lawful exercise of the Board's statutory "responsibility for developing and applying national labor policy." *Id.* at 28. The court also rejected (*id.* at 30-32) petitioner's argument that the conclusive presumption should be replaced by a rebuttable one in order to avoid infringing employees' rights to "refrain from" collective-bargaining activities. 29 U.S.C. 157. The court explained that the conclusive presumption is consistent with employees' rights because it "lasts only * * * between just six months to a year" and "serves . . . the NLRA's 'underlying purpose'" by providing "limited discouragement of an unduly hasty reexamination of" employees' choice to be represented

by the incumbent union. Pet. App. 29 (quoting *Lily Transp.*, 853 F.3d at 35-36 (quoting *Brooks* v. *NLRB*, 348 U.S. 96, 103 (1954))) (brackets omitted). The court further concluded that the conclusive presumption is consistent with this Court's decisions in *Fall River*, 482 U.S. 27, and *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972), which had endorsed the use of presumptions without suggesting that "a rebuttable presumption, rather than a bar, is *required* in a successorship situation." Pet. App. 30 (emphasis added) (quoting *Lily Transp.*, 853 F.3d at 39). The court emphasized that it had no occasion in this case "to decide the permissible outer limits of the successor bar rule." *Id.* at 31.

Judge Katsas concurred. Pet. App. 33-36. In his view, the court of appeals' "decision seem[ed] to [be] correct" under *Chevron USA Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Judge Katsas also agreed that the Board "adequately explained [its] policy justifications driving its interpretive choice." Pet. App. 35-36.

Petitioner sought panel and en banc rehearing, relying on the then-pending petition for a writ of certiorari in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). The court of appeals denied further review without any request for a vote. Pet. App. 39-42. The court also denied petitioner's motion to stay the mandate pending this Court's decision in *Loper Bright*. *Id.* at 43-44.

ARGUMENT

Petitioner acknowledges that Congress vested the Board with statutory authority to "develop rules concerning national labor policy," including presumptions in the successor-employer context. Pet. C.A. Br. 12. And petitioner does "no[t] dispute that a union that rep-

resented employees before the entrance of a successor employer is entitled to the presumption that it remains the representative of the bargaining unit." Pet. 14-15. Petitioner disagrees (Pet. 7) only with respect to whether the Board's temporary presumption should be conclusive or rebuttable for the short period in which it applies. Further review of that question is unwarranted. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals.

In lieu of urging plenary review, petitioner asks the Court to grant the petition, vacate the decision below, and remand the case (GVR) in light of *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024). But petitioner fails to show that *Loper Bright* would have affected the disposition below. The petition for a writ of certiorari should be denied.

1. The court of appeals properly upheld the Board's application of the successor bar in this case.

a. This Court has "emphasized often" that Congress tasked the NLRB with "the primary responsibility for developing and applying national labor policy." *NLRB* v. *Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990) (citations omitted). As this Court has repeatedly recognized, Congress "assigned to the Board the primary task of construing" the NLRA "in the course of adjudicating charges of unfair refusals to bargain." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495 (1979). The statutory grant of discretion to the Board includes "authority to formulate rules to fill the interstices of the [NLRA's] broad statutory provisions." *Curtin Matheson*, 494 U.S. at 786 (quoting *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978)); see *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (similar); *NLRB* v. *Truck*

Drivers Local Union 449, 353 U.S. 87, 96 (1957) (similar); *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 798 (1945) (similar). The Court has held that, when the Board exercises its discretion to establish a presumption, the rule need only be "rational and consistent with the NLRA." *Curtin Matheson*, 494 U.S. at 787 (citing *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987)).

The court of appeals correctly concluded (Pet. App. 28-31) that the Board has statutory discretion to apply the successor bar in its adjudication of unfair labor practice complaints. This Court has consistently recognized that the Board's congressionally conferred discretion includes the authority to promulgate presumptions that limit an employer's ability to withdraw its recognition of a union. For example, in *Brooks* v. *NLRB*, 348 U.S. 96 (1954), the Court upheld the Board's conclusive presumption that a union enjoyed majority support during the year following certification. *Id.* at 104. That presumption, *Brooks* explained, rationally advanced the Act's aims because without it "encouragement would be given to management or a rival union to delay certification by spurious objections to the conduct of an election and thereby diminish the duration of the duty to bargain." *Ibid.*; see *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 378 (1998) (explaining that "[t]he Board can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions" like an "irrebuttable presumption of majority support for the union during the year following certification").

This Court likewise has recognized that the Board has discretion to apply presumptions that—like the successor bar—address the labor uncertainty that

occurs when one employer replaces another. The Court has made clear that, in "successorship situations," a presumption can be "particularly pertinent" to advancing the NLRA's "overriding policy" of "'industrial peace.'" *Fall River*, 482 U.S. at 37-39 (citation omitted). In that delicate context, an incumbent union "needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor." *Id.* at 39; see *ibid.* (explaining that an incumbent union is "peculiarly vulnerable" because it "has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it").

Like the presumptions upheld by this Court, the successor bar reasonably advances the NLRA's goals. It provides a temporary "insulated period[]" that "enables the [incumbent] union to focus on bargaining, as opposed to shoring up its support among employees, and to bargain without being 'under exigent pressure to produce hothouse results or be turned out.'" *UGL-UNICCO*, 357 N.L.R.B. at 807-808 (quoting *Brooks*, 348 U.S. at 100). The doctrine's scope and duration thus reflect a policy decision "within the allowable area of the Board's discretion" under the Act. *Brooks*, 348 U.S. at 104; see *Fall River Dyeing*, 482 U.S. at 38-39.

b. Petitioner does not contest the Board's statutory authority to implement *some* presumption that an incumbent union enjoys majority support when one employer replaces another. Pet. 14-15 (admitting "[t]here is no dispute" on that point). Rather, petitioner voices

a policy preference that the temporary presumption be *rebuttable*. That argument lacks merit.[*]

Petitioner renews its contention (Pet. 8-10) that a rebuttable presumption of majority support would vindicate an employee's right under Section 7 of the Act, 29 U.S.C. 157, not to engage in collective bargaining and would better promote labor stability. But those arguments provide no sound reason to question the Board's exercise of its judgment and discretion under the Act, let alone to require the Board to adopt petitioner's preferred presumption. See pp. 2-4, 9-11, *supra*. Petitioner's reliance on Section 7 is especially inapt because "allow[ing] *employers* to rely on employees' rights in refusing to bargain with the formally designated union" would be "inimical" to the NLRA. *Brooks*, 348 U.S. at 103 (emphasis added). Nor does petitioner explain how, as a statutory matter, the Board's conclusive but temporary presumption "patently trespasses on Section 7 while some rebuttable presumptions would not." *NLRB* v. *Lily Transp. Corp.*, 853 F.3d 31, 35 (1st Cir. 2017) (Souter, J.). And petitioner's resort to policy arguments overlooks that striking the proper balance of interests and "effectuat[ing] national labor policy is * * * a difficult and delicate responsibility" that "Congress committed primarily to the [NLRB]." *Truck Drivers*, 353 U.S. at 96; see *UGL-UNICCO*, 357 N.L.R.B. at 804 (explaining that selecting a presumption is "an important policy choice" that requires "con-

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[*] In this Court, petitioner no longer challenges whether the Board's 2011 decision to restore a conclusive presumption reflected reasoned decision-making. Compare Pet. 7-16, with Pet. C.A. Br. 12-15, and Pet. App. 24-29. That question is therefore not presented here.

sider[ation of] the larger, sometimes competing, goals of the statute").

Petitioner's policy critiques are also unpersuasive on their own terms. Most fundamentally, petitioner's arguments misapprehend the effect of the successor bar. The presumption lasts only for a reasonable period not to exceed 12 months. Pet. App. 27-29. Precisely because the conclusive presumption is temporary, it balances the Act's aims to protect employees' freedom of choice and to promote stable bargaining relationships. See *Fall River*, 482 U.S. at 38-40; *Truck Drivers*, 353 U.S. at 96. If anything, it is *petitioner's* policy proposal that risks undermining an employee's rights and labor peace: As the Board has explained, a rebuttable presumption would not account for the fact that "the new relationship" between a successor employer and its employees "often begin[s] in a context where everything that the union has accomplished in the course of the prior bargaining relationship (including, of course, a contract) is at risk, if not already eliminated." *UGL-UNICCO*, 357 N.L.R.B. at 807. And as the court of appeals recognized, petitioner's proposed presumption would create an "added burden of rebuttal" and "increase litigation time and expense," Pet. App. 30, which the Board reasonably sought to avoid. Had petitioner simply negotiated with the union it voluntarily recognized, "the bar period could have begun and ended in short order." *Id.* at 67.

Petitioner errs in suggesting (Pet. 11-13) that this Court's precedent requires the Board to replace its conclusive presumption with a rebuttable one. If anything, this Court's decision in *NLRB* v. *Financial Institution Employees of America*, 475 U.S. 192 (1986), supports the successor bar. *Financial Institution* rejected a

Board rule that (1) required non-union employees to vote on a certified union's decision to affiliate with another union, and (2) permitted an employer to refuse to bargain with the reorganized union unless non-union members had voted on the reorganization. *Id.* at 197, 200-201. The Court explained that the rule "contravene[d]" the Act's framework for maintaining "stable bargaining relationships" by "effectively giv[ing] the employer the power to veto an independent union's decision to affiliate" and by undermining the presumption of a union's majority status. *Id.* at 209; see *id.* at 202-203 (explaining that the rule would "effectively decertify[] the reorganized union" and undermine "'[t]he industrial stability sought by the Act'") (citation omitted); see also *Fall River*, 482 U.S. at 41 n.9. Those same principles confirm that the successor bar falls within the Board's statutory discretion: The conclusive presumption promotes labor stability by preventing an employer from challenging a union's majority status for a limited time.

Petitioner's reliance (Pet. 13) on *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), is similarly misplaced. *Burns* rejected a Board rule requiring a successor employer to comply with a preexisting collective-bargaining contract, even if the employer "had not voluntarily assumed" the prior agreement. *Id.* at 274. The Court found that rule to be unlawful because the NLRA "does not compel any agreement whatever." *Id.* at 282 (citation omitted). *Burns* is beside the point because the successor bar does not mandate any agreement. Instead, it requires that a new employer *bargain* with a union—just as the employer would be required to do under *Burns*—with the limited addi-

tional requirement that the negotiation period last for a reasonable time (and no greater than 12 months).

Finally, petitioner does not advance its argument by invoking (Pet. 9-10) Section 9(c)(3) of the Act, which states that "[n]o election shall be directed in any bargaining unit or any subdivision" that had already held a valid election "in the preceding twelve-month period," 29 U.S.C. 159(c)(3). Petitioner draws from that text a negative inference that the Board is precluded from implementing additional policies limiting the timeframe in which an employer may "challeng[e] a union's representation." Pet. 9. But that conclusion does not follow from its premise. Nothing in Section 9(c)(3)'s one-year bar to Board elections undermines the Board's statutory authority to "develop national labor policy" that temporarily restrains employers from withdrawing recognition of a union. See *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 787-788 (1996); see also *Allentown Mack Sales*, 522 U.S. at 378 (endorsing "the Board's irrebuttable presumption" preventing an employer from challenging "majority support for the union during the year following certification").

This case would also be a poor vehicle to address petitioner's objection under Section 9(c)(3) of the Act because petitioner did not raise it before the Board. In authorizing judicial review of the Board's final orders in a court of appeals, the NLRA states that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e); see 29 U.S.C. 160(f); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982). Petitioner offers no explanation for its forfeiture. And quite aside from

whether petitioner could overcome that barrier, this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not pressed or passed upon in the decision below, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

2. The decision below does not conflict with the decision of any other court of appeals. Petitioner concedes (Pet. 6, 10) that the only other court of appeals to have addressed the successor bar in its current form is consistent with the decision below. See *Lily Transp.*, *supra*.

Petitioner's reference (Pet. 13) to *Landmark International Trucks, Inc.* v. *NLRB*, 699 F.2d 815, 818 (6th Cir. 1983), does not suggest any division in the courts of appeals either. *Landmark International* addressed a previous iteration of the successor bar doctrine that existed more than 40 years ago and is not at issue here.

3. Rather than seek plenary review, petitioner asks (Pet. 7-8, 10-11, 15-16) this Court to GVR in light of *Loper Bright*, 144 S. Ct. 2244. The Court should reject that request.

a. This Court's authority to GVR is grounded in its power to remand for further proceedings "as may be just under the circumstances." 28 U.S.C. 2106. The Court has explained that a GVR is "potentially appropriate" when "intervening" or "recent" developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

In *Loper Bright*, this Court overruled *Chevron USA* v. *NRDC, Inc.*, 467 U.S. 837 (1984), which had obligated courts to sustain permissible agency interpretations of ambiguous statutory language—a form of "binding deference" that "courts had never before applied." *Loper Bright*, 144 S. Ct. at 2260-2264 & nn.3-4. But *Loper Bright* emphasized that "often" a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion." *Id.* at 2263; see *id.* at 2268. The Court explained that such authorization exists where Congress "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme." *Id.* at 2263 (citation omitted). In those contexts, a reviewing court's role is to "ensur[e] the agency has engaged in 'reasoned decision-making' within th[e] boundaries" of an otherwise "constitutional delegation[]." *Ibid.* (quoting *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015)); see *id.* at 2261.

A GVR is unwarranted here because there is no "reasonable probability" that *Loper Bright* would cause the court of appeals to reject any premise on which its decision rests. *Lawrence*, 516 U.S. at 167. The decision below is consistent with *Loper Bright*: It neither cited nor relied on *Chevron*, and instead applied this Court's case law specific to the NLRA. Pet. App. 5-6; 22-32. That body of law predates *Chevron* by decades and recognizes the exact type of statutory discretion that *Loper Bright* reaffirmed. See 144 S. Ct. at 2263; pp. 2-4, 9-11, *supra*.

When this Court decided *Chevron* in 1984, it was already well-established that Congress in the NLRA had "assigned to the Board the primary task of construing" the NLRA "in the course of adjudicating charges of unfair refusals to bargain." *Ford Motor Co.*, 441 U.S. at 495; see, *e.g.*, *Beth Israel Hosp.*, 437 U.S. at 500 ("It is

the Board on which Congress conferred the authority to develop and apply fundamental national labor policy."); *Curtin Matheson*, 494 U.S. at 786 (similar); *Erie Resistor*, 373 U.S. at 236 (similar); *Truck Drivers*, 353 U.S. at 96 (similar). That congressional grant of discretion to the Board was "clearly meant to preserve" the Board's "power further to define" and engage in "future interpretation" of the Act. *First Nat'l Maint. Corp.* v. *NLRB*, 452 U.S. 666, 675 & n.14 (1981). Neither *Chevron* nor *Loper Bright* affected this Court's longstanding precedent construing the NLRA and recognizing Congress's vesting of discretion in the Board.

b. Petitioner attempts (Pet. 10 & n.3) to tether the court of appeals' decision to *Chevron* by pointing to Judge Katsas's concurring opinion. See Pet. App. 33-36. But that concurrence reflected a separate view that the court's decision was correct "[u]nder *Chevron*," *id.* at 35, as well. Nothing in the opinion for the court indicated any reliance on *Chevron* deference—a point further underscored by the orders denying panel and en banc rehearing, *id.* at 39-42, and declining to stay the mandate pending this Court's decision in *Loper Bright*, *id.* at 43-44; see Pet. C.A. Pet. for Reh'g 6-7; Pet. C.A. Mot. to Stay Mandate 4-6.

Petitioner wrongly asserts (Pet. 10) that a GVR is warranted because the decision below cited *Lily Transportation*, *supra*, an opinion of the First Circuit that in turn referenced *Chevron*. That argument lacks merit for at least two principal reasons.

First, the First Circuit in *Lily Transportation* discussed *Chevron* because one of the disputes in that case was whether *Chevron* deference applied. 853 F.3d at 35. Here, by contrast, it was common ground that *Chevron* did not govern. See Pet. C.A. Reply Br. 7 n.3 (asserting

that *Chevron* deference is inapplicable); Gov't C.A. Br. 15-17; 33-37 (relying on NLRA-related precedent); see Gov't Opp. to Mot. to Stay Mandate 11 & n.3 (noting that petitioner had not raised a challenge implicating deference "on *Chevron* grounds").

Second, the court of appeals relied on *Lily Transportation* not for its discussion of *Chevron*, but for the First Circuit's conclusions independently rejecting the "same arguments" that petitioner was raising in this case. Pet. App. 29. Specifically, the court of appeals observed that *Lily Transportation* had rejected petitioner's statutory argument under 29 U.S.C. 157 "without difficulty," Pet. App. 29 (citing *Lily Transp.*, 853 F.3d at 35), and had made clear that the Board's decision to apply the successor bar was adequately explained and consistent with this Court's decisions, *id.* at 29-31 (citing *Lily Transp.*, 853 F.3d at 38-39). That narrow discussion does not suggest that a GVR would prompt the court below to grant petitioner relief.

Finally, petitioner observes (Pet. 15-16) that this Court decided to GVR in *KC Transport, Inc.* v. *Su*, 144 S. Ct. 2708 (2024). That outcome is not instructive here because the court of appeals' decision in *KC Transport* was premised expressly on *Chevron*, see *Secretary of Labor* v. *KC Transp., Inc.*, 77 F.4th 1022, 1028 (D.C. Cir. 2023), and because the parties had agreed that this Court should hold and dispose of that petition in light of *Loper Bright*. As explained above, the decision below rests on the NLRA and 80 years of precedent commencing prior to—and independent of—*Chevron* itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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