

No. 08-1214

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IN THE  
**Supreme Court of the United States**

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GRANITE ROCK COMPANY,  
*Petitioner,*

v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS &  
TEAMSTERS LOCAL 287,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF OF RESPONDENT  
TEAMSTERS LOCAL 287**

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October 26, 2009

## **QUESTIONS PRESENTED**

Petitioner's breach of contract claim against the Union now before the Court presents two questions:

1. Whether by filing the lawsuit to enforce the no-strike provision in the tentative agreement reached at the bargaining table, Petitioner subjected itself to a contractual obligation to arbitrate the parties' dispute as to whether the agreement had been ratified.

2. Whether, in any event, the District Court erred in denying the Union's motion to compel arbitration of that dispute at a time when the tentative agreement had concededly been ratified and was in full force and effect.

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**OPINION BELOW**

The opinion of the Ninth Circuit in this case appears at 546 F.3d 1169 (9th Cir. 2008). The orders of the District Court dealing with the Union's motions to compel arbitration are unreported, but are included in the Joint Appendix at pp. 226-33, 234-48, and 343-62.

**JURISDICTION**

Respondent Local 287 accepts the jurisdiction statement appearing at p. 1 in Petitioner's Brief.

## **STATUTORY PROVISIONS**

Section 301(a) of the Labor Management Relations Action, 29 U.S.C. § 185(a), provides as follows:

Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

## **STATEMENT OF THE CASE**

### **A. Summary of the Underlying Facts**

Petitioner Granite Rock (“Granite Rock”) is a supplier of construction materials, including ready mix concrete, aggregate and asphalt, among other products. (JA 71, 119.) It has several facilities in Northern California and collective bargaining relationships with a number of unions. The facility principally involved in this case is a ready-mix plant in San Jose, California where Respondent Teamsters Local 287 (“Union” or “Local 287”) represents approximately twenty ready-mix drivers. (JA 71, 119-20.)

On June 9, 2004, following the expiration of their most recent agreement, Local 287 struck in support of its contract demands when negotiations were unsuccessful in producing a successor agreement. (JA 45, 120.) Early in the morning on July 2, after an all-night negotiating session, the parties reached agreement on the terms of a new contract, subject to ratification by the Union’s members. (JA 45.) At this point there was discussion of a “back-to-work”

agreement (addressed to issues that developed during the strike not dealt with in the tentative agreement), a draft of which Petitioner's representative, Bruce Woolpert, presented to the Union's representative, George Netto. (JA 45-46, 112, 140-41, 158-59.) Although the ensuing conversation about this development is controverted, it is undisputed that Netto expressed concern about a provision in Woolpert's draft that would have retained for a limited period of time the employees of a subcontractor who performed the work of the Union members during the strike. (JA 140-41, 159-60.) Nonetheless, Netto immediately withdrew all picketing and arranged for a meeting of the strikers at the Union's hall for 9:00 a.m. that same morning. (JA 162-63.)

The tentative new agreement was read and discussed at the membership meeting, but according to Netto's testimony in the District Court, he explained to the members that a ratification vote would not be taken until the parties had reached agreement on a back-to-work agreement. (JA 46, 166.) He also testified that an informal vote was taken on an Employer proposal dealing with a Saturday work provision that was included in the tentative agreement but had been particularly controversial during negotiations. (JA 166-68.) Later the same morning, Netto faxed Woolpert a counter-proposal to the proposed back-to-work agreement submitted by Woolpert at the close of their negotiations. (JA 168-71.) It was rejected, and on July 6, the Union renewed its strike and picketing. (JA 185.) Negotiations continued thereafter in an effort to reach a return to work agreement, but none was concluded. (JA 176-77.)

Finally, a successful ratification vote was conducted on August 22, 2004 to accept the tentative agreement for a successor contract, but the work stoppage continued in consequence of picketing attributable to a separate strike against Granite Rock involving a different bargaining unit. (JA 313, 325.) In mid-September, the latter labor dispute was settled and all Granite Rock employees returned to work. (JA 313.) The successor collective bargaining agreement was not executed until December 17, 2004, but was made effective retroactive to May 1, 2004, the day following the expiration date of the prior agreement. (JA 325.)

#### B. Proceedings in the District Court

This case originally came before the District Court on July 26, 2004, upon Granite Rock's application for injunctive relief against the then ongoing strike. (JA 83-84.) An Amended Complaint had been filed alleging that the strike violated the no-strike provision of the collective bargaining agreement which Granite Rock asserted to have been in effect since July 2. (JA 72-74.) Jurisdiction was premised on Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). (JA 70.) The Complaint alleged, *inter alia*, that Granite Rock was "willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it." (JA 76.)

During the course of the injunction hearing, and after colloquy between the District Court judge and counsel in which the nature and circumstances of the case were aired, the court conducted a hearing on the issue of contract ratification. (JA 117.) Before taking evidence on the ratification issue, the District Court, without objection of the parties, consolidated

the hearing with the merits of the case. *See* Rule 65(a)(2), Fed.R.Civ.P.. (JA 116-17, 211.) At the conclusion of the testimony, the court issued a bench decision in which the court credited Business Agent Netto’s testimony, found that the tentative agreement had not been ratified, denied Granite Rock’s request for injunctive relief, and dismissed the case in its entirety. (JA 204-11.)

On August 9, 2004, following the District Court’s dismissal of the action, Petitioner filed a motion for a new trial (Rule 59, Fed.R.Civ.P.), supported by a declaration of one of its drivers stating that he attended the July 2, 2004 membership meeting and that the tentative agreement was in fact ratified at that meeting. (JA 214-16, 217-21; Dkt. # 16.<sup>1</sup>). Following limited discovery, the court granted the motion on January 24, 2005. (JA 222-25.) In its Answer to the First Amended Complaint filed on February 17, 2005, Local 287 asserted as an affirmative defense “that [the Union’s] alleged conduct for which [Granite Rock] seeks damages—striking in breach of a no-strike clause—presents a dispute that is subject to the grievance and arbitration provisions of the collective bargaining agreement now in effect between the parties. . . .” (Dkt. # 43.) Local 287’s position in this respect was thereafter repeated in three separate pre-trial motions to compel arbitration. The first (Dkt. # 48), which was combined with an alternative motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, was denied on the ground that it was “misplaced at this time.” (JA 231.) The District Court explained that it “must first decide whether a contract exists before

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<sup>1</sup> All docket citations refer to the District Court’s docket.

either party can be subject to or ordered to take their dispute to arbitration.” (*Id.* at 232.)

This ruling was followed by a second motion (Dkt. # 66) filed by the Union seeking, *inter alia*, partial arbitration of Petitioner’s claims, *i.e.*, arbitration of the issues of contract violation and damages in the event that there was a judicial determination that the contract had been ratified. That motion was granted. (JA 234-48.)

The Union filed a third pre-trial motion (Dkt. # 213), again raising the question of arbitrability, shortly after the issuance of the decision of the Ninth Circuit in *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc). (Dkt. # 213.) Following this Court’s decision in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Ninth Circuit acknowledged in *Nagrampa* that a challenge to the validity of a contract containing an arbitration clause was to be resolved by arbitration, if the challenge was not directed to the arbitration clause itself but to the contract as a whole. *Nagrampa*, 469 F.3d at 1264, 1268-70.<sup>2</sup> The Union’s motion argued that *Nagrampa*, a case brought under the Federal Arbitration Act (“FAA”), was applicable in this case, since the Union’s challenge was to the entire contract, and certainly not to the arbitration clause which it sought to enforce. The District Court again disagreed, stating, “Since the resolution of the ratification issue is inextricably tied to the existence of any contract to arbitrate, the Court reaffirms its decision to decide this question in the first stage of this bifurcated proceeding.” (JA 361.)

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<sup>2</sup> The contract in *Prima Paint* was challenged on the ground of fraud in the inducement but “no claim is made that fraud was directed to the arbitration clause itself.” 388 U.S. at 402.

Thereafter, in late April and early May, 2007, this case was tried by a jury to resolve the dispute as to whether the tentative agreement had been ratified. The jury found that the tentative agreement had been ratified July 2, 2004 at the membership meeting on that day. (JA 378-80.)

### C. Proceedings in the Ninth Circuit

On appeal the Ninth Circuit sustained the Union's position that the dispute over ratification should have been referred to arbitration. The case was remanded to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (JA 61.)<sup>3</sup> Quoting from this Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), the Appellate Court's decision states that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." This principle, according to the Appellate Court, is applicable to challenges, as here, "to contract formation or to the contract as a whole—provided that both parties have consented." (JA 61.) As explained in the Court's opinion (JA 60):

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<sup>3</sup> The Union also appealed from the District Court's rulings denying its motions (1) to strike Petitioner's demand for a jury trial; (2) to dismiss the complaint on the ground that Petitioner's position concerning the ratification issue was precluded by the finding of the NRLB in a related case that a ratification vote had not been taken; and (3) its post-verdict alternative motion for a new trial or judgment as a matter of law (Rules 50(b) and 59 (a), Fed.R.Civ.P.). The Ninth Circuit did not address these issues in the light of its disposition of the appeal on the basis of its determination of the arbitration issue. (JA 47.)

Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause.

\* \* \*

When the parties have both consented to arbitration there are no concerns about arbitrators imposing themselves upon parties. If a party sues under a contract containing a broad arbitration clause, logic dictates that the most reliable way of honoring the parties' expectations is to enforce that arbitration clause from the outset unless the other party shows it never agreed to arbitrate.

In addition, the Ninth Circuit's opinion rejects Granite Rock's separate argument that the arbitration provision involved in this case "does not cover a dispute over formation." (JA 58, n.4.) The contract grievance and arbitration language, extends to "[a]ll disputes arising under this agreement." (JA 434.) The Appellate Court's opinion states that this language plainly satisfies the standard established by this Court that arbitration is required wherever the contract language is "susceptible of an interpretation" that covers the dispute. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). (JA 59.) Accordingly, the Court remanded the case to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (JA 61.)

#### D. Proceedings Before the NLRB

The events in this case were also the subject of a separate proceeding before the National Labor Rela-

tions Board. See *Teamsters Local 287 (Granite Rock Company)*, 347 N.L.R.B. 339 (2006). The Complaint in that case, based on a bad faith bargaining unfair labor practice charge filed by Granite Rock, alleged that Local 287 had violated Section 8(b)(3) of the Act by delaying the ratification vote on the tentative agreement of July 2, 2004, until August 22, 2004. *Id.* at 341. Evidence was submitted during the hearing in May, 2005, before the Administrative Law Judge (“ALJ”) concerning, *inter alia*, the Union’s membership meeting following the conclusion of the negotiations on the morning of July 2. *Id.* at 343. The ALJ concluded in his decision that the Union had failed to bargain in good faith by not conducting a ratification vote during the membership meeting on July 2. *Id.* at 345. However, the ALJ rejected Petitioner’s contention that the ratification vote had in fact been held and further that the tentative agreement had in fact been ratified. *Id.* at 344, n.5 (“ . . . I find no evidence that the employees ratified the contract on July 2.”).

On review, the Board on May 31, 2006, sustained the ALJ’s finding that the tentative agreement had not been ratified on July 2. *Id.* at 339 (“In the instant case, ratification did not occur until August 22.”). The Board also upheld his conclusion that the Union’s delay in ratifying the tentative agreement constituted bad faith bargaining. *Id.* at 339, 340. In addition, the Board upheld Granite Rock’s contention that the Board’s remedy should provide that the agreement, as finally executed, be given retroactive effect to July 2, 2004. *Id.*

The Ninth Circuit, in a short unpublished decision, enforced the Board’s Decision and Order. *Teamsters Local 287 v. N.L.R.B.*, 293 Fed.App. 518 (9th Cir. 2008).

**SUMMARY OF ARGUMENT**

There are two distinct, but compatible analyses that require affirmation of the Appellate Court's decision.

First, as the Ninth Circuit found, both parties demonstrated their consent to comply with the agreement's grievance and arbitration provisions to resolve the dispute as to whether the tentative agreement reached at the bargaining table had been ratified on July 2, 2004. Petitioner's commitment to arbitration was by way of bringing this lawsuit asserting that the agreement had in fact been ratified on that day and was in full force and effect from July 2 forward. In these circumstances a plaintiff subjects itself to a contractual obligation to comply with all provisions in the agreement, including its arbitration provision. This principle is well established under the Federal Arbitration Act, and because it is fully consistent with federal policy favoring arbitration of labor disputes, it is appropriate to apply it in Section 301 cases. The Union, of course, committed itself to arbitration of the dispute by filing motions to compel its arbitration.

Contrary to Petitioner's argument, the submission of the dispute to an arbitrator in the circumstances of this case does not offend the general rule against permitting an arbitrator to determine his/her own jurisdiction. Although an arbitration award in this case might establish that the tentative agreement was not ratified, which would negate the existence of the arbitration clause, or a judicial determination that there had been ratification, as happened in this case, which would mean that the dispute belonged in arbitration. This Court has ruled, however, that this "conundrum" has been resolved in favor of arbitra-

tion. See *Buckeye*, 546 U.S. at 448-49, citing *Prima Paint*, 388 U.S. at 395.

Nor does the Union's position take issue with the rule that courts, and not arbitrators, are to decide disputes over whether the parties have an obligation to arbitrate particular matters. The Union's motions did not request the District Court to require an arbitrator to decide whether the parties' dispute was to be arbitrated; the Union requested the District Court to make that decision. If the dispute in this case is to be arbitrated, it will be because this Court affirms the ruling of the Court of Appeals, and not because of a "gateway" ruling of an arbitrator.

The second discrete ground for affirming the decision below is that the tentative agreement was concededly in existence when the Union filed its motions to compel arbitration. Petitioner could no longer argue that there had to be a court decision as to the existence of the agreement before it had a contractual duty to comply with the arbitration provision. The underlying dispute had become whether the no-strike obligation was in effect during a particular period of time in the past. Petitioner does not and could not argue that it was not bound by the entire agreement, including its arbitration clause, when the matter came before the District Court during the post strike period.

The Petitioner's argument that the dispute the Union sought to have arbitrated is not within the scope of the arbitration provision is wholly without merit. That clause covers "[a]ll disputes arising under this agreement." (JA 434.) The Ninth Circuit answered the argument summarily in stating "[b]ecause Granite Rock is suing under the alleged new CBA, the arbitration is certainly susceptible of

an interpretation that covers the dispute” (JA 59), quoting from *Warrior & Gulf*, 363 U.S. at 582-83. That is all that is necessary under the strong presumption of arbitrability of labor disputes, which carries with it the admonition that “[d]oubts should be resolved in favor of coverage.” *Id.*

## ARGUMENT

### I. INTRODUCTION: THE SOURCE OF THE GOVERNING LAW

Local 287’s position in this case is that Petitioner was required to pursue its claim that the Union violated the no-strike clause through the grievance and arbitration provisions in the contract on which it relies in asserting that claim. *See Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers*, 370 U.S. 254 (1962). The persistent theme of Petitioner’s opposing argument is that it did not agree to arbitrate that issue; that whether it was under a contractual obligation to arbitrate cannot be ascertained until the ratification issue is resolved, a matter that is the responsibility of the court and not an arbitrator.

We show below that this line of reasoning cannot be sustained under the decisional law of this Court. Initially, however, we think it is helpful to an understanding of the decision below to discuss briefly the interplay between Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and the Federal Arbitration Act (“FAA”) (9 U.S.C. § 1 *et seq.*) as the decisional law under these two statutes bear upon this case.

Jurisdiction of the subject matter in this case lies in Section 301, and not the FAA which in any event is not a jurisdictional statute. *Moses H. Cone Memorial*

*Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 26, n.32 (1983).<sup>4</sup> The Ninth Circuit decision, however, relies on this Court’s decisions applying the FAA. The implicit and proper reading of this circumstance is that the principles underlying the FAA decisions cited by the Ninth Circuit are equally cogent in Section 301 cases. The fusion of case law under the FAA with Section 301 decisions is in full accord with the explanation of this Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), that “the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws.” *Id.* at 456. The FAA has been a prominent source of rules and guidance for federal courts in developing substantive law under Section 301. Indeed, this Court expressly acknowledged as much in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), where it looked to the FAA for guidance in determining the scope of judicial review to be given an arbitration award that was before the Court in a Section 301 case. As stated in *Misco*, 484 U.S. at 41, n.9:

[T]he federal courts have often looked to the [Federal Arbitration] Act for guidance in labor arbitration cases, especially in the wake of the holding that Section 301 . . . empowers the federal

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<sup>4</sup> As stated in the decision cited in the text, “[t]he Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under [28 U.S.C. § 1331] or otherwise.” *See also*, *Vaden v. Discover Bank*, 556 U.S. \_\_\_, 129 S. Ct. 1262, 1271-72 (2009); and *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1402 (2008).

courts to fashion rules of federal common law to govern ‘[s]uits for violation of contracts between an employer and a labor organization’ . . . .

In counterpart, this Court’s FAA decisions frequently cite Section 301 arbitration decisions in support of assertions having to do with the federal policy favoring arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985); *First Options v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83-85 (2002); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *see also 14 Penn Plaza v. Pyett*, 556 U.S. \_\_\_, 129 S. Ct. 1456, 1462 (2009) (motion to compel arbitration pursuant to collective bargaining agreement brought under FAA).<sup>5</sup>

It is accordingly not surprising that the Ninth Circuit looked to the relevant FAA line of decisions that relate directly to the issue in this case as an appropriate precedent to be added to the evolving body of substantive law under Section 301. Both statutes reflect strong national policy favorable to arbitration. *See Moses H. Cone Hospital*, 460 U.S. at 24-25 (“the [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the

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<sup>5</sup> The effect of this Court’s decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), on the application of the FAA to Section 301 cases need not be addressed here. As found by the court below, and discussed *infra*, pp. 14-18, both parties here have accepted a contractual obligation to comply with the arbitration provision of the tentative agreement, which negates any limitations the FAA might otherwise impose in the circumstances of this case, but certainly would not restrain the Court from looking to that statute for guidance in developing Section 301 substantive law that promotes federal labor law policy in labor arbitration cases.

scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”). As summarized by this Court with respect to Section 301, “The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command.” *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 377 (1974), quoting § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d). In short, the Ninth Circuit’s application of FAA precedent in concluding that the dispute between the parties in a Section 301 case is subject to arbitration stands on solid legal footing. Petitioner has not argued to the contrary.

## **II. GRANITE ROCK WAS SUBJECT TO A CONTRACTUAL OBLIGATION TO ARBITRATE THE DISPUTE WITH LOCAL 287**

1. Analysis of the merits of this case begins with an acknowledgement of the settled rule 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.” *Warrior & Gulf*, 363 U.S. at 582; *see also, First Options*, 514 U.S. at 942-43; *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). It is also settled law, however, that an agreement to arbitrate may be found where a party’s conduct is such that legally binds it to comply with the arbitration provision contained in the contract. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2nd Cir. 1993).

This Court’s decision in *John Wiley & Sons, Inc. v. David Livingston*, 376 U.S. 543 (1964), illustrates the point. A union there sought arbitration of contrac-

tual claims against the successor to the employer with which it had a collective bargaining agreement. The successor company denied being a party to the agreement, and specifically denied any obligation under its arbitration provision. The Court treated the issue, not as involving the question of whether the successor company had intentionally or expressly made a commitment to accept the arbitration provision in the agreement, but rather as whether the circumstances justified a “determination that the collective bargaining agreement does in fact create such a duty.” *Id.* at 547. In short, conventional rules of contract law may create contractual obligations by reason of the conduct of a party irrespective of the fact that the obligor does not explicitly commit himself to the bound by the agreement. In *Wiley* the protesting successor was held to comply with the arbitration clause by reason of “. . . the impressive policy considerations favoring arbitration” that underlie Section 301. *Id.* at 550.

The law in this area is more fully developed under the FAA than under Section 301. Thus, under FAA, a plaintiff suing to enforce a contractual claim will be equitably estopped from refusing to comply with an arbitration provision in the contract that covers its claim. See *Avila Group v. Norma J of California*, 426 F.Supp. 537, 541-42 (S.D.N.Y. 1977) (“[A plaintiff] cannot be allowed to assert the existence of a valid contract . . . to recover damages from [a defendant] . . . and at the same time contradictorily assert that no contract exists in order to avoid arbitration of its claims . . . .”); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 757 (11th Cir. 1993) (“ . . . since the plaintiff ultimately must rely on the terms of the . . . agreement in its claims against [defendant], the plaintiff was equitably estopped from repudiating

the arbitration clause of the agreement . . . ”), citing *Hughes Masonry v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 838 (8th Cir. 1981); *International Paper Company v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 417-18 (4th Cir. 2000) (“[P]laintiff cannot seek to enforce those contractual rights and avoid the contract’s requirement that ‘any dispute arising out of the contract be arbitrated.’”).<sup>6</sup> This line of decisions fully respects the Section 301 policy favoring arbitration. Indeed, this Court applied the same principle to hold that an employee whose claim is based on breach of a collective bargaining agreement was bound by the arbitration provision of the contract. *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). There is no reason for ignoring this decisional law in determining whether a plaintiff in a Section 301 action is obligated to arbitrate a dispute within the scope of an arbitration provision.

In the legal setting described above, there is no alternative to the conclusion that, by filing the lawsuit, Granite Rock bound itself to comply with the arbitration clause as well as all other provisions in the agreement reached at the bargaining table. That agreement assigns breach of contract disputes to be resolved by the procedures established in its griev-

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<sup>6</sup> See also *Sourcing Unlimited, Inc. v. Asimco International, Inc.*, 526 F.3d 38, 47-48 (1st Cir. 2008) (signatory’s tort claims were intertwined with a contract that included an arbitration clause, therefore, signatory was estopped from denying obligation to arbitrate); *Grigson v. Creative Artists Agency*, 210 F.3d 524, 527-38 (2000) (estoppel applied to require arbitration where plaintiff’s claims arose out of contractual arrangement with non-signatory defendant); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (court will compel arbitration where signatory to contract with an arbitration provision sues for non-signatory’s alleged violations of the agreement).

ance and arbitration provision. (See the discussion *infra*, pp. 26-29.) Granite Rock's First Amended Complaint alleged that the contract was in full force and effect and that Local 287 had violated its no-strike provision. (JA 73-75.) This Court established in 1962 that an alleged breach of a no-strike clause accompanied by a standard arbitration provision was subject to arbitration, and could not be tried judicially as an original matter pursuant to Section 301. *Drake Bakeries*, 370 U.S. at 265 66; see also *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

The Ninth Circuit accurately characterized Petitioner's conduct as "implicitly" acknowledging the arbitrability of its charge that Local 287 violated the no-strike clause of the agreement. (JA 60.) In denying this to be true, Petitioner necessarily argues that it can initiate a process in which decisional law incorporates arbitration as an essential component without being bound to arbitrate disputes that process requires to be arbitrated. As we have shown, however, "[Petitioner] cannot have it both ways. [It] cannot rely on the contract, when it works to [its] advantage, and repudiate it when it works to [its] disadvantage." *Hughes Masonry*, 659 F.2d at 839, quoting *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966). In short, Petitioner is subject to and bound by the arbitration procedures in the agreement it asserts to be in full force and effect no less than would be the case had Petitioner expressly agreed to be bound.

Local 287's consent to arbitrate the dispute is, of course, manifested by its motions to compel arbitration. We add only that the Union may follow this course while concurrently pressing its position that the tentative agreement was not ratified. In *Prima*

*Paint*, 388 U.S. at 395, a case decided under FAA, the Court approved the rule that “arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded,” and that if not independently challenged operate to require arbitration of disputes covered by the arbitration provision of the agreement. *Id.* at 402. Local 287 has obviously consented to arbitration as a process by which to resolve the ratification issue, just as Petitioner has acquired an obligation to arbitrate that issue by bringing this lawsuit. Just as obviously, the Court’s “separability” ruling in *Prima Paint* serves the federal policy favoring arbitration that underlies both FAA and Section 301.

2. The *Prima Paint* decision addresses situations where the issue is whether asserted defenses affecting the validity of a contract are to be resolved by the court or in arbitration. The dilemma in that context is that if an arbitrator finds the contract to be invalid, the case should not have been brought before him. If a court were to reject the invalidity argument, it would follow that the case should have been heard by an arbitrator. Recognizing this analytical problem, the *Prima Paint* court ruled in favor of arbitration, unless there was a challenge directed at the arbitration clause itself, raising an issue of whether the parties had excluded the particular dispute from arbitration. The same problem of logic exists in the instant case. Petitioner’s argument that the contract was ratified can only mean that the ratification dispute should have been arbitrated. If an arbitrator were to accept Local 287’s contention that the contract was not ratified, however, there would be no basis for the dispute to be given to the arbitrator. As stated by this Court in *Buckeye*, 546 U.S. at 448:

It is true . . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents approach permits a court to deny effect to an arbitration provision that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of separate enforceability of arbitration provisions.

The Ninth Circuit applied the *Prima Paint* ruling in the present case, noting correctly (JA 61):

The challenge here regards contract formation. Granite Rock does not challenge the arbitration independently, and both parties have consented to arbitration. As such Granite Rock’s claims against Local 287 should have been dismissed in favor of arbitration.

3. The *Buckeye* Court noted, however, that its holding addressed only cases in which the contract at issue was challenged as void or voidable, and not where there was a dispute about whether “any agreement between the alleged obligor and obligee was ever concluded.” 346 U.S. at 444, n.1. We do not think it necessary to confront that reserved question in the present case. The rationale for the notion that a contract formation dispute is not arbitrable is simply that if there is no contract there can be no arbitration requirement, and thus the existence of a contract must first be established before the arbitrability of a dispute can be addressed. This was the reasoning of the District Court in denying Local 287’s motion to compel arbitration. (JA 360-61.)

The present case, however, does not accommodate this rationale. The reservation in *Buckeye* concerning

contract formation would apply to a situation where a motion to compel arbitration, which of course binds the movant to arbitration, is brought against an opposing party that denies that the contract containing an arbitration clause was ever concluded. This was the situation in *First Options*, 514 U.S. at 938. The situation here is quite different. Both Granite Rock and Local 287 are legally committed to arbitrate this dispute over ratification, Granite Rock “implicitly” by suing to enforce the tentative agreement, and Local 287 by moving to compel arbitration. Moreover, as we show in heading III (*infra*, pp. 26-27) there was concededly an agreement in effect when the Union filed its motions to compel arbitration. There is certainly nothing in the relevant arbitration decisional law either under Section 301 or FAA, that precludes parties from agreeing to arbitrate their dispute as to whether the necessary steps have been taken to create a binding agreement between them. That, in effect, is what has happened here.

The Amicus Brief of the Chamber of Commerce analogizes the Union’s position to a “gun to the head” hypothetical (Amicus Br. at 15, n.3.) But no one asserts that there was “gun to the head” of Granite Rock when it sought to enforce the contract, first by injunctive relief and then by continuing its claim for damages, or that there was a “gun to the head” of Local 287 when it sought to enforce the arbitration clause of the contract by motion. Neither party asserts forgery. The positions of both parties are premised on the existence of an agreement to arbitrate. The Chamber’s Brief, taken in context, estab-

lishes, rather, the immateriality of Granite Rock's arguments as supported by the several *amici*.<sup>7</sup>

4. Granite Rock correctly argues that the decisional law of this Court requires that a dispute over the existence of mutual obligations to arbitrate is to be resolved by judicial determination, and not through arbitration. That is the course the Union has followed in this case by filing its motions to compel arbitration. Local 287's motions to compel arbitration were not tailored to have an arbitrator decide whether Granite Rock had an obligation to resolve the underlying dispute through arbitration. The motions, rather, requested the District Court to make that decision. As matters stand, the Ninth Circuit has made the "gateway" decision that arbitration is required. If the Union's position is sustained, the

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<sup>7</sup> Granite Rock relies heavily on the Third Circuit's analysis in *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Cir. 2000). The factual situation in *Sandvik* is analogous to that in this case in that the "party suing on a contract containing an arbitration clause resists arbitration, and the defendant, who denies the existence of the contract, moves to compel it." *Id.* at 100. The *Sandvik* Court, however, read this Court's decision in *Prima Paint* (see 388 U.S. at 403-04), to require arbitration of disputes over the validity of contracts where there is no separate challenge to the validity of the arbitration provision, to apply only where the contract dispute was avoidable, and not where the contract was void from its inception. ("Rather, we conclude that the doctrine of severability presumes an underlying, existent, agreement.") *Id.* at 105. This is no longer an acceptable interpretation, in view of this Court's rejection of any such distinction in *Buckeye*, 546 U.S. at 446. In addition *Sandvik* involves an issue of whether an agreement "ever existed" (*id.*), unlike here where it is uncontested that an agreement was concluded well before the Union filed motions to compel arbitration (*infra*, pp. 26-27).

arbitrator will be adjudicating the dispute between the parties in consequence of a judicial ruling.

What has been said above also disposes of Granite Rock's related argument that the Ninth Circuit's decision "gives an arbitrator the power to determine his or her own jurisdiction . . . ." (Pet'r Br. at 28.) Again, the Union's motion to compel arbitration sought the District Court's determination of the arbitrator's authority, not an order calling for the arbitrator to determine that question. The motion, if granted, would have been based on the Court's ruling that the arbitrator should decide the merits of the underlying dispute, *i.e.*, whether Petitioner's breach of the no-strike clause claim had merit, including whether Local 287's defense to that claim was valid. The arbitrator plainly would have had no reason or cause to examine the scope of the grievance and arbitration provisions involved; that issue had to be decided by the Court in the Union's favor as a prerequisite to granting the motion. There would be two possibilities in the arbitrator's disposition of the case. An award in favor of the Union would mean that there was no contract in effect (and hence no arbitration provision). Conversely, an award in favor of Petitioner would establish the impropriety of Petitioner's lawsuit. Indeed, the jury verdict obtained by Petitioner in this case established just that, *i.e.*, the case belonged in arbitration. But as stated above, there is a certain amount of perplexity in dealing with cases where there is an unchallenged arbitration provision in a contract whose validity is under attack. This "conundrum" was resolved in 1967 in

favor of arbitration. *Buckeye*, 546 U.S. at 448-49, citing *Prima Paint*, 388 U.S. at 395.<sup>8</sup>

The irony of Granite Rock's position that the contract formation issue should be decided by the District Court is that it seeks to have the District Court decide the merits of the underlying dispute between the contending parties, precisely the result found unacceptable in *AT&T Technologies*, the Court's decision on which Petitioner principally relies. As stated in that decision, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649-50; see also Justice Brennan's concurring opinion, 475 U.S. 753, 652-56.

5. Granite Rock speculates that "three disruptions to industrial peace [will] flow from the Ninth Circuit decision." (Pet'r Br. at 28.) There is little to be said for any of Granite Rock's opinions on the subject.

The first is an assertion that parties to labor agreements would be reluctant to enter into arbitration agreements if an arbitrator is empowered "to determine his/her own jurisdiction, which, in turn, could be manipulated to serve his or her own best interests." (Pet'r Br. at 28.) The short answer, as we have discussed *supra*, pp. 21-22, is that the Ninth Circuit's decision does not authorize arbitrators to determine their own jurisdiction. It is indeed the Ninth Circuit's decision that establishes and circumscribes the scope of the arbitrator's role in this case.

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<sup>8</sup> The same problem was inherently presented, although not discussed, in *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978 (2008), where resolution of the factual dispute that was referred to arbitration would also determine whether there was a contract that provided for arbitration.

The second alleged threat to industrial peace is that the decision below allows “one party to enforce an arbitration clause without giving effect to . . . the no-strike provision . . . .” (Pet’r Br. at 29.) This argument is hard to follow. The procedure for enforcing a no-strike clause is shared by the courts and arbitrators where, as here, alleged violations of a no-strike provision are subject to arbitration. Granite Rock failed to obtain injunctive relief in the present case, not because the District Court was without jurisdiction, but because the District Court, following hearing, thought the credible evidence was insufficient to grant that relief. However that may be, there is absolutely nothing in the decision below that restricts an employer from obtaining a judicial remedy for breach of a no-strike clause, other than to the extent to which the employer has assumed a contractual obligation to seek such relief in arbitration. Needless to say, Granite Rock did not apply for a remedy from an arbitrator relating to the alleged breach of the no-strike clause involved in this case.

Finally, Granite Rock complains that the decision below discourages the useful practice of reaching “tentative agreements” in contract negotiations by allowing parties “to dispute that a binding contract exists while simultaneously availing themselves of arbitration.” (Pet’r Br. at 29.) The theme of Granite Rock’s litigation, however, is that the agreement on which it sued was not tentative, but in full force and effect. There is no discouragement in the utilization of appropriate negotiation practices in holding a party to compliance with an arbitration clause in an agreement it asserts to be in effect.

**III. THE DISTRICT COURT ERRED IN FAILING TO COMPEL ARBITRATION AT A TIME THE AGREEMENT WAS CONCEDEDLY IN FULL FORCE AND EFFECT**

**A. The Tentative Agreement Was in Existence when Local 287 Filed its Motion to Compel**

Granite Rock filed the instant lawsuit because Local 287 disputed the ratification of the agreement reached at the bargaining table, contending it was under no obligation to end its strike. In the course of time, however, the agreement was executed and acknowledged by both parties to be in effect no later than August 22, 2004, and in any case, no later than mid-December, when the document was executed, retroactive to May 1. (JA 448.) The initial pleading by which Local 287 presented its position relevant to the present posture of this case was February 17, 2005, when it filed its Answer to the First Amended Complaint. (Dkt. # 43.) The delay in this filing is explained by the District Court's dismissal of the case on July 26, 2004, followed by Petitioner's Motion for a New Trial, then the discovery ordered by the District Judge, and finally the Order granting the Motion for a New Trial. (*Supra*, p. 4.) Local 287's Answer alleged as an affirmative defense "that [Local 287's] alleged conduct for which [Granite Rock] seeks damages—striking in breach of a no-strike clause—presents a dispute that is subject to the grievance and arbitration provisions of the collective bargaining agreement *now in effect*, and for that reason the Court may not assert jurisdiction at this time." (Dkt. # 43, emphasis added.)

At that time, neither party denied that the agreement was in full force and effect; it had been ratified

by the Union's members and signed by both parties. The agreement was made retroactive to May 1, 2004, with an expiration date of April 30, 2008.<sup>9</sup> The arbitration provision, which was an integral part of the agreement, was undeniably operative at the time Local 287 answered the First Amended Complaint. Nonetheless, Granite Rock declined to arbitrate the dispute, and opposed each of the motions filed by Local 287 to compel arbitration. Granite Rock's consistent position that the existence of the agreement after July 2 had to be established by the District Court before any arbitrability issue could be addressed had become meaningless. Both parties were in agreement that the contract was in full force and effect. It is, of course, settled law that the grievance and arbitration provisions of a collective bargaining agreement must be pursued to resolve disputes within their scope. In this sense, the contract provisions preempt court proceedings, at least in the initial stage of efforts by the parties to vindicate their positions. As stated in *Republic Steel*, 379 U.S. at 653:

If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements" (*quoting Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)).

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<sup>9</sup> Neither party has raised an issue as to the effect the retroactivity given to the term of the agreement may have on their respective positions involved in their dispute. In the Union's view, the silence of the parties in this respect need not preclude that question from surfacing in the arbitration hearing, if the decision below is affirmed.

### **B. The Presumption of Arbitrability Overcomes Petitioner's Defenses**

It cannot be legitimately questioned that Granite Rock's claim that the Union violated the no-strike clause on its face was subject to the grievance/arbitration provisions of the contract. Indeed, the District Court ordered the question of whether the Union's conduct breached the no strike clause to arbitration, including the issue of damages, and that ruling is not challenged here. (JA 246.) This is required by the Court's seminal ruling in *Drake Bakeries*, that a strike by a union does not relieve the employer of the obligation to grieve its claim against the union for a strike in violation of the agreement. *See also, Local Union No. 721, United Packinghouse, Food and Allied Workers v. Needham Packing Co.*, 376 U.S. 247, 248-49, 251-53 (1964). Those decisions reject the assertion that the Union's conduct effectively repudiated the grievance procedure. Whether the asserted strike is authorized or not, the employer must invoke the arbitration procedures and in Granite Rock's words "subject to all rights and defenses available to it." (JA 76, ¶ 17.)

Petitioner nonetheless appears to be renewing its position, which it presented "briefly" in the Ninth Circuit (JA 58, n.4) that the arbitration provision in this case does not cover the no-strike violation/ratification issues involved in the parties' dispute. (See Pet'r Br. at 23-24.) Section 20 of the agreement requires "[a]ll disputes arising under this agreement" to be resolved by arbitration, if not settled at the pre-arbitration steps of the grievance procedure. The scope of the arbitration clause is, of course, a matter for courts to determine, but in doing so courts are instructed, as the Ninth Circuit points out, 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.” (JA 58, n.4, quoting this Court’s decision in *Warrior & Gulf*, 363 U.S. 582-83.) In disposing of Petitioner’s argument, the Ninth Circuit stated: “Because Granite Rock is suing ‘under’ the alleged new collective bargaining agreement, the arbitration clause is certainly ‘susceptible of an interpretation’ that covers the dispute.” (JA 58-59.)

Granite Rock asserts, nonetheless, that “Nothing in the Agreement suggests that the parties agreed to arbitrate disputes over whether the Agreement existed.” (Pet’r Br. at 12.) But that is precisely backward and immaterial. There was a contract in effect when the Court reinstated the First Amended Complaint in granting Granite Rock’s motion for a new trial. In order to support its proposition Granite Rock must find some exception in the word “all” in Section 20 of the agreement which prefaces those disputes that are subject to arbitration: “all disputes arising under this agreement.” (JA 434.) Granite Rock points to no such express exclusion.<sup>10</sup>

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<sup>10</sup> Granite Rock turns the analysis on its head by arguing “. . . Granite Rock and the Union did not ‘clearly and unmistakably’ consent to arbitrate whether a contract was created. *AT&T Technologies . . .*” That is a misapplication of this Court’s opinion. The Court was referring not to whether something was arbitrable but whether the parties had agreed that the arbitrator could decide the arbitrability issue. Granite Rock devotes an entire section of its brief to this erroneous analysis that the “clear and unmistakable” doctrine applies to whether an issue is arbitrable. (Pet’r Br. at 23-24.)

The sequence of events works against Granite Rock's argument. Granite Rock knew about its claim at the time the parties were attempting to settle the resumed strike between July 6 and August 22. Granite Rock knew about Local 287's position at the time the Union ratified the agreement on August 22 and during the period between ratification and execution of the agreement in December. It could have sought some exclusion from the grievance procedure if it wanted to preserve its claim. Its failure to do so belies its claim that there is any such exclusion.

*Drake Bakeries* requires the Court to presume the parties intended to include this dispute among those subject to resolution through arbitration because it is not expressly exempted. 370 U.S. at. 259-60. ("[I]t would have been most appropriate . . . for the parties to have excluded from the arbitration procedures the company's claim for strike damages, if they had intended to so.") *See also Gateway Coal*, 414 U.S. at 379-80 (safety not excluded from arbitration even though it is a basic issue and there is doubt an arbitrator will have necessary concern for safety issues).<sup>11</sup> The language in Article 20 of the agreement in this case expressly excludes only certain disputes from arbitration. (See § 20(j) (JA 436-37) and § 1(c) (JA 397-98).) The dispute over ratification does not

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<sup>11</sup> It may also be noted that federal labor law accommodates a grieving party to arbitrate a dispute it believes not to be arbitral without forfeiting its right to preserve its position for court adjudication in the event the arbitration ruling is adverse to that position. *See George Day Construction Co. v. Carpenters Local 354*, 622 F.2d 1471 (9th Cir. 1984). This was the process followed by the prevailing party in *First Options*, 514 U.S. 938 (1995). Granite Rock did not avail itself of this option.

appear as an exception. The underlying issue in this case—whether the tentative agreement was ratified on July 2, 2004—is clearly within the scope of the arbitration clause.

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The upshot is that there are alternative legal grounds on which Granite Rock was bound to arbitrate the underlying dispute: (1) the filing of the lawsuit which constituted an acceptance by Granite Rock of a contractual obligation to comply with the arbitration clause of the agreement; and (2) its refusal to arbitrate in response to Local 287's Motions to Compel Arbitration after the tentative agreement had been ratified and executed. Accordingly, by directing the District Court to send the “entire dispute” to arbitration, the Ninth Circuit “simply remit[ed] the company to the forum it agreed to use for processing its strike damage claims.” *Drake Bakeries*, 370 U.S. at 266.

### CONCLUSION

For all the reasons stated above, it is respectfully requested that the decision below be affirmed.

Respectfully submitted,

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