No. 12-1178

In the Supreme Court of the United States

ROCHESTER GAS AND ELECTRIC CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a collective bargaining agreement that relieves an employer of its statutory duty to engage in collective bargaining before making a particular management decision also necessarily relieves the employer of its distinct duty to bargain with respect to the effects of its decision on its employees' terms and conditions of employment.

2. Whether the courts of appeals must defer to the National Labor Relations Board's interpretation of a collective bargaining agreement.

3. Whether an employer's statutory duty to engage in effects bargaining is limited to contexts in which the effects have a significant impact on the continued employment of bargaining unit employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 706 F.3d 73. The decision and order of the National Labor Relations Board (Pet. App. 36a-97a) is reported at 355 N.L.R.B. 507.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2013. The petition for a writ of certiorari was filed on March 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The "establishment and maintenance of industrial peace" is a "fundamental aim" of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.* See *First National Maintenance Corp.* v. *NLRB*, 452 U.S.

666, 674 (1981). Central to achieving that end is the Act's "promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *Ibid.* The Act accordingly grants "[e]mployees * * * the right * * * to bargain collectively through representatives of their own choosing." 29 U.S.C. 157.

Congress enacted provisions to implement that right in Section 8 of the Act, 28 U.SC. 158. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to "bargain collectively" with the representative union of its employees. 29 U.S.C. 158(a)(5); cf. 29 U.S.C. 158(b)(3). That statutory duty requires the employer to "meet at reasonable times and confer in good faith" with the union about the subjects in Section 8(d), including "wages, hours, and other terms and conditions of employment," 29 U.S.C. 158(d). See *First Nat'l Maint.*, 452 U.S. at 674-675 & n.12; *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). "Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition" to preserve for the National Labor Relations Board (NLRB or Board) the "power further to define those terms" in case-by-case adjudication. *First Nat'l Maint.*, 452 U.S. at 675 & n.14; see *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495-496 (1979) (Board's adjudicatory interpretation is entitled to "considerable deference"). The Board, in turn, has long construed "terms and conditions of employment" in Section 8(d) to encompass changes that would "material[ly], substantial[ly], and * * * significant[ly]" affect employees in the workplace. See *Peerless Food Prods.*, 236 N.L.R.B. 161, 161 (1978); see also *El Paso Elec. Co.* v. *NLRB*, 681 F.3d

651, 669-670 (5th Cir. 2012) (discussing illustrative decisions).

The Board has also long interpreted Section 8(a)(5)'s obligation to engage in collective bargaining as encompassing an obligation to engage in both "decisional bargaining" about an employer's underlying decision and "effects bargaining" about the effects that an employer's decision will have on the terms and conditions of employment. See, *e.g.*, *Challenge-Cook Bros.*, 282 N.L.R.B. 21, 26 (1986), enforced, 843 F.2d 230, 232-233 (6th Cir. 1988); *Holiday Inn*, 237 N.L.R.B. 1042, 1042-1043 (1978), enforced in relevant part *sub nom. Davis* v. *NLRB*, 617 F.2d 1264, 1267-1270 (7th Cir. 1980). In *First National Maintenance,* this Court ratified that decisional-bargaining and effects-bargaining distinction by holding that an employer's decision to terminate part of its business was a core entrepreneurial decision falling outside the scope of Section 8(d)'s mandatory bargaining subjects, even though the employer retained the distinct "duty to bargain about the results or effects of its decision." 452 U.S. at 676-677 & n.15, 686. The Court explained that "the 'effects' bargaining mandated by § 8(a)(5)"—*i.e.*, mandatory "bargaining over the effects of a decision"—"must be conducted in a meaningful manner and at a meaningful time" and, when warranted, the "Board may impose sanctions to insure [the] adequacy" of such bargaining. *Id.* at 681-682.

The statutory right to "bargain collectively" with respect to various terms and conditions of employment, 29 U.S.C. 157, 158(a)(5) and (d), is not absolute. "This Court long has recognized that a union may waive a member's statutorily protected rights" under the NLRA by entering into a contract on behalf of its members. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705

(1983). The Court, however, "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking" to waive the NLRA-protected right is "clear and unmistakable." *Id.* at 708.

2. a. Petitioner is a utility company that serves gas and electric customers in New York. Pet. App. 5a. Petitioner's low-voltage group employs eight unionized employees. *Id.* at 5a-6a. At all relevant times, respondent Local Union 36, International Brotherhood of Electrical Workers (Union), was the exclusive representative of those employees. *Id.* at 5a.

From at least 1990 and until January 2006, petitioner authorized low-voltage-group employees to use petitioner's service vehicles to commute to and from work and to keep the vehicles at home during off-duty hours. Pet. App. 6a. During that period, petitioner paid for the vehicles, gas, maintenance, and insurance. *Id.* at 6a, 59a. Petitioner withheld taxes from each employee's paycheck based on the amount of compensation the employee derived from use of a company vehicle, and petitioner informed potential employees that its vehicle-use policy formed part of the company's "compensation package." *Id.* at 6a, 58a-60a (annual value of taxable imputed income from vehicle use ranged from $426 to $663 per employee).

In November 2005, petitioner decided to rescind its vehicle-use policy and informed both low-voltage-group employees and the Union that its decision would become effective January 1, 2006. Pet. App. 6a, 56a-57a. The Union objected and repeatedly demanded bargaining with respect to both the decision to rescind the vehicle-use policy and the effects of that decision on employees'

terms and conditions of employment. *Id.* at 6a, 60a, 83a-84a.

In response, petitioner asserted that its collective bargaining agreement (CBA) with the Union authorized the decision and lifted any obligation to bargain over the decision or the effects thereof. Pet. App. 6a. The relevant contract did not specifically refer to petitioner's vehicle-use policy. Petitioner instead relied on general provisions in Article 8 of the contract, which provided that, unless otherwise expressly restricted, "all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in [petitioner], including but not limited to the rights," as pertinent here, "to regulate the use of * * * equipment[] and other property of [petitioner]" and "to issue, amend and revise reasonable policies, rules, regulations, and practices." *Id.* at 6a, 77a-78a. Article 7 also specified that petitioner "shall have the exclusive right to issue, amend, and revise * * * work rules, customs, regulations, and practices," except as otherwise provided in the contract. *Id.* at 76a. Article 24 stated that petitioner retained "the exclusive and unilateral right to issue, amend, revise or terminate any or all benefits and benefit plans." *Id.* at 79a.

The Union filed a grievance but, after six months, it withdrew the grievance to pursue its remedies with the NLRB. Pet. App. 7a.

b. In October 2006, the Board's General Counsel filed an administrative complaint alleging that, as relevant here, petitioner violated the collective bargaining obligations of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5). See Pet. App. 7a-8a. The complaint initially alleged that petitioner violated the Act by failing to provide the Union with an opportunity to bargain with respect to both

the "decision" to change the vehicle-use policy and the "effects" thereof. The complaint was later amended to challenge only petitioner's failure to bargain with respect to the effects of the policy change on employees' terms and conditions of employment. *Ibid.*; *id.* at 37a n.2, 51a-52a & n.3.

An administrative law judge (ALJ) concluded after an evidentiary hearing that petitioner violated Section 8(a)(5). Pet. App. 98a-146a. The ALJ found that petitioner's "decision to eliminate the [vehicle-use] benefit" reduced employees' overall compensation and had a "substantial monetary effect" that changed "employees' terms and conditions of employment in ways that were material, substantial, and significant." *Id.* at 128a-129a. The ALJ accordingly concluded that the "effects on employees of losing the benefit" is "a mandatory subject of bargaining [because] it relates to their wages and conditions of employment." *Id.* at 127a-128a.

The ALJ further determined that the Union had not waived its members' statutory right to effects bargaining in its contract with petitioner. Pet. App. 130a-131a. The ALJ found that none of the CBA's relevant contractual provisions "address [either] the removal of service vehicles at all" or "the effects of taking any action" under the provisions, and that no evidence suggested that any "negotiations * * * deal[t] with effects bargaining." *Id.* at 131a. The ALJ reasoned that "general contractual provision[s]" should not to be read "to waive [such] a statutorily protected right" unless the waiver is clear, *id.* at 130a (quoting *Metropolitan Edison*, 460 U.S. at 708), and, under Board precedent applying that "clear and unmistakable standard," a contract will waive the right to effects bargaining only when it is "clear and unmistakable that effects bargaining is being waived."

Ibid. Because the contract contains "nothing that clearly gives [petitioner] the right to avoid effects bargaining" and because the "Union timely and continuously requested to bargain over the matter," the ALJ concluded the Union did not waive that statutory right. *Id.* at 131a.

c. The Board affirmed the ALJ's "rulings, findings, and conclusions," and adopted the ALJ's recommended order with a modified remedy, Pet. App. 37a & n.1. See *id.* at 36a-97a. Like the ALJ, the Board found no occasion to determine whether petitioner's refusal to bargain over the decision to modify the "vehicle practice was lawful." *Id.* at 38a. It instead concluded that the "Union did not waive its right to effects bargaining" and that petitioner "unlawfully refused to bargain over the effects of its decision" to change its vehicle-use policy after the Union sought to bargain over the "monetary impact of the decision." *Id.* at 38a-39a & n.4.

3. The court of appeals denied petitioner's and the Union's cross-petitions for review and enforced the Board's order. Pet. App. 1a-35a. As relevant here, the court rejected petitioner's contention that the Union waived the right to bargain over the effects of the Vehicle Policy Change. *Id.* at 5a, 9a-23a, 32a.

The court of appeals explained that Section 8(a)(5) of the Act requires an employer "to engage in bargaining" with respect to both a decision to make certain changes in its business and "the effects that the decision might have upon employees' terms and conditions of employment." Pet. App. 9a-10a. A union, however, may waive that statutory bargaining right either expressly in a collective bargaining agreement or impliedly based on the "structure of the agreement and the parties' course of conduct." *Id.* at 10a-11a (citation omitted). Following

this Court's decision in *Metropolitan Edison*, the court of appeals explained that such a waiver must be "clear and unmistakable." *Id.* at 10a (quoting 460 U.S. at 708). The court also emphasized that while courts should defer to the Board's reasonable interpretation of the NLRA's "clear and unmistakable waiver" requirement as a reasonable construction of the Act, *id.* at 11a-12a, 17a, courts "do not * * * defer to the Board's interpretation of a contract" and instead engage in *de novo* contractual interpretation on review. *Id.* at 12a-14a, 18a.

The court of appeals then explained that a two-step analysis is appropriate when determining whether a union has waived its employees' statutory right to bargain. Pet. App. 5a, 15a. First, courts must look to the text of a CBA to determine *de novo* whether the contract "clearly and unmistakably" resolves the disputed issue. *Id.* at 14a-15a. If it does, the union has exercised the "statutory right to bargain" for its members and "resolved the matter" by contract. *Id.* at 15a. Second, if the contract does not directly resolve the issue, courts must determine whether the union has otherwise "clearly and unmistakably *waived* [the] right" to bargain over the issue in the CBA's provisions or by its past conduct, "including [its] past practices and bargaining history." *Ibid.* That waiver question, the court reasoned, is "a mixed question of law and fact" under which the Board's factual findings are reviewed for "substantial evidence." *Id.* at 14a, 16a.

In this case, the court of appeals noted, the question whether the CBA gave petitioner "the right to make the decision" to change its vehicle-use policy without collective bargaining was "not before [it]." Pet. App. 20a n.12. The court concluded, however, that, "even if [the CBA's] terms and conditions" gave petitioner "the right to alter

the terms and conditions of employment" by changing its policy, the contract did "not clearly and unmistakably set out whether (and how) [petitioner] must account for the effect that the Vehicle Policy Change has on [its] employee['s] benefits." *Id.* at 20a-21a. The court accordingly reviewed the Board's factual "finding that the Union" had "not waived its right to bargain over the effects of the Vehicle Policy Change" for its members and determined that that "finding is supported by substantial evidence": The agency record showed that "no negotiations over the effects of the decision" were ever held; no evidence about the CBA negotiations indicated "any intent by the Union to consciously waive" the right to effects bargaining; and the CBA itself "is silent" about such bargaining. *Id.* at 21a-22a. Accordingly, the court of appeals concluded, "there is no adequate basis for implying the existence of waiver," *id.* at 22a (quoting *Metropolitan Edison*, 460 U.S. at 708), and nothing in any "general contractual provision" cited by petitioner supported an inference that "'the parties intended to waive [the] statutorily protected right' to bargain over effects of a (contractually authorized) unilateral change affecting [petitioner's] terms and conditions of employment," *id.* at 23a (first brackets in original).

In his concurring opinion (Pet. App. 34a-35a), Judge Straub explained that the majority's two-step framework did not "disturb the substance of the established principles" that govern this case. *Id.* at 34a.

ARGUMENT

Petitioner contends (Pet. i, 9, 19-20) that a collective bargaining agreement that authorizes an employer unilaterally to make a decision without engaging in collective bargaining necessarily displaces the distinct obligation to bargain about the effects that the implemented

decision will have on employees' terms and conditions of employment. The court of appeals correctly rejected that contention, which raises a narrow question that has arisen only infrequently and does not warrant review. The petition lists (Pet. i) two other questions, but petitioner fails to explain why either would warrant certiorari. No further review is warranted.

1. a. The NLRA protects employees' statutory right to collective bargaining (29 U.S.C. 157) by requiring that their employer "bargain collectively" with the employees' representative union. 29 U.S.C. 158(a)(5). That duty, in turn, requires that the employer "meet at reasonable times and confer in good faith" with the union "with respect to," *inter alia*, "wages, hours, and other terms and conditions of employment," 29 U.S.C. 158(d). See *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674-675 & n.12 (1981). "Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition" to preserve the NLRB's "power further to define those terms." *Id.* at 675 & n.14. Both the Board and this Court have long recognized that the subjects "with respect to" which bargaining is mandatory, 29 U.S.C. 158(d), reflect an obligation not only to bargain about an employer's "decision" to change wages, hours, and other terms and conditions of employment but also the "effects" that an employer's decision will have on the terms and conditions of employment when those effects are "material, substantial, and * * * significant." See pp. 2-3, *supra*; cf. *International Ladies Garment Workers Union* v. *NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972) ("[I]t is now well settled that, quite apart from its obligation to bargain over its *decision* to relocate, the company

was under an independent duty to bargain over the effects of that decision.").

Those two statutory bargaining obligations are distinct. Whereas decisional bargaining requires good-faith discussions before an employer makes a decision to change employees' terms and conditions of employment, effects bargaining takes an employer's decision as a given and addresses only "alternatives that the parties could explore" to address the decision's effects "without calling into question the [employer]'s underlying, nonbargainable decision." *Natomi Hosps., Inc.*, 335 N.L.R.B. 901, 903-904 (2001) (*Good Samaritan*). Thus, while "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time," *First Nat'l Maint.*, 452 U.S. at 681-682, such bargaining does not stand as a barrier to an employer's ability to make business decisions. Nor does effects bargaining impose any "obligation [on an employer] to agree with union proposals": The employer must simply "meet with the union, provide information necessary to the union's understanding of the problem, and in good faith consider any [union] proposals" (*id.* at 678 nn.16-17) for addressing the effects that the employer's decision will have on the terms and conditions of its employees' employment.

The longstanding distinction between decisional and effects bargaining benefits both employers and employees. By separating the two, an employer can better negotiate desired flexibility to make business decisions without collective bargaining. Petitioner, for instance, presumably had concluded that its CBA with the Union confirms its ability to make (without bargaining) a broad range of management decisions, including decisions to "promote, demote, transfer, [or] lay off" employees and

to "expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation or service." Pet. App. 77a. As a matter of common sense, it would be significantly more difficult to secure a union's agreement to provisions waiving the right to bargain collectively about such significant matters, unless the union could reserve the ability to bargain over the significant effects of such decisions.

Of course, a union may waive its members' right to bargain collectively about the effects of such decisions. The "Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation." *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 707 n.11 (1983). But this Court has long held under the NLRA that such a waiver of "a statutorily protected right" may not be inferred from a "general contractual provision" in a CBA unless the waiver is "clear and unmistakable." *Id.* at 708; see *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-80 (1998) (unanimously reaffirming and extending this rule to CBA waivers of rights protected by another federal statute). The NLRB has thus concluded that "[c]ontractual language waiving a Union's bargaining rights as to a certain decision does not constitute a waiver of the right to bargain over that decision's effects" because, "[i]n the absence of [the] clear and unmistakable waiver" required by *Metropolitan Edison*, "such bargaining is still required." *Good Samaritan*, 335 N.L.R.B. at 901-902. The court of appeals properly applied those principles here. See Pet. App. 10a, 16a-17a (following *Metropolitan Edison*); accord *NLRB* v. *Challenge-Cook Bros.*, 843 F.2d 230, 232-233 (6th Cir. 1988).

Petitioner contends (Pet. 18-22) that the court of appeals erred and should have adopted petitioner's view that (Pet. 9) an employer need not "bargain with the union about the effects of a decision the employer has a unilateral right to make under a collective bargaining agreement." But petitioner cites no authority adopting such a per se rule. Cf., *e.g.*, *Enloe Med. Ctr.* v. *NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005) (recognizing that parties may treat decisional and effects bargaining separately in CBAs). Thus, although petitioner asserts (Pet. 19) that the court of appeals incorrectly "[t]reat[ed] the effects of [an employer's] decision as separate from the decision itself," petitioner provides no authority to support its conclusion that effects bargaining is necessarily displaced by a CBA that displaces decisional bargaining.

Petitioner fares no better with its separate contention (Pet. 21) that "[e]ffects bargaining only makes sense in the context of decisions that are reserved to an employer * * * as a matter of law, because of the employer's inherent right to run the business," and "not because of a collective bargaining agreement."[1] Petitioner, for instance, incorrectly suggests (Pet. 21) that *First National Maintenance* and other cases ordered effects bargaining because unions otherwise would lack the ability to bargain about decisions "reserved to man-

[1] Petitioner's argument does not appear to fit petitioner's own understanding of this case. Even if the CBA indicated that petitioner had a right unilaterally to change its vehicle-use policy as part of its authority "to regulate the use of * * * equipment[] and other property of [petitioner]" and "to issue, amend and revise reasonable policies, rules, regulations, and practices," petitioner's CBA itself embodies the view that those decisions reflect "statutory and inherent managerial rights," Pet. App. 77a-78a, not rights conveyed solely by the CBA.

agement by law." The Court in *First National Maintenance* concluded that an employer was not required to bargain over its decision to terminate part of its business while noting that effects bargaining remained mandatory; the Court did not conclude that effects bargaining was necessary because decisional bargaining was unavailable. See 452 U.S. at 677 & n.15 (employer never challenged in court the Board's order requiring it to "bargain about the results or effects" of closing its plant).

Petitioner has identified no authority to undermine the NLRB's interpretation of Section 8(a)(5) and (d) as imposing a distinct duty to engage in "effects" bargaining when an employer's decision sufficiently affects the "terms and conditions of employment," 29 U.S.C. 158(d). That longstanding and reasonable interpretation of the NLRB, endorsed by this Court in *First National Maintenance*, is entitled to substantial deference. See *First Nat'l Maint.*, 452 U.S. at 677 n.15, 681-682 ("There is no doubt that [the employer] was under a duty to bargain about the results or effects of its decision" under Section 8(a)(5); "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time"). And because employers have a distinct duty to engage in effects bargaining, it follows that employees' right to such bargaining will not be displaced by general contractual provisions that address decisional bargaining absent a clear and unambiguous waiver of employees' right to effects bargaining. See *Good Samaritan*, 335 N.L.R.B. at 901-902 (finding a general management rights-provision did not displace effects-bargaining rights); *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949) ("Management Functions"

clause did not clearly and unmistakably waive bargaining over changes to retirement plan).

b. The primary question that petitioner presents (Pet. i) concerns "whether an employer must bargain with the union about the effects of a decision the employer has a unilateral right to make under a collective bargaining agreement," Pet. 9. That question, however, has rarely been litigated. The Board and its administrative law judges have only infrequently considered effects-bargaining obligations in cases where decisional bargaining was contractually unnecessary. Likewise, only three courts of appeals—the court of appeals in this case, the Sixth Circuit in *Challenge-Cook Bros.*, 843 F.2d 230, and the D.C. Circuit in *Enloe*, 433 F.3d 834—have addressed the issue. And none of those decisions has produced a division of authority warranting review in this case.[2]

Petitioner contends (Pet. 11-12) that the effects-bargaining decision of the court of appeals conflicts with *Enloe*; *Bath Marine Draftsmen's Ass'n* v. *NLRB*, 475 F.3d 14 (1st Cir. 2007) (*Bath Marine*); and *Chicago Tribune Co.* v. *NLRB*, 974 F.2d 933 (7th Cir. 1992). But neither *Bath Marine* nor *Chicago Tribune* addressed effects bargaining. Both simply addressed whether CBAs allowed employers to make specific decisions without collective bargaining, not whether the employers were also excused from effects bargaining. *Bath Marine*, 475 F.3d at 17, 19; *Chicago Tribune*, 974 F.2d at 934-937.

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[2] Like the court of appeals here, *Challenge-Cook Bros.* concluded that CBA provisions giving an employer the right to make decisions without decisional bargaining did not unambiguously waive the right to effects bargaining. 843 F.2d at 233-234.

The D.C. Circuit in *Enloe* did address effects bargaining, but it did not adopt petitioner's position that collective bargaining about the effects of a decision is never necessary if a CBA permits the employer to make the underlying decision unilaterally. The employer in *Enloe* changed its staffing policy for nurses by making on-call duty mandatory, and the parties agreed that "the [CBA] authorized the [employer's unilateral] adoption of the mandatory on-call policy." 433 F.3d at 836. In deciding whether the contract also displaced the right to effects bargaining, the D.C. Circuit concluded that federal courts owe no deference to the Board in contract interpretation and determined that it would not follow the Board's lead in requiring a "clear and unmistakable" waiver of employees' right to effects bargaining. *Id.* at 838-839. The court stated that a CBA granting "an employer the unilateral right to make a particular decision" would not normally be thought to "reserv[e] a union's right to bargain over the effects of that decision," at least without "some language or bargaining history to support the proposition." *Id.* at 839. *Enloe* accordingly focused on whether "the parties intend[ed] the dichotomy" between decisional and effects bargaining and concluded based on the language of the contract and the "Union's [own] behavior" that the parties did not intend such a dichotomy. *Ibid.*; *id.* at 836, 839 (emphasizing that CBA expressly authorized the employer not only to adopt new policies but also to "*implement*" them and that CBA's use of "implementation" "means 'putting into effect'").

Although certain aspects of *Enloe*'s analysis are in tension with the court of appeals' analysis here, *Enloe* does not support the per se rule that petitioner advocates, namely, that an employer need not "separately

bargain about the 'effects' of a managerial decision" whenever a CBA gives the employer the "unilateral right to make that management decision." Pet. i; see Pet. 9, 19-22. Certiorari therefore is not warranted with respect to the first question that petitioner presents.

2. The petition separately presents the question whether federal courts must "defer to the [NLRB] in the interpretation of contracts." Pet. i. That question is not presented here. The court of appeals made clear that it does not "defer to the Board's interpretation of a contract such as a CBA" and instead applies *de novo* review "to interpret contracts." Pet. 12a, 18a. The court then applied *de novo* review to determine if the CBA unmistakably waived the right to effects bargaining. *Id.* at 22a. The second question presented thus warrants no further review.

3. Finally, petitioner seeks review of the question whether "the concept of effects bargaining extend[s] to managerial decisions that do not have a significant impact on the continued employment of bargaining unit members." Pet i. Petitioner does not contend that a division of authority warrants review and fails to identify any extraordinary circumstances warranting this Court's intervention. See Pet. 17-18.

Petitioner, for instance, errs in its assertion (Pet. 17) that *First National Maintenance* "took great pains to constrain the application of effects bargaining." The relevant agency effects-bargaining order was not challenged or otherwise limited in *First National Maintenance.* 452 U.S. at 677 & n.15. Petitioner likewise errs (Pet. 17-18) in his assertion that effects bargaining "reach[es] virtually every managerial decision" and goes "beyond any reasonable limit." Petitioner's citations to

NLRB decisions do not support that contention.[3] In any event, petitioner identifies no decision concluding that the Board's effects-bargaining doctrine impermissibly interprets Section 8(a)(5) and (d), much less a division of authority on the question that might warrant review.[4]

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[3] See *Wal-Mart Stores, Inc.*, 348 N.L.R.B. 274, 274-275, 293 (2006) (decision had effects of eliminating employees' "specialized and distinct meat-cutting skills and duties"; "greatly affected both job satisfaction and future earning potential"; and sufficiently transformed the nature of the work such that the previous bargaining unit was no longer appropriate), enforced *sub nom. United Food & Commercial Workers* v. *NLRB*, 519 F.3d 490 (D.C. Cir. 2008); *King Soopers, Inc.*, 340 N.L.R.B. 628, 628-629 (2003) (decision to adopt new work rule requiring all pharmacy employees to use prescription scanners that employer enforced with disciplinary action was subject to decisional bargaining, not effects bargaining; noting that circumstances were merely "analogous" to effects bargaining cases because the new-work-rule decision implemented a prior decision to install scanners).

[4] On June 24, 2013, this Court granted certiorari in *Noel Canning* v. *NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, No. 12-1281. The resolution of the two questions presented by the *Noel Canning* certiorari petition would be relevant to the President's exercise of his power to appoint Board Member Becker, who served on the three-member panel that decided this case. Petitioner did not discuss or challenge Member Becker's appointment to the Board in the court of appeals; the court of appeals did not address that appointment in its decision; and petitioner has not even noted, much less challenged, the appointment in its certiorari petition. Thus, any recess-appointment questions that petitioner might have raised are not properly before this Court, because they were neither pressed nor passed upon below, *United States* v. *Williams*, 504 U.S. 36, 41-42 (1992), and lie beyond the scope of the questions petitioner presented in this Court, *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). The Third Circuit has recently held that a reviewing court must address such recess-appointment issues *sua sponte* because they concern the statutory jurisdiction of a three-member Board panel. *NLRB* v. *New Vista Nursing and Rehabilitation*, No. 11-3440, 2013 WL 2099742, at *3-*6 (May 16, 2013), reh'g

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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pet. filed (July 1, 2013). The government disagrees with that holding and, on July 15, 2013, the Third Circuit ordered proceedings on the government's rehearing petition stayed pending this Court's decision in *Noel Canning*. Petitioner similarly does not challenge the court of appeals' decision on that ground.