No. 08-1214

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER ON NATIONAL LABOR POLICY, INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* ON THE MERITS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does a federal court have jurisdiction to determine whether a collective bargaining agreement was formed when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established?

2. Does Section 301(a) of the Labor-Management Relations Act, which generallypreempts otherwise available state law causes of action, provide a cause of action against an international union that is not a direct signatory to the collective bargaining agreement, but effectively displaces its signatory local union and causes a strike breaching a collective bargaining agreement for its own benefit?

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INTRODUCTION

Pursuant to Supreme Court Rule 37.3(a), the Center on National Labor Policy Inc. ("Center") and the National Association of Manufacturers ("NAM") submit this brief *amicus curiae* in support of Petitioner Granite Rock Co. All parties have given written consent to the filing of this brief.[1]

INTEREST OF THE *AMICI*

The Center is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions.

NAM is the nation's 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

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[1]The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

and the general public about the vital role of manufacturing to America's economic future and living standards.

The *amici* are filing this amicus brief in support of the Petitioner because the two issues being considered are of great importance to their members and to the business community. The *amici* wish to bring to the Court's attention that the federal common law of labor contracts requires revision and there will be an adverse impact on public policy and on labor law generally if the Ninth Circuit's aberrant decision is allowed to stand.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers Local 287 (AFL-CIO) et al.*, 546 F.3d 1169 (9th Cir. 2008), was granted by the Court on June 29, 2009.

STATEMENT OF FACTS

Before the expiration of a collective bargaining agreement between Granite Rock Co. and Local 287 on April 30, 2004, the parties began negotiations, and Rome Aloise, the administrative assistant to the General President of the International Brotherhood of Teamsters ("IBT") (who represented the interests of IBT and other local unions affiliated with the IBT in the negotiations) advised Local 287 that certain provisions of the agreement were inadequate. *See* 546 F.3d at 1171.

In June 2004, after a collective bargaining agreement between Granite Rock Co. and Local 287 expired, Local 287 members went on strike. *See ibid.* There was a new collective bargaining agreement which contained a "no-strike" clause and required the parties to arbitrate "[a]ll disputes arising under this agreement." *See id.* at 1171-72. At the conclusion of the successful bargaining session Local 287's business representative George Netto told Granite Rock Co. that they would stop picketing but also raised the topic of a "back-to-work" agreement to provide for the terms under which the parties would return to work, including liability for actions taken during the strike. *Id.* at 1171. The new agreement was allegedly ratified on July 2, 2004, *see id.* at 1171-72, but this is disputed, *see id.* at 1172.

On July 5, 2004, Aloise and Local 287 members instructed workers not to return to work the next day. On July 6, 2004, Netto demanded a back-to-work agreement which would explicitly shield Local 287, its members and IBT from any liability arising from the strike. Granite Rock Co. refused to sign such an agreement, and Local 287 continued its strike. *Ibid.*

Granite Rock Co. sued Local 287 for breach of contract and IBT for tortious interference with contract, both in the Northern District of California and under §301(a) of the Labor Management Relations Act ("LMRA" or "Labor Act"), 29 U.S.C. §185(a). The district court granted IBT's motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), on the ground that Granite Rock Co. had failed to state a claim against it under §301(a), and Granite Rock Co. timely appealed. However, the district court denied Local 287's motion to compel arbitration of the question of

contract ratification, and Local 287 timely appealed. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the claims against IBT, *id.* at 1176, but reversed the denial of Local 287's motion to compel arbitration of contract ratification, *id.* at 1172.

SUMMARY OF ARGUMENT

The court of appeals ordered arbitration to decide the existence of a collective bargaining agreement between the parties, where Granite Rock Co. had not consented to arbitration of this question. The presumption is contrary to this Court's jurisprudence arising from *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc.*, 514 U.S. 938, 944 (1995), which is not in favor of an arbitrator ruling on his/her own jurisdiction. The Ninth Circuit's decision conflicts with this Court's applicable decisions on the arbitrability of arbitrability; the applicability of state law under Section 301 of the Labor Act on the arbitrability of arbitrability, the doctrine of severability, and how broad may an arbitration clause be read, as set forth in *AT&T Technologies, Inc.*

The interpretation of a broad arbitration clause follows a dangerous tendency among other courts to produce an order to arbitrate arbitrability in a dispute *which itself may not be arbitrable*.

Of equally great concern to the *Amici*, the Ninth Circuit's holding bestows undeserved immunity upon international unions who intentionally interfere with collectively bargained agreements of their union locals, in

plain violation of Section 301 of the Labor Management Relations Act. The statutory purpose of repose in the legislative history of Section 301, now eliminates a remedy against an interloper, the international union here. While resolving the conflict among the federal circuit courts regarding the availability of a §301(a) action for tortious interference with a collective bargaining agreement, this Court should take into account the strong public policy remedy in favor of holding parent unions (and third parties) liable for the acts of their locals (agents) that interfere with stable collective bargaining relationships the Congress unquestionably chose to protect and preserve by the enactment of Section 301.

These questions require the Court's recognition.

ARGUMENT

I. ALL PARTIES ARE ENTITLED TO A JUDICIAL PROCEEDING TO DETERMINE THE THRESHOLD QUESTION WHETHER A CONTRACT EXISTS BEFORE ARBITRATION CAN PROCEED.

A union's agreement not to strike is commonly understood to be obtained in exchanged for a grievance-arbitration provision. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 248-49 (1970); *Reichold Chemicals, Inc.*, 277 N.L.R.B. 639, 640 (1985), or even as a condition of reaching agreement. *Shell Oil Co.*, 77 N.L.R.B. 1306, 1308 (1948). In the absence of a collective bargaining agreement, parties may exercise self-help and

economic weapons, such as lock-outs or strikes. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970). In that case, the Court observed that, "[i]t cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." 397 U.S. at 109.

In the present case, Local 287 went on strike against Granite Rock Co. asserting no agreement and engaged in strike behavior against the Company which clearly demonstrated that the Union believed no collective bargaining agreement with a no-strike clause had been reached with the Company. Since the existence of an agreement was in question, reinforced by the unions' economic activity inconsistent with an agreement, Granite Rock Co. sued to enforce compliance with the agreement it alleged existed.

Because the no-strike clause and the grievance and arbitration procedure are "the true essence of the typical CBA," the Ninth Circuit's holding would allow a labor union to receive all the benefit of any tentative bargaining agreement without giving up any rights in exchange. Malin and Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. Pa. J. Bus. & Emp. L. 175, 179 (Fall 2008) (quoting David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal L. Rev. 663 (1973)). The importance of this *quid pro quo* has been restated by Frank Cummings & Judge Jacob P. Hart, *Labor Contract Clauses from A to Z*, Emp. and Lab. Rel. L. for the Corp. Couns. and the Gen. Prac., SN020 ALI-ABA 503 (May 1-3, 2008), that a no-strike clause "is the only thing management gets out of a collective bargaining agreement; everything else is for the benefit of

the union."

Given the importance of tentative agreements in the bargaining process, which enables the parties to feel that progress is being made on a new contract without a disruption to the workflow, any ruling that unwinds these agreements will lead to more labor unrest and work stoppages as this case vividly demonstrates.

A. The Existence of an Arbitration Provision Within a Contested CBA Is Not Within the Province of an Arbitrator to Decide.

The federal policy supporting arbitration has been settled. It is an issue for judicial determination and not an arbiter, unless the parties clearly and unmistakably provide otherwise. In this case, however, the court of appeals misapplied the law and decided this important federal question in a way which conflicts with this Court's applicable decisions and decisions in other federal and state courts.

In *AT&T Technologies Inc.* v. Communication Workers, 475 U.S. 643, 648-49 (1986), vacating a decision which had affirmed an order for arbitration of arbitrability, this Court reaffirmed 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. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit

> such grievances to arbitration [citations omitted].

Accord, *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 208 (1991) ("a party cannot be forced to arbitrate the arbitrability question" (citation omitted)) (reversing portion of decision which had refused to enforce Board's order that certain grievances were not arbitrable); *see also Mendez v. Puerto Rican Int'l Companies Inc.*, 553 F.2d 709, 711 (3d Cir. 2009).

Therefore, "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." *See AT&T Technologies Inc.*, 475 U.S. at 649; *accord*, *Litton Financial Printing Division*, 501 U.S. at 208 ("[w]hether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court"); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473 (2009) (rejecting respondents' argument that "the particular CBA at issue here does not clearly and unmistakably require them to arbitrate their ADEA claims" where "respondents did not raise these contract-based arguments *in the District Court or the Court of Appeals*" (emphasis added)); *Local Union No. 898 of the Int'l Brotherhood of Electrical Workers, AFL-CIO v. XL Electric Inc.*, 380 F.3d 868, 870 (5th Cir. 2004) ("the question of arbitrability is a question for the court") (affirming refusal to enforce arbitration award where contract was not in effect). Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is also for the court to decide. *See AT&T Technologies*

Inc., 475 U.S. at 652.

Local 287's dispute of the ratification date of the new collective bargaining agreement raises a question of arbitrability because its dispute affects whether or not there was a contract in effect during the continuation of the strike on and after July 5, 2004. Since Granite Rock Co. (and also the International Brotherhood of Teamsters, which was not a party to the agreement) never agreed to arbitrate this particular issue, the court of appeals decision in this case conflicts with *AT&T Technologies Inc.* and *Litton Financial Printing Division*.

AT&T Technologies Inc., 475 U.S. at 649, holds that "*[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" (emphasis added). The court of appeals at 546 F.3d at 1177 n.4, reaches its result here by disregarding this holding, relying instead on the subsequent, more general and contrary language in *AT&T Technologies Inc.* that,

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

By relying on the wrong language from *AT&T Technologies Inc.*, the court of appeals has decided this important federal question in this case in a way which undermines this Court's clearly applicable decision in that

case and the understanding of parties in collective bargaining.

This Court reaffirmed *AT&T Technologies Inc.*'s more specific holding that the court should decide arbitrability in *First Options of Chicago, Inc.,* 514 U.S. at 944: "*Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so*" (emphasis added, citations omitted) (affirming finding that arbitrability was subject to independent review by the courts).

In *First Options of Chicago, Inc.*, 514 U.S. at 943, this Court also confirms the principles that "[i]f ... the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently" (emphasis omitted) and that "arbitration is simply a matter of contract between the parties; it s a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."

There is no indication that the courts cannot make an exact pronouncement in this case, which involves the protection of important federal rights both statutory (§301(a)) and constitutional (*see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by 14th Amendment includes "the right of the individual to contract")). In addition, only a judicial proceeding may provide the jury trial guaranteed by the Seventh Amendment. *See Chauffeurs, Teamsters and Helpers Local 391 v. Terry*, 494 U.S. 558, 573-74 (1990)(affirming

right to jury trial in contract action under §301).[2]

The rule of law is an important consideration here. Arbitration, however, is a form of personal decisionmaking with only minimal judicial review. *See Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 509 (2001) ("Judicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement") (reversing decision which had reversed arbitration proceedings and instructed entry of award); *United Paperworkers International Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 39 (1987) ("improvident, even silly, factfinding .... is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts") (reversing decision which had affirmed vacation of arbitration award); *Clear Channel Outdoor Inc. v. International Unions of Painters and Allied Trades Local 770*, 558 F.3d 670 (7th Cir. 2009)("[w]hat Clear Channel's argument boils down to is that the arbitrator's decision is contrary to the plain meaning of the contract; but this is simply another way of arguing that the decision is wrong on the merits, and that is precisely the type of argument that is beyond our purview") (affirming order which confirmed arbitrator's

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[2]The FAA also specifically creates the right to a jury trial on the issue of the existence of an agreement to arbitrate. *See Avedon Engineering Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir. 1997)("[w]hen parties dispute the making of an agreement to arbitrate, a jury trial on the existence of the agreement is warranted unless there are no genuine issues of material fact regarding the parties' agreements")(reversing stay pending arbitration).

award); *Veeder Root Co. v. Local 6521 United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, 293 Fed. Appx. 924, 925 (3d Cir. 2008) ("[w]e do not review an arbitrator's decision for legal error") (reversing vacation of arbitration award).

Further, due process protects parties from financially interested judges. *See Connally v. Georgia*, 429 U.S. 245, 250 (1977) (justice of the peace "is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his issuance of the warrant, and he receives nothing for his denial of the warrant") (vacating criminal conviction where financially interested justice of the peace had issued search warrant); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) ("[b]ecause the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board") (affirming injunction against Board); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)("[i]t is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal") (reversing criminal conviction where mayor was paid from criminal fines).

An arbitrator, on the other hand, may have a financial incentive to find arbitrability. Arbitrator fees of $600 per hour are not uncommon, and mediation can be as high as $25,000 per day. *See* Harry T. Edwards, *Where are we Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. Univ. L. Rev. 293, 307

(1999).

The ruling of the Ninth Circuit overlooks these important markers by directing an impractical outcome. The Ninth Circuit improperly drew up the requirement that an independent challenge to an arbitration clause must be asserted to obtain a judicial ruling. This very condition is contrary to the long line of decisions from this Court and the federal circuit courts and must be reversed.

B. Federal Policy Requires Consistency Between the Federal Courts of Appeals and State Courts Considering Labor Arbitration Provisions.

Concurrent state court jurisdiction under Section 301 of the Labor Act and the FAA necessitates reversal.

Congress did not foreclose state court jurisdiction to enforce collective bargaining agreements under Section 301(a), but intended the enactment to "*supplement* and not to encroach upon, the pre-existing jurisdiction of the state courts." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 245 (1970). Recognizing that "a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, *id.* at 246, the "relative uniformity" in the federal and state court systems was to prevail, *id.*, and therefore "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual process of the law,'" *Arnold v. Carpenters District Council of Jacksonville*. 417 U.S. 12, 16 (1974), quoting *Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962), which meant that Section 301 claims "may be

brought in either state or federal courts." *Id.*[3]

First Options of Chicago, Inc., *id.* at 944, instructs that "when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts," but there is no indication in this case that the court of appeals considered California state law.

In California, "[t]he arbitrability of a dispute may itself be subject to arbitration *if the parties have so provided in their contract*," but this is "unusual" and still requires the court to decide this question:

> [E]ven when the parties have conferred upon the arbiter the *unusual* power of determining his own jurisdiction, the court cannot avoid the necessity of making a certain threshold determination of arbitrability, namely, whether the parties have in fact conferred this power on the arbiter.

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[3]The state courts have indeed handled labor contract cases under Section 301 and applied the prevailing arbitration standards to them. *See e.g.,Peters v. Rivers Edge Min., Inc.*, 2009 WL 804116, 186 L.R.R.M. (BNA) 2156 (W.Va., 2009); *Kostecki v. Dominick's Finer Foods, Inc. of Illinois,* 361 Ill.App.3d 362, 836 N.E.2d 837, 843 (Ill.App. 1 Dist. 2005); *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Sandvik*, 102 Wash. App. 764, 10 P.3d 470, 474 (Wash App. Div. 3, 2000); *Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.,* 65 Cal.App.4th 732, 76 Cal.Rptr.2d 814 (Cal.App. 2d Dist. 1998); *International Longshoremen's and Warehousemen's Union Local 8 v. Pacific Maritime Ass'n*, 133 Or.App. 245, 889 P.2d 1358 (Or.App. 1995); Local Lodge No. 1426, *Intern. Ass'n of Mach.& Aerospace Workers, AFL-CIO v. Wilson Trailer Co.*, 289 N.W.2d 608 (Iowa 1980).

McCarroll v. Los Angeles County District Council of Carpenters, 315 P.2d 322, 333 (Cal. 1957), *cert. denied*, 355 U.S. 932 (1958) (emphasis added) (affirming state court injunction against challenge that issue should have been referred to arbitration).

The decisions in *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which involve allegedly invalid agreements, are distinguishable from both *Teledyne Inc.* and this case on their facts: "The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye Check Cashing Inc.*, 546 U.S. at 444 n.1; *accord*, *Sandvik AB v. Advent International Corporation*, 220 F.3d 99, 106-07 (3d Cir. 2000)("[T]he doctrine of severability presumes an underlying, existent, agreement .... Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be 'void' or non-existent, as is contended here, and those that are merely 'voidable,' as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of an arbitration agreement is in dispute").

Numerous federal circuit court decisions support this distinction between invalid and non-existent contracts. *See Sanford v. Memberworks Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration"); *Adams v. Suozzi*, 433 F.3d 220, 226 (2d Cir.

2005) ("[t]he District Court possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties"); *Microchip Technology Inc. v. U.S. Philips Corporation*, 367 F.3d 1350, 1358 (Fed. Cir. (Ariz.) 2004)("[c]ontrary to the Ninth Circuit's decision in *Teledyne*, the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists is not limited to situations in which there is an independent challenge to the arbitration clause"); *Will-Drill Resources Inc. v. Samson Resources Co.*, 352 F.3d 211, 219 (5th Cir. 2003) ("[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator never had any authority to decide the issue. A presumption that a signed document represents an agreement could lead to this untenable result. We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute" (citation omitted)); *Spahr v. Sacco*, 330 F.3d 1266, 1273 (10th Cir. 2003) ("[T]he analytical formula developed in *Prima Paint* cannot be applied with precision when a party contends that an entire contract containing an arbitration provision is unenforceable because he or she lacked the mental capacity to enter into the contract. Unlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract"); *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587, 591 (7th Cir. 2001)("Many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being .... The approach of *Sandvik* and its

predecessors is sound, for a person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. Courts have jurisdiction to determine their jurisdiction not only out of necessity (how else would jurisdictional disputes be resolved?) but also because their authority depends on statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties *do* control the existence and limits of an arbitrator's power. No contract, no power"). *Also Chastain v. Robinson-Humphrey Co. Inc.*, 957 F.2d 851, 854-55 (11th Cir. 1992); *Three Valleys Municipal Water District v. E.F. Hutton & Co. Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991); *I.S. Joseph Co. Inc. v. Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986).

The court of appeals' decision in this case therefore conflicts with that of virtually every other federal circuit court on this important federal question.[4]

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[4]On the other hand, some other federal circuit courts also have applied *Prima Paint Corporation* to void contracts, and such application can directly undermine consumer protection laws. *See* Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 Marq. L. Rev. 581, 601-07, 610, 615 n.248 (2002) (noting that "the fact that consumers are seeking clarification on this issue [in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002)] once again [after *Burden v. Check Into Cash of Kentucky LLC*, 535 U.S. 970 (2002)(denying certiorari)] is evidence of the desperate need for the Supreme Court's voice on this issue"); *see also* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 Baylor L. Rev. 753, 784-85 and n.153 (2004)(*Prima Paint Corporation* applied to void contracts).

The court of last resort in California also supports the distinction between invalid and non-existent agreements. *See Rosenthal v. Great Western Financial Securities Corporation*, 926 P.2d 1061, 1074 (Cal. 1996)("[i]f the entire contract is void *ab initio* because of fraud, the parties have not agreed to arbitrate any controversy; under that circumstance, *Prima Paint* does not require a court to order arbitration").

Decisions by numerous state courts of last resort support the distinction. *See Thompson v. Lithia Chrysler Jeep Dodge of Great Falls Inc.*, 185 P.3d 332, 338 (Mont. 2008) ("[i]f formation of a contract never occurred, then the parties never agreed to arbitrate and it would be inappropriate to submit the matter to arbitration"); *Fox v. Tanner*, 101 P.3d 939, 949-50 (Wyo. 2004)("[w]e do not find this argument [that only a claim of fraud in the inducement addressed to the arbitration provision itself should be adjudicated by the court] compelling"); *Hudson v. Outlet Rental Car Sales Inc.*, 876 So.2d 455, 457 (Ala. 2003)("a challenge to the very existence of the contract ... is an issue for a court, not an arbitrator, to decide" (citations omitted)); *Iowa Management & Consultants Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 656 N.W.2d 167, 171 (Iowa 2003) ("if the entire agreement is invalid under federal law, this would also invalidate the provision in the agreement for arbitration of disputes").

California law, contrary to the court of appeals in this case, presumes that the court will decide arbitrability:

> Whatever the merits of the procedure, we think it sufficiently outside the usual understanding of the relations of court and

> arbiter and their respective functions to assume that the parties expected a court determination of arbitrability unless they have clearly stated otherwise.

McCarroll, 315 P.2d at 334.

A California court could not have found that the parties had authorized the arbitrator to determine arbitrability in this case without first finding that they had formed a contract, but the court of appeals in this case refers this issue to the arbitrator instead. The Ninth Circuit's opinion decides this important federal question in a way which must be corrected.

C. Labor Law Questions Should be Resolved Consistently with the National Policy For Resolving Commercial and Labor Disputes.

This Court settlement of the important question whether to consider state law in its Section 301 consideration, should also consider the impact of not considering the impact of the FAA and its requirements. The Ninth Circuit applied FAA caselaw principles to reach its result in the instant case.

It is well established that "the substantive law to apply in suits under §301(a) is *federal* law, which the courts must fashion from the policy of our national labor laws." *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (emphasis added). "Federal interpretation of the federal law will govern, not state law." *Id.* at 457; *see also United Steelworkers of*

America v. American Manufacturing Co., 363 U.S. 564, 567 (1960) (decrying "preoccupation with ordinary contract law" in Labor Management Relations Act case). But, *First Options of Chicago, Inc.* (and also *Mendez*) arise under the FAA, as do at least four of the decisions which are critical to the court of appeals' opinion in this case, *see Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397 (1967); *Nagrampa v. MailCoups Inc.,* 469 F.3d 1257, 1263 (9th Cir. 2006); and *Teledyne Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir. 1989).

Since *these are not §301 or even labor law cases*, it is impossible to determine whether they should control this case without resolving the conflict among the federal circuit courts on the same important matter regarding whether the FAA applies to §301 cases, *cf. Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 494 (5th Cir. 2003) ("when reviewing a case involving a CBA and arising under Section 301, courts are not obligated to rely on the FAA"); *Coca-Cola Bottling Co. of New York Inc. v. Soft Drink and Brewery Workers Union Local 812, Int'l Brotherhood of Teamsters*, 242 F.3d 52, 53 (2d Cir. 2001) ("[w]e hold that in cases brought under Section 301 ..., the FAA does not apply") (rejecting jurisdictional challenge based on FAA); *with Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO)*, 36 F.3d 712, 715 (7th Cir. 1994), *reh'g denied*, 1994 WL 716867 (7th Cir. 1994), *cert. denied*, *United Paperworkers Int'l Union, AFL-CIO v. Briggs & Stratton Corp.*, 514 U.S. 1126 (1995) ("our circuit is among the minority that ... applies the Arbitration Act to most collective bargaining agreements").

This Court should, but it does not appear that it has yet settled this important question of federal law. In *Textile Workers Union of Am.*, "[a]lthough the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to §301 of the Labor Management Relations Act, 1947, 29 U.S.C. §185," "it did not reject the Court of Appeals' holdings that the arbitration provisions would not otherwise be enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 (1991) (Stevens, J., dissenting). *See William B. Gould IV, Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 Emory L.J. 609, 640-43 (2006) ("there is now both division and doubt on the issue").

Of course, the 5-4 decision in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 119 (2001), also does not settle either the applicability of the FAA to §301 cases or whether a collective bargaining agreement constitutes an employment contract. Section 2 of the FAA makes written agreements to arbitrate valid "in any maritime transaction or a contract evidencing a transaction involving commerce; Section 1 exempts certain employment contracts from the FAA.

Justice Stevens' dissenting opinion in *Circuit City Stores Inc.*, *id.* at 124-26, 128 and n.2, suggests that the FAA applies only to commercial and admiralty contracts and not to employment contracts or labor law at all; *see also id.* at 139 (Souter, J., dissenting) ("excluding all employment contracts from the Act's enforcement of mandatory arbitration clauses is consistent with Secretary Hoover's suggestion that the exemption language would respond to any 'objection ... to the inclusion of workers'

contracts'").[5]

In fact, organized labor abandoned its opposition to the FAA on the assumption that it did not apply to labor law, see *id.* at 126-27 (Stevens, J., dissenting) ("The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added to [9 U.S.C.] §1, and the amendment eliminated organized labor's opposition to the proposed law").

Professor Gould discusses the importance of whether a collective bargaining agreement constitutes an employment contract and is therefore within the scope of the FAA, with respect to matters such as the expeditiousness of arbitration and the availability of discovery and judicial review which may affect many cases other than this one. *See* Gould, *supra*, at 644-50.

The court of appeals' disregard of *First Options of Chicago, Inc.*'s instruction to consider state law amounts necessitates correction. Since the issue in *Teledyne Inc.* was whether the contract was ever finalized, the Ninth Circuit was incorrect in that case, *see* 892 F.2d at 1410, to rely on *Prima Paint Corp.* By relying on *Buckeye Check*

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[5]*See also* Hearings on S.4213 and S.4214 Before the Subcommittee on the Judiciary of the Senate Judiciary Committee, 67th Cong., 4th Sess. 9 (1923)("not intended to be an act referring to labor disputes, at all"); and 65 Cong. Rec. 1931 (1924) ("[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts"); *both quoted in* S. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449, 466 (1996).

Cashing Inc. and *Prima Paint Corp.*, the Ninth Circuit repeats the error it already made in *Teledyne Inc.* *See* Jonathan M. Strang, *The Chicken Comes First: Who Decides if an Arbitrator Has Jurisdiction to Arbitrate?*, 16 Fed. Circuit B.J. 191 (2006).

D. The Breath of the Arbitration Clause Does Not Require An Arbitrator's Expertise to Decide Whether a Contract In Fact Exists.

The Ninth Circuit's interpretation that arbitration of arbitrability was proper conflicts with this Court's applicable decisions set forth above, in *AT&T Technologies Inc.*; *Boys Markets Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 248 (1970); *Textile Workers Union of America*; and *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962), and with the decisions of many other federal circuit courts and state courts of last resort, including California. This is particularly true in a case involving a strike, where, incredibly, the court of appeals *has produced an order to arbitrate arbitrability in a dispute which itself is not arbitrable.*

The court of appeals in this case, 546 F.3d at 1177, believes that the arbitration clause in this case covering "[a]ll disputes arising under this agreement" "is broad enough to cover the dispute over contract formation." But the arbitration clause in *AT&T Technologies Inc.*, 475 U.S. at 645 n.1, where this court disallowed arbitration, is similar, covering "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder." The court of appeals' opinion

does not merely misapply *AT&T Technologies Inc.*'s rule of law here: rather, since it relies on the wrong holding from *AT&T Technologies Inc.* as discussed above, it decides this additional important federal question in a way which actually conflicts with this Court's clearly applicable decision in *AT&T Technologies Inc.*

Further, broad arbitration clauses like the one in this case are quite common even in the federal and state cases cited above, where courts have rejected arbitration of contract formation. *See Sanford*, 483 F.3d at 958 n.2 (agreement provided for arbitration of "[a]ny dispute arising between You and Us"); *Adams*, 433 F.3d at 223 ("breach of the terms of this Memorandum"); *Microchip Technology Inc.*, 367 F.3d at 1353 ("[a]ll disputes arising out of or in connection with the interpretation or execution of this Agreement"); *Will-Drill Resources Inc.*, 352 F.3d at 213 (any "action dispute [sic], claim or controversy of any kind now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with" the agreement); *Spahr*, 330 F.3d at 1268 ("any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or the breach thereof"); *Sandvik AB*, 220 F.3d at 101 (agreement provided for arbitration of "[a]ny dispute arising out of or in connection with this Agreement and/or any agreement arising out of this Agreement"); *Chastain*, 957 F.2d at 853 ("[b]oth agreements contain arbitration clauses, broadly binding the contractual parties to arbitrate any disputes arising in connection with the account"). The court of appeals' decision in this case therefore conflicts with each of these decisions by other courts on this important question of federal law.

In addition, "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." *Lucas Flour Co.*, 369 U.S. at 105 (affirming damages judgment against union for strike). This arises from the fact that an agreement to arbitrate is the *quid pro quo* for an agreement not to strike, *see Boys Markets Inc.*, 398 U.S. at 248 (reversing judgment which had reversed injunction against union); *Textile Workers Union of America*, 353 U.S. at 455. Therefore, the strike itself provides indication that there was no agreement to arbitrate. *See International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1199 v. Pepsi-Cola General Bottlers Inc.*, 958 F.2d 1331, 1335 (6th Cir. 1992)("[t]he fact that Local 1199 called a strike demonstrates that Local 1199 did not believe that an implied agreement incorporating all of the undisputed terms of the old collective bargaining agreement existed") (affirming summary judgment against union which had sought arbitration); *International Union, United Mine Workers of America v. Big Horn Coal Co.*, 916 F.2d 1499, 1502 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992) ("the commencement of a seven-month strike on October 5, 1987, during which time the alleged misconduct occurred, shows continued dissatisfaction with and rejection of the employer's offer") (reversing order for arbitration).

Indeed, under California law, the arbitration clause in this case would not allow arbitration even of the merits of Granite Rock Co.'s underlying breach of contract claim, let alone arbitration of arbitrability. *See McCarroll*, 315 P.2d at 334-35 (where arbitration procedure is alternative

to strike and for the purpose of avoiding a strike, not to adjudicate strike once it has occurred, agreement to arbitrate "all grievances or disputes arising between [the parties] over the interpretation or application of the terms of this Agreement" did not provide for arbitration of breach of no-strike clause, rather the contract must be read as a whole and the arbitration clause viewed in light of its purpose).

The court of appeals' suggestion in this case that the parties had agreed to arbitrate arbitrability where they had not agreed to arbitrate even the ultimate dispute, therefore not only lacks credibility, but also conflicts with the applicable decisions of this court, other federal circuit courts and California's court of last resort.

The court of appeals' holding appears to be a misapplication of dictum in *First Options of Chicago Inc.* 514 U.S. at 943. Although the court of appeals fails to cite any precedent for this misapplication (just as it fails even to mention *First Options of Chicago Inc.* in its opinion at all), in fact the decision in this case follows a dangerous tendency in which other federal circuit courts have been similarly too casual in finding the "clear and unmistakable" requirement satisfied. *See* Joseph L. Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443 (2006); Berger, *supra*, at 790 and n.178-79. This tendency must be arrested.

II. AN LMRA SECTION 301(a) ACTION IS AVAILABLE AGAINST THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN THIS CASE IN VIEW OF THE STRONG PUBLIC POLICY IN FAVOR OF HOLDING PARENT UNIONS LIABLE FOR THE ACTS OF THEIR LOCALS.

Notwithstanding the conflict among the federal circuit courts regarding the availability of a Section 301(a) action for tortious interference with a collective bargaining agreement, the goal of Section 301(a) is labor stability and there is a strong public policy in favor of holding parent unions liable for the acts of their locals. The Ninth Circuit's denial of a contractual or tort remedy in this case is contrary to this statutory purpose and public policy by eliminating any remedy which Granite Rock Co. could apply for from the district court against the international union.

Congress enacted §301(a) in 1947 following a period of increased strikes. S. Rep. No. 105, 80th Cong., 1st Sess., p.2 (1947); *accord*, H. Rep. No. 245, 80th Cong., 1st Sess., p.4. "During the last few years, the effects of industrial strife have at times brought our country to the brink of general economic paralysis." H. Rep. No. 245 at 3.

Labor stability has been the goal of §301(a) from the beginning, S. Rep. No. 105 at 15-16:

> In the judgment of the committee.... We feel that the aggrieved party should also have a right of action in the federal courts .... If

> unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations .... Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

The existence of a tort as well as a contract remedy in these cases may advance the Congressional goal substantially by protecting the contract and signifying "society's interest in contractual integrity and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy." John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491, 1511 (1981) (citation omitted).

But for Section 301(a), Granite Rock would have had a remedy against the International Brotherhood of Teamsters under California state law for its interference with the collective bargaining agreement according to the Ninth Circuit. *See Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530-31 (Cal. 1998). But, §301(a) preempts state tort as well as contract claims which involve interpretation of a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Contrary to Congress' clear intent, the court of appeals in this case therefore has left Granite Rock Co. without a remedy against the international union.

The court of appeals expressly acknowledges the

conflict among the circuit courts regarding the availability of a Section 301(a) action for tortious interference with a collective bargaining agreement. *See* 546 F.3d at 1174-75. While resolving that conflict, this Court should take into account the strong public policy in favor of holding parent unions liable for the acts of their locals. Decisions from numerous circuit courts reflect this policy.

In *Westmoreland Coal Co. Inc. v. Int'l Union, UMWA*, 910 F.2d 130, 136 (4th Cir. 1990), the court affirmed relief against an international union in a §301(a) case based in part on statements by individual union officials, and specifically distinguished this Court's decision in *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 216-18 (1979):

> *Carbon Fuel Co.* is distinguishable. There, the Supreme Court held that an international union which neither instigates, supports, ratifies, nor encourages "wildcat" strikes by local unions cannot be held liable for the actions of the locals. The court was careful to distinguish the situation in *Carbon Fuel Co.* from one in which a local union takes actions, authorized by the parent union, which violate a contract.

Numerous other decisions also illustrate the liberal application of agency concepts in labor cases. *See Alexander v. Local 496, Laborers' International Union of North America*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) ("where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct") (affirming finding that

international union was liable for acts of local union); *Dowd*, 975 F.2d at 785 n.4, citing *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union even absent evidence that union actually initiated or endorsed picketing); *NLRB v. International Union, United Mine Workers of America*, 727 F.2d 954, 956 (10th Cir. 1984)("the District and the Local were acting as agents for the International") (upholding Board conclusion that international union was responsible for violations by district and local unions); *Lane Crane Service Inc. v. International Brotherhood of Electrical Workers Local Union No. 177*, 704 F.2d 550, 554 (11th Cir. 1983)("express authorization or ratification are not necessary for liability") (affirming judgment against international union under ordinary agency standards); *Vulcan Materials Co. v. United Steelworkers of America AFL-CIO*, 430 F.2d 446, 457 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971)("the acts of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified"; "since the International and the Local were acting in concert, they are responsible for the conduct, not only of their own agents, but of each other's agents") (affirming judgment against local and international union); *Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO*, 338 F.2d 309, 317-19 (5th Cir. 1964)("[e]ven if the International should not be considered as a participant with Local 506 in the unlawful interference with Allen's employment, the International is liable for the acts of the Local under the doctrine of respondeat superior") (reversing district court holding that international union was not liable for acts of local union); *White Oak Coal Co.*

v. United Mine Workers of America, 318 F.2d 591, 598 (6th Cir. 1963), *cert. denied*, 375 U.S. 966 (1964)("actual authorization of specific acts was unnecessary") (affirming judgment against national union).

In *Dowd v. Int'l Longshoremen's Assn., AFL-CIO*, 975 F.2d 779, 785 (11th Cir. 1992), a secondary boycott case affirming an injunction against an American union which had allegedly violated the National Labor Relations Act by inducing Japanese unions to pressure importers not to import certain items, the court references "the liberal application of agency concepts appropriate in the labor context" and specifically notes that in labor cases *an agency or joint venture relationship may exist even where some of the elements required in an ordinary tort or contract dispute are absent. Id.* at 91 (emphasis added).[6]

Further, the *Dowd* court's citation to *Cagle's Inc. v. NLRB*, 588 F.2d 943, 947-48 (5th Cir. 1979) (where employer encouraged Chamber of Commerce director to campaign against formation of union and failed to effectively disavow such interference, employer was responsible for director's conduct even though director was not employer's formal agent); and *Star Kist Samoa Inc.*, 237 N.L.R.B. 238 (1978) (employer was responsible for anti-union activities of community organization, even where it had no right to demand or control the actions of

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[6]In fact, the liability of an international union has been recognized by the Ninth Circuit in remedy for breaches of contractual responsibilities delegated to its local union. In *NLRB v. Int'l Longshoremen's and Warehousemen's Union*, 210 F.2d 581, 584-85 (9th Cir. 1954), the court enforced a Board order that an international union was responsible for the unfair labor practices of a local union under "a general principle of agency law."

the community organization).

Even an international union's mere awareness of the conduct and failure to repudiate an agent's acts may create responsibility. *Dowd*, 975 F.2d at 785 n.4, *citing Soft Drink Workers Union, Local No. 812*, 304 NLRB No. 22 (1991) (where union was aware of unfair labor practices by member on behalf of union and failed to repudiate conduct, union was responsible for member's actions); and *Service Employees Union, Local No. 87*, 291 NLRB 82 (1988) (picketers acted as agents of union, based upon union's apparent endorsement and ratification, even absent evidence that union actually initiated or endorsed picketing); *see also Alexander v. Local 496, Laborers' Int'l Union of North America*, 177 F.3d 394, 409 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) ("where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct"); *Myers v. Gilman Paper Corp.*, 544 F. 2d 837, 851 (5th Cir. 1977), *reh'g denied*, 556 F.2d 758 (5th Cir. 1977), *cert. dismissed, Local 741, Int'l Brotherhood of Electrical Workers, AFL-CIO v. Myers*, 434 U.S. 801 (1977) (international union is liable for a local union's discrimination where a "sufficient connection" exists between the two).

The liability of a parent national union has been upheld specifically with respect to the acts of a local union during bargaining. In *Riverton Coal Co. v. UMWA*, 453 F.2d 1035, 1042 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972), the court, remanding for entry of judgment in favor of plaintiff corporations against a national union, states that the,

> UMW, having the power to correct the unlawful action of the local union, and deciding to accept the benefit of it instead of taking appropriate action to halt the strike as it was required to do under the contract, thereby induced and encouraged both the 1964 and the 1966 strike.

Similarly, in *Sheet Metal Workers' Int'l Assn., AFL-CIO v. NLRB,* 293 F.2d 141, 149 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 896 (1961), the court enforced a Board order that an international union was responsible for the unfair labor practices of local unions, including the requirement of certain provisions in collective bargaining agreements. The acts creating liability need not be great. In *Int'l Bhd. of Electrical Workers, AFL-CIO v. NLRB*, 487 F.2d 1113, 1128 (D.C. Cir. 1972), the court affirmed the Board's conclusion that an international union had committed unfair labor practices merely by its routine disposition of an appeal and retention of records regarding a local union's disciplinary actions.

> And, the policy favoring liability is so strong that
>
> where a union affirms prior conduct performed on its behalf, the union may be responsible for the unfair labor practices of another even where the conduct did not bind the union at the time it occurred.

Dowd, 975 F.2d at 786, *citing Service Employees Union, Local No. 87*, 291 NLRB 82 (1988); and *Sheet Metal Workers Union, Local No.2*, 203 NLRB 954, 956 (1973).

All of this, of course, is merely a specific application of the general rule that third parties may not disrupt labor relationships. *See NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951) ("[i]t was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract") (reversing judgment which had set aside Board order against trades council); *Wells v. Int'l Union of Op. Engrs, Local 181*, 303 F.2d 73, 75 (6th Cir. 1962) ("defendants' activities were secondary in nature and were engaged in for the purpose of inducing the Transit-Mix employees not to deliver concrete to the Tye & Wells job site and, therefore, in turn to force Tye & Wells to breach its contract with the United Construction Workers") (affirming judgment against unions for secondary boycott). Yet the court of appeals has effectively endorsed IBT's disruption in this case, contrary to the purpose of §301(a).

The federal courts at the very least should possess the power to enjoin acts by third parties under Section 301 that interfere with the Congressional interest, just as it permitted the injunction in *Boys Market*.

CONCLUSION

Wherefore, the Center on National Labor Policy Inc. and the National Association of Manufacturers respectfully requests this Court reverse the decision of the United States Court of Appeal for the Ninth Circuit.

Respectfully submitted,

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