No. 02-1111

In the Supreme Court of the United States

MICHIGAN COMMUNITY SERVICES, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the decision of the National Labor Relations Board to afford administrative comity to elections conducted by the Michigan Employee Relations Commission among petitioners' employees on April 20, 1989.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 309 F.3d 348. The decision and order of the National Labor Relations Board (Pet. App. 28a-41a), and the decision of the administrative law judge (Pet. App. 42a-89a) are reported at 332 N.L.R.B. No. 22.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2002. The petition for a writ of certiorari was filed on January 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners operate group homes for individuals with disabilities in Michigan. Pet. App. 2a, 4a, 45a. Those operations are funded by annual contracts with the Michigan Department of Mental Health (MDMH). The contracts establish the level of wages and benefits for which MDMH will reimburse petitioners during the term of the contracts. *Id.* at 4a, 21a-22a. Under Section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. 152(2), petitioners are subject to the jurisdiction of the National Labor Relations Board (Board) as "employers." Pet. App. 45a. MDMH, however, is not subject to the Board's jurisdiction, because it is exempt from Section 2(2)'s definition of "employer." See 29 U.S.C. 152(2) ("The term 'employer' * * * shall not include * * * any State or political subdivision thereof."); Pet. App. 4a.

In 1985, the Union[1] began organizing petitioners' employees. Pet. App. 4a. In January 1988, the Union filed representation petitions with the Michigan Employee Relations Commission (MERC). *Id.* at 4a-5a, 33a, 46a. The Union filed the representation petitions with MERC rather than the Board because, under the then-governing Board decision in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the Board would not exercise

[1] Two labor organizations are involved in this case, the American Federation of State, County & Municipal Employees (AFSCME) and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). AFSCME conducted all but one of the organizing campaigns at petitioners' facilities. See Pet. App. 5a n.1, 32a-33a. For purposes of this brief, the distinction between AFSCME and the UAW is not relevant. Accordingly, we refer to the two labor organizations collectively as "the Union."

jurisdiction over Section 2(2) employers (such as petitioners) when they have close ties to an exempt governmental entity (such as MDMH). Pet. App. 4a, 10a-13a, 33a & n.4, 46a.

MERC asserted jurisdiction over petitioners and MDMH pursuant to state law. Rejecting MDMH's position to the contrary, MERC found that MDMH is a "joint employer[ ]" of petitioners' employees. Pet. App. 4a-5a, 47a, 48a.[2] On April 20, 1989, MERC conducted elections among the employees at petitioners' facilities. The Union won each election and was certified by MERC as the employees' collective bargaining representative. *Id.* at 5a-6a, 33a, 53a & n.12. MDMH, however, refused to bargain with the Union and sought judicial review of MERC's certifications in state court. *Id.* at 6a, 33a, 53a & n.12. Petitioners, in turn, refused to honor MERC's certifications in light of MDMH's unwillingness to participate in collective bargaining. *Id.* at 6a, 33a. After protracted state-court litigation, MERC's certifications were upheld by the Michigan Court of Appeals. *Id.* at 5a, 6a, 47a; see *AFSCME* v. *Louisiana Homes, Inc.*, 511 N.W.2d 696 (Mich. Ct. App. 1993) (per curiam), cert. denied, 513 U.S. 1077 (1995).

The Board, however, then overruled the *Res-Care* jurisdictional standard that had been in place at the time MERC conducted the elections. See *Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995). In its *Management Training* decision, the Board held that it will assert jurisdiction over employers (such as petitioners) with close ties to an exempt governmental

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[2] Two otherwise independent entities may be deemed "joint employers" of the same group of employees if the firms share or codetermine essential employment terms of those employees. See Pet. App. 32a n.3.

entity, provided that the employer at issue meets (i) Section 2(2)'s definition of "employer" and (ii) the Board's established monetary standards for an assertion of jurisdiction in the relevant industry. See Pet. App. 13a-14a.

Following the Board's *Management Training* decision, MDMH requested the Michigan Court of Appeals to reconsider its earlier affirmance of MERC's certifications of the Union. Pet. App. 6a, 49a. Granting that request, the state court of appeals concluded that MERC's jurisdiction over petitioners was preempted by the NLRA. The state court therefore vacated MERC's certifications of the Union. *Id.* at 6a-7a, 33a-34a, 47a-48a; see *AFSCME* v. *Department of Mental Health*, 545 N.W.2d 363 (Mich. Ct. App. 1996).

2. In March and July 1996, the Union requested petitioners to engage in collective bargaining pursuant to the NLRA without MDMH's participation. Petitioners, however, refused to bargain with the Union on that basis. Pet. App. 7a-8a, 34a, 54a. The Union then filed unfair labor practice charges against petitioners with the Board. *Id.* at 8a, 34a. Acting on the Union's charges, the Board's General Counsel issued a consolidated complaint alleging, in relevant part, that petitioners had violated Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), by refusing to bargain with the Union based on the 1989 MERC elections. Pet. App. 8a, 34a-35a, 42a.[3]

After a hearing, the Board (in agreement with the administrative law judge) sustained that allegation. Pet. App. 34a-35a. Applying settled Board precedent,

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[3] Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. 158(a)(5).

the Board concluded that it was appropriate to afford administrative comity to the 1989 MERC elections because: (i) the result of the elections reflected the voters' true representational desires, (ii) there had been no showing of election irregularities, and (iii) due-process requirements had been observed. *Id.* at 34a-35a & n.8 (applying *William Okie, Jr. (Standby One Associates)*, 274 N.L.R.B. 952, 953 (1985)); see Pet. App. 71a-72a. The Board rejected petitioners' contention that their refusal to bargain with the Union was justified by the fact that MDMH would no longer be at "the bargaining table." *Id.* at 35a; see *id.* at 72a-73a. Rather, the Board concluded that "the removal of joint employer [MDMH] from the bargaining table is not such an unusual circumstance as to relieve [petitioners] from their bargaining obligation" under Section 8(a)(5). *Id.* at 35a. As a remedy, the Board ordered petitioners to bargain with the Union. *Id.* at 36a-37a, 85a-89a.

3. The court of appeals enforced the Board's order as "supported by substantial evidence on the record." Pet. App. 27a. Examining the evidence in light of the Board's standard for affording comity to the decisions of other tribunals, the court held that "the Board did not err in extending comity to the [1989] MERC-conducted elections." *Id.* at 23a. Like the Board, the court found that (i) "the state-conducted elections reflected the true desires of the affected employees," (ii) there had been "no showing of election irregularities," and (iii) there had been "no apparent deviation from due process requirements." *Id.* at 18a.

The court of appeals rejected petitioners' contention that the 1989 MERC elections should be set aside based on an "alleged misrepresentation that MDMH was a joint employer in these proceedings." Pet. App. 19a. Petitioners argued that, under *Mitchellace, Inc.* v.

NLRB, 90 F.3d 1150 (6th Cir. 1996), the court should apply a multi-factor test for determining whether a misrepresentation during an organizing campaign warrants setting aside a Board-conducted election. The court, however, held *Mitchellace* inapplicable because "there was no misrepresentation concerning MDMH's status as a joint employer." Pet. App. 21a. The court explained that, "[a]t the time that MERC conducted the elections, it was the case that MDMH was considered to be a joint employer"; further, "everyone knew, or should have known, that the status of [MDMH] as employer under [state law] was subject to vigorous litigation." *Id.* at 20a. The court thus found no evidence in the record that petitioners' employees had been "misled by the status of MDMH at the time of the elections." *Ibid.*

The court of appeals also rejected petitioners' contention that "the changed circumstance of MDMH not being at the bargaining table called into question whether the election results reflected the desires of their employees to be represented by the Union[]." Pet. App. 21a. The court observed that petitioners' annual contracts with MDMH "do not prevent the employers from agreeing to increase [wage and benefit] terms during collective bargaining with their employees." *Id.* at 22a. Moreover, the court found that "the only real change in the employees' situation resulting from the Board's recognition of the [1989] MERC-conducted elections * * * is that [petitioners'] employees are now authorized to strike," which "strengthen[s] their ability to enforce their bargaining

demands." *Ibid.*[4] Given those circumstances, the court found that it was "not very likely that" MDMH's absence from "the bargaining table would have affected employee views and attitudes about union representation." *Ibid.*

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. To the contrary, petitioner's primary argument is that the Sixth Circuit misapplied its own precedents. Accordingly, further review is unwarranted.

1. Petitioners err in contending (Pet. 9-23) that the court of appeals applied an incorrect legal test in determining whether to accept the results of the 1989 MERC elections. The Board's "established practice" is to afford administrative comity to "the elections and certifications of responsible state government agencies" when (i) "the state proceedings reflect the true desires of the affected employees," (ii) "election irregularities are not involved," and (iii) "there has been no substantial deviation from due process requirements." *William Okie, Jr. (Standby One Assocs.)*, 274 N.L.R.B. 952, 953 (1985) (quoting *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977), enforcement denied on other grounds, 608 F.2d 965 (3d Cir. 1979)). See, *e.g.*, *Doctors Osteopathic Hosp.*, 242 N.L.R.B. 447, 448 (1979), enforced mem., 624 F.2d 1089 (3d Cir. 1980); *St. Luke's Hosp. Ctr.*, 221 N.L.R.B. 1314, 1315, enforced, 551 F.2d

[4] Before the Board asserted jurisdiction, Michigan law would have barred the employees from calling a strike. See Pet. App. 5a, 22a (noting effect of Michigan's Public Employment Relations Act).

476 (2d Cir. 1976); *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970).

Applying those settled principles, the court of appeals correctly concluded that substantial evidence supported the Board's decision to afford administrative comity to the 1989 MERC elections. See Pet. App. 18a-19a, 27a. First, the court found that "the state-conducted elections reflected the true desires of the affected employees." *Id.* at 18a. In support of that finding, the court cited evidence that "eighty-five percent of the employees in the thirty subject [bargaining] units voted in favor of union representation." *Ibid.* The court also cited evidence that, "in nine of the units, there were zero votes cast against union representation." *Ibid.* Second, the court found that there had been "no showing of election irregularities." *Ibid.* The court noted that "no objections were filed in these elections" and that, "[a]fterwards, there was no decertification petition or challenge to the MERC elections." *Ibid.* Third, the court found "no apparent deviation from due process requirements." *Ibid.* The court cited "testimony that state-election [*i.e.*, MERC's] procedures are as rigorous as the Board's." *Ibid.* Those findings raise no issue warranting this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

a. Petitioners nonetheless argue (Pet. 9-11) that the court of appeals erred by applying the holding of *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), to decide whether to accept the results of the 1989 MERC elections. Petitioners' contention, however, is based on a mischaracterization of the court of appeals' decision. The Board's decision in *Management Training* articulated a new two-part test for determining *whether the Board will exercise jurisdiction* over an employer with

close ties to an exempt governmental entity. See *id.* at 1358. Under that test, the Board inquires whether the employer at issue meets (i) the NLRA's definition of "employer" and (ii) the Board's established monetary standards for an assertion of jurisdiction in the relevant industry. *Ibid.*; see Pet. App. 13a-14a. *Management Training* replaced an earlier Board test that examined whether the exempt governmental entity possessed substantial control over essential employment terms of the Section 2(2) employer's workers. See *Res-Care, Inc.*, 280 N.L.R.B. 670, 670 n.1, 673-674 (1986); Pet. App. 13a; pp. 2-3, *supra.*

Contrary to petitioners' suggestion, the court of appeals in this case did *not* apply (much less extend) *Management Training* to determine *whether to accept the results* of the 1989 MERC elections. Rather, in answering that question, the court (like the Board) applied the Board's settled three-part test, articulated in *Standby One Associates*, *supra*, for determining whether an election conducted by a responsible state agency acting with ostensible jurisdiction is entitled to administrative comity. See Pet. App. 18a-19a (applying *Standby One Associates*, *supra*); *id.* at 34a-35a & n.8. And, the court correctly held that, consistent with that test, substantial evidence supported the Board's decision to afford administrative comity to the 1989 MERC elections. See *id.* at 18a-19a, 27a.[5]

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[5] The court of appeals applied *Management Training* to resolve a different question—the effect of another set of elections—not before this Court. See Pet. App. 23a-27a. In addition to the 1989 elections at issue here, MERC conducted a set of elections among the employees of certain group home operators (including two of petitioners) *after* the Board had issued its *Management Training* decision in July 1995. The Union won those elections. See *id.* at 7a, 8a n.3. The Board declined to afford those elections administrative

b. Petitioners also contend (Pet. 13-23) that the court of appeals erred in refusing to apply the multi-factor test set forth in *Mitchellace, Inc.* v. *NLRB*, 90 F.3d 1150 (6th Cir. 1996), when determining whether a "misrepresentation" during an organizing campaign warrants setting aside a Board-conducted election. See Pet. App. 20a (discussing *Mitchellace* factors). "The *Mitchellace* analysis," petitioners urge, "is appropriate in this case because all parties involved with the election were subject to the misrepresentation that the State of Michigan [*i.e.*, MDMH] was a joint employer" of petitioners' employees. Pet. 14.

The proper scope of the Sixth Circuit's *Mitchellace* decision is not an issue that warrants this Court's review, and the court of appeals properly resolved that question in any event. As the court of appeals explained, the *Mitchellace* test was not applicable because there was no "misrepresentation" with respect to MDMH's status as a joint employer at the time of the 1989 MERC elections. See Pet. App. 20a. When MERC conducted the 1989 elections, MDMH in fact "was considered to be a joint employer." *Ibid.* Furthermore, "everyone knew, or should have known, that the status of [MDMH] as employer under [state law] was subject to vigorous litigation" and thus potentially subject to change. *Ibid.* In deciding whether to vote for or against the Union, a reasonable employee therefore would have taken into account the possibility that MDMH ultimately might not be a party to collec-

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comity, and the court upheld the Board's decision on the ground that *Management Training* had *already* deprived MERC of jurisdiction over those employers at the time the elections were held. See *id.* at 23a-26a, 34a & n.7, 35a-36a, 74a. The Union has not sought this Court's review of that ruling.

tive negotiations between petitioners and the Union (assuming the Union was selected as the employee's bargaining representative). Absent evidence demonstrating that the employees who voted in the 1989 MERC elections had been "misled by the status of MDMH at the time of the elections," *ibid.*, the court properly declined to apply its *Mitchellace* test to this case.[6]

2. Petitioners also err in contending (Pet. 24) that "application of Board comity in this matter undermines the doctrine of federal preemption." As a general rule, a State is preempted from exercising jurisdiction over representational matters as to which the Board has asserted its jurisdiction. See *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767 (1947). However, Section 14(c)(2) of the NLRA, 29 U.S.C. 164(c)(2), permits "any agency * * * of any State" to "assum[e] and assert[] jurisdiction over labor disputes over which the Board declines * * * to assert jurisdiction." Here, at the time of the 1989 elections, the Board had declined to exercise its jurisdiction over employers (such as petitioners) with close ties to an exempt governmental entity. See Pet. App. 4a, 10a-

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[6] Petitioners contend (Pet. 13) that their inability to know in advance that MDMH would ultimately be absent from the bargaining table deprived them of the opportunity to mount an effective campaign against the Union. That contention is unpersuasive. Petitioners posit (see Pet. 3 n.1, 12, 19) that MDMH controls the amount that petitioners are able to pay employees and that MDMH will not agree to increase the reimbursement levels specified in its annual contracts with petitioners. Nothing prevented petitioners from making the same arguments to the voters before the 1989 MERC elections, or from advising the voters that state law prohibited them from seeking to alter MDMH's position by calling a strike.

13a, 33a & n.4, 46a; see also *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986). MERC was therefore authorized by the NLRA to assert jurisdiction over petitioners at that time. The Board's extension of administrative comity to the election results thus represented a proper application of federal law and was consistent with principles of federal preemption.

3. Finally, petitioners are mistaken in asserting (Pet. 25-28) that MDMH's absence from the bargaining table is a "changed circumstance" that required the court of appeals to reject the results of the 1989 MERC elections. As the court of appeals found, "the only real change in the employees' situation resulting from the Board's recognition of the [1989] MERC elections * * * is that [petitioners'] employees are now authorized to strike." Pet. App. 22a; see pp. 6-7 & note 4, *supra*. While petitioners' employees would have been prohibited from striking against MDMH under state law before the Board overruled *Res-Care, Inc.* and asserted jurisdiction, they now may strike against petitioners under the NLRA. Because that change "strengthen[s]" rather than weakens the employees' "ability to enforce their bargaining demands," the court of appeals correctly found that it was "not very likely that the absence of the MDMH at the bargaining table would have" adversely "affected employee views and attitudes about union representation." Pet. App. 22a. To the contrary, to the extent they had any effect, the NLRB's assertion of jurisdiction, MDMH's absence from the bargaining table, and the employees' resulting ability to strike, would have increased the attractiveness of union representation.

Petitioners nonetheless urge (Pet. 27) that "[e]mployees would hardly have voted for a decrease in their wages to finance a union dues deduction, in light of the

improbability of wage increases at the bargaining table." That argument is incorrect for two reasons. First, it is based on the unwarranted assumption that employees seek collective representation only to bargain over wages. Employers and unions may choose to bargain over a variety of non-wage subjects, such as employee evaluation and disciplinary procedures, grievance procedures, and scheduling of work. See 29 U.S.C. 158(d) (defining collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours, and other terms and conditions of employment").

Second, even with respect to wages, petitioners' annual contracts with MDMH do not prevent petitioners from agreeing to wage increases. See Pet. App. 22a. Through collective bargaining, petitioners and the Union may be able to identify cost savings in areas of petitioners' operations to pay for a wage increase. Further, the employees' ability to call a strike against petitioners under the NLRA is likely to have a bearing on whether MDMH will agree to raise the reimbursement rates in its annual contracts with petitioners in order to fund any wage increases petitioners and the Union may negotiate during collective bargaining.

For similar reasons, petitioners err in suggesting (Pet. 26, 28) that the present case involves changed circumstances similar to those at issue in *NLRB* v. *Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986) (*Parsons*). In that case, the court concluded that a new election was required when, after holding an initial election in a bargaining unit consisting of *both* full- and part-time faculty members, the Board modified the bargaining unit to include *only* part-time faculty. *Id.* at 504. The court found that, in the circumstances of that

case—which included the union's narrow margin of victory—the "realities of the workplace" did not support the Board's determination that part-time faculty would not have voted differently if had they had known in advance that the bargaining unit would not include full-time faculty. *Id.* at 507.

No such conclusion can be drawn here. The Board did not modify the scope of the bargaining units in which MERC conducted the 1989 elections. Furthermore, as discussed above, the "realities of the workplace," *Parsons*, 793 F.2d at 507, support the conclusion that petitioners' employees would not have voted differently even if they had known for certain that the NLRB would assert jurisdiction and that, as a result, MDMH would not be a participant in collective bargaining. Those changed circumstances allow employees to strike in support of their bargaining demands—an ability that makes union representation more rather than less attractive, and enhances the employees' ability to influence not only petitioners' conduct but also MDMH's willingness to reimburse petitioners for any increased wages. Moreover, unlike the election in *Parsons*, the results of the 1989 MERC elections were not close. In the aggregate, 85% of the employees voted in favor of the Union. Pet. App. 18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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