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No. 12-99

In The
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

vs.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 – the federal labor anti-bribery statute – makes it criminal for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor union that seeks to represent its employees, and prohibits the labor union from receiving the same. The Third and Fourth Circuits have held that agreements between employers and unions that set ground rules for union organizing campaigns – including employer promises to remain neutral and recognize the union upon a showing of majority support, and union promises to forego the rights to picket, boycott, or otherwise put pressure on the employer's business – are not "payment" or "delivery" of "things of value" proscribed by § 302. The Third Circuit found that a contrary holding would "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004) ("*Sage*"), *cert. denied*, 544 U.S. 1010 (2005). In this case, however, the Eleventh Circuit came to the opposite conclusion. The question presented is:

Whether an employer and union may violate § 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited

QUESTION PRESENTED – Continued

access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business.

LIST OF PARTIES AND CORPORATIONS

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Petitioner UNITE HERE Local 355 (the "union"), Respondent Martin Mulhall, and Co-defendant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras" or the "employer"). The United States Department of Justice; United States Department of Labor; the National Labor Relations Board; the American Federation of Labor and Congress of Industrial Organizations; Change to Win; Communications Workers of America; International Brotherhood of Teamsters; Service Employees International Union; United Automobile Workers; United Food and Commercial Workers International Union; United Steel Workers; and National Federation of Independent Business Small Business Legal Centers appeared as *amici curiae* in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE DECISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit below is reported as *Mulhall v. UNITE HERE Local 355 et al.,* 667 F.3d 1211 (11th Cir. 2012) ("*Mulhall II*"). Pet. App. 1-12.[1] A previous appellate decision is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). Pet. App. 34-60. The order denying the petition for rehearing and for rehearing *en banc*, Pet. App. 61-62, is not reported. The opinions of the district court, Pet. App. 13-23 and Pet. App. 24-33, are not reported.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2012. Pet. App. 1. It denied the union's petition for rehearing on April 25, 2012. Pet. App. 61-62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] In this brief, references to materials contained in the appendix to the petition for writ of *certiorari* are designated "Pet. App." References to materials contained in the Joint Appendix filed herewith are designated "J.A."

STATUTORY PROVISION INVOLVED

Section 302 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley amendments"), as amended and codified at 29 U.S.C. § 186, provides in relevant part:

> § 186. Restrictions on financial transactions.
>
> (a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations
>
> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any

other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . .

(c) Exceptions [omitted].

Section 302, 29 U.S.C. § 186, is set forth in its entirely in the Statutory Appendix.

STATEMENT OF THE CASE

The Eleventh Circuit became the first court since Congress enacted the LMRA in 1947 to hold that an agreement between an employer and a union setting ground rules for organizing – including promises by the employer to remain neutral toward union representation, to let the union onto its property to talk to

employees, and to give the union employees' names and addresses, and promises by the union to forego its rights to picket, boycott or otherwise put pressure on the employer's business – may violate § 302. The theory has been pressed on two other circuit courts, both of which have rejected it soundly. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374-376 (4th Cir. 2008); *Sage*, 390 F.3d at 218-219. This Court and the courts of appeals have unanimously and for decades enforced agreements of the sort at issue here. Only now, 65 years after the passage of the Taft-Hartley amendments to the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), has the propriety of this important part of cooperative labor-management relations been put in doubt.

In 2004, Mardi Gras and the union entered into a Memorandum of Understanding (the "neutrality agreement"), covering any licensed gaming facility in Miami-Dade or Broward county owned or operated by Mardi Gras. Pet. App. 78-86. The neutrality agreement required Mardi Gras to voluntarily recognize the union as the representative of its employees if a majority of them gave written authorizations to the union to be their agent. Pet. App. 81-82, ¶ 9. It also provided that if the union conducted an organizing campaign among the employees, Mardi Gras would remain neutral and would not express any opposition to its employees' selection of an exclusive representative, or preference for any particular union. Pet. App. 79, ¶ 4. Mardi Gras promised to allow the union to communicate with its employees by letting union

representatives engage in organizing efforts in non-public areas of its facility during employees' non-work times. Pet. App. 80, ¶ 7. Mardi Gras also agreed to share information about its employees' job classifications, names, and addresses. Pet. App. 81, ¶ 8. In return, the union promised not to strike, picket, or engage in other economic action against Mardi Gras while the neutrality agreement was in effect. Pet. App. 82, ¶ 11.

The neutrality agreement contains other provisions benefiting Mardi Gras and the union. The parties agreed that "any disputes over the interpretation or application of this Agreement shall be submitted to expedited and binding arbitration" by an arbitrator jointly chosen from a panel provided by the American Arbitration Association. Pet. App. 84, ¶ 14. The parties chose arbitration as the exclusive means to resolve their disputes during any organizing drive. Pet. App. 81-82, ¶ 9. In addition, Mardi Gras agreed to notify the Union if it had job vacancies and to permit the Union to refer applicants, with Mardi Gras remaining "the sole judge of an applicant's suitability[.]" Pet. App. 79-80, ¶ 6. The parties further agreed that the neutrality agreement would not take effect unless Mardi Gras installed "slot machines, Video Lottery Terminals or similar gaming devices" at the covered facility. Pet. App. 85, ¶ 15.

The union supported a successful Florida ballot initiative that authorized legalization of slot machines in Miami-Dade and Broward counties. Pet. App. 38; *see* FLORIDA CONST., Art. X, Section 23. The

neutrality agreement at issue here was one of many negotiated between the union and a consortium of race-track owners, in anticipation of expanded gaming in these counties. J.A. 55. After the initiative passed, Mardi Gras installed slot machines at the Hollywood Greyhound Track and opened them to the public in 2006. The union notified Mardi Gras of its intent to organize the facility's employees, and Mardi Gras provided the union its employees' names and addresses in 2006 and 2007. Pet. App. 14. In 2008, however, Mardi Gras refused to provide any further information or to arbitrate its breach of the neutrality agreement. Pet. App. 14-15. In response to the union's petition to compel arbitration, Mardi Gras argued that the agreement was void under § 302(a)(2) because Mardi Gras had promised to pay things of value to the union in it. *Id*. The district court held that because Mardi Gras did not challenge the legality of the neutrality agreement's arbitration clause specifically, the issue of legality was for the arbitrator in the first instance. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, No. 08-cv-61655-PAS (S.D. Fla. April 16, 2009), Order Granting Motion to Compel Arbitration, at 3.[2]

A few weeks after Mardi Gras challenged the agreement, Respondent Martin Mulhall brought this

[2] An arbitrator subsequently held that that the neutrality agreement was legal under § 302 and ordered Mardi Gras to comply with it. J.A. 44-64. A district court confirmed this award, J.A. 65-74, and Mardi Gras did not appeal.

action against the union and Mardi Gras, claiming entitlement to injunctive and declaratory relief under § 302. Pet. App. 63. Jurisdiction was placed under § 302(e), as well as 28 U.S.C. §§ 1331, 2201 and 2202. Pet. App. 64, ¶¶ 1-2. Mulhall alleged that he is an employee of Mardi Gras. Pet. App. 65, ¶ 6. The full text of the neutrality agreement was attached as Exhibit A to the Complaint. Pet. App. 78-86. The Complaint alleged that the agreement required Mardi Gras to deliver to the union three "things of value": employees' names and addresses, access to the casino property, and the employer's promise to be neutral about union organizing. Pet. App. 66, ¶ 9. It also alleged that the agreement contains a waiver of the employer's right to file a representation petition or unfair labor practice charges with the National Labor Relations Board ("NLRB"). Pet. App. 66, ¶ 10. The union's exchange in the neutrality agreement was to forego picketing, boycotting, striking, or other economic action against the employer. Pet. App. 66, ¶ 11; 82, ¶ 11. Mulhall also alleged that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." Pet. App. 66, ¶ 11.

Mulhall theorized that the three things were "things of value" within the meaning of § 302(a) because the union "subjectively desires" them, they are "objectively useful" to the union in its organizing efforts, and they have "monetary and market value." Pet. App. 68-70, ¶¶ 17, 20 and 25. No specifics were given to explain how Mulhall reached these conclusions. He

alleged, "[u]nions have made, and are liable to make, wage, benefit and other concessions at the expense of employees" in exchange for these three things. Pet. App. 72, ¶ 28. Again, no specifics were given about this union or any other union.

Mulhall contended that the union demanded the three "things of value" by serving a notice of intent to organize and filing its complaint in district court to compel arbitration. Pet. App. 67, ¶¶ 12-14. Mulhall quoted a statement in the union's petition to compel arbitration that the union and its members suffered irreparable harm because the violations of the neutrality agreement made it more difficult for the union to organize Mardi Gras employees. Pet. App. 71, ¶ 27. Mulhall's legal theory was that the three concessions are "things of value" within the meaning of § 302(a)(2) and § 302(b)(1) and are not within any of the exceptions listed in § 302(c). Pet. App. 73-74, ¶¶ 31-33, 35. He alleged that Mardi Gras would violate the law if it performed its promises in the neutrality agreement and that the union had already violated it by demanding performance. Pet. App. 74, ¶¶ 36-37. He prayed for injunctive and declaratory relief with respect to the names and addresses, access, and neutrality, stopping short of demanding an injunction against performance of the other provisions of the neutrality agreement. Pet. App. 75.

Mardi Gras answered the complaint three days after it was filed, admitting all of its allegations. J.A. 16-17. The district court dismissed the case on standing grounds. Pet. App. 29-33. The Eleventh Circuit

reversed this holding in *Mulhall I* and remanded for further proceedings. Pet. App. 60.

On remand, the district court dismissed the case for failure to state a claim under § 302. Pet. App. 13-23. It held that providing employee information, facility access, and neutrality does not constitute the "payment" or "delivery" of a "thing of value" prohibited by § 302. The court found that "[t]here is no indication of corruption or bribery of Unite Here officials" in this case. Pet. App. 19.

The district court rejected Mulhall's argument that because "the complaint alleges that the things provided to Unite Here under the MOA have 'monetary and market value' . . . he has sufficiently pled his claim for purposes of a motion to dismiss," holding that these allegations did not meet the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-679 (2009). Pet. App. 19-20. The district court also rejected Mulhall's argument that the term "thing of value" "is a term of art and thus the term should be interpreted the same way in all circumstances and under all statutes," noting that there was no "authority to support this sweeping proposition." Pet. App. 20. The district court rejected Mulhall's analogy to cases involving the criminal appropriation of confidential governmental and business information, stating that Mulhall "fail[ed] to cite a single case from any circuit that establishes that a list of employees and their addresses constitutes confidential business information." Pet. App. 21.

A divided panel of the Eleventh Circuit reversed. The majority held that the complaint sufficiently stated a claim under § 302 and remanded for further proceedings, with Judge Restani dissenting. Pet. App. 1-12. The majority recognized the contrary holdings in *Sage* and *Adcock*, but made no effort to distinguish them or argue with their reasoning. Pet. App. 5-6. Instead, it decided that in "search[ing] for the line between the proper and the improper, we must rely upon our common sense." Pet. App. 7.

The majority's analysis of whether information, access, and neutrality are "things of value" under § 302 was limited to the following: "[i]t seems apparent that organizing assistance can be a thing of value[.]" Pet. App. 7. The majority concluded that although it "can be considered valuable," "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." Pet. App. 7. But the majority concluded that such assistance "can be paid or operate as a payment," because "[w]hether something qualifies as a payment depends . . . on whether its performance fulfills an obligation." Pet. App. 8.

By its own reasoning, the majority should have stopped there. The information, facility access, and neutrality that Mardi Gras promised clearly fulfilled an obligation; they were part of a contract with the union. Perhaps recognizing that its analysis would criminalize all manner of obligations contained in labor-management agreements, the majority added a scienter requirement not found in § 302(a)(2): "If

employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 . . . are implicated." Pet. App. 8. Thus, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." Pet. App. 8. The court did not explain what "scheme to corrupt a union" was alleged in the complaint[3] or how an agreement giving the union the means to realize what the NLRA promotes – collective bargaining and labor peace – could be the mechanism by which corruption was accomplished. Instead, it remanded so that the district court could "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." Pet. App. 9.

In dissent, Judge Restani pointed out that the complaint does not allege that Mardi Gras offered the organizing concessions as a bribe and "makes no allegation of wrongdoing relating to the formation of the Agreement[.]" Pet. App. 10, 11. But more importantly, Judge Restani pointed out that the majority's interpretation of § 302 is inconsistent with the LMRA's purpose: "The LMRA is designed to promote both labor peace and collective bargaining. The LMRA cannot promote collective bargaining and, at

[3] As the dissent pointed out, Mulhall alleges no such thing. Rather, Mulhall "merely alleges that unions, in general, have or may have improper motives when negotiating for these concessions. . . . Such general allegations are insufficient under our pleading standards." Pet. App. 11-12.

the same time, penalize unions that are attempting to achieve greater collective bargaining rights." Pet. App. 10-11 (internal citations omitted).

The union filed a petition for rehearing or rehearing *en banc*. The United States Department of Justice, the United States Department of Labor, and the NLRB filed a joint brief for the United States as *amicus curiae* disagreeing with the Eleventh Circuit's analysis and supporting the petition for rehearing. J.A. 106-125. The petition for rehearing was denied. Pet. App. 61-62. A timely petition for writ of *certiorari* followed.

SUMMARY OF ARGUMENT

1. Mulhall's theory isolates the words "thing of value" from the rest of the phrase where it appears, from § 302 as a whole, and from the rest of the NLRA. He gives these words virtually limitless meaning, to include anything useful or valuable enough to a labor organization that the organization will expend resources to attain it. He must do so because there is no other way to construe the words to condemn neutrality, access, and employees' contact information. The second part of his simple syllogism is to point out there is no exception for these in § 302(c), just as there is no exception for most other common labor-contract provisions, including recognition of the union, arbitration, and union security. There is no

exception even for collective bargaining agreements themselves.

2. "Other thing of value" in § 302 is preceded by "any money or" and therefore must be read to mean something of commercial value like money. It must be paid, lent or delivered, terms which mean the transfer of money or property. An employer's decisions concerning on how to exercise its free speech rights (including remaining silent), whom it lets on its premises, and whether to share information about its employees are not like money or other property and are not transfers. The exceptions in § 302(c) refer exclusively to money or tangible goods, and § 302(d)'s criminal penalties are geared to the monetary value of what has been transferred, underscoring the meaning of the prohibition.

3. The purpose of § 302 is to prevent the collective bargaining process from being undermined through bribery or corruption. *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959). A neutrality agreement setting ground rules for a union organizing campaign and preventing strikes, picketing and boycotts during the campaign does not even remotely touch upon this purpose. Mulhall's theory, which has no bounds, would criminalize the very things the Act promotes – industrial peace, voluntary and enforceable labor-management agreements, and arbitration – for they are valuable to labor organizations and § 302 has no exceptions for them.

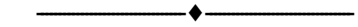
4. All prosecutions upheld under § 302 have been for receiving money or other commercially valuable property. None has been for entering into neutrality agreements or any component of such an agreement, including neutrality, access, or employee lists. Several courts have considered Mulhall's argument in civil cases and all but the Eleventh Circuit have rejected it completely, including the Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). They have recognized that it is a "remarkable assertion" that "makes no sense" and has no legal support. *Sage*, 390 F.3d at 219; *Adcock*, 550 F.3d at 375-376. Mulhall has been forced to try to find support by drawing from cases under other statutes with different wording and in unrelated contexts.

5. Neutrality agreements including the features attacked in this case have been routinely enforced under LMRA § 301(a) in a long line of cases following *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962). The point of these agreements, an employer's voluntary recognition of a union upon a showing of majority support, is a fundamental policy under of the LMRA. Mulhall would make neutrality agreements and voluntary recognition illegal, as both are more valuable to a labor organization than the specific promises at issue and § 302 makes no exception for them. Furthermore, provisions for access and information about employees are extremely common in collective bargaining agreements and have been so since before the passage of the LMRA and the extensive amendments to § 302 in the Labor-Management

Reporting and Disclosure Act of 1959, Pub.L. 86-257, 73 Stat. 519 ("LMRDA"). Under Mulhall's theory, they are just as illegal in those agreements as in neutrality agreements, as are many other contract provisions like arbitration and union security that are at least as valuable and have no § 302 exceptions. In fact, there is no exception for collective bargaining agreements, the most valuable thing of all and the goal of the entire Act. The Third Circuit's conclusion in *Sage* that the theory would "wreak havoc" with the Act was, if anything, an understatement. Mulhall's theory is a loose cannon that would sink the ship § 302 is supposed to defend.

6. The Eleventh Circuit also shrank from Mulhall's theory but could not bring itself to agree with all the other courts that neutrality agreements are valid and enforceable, including neutrality, access, and employee information. Instead, the Eleventh Circuit decided that liability hinged on the reason "why [the union] and Mardi Gras agreed to cooperate" and whether it was a "corrupt" reason. This overlooked that § 302 is a strict-liability statute and requires no such *mens rea*. There is no allegation in the complaint that the agreement was part of some scheme for bribery and corruption, befitting Mulhall's theory that the advantages given to the union in the agreement are *ipso facto* violations. The court also overlooked the NLRA's strong policy in favor of labor-management cooperation and the constitutional protection for joint advocacy of legislation. Rather,

the court applied its "common sense" and remanded the case for inquiry into hidden motives.



ARGUMENT

I. ALL OTHER FEDERAL COURTS THAT HAVE CONSIDERED MULHALL'S THEORY HAVE REJECTED IT CATEGORICALLY.

Until the Eleventh Circuit's decision, Mulhall's theory was regarded as patently specious in all decided cases. It was first tested in *Sage*, 390 F.3d at 218-219, where it was raised as a defense in an action to compel arbitration under a neutrality agreement. Writing for the court, Judge Chertoff saw many reasons why the argument "makes no sense," including the language of § 302 itself. "The fact that a neutrality agreement – like any other labor arbitration agreement – benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute." *Id*. Moreover, "the structure of other provisions of the labor law also militates against Sage's position. . . . Sage's interpretation of Section 302 would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Id*. How massive and far-reaching that havoc would be is described in Parts V-VII, below.

The Fourth Circuit came to the same conclusion in *Adcock*, 550 F.3d at 375-376. The agreement in question was between the truck manufacturing company Freightliner and the United Automobile Workers. It set rules for the union's planned organizing effort at Freightliner's non-union facilities in North Carolina. *Id*. at 371. The agreement provided union representatives access to the facilities to meet with employees and promised employer neutrality, among other things. *Id*. Employees sued alleging a violation of § 302. In an opinion authored by Judge Hamilton, the court concluded, "[U]nder the plain language of the statute, the concessions made by Freightliner in the Card Check Agreement did not involve the payment or delivery of a 'thing of value'." *Id*. at 374. Permitting the union access to employees does "not involve the delivery of either tangible or intangible items to the union." *Id*. This reading of the statute was consistent with the purposes of § 302, which was aimed at stopping corruption that undermined the integrity of the collective bargaining process or opened up the possibility of abuse by union officials of the wealth amassed in benefit funds. *Id*. at 375, citing *Arroyo*, *supra*. It was obvious to the court that the Freightliner agreement did not involve the problems Congress intended to fix in § 302. "By no stretch of the imagination are the concessions a means of bribing representatives of the Union. . . . Rather, the concessions served the interests of both Freightliner and the union, as they eliminate the potential for hostile organizing campaigns in the workplace." *Id*. The court also pointed to the penalty provisions of § 302

which are geared to the value of the money or other thing involved in the violation. "Thus, Congress clearly intended Section 302's 'thing of value' to have at least some ascertainable value" and Freightliner's concessions to the union had none whatsoever. *Id*.

All the district courts which have had this issue before them came to the same conclusion. *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003) ("Defendant's reading of the statute is clearly out of context and irrelevant to the current matter."); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006); *Adcock v. International Union, UAW*, No. 3:06-cv-32, 2006 WL 3257044, *2 (W.D.N.C. 2006) ("If the Court were to find that participation in cardcheck agreements was illegal, it would have the effect of criminalizing all collective bargaining agreements."); *see also Brylane, L.P.*, 338 NLRB 538, 538-539 (2002).

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF § 302 IS AT WAR WITH SETTLED INTERPRETATION OF LMRA § 301.

There is a long, unbroken line of cases under LMRA § 301(a) enforcing neutrality agreements like the one at issue here. At the same time Congress enacted § 302, it enacted § 301, 29 U.S.C. § 185. Pub. L. 80-101, 61 Stat. 136, 156-157. Section 301(a) gives the federal courts jurisdiction over "suits for violation of contract between an employer and a labor

organization representing employees in an industry affecting commerce as defined in this Act. . . .” The purpose of § 301(a) was to make labor contracts equally binding on both employers and unions, to the end of promoting industrial peace through the enforcement of these contracts, including the no-strike clauses Congress expected would be included in them. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453-455 (1957). *See Groves v. Ring Screw Works*, 498 U.S. 168, 173-174 (1990); *NLRB v. American Ins. Co.*, 343 U.S. 395, 401-402 (1952) (“The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.”).

The “contracts” enforceable under § 301(a) are not limited to collective bargaining agreements with incumbent unions. Section 301 gives federal courts jurisdiction over agreements “between employers and labor organizations significant to the maintenance of labor peace between them.” *Lion Dry Goods*, *supra*, 369 U.S. at 28. It confers jurisdiction even where the contracting union is not currently the bargaining representative for the employees. *Id*. at 27. The contract the Court enforced in *Lion Dry Goods* was between two department store employers and two unions that did not represent the stores’ employees. The contract settled a strike by some of the unions’ members against one store and a protracted dispute (but no strike) with the other. *Id.* at 20-21. The contract granted the union access to the employers’ premises, reinstated strikers, established employment terms,

committed both the employers and the unions not to interfere with employees' rights to decide whether or not to join the union, and limited the parties' right to demand an NLRB election. *Id*. at 20 n.4. The Court rejected the employer's contention that the only contracts enforceable under § 301(a) are collective bargaining agreements "concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees." *Id*. at 25-26. The Court concluded that Congress quite deliberately chose not to confine § 301(a) to collective bargaining agreements and to use the broader term "contracts", including agreements about organizing ground rules. "If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." *Id*. at 27.

In the 50 years since *Lion Dry Goods*, agreements setting ground rules for union organizing have been uniformly enforced under § 301(a) in many cases throughout the country and in a wide variety of settings. This history shows the flexibility and utility of these agreements as labor-management solutions. The agreements in all the following cases – containing the same types of provisions as the agreement here – were found lawful and enforceable.

In *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1250-1251,

1253 (4th Cir. 1988), the union organized a manufacturing plant through an NLRB election but the employer decided to close the plant before a collective bargaining agreement could be negotiated. *Id*. at 1250. The employer and the union bargained about the effects of the plant closing and reached an agreement. The agreement included arrangements for a private election at the employer's new plant. *Id*. at 1250-1251. The employer promised to be neutral and not to discriminate against union supporters. *Id*. at 1251.

Hotel Employees Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992) involved the employer's plan to build a new hotel on public land in San Francisco, which the union opposed. Marriott made an agreement with the union about ground rules for organizing at the hotel once it was built, and the union withdrew its opposition to the project. *Id*. at 1465-1466. The agreement provided for voluntary recognition if the union showed majority support among employees, employer neutrality, and hiring preference for applicants referred by the union if qualifications were equal to other applicants. *Id*. at 1466 n.2. The court held that it would enforce all these provisions. *Id*. at 1468-1470.

In *Sage*, 390 F.3d at 208-209, the employer entered into a neutrality agreement in order to get public financing for the hotel it was developing. The agreement included a no-picketing promise, a card-check procedure for recognition, and the settlement of disputes through arbitration. *Id*. at 209. It also

contained clauses identical to those Mulhall challenges here. *Sage*, 299 F. Supp. 2d at 465.

In *Hotel Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993), the agreement concerned an existing hotel and restaurant. The union agreed to forego its right to picket the hotel. In exchange, the employer promised to allow the union's organizers access to its property, conditioned on the union's promise not to coerce or threaten employees during such visits. *Id*. at 563. The agreement also provided for arbitration of disputes. The Second Circuit concluded that an arbitration award remedying breaches by the employer of its promises in the agreement was enforceable under § 301(a) because "its underlying aim was to resolve peacefully those tensions inevitably flowing from a union organizing effort" and the neutrality promise dealt with the hotel's relations with its employees. *Id.* at 566-567.

These agreements often are part of a larger labor-management relationship. *See Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 550-551 (6th Cir. 2002) (in a multi-plant master labor agreement, employer neutrality in organizing campaigns at additional plants); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 405 (6th Cir. 1998) (in a side letter to a collective bargaining agreement, procedures to be followed if the union sought to organize the employees in another of the employer's plants or affiliate with a union already representing such employees, including employer neutrality and access). *See also Patterson v. Heartland Industrial Partners*, 428 F. Supp. 2d at

716-717 (agreement between David Stockman's investment partnership and the Steelworkers for a "constructive relationship" in union organizing of plants the firm would acquire, including furnishing employees' names and addresses, access to the workplace, and neutrality).

The agreement between a hospital system and a union in *Service Employees v. St. Vincent Med. Ctr.*, 344 F.3d 977 (9th Cir. 2003) was similar, but the union was given the option of a private election or an NLRB election, and instead of neutrality the parties agreed on specific guidelines about what and how they could communicate to employees. *Id*. at 979-980. The agreement was part of an effort by the parties to "undertake a new approach to providing quality care for patients and quality jobs for healthcare employees" and covered other subjects in addition to union organizing, including commitments to quality and accessible healthcare. *Id.*; *NY Health & Human Svs. Union v. NYU Hosp. Ctr.*, 343 F.3d 117, 118-119 (2d Cir. 2003) (same); *see also District Two, Marine Engineers Beneficial Association v. Amoco Oil Company*, 554 F.2d 774, 778-779 (6th Cir. 1977) (finding § 301(a) jurisdiction to enforce agreement between employer and union of supervisors to conduct representation election, even though outside NLRB jurisdiction because supervisors are not "employees").

Neutrality agreements with provisions like the ones here are very common.[4] If Mulhall were correct, the agreements in *Lion Dry Goods* and its progeny were illegal and unenforceable because they "paid" or "delivered" a "thing of value" under § 302. But Congress could not have intended that agreements that were illegal under § 302 would nevertheless be enforceable under its companion, § 301(a). *Lion Dry Goods* and all the cases following it would have to be overruled to sustain Mulhall's theory. Employers' freedom of contract – another key element of federal labor policy – would be impaired. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

III. THE LMRA REQUIRES THAT ARBITRATION BE FOSTERED, NOT CRIMINALIZED.

The neutrality agreement provides that all disputes arising under it will be resolved through arbitration. Pet. App. 84-85, ¶ 14. The courts of appeals have invariably enforced arbitration requirements in neutrality agreements, often relying on *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). They have compelled arbitration. *Sage*, *supra*; *NY Health & Human Svs. Union*, *supra*; *South Bay Boston Mgmt. v. UNITE HERE Local 26*,

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[4] *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828-831 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45-46 (2001).

587 F.3d 35, 42 (1st Cir. 2009) (enforcing neutrality agreement's arbitration clause over employer's claim that the agreement was void *ab initio*). They have enforced arbitration awards. *Hotel Employees Local 217*, *supra*; *AK Steel Corp.*, *supra*; *Dana Corp.*, *supra*.

In *Hotel Employees Local 217*, 996 F.2d at 567, the Second Circuit stated that its decision to enforce the neutrality agreement was "strengthened by the significant inclusion in the contract of an arbitration provision" because "[a]rbitration is strongly favored as a mechanism to resolve disputes in the workplace, and to a large extent arbitral decisions are insulated from judicial review," citing *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). It pointed out that this Court has held that employers and unions may make enforceable, private arbitration agreements for resolution even of representation issues, particularly where this is a substitute for labor strife, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964) and *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Neutrality agreements like the one at issue here privatize the organizing process. Both parties agree not to file unfair labor practice charges with the NLRB. All matters that might have been charges, as well as all other disputes under the agreement, are settled through arbitration rather than the NLRB's lengthy and expensive processes. In addition to preserving labor peace, the neutrality agreement thus carries out an essential policy of the Taft-Hartley Act.

Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 251-253 (1970); *Collyer Insulated Wire*, 192 NLRB 837 (1971).

The Court decided in *Boys Markets* that the policy favoring arbitration is so strong it should trump the plain language of § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. In the LMRA, the "congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id*. at 251. The Court noted the "importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end," *id*. at 252, the effectiveness of which would be greatly reduced without a mechanism to prevent "resort to strikes, walkouts, or other self-help measures" over arbitrable matters, *id*. at 249. It therefore held that the federal courts may enjoin strikes over violations of collective bargaining agreements containing arbitration provisions despite the absence of any applicable exception in § 4 of the Norris-LaGuardia Act. *Id*. at 252-253. "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the

policies that inspired ostensibly inconsistent provisions." *Id*. at 250.

Arbitration is so important to a union as a means of saving time and expense in resolving disputes that it gives up its most potent tool, the right to strike, in exchange. *See id.* at 248. Nevertheless, Mulhall's logic means that an employer's agreement to arbitrate is illegal because it *is* so valuable to the union and there is no exception for it in § 302(c).

IV. SECTION 302'S LANGUAGE, CONTEXT, AND LEGISLATIVE HISTORY MAKE CLEAR THAT IT DOES NOT APPLY TO THE CHALLENGED CLAUSES.

A. Neutrality, Employee Information, And Facility Access Are Not "Money Or Other Things Of Value" That May Be "Paid, Lent Or Delivered."

It is clear from § 302's language and context that Congress did not intend it to criminalize employer neutrality or agreements that provide unions access to facilities and employee information. An employer "pay[s], lend[s], or deliver[s] any money or other thing of value" within the meaning of § 302 only when it transfers to a union money or property with an objective, market-based value. An employer's agreement to abstain from doing some act that it otherwise has a right to do – like speaking against unionization or trespassing union organizers – is not the "payment" or "delivery" of a "thing of value." Nor does § 302(a) reach an employer's agreement to provide a union

some arguable, intangible "thing" – like employee contact information – whose only value is subjective and inseparable from the admittedly legal goals of communicating with employees and seeking voluntary recognition.

Mulhall's reading relies on tortured syntax. As a matter of basic usage, much of Mulhall's interpretation is senseless. No one would say that a person "pays" or "delivers" neutral speech (or the absence of speech) to someone else, or that the other person "receives or accepts" it. *See Sekhar v. United States*, 570 U.S. ___, 133 S.Ct. 2720, 2727 (2013) ("No fluent speaker of English would say that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person 'obtained and exercised another's right to free speech.'"). Nor does one "pay" access to one's real property to someone else. A person can "deliver" *possession* of property, but only in the sense of formally transferring title or deed. *See* BLACK'S LAW DICTIONARY (6th ed. 1990), at 428-429 ("*Delivery*: The act by which the res or substance thereof is placed within the actual or constructive possession or control of another"; "The final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such manner that it cannot be recalled by the grantor"); BLACK'S LAW DICTIONARY (3d ed. 1933), at 548 ("*Delivery*: The final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such manner that it cannot be recalled by the grantor."; "The tradition or

transfer of the possession of personal property from one person to another."); III OXFORD ENGLISH DICTIONARY (Oxford: The Clarendon Press 1933), at 167 (Deliver: "*Law*: To give or hand over formally (*esp.* a deed to the grantee, or to a third party . . . So 'to deliver' seisin of hereditaments, or a corporeal chattel."). Nothing of the sort is involved here. Mardi Gras has not "delivered" possession or control over its property to the union; it has simply limited its freedom to exercise its own possessory rights. *See Adcock*, 550 F.3d at 374; *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 401-402 (2003) (characterizing restrictions on a business's "intangible right to exercise exclusive control over the use of its assets" as "obtaining of property from" that business under the Hobbs Act "would be an unwarranted expansion of the meaning of that phrase") (italics and internal quotation omitted).

The Eleventh Circuit improperly stretched terms to their outermost definitional possibilities. The Eleventh Circuit decided that the terms "pay" and "payment" meant any action that "fulfills an obligation" to a union. Pet. App. 8. But that expansive definition would lead to untoward results in a statute whose central goal is encouraging – not criminalizing – mutual obligations between unions and employers. While it is possible to interpret "payment" figuratively as any fulfillment of an obligation, "[i]n a more restricted legal sense payment is the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other

value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part." BLACK'S LAW DICTIONARY (6th ed. 1990), at 1129; *ibid*. ("Payment is a delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due."); BLACK'S LAW DICTIONARY (3d ed. 1933), at 1339 ("*Pay*: To discharge a debt; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance. . . . The term, however, is sometimes limited to discharging an indebtedness by the use of money."); VII OXFORD ENGLISH DICTIONARY, *supra*, at 577: (Pay: "To give, deliver, or hand over (money, or some other thing) in return for goods or services, or in discharge of an obligation; to render (a sum or amount owed)."); *cf*. *id*. at 578 ("*fig*. (or in figurative expressions): to give or render (anything owed, due, or deserved); to discharge (an obligation).").

Nor is it valid to conclude, as the Eleventh Circuit apparently did, that because neutrality, facility access, and employee information have utility to a union, they are "things of value" within the meaning of § 302(a). If considered in isolation, the term "thing of value" is virtually limitless, and providing a union "anything" that it values becomes criminal bribery. But this Court has often rejected such myopia. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it."); *Dolan v. U.S.*

Postal Serv., 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

The words "thing of value" must be read in context. Congress made the words "thing of value" part of a larger phrase – "any money or other thing of value." Interpreting the phrase "thing of value" to mean anything that is of utility or subjectively valuable to a union reads the words "money or other" out of the statute. Money is something of utility and subjective value to a union, and so is subsumed by the Eleventh Circuit's definition of "thing of value." But this definition makes reference to "money" in § 302(a) superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174-175 (2001); *Babbitt v. Sweet Home Chapter of Cmtys. for Great Ore.,* 515 U.S. 687, 698 (1995). On the other hand, reading the residual phrase "other thing of value" to include only property that is not money but is "like" or equivalent to money "does not make the word[s] identical to [their] statutory neighbor[ ]." *Bullock v. BankChampaign, N.A.*, 569 U.S. ___, 133 S.Ct. 1754, 1760 (2013). The juxtaposition of "other thing of value" with "money" demonstrates that Congress intended to limit covered "things of value" to "things" that are monetary equivalents. *See, e.g.*, *Duffy v. Cent. R.R. Co. of N.J.*, 268 U.S. 55, 64 (1925)

(interpreting "rentals or other payments required to be made as a condition to the continued use or possession of property" in Revenue Act of 1916 to exclude payments for costs of improvements because "the phrase 'or other payments' . . . was evidently meant to bring in payments *ejusdem generis* with 'rentals' "); *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration"); *Wash. State Dept. of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 384 (2003).

Congress used the word "any" to modify the entire phrase "money or other thing of value" rather than the words "other thing of value" (as in "money or *any* other thing of value"). Because the term "money" is definite in its nature, "any" must refer to *quantity*, rather than to the nature or quality of the thing being transferred. In making clear that there would be no *de minimis* exception to the amount of "money or other thing of value" transferred, Congress demonstrated that covered "things of value" must be quantifiable in number (i.e., tangible "things") or, at the least, have some quantifiable monetary value. *See also* 29 U.S.C. § 186(d)(2) (distinguishing felonies from misdemeanors based on "the value of the *amount* of money or thing of value involved") (emphasis added). Section 302(c)(3)'s exception for "the sale or purchase of an *article or commodity* at the prevailing market price in the regular course of business" further supports the interpretation of "thing of value" as

referring to property with a quantifiable, market-based value. 29 U.S.C. § 186(c)(3) (emphasis added).[5]

Other parts of § 302 make Mulhall's and the Eleventh Circuit's interpretation indefensible. It is clear that Congress intended "payments" to labor organizations and their representatives mandated by collective bargaining agreements to be covered by § 302(a) because § 302(f) exempted "contract[s] in force on June 23, 1947" from coverage. 29 U.S.C. § 186(f). But the exceptions listed in § 302(c) that relate to employer payments that are authorized in collective bargaining agreements – compensation paid to employees who are also union representatives, dues covered by check-off clauses, and money remitted to trust funds – all involve the "payment" of money. 29 U.S.C. §§ 186(c)(1), (c)(4), (c)(5); *see also* 29 U.S.C. §§ 186(c)(6)-(9).

Congress did not include exceptions for the many garden-variety contract clauses that do not involve

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[5] The Court is not required to determine in this case whether intangible property with an objective, market-based value may be a "thing of value" paid or delivered under § 302. But given § 302's contextual features, it is likely that Congress intended to limit the term "thing" to its common, corporeal meaning. *See* XI OXFORD ENGLISH DICTIONARY, *supra*, at 309 (Thing: "[11] A material object, a body; a being or entity consisting of matter, or occupying space. (Often a vague designation for an object which it is difficult to denominate more easily.)"; "[12a] A collective term for that which one possesses; property, wealth, substance. [b] A piece of property, an individual possession; usually in *pl.*, possessions, belongings, goods[.]").

the transfer of money or monetary equivalents, but that do "fulfill an obligation" and that unions consider valuable to their institutional interests, enough so that they will expend resources to attain them. A partial list includes, in addition to the specific clauses that Mulhall challenges, exclusive control over the grievance process (*see Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967)); arbitration (*see supra* at 24-27); union security clauses (*see Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998)); an employer's no-lockout promise; and super-seniority for union stewards (*see Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 527-528 (1948)). All of these concessions are economically valuable to unions, and employers give them in return for consideration, including union promises not to strike. But it is beyond doubt that Congress did not intend – covertly and with no legislative discussion either before or since – to criminalize these common contract terms. The absence of a statutory exception for any of them demonstrates the error of the Eleventh Circuit's reading of §302(a).

The canon of strict construction applies. Perhaps sensing this, the Eleventh Circuit majority pulled back and concluded that it is only criminal for an employer to enter into an agreement containing the challenged clauses with the "intent[ ] of improperly influencing a union." Pet. App. 8. But this scienter requirement is not part of § 302(a)(2), "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." *United States v. Ryan*, 350 U.S. 299,

305 (1956); *United States v. Phillips*, 19 F.3d 1565, 1581-1582 (11th Cir. 1994). Because § 302(a)(2) does not require any wrongful intent, adopting an interpretation of "thing of value" as fuzzy as "anything sufficiently useful to a union that it will expend resources to attain it" would raise serious due-process concerns. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *United States v. Lanier*, 520 U.S. 259, 266-267 (1997) ("[A]s a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes . . . ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.") (internal citation omitted).

Application of the strict-construction doctrine is especially appropriate to a statute that draws the line between misdemeanor and felony based on the dollar value of the "money or other thing of value" paid or delivered. 29 U.S.C. § 186(d)(2); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (application of the doctrine to a criminal penalty provision "'means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended'") (quoting *Ladner v. United States*, 358 U.S. 169, 178

(1958)). It is hard to believe that Congress intended – in a strict-liability statute – to make the line between spending up to five years in prison or less than one year hinge on the subjective value a union placed on a contractual obligation, or the amount of resources a union was willing to expend to attain it. *See Adcock*, 550 F.3d at 375.

B. The Legislative History Of § 302 Confirms That It Was Intended To Cover Only Transfer Of Money And Property With An Objective Monetary Value.

There is not the slightest indication in the legislative history of either the 1947 Taft-Hartley amendments or the revisions to § 302 in the LMRDA that Congress intended to criminalize an employer's agreement to remain neutral during union organizing or to provide a union facility access or employee information. The scope of § 302 generally, and the "payment" or "delivery" of "any money or other thing of value" specifically, must be understood in light of Congress's purpose in enacting the statute. *See Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) ("[T]he phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts."); *NLRB v. International Longshoremens' Association*, 447 U.S. 490, 504 (1980) (holding that although the literal language of the "hot cargo" prohibition of 29 U.S.C. § 158(e) does not distinguish between primary and

secondary effects, "Congress intended to reach only agreements with secondary objectives."). Congress's purpose in enacting § 302 did not include making common forms of labor-management cooperation a federal crime.

Section 302 originated in the Senate, and was intended, primarily, as a "stopgap" measure to regulate employer payments to union welfare funds. *See* 93 Cong. Rec. 4747 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, at 1313 (1948) ("Legis. Hist. LMRA") (remarks of Senator Taft); *id*. at 1304 (remarks of Senator Ball); S. Rep. No. 105, 80th Cong. 1st Sess. 52 (1947), reprinted at 1 Legis. Hist. LMRA, at 458. A second purpose was to criminalize "extortion" by union representatives for "personal advantage." *Id*. at 1311 (remarks of Senator Taft); *id*. at 458 ("Thus, the amendment makes extortion illegal and also prevents the check-off of union dues unless authorized in writing by the individual employee."); *see* Note, *Taft-Hartley Regulation of Employer Payments to Union Representatives: Bribery, Extortion and Welfare Funds under Section 302*, 67 YALE L.J. 732, 732-736 (1958). As this Court summarized:

> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might

> achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem[.]

Arroyo, *supra*, 359 U.S. at 425-426.

The antecedent of Congress's use of "any money or other thing of value," then, was common-law extortion, which involved the wrongful taking of money or some tangible, valuable property. 2 E. Coke, The First Part of the Institutes of the Laws of England 368b (18th English ed. 1823) ("Extortion . . . is a great misprision, by wresting or unlawfully taking by any officer, by color of his office, any money or valuable thing of or from any man"); 4 W. Blackstone, Commentaries 141 (Univ. of Chicago Press 1979) (extortion is "an abuse of public, justice which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value."); *see Sekhar*, 133 S.Ct. at 2724 (at common law, "[e]xtortion required the obtaining of items of value, typically cash, from the victim."); *Scheidler*, 537 U.S. at 402 ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office.").

Common-law extortion was distinct from the statutory crime of "coercion" – the use of threats to "'compel another person to do or abstain from doing an act which such person has a legal right to do or to abstain from doing.'" *Sekhar*, 133 S.Ct. at 2725

(quoting N.Y. Penal Code § 653 (1881)). What Mulhall incorrectly characterizes as "things of value" here – Mardi Gras' agreeing to limit its own speech and property rights, and ultimately agreeing to recognize the union on a showing of majority support – could only be an object of coercion, not a thing of value subject to extortion. *People v. Weil*, 273 N.Y. 653, 8 N.E.2d 332 (1937) (defendant guilty of statutory coercion where he "unlawfully did use and attempt intimidation of a stated person by threats and force with a view to compel him to do an act which such person had a legal right to abstain from doing, to wit, to compel him to enter into a certain agreement with a labor union"); *People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (1934); *see Scheidler*, 537 U.S. at 405-406; *Sekhar*, 133 S.Ct. at 2725-2726.

Congress made major substantive revisions to § 302 in the LMRDA, prompted by the McClellan Committee's sensational "investigation . . . of the extent to which criminal or other improper practices or activities are, or have been, engaged in the field of labor-management relations . . . " S. Res. 74, 85th Cong. (1957), reprinted in Hearings Before the Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., pt. 1, at 1 (1957); Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 892 (1960). The committee's mission was to focus on "problems inherent in labor-management collusion . . . violence, shakedowns and extortions." S. Res. 74, at p. 2. But in none of the McClellan Committee's

many hearings – extending from 1957 to 1959, is there any notion that such "collusion" and "extortions" might include employer neutrality toward organizing, providing unions access to facilities and information about employees, or voluntary recognition of labor organizations as employee representatives.

The addition in the LMRDA of limits on recognitional picketing, § 8(b)(7), 29 U.S.C. § 158(b)(7), further discredits the Eleventh Circuit's theory. If voluntary recognition were a "thing of value" under § 302, then picketing to get it would certainly be a "demand" and therefore a violation. Section 8(b)(7) would not have been needed if recognitional picketing were already a violation of § 302. Also § 8(b)(7) actually allows recognitional picketing to take place for some time (or without time limit if there is no work stoppage), something Congress would hardly have provided if it thought such picketing was already prohibited by § 302, and without making an exception for it in § 302(c). *Cf.* 29 U.S.C. § 522, also added by the LMRDA (prohibiting extortionate picketing to take or obtain any "money or other thing of value" for "personal profit or enrichment").

C. All Decisions Finding § 302 Violations Besides The Eleventh Circuit's Have Involved Payments Of Money Or Property With Objective, Market-Based Value.

No reported case in the last 65 years has identified conduct remotely like that described in the neutrality agreement as violating § 302. All of the cases in which courts have upheld convictions under § 302 have involved the transfer of money or a thing with an objective, market-based value. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 918-920 (2d Cir. 1964) (payments made directly by employer to union to compensate the union for lost revenues as a result of containerization); *United States v. Fisher*, 387 F.2d 165, 168 (2d Cir. 1967) (employer's delivery of free construction materials to union official); *United States v. Ferrara*, 458 F.2d 868, 870 (2d Cir. 1972) (restaurant coffee supplier's payment of commissions to union officials in scheme to force restaurant to purchase supplier's coffee); *United States v. Pecora*, 484 F.2d 1289, 1291 (3d Cir. 1973) (contributions to union official's honorary dinner that bore no resemblance to cost of event, where surplus proceeds went to the union official in cash); *United States v. Boffa*, 688 F.2d 919, 935 (3d Cir. 1982) (employer's payment of lease and provision of car to union official); *United States v. Carlock*, 806 F.2d 535, 555 (5th Cir. 1986) (employer payments to union official's daughter-in-law's company); *United States v. Schiffman*, 552 F.2d 1124, 1125 (5th Cir. 1977) (union official's demand for hotel room rates $1,200 less than

what the union would have paid under generally applicable corporate rates); *Korholz v. United States*, 269 F.2d 897, 899-900 (10th Cir. 1959) (employer payments to union official's third-party creditor in satisfaction of union official's debts); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1393-1394 (11th Cir. 1994) (monthly payments of pension benefits to union negotiators in return for concessions); *see also United States v. Freuhauf*, 365 U.S. 146, 152 (1961) (employer's low-interest loans to union official).

On the few occasions that litigants have ventured arguments similar to the ones Mulhall makes, courts have dismissed the arguments as baseless. *United States v. Cervone*, 907 F.2d 332, 347 (2d Cir. 1990) ("intangible value of a continuing ability to influence corrupt union practices" is not a "thing of value" under § 302; "[t]he government cites no caselaw to support its intangible benefit theory, and we are aware of none"); *Zentner v. Am. Fed'n of Musicians*, 237 F. Supp. 457, 463 (S.D.N.Y. 1965) ("[W]here, as here, an employer is requested merely to furnish 'the names, addresses and locals of all members performing such engagement, and the scale wages received by each member' in order to secure enforcement of the union's dues structure, it would be a perversion of the Congressional purpose to construe the phrase 'any . . . thing of value' to include the requested information."), *aff'd Zentner v. Am. Fed'n of Musicians of U.S. & Canada*, 343 F.2d 758, 758-759 (2d Cir. 1965); *Shapiro v. Rosenbaum*, 171 F. Supp. 875, 878 n.8 (S.D.N.Y. 1959) (rejecting "the extraordinary contention" that

employers' promises in collective bargaining agreements to make payments that were otherwise lawful under § 302 were nonetheless criminal because they served as consideration for the agreements and were desired by the union; "[T]he Court will state that it considers such a contention to be patently without merit. Plaintiffs' position in this respect could only be sustained by a construction of Section 302 which would abolish collective bargaining by making illegal every employer's promise to a union which contemplated a benefit to anyone, including the employer's own employees."); *see infra* at 48-54.

In two cases, courts included loose *dicta* in their opinions, claiming that § 302 reaches transfers of intangibles without any fixed monetary value. *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) ("Value is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances."); *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011) ("Truly, of all the things in this world widely regarded as valuable, money and the like comprise only a small percentage."), *cert. denied*, 131 S.Ct. 3039 (2011). Mulhall pounced on these *dicta*, and the Eleventh Circuit majority recited them unquestioningly. Brief of Appellant Martin Mulhall (11th Cir. March 21, 2011), at 19; Pet. App. 6. But *Roth* involved an employer that lent nearly $100,000 to a union representative on a no-interest, no-collateral basis. *Roth*, 333 F.2d at 451-452. *Douglas* involved union officials' demand that the employer pay their cronies $150,000 a year in order to settle

a strike. *Douglas*, 634 F.3d at 858. These cases do not provide any support for Mulhall's theory.

D. Isolating The Phrase "Thing Of Value" And Arguing That It Holds The Same Meaning Across Statutory Contexts Is An Unsound Interpretive Method.

Because his theory finds no support in any § 302 caselaw and is at odds with the LMRA's language, context, and purpose, Mulhall seeks to expand the interpretive field by isolating the phrase "thing of value" and claiming that it is a "term of art" that carries the same meaning across statutory contexts. This would be an unsound approach to statutory construction even if "thing of value" had some universal meaning. *Johnson v. United States*, 559 U.S. 133, 139-140 (2010) ("Although a common-law term of art should be given its established common-law meaning, we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, and we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'") (internal citations omitted).

Statutory variations on the phrase "thing of value" exist in highly disparate contexts, and it makes no sense to argue that the term means the same in each of them. This is clear from even the small sample of statutes that Mulhall cites. Mulhall Mem. Supp. Pet., at 5-6 & n.3. Some do not use the

phrase "any money or other thing of value" at all, but rather the expansive "anything of value." 5 U.S.C. § 7353 ("[N]o Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept *anything of value* from a person. . . ."); 18 U.S.C. § 201(b)(1); 18 U.S.C. § 666. Others do not link the phrase "thing of value" semantically to the word "money," as § 302 does, and so indicate that it has a separate meaning. 18 U.S.C. § 641 (prohibiting the conversion of "any record, voucher, money, or thing of value of the United States or of any department or agency thereof"); 18 U.S.C. § 912 (person who pretends to be an officer of the United States and "in such pretended character demands or obtains any money, paper, document, or thing of value" guilty of felony); 18 U.S.C. § 1954; 12 U.S.C. § 2607. Moreover, the criminal statutes Mulhall cites all involve some independently wrongful intent and act – such as fraud, conversion, or extortion by threat of physical harm, kidnapping, or injury to property – as § 302 does not. The factual scenarios in which prosecutions arise have nothing to do with the facts here. *See* Pet. Response to Cross-Pet., at 18.

This is only the tip of the iceberg. The phrase "money or other thing of value" exists in many other state and federal statutes. It appears in statutes regulating campaign contributions (2 U.S.C. § 441e(a)(1)(A)); banning unauthorized payments for child adoption (Mich. Comp. Laws § 710.54); barring apartment owners from selling commercial access to tenants for

the purpose of "selling or delivering fuel, ice or food" (N.Y. Real Prop. Law § 238); regulating abusive telemarketing (15 U.S.C. § 6106(4)); defining "gambling," as in the federal statute criminalizing "gambling ships" on the high seas (18 U.S.C. § 1081);[6] and prohibiting aggressive panhandling (*see Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 552 (4th Cir. 2013)), among many others. The notion that a single definition of "thing of value" can apply across these varied contexts is far-fetched, to say the least.

Defining a candidates' speech to be a "thing of value" under a statute regulating campaign practices can raise significant First Amendment problems. *See Brown v. Hartlage*, 456 U.S. 45, 56-57 (1982) (campaign promise to accept lower salary while in office could not constitutionally be considered the promise of a "thing of value" in return for votes under Kentucky Corrupt Practices Act). Defining leniency in

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[6] A now-forgotten judicial battle raged in the 1940s and 50s over whether pinball machines were banned by state statutes prohibiting "gambling devices" on which "a thing of value" could be won. *See* 89 A.L.R.2d 815, § 3(a) (originally published in 1963); *compare People v. Horton*, 33 Misc.2d 294, 295 (N.Y. Police Ct. 1961) (holding that winning extra plays in pinball is not a "thing of value": "In this case, the player, if he is skillful enough, can obtain an additional ball which adds to his score. There is no element of chance and the user of the machine does not receive any monetary reward for his effort.") *with Thamart v. Moline*, 66 Idaho 110, 156 P.2d 187, 187-188 (Idaho 1945) ("the chance a player takes, in getting extra plays" covered by gambling-device statute because "amusement, or the right to participate in the game or to shoot the balls used in playing that game, [is] a thing of value.").

prosecution as a "thing of value" makes sense in a statute prohibiting public officers from being "influenced or rewarded in connection with any [public] business . . . involving *anything of value*[.]" 18 U.S.C. § 666(a)(1)(B); *United States v. Freeman*, 208 F.3d 332, 341-342 (1st Cir. 2000) (strip club owner's providing police officers with cash, free drinks and access to dancers' dressing rooms in exchange for police leniency violated 18 U.S.C. § 666(a)(1)(B)). But it makes no sense at all in a witness-tampering statute that prohibits public officials from "promis[ing] *anything of value* to any person, for or because of the testimony under oath or affirmation given or to be given by such person[.]" 18 U.S.C. § 201(c)(2); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (Easterbrook, J.) ("Forgoing criminal prosecution (or securing a lower sentence) is not a 'thing of value' within the meaning of § 201(c)(2). . . . [T]reating immunity from prosecution (or a prosecutorial promise that would lead to a lower sentence) as a 'thing of value' would put § 201(c)(2) at war with a long history of lawful inducements to testify[.]") (internal citation omitted).

Mulhall's expansive reading of the phrase "thing of value" in § 302(a) puts it similarly at war with the LMRA's purpose and history.

V. NEUTRALITY, ACCESS, AND EMPLOYEE INFORMATION ARE LONG-STANDING STAPLES OF LABOR RELATIONS WHICH HAVE NEVER BEFORE BEEN QUESTIONED UNDER § 302.

The destabilizing effect of the Eleventh Circuit's decision is strongly demonstrated when each provision of the neutrality agreement that Plaintiff alleges to be illegal is considered separately. Each has been approved and occupies a long-standing and well-established place in labor law.

Neutrality. Employers have a right of free speech under § 8(c) of the NLRA, 29 U.S.C. § 158(c). This provision was added by the Taft-Hartley amendments at the same time as § 302.[7] *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008). Employers may oppose unionization, but they may also speak in favor, *NLRB v. O'Keefe & Merritt Mfg. Co.,* 178 F.2d 445, 447-448 (9th Cir. 1950), *Coamo Knitting Mills*, 150 NLRB 579, 580-581 (1964), or stay neutral, *Kimbrell v. NLRB*, 290 F.2d 799, 801-802 (4th Cir. 1961).

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[7] At the time of the Taft-Hartley amendments, many collective bargaining agreements contained neutrality provisions, or "harmony clauses." Prentice-Hall, 4 *Labor Equipment*, "Union Contracts and Collective Bargaining" (Prentice-Hall 1946) ("Prentice-Hall"), at ¶ 53,352 ("contracts frequently contain the equivalent of what in international relations is referred to as a non-aggression pact. In the field of labor relations, these mutual pledges are something called non-discrimination or harmony clauses. . . . [T]hese clauses contain: . . . mutual pledges by employer and union not to engage in antagonistic propaganda.").

In *Hotel Employees v. Marriott*, *supra*, the court found that employer neutrality did not contravene any existing federal labor policy. "Nothing in the relevant statutes or NLRB decisions suggests employers may not agree to remain silent during a union's organizational campaign – something an employer is certainly free to do in the absence of such an agreement." 961 F.2d at 1470. Employers have a right of free speech under § 8(c) of the LMRA but "[t]his provision does not suggest an employer's agreement not to express its views is unenforceable." *Id.* The Sixth Circuit agreed in *UAW v. Dana*, 278 F.3d at 558-560. "[A]n employer's voluntary agreement to silence itself during union organizing campaigns does not violate federal labor policy." *Id.* at 558. *See also Amalgamated Clothing*, *supra,* 845 F.2d at 1253; *AK Steel*, *supra,* 163 F.3d at 407-408.

Under the neutrality agreement at issue here, the employer agreed to stay neutral and not try to influence its employees' decisions. An employer is not required to speak against unionization. Requiring it to do so – on threat of criminal sanction – is inimical to the free-speech policy "which suffuses the NLRA" and to Congress's deregulation of employer speech about unionization in § 8(c):

> In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts]

> to coercion within the meaning of the Act." *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477. We subsequently characterized *Virginia Electric* as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization. *Thomas v. Collins*, 323 U.S. 516, 537-538 (1945).

Chamber of Commerce, 554 U.S. at 66-67; *see Wooley v. Maynard,* 430 U.S. 705, 714 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-797 (1988) (emphasis in original). The decision below violates this right not to speak by threatening civil and criminal punishment of employers who choose not to speak against unionization and agree to be neutral.

Union access. Granting access to union representatives was a very common practice throughout many industries when the LMRA was enacted. The NLRB reported in 1940 that "[u]nion representatives are permitted to enter the shop for the purpose of discussing grievances with the employees in the shoe, fur, men's clothing, women's clothing, bakery and confectionery, upholstery and floor-covering, cement and plaster, bricklaying, plumbing, leather, automobile, flat-glass, shipbuilding, rubber, brewery, gas, coke, and chemical, electrical, radio and machine, and

printing industries." *In the Matter of Cities Service Oil, et al.*, 25 NLRB 36, 50 (1940). In the maritime industry, unions had access to 95 per cent of American ships, except tankers, and to 50 per cent of tankers. *Id*. This was not recent; it went back more than 35 years. *Id*. at n.29. The practice continued on through the war and after. *Richfield Oil Corp.*, 49 NLRB 593, 602 (1943); *Heinz, H. J., Co.*, 72 NLRB 316, 329 (1947); Bureau of National Affairs, BASIC PATTERNS IN UNION CONTRACTS (4th ed. 1957), at 65:6 (39% of surveyed collective bargaining agreements included provision granting union officials plant access); *Murphy Diesel Co*., 120 NLRB 917, 923 (1958).

Employers may exclude union organizers from their property in most instances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535-538 (1992). In some circumstances, however, the NLRA is interpreted to require an employer to let them on the premises. *Id.* at 539-540. Employers can also agree to permit access, as so many have done over the entire history of the NLRA and before. When they do so, the agreement is binding and enforceable. *Lion Dry Goods*, 369 U.S. at 20 n.4. It is a "mandatory subject of bargaining" which an employer may not change unilaterally. *Beverly Health v. NLRB*, 317 F.3d 316, 321-322 (D.C. Cir. 2003); *Facet Enters., Inc. v. NLRB,* 907 F.2d 963, 983 (10th Cir. 1990) (plant access among the "important areas of labor-management relations"); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 402-404 (5th Cir. 1984); *Boyer Bros*., 217 NLRB 342, 344 (1975). This ancient practice and doctrine would

be legally impossible if providing access to a union were "delivering" or "paying" a "thing of value" and a § 302 violation.

Employees' names and addresses. The NLRB has long required employers to supply lists of names and addresses of employees eligible to vote in union elections, following *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).[8] It adopted this approach in order to benefit employees by opening up communication. *Id*. at 1240. This Court approved in *NLRB v. Wyman-Gordon Co.*, *supra*, rejecting the notion that such a requirement was somehow unlawful: "The respondent [employer] also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit." *Id*., 394 U.S. at 767. One challenge rejected by the Court was that the provision of names and addresses would violate § 302. *See* Brief for Wyman-Gordon Company to the Supreme Court, *NLRB v. Wyman-Gordon Co*. (No. 463), 1969 WL 120290, at 38-44; *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) ("[W]e are not greatly impressed by the contention that compelling a list of names and addresses forces appellant . . . to give a 'thing of value' to a labor organization, in violation of 29 U.S.C. § 186.").

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[8] Even prior to this, unions and employers negotiated contract provisions requiring employers to provide information. Prentice-Hall, at ¶ 56,754.6 (companies agree with United Auto Workers to provide lists of employee names and addresses).

A union is also entitled to get employee information – including names and addresses – from an employer pursuant to the bargaining duty imposed once a union is recognized as the employees' collective-bargaining representative. This was the law before enactment of § 302. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 487 (7th Cir. 1942) (enforcing Board order requiring employer to provide names, classifications and wages; rejecting employer's argument that the information was confidential). It has never been doubted since then. *See Yawman & Erbe Mfg. Co.*, 89 NLRB 881, 882-883 (1950), *enf'd* 187 F.2d 947 (2d Cir. 1951); *Verona Dyestuff Division Mobay Chemical Corp*., 233 NLRB 109, 112 (1977); *Beverly Health & Rehab. Svs.*, 346 NLRB 1319, 1326-1327 (2006). There is no exemption under § 302(c) for providing this information. Indeed, *all* information an employer is required to give a union as part of the bargaining process under the Court's decision in *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 153-154 (1956) has some "value." Yet that obligation – not one expressed in the statute but drawn from the general duty to bargain – is not made an exemption under § 302(c).

There is a free speech aspect to this issue, as well. Employers have a right under the First Amendment to convey information. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 & n.7 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-765 (1976). This should include employees' names and addresses, which are simply information. "Even

dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *University City Studios v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001). In addition to being information in itself, a list of names and addresses has only one purpose: to enable further speech. Giving information to unions is of course protected speech, but so are invitations to hear such speech. *Thomas v. Collins*, 323 U.S. 516, 534 (1945).

By holding that agreements for employer neutrality, worksite access, and the provision of employee lists may be the "payment" of "things of value," the Eleventh Circuit calls into question decades of settled precedent. This shows how much its decision is at odds with the structure of the LMRA.

VI. MULLHALL'S THEORY AND THE COURT OF APPEALS' DECISION WOULD DESTABILIZE OTHER IMPORTANT AREAS OF LABOR LAW.

A. Voluntary Recognition Is The Only Purpose Of The Challenged Provisions And Is Threatened.

Voluntary recognition is the very object of the neutrality agreement. The agreement does not confer recognition on the union as the bargaining agent of any employees and does not entitle the union to receive dues or any other payments from employees. It only provides a process through which a union might in the future obtain the support of a majority of the employees and gain recognition. *Hotel Employees*

Local 217, 996 F.2d at 566; *New Otani Hotel*, 331 NLRB 1078, 1080-1081 (2000). The agreement's provisions allowing facility access, promising employer neutrality, and entitling the union to employee names and addresses are only means to the end. They have no independent benefit or value to a union.

The complaint does not allege that the employer's promise to recognize the union upon a showing a majority status violates § 302, and the Eleventh Circuit did not so find. Surely, this is because the law is so clear that this has always been allowed under the NLRA. A union must show the support of a majority of employees before it may be recognized as the exclusive representative. *ILGWU v. NLRB* (*Bernhard-Altmann Texas Corp.*), 366 U.S. 731, 738 (1961). This requirement may be satisfied by the union's presentation of authorization cards signed by a majority of employees. This Court stated in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 600 (1969), "In short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under Section 8(a)(5) solely to those unions whose representative status is certified after a Board election." The Court thoroughly analyzed the issue and concluded that union authorization cards could lawfully be used to support recognition. 395 U.S. at 595-600 & n.17; *see Bernhard-Altmann*, 366 U.S. at 739 ("If an employer takes reasonable steps to verify union claims [of majority status] . . . he can readily ascertain their validity and obviate a Board election."); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973); *NLRB v.*

Broad Street Hosp. & Med. Ctr., 452 F.2d 302, 305 (3d Cir. 1971) ("Voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted, if recognition were to be limited to Board-certified elections. . . ."); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981) ("An employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.'") (internal citation omitted), *cert. denied*, 102 S.Ct. 391 (1981); *see* § 9(c)(1)(A)(i) of the NLRA, 29 U.S.C. § 159(c)(1)(A)(i) (employees may file a petition for an election if "their employer declines to recognize their representative.")

One of the authors of the Taft-Hartley Act explained how he expected an employer to react to a union claim of majority status:

> . . . When approached by a union organizer with a demand for recognition, would it not be logical to suppose that [management] would first demand proof of a majority organization and recognize the union as the collective bargaining representative of his employees only when furnished with such proof?
>
> Why should it be necessary to continue the elaborate, costly, and confusing processes of the National Labor Relations Board, with its thousands of employees both in Washington and throughout the country, in examining, questioning, and determining in each instance which labor organizer has the

> confidence of a majority of the employees of every individual plant in the nation?
>
> Sometime, somewhere, our Federal government must make a start at retrenching.

Fred A. Hartley, OUR NEW NATIONAL LABOR POLICY 188 (1948).

The complaint and the Eleventh Circuit's decision divorce specific provisions of the neutrality agreement from the agreement's purpose. The provisions of the neutrality agreement that the Eleventh Circuit found potentially criminal under § 302 are simply means to the end of voluntary recognition. If these provisions are the illegal payment of things of value under § 302, then so must the voluntary recognition requirement at the agreement's heart. But there is no room in decades of established case law for Mulhall's assertion that an agreed-upon process for fostering voluntary recognition should suddenly be regarded as criminal.

Accepting the Eleventh Circuit's reasoning would revolutionize, and upset, the fundamental understanding of the recognition process under the NLRA that has persisted since its enactment and through the Taft-Hartley amendments and the LMRDA.

B. The Decision Below Would Also Open The Way For § 8(a)(2) Employer-Assistance Charges To Become Court Cases, And For A New, More Intrusive Standard In Duty Of Fair Representation Cases.

Section 8(a)(2). Like § 302, LMRA § 8(a)(2), 29 U.S.C. § 158(a)(2), prohibits an employer from making a "contribution of financial or other support" to a labor organization, but courts have refused to read "other support" literally.

> (Literally, . . . almost any form of employer cooperation, however innocuous, could be deemed 'support' or 'interference.' Yet such a myopic view of § 8(a)(2) would undermine its very purpose and the purpose of the [NLRA] as a whole – fostering free choice – because it might prevent the establishment of a system the employees desired. Thus, the literal prohibition of § 8(a)(2) must be tempered by recognition of the objectives of the NLRA.)

Hertzka & Knowles v. NLRB, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *see Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1015-1016 (9th Cir. 1990); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167 (7th Cir. 1955).

Mulhall's myopic theory would change all this and make an employer's violation of § 8(a)(2) of the NLRA into a § 302 violation. Mulhall asserts that anything an employer gives a union that is helpful for organizing violates § 302. J.A. 102 ("enforcing § 302

with respect to organizing assistance cannot possibly conflict with the NLRA"), 104 ("enforcing § 302 against 'thing[s] of value' useful for organizing causes no absurd results"). An employer obviously gives something to a "labor organization" that is "useful" to organizing when it violates § 8(a)(2) in respect to that union. Accepting Mulhall's view would open up an entirely new avenue for redressing § 8(a)(2) violations: suits under § 302(e) and even under the RICO statute, given that § 302 violations are RICO predicate offenses, 18 U.S.C. § 1961(1)(C).

Section 8(a)(2) violations occur in a wide variety of forms, including some types of employee committees that are considered "labor organizations." *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 212-213 (1959); *Electromation, Inc.*, 309 NLRB 990, 997-998 (1992), *enf'd* 35 F.3d 1148 (7th Cir. 1994). Employer discrimination between unions with respect to such things as access for organizing have always been dealt with only by the NLRB in its enforcement of § 8(a)(2). *See, e.g., Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). This would no longer need be the case, as employees and unions took to the courts for potentially faster and more powerful injunctive relief, circumventing the NLRB's control of injunctive relief against unfair labor practices under § 10(j) of the NLRA, 29 U.S.C. § 160(j). Mulhall has not suggested any limitation on his theory that would avoid this result.

Duty of Fair Representation. The Eleventh Circuit's approach is much more indefinite than Mulhall's simple analysis but also has the potential to

do serious mischief to the collective-bargaining process. The Court of Appeals instructed the district court to conduct a search into whether "innocuous ground rules" were part of a "corrupt scheme" that the complaint did not allege and the court did not describe even hypothetically. Pet. App. 8, 9. Law settled for decades provides a means for employees unhappy with collective bargaining agreements, strike settlements, grievance settlements, and other labor-management agreements to attack them but imposes a standard that prevents undue disruption. *Airline Pilots Association v. O'Neill*, 499 U.S. 65, 78 (1991) (a "wide range of reasonableness" is given to unions negotiating these agreements). The Eleventh Circuit's decision would create the opportunity to recast a duty of fair representation claim as a § 302 case and open the way for investigatory discovery into the reasons why an employer and a union made an otherwise "innocuous" agreement.

VII. THE UNION LOBBIED FOR LEGISLATION ENABLING THE EMPLOYER TO CREATE THE BUSINESS COVERED BY THE AGREEMENT: THIS IS COOPERATION THAT LABOR LAW ENCOURAGES AND CANNOT SUPPORT MULHALL'S § 302 THEORY.

The Eleventh Circuit apparently found it potentially "corrupt" that the union and employer worked together to pass mutually beneficial legislation. Pet. App. 3, 8. The Court therefore remanded so the district court could "determine why Unite and Mardi

Gras agreed to cooperate with one another." Pet. App. 9. But there was nothing corrupt or hidden involved; cooperation between employers and unions is at the heart of the LMRA.

The allegation in Paragraph 11 of the complaint that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras" does not meet *Iqbal* standards. *Ashcroft v. Iqbal*, *supra*, 556 U.S. 662; *see Mulhall II*, Pet. App. 11-12 (Restani, J., dissenting). No facts were alleged to support this conclusion. It is belied by the text of the neutrality agreement itself. Paragraph 15 of the agreement states that it would be in effect "for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility" and the agreement "is not in effect if slot machines, Video Lottery Terminals or similar gaming devices are not installed and open to the public at the gaming facility." Pet. App. 85. This condition was explicit, not hidden, and was entirely logical and benign. It was in the union's *self-interest* to lobby for legalization of slot machines. If successful, which it was, the agreement would become effective and the employer would let the union *try* to organize its employees without hindrance. The union would not have violated the agreement if it refrained from campaigning, and the agreement would have become effective even if the law passed without the union's help.

There is no question, however, that the union wanted the neutrality agreement enough to give up

its right to take economic action against the employer, which was made an explicit, enforceable condition in the neutrality agreement. Nor is there any question that the union desired the neutrality agreement enough to expend resources helping Mardi Gras get into the casino business. The question under § 302, however, is not whether the union wants something from the employer but whether it is the type of thing that Congress intended to stop. Sixty-five years of jurisprudence before the Eleventh Circuit's decision shows the opposite: this kind of agreement is something the NLRA encourages.

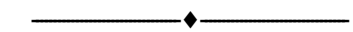
The NLRA was designed to promote labor-management cooperation. Its policy is "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151. "The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991); *see Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers."); *see also* Labor Management Cooperation Act, 29 U.S.C. § 175a. Neutrality agreements are a prominent way of accomplishing this. *Dana Corporation*, 356 NLRB No. 49 (2010), *slip op.* at 7-8, *enf'd* 698 F.3d 307 (6th Cir. 2012).

The notion that unions and employers commit criminal offenses by helping each other is antithetical to the NLRA's basic premise. The employer always receives consideration for a neutrality agreement. The one here, like those in all the court and NLRB cases on the subject, has a prohibition against picketing and other disruptive labor actions – valuable consideration for a fledgling business. The existence of such consideration does not make a neutrality agreement illegal. This makes it enforceable under the common law of contracts and under § 301(a). *Lion Dry Goods*, 368 U.S. at 28.

If it is sound logic that a union's help for the employer's business can make a labor-management agreement criminal, then a new era of labor relations is ushered in. Unions try to help their employers all the time, and, of course, they expect benefits in return, both in the form of more and better jobs for their members (or at least not losing them) and in a cooperative attitude in collective bargaining. When they do so by lobbying for mutually beneficial legislation, their conduct is not unlawful; it is protected by the Petition Clause. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-670 (1965) (joint union-employer lobbying for minimum wage that would favor large employers signed to union's agreement could not violate antitrust law, following *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 137-138 (1961)); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325-326 (5th Cir. 1994) (First Amendment barred LMRA § 303 challenge to unions'

lobbying for legislation sought by company in return for dismissal of nonunion subcontractor); *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (joint lobbying by restaurant association and labor union protected under *Noerr-Pennington* doctrine); *see also Nevada Com'n on Ethics v. Carrigan*, 564 U.S. ___, 131 S.Ct. 2343, 2353 (2011) (Kennedy, J., concurring) ("Just as candidates announce positions in exchange for citizens' votes, so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy.") (internal citation omitted). Once again, the Eleventh Circuit's approach proves too much. If an otherwise lawful labor-management agreement can be tainted by a union's lobbying for mutually beneficial legislation, why not a collective bargaining agreement or any other form of labor-management cooperation?

Because the whole purpose of the neutrality agreement here is to foster the aims of the NLRA – the avoidance of labor disputes, labor-management cooperation, and the promotion of collective bargaining and arbitration – the agreement cannot be condemned by § 302.



CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

29 U.S.C. § 186. Restrictions on Financial Transactions*

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; *or*

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such

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* Unless otherwise indicated, the provisions of § 302 contained in the LMRA are in century type; additions to those sections made by the LMRDA appear in italics. Deletions resulting from the LMRDA amendments and subsequent amendments have been omitted.

employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any *person to request, demand,* receive, or accept, or agree to *receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)* of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49)[†] *employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the*

[†] Parenthetical phrase amended by Pub. L. 104-88, 104th Cong., 1st Sess., 1995, 109 Stat. 803.

unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) *in* respect to any money or other thing of value payable by an employer *to* any *of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization,* who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the

termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on

petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; *(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds*; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That

the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds;[‡] (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959;[§] or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or

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[‡] Clause (7) of § 302(c) was originally added by Pub. L. 91-86, 91st Cong., 1st Sess., 1969, 83 Stat. 133, and subsequently amended.

[§] Clause (8) of § 302(c) was originally added by Pub. L. 93-95, 93rd Cong., 1st Sess., 1973, 87 Stat. 314, and subsequently amended.

more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.**

(d) Penalties for violations††

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not

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** Clause (9) of § 302(c) was added by Pub. L. 95-524, 95th Cong., 2d Sess., 1978, 92 Stat. 1909.

†† Clause (d) of Section 302 was amended to current form by Pub. L. 98-473, 98th Cong., 2d Sess., 1984, 98 Stat. 1837.

more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.