No. 23-325

IN THE

Supreme Court of the United States

SOUTH CAROLINA STATE PORTS AUTHORITY, AND STATE OF SOUTH CAROLINA,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* SENATORS LINDSEY GRAHAM AND TIM SCOTT IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Senator Lindsey Graham is the Senior United States Senator from the State of South Carolina. Senator Graham has served South Carolina as an elected official for over thirty years. He began his career as a commissioned officer in the Judge Advocate General "JAG" Corps of the U.S. Air Force, later joining the South Carolina Air National Guard and the U.S. Air Force Reserve. In 1992, Senator Graham won election as a member of the South Carolina State House. He was later elected to the U.S. House of Representatives, and for the past twenty years has served South Carolina in the U.S. Senate. Senator Graham is currently the Ranking Member of the Senate Judiciary Committee, following a term as its Chairman during the 116th Congress.

Senator Tim Scott has served the people of South Carolina in the United States Senate since 2013. Following a career as a business owner and time as a local elected official in Charleston County, Senator Scott served in the South Carolina State House and the U.S. House of Representatives. Following a 2013 appointment, Senator Scott won election to the United States Senate in 2014. He currently serves as

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici curiae* further affirm that counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days before its due date.

Ranking Member of the United States Senate Committee on Banking, Housing, and Urban Affairs.

Senator Graham and Senator Scott's interest in this case is twofold. First, and particularly in light of Senator Graham's leadership on the Judiciary Committee, they are intent on ensuring that our Article III courts protect the faithful execution of our laws, consistent with their plain meaning. The courts must serve as a bulwark against a bloated and often activist administrative state. When administrative agencies adopt strained or outright implausible legal interpretations, our constitutional structure is impeded. In such instances, the duty of the judicial branch is to correct the overreach.

Second, in their role as elected officials, *amici* work to promote the economic success of South Carolina and the Nation. The South Carolina Ports, in conjunction with the State's manufacturing sector, contribute significantly to the State and National economy. Senator Graham has worked to secure federal funding supportive of the South Carolina Ports, such as the Army Corps of Engineers' deepening of the Charleston Harbor. The Ports act as an economic multiplier, creating jobs and increasing wages. South Carolina is a global competitor for industry, aided by its geographic location and driven by its sound economic policies. The number of foreign manufacturers, including BMW, Volvo, and Mercedes-Benz, who have located plants in the State showcase South Carolina's economic prowess. *Amici* have a strong interest in protecting and strengthening this success.

INTRODUCTION AND SUMMARY OF ARGUMENT

In South Carolina, labor responsibilities at the ports are handled by both unionized dockworkers and State employees. A total of 270 State employees operate the cranes, while over 2,000 laborers represented by the International Longshoremen's Association ("ILA") perform the other longshoreman work, such as loading and unloading container ships. This hybrid model has proven effective, efficient, and economically efficacious.

The dockworkers' union, however, is not satisfied with having 88% of the work. It wants all of it. In its attempt to seize the 270 crane operator positions, the union cannot directly pressure the South Carolina State Ports Authority ("Ports"). This is because the union itself does not have a collective bargaining agreement (or any contractual relationship) with the Ports. Instead, unionized dockworkers are employees of third-party companies, which are contracted to perform longshoreman work. With no direct contractual relationship, the union has resorted to what's known as a secondary boycott. It has coerced third-party employers to boycott the new Leatherman Terminal. The secondary boycott has had a devastating effect, causing the Ports' new $1.5 billion Leatherman Terminal to sit largely idle.

The union's actions are unlawful. In 1947 Congress banned secondary boycotts. It did so to prevent union power grabs like this one. Seeking to vindicate its legal rights and put an end to the economically devastating secondary boycott, the Ports filed suit before the National Labor Relations Board

("NLRB"). An administrative law judge held that the union's actions constituted a textbook (and therefore unlawful) secondary boycott. But the NLRB then overturned that ruling, relying upon a fundamentally flawed expansion of what's known as the work-preservation doctrine. And the Fourth Circuit affirmed.

The work-preservation doctrine operates as a defense to the secondary-boycott ban. It permits boycott activity that seeks to preserve *existing* union work. Applying that defense here is facially incorrect. Union laborers have *never* operated the cranes at the South Carolina Ports. In fact, union laborers have never operated cranes at *any* of the Southeastern ports, to wit, those in North Carolina, South Carolina and Georgia. Because the purpose of the union's boycott is to obtain *new* work—operating the cranes at the Leatherman Terminal—it is unlawful. And that unlawful activity has grounded work largely to a halt at the Leatherman Terminal.

History speaks to the potentially devastating consequences of such work stoppages. Economists who have studied the decline of U.S. industry in the latter-part of the 20th Century have concluded that labor conflict—work stoppages, such as strikes or boycotts—accounted for *approximately half* of the decline in the Rust Belt's manufacturing industry. Quantitative data shows that more labor strife corresponds with less job growth. And more union overreach corresponds with less industrial investment. *Amici* are thus concerned about the risks that this unlawful boycott and the decision below pose

to economic growth and industrial investment in South Carolina.

The Fourth Circuit failed to vindicate the statutory directive banning secondary boycotts. And it failed to protect the South Carolina Ports from an aggressive and unlawful union power grab. This Court should grant certiorari and reverse.

ARGUMENT

I. The Decision Below Undermines The Purpose Behind The Secondary-Boycott Ban.

The secondary-boycott ban was born of experience with different power balances between industry and labor. In the early twentieth century, courts began enjoining certain labor-related boycotts under the Sherman Act. *See Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 & n.6 (1967) (citing *inter alia Loewe v. Lawlor*, 208 U.S. 274 (1908)). Congress became concerned that these injunctions were being overused, stymying the rights of workers. It thus enacted Section 20 of the Clayton Act in 1914, which limited the use of Sherman Act injunctions in labor disputes. *Id.* at 620–621.

Unfortunately, unions abused this legal protection. In the years following the Clayton Act's passage, the International Association of Machinists embarked on "an elaborate scheme to coerce and restrain neutral customers" of its bargaining opponent. *Id.* at 621 (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 461 (1921)). Litigation over the aggressive behavior led this Court to hold that Section 20 protected only boycotts "directed against an employer

by his own employees." *Id.* The *Duplex* decision was the seed of the secondary-boycott ban: it held that "'primary' but not 'secondary' pressures were excepted from the antitrust laws." *Nat'l Woodwork*, 386 U.S. at 622.

Following the 1921 *Duplex* decision, Congress decided to do away with the primary/secondary distinction in 1932, passing the Norris-LaGuardia Act. But what resulted was a new series of union abuses of Sherman Act immunity. *See id.* at 622–23. Therefore, acting upon decades of data and experience, Congress in 1947 enacted the Taft Hartley Act, which contained the earliest form of the secondary-boycott ban that is now codified in Section 8(b)(4) of the NLRA.[2] *Id.* at 623–24. Senator Robert Taft, one of the Act's namesakes, stated that the provision's purpose was to "make[] it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an

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[2] The relevant portion of Section 8(b) provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person . . . .

29 U.S.C. § 158(b)(4)(ii)(B).

Section 8(e), which was added in 1959 by the Landrum-Griffin Act, also prohibits both unions and employers from contracting or agreeing to "cease doing business with any other person." *Id.* § 158(e). The Act likewise prohibits unions from coercing employers to execute such contracts. *Id.* § 158(b)(4)(ii)(A).

employer and his employees." *Id.* at 624 (citation omitted).[3]

More fine-tuning occurred over the following decade, shoring up the secondary-boycott ban's core purpose. In 1958, this Court held that, as written, Section 8(b) did not stop unions from using contractual "hot cargo" provisions. *See Loc. 1976, United Brotherhood of Carpenters & Joiners of Am., A.F.L. v. NLRB*, 357 U.S. 93 (1958). Hot cargo clauses are contractual restrictions prohibiting third-party employers from doing business with other entities that either do not use union labor or that are under boycott. These clauses had become a common tactic to circumvent Section 8(b). Congress corrected this defect through the Landrum-Griffin Act of 1959, where it amended the secondary-boycott ban "to close various loopholes," including the addition of Section 8(e). *See Nat'l Woodwork*, 386 U.S. at 633–34.

Congress chose to ban secondary boycotts because of their "significant adverse effects on the market and on consumers." *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 624 (1975) (explaining that). At every step, preventing anticompetitive negotiating tactics, and the collateral damage that flows therefrom, has been the purpose

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[3] A Senate committee report put a fine point on the purpose of the legislation, stating that under the Taft Hartley Act, "it would not be lawful for a union to engage in strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)." *Id.* at 625 (citation omitted).

and effect of the secondary-boycott ban. The NLRB and the Fourth Circuit's decisions below frustrate this purpose by expanding what is known as the work-preservation doctrine—a judicially-engineered exception to the ban.

Under longstanding precedent, to establish a work-preservation defense, a union must satisfy two elements: First, the union's activity "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, AFL-CIO*, 447 U.S. 490, 504 (1980). "Second, the contracting employer must have the power to give the employees the work in question . . . ." *Id.* The defense is meant to suss out the "object" of a union's activities. The NLRA "protect[s] . . . the purpose of preserving for the contracting employees themselves work traditionally done by them." *Id.* (citation omitted). It follows that a union can affect a secondary boycott if it can demonstrate that the purpose of that boycott is to preserve its own members' work.

The panel below (channeling the NLRB) misapplied each prong, stretching the defense beyond recognition. First, it drastically mischaracterized the relevant scope of the work. The panel majority concluded that, because ILA workers typically perform the relevant work "at East and Gulf ports," meaning across the *entire East Coast*, the ILA's boycott at the Leatherman Terminal was aimed at the preservation of ILA members' work, rather than at the acquisition of new work. Pet.App.17a. But as Judge Niemeyer wrote in dissent, this ignores that the relevant bargaining unit is *not* the *whole* ILA but only

Local 1422. Indeed, while *some* East Coast ports, such as the Port of Baltimore, utilize union labor for crane operation, the Ports of Charleston, Wilmington, and Savannah have instead always used the hybrid model. Pet.App.34a–35a. It is wrong to look at work *coastwide* when several of the ports therein have historically utilized a different model. A union is not "preserving" work when it is attempting to obtain work it has never done.

The second prong—sometimes called the "right of control" test, *Int'l Longshoremen's Ass'n*, 447 U.S. at 504—requires that the union's efforts be "directed at the employer with the right to control the work," Pet.App.42a (citations and emphasis omitted). Here, the union targeted the Maritime Alliance and its members. But those employers have *no right* to control the work of the crane-operating employees of the Ports. In holding otherwise, the Fourth Circuit endorsed the union's fanciful argument that the carriers can effectively "control" work by choosing where their ships call. Pet.App.47a–48a. Put differently, this faulty legal fiction holds that a union's unlawful secondary boycott is shielded by the work-preservation defense because the targeted secondary employer could choose to take its business elsewhere.

In summary, the panel stacked the deck by selecting the entire East and Gulf Coast as the relevant comparator to the local union's work. Its sweeping reliance on historical changes in the industry, rather than concrete present-day examples, has no principled boundaries. And the panel's holding that a third party "controls" the target employer's workforce by deciding whether to do business with the

employer risks swallowing the secondary-boycott rule altogether. The object of a secondary boycott is to force a third party to exercise its otherwise-free bargaining power to harm the employer. How would a ban on such boycotts accomplish anything if the very power to harm the employer indirectly is a *defense* to the ban?

The NLRB and Fourth Circuit decisions thus undermine the pro-competitive principles that Congress designed the secondary-boycott ban to protect. This Court should thus grant review of this important question and reverse.

II. This Court Should Grant Review To Vindicate The Plain Meaning Of The NLRA And To Alleviate The Economic Harm The Decision Below Has Unleashed.

The history of twentieth century America is one of boom and bust. Following the roaring 20s, the Great Depression sent shockwaves throughout the Nation. It took the manufacturing boom necessitated by World War II to bring the Country's economy back to life. Economic expansion ensued, with the U.S. leading the world in steel production through the end of the 1960s.[4] This manufacturing dominance did not last. Rather, U.S. steel production accounted for a mere 11% of the world's steel by 1985. *Id.* The 1970s and 1980s saw the rapid decline of manufacturing,

[4] Lloyd Kenward, *The Decline of the US Steel Industry: Why Competitiveness Fell Against Foreign Steelmakers*, IMF: FIN. & DEV., December 1987 at 30, https://bit.ly/4729Ya2.

particularly in the Northeast and Midwest, earning those regions the "Rust Belt" moniker.[5]

Labor strife had much to do with this catastrophic economic downturn. A forthcoming article from the University of Chicago Press' Journal of Political Economy puts it bluntly: "Quantitatively, labor conflict accounts for around half of the decline in the Rust Belt's share of manufacturing employment."[6] In their peer-reviewed article *Labor Market Conflict and the Decline of the Rust Belt*, professors Simeon Alder, David Lagakos, and Lee Ohanian explain that "the Rust Belt's decline was driven by labor market conflict," which "manifested itself in strikes and wage premia." *Id.* at 40 (emphasis added). Other factors, such as the rise of foreign competition, played "a more modest role quantitatively." *Id.*

The strikes and wage premia, in turn, "reduced investment in the region's main industries" which "led to the movement of manufacturing employment out of the Rust Belt and into the rest of the country." *Id.* Labor conflict declined only "following several legal and political shifts that substantially reduced union bargaining power in the 1980s." *Id.* (emphasis added). That led to "higher rates of productivity growth and the region's stabilization, albeit at a much lower level than before." *Id.*

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[5] *See* James Chen, *Rust Belt: Definition, Why It's Called That, List of States*, INVESTOPEDIA (Nov. 9, 2022), https://bit.ly/3s5uXKm.

[6] Simeon Alder et al., *Labor Market Conflict and the Decline of the Rust Belt*, J. OF POL. ECON. (forthcoming 2023) (manuscript at 1) (emphasis added), https://bit.ly/3sbAQWs.

The lesson drawn from that quantitative analysis is that work stoppages restrain economic resilience and job growth. As the authors explain, "there is a strong negative association at the state industry level between rates of work stoppages and employment growth between 1950 and 2000." *Id.* at 2. In particular, outsized union bargaining power cripples investment: "a higher union bargaining weight leads to lower average rates of investment and productivity growth by Rust Belt firms relative to firms in the rest of the country." *Id.* at 2.

As discussed above, Congress banned secondary boycotts in 1947 to protect free trade. History demonstrates the wisdom of that policy decision. Even without recourse to secondary boycotts, strained relations and vast union power contributed to significant work stoppages resulting from primary boycotts. Quantitative analysis established that these work stoppages went a long way toward creating the Rust Belt and the decline of investment in the region.

The intractable nature of the relationship between management and union leaders—treating each other as adversaries rather than as partners—harms the economy. *See* Alder at 40. Yet, as explained, a balance has existed in South Carolina and other southeastern ports through the adoption of a hybrid model. Petitioner SCSPA employs 270 state employees to "operate state-owned lift equipment to load and unload container ships that call at" the Port's Terminals. Pet.App.57a & 114a. ILA-represented employees—over 2,000 to be exact—perform the remainder of longshore work at the Ports. *Id.* This

hybrid model has worked well, balancing competing interests and spurring economic growth.

But the union is not satisfied with this model. It has therefore disrupted the Ports' important work by orchestrating this secondary boycott. As the Petition explains, the southeastern ports "are in the cross-hairs of the unions," and "the assumptions on which they have been doing business are threatened." Pet.30. Union aggressiveness to acquire new work cannot be overstated. For example, ILWU—the west coast counterpart of the ILA—"drove port operator ICTSI out of business in Portland in order to acquire just *two* reefer jobs there." Pet.30 (emphasis added).

Congress struck a balance between labor and industry with the passage of the Taft Hartley Act in 1947, and amendments thereto in 1959. A proper application of that legal regime is necessary to protect the economic success of South Carolina, especially its export-oriented manufacturing industry, which has been the linchpin of the State's economic development over the last decade. [7]

As explained by other *amici*, the South Carolina Ports represent an economic engine for all 46 counties of the State, generating around $86.7 billion in revenue each year. *Id.* This impact translates to 260,020 jobs and $17.6 billion in labor income. *Id.* As a boon to local manufacturing and U.S. exports, up to 73.2% of all cargo exported through the South Carolina Ports originates *from companies located in*

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[7] Joseph C. Von Nessen, *Economic Impact Of The South Carolina Ports Authority, Statewide and Regional Analysis* at 4 (Oct. 2023), https://bit.ly/3FQF7St [hereinafter Impact Study].

South Carolina. *Id.* The direct and indirect economic benefits to citizens of the State are indisputable. One in nine jobs in the State are linked to the Ports. *Id.* In turn, through direct and indirect economic activity, the Ports bring in *approximately $1.5 billion in tax revenue for the State annually*. *Id.* More state tax revenue means more critical infrastructure, better schools, and better hospitals. And the advanced manufacturing jobs that correspond with the Ports results in higher wages. In 2022, the annual wages in the state manufacturing sector were about *22.2% higher* than the U.S. state average over the same period. *See id.* at 26 ($67,514 compared to $55,254).

State and federal tax dollars have made significant contributions to the success of the South Carolina Ports. Planning started over twenty years ago to develop the Leatherman Terminal, which finally opened in March 2021.[8] South Carolina invested over $1.5 billion in the terminal. *See* Pet.31. Moreover, the Army Corps of Engineers recently completed a $580 million harbor renovation project—deepening the harbor and strengthening the area's cargo-processing abilities.[9] Indeed, at 52 feet, Charleston now has the deepest harbor on the East Coast. *Id.* This project moved forward after the Senate passed the Water Infrastructure Improvement

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[8] Press Release, South Carolina State Ports Authority, *SC Ports Opens State-of-the-Art Hugh K. Leatherman Terminal* (Apr. 9, 2021), https://bit.ly/474hUaR.

[9] Press Release, South Carolina State Ports Authority, *Charleston Has The Deepest Harbor On The East Coast at 52 Feet* (Dec. 5, 2022), https://bit.ly/3Fymr9E.

for the Nation Act ("WIIN") in 2016.[10] Following the passage of WIIN, federal appropriations authorized approximately $246 million in federal funds for the project.[11] South Carolina fronted a significant portion of money to speed completion of the harbor deepening project, setting aside about $300 million.[12]

These investments of taxpayer dollars have clear intended benefits. As South Carolina Governor Henry McMaster has explained, among the many benefits specific to the Leatherman Terminal (which currently sits largely idle) is that it provides "near-dock rail . . . connecting the [Leatherman Terminal] to Class I railroads operated by CSX Transportation and Norfolk Southern."[13] Corresponding infrastructure improvements will also reduce highway congestion in the area. *Id.* Likewise, as recognized in a 2015 Army Corps of Engineers study, the deepening of the harbor will enable carriers "to load Post-Panamax vessels more efficiently and thereby reduce transiting costs. In the future, these carriers are anticipated to replace smaller less efficient vessels with the larger more

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[10] Press Release, South Carolina State Ports Authority, *Congress Authorizes Charleston Harbor Deepening Project* (Dec. 10, 2016), https://bit.ly/3QvLWPj.

[11] South Carolina State Ports Authority Finance Department, *Annual Comprehensive Financial Report: For Fiscal Years Ended June 30, 2022 and 2021* at 6 (S.C. Ports), https://bit.ly/497Gvx8.

[12] *Supra* note 9.

[13] Brief of *Amicus Curiae* Governor Henry McMaster at 5, South Carolina State Ports Authority v. NLRB, 75 F.4th 368 (2023) (No. 23-1059).

efficient vessels on East Coast service lanes that will call on Charleston Harbor."[14]

But these significant economic and environmental benefits have not been realized. No new jobs have been created, and no additional state tax revenue has been generated, which limits investments into the region's infrastructure, schools, and hospitals. This result is *exactly* what the secondary-boycott ban was meant to stop, and it is the consequence of an Article III court permitting an administrative agency to run roughshod over Congress' judgment.

There is no doubting this case's importance. It is important for the people of South Carolina. It is important to ensure consistent application of the law nationwide. And it is important to vindicate the federal constitutional structure, so that the People remain governed by a nation of laws, rather than ruled by administrative fiat.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant the petition for certiorari.

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[14] U.S. Army Corps of Engineers, Appendix C: Charleston Harbor Post 45, Charleston, South Carolina, Economics at 55 (May 2015), https://bit.ly/45FGkGw.

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