No. 16-1370

In the Supreme Court of the United States

MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
DAVID HABENSTREIT
Assistant General Counsel
MEREDITH JASON
Deputy Assistant General Counsel
JULIE B. BROIDO
Supervisory Attorney
ERIC WEITZ
Attorney
National Labor Relations Board
Washington, D.C. 20570

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the National Labor Relations Board may reasonably consider an employee's lack of subjective intent to harm his employer's business in determining whether his conduct was so disloyal as to lose the protection of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, under this Court's decision in *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 16-1370

MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-76a) is reported at 837 F.3d 25. The decision and order of the National Labor Relations Board (Pet. App. 77a-112a) is reported at 357 N.L.R.B. 103.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2016. A petition for rehearing was denied February 10, 2017 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.*, guarantees employees "the right to self-organization, to form, join or

assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. This "broad" language is intended to advance the policy of the NLRA "to protect the right of workers to act together to better their working conditions." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). It has long been settled that Section 7 encompasses concerted efforts by employees to improve their terms and conditions of employment "through channels outside the immediate employee-employer relationship," including appeals to the general public. See *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 (1978).

Section 8(a)(1) of the NLRA, in turn, makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1). An employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activities protected by Section 7. *Washington Aluminum*, 370 U.S. at 12-13. At the same time, however, Section 10(c) of the NLRA protects an employer's right to discharge any employee "for cause," even in the midst of an ongoing labor dispute. 29 U.S.C. 160(c).

In *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) (*Jefferson Standard*), this Court addressed the interplay of these provisions. The Court held in that case that Section 10(c) permitted a television broadcasting company to discharge a group of technicians who distributed handbills "making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."

Id. at 471. Emphasizing that the handbill "made no reference to wages, hours or working conditions" or to any grievance against the employer, the Court held that "[t]he fortuity of the coexistence of a labor dispute affords these technicians no substantial defense." *Id.* at 476. In those circumstances, the Court explained, the employees forfeited the NLRA's protection by engaging in "such detrimental disloyalty" as to provide cause for discharge. *Id.* at 472. The Court therefore affirmed the National Labor Relations Board's (Board) conclusion that the employees' termination was lawful. *Ibid.*

In the decades following *Jefferson Standard*, the Board has developed a two-prong test for determining whether employee communications to third parties retain the protection of the NLRA, such that they cannot provide "cause" for discharge under Section 10. Under the Board's test, third-party communications are protected as long as they: (1) indicate that they are "related to an ongoing dispute between the employees and the employers"; and (2) are not "so disloyal, reckless or maliciously untrue as to lose the [NLRA's] protection." *American Golf Corp.* (*Mountain Shadows*), 330 N.L.R.B. 1238, 1240 (2000).

2. a. Petitioner is a home service provider that installs and maintains satellite television equipment. Pet. App. 79a. It employs service technicians who install the satellite receivers in customers' homes and are paid based on the number of installations completed in a given pay period. *Id.* at 81a. At the time of the events in question, DirecTV, Inc. was petitioner's sole client in the Orlando, Florida area. *Id.* at 79a. DirecTV paid petitioner a fee for every installation, and the contract between the two companies allowed for penalties if petitioner failed to meet performance standards. *Ibid.*

When DirecTV receivers are installed in customers' homes, they can be connected to a telephone line, which allows the customer to order pay-per-view programming, to have caller ID information displayed on the television screen, and to receive downloads of DirecTV software upgrades. Pet. App. 80a. Telephone-line connections also permit DirecTV to monitor which programs customers are viewing, benefiting DirecTV's business interests. *Ibid.* Telephone-line connections, however, are not necessary for the satellite receivers to function in any other respect, and, for a variety of reasons, many customers resist having the connections made. *Id.* at 80a, 82a.

b. In early 2006, DirecTV informed petitioner that it would begin imposing penalties if petitioner did not increase the rate of telephone-line connections. Pet. App. 81a. When less than 50% of newly installed receivers in a given month were connected to telephone lines, DirecTV would charge petitioner $5 for each unconnected receiver. *Ibid.* Petitioner subsequently informed its service technicians that it was modifying their pay structure accordingly. *Ibid.* The technicians would be paid $2 less for each installation, but would receive an additional $3.35 for every receiver they connected to a telephone line. *Ibid.* In addition, if the technicians did not connect at least 50% of newly installed receivers to a telephone line during any 30-day period, petitioner would deduct $5 from their pay for every unconnected receiver. *Ibid.* Technicians who failed to meet the 50% threshold for 60 consecutive days would also be subject to termination. *Ibid.*

The technicians voiced strong opposition to the changes during several meetings, and argued that it would be difficult to meet the required 50% threshold

given the numerous obstacles they had encountered. Pet. App. 81a-82a. The technicians explained to their managers that some customers had privacy concerns about DirecTV's data-tracking, some were concerned about children ordering pay-per-view programming, some objected to having to choose between having exposed wiring or paying a $50 fee for a custom installation, and some customers' homes simply lacked land lines altogether. *Id.* at 82a.

In response, petitioner suggested a series of purported workarounds, including connecting the receiver to a telephone line without telling the customer or telling the customer—falsely—that the receiver would not function without a telephone-line connection. Pet. App. 82a. During one meeting, petitioner's regional operations manager instructed the technicians to tell customers "whatever you have to tell them" and "whatever it takes" to make the connections, including jokingly suggesting that the employees tell customers the receiver would "blow up" if left unconnected. *Ibid.*

Petitioner also showed its employees a video produced by DirecTV regarding the importance of making the telephone-line connections. Pet. App. 82a. In the video, DirecTV's vice president for field operations explained that the increased emphasis on connection rates was coming from DirecTV. *Id.* at 82a-83a. Two DirecTV vice presidents also suggested that the employees connect receivers without telling customers or tell customers —again, falsely—that the connection was "mandatory" and necessary "for the equipment to function correctly." *Id.* at 83a.

In their first paychecks under the new pay structure, many technicians were backcharged for failing to reach the 50% threshold. Pet. App. 83a. After receiving their

checks, several technicians assembled at petitioner's Orlando facility on consecutive mornings and again expressed their dissatisfaction with the new policy to petitioner's managers. *Ibid.* Petitioner declined to rescind or reconsider the modified pay policy. *Ibid.*

c. Finally, a group of the technicians decided to publicize their complaints in an effort to convince petitioner to reconsider its policy. Pet. App. 84a. Technician Frank Martinez contacted a local television reporter from WKGM-TV Channel Six in Orlando. *Ibid.* On the morning of March 30, 2006, Martinez and 27 of his coworkers drove from petitioner's facility to the news station in their company vans and uniforms bearing the DirecTV logo and conducted on-camera interviews with the reporter. *Ibid.* The reporter later added additional footage and voiceovers to the filmed interviews to create a news segment. *Id.* at 84a, 95a n.12.

The full story was broadcast on the local news station in May 2006. Pet. App. 85a. The anchors introduced the story by stating that the employees had come to them about "a company policy that charges you for something you may not ever use * * * [and] if you don't pay for it, the workers do." *Ibid.* The segment then cut to video of the reporter interviewing the service technicians in the studio:

> [TECHNICIAN #1]: We're just asking to be treated fairly.
>
> [REPORTER]: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

[TECHNICIAN #2]: If we don't lie to the customers, we get back charged for it. And you can't make money.

[REPORTER]: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

[REPORTER]: So it's a convenience. . . .

[TECHNICIAN #3]: It's more of a convenience than anything else. . . .

[REPORTER]: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been putting pressure on them. Deducting five bucks from their paychecks for every DirecTV receiver that's not connected to a phone line.

[TECHNICIAN #3]: We go to a home that . . . needs three . . . three receivers that's . . . fifteen dollars.

[REPORTER]: Throw in dozens of homes every week and the losses are adding up fast.

[REPORTER] (questioning a room full of technicians): How many of you here by a show of hands have had $200 taken out of your paycheck? (Accompanying video shows virtually every technician in the room raising his hand.)

[TECHNICIAN #3]: More.

> [REPORTER] (reporting): Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.
>
> [TECHNICIAN #3]: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.
>
> [REPORTER] (interviewing): You've been told to tell customers that . . .
>
> [TECHNICIAN #3]: We've been told to say that. Whatever it takes to get the phone line into that receiver.
>
> [REPORTER] (reporting): That lie could cost customers big money . . . the fee to have a phone line installed could be as high as $52.00 per room . . . want a wireless phone jack? That will cost you another 50 bucks.

Id. at 86a-88a.

The broadcast then cut to the reporter outside petitioner's Orlando office unsuccessfully attempting to interview one of petitioner's managers. Pet. App. 88a. The reporter noted that "statements from [MasTec's] corporate office and from DirecTV make it clear the policy of deducting money from employees' paychecks will continue." *Id.* at 89a. The report concluded with the reporter observing that DirecTV had recently settled a suit filed by Florida and 21 other States for deceptive practices and one of the news anchors stating: "You think they would have learned the first time." *Id.* at 90a.

The segment was rebroadcast, in slightly different versions, over a two-day period. Pet. App. 90a. Petitioner reviewed the recorded broadcasts and also forwarded them to DirecTV, after which one of DirecTV's

vice presidents told petitioner that he did not want any of the service technicians who appeared in the segment to represent DirecTV in customers' homes. *Ibid.* On May 3, 2006, after identifying the technicians who appeared in the segment, petitioner fired all of them, including the 26 involved in this case. *Ibid.* One of those employees subsequently filed an unfair labor practice charge with the Board. *Id.* at 114a.

3. a. In April 2007, the Board's General Counsel issued a consolidated unfair labor practice complaint alleging, among other things, that both petitioner and DirecTV violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by causing the discharge of the 26 employees for engaging in protected concerted activity. Pet. App. 114a. Following an evidentiary hearing, an administrative law judge (ALJ) concluded that the employees' communications were expressly related to an ongoing labor dispute and were otherwise protected, but that they lost the protection of the NLRA under the second prong of the Board's *Mountain Shadows* test because the statements were maliciously untrue and flagrantly disloyal. *Id.* at 152a-158a. The Board's General Counsel filed exceptions to the ALJ's recommended decision. *Id.* at 78a & n.1.

b. The Board reversed the ALJ in relevant part, concluding that the employees' conduct did not lose the protection of the NLRA and that petitioner and DirecTV therefore violated Section 8(a)(1) by causing the discharges of petitioner's employees. Pet. App. 79a. The Board applied its two-prong *Mountain Shadows* test, which neither company contested as the appropriate standard. *Id.* at 93a. It noted that the first prong was "not at issue" because neither petitioner nor DirecTV

challenged the ALJ's finding that the employees' communications to the news station were "clearly related to their pay dispute." *Ibid.* As to the second prong, the Board rejected the ALJ's conclusion that the employees' conduct lost the protection of the NLRA because it was maliciously untrue and flagrantly disloyal. *Id.* at 92a-93a.

The Board first concluded that the employees' communications were not "maliciously untrue." Pet. App. 93a-96a. For the most part, the Board found, the employees' statements were "accurate representations of what [petitioner and DirecTV] had instructed the technicians to tell customers." *Id.* at 94a. The Board observed that, regardless of the precise words used by the companies, the "technicians *were* essentially told to lie," as they would have "readily underst[oo]d" the companies' instruction to tell customers "whatever you have to" and "whatever it takes" as including intentionally false statements such as that the receiver would not work without a telephone connection. *Ibid.* Although the employees did not specify that they would only be charged by petitioner if they failed to connect 50% of newly installed receivers to a telephone line, the Board found that that was at most "an inaccuracy," not rising to the level of knowingly or maliciously withholding the truth. *Id.* at 95a.

The Board then considered whether the employees' communications constituted either "unprotected disloyalty" or "reckless disparagement" of the companies' services. Pet. App. 96a; see *id.* at 96a-98a. Under Board precedent, the Board explained, public communications will be found unprotected under this part of the standard only if they are "flagrantly disloyal, wholly incommensurate with any grievances which [the employees]

might have." *Id.* at 97a. The Board concluded that the technicians' statements did not meet that standard. *Id.* at 97a-98a.

In so concluding, the Board emphasized that the employees raised their concerns to the news station only "after repeated unsuccessful attempts to resolve their pay dispute in direct communications with [the companies]." Pet. App. 97a. It noted that, although the content of the news broadcast "shed unwelcome light on certain deceptive business practices," the employees' communications were confined to the underlying labor dispute and were "directly related to the technicians' grievance about what they considered to be an unfair pay policy that they believed forced them to mislead customers." *Ibid.* And it observed that, "[w]hile the technicians may have been aware that some consumers might cancel * * * services after listening to the newscast, there is no evidence that they intended to inflict such harm on [the companies], or that they acted recklessly without regard for the financial consequences to [the companies'] businesses." *Id.* at 97a-98a.

Because the technicians' statements were neither maliciously untrue nor so "disloyal" or "reckless" as to lose the protection of the NLRA, the Board concluded that both petitioner and DirecTV violated Section 8(a)(1) of the NLRA by firing or causing the discharge of 26 employees for participating in the protected communications. Pet. App. 98a.

In a separate concurrence, Board Member Becker agreed with the result but suggested that the Board's analysis was too restrictive of employees' rights. Pet. App. 107a-112a. In his view, any employee statement

that is expressly linked to a labor dispute should be protected by the NLRA "unless it was uttered with actual malice." *Id.* at 109a.

Board Chairman Liebman also wrote a separate concurrence, noting that, although Member Becker's view may well be correct, no party had challenged the Board's existing approach in this case and, in any event, the outcome would be same under either the Board's established precedent or Member Becker's view. Pet. App. 112a.

4. a. The court of appeals denied the petitions for review filed by petitioner and DirecTV, and enforced the Board's order in full. Pet. App. 45a. The court began by noting that the question raised by the petitions was "not where [the court] think[s] the line between protected and unprotected activity should be drawn," but instead "whether the Board's finding that the employees' third-party appeal falls on the protected side" was in accordance with established law and supported by substantial evidence. *Id.* at 5a; see *id.* at 16a-17a. "Determining whether activity is concerted and protected," the court noted, "'is a task that implicates the Board's expertise in labor relations,' so the 'Board's determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable.'" *Id.* at 16a (citations omitted).

Turning to that question, the court of appeals explained that neither petitioner nor DirecTV challenged the correctness of the legal standards applied by the Board, including the Board's two-prong *Mountain Shadows* test and the Board's requirement that conduct be "flagrantly disloyal" in order to be rendered unprotected under the second prong. Pet. App. 24a-26a; see *id.* at 17a. Moreover, the court continued, there was "no

dispute" that the technicians' statements during the broadcast indicated a relationship to an ongoing labor dispute under the first prong of the Board's *Mountain Shadows* test. *Id.* at 21a. The issues on appeal thus solely concerned the Board's application of the second prong—*i.e.*, "whether the employees' statements in the interview were 'so disloyal, reckless or maliciously untrue as to lose the [NLRA]'s protection.'" *Id.* at 22a (quoting *Mountain Shadows*, 330 N.L.R.B. at 1240).

The court of appeals first considered the Board's conclusion that the employees' statements were not "so disloyal . . . as to lose the Act's protection." Pet. App. 24a (citation omitted); see *id.* at 24a-35a. Under the Board's precedents, the court observed, third-party appeals become unprotected under this standard only when they are "flagrantly disloyal, wholly incommensurate with any grievances which [the employees] might have." *Id.* at 24a (brackets in original; citations omitted). The court held that the Board reasonably concluded that the employees' statements did not lose the Act's protections under that "inherently fact-intensive, context-dependent" test. *Id.* at 33a; see *id.* at 35a.

The court of appeals rejected petitioner's argument that the Board could not properly consider as one factor "the lack of evidence that the employees participated in the newscast with the intention to cause subscribers to cancel their service rather than the intention to gain public support in the pay dispute." Pet. App. 27a; see *id.* at 27a-32a. Although the D.C. Circuit had previously held that the test for whether an employee engaged in disloyal conduct at all must be an objective one, see *George A. Hormel & Co.* v. *NLRB*, 962 F.2d 1061 (D.C. Cir. 1992), the court held that intent reasonably *could* be considered to determine whether that conduct "rises

to the level of flagrant disloyalty." Pet. App. 29a. "The Board thus could consider an actor's state of mind to bear on whether the degree and nature of his disloyalty warrants denying the Act's protections even though his appeal related to an ongoing grievance." *Id.* at 31a-32a (citing *Sierra Publishing Co.* v. *NLRB*, 889 F.2d 210, 219 n.13 (9th Cir. 1989)).

The court of appeals also affirmed the Board's finding that the technicians' communications were not "maliciously untrue." Pet. App. 35a; see *id.* at 35a-44a. Examining each challenged statement one-by-one, the court held that substantial evidence supported the Board's finding that the statements either accurately represented what the technicians had been instructed to do or were "no more than good-faith misstatements or incomplete statements, not malicious falsehoods justifying removal of the Act's protection." *Id.* at 37a (citation omitted).

Finally, the court of appeals rejected DirecTV's argument that petitioner's employees "had no protected rights vis-à-vis their employer's customer," and that the Board thus wrongly found that DirecTV also violated the NLRA by causing petitioner to discharge the 26 employees. Pet. App. 45a. The court held that the argument provided "no basis" for granting relief to DirecTV, because an employer can violate the NLRA "not only with respect to its own employees but also by actions affecting employees" of another employer. *Ibid.* (citation omitted). It was enough under settled law that DirecTV caused MasTec to terminate its employees on the basis of protected activity for the Board to find that DirecTV committed an unfair labor practice. *Ibid.*

b. Judge Brown dissented. Pet. App. 45a-76a. First, Judge Brown objected to the majority's distinction of

the D.C. Circuit's prior decision in *Hormel*, which she read as precluding the Board's consideration of an employee's intent to determine whether his conduct was "so disloyal" as to lose the Act's protections. See *id.* at 50a-57a. Second, Judge Brown stated that the majority had misinterpreted *Jefferson Standard*. In her view, "[n]othing in *Jefferson Standard* supports an analysis of 'flagrant' disloyalty contingent upon subjective intent," or indeed "suggests terminable disloyalty must be 'flagrant'" at all. *Id.* at 58a; see *id.* at 58a-65a. Finally, she disagreed that the employees' statements were not "maliciously untrue" and questioned whether the Board should be considering whether statements are "maliciously untrue," as opposed to simply disloyal, at all. *Id.* at 65a-72a.

c. The court of appeals denied the companies' petitions for panel rehearing. Pet. App. 1a-2a. The full court denied their petitions for rehearing en banc, with Judge Brown dissenting. Order (Feb. 10, 2017).

ARGUMENT

Petitioner contends (Pet. 17-30) that the court of appeals wrongly denied its petition for review of the Board's decision, principally on the ground that the technicians' participation in the newscast was so disloyal as to lose the protections of the NLRA. But the Board's decision to the contrary was reasonable and supported by substantial evidence, and the decision of the court of appeals enforcing the Board's order is correct. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. In *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) (*Jefferson Standard*), this Court recognized that, while

the NLRA "safeguard[s]" employees' rights to engage in concerted activities for their "mutual aid or protection," including by making an appeal to the general public, the Act does not prevent employers from discharging employees for disloyal conduct "separable" from concerted activities, and that circumstances may make it necessary to determine whether "concerted activities were carried on in such a manner as to come within the protection of [Section] 7." *Id.* at 473-474; see *id.* at 475-477. In *Jefferson Standard*, the Court affirmed the Board's decision that an employer could lawfully discharge a group of employees who, "at a critical time" for their employer's business, distributed handbills "making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Id.* at 471. That the attack was made in the midst of an ongoing labor dispute afforded the employees "no substantial defense," because the employees "took pains" to separate the two events. *Id.* at 476. The handbill "omitted all reference" to the ongoing labor dispute and, instead, criticized "public policies of the company which had no discernible relation to that controversy." *Ibid.* In that way, the Court explained, it actually "diverted attention from the labor controversy," rather than elicit public support for the employees. *Ibid.*

The Court made clear that the "responsibility" for making necessary factual determinations and distinguishing between protected concerted activity and unprotected disloyalty "falls upon the Board." *Jefferson Standard*, 364 U.S. at 475. As noted, under the Board's current approach, third-party appeals by employees are protected under the NLRA where they: (1) indicate

that they are "related to an ongoing dispute between the employees and the employers"; and (2) are not "so disloyal, reckless or maliciously untrue as to lose the [NLRA's] protection." *American Golf Corp.* (*Mountain Shadows*), 330 N.L.R.B. 1238, 1240 (2000).

Petitioner does not challenge the Board's two-prong test as a general matter, but it argues (Pet. 17-24) that the court of appeals' decision "[c]ontravenes" this Court's precedent because it affirmed the Board's consideration of the employees' lack of subjective intent to harm their employer as one factor relevant to the second prong—*i.e.*, whether their conduct was "so disloyal" as to lose the protection of the NLRA. Pet. 17, 20 (citation omitted). This approach, petitioner asserts (Pet. 20), is inconsistent with "the *Jefferson Standard* test announced by this Court." Petitioner is incorrect.

Nothing in *Jefferson Standard* precludes the Board from considering an employee's subjective intent as one factor in its analysis of whether his conduct was separable from protected activity or demonstrated sufficient disloyalty as to be unprotected and justify his discharge. To the contrary, the Court expressly provided that the responsibility to "find the facts material" to that determination "falls upon the Board." *Jefferson Standard*, 464 U.S. at 475. And, if anything, the Court's analysis in *Jefferson Standard* indicates that subjective intent may be considered. Its description of the employees' conduct at issue as "a sharp, public, disparaging attack * * * reasonably calculated to harm the company's reputation" suggests an intent to harm. *Id.* at 471; see *id.* at 476-477 (repeatedly describing the employees' "attack" on the company's policies and products having no connection to the labor controversy). In-

deed, the Court quoted with approval the Board's observation that "the employees * * * deliberately undertook to alienate their employer's customers by impugning the technical quality of his product." *Ibid.* (quoting *Jefferson Standard Broad. Co.*, 94 N.L.R.B. 1507, 1511 (1951)). As this Court has noted in another context, "intent is of the very essence of offenses based on disloyalty." *Morissette* v. *United States*, 342 U.S. 246, 249 n.21 (1952). There is therefore nothing unreasonable about the Board's consideration of intent as one factor in its analysis here.

Petitioner highlights (Pet. 21-23) a disagreement between the majority and dissent below over the best reading of the penultimate sentence in *Jefferson Standard*, in which the Court stated: "Even if the [employees'] attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in [Section 7], the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section." *Jefferson Standard*, 346 U.S. at 477-478. The majority read that sentence as pertaining to what would become the first-step inquiry under *Mountain Shadows*—*i.e.*, whether the employees' conduct was related to an ongoing labor dispute. See Pet. App. 22a-23a. That is, it expressed the Court's view that, "even if the Board had found the employees' handbill to be protected activity connected to the ongoing labor dispute, the Court would have disagreed because the 'means used by the technicians' in the handbill had omitted any reference to . . . that dispute." *Ibid.* (citation omitted). The dissent, on the other hand, read the sentence as addressing what would become the second-step inquiry under *Mountain Shadows*. See *id.* at 58a-59a. In other words, "even if

the Board [had] found the first prong satisfied," the Court would have found the discharge justified because "the 'means,' i.e., the handbill's disparaging contents, were sufficiently disloyal to merit termination." *Id.* at 59a.

Petitioner agrees (Pet. 21-22) with the dissent. In the Eighth Circuit decision that is the subject of petitioner's supplemental brief, that court of appeals similarly "disagree[d]" with the decision below on this point. *MikLin Enters., Inc.* v. *NLRB*, No. 14-3099, 2017 WL 2835648, at *5 n.1 (8th Cir. July 3, 2017) (en banc). But, for purposes of this petition, it does not matter which side has the better of that issue. That disagreement has no bearing on whether the Board may properly consider an employee's subjective intent as one factor in the second-step inquiry. If the panel majority below is correct, the *Jefferson Standard* decision does not speak to that question. But even if the dissent is correct, as described above, *Jefferson Standard* indicates that subjective intent *is* relevant to whether an employee's conduct in connection with an ongoing labor dispute is so disloyal as to provide "cause" for his discharge. The Eighth Circuit agreed. See *id.* at *6 ("[A]n employee's subjective intent is of course relevant to the disloyalty inquiry—'sharp, public, disparaging attack' suggests an intent to harm.") (quoting *Jefferson Standard*, 346 U.S. at 471).

Finally, petitioner erroneously contends (Pet. 20) that the facts here "closely track" those in *Jefferson Standard*. The employees' statements in *Jefferson Standard* constituted a "vitriolic attack" on their employer, gratuitously disparaging the company's television broadcasts in a manner that had no connection to the labor dispute or the technicians' responsibilities, and included no appeal for public sympathy or support. 346 U.S. at 468; see *id.* at 476. The technicians in *Jefferson Standard*

simply sought to "harm the company's reputation and reduce its income" at a critical time in its business to give them leverage in the ongoing dispute. *Id.* at 471. Their behavior was "hardly less 'indefensible' than acts of physical sabotage." *Id.* at 477.

In contrast, the employees' conduct in this case was a public appeal for support in their labor dispute, which the NLRA protects. The technicians' statements focused solely on publicizing their objections to the company's new pay policy, not its product or unrelated business policies; their complaints were directly related to their responsibilities at the company; they expressly appealed to the public's support for their efforts to be "treated fairly"; and they did not act with the intent to harm the company or sabotage its business in an effort to gain leverage. Pet. App. 86a; see *id.* at 84a-90a, 97a-98a; see also *id.* at 26a-27a, 35a (court of appeals' decision). The Board's decision that such conduct was protected by the NLRA was reasonable, and petitioner provided no ground for the court of appeals to disturb that judgment.

2. Petitioner also errs when it claims (Pet. 24-28; Pet. Supp. Br. 8) that the court of appeals' decision conflicts with decisions of other courts of appeals on whether an employee's subjective intent is relevant to determining whether his conduct is "so disloyal" as to lose protection under *Jefferson Standard*.

Most of the decisions petitioner cites simply do not engage with that question—and thus cannot be the basis for a circuit split on whether intent can be a factor in the analysis. See *Misericordia Hosp. Med. Ctr.* v. *NLRB*, 623 F.2d 808, 811-815 (2d Cir. 1980) (affirming the Board's conclusion that the employee's conduct was not so disloyal); *Texaco, Inc.* v. *NLRB*, 462 F.2d 812, 814 (3d Cir.

1972) (same); *NLRB* v. *National Furniture Mfg. Co.*, 315 F.2d 280, 284-286 (7th Cir. 1963) (same). In fact, two of the decisions do not apply *Jefferson Standard* at all. See *NLRB* v. *Parr Lance Ambulance Serv.*, 723 F.2d 575, 580 (7th Cir. 1983) (affirming the Board's conclusion that an employee engaged in protected activity when he refused to operate an ambulance that was missing required medical equipment);[1] *Golden Day Sch., Inc.* v. *NLRB*, 644 F.2d 834, 839-841 (9th Cir. 1981) (affirming the Board's remedial choice to order reinstatement of unlawfully discharged employees; holding that, because petitioner's arguments "relate only to the appropriateness of the remedy," "cases such as [*Jefferson Standard*] * * * are not strictly relevant").

The Seventh Circuit has held that an employee's "reckless disregard of his employer's business interests" was sufficient cause to remove the Act's protections from his third-party communications revealing confidential business information, even though the employee did not intend to harm the company. *NLRB* v. *Knuth Bros., Inc.*, 537 F.2d 950, 956 (7th Cir. 1976); see *id.* at 953 n.4. But neither the Board's order in this case, nor the court of appeals' decision affirming it, indicates that subjective intent to harm is *required*, and nothing in the *Knuth Bros.* decision indicates that the lack of such an intent could not be a factor in the analysis under

---

[1] It is, therefore, of no moment that the Seventh Circuit in *Parr Lance Ambulance* held that the employee's motive was irrelevant to determining whether his conduct was "related to working conditions." 723 F.2d at 578. The court of appeals' decision in this case expressly held that subjective intent may be relevant to some determinations under the NLRA and irrelevant to others. See Pet. App. 31a-32a.

different circumstances. See Pet. App. 20a (court of appeals' decision) (quoting with approval the Board's test asking whether third-party communication is "not so disloyal, *reckless*, or maliciously untrue as to lose the Act's protection" (emphasis added; citation omitted)); *id.* at 96a (Board's decision) (asking whether the technicians' statements "constituted unprotected disloyalty *or* reckless disparagement" (emphasis added)).

The courts of appeals decisions that have addressed whether subjective intent can be a factor in the *Jefferson Standard* analysis, including the Eighth Circuit's recent decision, have held that it can be. See *MikLin Enters.*, 2017 WL 2835648, at *6 ("[A]n employee's subjective intent is of course relevant to the disloyalty inquiry."); *Sierra Publishing Co.* v. *NLRB*, 889 F.2d 210, 218-219 & n.13 (9th Cir. 1989) (holding that the Board "acted appropriately" in considering "whether the employees were maliciously motivated" as one factor in its analysis; "motive, if discernible, may illuminate loyalty or disloyalty"). In *MikLin Enterprises*, the Eighth Circuit overturned the Board's decision because, in that court's view, the Board did not merely consider the employees' lack of intent to harm as *a factor* in its disloyalty analysis, but as *dispositive* of the question. See 2017 WL 2835648, at *6. In this case, however, the court of appeals correctly read the Board's decision as treating the lack of subjective intent to harm "as one consideration" of several in its analysis. Pet. App. 27a.

Petitioner contends (Pet. Supp. Br. 8) that there is "no distinction" between the conduct of the employees in *MikLin Enterprises* and of the technicians in this case. In both cases, petitioner asserts, the employees "made 'materially false and misleading' public claims that were 'reasonably calculated to harm the company's

reputation and reduce its income.'" *Ibid.* (quoting *MikLin Enters.*, 2017 WL 2835648, at *9). But, in fact, the Board found that the technicians' public statements in this case were *not* materially false and misleading. See Pet. App. 94a ("The record clearly establishes that al-though the Respondents may have avoided expressly using the word 'lie' when suggesting ways to overcome obstacles to making receiver-phone line connections, both Respondents affirmatively encouraged the technicians to do just that."); *id.* at 95a ("The [technicians'] statements [on backcharges] * * * fairly reflected their personal experiences under the new pay scheme."). And the court of appeals accepted those factual findings. See *id.* at 37a ("We hold that the Board could reasonably consider the evidence adequate to support its findings."); see also *id.* at 35a-44a.[2]

3. Finally, petitioner is wrong in contending (Pet. 28-30) that the court of appeals' decision "essentially" allowed the technicians to engage in an unlawful secondary boycott of their employer's "larger, more well-known

---

[2] Petitioner also appears to assert that the Eighth Circuit's *MikLin Enterprises* decision is inconsistent with the decision below insofar as the Eighth Circuit concluded that "an employee's public actions, even if related to a labor dispute, can be sufficient to remove employees from the protections of the Act, regardless of whether they would otherwise be considered protected by Section 7." Pet. Supp. Br. 8 (emphasis omitted). But there is no disagreement on that point. That is the second prong of the Board's *Mountain Shadows* test. As the D.C. Circuit recognized, that prong "does independent work, in that an employee's third-party appeal, to be protected, not only must relate to an ongoing labor dispute (the first prong) but also cannot be 'so disloyal, reckless, or maliciously untrue' as to fall outside the Act's protections (the second prong).'" Pet. App. 22a (quoting *Mountain Shadows*, 330 N.L.R.B. at 1240). Indeed, whether that prong was satisfied here was the only contested issue in the court of appeals. See *ibid.*

customer, DirecTV." Pet. 29. Contrary to petitioner's suggestion, DirecTV was not an "unoffending employer[]" embroiled in a controversy that was "not [its] own." *Ibid.* (quoting *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951)). Before the technicians made their public statements, DirecTV's vice president for field operations Stephen Crawford urged them in a pre-recorded video message to "blame" DirecTV, not petitioner, for the increased emphasis on connection rates and suggested that the technicians could meet the new requirements by connecting receivers without telling customers or falsely telling customers that the connection was mandatory. Pet. App. 82a; see *id.* at 83a. After the television segment aired, it was Crawford who informed petitioner that he no longer wanted any of the technicians involved to represent DirecTV (petitioner's sole customer in Orlando) in customers' homes, causing them to be fired. *Id.* at 90a. As the court of appeals correctly determined, "'[a]n employer violates the [NLRA] when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affect[] the working conditions of the latter's employees' for an unprotected reason." *Id.* at 45a (first and third sets of brackets in original) (quoting *Dews Constr. Corp.*, 231 N.L.R.B. 182, 182 n.4 (1977)). That is precisely what DirecTV did. *Ibid.*

In any event, the "secondary boycott" argument was advanced below only by DirecTV, as a rationale for refusing to enforce the order against *it*. See DirecTV C.A. Br. 25-28; Pet. App. 45a (addressing DirecTV's argument). DirecTV has not asked this Court to review the court of appeals' decision. And petitioner did not make

a similar argument. As a result, any "secondary boycott" argument that would provide relief to petitioner is now waived. Thus, even if the issue otherwise warranted this Court's review, this case presents no opportunity to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
DAVID HABENSTREIT
Assistant General Counsel
MEREDITH JASON
Deputy Assistant General Counsel
JULIE B. BROIDO
Supervisory Attorney
ERIC WEITZ
Attorney
National Labor Relations Board

AUGUST 2017