No. 11-606

In the Supreme Court of the United States

LEIFERMAN ENTERPRISES, LLC, DBA HARMON AUTOGLASS AND ITS SUCCESSOR AUTO GLASS REPAIR AND WINDSHIELD REPLACEMENT SERVICE, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

This Court in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), held that the National Labor Relations Board may impose liability on a successor employer for the unfair labor practices of its predecessor if the successor had knowledge of that potential liability.

The question presented is whether the court of appeals correctly held that the Board acted within its broad remedial discretion in imposing liability on the successor company in this case, where it is undisputed that the successorship requirements established in *Golden State Bottling* were fulfilled, and the parties to the sale of the predecessor company contemplated that the predecessor's secured creditor would indemnify the successor for any derivative liability to the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 649 F.3d 873. The supplemental decision and order of the National Labor Relations Board (Pet. App. 19-21) is reported at 355 N.L.R.B. No. 66. That decision incorporates and adopts the Board's October 30, 2009, supplemental decision and order (Pet. App. 22-40), which is reported at 354 N.L.R.B. 872.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The petition for a writ of certiorari was

filed on November 10, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 10(c) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 160(c), gives the National Labor Relations Board (Board) broad discretion to remedy "unfair labor practice[s]" by "tak[ing] such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. In *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 176 (1973) (*Golden State Bottling*), this Court held that the Board's authority is not limited to issuing orders against "the actual perpetrator of an unfair labor practice." "[I]n appropriate circumstances," the Board may impose liability "against those to whom the business may have been transferred," including a bona fide purchaser that was not a party to the unfair labor practices but acquired the predecessor with "knowledge that the wrong remains unremedied." *Id.* at 178-179, 180 (internal quotations and citation omitted).

Successor liability is premised on the recognition that when the new employer has "continued, without interruption or substantial change, the predecessor's business operations, [the] employees who have been retained will understandably view their job situations as essentially unaltered * * * [and] may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices * * * as a continuation of the predecessor's labor policies." *Golden State Bottling*, 414 U.S. at 184. Successor liability thus vindicates important federal labor policies. Imposing such liability also generally is equitable to the parties, as the successor's "potential liability for remedying the unfair labor

practices is a matter which can be reflected in the price he pays for the business, or [the successor] may secure an indemnity clause in the sales contract." *Id.* at 172 n.2 (quoting *Perma Vinyl Corp.*, 164 N.L.R.B. 968, 969 (1967), enforced *sub nom. United States Pipe & Foundry Co.* v. *NLRB*, 398 F.2d 544 (5th Cir. 1968)).

2. a. Petitioners are Leiferman Enterprises, LLC (Leiferman) and its successor, Auto Glass Repair and Windshield Replacement Services, Inc. (WRS). Leiferman sold and installed automotive glass at various facilities in the Minneapolis area. Pet. App. 2. Fifteen of Leiferman's employees were represented by the International Union of Painters and Allied Trades District Council 82 (Union) under a collective-bargaining agreement in effect from July 1, 2003, through June 30, 2006. *Ibid.*

Leiferman financed its business through a series of secured lending agreements with Harmon AutoGlass Intellectual Property (HAIP). Pet. App. 3. In 2005, Leiferman defaulted on its loan. It subsequently entered into and defaulted on a forbearance agreement with HAIP that required certain payments to HAIP and the sale of the business to a third party. *Ibid.*

Meanwhile, Leiferman and the Union were negotiating a new collective-bargaining agreement. On August 13, 2006, without reaching an impasse with the Union, Leiferman implemented its final offer and unilaterally changed its employees' terms and conditions of employment. Pet. App. 3. The Union responded by filing unfair labor practice charges with the Board, alleging that the unilateral changes violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). Pet. App. 3-4.

While those charges were pending, in September 2006, HAIP successfully petitioned in Minnesota state

court for the appointment of a receiver to operate and sell Leiferman. Pet. App. 4. Beginning in October 2006, the receiver sent bid solicitations to prospective purchasers. The solicitations advised purchasers of Leiferman's potential liability to the Board, and all prospective purchasers required that, as a condition of any sale, HAIP indemnify them for any liability to the Board. *Id.* at 4-5, 30. In November 2006, while the bid solicitations were outstanding, the Board's General Counsel issued a complaint alleging that Leiferman's unilateral changes were unlawful. *Id.* at 4.

On January 31, 2007, the Minnesota court administering the receivership approved the sale of Leiferman to WRS. Pet. App. 4. The court's order stated that the "manner and terms of the proposed sale . . . are fair and commercially reasonable" and that WRS's purchase of Leiferman was "free and clear of any liens and encumbrances." *Id.* at 5 (alteration in original). In August 2007, the court entered judgment in HAIP's favor for approximately $3.7 million. After the sale of Leiferman's assets, a deficiency of $3 million remains unpaid. *Ibid.*

b. On February 21, 2008, the Board found that Leiferman had violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1), by implementing unilateral changes to employees' terms and conditions of employment without reaching a good-faith bargaining impasse with the Union. Pet. App. 41-42. The Board's order required Leiferman and "its officers, agents, successors, and assigns" to, among other things, make the employees whole for any losses suffered as a result of the unlawful unilateral changes. *Id.* at 53-55.

The Board then conducted a supplemental compliance proceeding in order to tailor its general remedy to

the specific circumstances of this case. Pet. App. 26; see generally *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 902 (1984). A Board administrative law judge (ALJ), applying *Golden State Bottling,* found that WRS was a successor to Leiferman and could be held liable for Leiferman's unfair labor practices.[1] Relying on the parties' stipulations, the ALJ found that WRS had had notice of Leiferman's potential liability and had continued Leiferman's business without interruption. Pet. App. 34; see *Golden State Bottling*, 414 U.S. at 178-185. The ALJ also rejected WRS's argument that successor liability was precluded by the state court's statement that the sale was "free and clear." Pet. App. 35-36. The ALJ concluded that the "free and clear" language must be read in conjunction with the terms of the sale, which included HAIP's agreement to indemnify WRS for liability arising from the Board proceeding. That agreement, the ALJ explained, was intended to facilitate the sale, and there was no reason to think that the state court intended to nullify such a critical component of the purchase agreement. *Id.* at 35. The ALJ also noted that even if the state court's "free and clear" language could somehow be read to nullify the indemnification provision, the state court's order should not be read to override the federal law of successor liability under *Golden State Bottling*. *Id.* at 35-37.

c. The two then-sitting members of the Board affirmed the ALJ's decision. Pet. App. 22-25.

The Board then petitioned the court of appeals to enforce its order. While review of the Board's decision was pending before the Eighth Circuit, this Court issued

[1] WRS disputed that it was a successor employer, but agreed that the Board's compliance officer correctly calculated the amount of the monetary award to be $54,518.25, plus interest. Pet. App. 6, 32.

its decision in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2638 (2010), in which it held that the Board did not have authority to issue decisions when its membership fell to two. After a remand from the Eighth Circuit, a three-member panel of the Board issued a Supplemental Decision and Order, which adopted and incorporated by reference the Board's original two-member decision. Pet. App. 19-21.

3. Upon the Board's petition, the court of appeals enforced the Board's order. Pet. App. 1-16. The court held that the Board's conclusion that WRS was a successor employer that could be held liable for Leiferman's unfair labor practices under *Golden State Bottling* was supported by substantial evidence. *Id*. at 12-16. Specifically, the court held that the Board reasonably found the *Golden State Bottling* factors satisfied because WRS had known of Leiferman's potential liability when WRS purchased the business, and had continued Leiferman's business without interruption or substantial change. *Ibid*.

The court also rejected WRS's "novel legal argument[]" that imposing successor liability would be inequitable because HAIP ultimately would have to pay approximately $55,000 to indemnify WRS for the Board's backpay order, even though HAIP had yet to recoup $3 million in loans to Leiferman. Pet. App. 15. The court concluded that HAIP's obligation "is a direct product of HAIP's own free bargaining. HAIP wanted to recover some value from its collateral in Leiferman's assets, and, to accomplish this, it voluntarily agreed to indemnify the purchaser." *Ibid*. The court also observed that *Golden State Bottling* had expressly stated that successor companies would be able to take potential NLRA liability into account in negotiating an indemnification agree-

ment and the price of the business. *Ibid.* (quoting *Golden State Bottling*, 414 U.S. at 185). The court of appeals therefore rejected "WRS's appeal to equity on a third party's [HAIP's] behalf when that third party freely contracted for the purportedly inequitable treatment." *Id.* at 16.

Finally, the court rejected WRS's claim that any liability to the Board was extinguished by language in the Minnesota court's statement that the sale of Leiferman was "free and clear" of liens and encumbrances. The court explained that the Minnesota court approved the sale based in part on its finding that the terms of the sale were fair and commercially reasonable, and that "[o]ne of the sale's terms *was* the indemnification clause compelling HAIP to indemnify WRS against any resulting NLRA liability." Pet. App. 16.

ARGUMENT

Petitioners contend that the court of appeals' affirmance of the Board's imposition of successor liability on WRS is "inequitable" (Pet. 11) because HAIP will ultimately be responsible for indemnifying WRS for the backpay award. Pet. 8-18. Further review is unwarranted. The court of appeals' fact-bound decision is correct, and it does not conflict with any decision of this Court or another court of appeals.

1. a. The court of appeals correctly held that the Board's application of the standards set forth in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973), was supported by substantial evidence. In *Golden State Bottling*, the Court held that the Board may in appropriate circumstances deem a bona fide purchaser of a business to be a "successor in interest" that should be held liable for the past unfair labor practices of the company

that the purchaser acquired. *Ibid.* The Court explained that when a successor purchases a business with knowledge of pending Board litigation to remedy unfair labor practices, employees who continue working for the company may reasonably believe that the successor is permitting the predecessor's unremedied unfair labor practices to continue. *Id.* at 184-185. Imposing successor liability therefore furthers important NLRA interests by dispelling that perception and preventing labor unrest. *Ibid.* Therefore, when the purchaser has notice of the predecessor company's potential liability, and it "has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations," the Board may impose liability on the purchaser for the predecessor's prepurchase unfair labor practices. *Id.* at 184.

The court of appeals correctly found that "substantial evidence of each of these factors existed." Pet. App. 12. WRS was not only aware of the Board's complaint against Leiferman, but it purchased Leiferman on the condition that HAIP indemnify it against any resulting liability. WRS continued Leiferman's business without interruption, licensed its trade name, and maintained much of Leiferman's workforce, such that a majority of the employees of the new company were "holdovers from the old Leiferman entity." *Id.* at 13; see *id.* at 12-14.

b. Petitioners do not challenge the court of appeals' conclusion that the Board's decision was supported by substantial evidence. Rather, petitioners contend that the Board's order has the improper effect of granting the backpay order "priority" over HAIP's secured claims against Leiferman. Pet. 11. The court of appeals correctly rejected this "novel" argument. Pet. App. 15.

The Board's order does not make any ruling with respect to HAIP's rights and obligations in the already-concluded state-court receivership proceeding, or the priority that a backpay award would have relative to other secured and unsecured claims if that award were to be discharged in a bankruptcy or receivership proceeding. The order does not purport to resurrect claims that were discharged in the state receivership proceeding; to the contrary, the terms of the parties' agreement expressly contemplated that Leiferman's purchaser might subsequently be liable for the backpay claims and that HAIP would indemnify any such liability, and the state court found that the sale's terms—including the indemnification term—were "fair and commercially reasonable." *Id.* at 15-16. Nor does the order collect from Leiferman assets ahead of HAIP or affect HAIP's efforts to collect from Leiferman.

Petitioners' argument is thus based solely on the fact that because HAIP agreed to indemnify WRS against the backpay award as a condition of WRS's purchase of the business, HAIP may ultimately be liable to "pay approximately $55,000 to compensate unsecured labor claimants." Pet. App. 15. But that is not the result of the Board's order, which runs only against WRS as Leiferman's *Golden State Bottling* successor. Rather, HAIP's liability is purely a consequence of its prior independent decision to indemnify WRS for any Board liability in an effort to facilitate the sale of Leiferman, boost the purchase price, and recoup its losses from the loan to Leiferman. *Id.* at 15, 38. Any diminution of HAIP's ultimate net recovery on its secured debt is therefore "a direct product of [its] own free bargaining"—not the Board's order. *Id.* at 15.

In upholding the Board's imposition of successor liability on WRS, then, the court of appeals had no occasion to consider the priority to be given to a Board order in a bankruptcy or receivership proceeding, and it did not hold, as petitioner suggests (Pet. 10), that "a Board's backpay order is * * * entitled to a special status, such as priority in payment over an innocent secured creditor." The question of the relative priority of a backpay order in a bankruptcy or receivership proceeding is not presented by this case.

c. Petitioners are also incorrect in arguing that the court of appeals ignored equitable considerations in upholding the Board's order. Pet. 10-11. As the court explained, "this type of transaction"—in which a seller agrees to indemnify a purchaser against potential liability arising out of unfair labor practices—"is precisely what the Supreme Court envisioned as one of the benefits that *Golden State* successorship conferred." Pet. App. 15. Because the purchaser must have notice of the potential NLRA liability before it purchases the business in order for successor liability to be imposed under *Golden State Bottling*, the doctrine contemplates that the predecessor's "potential liability for remedying the unfair labor practices is a matter which can be reflected in the price [the purchaser] pays for the business, or [the purchaser] may secure an indemnity clause in the sales contract." *Golden State Bottling*, 414 U.S. at 185. HAIP and WRS chose the latter course, and the state court approved the resulting purchase agreement as "fair and commercially reasonable." Pet. App. 5. Given that the parties anticipated—and bargained concerning—the eventual imposition of successor liability, the court of appeals correctly concluded that it is not inequitable to enforce the Act against WRS. That "intensely

fact-specific" conclusion is, moreover, dependent on the particular circumstances of the transactions at issue in this case, and therefore it does not warrant this Court's review. See *Sullivan* v. *Dollar Tree Stores, Inc.*, 623 F.3d 770, 782 (9th Cir. 2010).

2. Petitioners claim (Pet. 8) that the court of appeals' decision conflicts with *Nathanson* v. *NLRB*, 344 U.S. 25 (1952), but that decision has no bearing on the facts at issue here. In *Nathanson*, this Court held that, as a matter of federal bankruptcy law, the Board's claim for a backpay remedy did not warrant priority in a bankruptcy proceeding as a "debt due the United States" because the money collected by the Board would go to employees rather than the government. *Id.* at 27-28 (citing 11 U.S.C. 64 (1946)). As discussed above, the court of appeals' decision in this case does not implicate the Court's decision in *Nathanson*, because the court of appeals did not consider the priority to be given a claim for backpay in a federal bankruptcy proceeding or a state receivership proceeding. And contrary to petitioners' assertion, the court of appeals' holding does not create the possibility of "disparate treatment of secured creditors" (Pet. 15), because it does not suggest that federal backpay claims may supersede state-law priority rules.

3. Petitioners are also incorrect in arguing (Pet. 9-10, 11-14) that the court's decision conflicts with decisions of other courts of appeals.

In *In re Trans World Airlines*, 322 F.3d 283, 288 (2003), the Third Circuit held that employment discrimination claims against bankrupt airline company TWA were "interest[s] in property" for purposes of Section 363 of the Bankruptcy Code, which permits the court to order a sale of property "free and clear" of "interest[s]

in such property." 11 U.S.C. 363(f). The court therefore held that the federal bankruptcy court had acted within its authority in treating the employment claims as interests in property and ordering that the sale of TWA to American Airlines would be "free and clear" of those claims. 322 F.3d at 288-289. *Trans World Airlines* thus concerned whether employment claims could be discharged in the context of an asset sale in connection with a bankruptcy proceeding, rather than, as here, the question whether *Golden State Bottling* successor liability should be imposed *following* the sale of the predecessor company, when that sale specifically contemplated that the backpay claims would survive the receivership proceeding.

The *Trans World Airlines* court also observed that "[e]ven were we to conclude that the claims at issue are not interests in property, the priority scheme of the Bankruptcy Code supports the transfer of TWA's assets free and clear of the claims" because there was no indication that Congress intended to give employment claims priority over other unsecured claims in bankruptcy proceedings. 322 F.3d at 291. Although petitioners contend (Pet. 13) that the Third Circuit therefore rejected the "exact inequity * * * present here," the court simply relied on *Nathanson* in concluding that the Bankruptcy Code does not accord priority to employment claims. That reasoning has no relevance here, where HAIP's potential liability is the result of its voluntary execution of an indemnification agreement rather than any ruling that the backpay order should enjoy

priority over other claims in the receivership proceeding.[2]

The court of appeals' decision also does not conflict with *Musikiwamba* v. *ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985). See Pet. 10-11. There, the court held, by analogy to *Golden State Bottling*, that successorship principles apply to Section 1981 employment-discrimination claims. Petitioners rely (Pet. 11) on the court's statement that "it is also relevant whether the predecessor could have provided any or all relief to the [discrimination] plaintiff prior to the transfer of assets," because, in the court's view, discrimination plaintiffs should not be encouraged to file "meretricious claims" in the hopes of imposing liability of the "deep-pocket" successor company. *Musikiwamba*, 760 F.2d at 750-751. The court made that observation, however, in the context of explaining that "the substantial dissimilarities existing between the wrongs and remedies for violations of the NLRA and section 1981 require a somewhat different analytical framework" for "analyz[ing] a successor's liability under section 1981." *Id.* at 750. And the court rejected the argument that successor liability was generally inappropriate when the predecessor is insolvent, explaining that creditors may anticipate and protect themselves against the possibility that "the predecessor might not be able to repay them." *Id.* at 749. *Musikiwamba* therefore does not support petitioners' view (Pet. 10-11) that the predecessor's inability to remedy its own unfair labor practices militates against imposing successor liability.

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[2] Similarly, petitioner's reliance (Pet. 10) on *In re New England Fish Co.*, 19 B.R. 323, 324, 329 (Bankr. W.D. Wash. 1982), is misplaced. There, as in *Trans World Airlines*, the bankruptcy court held that Title VII claims could be extinguished in a bankruptcy sale under 11 U.S.C. 363.

In any event, the Seventh Circuit has since clarified that a predecessor's inability to compensate employment claims does not preclude successor liability. As that court has noted, although ability to pay may be relevant to the equities in particular cases, the important purpose of remedying meritorious claims is implicated when the successor purchases the predecessor with knowledge of the claims and continues the business, whether or not the predecessor would have been able to satisfy the claims prior to its sale. See *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund* v. *Tasemkin, Inc.*, 59 F.3d 48, 51 (7th Cir. 1995); *EEOC* v. *Vucitech*, 842 F.2d 936, 945 (7th Cir. 1988) (holding that when the successor employer knows about the liability and the predecessor's likely inability to pay the judgment, "the presumption should be in favor of successor liability").

Peters v. *NLRB*, 153 F.3d 289 (6th Cir. 1998), is also distinguishable. Pet. 13-14. There, the Sixth Circuit refused to impose *Golden State* liability against a second-generation successor because the second-generation successor did not have the opportunity to negotiate with the predecessor company—*i.e.*, the company that had engaged in the unfair labor practices—for an indemnification clause or a price that would capture the risk of unfair labor practice liability. *Peters*, 153 F.3d at 301 (stating that "[t]he equitable balance that existed in *Golden State* does not exist in the circumstances of this case"). Here, in contrast, WRS could, and did, negotiate with HAIP for indemnification. In addition, although petitioners highlight (Pet. 14) the *Peters* court's observation that successor liability could impede the second-generation successor's ability to change terms and conditions of employment, that concern is not present here,

because unlike in *Peters*, the Board did not impose a bargaining obligation on WRS. See 153 F.3d at 301. Rather, the Board's order requires WRS only to provide the monetary remedy for Leiferman's unfair labor practices. See Pet. App. 24.

4. Finally, petitioners' speculative claim (Pet. 16) that the court's decision will discourage creditors from lending money to unionized companies and will encourage lenders to "fire as many union workers as possible" in order to avoid successor liability does not provide a basis on which to grant certiorari. Successor liability has long been an available remedy for unfair labor practices, see *Golden State Bottling*, 414 U.S. at 185, and courts have recognized that creditors are able to protect themselves against the possibility that successor liability will affect their ability to recoup their entire investment. See *Musikiwamba*, 760 F.2d at 749 (explaining that creditors may anticipate potential successor liability by requiring "interest payments or higher prices for goods"). Moreover, a successor would have a strong disincentive to make hiring decisions with the purpose of avoiding obligations under the Act, because such an action is an unfair labor practice that would subject a purchaser to independent liability under the Act. See, *e.g.*, *U.S. Marine Corp.* v. *NLRB*, 944 F.2d 1305, 1316 (7th Cir. 1991) (en banc), cert. denied, 503 U.S. 936 (1992). Such actions would be unlikely to prevent successor liability, which turns on whether the purchaser had notice of the unfair labor practices and continued the predecessor's operations, not on whether it hired a majority of its employees from the predecessor's workforce. See *Golden State Bottling*, 414 U.S. at 184 & n.6.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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