No. 07-734

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 21,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT BRIEF OF *AMICI CURIAE*, THE COUNCIL ON LABOR LAW EQUALITY AND THE NATIONAL ASSOCIATION OF MANUFACTUERS, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICI* [1]

The *Amici* jointly file this brief in support of the Petition in order to bring to this Court's attention

[1] Pursuant to Supreme Court Rule 37.6, the *Amici* state that no counsel for a party authored this brief, in whole or in part, and no persons other than the *Amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. *Amici* further state that all parties to the Petition have been notified of and consented to the filing of this brief, and letters evidencing such consent and notice are being filed with the Court pursuant to Rule 37.2.

both the reversible errors in the Seventh Circuit's decision here at issue, and the serious implications to the balance of interests under federal labor law created by that decision.

The Council on Labor Law Equality (COLLE) is a national association comprised of senior labor relations executives and in-house legal counsel of Fortune 500 companies, and is dedicated to maintaining a fair and balanced national labor policy through the filing of *amicus curiae* briefs with the National Labor Relations Board (NLRB) and federal courts in landmark cases affecting labor-management relations. Most of COLLE's member companies are signatories to collective bargaining agreements and have mature bargaining relationships with unions representing their employees.

The National Association of Manufacturers (NAM) is the nation's oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. The NAM closely monitors the activities of the NLRB and court decisions relating to the National Labor Relations Act ("NLRA"), and often participates as *amicus* in important cases affecting national labor law.

As is further explained below, the *Amici* submit this supporting brief in order to advise the Court of the significant adverse impact of the Seventh Circuit's decision on labor relations throughout the United

States, based on its erosion of the contractual basis for collective bargaining and labor arbitration, and the potential disruptions and crisis of confidence in the bargaining and arbitration process that the decision is likely to cause for employers, unions, and represented employees alike.

SUMMARY OF THE ARGUMENT

The ruling below improperly disregards the precedents of this Court and other courts that establish the purely contractual nature of collective bargaining and arbitration, and the judiciary's role in resolving questions of substantive arbitrability. Effectively, the ruling improperly introduces a judicially imposed form of "interest arbitration" over a limitless set of issues arising under labor agreements that do not authorize such arbitration. That practice will have a severely negative impact on the bargaining process, as parties will be forced to compensate for this new and novel reality that courts may impose arbitration obligations that circumvent their contractually agreed upon terms.

Accordingly, this Court should grant the Petition so that it can resolve these conflicts and prevent the far-reaching negative implications and other adverse consequences of this decision.

REASONS FOR GRANTING THE PETITION

A. THE COURT BELOW ERRED IN SEVERAL SIGNIFICANT RESPECTS AND ABDICATED ITS RESPONSIBILITY IN DETERMINING ARBITRABILITY, CONTRARY TO THE TERMS OF THE PARTIES' AGREEMENT AND SETTLED LAW.

At issue in this case is a decision by a divided panel of the Seventh Circuit that wrongfully ordered arbi-

tration in a manner that turns on its ear not only the parties' negotiated collective bargaining agreement ("CBA"), but also established precedent and public policy concerning the nature of labor agreements and the obligation to arbitrate pursuant to those agreements.[2] The panel majority acknowledged that the CBA expressly limits arbitration to matters involving the interpretation and application of the agreement's terms or provisions, and that it is utterly silent on the issue of the performance guidelines underlying this dispute. The court nonetheless found the parties' performance guidelines dispute arbitrable, predicating its decision solely on the CBA's recognition clause: a standard boilerplate provision found in virtually every labor agreement in the nation, the plain terms of which bear absolutely no relationship to work performance guidelines.[3] It so held because "an arbitrator could interpret the recognition clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union." App. 2a-3a, 5a-6a.

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[2] To avoid redundancy, we incorporate by reference Petitioner's Statement of the Case. Petition, 2-7.

[3] As Judge Sykes correctly observed in dissent, a generic recognition clause of the type involved here "merely specifies who—that is which union—shall be recognized as the employees' bargaining agent; it does not address any substantive topics pertaining to employment terms or conditions as a general matter, much less performance guidelines in particular" (emphasis in original). App. 12a-13a. *See also* Petition, 8-11, for an explanation, fully endorsed by COLLE and the NAM, of the practical, legal and policy reasons why such a boilerplate recognition clause cannot serve the broad function assigned to it by the panel majority of making an otherwise non-arbitrable dispute arbitrable.

COLLE and the NAM respectfully join dissenting Judge Sykes in her "serious concerns about the essentially limitless reach" of the majority's "impossible" interpretation of the recognition clause, which has a "boundless" capacity to compel arbitration on an open-ended set of issues that the parties never contracted to arbitrate. App. 14a, 18a. As Judge Sykes noted, that interpretation "would require the arbitrator to completely rewrite the recognition clause, engrafting a duty that is not there. Indeed, such an interpretation would contradict well-settled principles in the case law pertaining to the statutory duty to bargain collectively and establishing the rights and obligations that arise from good-faith bargaining impasses and illegal bargaining demands." App. 14a-15a. As the dissent further explained, because the parties' agreement "contains no terms or provisions whatsoever relating to the [disputed] performance guidelines," App. 12a, "if this dispute is arbitrable as an arguable violation of the recognition clause, then almost any dispute is; any Company action that can be characterized as contrary to the Union's interests 'could' violate the recognition clause if its scope is as boundless as the majority believes." App. 17a-18a (emphasis added).

Other errors and fallacies in the Seventh Circuit majority's decision, which constitute additional grounds for a grant of certiorari in this matter of vital importance to all involved in the collective bargaining and labor arbitration process, include the following:

1. The panel majority's ruling, as Judge Sykes concluded, "violates the fundamentally contractual nature of arbitration" and the established first principle of arbitration law that "arbitration is a matter of contract and a party cannot be required to submit to

arbitration any dispute which he has not agreed so to submit." App. 18a (quoting *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) (stating that "arbitration is a matter of consent" and "it will not be imposed upon parties beyond the scope of their agreement"); *Nolde Bros. Inc. v. Local No. 358, Bakery Workers Union*, 430 U.S. 243, 250-251 (1977); *Gateway Coal Co. v. United Mineworkers of Am.*, 414 U.S. 368, 374 (1974); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

In this case, the panel majority noted this fundamental principle of arbitration law, and then proceeded to ignore it. App. 3a. Because it is undisputed that the parties agreed to arbitrate only matters involving the interpretation or application of a CBA term or provision, or the discipline of employees, and "nothing in the CBA specifically pertains to the implementation of performance guidelines," the court below should have found the dispute at issue non-arbitrable, without any further inquiry into the unrelated terms of the CBA's recognition clause.[4] App. 2a-3a.

This was Judge Sykes' well-reasoned position in dissent. Guided by the bedrock first principle concerning the strictly contractual nature of arbitration, she observed that the presumption favoring arbitra-

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[4] As Petitioner points out, that is exactly what the Seventh Circuit did in rejecting a union's attempt to use a similar recognition clause to compel arbitration in *Independent Petroleum Workers of Am., Inc. v. American Oil Co.,* 324 F.2d 903 (7th Cir. 1964), *aff'd per curiam*, 379 U.S. 130 (1964). Petition, 13-14.

tion means only that doubts about whether a particular dispute is covered by an arbitration clause are resolved in favor of coverage, but that the presumption is overcome when "it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." App. 11a-12a (quoting *Warrior & Gulf Navigation Co*., 363 U.S. at 582-83).[5] Having considered its plain terms, the dissent accordingly concluded that the arbitration clause was "not reasonably susceptible of an interpretation that covers this dispute." App. 17a.

2. Next, in interpreting the CBA's arbitration clause, the panel majority purportedly first looked "to the plain meaning of the provision, and str[o]ve to avoid absurd results," but satisfied neither objective in ruling that the recognition clause was ambiguous and sufficient to compel arbitration over the Petitioner's implementation of its performance guidelines. App. 5a-6a.

As Petitioner has shown, there is actually no ambiguity regarding the recognition clause's plain meaning, because such clauses, by their terms, are unrelated to questions of arbitrability and only pertain to the recognition of a union as the representative of a defined bargaining unit of employees. Petition, 8-9.

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[5] This Court in *Litton Financial* made it plain, in a somewhat different context, that (1) the presumption favoring arbitrability should not be applied "wholesale," where to do so—as here—"would make limitless the contractual obligation to arbitrate," and (2) although doubts should be resolved in favor of arbitration, "we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a labor agreement." 501 U.S. at 209.

Further, recognition clauses have been found by this Court to be only permissive subjects of bargaining (as opposed to mandatory bargaining subjects) because they have no bearing on "wages, hours, [or] other terms [and] conditions of employment." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958).[6] Significantly, as Judge Sykes observed in her dissent, nothing in the "generic" recognition clause at issue addressed "any substantive topics pertaining to employment terms and conditions as a general matter, much less performance guidelines in particular," nor did it "articulate any duties beyond recognition or describe the scope of bargaining." App. 12a-13a. Judge Sykes concluded that the clause "is simply not susceptible of an interpretation that would vest the Union with the sort of veto power suggested by the majority." App. 15a.

In the absence of review by this Court, virtually all labor disputes would become arbitrable (regardless of the parties' underlying intent or the nature of the dispute) merely by virtue of the boilerplate recognition clauses found in nearly all labor agreements—clauses that, by their terms, are not intended to reach questions of arbitrability unless they so provide or unless there is some direct nexus (absent here) tying the dispute to a CBA's recognition and arbitration provisions. Here, the recognition clause is simply too weak a reed to support arbitration.

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[6] Under *Borg-Warner*, an employer's efforts to change the terms of its recognition clause to avoid the reach of the majority's ruling would arguably constitute a *per se* violation of the duty to bargain in good faith set forth in § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). 356 U.S. at 356-359.

3. Finally, the Seventh Circuit majority wrongly premised the requirement that the performance guidelines must be arbitrated on its speculation that "an arbitrator could interpret the recognition clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union," and its suggestion that an arbitrator might interpret the clause as imposing implied "duties of notice and negotiation," so as to make the performance guidelines arbitrable.[7] App. 6a. But that is circular reasoning, and amounts to an abdication of the Seventh Circuit's well-established obligation as an independent gatekeeper in determining questions of substantive arbitrability.[8]

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[7] The majority's approach would, as noted earlier, "require the arbitrator to completely rewrite the recognition clause, engrafting a duty that is not there," App. 14a, which is particularly inappropriate in this case because it is our understanding that the CBA expressly prohibits the arbitrator from doing what the majority suggests in providing that "the arbitrator shall have no authority to add to, subtract from, or change any of the terms" of the labor agreement. Such limiting language on the jurisdiction of arbitrators is found in the vast majority of CBAs. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 112 and note 34 (Alan Miles Ruben ed., 6th ed. 2003).

[8] As the dissent observed, the majority's reasoning also contradicts "well-settled principles in the case law pertaining to the statutory duty to bargain collectively and establishing the rights and obligations that arise from good-faith bargaining impasses and illegal bargaining demands." App. 14a. An arbitrator, despite the majority's ruling, should not be given carte blanche to deviate from these established principles and impose instead his or her "own brand of industrial justice." *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960)); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

Stated differently, under the second rule of this Court's *Steelworkers Trilogy* (which "follows inexorably from the first," namely that a party cannot be forced to arbitrate claims it has not agreed to arbitrate), "the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination," and not a matter for arbitrators to decide. *AT&T Techs.*, 475 U.S. at 649. Here, the panel majority never reached that dispositive gateway issue, and its conclusion that an arbitrator *might* find some arbitrable duties under the recognition clause (something the arbitrator is contractually forbidden from doing, *see supra*, note 7) cannot be substituted for the court's own determination about whether such implied duties actually exist. That obligation is inescapable in view of the parties' agreement to arbitrate "only" those disputes that in fact involve the interpretation or application of a CBA term or provision. By shifting that responsibility to an arbitrator, the Seventh Circuit therefore ran afoul not only of the teachings of *AT&T Techs.* and related precedent, but also of the Court's admonition in *Litton Financial* that in determining "whether the parties agreed to arbitrate [a] dispute, [courts] cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement."[9] *Litton Fin. Printing Div.*, 501 U.S. at 209.

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[9] The Seventh Circuit itself has recognized that under *Litton Financial* "the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If courts must, to decide the arbitrability issue, rule on the merits, so be it." *Teamsters Local 744, Int'l Bhd. of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162, 165 (7th Cir. 1996) (quoting *Indep. Lift Truck*

In fact, in impermissibly deferring the arbitrability issue to an arbitrator, the panel majority here fell into the same trap that led to the Seventh Circuit's reversal in *AT&T Techs*. That decision explained the policy underpinnings for requiring courts, not arbitrators, to decide issues of substantive arbitrability in labor cases:

> The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction . . . ." Cox, Reflection Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those

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Builders Union v. Hyster Co., 2 F.3d. 233, 236 (7th Cir. 1993)). *Hinckley* involved the question of whether certain categories of employees were covered by the labor agreement (presumably an issue arising under the CBA's recognition clause), which the district court had deferred to an arbitrator pursuant to a standard arbitration clause. 76 F.3d at 163. The Seventh Circuit reversed and remanded for the district court to decide conclusively whether the CBA covered the disputed employees. *Id.* Noting the tension between two doctrines relating to arbitrability—the requirement that courts, not arbitrators, resolve arbitrability issues, on the one hand, and the rule that courts stay out of the potential merits of the underlying case on the other—the Seventh Circuit (relying on this Court's *Litton Financial* decision) recognized the primacy of the first requirement over the second when an examination of the jurisdictional merits is required to determine arbitrability. *Id.* at 163-168*; accord Hyster Co.*, 2 F.3d 233. Thus, the Seventh Circuit in *Hinckley* held—in contrast to its holding here—that the district court's failure to determine conclusively the employee coverage issue (the question on which arbitrability hinged), and its deferral of that issue to the arbitrator, was improper because the lower court had not, on its own, actually decided the question of arbitrability. 76 F.3d at 165.

> disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid*. This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

475 U.S. at 651.

As this Court further stated in *First Options of Chicago*:

> [C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. . . . [T]he law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption [in favor of arbitration].

514 U.S. at 944-945 (citation omitted).

There obviously is no such "clear and unmistakable" evidence in this case. The same policy considerations aforementioned by this Court apply here, and together with the other reasons set forth herein and in the Petition, warrant a grant of certiorari.

B. UNLESS REVERSED BY THIS COURT, THE DECISION BELOW WILL UNDERMINE IMPORTANT PUBLIC POLICIES SUPPORTING FREE COLLECTIVE BARGAINING, THE VOLUNTARY ARBITRATION OF LABOR DISPUTES, AND JUDICIAL ECONOMY.

The practical effect of the Seventh Circuit's decision in this case is to impose compulsory interest arbitration on parties to collective bargaining agreements that have not contemplated or agreed to interest arbitration.[10] The decision in this case does

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[10] Compulsory interest arbitration, in contrast to the normal type of arbitration that involves rights and duties under an existing labor agreement, has been defined to mean the "process of settlement of employer-labor disputes" that are "required by law," under which an outside arbitrator or government agency "has power to investigate and make an award which must be accepted by all parties." ELKOURI & ELKOURI, *supra* note 7, at 20. This Court explained the fundamental distinction between interest disputes and rights disputes as follows in *Elgin, J. & E. Ry Co. v. Burley*:

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claims to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. 711, 723 (1945).

just that, without regard to the parties' consent, and goes far beyond the scope of their bargained-for arbitration clause, which is indisputably limited solely to disputes arising from the interpretation or application of terms or provisions of the CBA. And it did so despite the rule that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway Coal Co.*, 414 U.S. at 374.

The Seventh Circuit's decision dictates that a mere recognition clause, contrary to its clear terms, may now serve as the basis for imposing what effectively amounts to compulsory interest arbitration. And that ruling, as has been shown, potentially allows an arbitrator to impose terms and conditions of employment on "limitless" matters outside of the collective bargaining agreement. To repeat what dissenting Judge Sykes stated below: "if this dispute is arbitrable as an arguable violation of the recognition clause, then almost any dispute is; any Company action that can be characterized as contrary to the Union's interests 'could' violate the recognition clause if its scope is as boundless as the majority believes." App. 17a-18a. The majority's decision is therefore tantamount to judicially compelled interest arbitration.

1. Ordering such interest arbitration without the parties' consent is contrary to well-established national labor policy, and this Court's decisions recognizing the importance of free collective bargaining

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(continued)

Disputes over rights are readily susceptible to resolution by arbitrators under the terms of a labor agreement that spells out those rights. Disputes over interests, by contrast, "involve questions of policy that, for lack of predetermined standards, have not been generally regarded as justiciable or arbitrable." ELKOURI & ELKOURI, *supra* at 109.

and the voluntary arbitration of disputes as cornerstones of our federal labor laws. Thus, it is axiomatic that interest arbitration is generally disfavored by the courts and private-sector parties to collective bargaining, except where such a requirement has been freely recognized and negotiated by the parties. And even in cases in which the parties have contracted for such arbitration, courts have carefully and narrowly applied interest arbitration clauses because of their wide scope and broad application once they are in force. *See generally* ELKOURI & ELKOURI, *supra* at 1349-1350.

Interest arbitration, therefore, when not voluntarily negotiated and enshrined in the contract, is not in the best interests of any party to a collective bargaining agreement—neither the union, nor the employer, nor the employees covered by CBAs—because it imposes *post hoc* terms and conditions of employment either not contemplated by the parties or intentionally excluded by them from the contract grievance procedure. In effect, engrafting the imposition of new terms and conditions of employment onto a collective bargaining agreement ignores all of the prior give-and-take of negotiations that is usually involved in reaching agreement on a labor contract, and potentially substitutes a determination by a third party outside of the collective bargaining process.

Compelling agreement on a term or condition of employment outside the four corners of a collective bargaining agreement, and indisputably not subject to the agreement's grievance arbitration clause, is precisely what Congress sought to avoid in enacting section 8(d) of the NLRA. 29 U.S.C. § 158(d). Under section 8(d), the duty of the parties to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." *Id*. As

this Court said in discussing the effect of that language, it is clear that "the Board may not, either directly or indirectly . . . sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952).

Similarly, in *H.K. Porter Company, Inc. v. NLRB*, 397 U.S. 99 (1970), this Court upheld the clear national labor policy that it is not for the Board or the courts to compel an employer to agree to negotiate a proposal (in that case, a dues check-off clause; in this case, the language of performance guidelines) against its will, even where the proposal is seemingly fundamental to the workplace and essential to the future relationship of the parties. As the Court said:

> It is implicit in the entire structure of the [NLRA] that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . One of these fundamental policies [of the Act] is freedom of contract. While the parties freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 107-108. It is for these reasons that compulsory arbitration, and in particular compulsory interest arbitration, is not favored by most parties in private sector collective bargaining. Compulsory interest arbitration has only received wider use in the public sector as a substitute for the right to strike

otherwise prohibited by law (rather than in the case of a no-strike provision negotiated through the "give and take" of collective bargaining, as is the case here), or where workers are not free to engage in collective bargaining in its fullest sense. ELKOURI & ELKOURI, *supra* at 21 (quoting Schwartz, *Is Compulsory Arbitration Necessary*?, 15 Arb. J. 189, 200 (1960)).

That leading treatise on labor arbitration summarizes the general aversion to compulsory arbitration in the private sector as follows: "(1) it is incompatible with free collective bargaining, (2) it will not produce satisfactory solutions to disputes, (3) it may involve great enforcement problems, and (4) it will have damaging effects on the economic structure." *Id*. at 21.

In fact, the ELKOURI & ELKOURI treatise goes further, describing compulsory interest arbitration as "the antithesis of free collective bargaining," and "a dictatorial and imitative process rather than a democratic and creative one," where an arbitrator's judgment is imposed on the parties, in the absence of a contract, concerning what in his or her opinion the parties should have agreed to or would have agreed to absent arbitration—"an imposed decision that will often fail to satisfy either party, rather than an acceptable settlement based on a meeting of the minds." *Id*. at 21-22.

Many of those same arguments against compulsory arbitration apply with equal force here, where the Seventh Circuit has effectively compelled the parties to arbitrate terms and conditions of employment well outside of the collective bargaining agreement, and where those terms and conditions are excluded from the agreement's grievance arbitration clause. Thus, if parties are not limited to the arbitration of the

agreed-upon and bargained for terms of their contract, and if courts are permitted to order arbitration simply by confecting an artificial nexus to an agreement's recognition clause, then the effect would obviously undermine the collective bargaining process. The result may well be, as has been noted, that "one or both of the parties may make only a pretense at bargaining in the belief that more desirable terms may be obtained through arbitration that is assured if bargaining fails. . . ." *Id*.

2. Likewise, the result of the Seventh Circuit's decision, contrary to the national labor policy supporting collective bargaining, will be to cause uncertainty on the part of both parties as to whether the "deal" they struck in the give-and-take of collective bargaining will be subject to judicially-imposed compulsory reopening on any and all terms merely as a function of their CBA's recognition clause. In effect, no collective bargaining agreement would ever be a final contract on which the parties could rely in confidence.

In fact, the potential uncertainty would be just as great for unions as for employers. For example, if a mere recognition clause is a sufficient nexus to compel arbitration of "limitless" subjects, it is foreseeable that some courts may compel arbitration of internal union activities in the administration of grievances. This would be at odds with the rule that the alleged improper activities of union officials in their administration of grievances (such as whether they have fulfilled their duty of fair representation owed to represented employees) are not subjects for arbitration because a contrary approach "might well result in a form of policing of internal union affairs by a third party who clearly was not intended nor com-

petent to accomplish such a purpose." ELKOURI & ELKOURI, *supra* at 107. Thus, internal union activities could arguably be arbitrable simply by virtue of a recognition clause.

Similarly, if courts were to follow the Seventh Circuit's logic and find recognition clauses, contrary to their plain language, to be reservoirs of substantive law, a future arbitrator may well impose a broad no-strike prohibition where one has not been negotiated by the parties. The general rule articulated by this Court is that a no-strike obligation will not be implied just from the existence of an arbitration clause. *Local 174, Teamsters, Chauffeurs, Warehouseman, and Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Gateway Coal Co. v. United Mineworkers of Am.*, 414 U.S. 368. However, if a recognition clause can authorize an arbitrator to impose "limitless" requirements not otherwise agreed to by the parties, it is certainly possible that a union's commitment not to strike will be found arbitrable as well, and that an arbitrator may eventually impose a broad no-strike requirement on that union and the employees it represents.

Moreover, where courts have found it appropriate to infer the existence of a no-strike obligation with respect to matters that the parties are contractually obligated to arbitrate, the imposition of an arbitration requirement, simply by operation of the recognition clause over subjects on which the contract is silent, could greatly enlarge a union's no-strike obligation. Contrary to the interests of unions, an unintended consequence of the decision below may be to broaden the potential scope of *Boys Markets* injunctions, which would greatly curtail strike activities over a "limitless" source of newly-found

arbitrable grievances. *See Boys Markets, Inc. v. Retail Clerks Union, Local* 770, 398 U.S. 235 (1970).

For represented employees, the lack of certainty as to what is or is not included in a ratified collective bargaining agreement would undermine their confidence in the collective bargaining process, in view of the "limitless" issues not set forth in the agreement itself that may become subject to interest arbitration at the whim of either party, a court, or an arbitrator, merely as a function of the recognition clause. This would greatly reduce the willingness of parties to enter into agreements that provide for arbitration, even where the arbitration clause is limited, as here, to specified disputes. That in turn would "undercut[] the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties." *AT&T Techs*., 475 U.S. at 651.

3. The Seventh Circuit's decision also undermines the judicial economy that has resulted from the well-established national labor policy supporting arbitration of grievances arising under labor contracts, which has largely removed such disputes from the federal court dockets, while leaving resolution of substantive arbitrability issues for the courts. *See, e.g., AT&T Techs.*, 475 U.S. at 648-49. Further, the scope of judicial review of labor arbitration has traditionally been extremely limited in cases where, as in the present matter, the parties have been ordered to submit a dispute to an arbitrator. Once that is done, as this Court said in *First Options of Chicago*, the courts "should give considerable leeway to the arbitrator, setting aside his or her decision

only in certain narrow circumstances." 514 U.S. at 943. *See also United Paperworkers Int'l Union v. Misco, Inc*., 484 U.S. 29 (1987); *Eastern Associated Coal Corp. v. United Mineworkers of Am., District 17*, 531 U.S. 57 (2000).

However, the uncertainty created by the court below in this case as to the arbitrability of potentially any matter arising in the workplace, regardless of whether that matter is included or even clearly excluded by the contractual arbitration clause will subject federal courts to innumerable disputes regarding questions of substantive arbitrability in proceedings to stay or compel arbitration, and in actions seeking to affirm or vacate arbitrators' awards in such cases.

Using the recognition clause rationale of the Seventh Circuit as the springboard to compel arbitration over a "limitless" number of otherwise unarbitrable disputes (and to thereby gain new or more favorable terms in arbitration than they were able to attain at the bargaining table), unions—limited only by their own creativity—may decide to rush to court to compel arbitration not only in the Seventh Circuit but in other Circuits, thus potentially flooding the federal courts. Indeed, the decision at issue amounts to an open invitation for unions to force arbitration in order to enhance the provisions of their CBAs or to add new requirements to those that were negotiated. This could also result in more actions brought by employers to vacate arbitration awards that conflict with the standards set forth in the *Steelworkers Trilogy*. *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564; *Warrior & Gulf Navigation Co*., 363 U.S. 574; *Enterprise Wheel & Car Corp*., 363 U.S. 593. And all of this, in turn, could lead to clogged court dockets, and the imposition of increased Rule

11 sanctions and costs for what courts may eventually view as frivolous pre- and post-arbitration litigation. As the Seventh Circuit warned in a recent case for vacatur of an arbitration award, "mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts. . . ." *CUNA Mutual Insurance Society v. Office and Professional Employees Int'l Union, Local 39*, 443 F.3d 556, 561 (7th Cir. 2006). Yet its decision in this case will precipitate just such an increase in litigation.

4. In summary, the major benefits of collective bargaining agreements for employers are predictability, stability and industrial peace, achieved through the inclusion of a no-strike provision and an agreed upon system of dispute resolution, such as grievance arbitration, for the duration of the contract. These benefits are negotiated in exchange for the setting of terms and conditions of employment through the voluntary give-and-take of collective bargaining. For members of COLLE, the NAM and the business community generally, the Seventh Circuit's decision, absent review by this Court, will have the direct and immediate adverse effect of destabilizing the administration of current CBAs and disrupting mature bargaining relationships. It would impact future negotiations for new or successor agreements, with employers never being quite certain what "limitless" subjects outside of those agreements may be deemed arbitrable under a recognition clause, and with unions vested "with the sort of veto power suggested by the majority." App. 15a. This unwise, unwarranted, and unpredictable expansion of the duty to arbitrate to matters outside of the clear and unmis-

takable terms agreed upon as subjects for arbitration set forth in the CBA is contrary to sound, well-established national labor policies promoting industrial harmony through collective bargaining and a predictable method of resolving workplace disputes through arbitration.

CONCLUSION

For the reasons set forth above and in the Petition, the Writ should be granted.

Respectfully submitted,

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