Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BE&K CONSTRUCTION CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01–518. Argued April 16, 2002—Decided June 24, 2002

Petitioner, who had a contract to modernize a steel mill, and the mill owner filed a federal lawsuit against respondent unions, claiming that the unions had engaged in lobbying, litigation, and other concerted activities in order to delay the project because petitioner had nonunion employees. Ultimately, petitioner lost on or withdrew each of its claims. In the meantime, two unions lodged complaints against petitioner with respondent National Labor Relations Board (Board). After the federal court proceedings ended, the Board's general counsel issued an administrative complaint, alleging that petitioner, by filing and maintaining its lawsuit, had violated §8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. 29 U. S. C. §§157, 158(a)(1). The Board ruled in the general counsel's favor, finding that the lawsuit was unmeritorious because its claims were dismissed or voluntarily withdrawn with prejudice, and that it was filed to retaliate against the unions, whose conduct was protected under the NLRA. It ordered petitioner to cease and desist from prosecuting such suits, to post notice to its employees acknowledging the Board's finding and promising not to pursue such litigation in the future, and to pay the unions' legal fees and expenses incurred in the lawsuit. The Sixth Circuit granted the Board's enforcement petition. Relying on *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U. S. 731, 747, it held that because the Judiciary had already found petitioner's claims against the unions unmeritorious or dismissed, evidence of a simple retaliatory motive sufficed to adjudge petitioner of committing an unfair labor practice. It also re-

Syllabus

jected petitioner's argument that under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* 508 U. S. 49, only baseless or sham suits can restrict the otherwise unfettered right to seek court resolution of differences, finding that case inapplicable because its immunity standard was established in the antitrust context.

Held: The Board's standard for imposing liability is invalid. Pp. 6–19.

(a) The right to petition is one of the most precious liberties safeguarded by the Bill of Rights. This Court has considered that right when interpreting federal law, recognizing in the antitrust context, for example, that genuine petitioning is immune from liability, but sham petitioning is not. The two-part definition adopted in *Professional Real Estate Investors* requires that sham antitrust litigation must be objectively baseless such that no reasonable litigant could realistically expect success on the merits, and that the litigant's subjective motivation must conceal an attempt to interfere directly with a competitor's business relationship through the use of the governmental process as an anticompetitive weapon. 508 U. S., at 60–61. This suit raises the same underlying issue of when litigation may be found to violate federal law, but with respect to the NLRA. Recognizing the connection, the Court has previously decided that the Board can enjoin lawsuits by analogizing to the antitrust context, holding that the Board could enjoin ongoing baseless suits brought with a retaliatory motive. Here, however, the issue is the standard for declaring completed suits unlawful. In *Bill Johnson's,* the Court addressed that issue in dicta, noting a standard which would allow the Board to declare that a lost or withdrawn suit violated the NLRA if it was retaliatory. However, at issue in *Bill Johnson's* were ongoing suits, and the Court did not consider the precise scope of the term "retaliation." Although its statements regarding completed litigation were intended to guide further proceedings, the Court did not expressly order the Board to adhere to its prior unlawfulness finding under the stated standard. Exercising its customary refusal to be bound by dicta, the Court turns to the question presented. Pp. 6–10.

(b) Because of its objective component, *Professional Real Estate Investors'* sham litigation standard protects reasonably based petitioning from antitrust liability; because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not. The Board argues that the broad immunity necessary in the antitrust context, with, *e.g.,* its treble damages remedy and privately initiated lawsuits, is unnecessary in the labor law context where, *e.g.,* most adjudication cannot be launched solely by private action and the Board cannot issue punitive remedies. At most, those arguments show that the NLRA poses less of a burden on petitioning, not that its burdens raise no First

Syllabus

Amendment concerns. If the Board may declare that a reasonably based, but unsuccessful, retaliatory lawsuit violates the NLRA, the resulting illegality finding is a burden by itself. The finding also poses a threat of reputational harm that is different and additional to any burden imposed by other penalties. Having identified this burden, the Court must examine the petitioning activity it affects. The *Bill Johnson's* Court said that the Board could enjoin baseless retaliatory suits because they fell outside the First Amendment and thus were analogous to "false statements." 461 U. S., at 743. At issue here, however, is a class of reasonably based but unsuccessful lawsuits. Whether this class falls outside the Petition Clause at least presents a difficult constitutional question, given the following considerations. First, even though all lawsuits in this class are unsuccessful, the class includes suits involving genuine grievances because genuineness does not turn on whether the grievance succeeds. Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Finally, the analogy of baseless suits to false statements does not directly extend to suits that are unsuccessful but reasonably based. Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, this Court must also consider the significance of that particular limitation, which is fairly included within the question presented. Pp. 10–15.

(c) The Board's definition of a retaliatory suit as one brought with a motive to interfere with the exercise of protected NLRA §7 rights covers a substantial amount of genuine petitioning. For example, an employer's suit to stop what the employer reasonably believes is illegal union conduct may interfere with or deter some employees' exercise of NLRA rights. But if the employer's motive still reflects a subjectively genuine desire to test the conduct's legality, then declaring the suit illegal affects genuine petitioning. The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Yet ill will is not uncommon in litigation, and this Court, in other First Amendment contexts, has found it problematic to regulate some demonstrably false expression based on the presence of ill will. Thus, the difficult constitutional question is not made significantly easier by the Board's retaliatory motive limitation. The final question is whether in light of the NLRA's important goals, the Board may nevertheless burden an unsuccessful but reasonably based suit that was brought with a retaliatory purpose. While the speech burdens are different here than in the antitrust context, the Court is still faced with the difficult constitutional question whether a class of petitioning may be declared unlawful when a substantial portion is subjectively and objectively genuine. This Court avoided a similarly difficult First Amendment issue in *Edward J. DeBartolo Corp.* v. *Florida*

Syllabus

Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 575, by adopting a limiting construction of the relevant NLRA provision. Section 158(a)(1)'s prohibition on interfering, restraining, or coercing is facially as broad as the prohibition in *DeBartolo,* and it need not be read so broadly as to reach the entire class of cases the Board has deemed retaliatory. Because nothing in §158(a)(1)'s text indicates that it must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, the Court declines to do so. And because the Board's standard for imposing NLRA liability allows it to penalize such suits, its standard is invalid. Pp. 15–19.

246 F. 3d 619, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS, SOUTER, and GINSBURG, JJ., joined.