No. 04-1603

In the Supreme Court of the United States

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., AKA SC CONDOMINIUM ASSOCIATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that individuals employed to perform maintenance work in the common areas of a condominium complex were employees under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and not excluded from the Act's coverage as "employed * * * in the domestic service of any family or person at his home" under that section.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 400 F.3d 1336. The decision and order of the National Labor Relations Board (Pet. App. 9a-17a) is reported at 340 N.L.R.B. No. 82. The decision and direction of election of the Board's regional director for Region 12 (Pet. App. 18a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2005. The petition for a writ of certiorari was filed on May 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(3) of the National Labor Relations Act (NLRA or Act) defines "employee" for purposes of the Act. That definition excludes "any individual employed * * * in the domestic service of any family or person at his home." 29 U.S.C. 152(3).

In determining whether an employee is "employed * * * in the domestic service of any family or person at his home" under Section 2(3), the National Labor Relations Board focuses "on the principals to whom the employer-employee relationship *in fact* runs and not merely on the * * * 'domestic' nature of * * * the services rendered." *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979). The Board, with judicial approval, has held that workers performing maintenance and cleaning work at a condominium are not employed "in the domestic service of any family or person at his home," where they perform those services "on behalf of and are clearly employed by" the incorporated condominium association. See *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1005 (11th Cir. 1987).

2. Petitioner is a nonprofit Florida corporation that provides maintenance and security services to condominium owners at a condominium complex consisting of two high rise residential buildings, which have a total of 192 condominium units, and one recreational facility. Pet. App. 2a, 11a, 19a, 30a. Petitioner is controlled by a board of directors, which is elected by the owners of the condominium units. *Id.* at 22a. A resident manager supervises petitioner's entire staff and reports directly to the board of directors. *Ibid.* He functions like a building superintendent in an apartment complex and is available 24 hours a day, seven days a week. *Ibid.*

Petitioner employs five maintenance employees, including one lead maintenance worker, one painter, and three janitors, all of whom report to the resident manager. Pet. App. 22a. They wear dark khaki uniforms, *id.* at 28a, and use radios to communicate with one another, *id.* at 26a. The lead maintenance employee is responsible for installing, repairing, and maintaining equipment, such as lighting and pool heaters, in the common areas of the building. *Id.* at 5a, 28a. Occasionally he enters residential units to perform work on behalf of petitioner, such as maintenance on air conditioning drain lines and condensation lines. *Id.* at 5a, 28a, 32a. The painter spends 90 to 95% of his time painting outside. On his own time, he may perform work inside residential units and receive payment directly from the individual resident. *Id.* at 29a. Each of the three janitors is assigned to one of the three buildings. The janitors spend their time carrying recycling materials and cleaning common areas, such as the elevators, lobbies, catwalk, and stairwells. *Ibid.*

3. On April 3, 2003, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO (Union), filed a petition with the Board seeking certification as the collective-bargaining representative of petitioner's five maintenance employees.[1] Pet. App. 2a. Petitioner opposed the Union's election petition, claiming, *inter alia*,

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[1] The Union's petition sought to include petitioner's security employees in the bargaining unit. The Board's regional director concluded that those security employees were guards, who, under Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), could not be represented in a unit that included nonguards. Pet. App. 35a-40a. The Union did not contest that ruling. The status of petitioner's security employees was therefore not before the court of appeals and is not before this Court.

that the petitioned-for unit was inappropriate, because the maintenance employees were employed in the domestic service of families or persons at their homes and therefore excluded by Section 2(3) of the Act. *Ibid.*

Following a hearing, the Board's regional director issued a decision, finding, in relevant part, that petitioner's maintenance employees were covered by the Act and directing an election in a unit of "[a]ll full-time and regular part-time maintenance employees * * * employed by [petitioner] at its facility in Ft. Lauderdale, Florida." Pet. App. 3a, 12a, 43a. In finding that the five maintenance workers were not individuals "employed * * * in the domestic service of any family or person at his home," the regional director "focus[ed] * * * on the principals to whom the employer-employee relationship in fact runs." Pet. App. 33a (quoting *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979), and citing *Imperial House Condominium*, 279 N.L.R.B. 1225 (1968), aff'd, 831 F.2d 999 (11th Cir. 1987)). The regional director observed that "[t]he employees perform the vast majority of their work in common areas of the complex," Pet. App. 31a, and that when they enter individual units on rare occasions to perform maintenance on air conditioning lines, they perform work on behalf of petitioner, and not as employees of individual unit owners. *Id.* at 29a, 32a. The regional director concluded that the five maintenance employees "work for the entire condominium association, rather than for any individual unit owner." *Id.* at 31a.

The regional director rejected petitioner's contention that applying the Act to its maintenance employees would violate principles of state sovereignty and federalism because the State recognizes the use of the condominium legal structure and permits condominium own-

ers to claim a homestead exemption on their state tax returns. Pet. App. 33a. The regional director explained that application of the Act would neither prevent the organization of condominium associations nor preclude individual condominium owners from claiming a homestead exemption under the Florida state constitution. *Ibid.* The regional director further explained that "Florida's sovereignty is not jeopardized by the Federal Government exercising jurisdiction over employees who are employed by an entity (a condominium), which is a creature of state law." *Ibid.* The regional director noted that corporations, like condominiums, are "creatures of the state which incorporate[s] them, but this does not preclude the assertion of federal jurisdiction over a corporation's employees and its labor relations." *Ibid.* Rejecting petitioner's remaining constitutional claims, based on the Fourth and Fifth Amendments, the regional director found that the Board's recognition of the rights of employees would not itself result in any of the consequences—such as a taking of the owners' property or the imposition by the government of "cruel and unusual punishment"—that petitioner claimed would violate its constitutional rights. *Id.* at 34a. The Board subsequently denied petitioner's request for review of the regional director's decision and direction of election. *Id.* at 3a.

On June 11, 2003, the regional director conducted a secret-ballot election in the specified unit. Pet. App. 3a. By a 5-0 vote, the Union won the election. *Ibid.* The regional director then certified the Union as the exclusive collective-bargaining representative of petitioner's maintenance employees. *Id.* at 3a, 12a, 43a.

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. Pet. App.

3a, 12a. The Board's General Counsel issued a complaint, alleging that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 3a. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted summary judgment, decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, and ordered petitioner to bargain on request with the Union. *Id.* at 10a-13a.

4. Petitioner filed a petition for review in the court of appeals, and the Board filed a cross-application for enforcement of its order. The court of appeals denied the petition for review and enforced the Board's bargaining order. Pet. App. 1a-8a.

The court of appeals upheld the Board's determination that petitioner's maintenance workers did not fall within the "domestic service" exemption of Section 2(3), relying on its prior decision in *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1001, 1005 (11th Cir. 1987). In that case, the court had held that employees involved in housekeeping activities at a condominium were not exempt as "domestic" employees, because they were not employed by owners of condominium units to whom the housekeepers rendered services, but performed their services "on behalf of and are clearly employed by the Condominium, a Florida corporation." *Ibid.* Noting the evidence that the five maintenance workers employed by petitioner similarly work almost exclusively in the common areas, the court held that substantial evidence supported the Board's finding "that the employees at issue in this case are employed by the Association, rather than the individual unit owners," and that therefore the Board "was warranted in holding that

these employees are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3)." Pet. App. 7a.

The court summarily rejected petitioner's contention that this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), required a different result. Pet. App. 7a. The court also summarily rejected petitioner's constitutional arguments. *Id.* at 7a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As this Court has recognized, the Board's interpretation of the term "employee" in Section 2(3) of the Act is entitled to deference if it is based on a reasonable construction of the statute. *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-399, 409 (1996) ("appropriate weight * * * must be given to the judgment of the agency whose special duty is to apply th[e] broad statutory language to varying fact patterns") (citing *Bayside Enters., Inc.* v. *NLRB*, 429 U.S. 298, 304 (1977)); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 437, 843 (1984). As this Court has further recognized, the Board and reviewing courts "must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, 517 U.S. at 399. Consistent with those principles, the court of appeals correctly affirmed the Board's determination that the maintenance employees employed by the condominium association are "employee[s]" and are not "employed

* * * in the domestic service of any family or person at his home" under Section 2(3) of the Act.

a. The Board, in its few decisions construing the domestic employee exemption of Section 2(3), has consistently focused on the employment relationship by examining the "principals to whom the employer-employee relationship in fact runs," or, in other words, who employs the workers. *Ankh Servs.*, 243 N.L.R.B. at 480. The Eleventh Circuit, the only court of appeals to review a decision involving the domestic employee exemption, previously affirmed a Board determination that the domestic service exemption does not cover employees who were not employed by individual condominium unit owners but were instead employed by the condominium association, a corporate entity. *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d at 1005. The court observed that the Board's focus accurately characterized "the true economic relationship existing between the employers and employees." *Ibid.*[2] The court of appeals' conclusion here (Pet. App. 7a) is fully consistent with that precedent.

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[2] The very limited legislative history of the exemption supports the approach taken by the Board and approved by the Eleventh Circuit. In *Ankh Services*, the Board noted that Congress stated that it meant only to exclude "domestic servants" from the NLRA. 243 N.L.R.B. at 480 & n.17 (quoting S. Rep. No. 1184, 73d Cong., 2d sess. 1, 3 (1934)). The Board further observed that "Congress did not * * * elaborate on the term 'domestic servant' nor did it define the scope of any particular employment relationship it may have intended to exempt from the operation of the Act." *Ibid.* Nor did Congress indicate an intent to exclude from coverage "any other than those individuals whose employment falls within the commonly accepted meaning of the term 'domestic servant.'" *Id.* at 480.

b. Contrary to petitioner's claim (Pet. 9-11, 18), the Board's overruled decision in *Point East Condominium Owners Ass'n,* 193 N.L.R.B. 6 (1971), does not support its argument that the Board erred in finding the domestic employee exemption inapplicable to petitioner's employees. In *Point East*, the Board declined to exercise discretionary jurisdiction over a condominium association because the Board determined that none of its existing jurisdictional standards applied. In particular, the Board found that its standard for asserting jurisdiction over retail establishments was inappropriate for condominiums because the employer association provided no services to persons other than the owners, and therefore was not clearly engaged in the sale of a service. *Id.* at 6. See *Leisure Village Ass'n,* 236 N.L.R.B. 102, 102 n.3 (1978) (clarifying *Point East* as holding that the Board had not yet "established a standard governing exercise of its jurisdiction over enterprises engaged in managing and maintaining condominiums").

When subsequently presented with "an exhaustive collection of data and analysis" prepared by the Department of Housing and Urban Development showing the accelerated growth of condominiums and their prominent role as a housing resource, however, the Board concluded that condominiums "are engaged in the business of concerted home management and maintenance." *30 Sutton Place*, 240 N.L.R.B. 752, 752-753 (1979). The Board further found that "this business had a substantial impact on interstate commerce, warranting our assertion of jurisdiction," so that employees of condominiums and the entities themselves "when acting as employers, may invoke the rights and privileges of the Act." *Id.* at 753 (overruling *Point East* to the extent it was inconsistent with *30 Sutton Place*).

In reaching that conclusion, the Board reasonably determined that the domestic employee exemption did not preclude its assertion of jurisdiction, because there was a substantial difference between employment by a single homeowner, where an individual and personal relationship is created, and employment by a condominium entity, which is similar to employment at an apartment house. 240 N.L.R.B at 753 n.6. The Eleventh Circuit in *Imperial House Condominium* endorsed the Board's reasoning in the specific context of a condominium association incorporated under Florida law. 831 F.2d at 1004-1005.[3]

2. The court of appeals correctly rejected petitioner's suggestion (Pet. 17-18) that the decision in this case conflicts with this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Kentucky River* addressed Section 2(11) of the NLRA, 29 U.S.C. 152(11), which defines the term "supervisor," another category that Section 2(3) excludes from the definition of employee.[4] The Court held that the Board's

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[3] Petitioner relies (Pet. 13-15) on the dissenting opinion of two Board members in the Board's *Imperial House* decision, which advocated a return to *Point East*. See 279 N.L.R.B. at 1228. Even the dissent in *Imperial House*, however, recognized that nothing in the NLRA precluded the Board's assertion of jurisdiction over condominiums and disclaimed any argument that condominium employees are "domestic employees." *Id.* at 1228-1229.

[4] Section 2(3) provides that the term employee "shall not include * * * any individual employed as a supervisor." Section 2(11) states that "[t]he term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

interpretation of the term "independent judgment," which Section 2(11) uses to define who is a "supervisor," to exclude a particular kind of judgment—namely, professional or technical judgment in directing less skilled employees—inserted a "startling categorical exclusion into statutory text that does not suggest its existence." 532 U.S. at 713-714. The Court also held that the Board's application of its definition only when such judgment was used "in directing" less skilled employees was directly contrary to the statutory text, which ties the use of independent judgment to twelve distinct functions, such as hiring, transferring, suspending, laying off, etc. *Id.* at 715-716.

Those determinations about the Section 2(11) phrase "independent judgment" have no bearing on Section 2(3)'s exclusion of individuals "employed * * * in the domestic service of any family or person at his home." Unlike in *Kentucky River*, there is no conflict between the language of Section 2(3) excluding individuals employed in domestic service and the Board's conclusion, affirmed by the court of appeals, that the exclusion does not apply to petitioner's employees.

3. The court of appeals also correctly rejected petitioner's constitutional arguments. See Pet. App. 7a-8a. Petitioner argues (Pet. 18) that applying the NLRA to its employees would "violate[] State sovereignty." As the regional director explained in rejecting that contention, however, the finding that petitioner's employees are covered by the Act does not prevent the organization of condominium associations or preclude individual con-

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exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

dominium owners from claiming the State's homestead exemption. Pet. App. 33a.[5]

Petitioner's contention (Pet. 21-22) that applying the Act to its employees would violate various constitutional provisions is also mistaken. For example, petitioner contends (Pet. 21) that a union might go on strike, and that such a strike would amount to a "taking" under the Just Compensation Clause or a "denial of due process, in violation of the Fifth Amendment (insofar as the NLRB would be authorizing such a result)." Pet. 22. None of the hypothetical situations petitioner posits (Pet. 21-22) appear to raise any constitutional issue. They do not involve state action and, for the most part, would not in any event constitute the kind of conduct forbidden by the Constitution. In addition, any now-hypothetical constitutional claims petitioner may have could be asserted if and when the strike or other union activity posited by petitioner in fact materialized. At present, all that is at issue is the recognition of the Union as the exclusive representative of petitioner's employees. There is nothing in that recognition that presents any constitutional issue.

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[5] Petitioner is mistaken (Pet. 19-20) in contending that *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), has anything to do with this case. In *Federal Maritime Commission*, this Court held that state sovereign immunity barred the Federal Maritime Commission from adjudicating a private party's complaint *against a state port authority* that the state-run port violated the Shipping Act of 1984. Petitioner is a private employer and not an arm of the State of Florida. Petitioner is therefore not entitled to state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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