No. 08-1214

IN THE
SUPREME COURT OF THE UNITED STATES

GRANITE ROCK COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF THE PETITION

Quentin Riegel
Of Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1790
(202) 637-3000

Maurice Baskin
Counsel of Record
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amicus*

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INTERESTS OF THE *AMICUS* [1]

The National Association of Manufacturers (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 and the general public about the vital role of manufacturing to America's economic future and living standards.

The NAM is filing this *amicus* brief in support of the Petition because the Petition raise two issues that are both of great importance to NAM's members and the business community. The NAM wishes to bring to the Court's attention the adverse impact on public policy and on labor law generally if the Ninth Circuit's aberrant decision is allowed to stand.

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[1] Pursuant to Supreme Court Rule 37.2, the *Amicus* states that all parties have consented to the filing of this brief, and letters evidencing such consent are being filed with the Court. Pursuant to Supreme Court Rule 37.6, the *Amicus* further states that 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 *Amicus*, their members, or their counsel made a monetary contribution to its preparation or submission.
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SUMMARY OF ARGUMENT

In a ruling that is completely at odds with the holdings of this Court and the majority of other circuits, the Ninth Circuit has abdicated the proper role of the judiciary in deciding whether parties to collective bargaining have agreed to arbitrate their disputes. The appeals court's holding that employers can be bound to arbitrate issues of contract formation, without the *quid pro quo* of an enforceable no-strike clause under a tentative agreement, threatens to undermine the process of collective bargaining itself. Review by this Court is urgently needed in order to prevent serious injury to the bargaining process. Absent such review, unionized employers generally will be greatly discouraged from entering into tentative agreements with unions that contain arbitration provisions, thereby undermining the goal of labor harmony that Section 301 was intended to achieve.

Of equally great concern to the *Amicus*, 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 court of appeals decision again creates a conflict with other circuits on an issue of great importance to the broader business community. The Petition should be granted so that the true perpetrators of violations of labor agreements can be held responsible for their actions, and their violations remedied, as the drafters of Section 301 intended.

I. BY ALLOWING ARBITRATORS TO DECIDE ISSUES OF CONTRACT FORMATION, THE NINTH CIRCUIT'S DECISION THREATENS TO UNDERMINE THE COLLECTIVE BARGAINING PROCESS AND CREATES A CONFLICT IN THE CIRCUITS.

The Ninth Circuit's decision enables a labor union to enforce an arbitration clause without being bound by any other aspect of a tentative agreement reached with an employer, including a no-strike clause. See Petition at 10, *et seq*. This holding, if allowed to stand, will have serious adverse consequences for labor relations and the collective bargaining process. Certainly**,** employers will be much less likely to agree to tentative agreements that include arbitration clauses under this decision.

It is well settled that the primary incentive for employers to sign collective bargaining agreements containing arbitration clauses is that "the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957). *See also* R.W. Fleming, The Labor Arbitration Process 31-32 (1965) ("Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration ... are in large part based on the theory that the arbitration clause is the quid pro quo for the no-strike clause."). Empirical evidence demonstrates the importance of maintaining employers' incentives to

agree to arbitration clauses in tentative agreements, since there would be almost no collective bargaining agreements without such clauses. *See* Archibald Cox *et al*., Labor Law: Cases and Materials 518 (9th ed. 1980) (estimating that arbitration provisions reflecting this bargained exchange appear in about ninety-six percent of all labor agreements).

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)). [2]

In addition, the Ninth Circuit's holding will decrease employers' incentives to sign tentative agreements that include arbitration clauses for fear that an arbitrator will have the power to determine whether an agreement has been completed. The main concern employers will have in this instance is the level of deference courts pay to arbitration

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[2] As one scholar has put it, "In my view, [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." 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).

decisions, and courts' corresponding hesitancy to review them. For example, in *United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 596 (1960), this Court remarked that "refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *Enterprise Wheel* went further, stating that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." Id. at 598.[3]

The logical result of the Ninth Circuit's decision is that employers will be discouraged from agreeing to include an arbitration clause in a tentative agreement, for fear that they will thereby be waiving their right to enforce the tentative agreement in court. This means that there will be fewer tentative agreements. Given the importance of tentative agreements in the bargaining process, which enable parties to feel that progress is being made on a new contract without a disruption to the

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[3] As a recent study illustrates, arbitration award enforcement is at its peak. Michael H. LeRoy & Peter Reuille, *As The Enterprise Wheel Turns: New Evidence On The Finality Of Labor Arbitration Awards*, 18 Stan. L. & Pol'y Rev. 191, 195 (2007). Courts now enforce awards in close to seventy-six percent of arbitration awards, a marked increase from past years. *Id*. Even more strikingly, courts have enforced between seventy and eighty percent of challenged awards, *regardless of the legal argument*. *See id*.

workflow, this will lead to more labor unrest and work stoppages.

It was for these reasons that this Court held in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), that it is the courts and not the arbitrators who must decide in the first instance whether the parties have agreed to arbitrate their disputes at all. As the Court observed, *id*. at 651:

> The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced,"…if a labor arbitrator had the "power to determine his own jurisdiction." [*Quoting* Cox, *supra*]. Were this the applicable rule, an arbitrator would not be constrained to resolve only those 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 agreement, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.

See also John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (whether an employer is bound by an agreement containing an arbitration clause is a "threshold question" for the court to decide).

As numerous circuit courts of appeals have further held, this Court's mandate compels judicial resolution of all jurisdictional issues relating to whether the parties have agreed to arbitration in the first place, including contract formation. *See Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F. 3d 1350, 1358 (Fed. Cir. 2004); *Sandvik AB v. Advent Int'l Corp.*, 220 F. 3d 99 (3d Cir. 2000); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F. 3d 587 (7th Cir. 1995); and numerous other cases from virtually every circuit other than the Ninth, cited in the Petition at 14-18.

Of particular significance is the Second Circuit's holding in *Adams v. Suozzi*, 433 F. 3d 220 (2d Cir. 2005), which found in direct conflict with the Ninth Circuit here that courts should not compel arbitration before determining whether all conditions precedent to formation of a collective bargaining agreement have occurred. In that case as in this one, a dispute arose over whether a tentative agreement had been submitted to a union's membership for ratification so as to create a final and binding agreement. Though the court ultimately found there that the ratification had not taken place (unlike the present facts), the court made it clear that this was a judicial decision to make, not that of an arbitrator. Rejecting the position now adopted by the Ninth Circuit, and citing this Court's holding in *AT&T*, the Second Circuit declared: "The District Court possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties." *Id*. at 226.

The Ninth Circuit's decision in the present case ignores or misinterprets this Court's mandate in favor of judicial resolution of issues of contract formation and will have pernicious effects on the process of collective bargaining unless corrected by this Court. For this reason, and to resolve an obvious split in the circuits on this issue of national importance, the *Amicus* asks that the Petition be granted.

II. BY ALLOWING INTERNATIONAL UNIONS TO ESCAPE LIABILITY UNDER SECTION 301 FOR ACTIONS CONTRARY TO THE STATUTE, THE NINTH CIRCUIT'S DECISION CREATES ANOTHER CIRCUIT CONFLICT ON AN ISSUE OF GREAT IMPORTANCE

The Ninth Circuit also held in this case that the International Brotherhood of Teamsters was immune from suit under Section 301, even if the international union compelled its affiliated local union to refuse to honor its previous commitment to the tentative agreement with Granite Rock. As explained in the Petition, at 33, the Ninth Circuit has previously held in *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401 (9th Cir. 1992), that Section 301 preempts California tort claims for contractual interference because proving a contract breach is an essential element of such a claim. *Id.* at 1412. The current decision thus leaves employers without any remedy against international unions who directly interfere with agreements that Section 301 was intended to protect. This is an issue of

great concern to the *Amicus* and its members and should be reviewed by this Court.

This Court has held that Section 301 preempts state claims that require interpreting any term of a collective bargaining agreement, such as its no-strike language. *See Allis-Chalmers v. Lueck,* 471 U.S. 202, at 212, 220. Therefore, it should follow that a contractual interference claim "arises under" Section 301 when such a claim cannot be resolved without adjudicating whether a labor contract was breached. The Ninth Circuit failed to so hold, contributing to a severe split in the circuits on this issue.

Absent review and reversal by this Court, many unionized employers will face the prospect of internationally sanctioned strikes that violate local bargaining agreements but cannot be remedied. This subversion of local bargaining agreements by international unions is contrary to the language and intent of Section 301.

The control exercised by the International over Granite Rock's bargaining process was by no means unique to this case. It is very common for international unions to retain control over the bargaining process even though the international is not called upon to sign the actual collective bargaining agreement. For this reason, the Ninth Circuit's decision threatens to have a significant adverse impact beyond the immediate parties to this case.

The *Amicus* fully agrees with the Petitioner's assertion that the Ninth Circuit's holding will cause uncertainty during the term of a collective bargaining agreement regarding recurring economic disputes. See Petition at 35. Because of the control exercised by international unions over their locals, the internationals should be held responsible for violating Section 301 when they order their locals to violate the no-strike provisions of such agreements, as occurred here.

As the Ninth Circuit acknowledged, 546 F. 3d at 1174, its decision on this point conflicts directly with the Third Circuit's decision in *Wilkes-Barre Publishing Co. v. Newspaper GuiId of Wilkes-Barre, Local 120,* 647 F.2d 372, 381 (3d Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982). In that case, as in this one, an employer sued a nonsignatory international union for inducing a breach of a labor contract. The Third Circuit held that Section 301(a) jurisdiction "reaches not only suits on labor contracts, but also suits seeking remedies for violations of such contracts." *Id.* at 380, 381 n.6. The Third Circuit rejected the emphasis on labels attached to remedies (as tort or contract) under the federal common law applying Section 301(a). *Id.* at 381. The Ninth Circuit opinion falls prey to exactly such labeling and ignores the realities of the relationship between union

locals and their international controllers.[4]

CONCLUSION

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

Respectfully submitted,

Quentin Riegel
Of Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004-1790
(202) 637-3000

Maurice Baskin
Counsel of Record
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amicus*

[4] *See also United Association of Journeymen and Apprentices v. Georgia Power Co.,* 684 F.2d 721 (11th Cir. 1982) (agreeing with the reasoning of the Third Circuit in *Wilkes-Barre*).