NO. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

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

PETITIONER'S REPLY BRIEF

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November 25, 2009

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PETITIONER'S REPLY BRIEF

I. COURTS, NOT ARBITRATORS, HAVE THE AUTHORITY AND RESPONSIBILITY TO DETERMINE WHETHER A CONTRACT WAS FORMED.

A. Granite Rock's "Agreement" To Arbitrate Formation Cannot Be Implied.

The first question accepted by this Court explores contract formation – specifically, who determines what contract, if any, existed from July 2, 2004 to August 22, 2004. Local 287's "implied consent" theory (Local 10-12) fails because the test requires that Granite Rock "clearly and unmistakably" agree to arbitrate formation. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 208-9 (1991); *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 648-49 (1986); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964). Granite Rock made no such agreement.

Local 287 argues that bringing this lawsuit "implied" an agreement to arbitrate formation. (Local 15-16.) Lacking Supreme Court support for its position, Local 287 relies principally on *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1063-64 (2d Cir. 1993). *Deloitte* does not help Local 287 because: (1) it does not involve a collective

bargaining agreement; (2) the arbitration provision in *Deloitte* was far broader than that in this case;[1] and, (3) the plaintiff admittedly received actual benefits under the agreement on which it sued. *Deloitte*, 9 F.3d 1060, 1063-64. In sharp contrast, Granite Rock was denied the paramount benefit of its contract – adherence to the no-strike clause. Moreover, *Deloitte* is silent regarding the requirement that an agreement to arbitrate formation be "clear and unmistakable."

Local 287's reliance on *Wiley* and a series of FAA cases is equally unavailing.[2] (Local 15-17.) Not one of these supports Local 287's assertion that Petitioner must arbitrate formation.[3] Collectively, the FAA cases illustrate the application of equitable estoppel to prevent a party from simultaneously claiming a contract benefit and avoiding its burdens. This is precisely what Local 287 attempts to achieve.

Local 287 forced Granite Rock to sue because it denied the agreement existed on July 2 and

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[1] Unlike the "arising under this Agreement" language in this case, *Deloitte* required arbitration of "any Dispute *or any other disagreement concerning this Agreement*." *Deloitte*, 9 F.3d 1060, 1063 (emph. added).

[2] In *Wiley,* both parties and the Court agreed whether a contractual obligation to arbitrate existed was for judicial determination. *Wiley,* 376 U.S. 543, 546-48. *Wiley* itself warned that it "cannot readily be assimilated to the category of those [cases] in which there is no contract" – which, according to Local 287, is precisely this case. *Id.* at 550.

[3] Although there is general consistency between FAA cases and Section 301 suits involving arbitration, Local 287 admits that, when FAA cases are inconsistent with Section 301(a), Section 301 precedent prevails. (Local 1, 12.)

unequivocally refused to arbitrate. Instead, Local 287 consented to the court's jurisdiction and agreed to a ruling on formation. (JA 113-17.) The court accepted jurisdiction and concluded that no contract was formed. (JA 203-11.) This "Judgment" was entered with Local 287's full approval. (JA 212-13.) Thirteen days later, Petitioner filed a new trial motion after an eyewitness came forward providing a sworn statement that ratification had occurred on July 2. (JA 214-16, 222-25.) Local 287 defended the "Judgment" while opposing Petitioner's motion. It objected to the court's formation determination *only after* it received the ruling granting Petitioner a new trial.[4]

Local 287 also claims that it "did not request the District Court to require an arbitrator to decide whether the parties' dispute was to be arbitrated" but rather, "requested the District Court to make

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[4] In a separate proceeding, Region 32 of the National Labor Relations Board ("N.L.R.B.") refused to adopt Granite Rock's position that the tentative agreement was ratified on July 2. It issued an administrative complaint against Local 287 alleging it engaged in bad faith bargaining by postponing the ratification vote. When this complaint was litigated before an N.L.R.B. Administrative Law Judge, Granite Rock "made it crystal clear that it explicitly reserved the ratification issue for litigation in [federal] [c]ourt." (Dkt. 103, 8.) The N.L.R.B. proceeding focused on bad faith bargaining. *Id.* The July 2 ratification was not litigated. *Id.* Ultimately, Local 287 was found to have bargained in bad faith. *Teamsters Local 287, Int'l Bhd. of Teamsters*, 347 N.L.R.B. 339 (2006). The N.L.R.B. gave the contract, as finally executed, retroactive effect to July 2, 2004. *Id.* at 340. This decision was affirmed by the Ninth Circuit. *Teamsters Local 287, Int'l Bhd. of Teamsters v. N.L.R.B.*, 293 Fed. Appx. 518, 519-20 (9th Cir. 2008). By different routes, the N.L.R.B. and a unanimous jury both found the parties' contract effective on July 2. (JA 378-80.)

that decision." (Local 11.) This wordplay is disingenuous. First, it is inconsistent with the Ninth Circuit's decision that Respondent asks this Court to affirm. Second, it is at odds with Local 287's position before the Ninth Circuit that it was "willing, and sought, to have an arbitrator decide its formation challenge ...." (*See* Nin.Cir.Op.Br. 39.) Finally, Local 287's Rule 12(b)(6) motion undermines its current assertion because, if successful, it would have deprived the court of the opportunity to make the decision it now claims it requested. Local 287 misstates the objective of its motion to compel arbitration; it asked the District Court to delegate formation to an arbitrator. When one party denies a contract exists and neither party offers evidence of a "clear and unmistakable" agreement to submit formation to an arbitrator, the court must decide that issue according to *Wiley, Flair, AT&T, Litton, First Options, Howsam*, and *Green Tree.*

B. The July 2 Agreement Is Silent On Formation; Thus, There Is No "Clear And Unmistakable" Agreement To Arbitrate Formation And The Presumption Of Arbitrability Is Reversed.

The arbitration provision states "all disputes arising under this agreement" will be arbitrated and any decision by the arbitrator must be "within the scope and terms of this agreement." (JA 434-35.) As Petitioner's Brief explains, that language presupposes formation of a valid and binding agreement and narrows the universe of disputes to

those that "arise under the Agreement" once formed.[5] (Pet. Br. 23-24.)

Local 287 argues that because "the dispute about formation does not appear as an exception," it must be presumed to be within the scope of arbitration. (Local 29-31.) Unlike the meeting-payroll and recognition issues excluded from the arbitration provision, there was no need to exclude formation explicitly, because formation issues do not "arise under the agreement." (JA 436-37.)

Local 287's fall back argument echoes the Ninth Circuit and asserts that the arbitration clause is "certainly susceptible of an interpretation that covers the dispute ... and that is all that is necessary under the strong presumption of arbitrability." (Local 11-12, 28-29.) This Court has explicitly disagreed, repeatedly holding courts should not assume that the parties agreed to arbitrate

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[5] In contrast, the arbitration provision at issue in *Flair Builders* included: "[a]ny difference, whatever it may be, not settled by the parties within 48 hours of occurrence." *Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972). Similarly, *Buckeye* included: "[a]ny claim, dispute, or controversy ... arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006). Likewise, *Wiley* covered: "any differences, grievance, or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application or enforcement." *Wiley*, 376 U.S. 543, 553. Finally, *Prima Paint* included: "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof." *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 398 (1967).

arbitrability without "clear and unmistakable" evidence. As this Court explained in *First Options*:

> [T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' -- for in respect to this latter question *the law reverses the presumption*.

514 U.S. 938, 944-45 (emph. added).

C. Neither *Prima Paint* Nor *Buckeye* Requires Arbitration Of Formation Disputes.

Neither *Prima Paint* nor *Buckeye* restricts courts' authority to determine whether a contract was formed. (*See* Pet. Br. 25-27; Chamber Am. Br. ("Chamber") 6-19.) It is only by contending that the dispute is about something other than the July 2 formation issue or by relying on an impermissible "implicit agreement" that Local 287 can attempt to rely on those cases.

Local 287 misconstrues the judiciary's responsibility to determine whether a contract exists as required by this Court's precedent. There is no "conundrum" about this issue. *AT&T* cautions courts against ruling on the underlying claim's potential merits when deciding whether the parties have agreed to submit a particular grievance to arbitration. (Local 22, 24.) However, Local 287's

argument that a judicial determination of formation vitiates *AT&T's* holding is wrong. *Id.* Resolution of formation is not the equivalent of deciding the underlying dispute's merits.[6] *AT&T*, 475 U.S. 643, 651.

Local 287's assertion that the Ninth Circuit made the "gateway" ruling required by *AT&T* and its progeny is incorrect. (Local 22.) Rather, the Ninth Circuit vacated the unanimous jury verdict on formation and ordered the parties to arbitrate – erroneously placing that issue with an arbitrator. In doing so, the Ninth Circuit and Local 287 collapsed two distinct lines of Supreme Court precedent (*see* Pet. Br. 25-27; Chamber 6-19) and ignored the carve out language of *Buckeye.*[7]

D. Local 287 Understates The Adverse Consequences That The Decision Below Will Have On Industrial Peace.

According to the Ninth Circuit, the existence of an undisputed arbitration provision in the tentative agreement was the "only critical fact" needed to justify submitting the entire dispute to arbitration. (JA 46-47.) Like a warning beacon, the decision below cautions against finalizing an arbitration clause before ratifying a labor contract. That works against the national labor policy favoring arbitration. The prospect of enforcing a

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[6] The questions on the merits in the underlying dispute are: (1) was the no-strike clause of the July 2 Agreement breached; and (2) if so, what are the damages. The jurisdictional question before the jury was whether a contract was formed on July 2. These questions are not synonymous.

[7] *Buckeye*, 546 U.S. at 444 n.1. (Pet. Br. 25-27.)

tentative agreement on arbitration promises to discourage employers and unions from including any arbitration provision in their agreements.

Local 287 dismisses Petitioner's argument concerning the threat to industrial peace as "hard to follow." (Local 25.) It is not, however, difficult to understand the inherent inequity in enforcing the arbitration provision against Granite Rock while refusing to give the no-strike clause contemporaneous effect. One is *quid pro quo* for the other. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 n. 4 (1960).

Finally, Local 287's assertion that Granite Rock did not seek a remedy from an arbitrator regarding the alleged breach of the no-strike clause is surprising. (Local 25.) Granite Rock failed to obtain injunctive relief and submission of the underlying dispute to arbitration because the Court initially held that formation had not occurred.

E. Local 287's Newly Asserted Theory Regarding The Sham August 22 "Ratification" Is Untimely And Fails To Demonstrate Petitioner's Consent.

On August 22, while this litigation was pending and while Local 287 continued to deny the July 2 Agreement's formation, Local 287 unilaterally held what it called a "ratification vote." (Local 4.) For the first time since litigation began five years ago, Local 287 now asserts formation occurred on August 22 and that this unilateral proclamation provides an alternative basis for establishing Granite Rock's implied consent to arbitrate the July 2 formation issue. (Local 11, 26-27.)

Local 287 has known about the August 22 event since it occurred and properly refrained from any argument that it usurped the federal court's authority to decide formation. The newly advanced argument (premised upon the August 22 "shadow agreement") should not be considered because it was never properly raised in either court below, or in its opposition to certiorari. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114 (1986); *West Ohio Gas Co. v. Public Utilities Co.*, 294 U.S. 63, 76-77 (1935).

The orchestrated ratification did not require Granite Rock to dismiss its lawsuit.[8] It is undisputed that there was no bargaining after July 2 nor was there substantive discussion about the proposed contract on August 22 among the union members. Thus, the contract allegedly "ratified" on August 22 was identical to the agreement that had been ratified on July 2. Had the collective bargaining agreement not been ratified on July 2, Petitioner would have made proposals reflecting the economic effect of renewed picketing and changed conditions. However, Petitioner was certain that the contract had been approved and, consistent with that position, it made no additional proposals.

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[8] As reflected in the July 2 Agreement and the "shadow agreement," the contract term is from May 1, 2004 to April 30, 2008. (JA 394, 448.) Generally, and in this case, matching the starting date with the former contract's expiration allows for benefit continuity. Local 287 never has argued that the arbitration language dates back to May because it could not do so without acknowledging that the no-strike language also existed. All parties agree that the no-strike clause became effective at formation. Thus, the critical event and relevant date is when the contract was formed – which is for the court. *Wiley*, 376 U.S. 543, 546-47; *AT&T*, 475 U.S. 643, 648-49.

Indeed, the document the parties signed in December 2004 was entirely based on the July 2 "Last, Best and Final Offer." (JA 397-448.) Common sense dictates that Local 287 cannot manufacture Petitioner's "consent" to arbitrate formation by unilaterally staging a vote on August 22, while litigation is pending regarding the July 2 formation, and after both parties consented to the court's jurisdiction to resolve that issue.[9]

Local 287's newly asserted theory based on the sham ratification also fails because: (1) the ratification should be seen for what it is – a tactical strategy designed to benefit Respondent's position before the district court and the NLRB; (2) Local 287 should be equitably estopped from changing its position, yet again; (3) the August 22 "ratification" does not resolve the critical formation dispute over whether a contract was formed on July 2; (4) neither the July 2 Agreement nor the August 22 "shadow agreement" includes "clear and unmistakable" language demonstrating the parties agreed to

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[9] *Amicus* AFL-CIO ignores the Ninth Circuit's reasoning, the prior positions of Local 287, and the question accepted by this Court for review regarding formation. AFL-CIO's only argument hinges on the August 22 "ratification." It wrongly accuses Petitioner of being "deceptive" when it argues no contract existed. (AFL-CIO 14.) This case's facts and allegations have been transparent throughout the litigation. The July 2 Agreement, according to Local 287, never has been ratified. The "shadow agreement" of August 22 has not been accepted by Petitioner, except as part of the July 2 Agreement. Thus, Local 287 consistently has claimed no Agreement was formed or in effect during the relevant period (July 2 through August 22). Furthermore, Petitioner never has "clearly and unmistakably" consented to arbitrate formation of the July 2 Agreement much less the alleged August 22 formation.

arbitrate formation; and (5) Respondent has not explained how an arbitrator, given authority based only on the August 22 "shadow agreement," could determine whether a contract was formed on July 2. *AT&T,* 475 U.S. 643, 648-49.

The August 22 theory is also contrary to public policy because it discourages employers from accepting the return of striking workers. If Local 287 had the power to forum shop by claiming formation of a new contract on August 22, Petitioner would need to reject any contract unless Local 287 acknowledged formation on July 2. That impedes rather than fosters industrial peace. Petitioner allowed Local 287 to end its dispute and permitted employees to return to work without forcing the Local to agree that formation occurred on July 2 because the parties were litigating that exact question in court. Public policy and common sense encourage ending labor disputes as soon as possible and leaving the formation question to the court.[10]

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[10] It remains Petitioner's contention that the critical agreement was formed on July 2, which IBT subsequently disapproved. Petitioner, of course, rejects the newly asserted "August 22 theory," but IBT may also wish to address this issue. Granite Rock's complaint alleges that Rome Aloise, IBT's representative, stated "he had the authority of ... IBT to settle the unlawful strike." (JA 314.) It further alleges that the August 22 ratification was authorized by IBT. (JA 313.) If a second contract was formed on August 22 (which Granite Rock denies), the Complaint alleges that Local 287 acted under the authority and on behalf of IBT. Thus, IBT would be bound to the "shadow agreement" by virtue of its agency status and be a party for purposes of liability and damages if the contract became operative on July 2.

II. GRANITE ROCK'S SUIT AGAINST IBT IS COGNIZABLE UNDER SECTION 301(a) BECAUSE IT IS CONSISTENT WITH THE STATUTE'S PLAIN LANGUAGE AND ITS PURPOSE TO ENFORCE LABOR CONTRACTS.

A. Federal Courts Have Authority To Fashion A Remedy For Conduct Causing A Contract Violation; Section 301(a)'s Plain Language Bestows Jurisdiction And Congressional Intent Requires A Remedy.

IBT argues that Granite Rock may only enforce its contract with one type of claim – breach of contract against a defendant with duties under the contract.[11] It argues that Section 301(a)'s plain

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[11] IBT asserts that Granite Rock abandoned its contract breach claim premised on agency (IBT 13) as well as its inducement claim, and thus, this Court improvidently granted certiorari. (IBT 16.) These contradictory contentions attempt to bypass the critical policy questions before the Court. Petitioner has consistently asserted a focused claim against IBT premised on inducement/interference and described it below as an action grounded in contract law but including, as necessary, inducement concepts. (Nin.Cir.Rep.Br. 57 (identifying the claim as a "federal common law 'hybrid' action"); Nin.Cir.Op.Br. 26, 31 n. 10, 64-65.) Although Petitioner withdrew its claim that IBT acted as Local 287's undisclosed principal for purposes of ratifying and thereby forming the July 2 contract (Dkt. 178, 8:6-9), Petitioner never abandoned its allegations that by directing Local 287 and its members to strike, Local 287 acted as IBT's agent for purposes of the contract breach. (JA 306.) Petitioner, moreover, alleged that IBT displaced Local 287 by directing it to strike and to deny ratification. (JA 311-15, 318.) Granite Rock expressly stated it had "not abandoned its agency legal theory, but may raise the

language "[d]emonstrates that it is limited to claims for breach of contract," but foregoes an analysis of the statute's text. (IBT 17.) The statute expressly embraces "[s]uits for violations of contracts" and requires that the contracts be "between an employer and a labor organization ...."[12] If an action falls within this broad jurisdictional grant, federal courts are given the responsibility to fashion a body of federal law to enforce labor contracts. *See Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). This authority is not limited to traditional breach of contract claims, but draws upon all common law necessary for contract enforcement. *Id.* at 457.

IBT attempts to support its theory by referring to one sentence in *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile Workers*, 523 U.S. 653, 657 (1998), stating that Section 301 requires a "'claim [that] a contract has been violated.'" (IBT 18.) IBT then posits that the "common understanding" of Section 301(a)'s phrase "for violation of contracts" is "a suit directed at a defendant to remedy an alleged breach of *its contractual obligation*." (*Id.*) (emph. in original). With *no citation to authority* beyond the Ninth Circuit's decision, IBT concludes that "a suit

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issue again should discovery show the factual basis needed." (Dkt. 178, 6:23-24.) To the extent this Court holds agency or alter ego theories could apply to post-July 2 conduct, Petitioner submits its Third Amended Complaint sets forth sufficient facts to support a "plausible" claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Crull v. GEM Ins. Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995).

[12] For a detailed analysis of Section 301(a)'s language, see Petitioner's Brief 33-34.

against a non-party, that owes no duty created by the contract, is not a suit 'for violation of contract[ ].'" (*Id.*)

Nothing in Section 301(a) or this Court's decisions, including *Textron,* support that linguistic leap. The parties in *Textron* disputed whether federal courts retain Section 301(a) jurisdiction over declaratory actions in which one party alleged the other had fraudulently induced its agreement. The union argued the word "for" within "suits for violation of contracts" broadly permits jurisdiction over any claim that *concerns* a labor contract breach. 523 U.S. 653, 657. The Court rejected that interpretation, holding that jurisdiction exists only over Section 301(a) claims filed "*because a contract has been violated*." *Id.* at 657 (emph. in original). The Court did *not* hold the only proper Section 301(a) claim is one for contract breach. Likewise, the Court did *not* hold the only proper defendant is a signatory or someone with contractual rights or duties.[13]

In contrast to the union in *Textron*, Granite Rock filed suit against IBT *because its labor contract rights were violated* in a costly, Company-wide strike caused by IBT. (JA 311-14.) This Court extends Section 301(a) jurisdiction over claims

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[13] IBT states that in *Textron*, "[t]he Court was not suggesting ... that Section 301(a) extends beyond the enforcement of contractual rights and duties." (IBT 19 n. 14.) Granite Rock, however, has not suggested that Section 301(a) jurisdiction extend beyond enforcing such rights and duties. Indeed, Granite Rock's claim against IBT is *intended* to provide for the "enforcement of contractual rights and duties," *i.e.*, enforcement of its contract's no-strike rights.

beyond contract breach claims when necessary to enforce contractual rights.[14] In *Int'l Bhd. of Elec. Workers AFL-CIO v. Hechler*, 481 U.S. 851, 863-65 (1987), this Court held that federal courts have jurisdiction over a union member's state-law tortious breach of contract claim.[15] In *Vaca v. Sipes*, 386 U.S. 171, 188-89 (1967), this Court recognized claims for a union's breach of its duty of fair representation. The elements to prove that a union breached that duty require the aggrieved employee to prove that the union's conduct was "arbitrary, discriminatory, or in bad faith," and are obviously not premised on contract principles. *Id.* at 190.

IBT attempts to defeat the proposed action by profiling it as a "tort" and discounting that inducement/interference exists as an essential legal

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[14] IBT suggests the Restatement (Second) of Tort's omission of a chapter devoted to labor disputes supports its assertion that such claims are disallowed under Section 301(a). (*See* IBT 39 (quoting RESTATEMENT (SECOND) OF TORTS Div. 9 Intro. Note (1977); PROSSER & KEETON ON TORTS: Lawyer's Ed. § 130 at 1027 (W. Page Keeton, ed., 5th ed. 1984).) The omission of this chapter, however, is hardly surprising given Section 301's preemptive effect on state-law tort claims.

[15] Realizing that *Hechler* evidences this Court's recognition under Section 301(a) of a tort claim, IBT asserts that *Hechler* was abrogated by this Court's decisions in *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990) and *Textron,* and that, in *Hechler*, the Court held only that the plaintiff's tort claim was preempted by Section 301. (IBT 33-34.) *Textron* did not limit Section 301(a) suits to breach of contract claims. In *Hechler*, this Court determined that the plaintiff's state tort claim was preempted, but could be advanced as a duty of fair representation claim or a Section 301(a) action. The case was remanded to determine the appropriate limitations period. *Hechler*, 481 U.S. 851, 865. This Court reaffirmed *Hechler*. *Rawson,* 495 U.S. 362, 374.

concept for enforcing contracts. This Court, however, has applied Section 301 in preemption cases "[w]hether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). IBT accepts that Section 301(a) preempts any claim for labor contract violations, including a state law inducement claim, but insists the Court preclude Section 301 remedies unless the action is ensconced solely in "contract law." To limit Section 301 liability exclusively to contract breach claims, but broadly preempt all actions alleging labor contract violations, immunizes blatant misconduct, impairs the statute's effectiveness, improperly "elevate[s] form over substance," and is fundamentally unfair. *Id.* at 211.

Section 301(a) indisputably provides jurisdiction over claims, like Granite Rock's claim, that have been filed "*because a contract has been violated*" and the contract in question is "between" an employer and a labor organization. *Textron*, 523 U.S. 653, 657 (emph. in original). Once the "plain language" requirements are established, it is whether the action fulfills Congress' mandate to enforce labor contracts, not the artificial label attached to the action, that is determinative.

B. IBT Cannot Escape Liability For Displacing Its Local And Directly Inducing A Company-Wide Strike Merely Because Its Duty To Honor The No-Strike Clause Was Not Expressly Stated In The Contract.

IBT asserts that Section 301(a) claims only may be alleged against entities with duties

expressed in the labor contract. Section 301(a)'s plain language, intent, and this Court's precedent do not support such a limitation and do not excuse IBT's intentional violation of Petitioner's contract rights.

Section 301(a) protects Granite Rock's right to the no-strike clause's benefits, thereby promoting labor peace and the nation's economic interests. Since inception, inducement/interference actions were intended to provide remedies when "[o]ne who, having knowledge of an existing valid contract between others, intentionally, knowingly, and without reasonable justification or excuse, induces one of the parties to the contract to breach it to the damage of the other party." *Klauder v. Cregar*, 327 Pa. 1, 8, 192 A. 667, 671 (1937); *see also* RESTATEMENT (SECOND) OF TORTS, § 766 (1977). IBT should not be permitted to shirk its duty to respect another's contract simply because Granite Rock's contract did not explicitly name IBT.

IBT cites an article written by Archibald Cox in support of its assertion that Granite Rock may only allege a claim against an international union that has an explicit no-strike duty. (IBT 12-13.) (citing Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv.L.Rev. 274, 311-12 (1949).) Professor Cox, however, recognized an international that "promise[s]" to abide by a no-strike clause should be liable for strikes violating such a clause when it engages in the strike for its own benefit and displaces a local union. Cox, *supra*, at 311-12. Granite Rock submits that when IBT caused Local 287 and its members to strike, IBT, by displacing Local 287, assumed the

Local's role under the contract, and consequently, assumed a duty to abide by the contract's terms, including the no-strike clause. *Cf., Wiley*, 376 U.S. 543, 550-51; *Brown v. Sandimo Materials*, 250 F.3d 120, 127 (2d Cir. 2001). Whether this "promise" derives from a general duty to respect contracts (common law inducement) or from IBT's displacement of and control over Local 287 in causing the breach, it is consistent with Congress' intent that Section 301(a) provide remedies necessary to enforce labor contracts.[16]

IBT induced a Company-wide strike in order to extort Petitioner into signing a hold harmless agreement – a "contract" between an employer and a labor union that would have immunized IBT from liability associated with its strike activities. IBT should not be rewarded with judicial immunity because it failed to obtain the contract it sought.

C. Congress Provided Federal Courts Authority To Enforce Existing Labor Contracts For The Benefit Of The Public, The Economy, And The Parties.

Congress enacted the Labor Management Relations Act ("L.M.R.A.") to address "the effects of industrial strife [that] have, at times, brought our country to the brink of economic paralysis." H.R. Rep. No. 80-245, at 3 (1947), 1 Leg. Hist. at 292, 294. Section 301(a) of the L.M.R.A. addressed this problem. IBT acknowledges Congress intended that

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[16] If it is necessary to draw upon agency, single-employer, alter ego, joint venture, or successor theories to provide a remedy, Granite Rock's complaint alleges facts sufficient to support application of such theories.

Section 301(a) provide courts with jurisdiction over claims to *enforce* labor contracts, but asserts that Congress intended to limit enforcement only to defendants with express duties in the contract.[17] Nothing in the plain language or legislative history of the L.M.R.A. indicates Congress intended to place that limitation on Section 301(a) suits. The opposite is true – Congress enacted Section 301(a) to enable federal courts to protect the public, the economy, and the parties by enforcing agreed-upon labor contracts. *Lincoln Mills*, 353 U.S. 448, 452 (quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 42 (June 3, 1947) ("'Once parties have made a collective bargaining contract *the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board*.'")) (emph. added).

IBT confuses the N.L.R.B.'s and courts' roles. Respondent admits Granite Rock had no recourse against it in N.L.R.B. proceedings, but claims that because Congress failed to recognize an administrative unfair labor practice under Section 8(b)(3) of the National Labor Relations Act ("N.L.R.A.") that might have addressed IBT's misconduct, Congress did not provide any remedy for Granite Rock.[18] (IBT 24-25.) IBT's argument

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[17] IBT quotes legislative history excerpts, but takes these excerpts out of context. Regarding Senator Ball's quote, IBT ignores that the debate in which he participated concerned the ability to sue union members, not internationals that directly cause strikes. (IBT 23.) Likewise, conference committee reports do not necessarily address every substantive difference between the final bill and its earlier versions. (*See* IBT 27.)

[18] IBT abandoned its prior argument that Granite Rock could pursue a remedy against it by filing an N.L.R.B. charge, but,

ignores that by enacting Section 301(a), Congress intended that courts, not the N.L.R.B., principally enforce agreed-upon labor contracts.

There is an obvious reason why Congress eliminated the relevant language of the House's Section 8(b)(3) version. This Section addresses parties' conduct during the *negotiation* of labor contracts.[19] Because strikes are unions' primary weapon during ongoing labor negotiations, it is not surprising that Congress declined to provide remedies against international unions that cause strike activity *before* a contract has been reached.

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relying on the same two cases IBT cited to the Ninth Circuit, AFL-CIO asserts that an N.L.R.B. remedy exists. (*See* AFL-CIO. Br. at 31 (citing *Paperworkers Local 620*, 309 N.L.R.B. 44 (1992), *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1407 (6th Cir. 1992)); (IBT Ans. Br. 33 n. 33.) Neither case supports AFL-CIO's position. Section 8(b)(3) bad faith bargaining charges may be alleged against exclusive bargaining representatives. 29 U.S.C. § 158(b)(3). In both *Paperworkers Local 620* and *Kobell*, the internationals were employees' bargaining representative and contract signatories. No Section 8(b)(3) remedy exists against non-signatory internationals, like IBT, who are not acting as the exclusive bargaining representative.

[19] The House version of the bill IBT cites as the basis for its position contemplates strikes occurring in the context of ongoing labor contract negotiations. H.R. 3020, 80th Cong. § 101 (1947), 1 Leg. Hist. at 769-83. This proposed unfair labor practice would apply to IBT's involvement in a strike *before* a contract was reached. But, once the parties agree to a contract, its primary enforcement shifts to courts. Because Section 8(b)(3) is limited to the employees' exclusive bargaining representative, the N.L.R.B. is without jurisdiction to remedy IBT's misconduct. No such limitation exists under Section 301(a).

Congress decided that the N.L.R.B. should have authority to regulate *pre-contract* activities and that federal courts should perform the critical role of enforcing agreed-upon contracts. *Lincoln Mills*, 353 U.S. 448, 452. Consistent with that responsibility, Congress intended that courts remedy an international's inducement of a company-wide strike.[20] Providing a remedy for such misconduct is necessary to fulfill "society's interest in contractual integrity and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy." John Danforth, *Tortious Interference With Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 Colum.L.Rev. 1491, 1511 (1981) (citation omitted).

[20] IBT asserts that Granite Rock's discussion of Congress' intent to incorporate California inducement/interference actions as set forth in *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 35 (1941), in Section 301(a), is misguided because that case described an exception for labor strikes. However, that exception only applied to strikes that "improve[d] working conditions ... of sufficient social importance to justify" the interference – not when unions strike to gain benefits for themselves. *Id.* at 34.

D. IBT's Parade Of Horribles Is Contradicted By Common Sense, Experience, And The Action's Narrow Application.

1. Granite Rock's Proposed Action Will Not Cause Parties To Avoid Arbitrating Their Disputes Nor Will It Unduly Increase Federal Courts' Dockets.

Granite Rock's claim is narrowly defined and requests only the same remedies that would be available against Local 287.[21] It requires that the non-party have knowledge of the contract, and, for

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[21] IBT reports that, in the Ninth Circuit, Granite Rock requested punitive damages against IBT, thus implying that Petitioner abandoned its inducement/interference claim by now claiming only contract damages. Given the nature of its claim, Petitioner consistently has requested that contractual damages be awarded for IBT's misconduct; however, it also invited punitive damages should the Ninth Circuit determine they were appropriate. (Nin.Cir.Op.Br. 68; Nin.Cir.Rep.Br. 30.) IBT correctly states that Granite Rock previously argued that punitive damages may be appropriate for IBT's malicious misconduct. Petitioner hereby withdraws that suggestion, and requests the same damages as would be awarded against Local 287. This request is consistent with its displacement analysis, and further addresses IBT's concern that recognition of Petitioner's proposed action encourages unnecessary litigation. When determining remedies for tort/contract actions, courts have not hesitated to limit them to contractual damages. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696 (1988) ("the employment relationship is fundamentally contractual," and that "contractual remedies should remain the sole available relief" for breach of the implied covenant of good faith and fair dealing claims against employers even though such claims contain both tort and contract elements).

its own gain, displace a signatory party and directly induce a contract violation. This eliminates the possibility that IBT's hypothetical bank, which, without knowledge of a labor contract, denies a loan to an employer, will be subject to liability. (IBT 48.) Similarly, a non-signatory union that supports workers striking in violation of the signatory's no-strike clause, would have no liability under Section 301(a), provided that union did not directly cause the workers to violate the contract. Further relief would be limited to contract damages or injunctive relief, providing little incentive to make such claims when the signatory party is sufficiently solvent. The "flood" of litigation IBT speculates might occur is improbable given the narrowness of the proposed action.[22]

As illustrated by the Third Circuit's actual experience, Section 301 inducement/interference actions will not create massive litigation. In the decades since *Wilkes Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372 (3d Cir. 1981), recognized traditional interference claims against non-signatories under Section 301(a), federal courts have not been barraged by these claims. Indeed, Third Circuit plaintiffs have alleged them very infrequently even though traditional interference claims are broader than Petitioner's tailored claim for contract damages.[23]

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[22] A "flood" of litigation also is unlikely because employers typically will seek injunctive relief when unions induce strikes that violate no-strike clauses. (Pet. Br. 58 n.32.)

[23] Tortious interference claims appear to have been alleged against non-signatories in approximately nine reported circuit cases. *Biedelman v. Stroh Brewing Co.*, 182 F.3d 225 (3d Cir.

IBT's speculation that employees will file inducement/interference claims against supervisors and parent companies, requiring federal courts to litigate routine wrongful discharge cases, is fanciful. With respect to claims against supervisors, employees cannot escape arbitration of their discharge claim by filing an inducement/interference action because supervisors are agents of their employers in personnel actions. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 756 (1998); *Min Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002). A discharge claim subject to an arbitration provision will likely be arbitrated because of that agency status. Elkouri & Elkouri, HOW ARBITRATION WORKS, 547-52 (Alan Miles Ruben ed., 6th ed. 2003).

Likewise, little possibility exists that employees will file inducement/interference claims against non-party parent companies. The employee must have some good faith basis to allege that a parent company, for its own benefit, displaced and induced its subsidiary to violate a contract's just

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1999); *Int'l Bhd. of Boilermakers v. Local Lodge D504*, 866 F.2d 641 (3d Cir. 1989); *Seritti v. Miners Memorial Medical Center*, 2001 U.S. Dist. LEXIS 10558 (M.D. Pa. July 24, 2001); *United Food and Commercial Workers Union v. Fleming Foods East, Inc.*, 105 F.Supp.2d 379 (D. N.J. 2000); *Farmland Dairies v. Milk Drivers & Dairy Employees Union*, 1997 U.S. Dist. LEXIS 7813 (D.N.J. Feb. 11, 1997); *Int'l Assoc'n of Heath and Frost Insulators v. Absolute Environmental Service, Inc.*, 814 F. Supp. 392 (D. Del. 1993); *Young v. West Coast Ind. Relations Assoc'n*, 144 F.R.D. 206 (D. Del. 1992); *Meier v. Hamilton Electronic Systems, Inc.*, 748 F. Supp. 296 (E.D.Pa. 1990); *Cole v. Pathmark of Fairlawn*, 672 F. Supp. 796 (D.N.J. 1987).

cause provision.[24] Few, if any, circumstances would justify such claims and little incentive would exist to make them. Notably, it appears that none have been reported in the Third Circuit since *Wilkes-Barre*. As the dearth of Third Circuit cases suggests, recognizing Granite Rock's proposed claim will not "subject a wide-range of non-party defendants to suits by employees, unions, employers and others." (IBT 47.)

2. Granite Rock's Proposed Action Does Not Usurp Either Labor Arbitrators' Or The N.L.R.B.'s Respective Roles.

Federal courts have, through Section 301(a) and other provisions of the L.M.R.A., always shared with the N.L.R.B. and arbitrators the responsibility to enforce national labor policy and interpret labor contracts. This Court has not hesitated to construe collective bargaining agreements when necessary to fulfill the statute's purpose. In *Rawson*, this Court considered whether a union had, under its contract, an affirmative duty to conduct mine inspections so that the plaintiffs could proceed with their fraud and negligence claims against the union for failing to perform that duty. 495 U.S. 362, 374-75. Courts, moreover, routinely analyze labor contract provisions to resolve duty of fair representation

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[24] The law regarding a parent company's responsibility for its subsidiary's actions is far more developed than any similar doctrine between an international and its locals. *South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 802 n.3 (1976). It is likely that a court would apply the single-employer or alter ego doctrine rather than Granite Rock's claim.

claims filed concurrently with contract breach claims. *See Vaca*, 386 U.S. 171, 193-94. This Court has held that federal courts may exercise jurisdiction and authority under Section 301(a) over claims that also could be pursued before the N.L.R.B. *Id.* at 180-81.

3. Federal Courts Are Well-Equipped To Decide The Action Alleged By Granite Rock.

IBT contends that "[t]he task of creating a federal common law of tortious interference will be extremely complex and burdensome," and that courts will have problems applying state-specific inducement/interference standards. (IBT 42.) But, IBT ignores that Section 301(a) authorizes courts to develop *uniform* federal common law. *Lincoln Mills*, 353 U.S. 448, 450-51. Federal courts need not apply individual state standards for these claims. By adopting Petitioner's proposed claim, or a variation thereof, this Court will provide courts with authority to enforce a uniform inducement/interference claim primarily drawn from contract law.

The narrowness of Petitioner's proposed claim further negates IBT's argument. Petitioner's claim includes four essential elements: (1) knowledge of the existing employer-union labor agreement; (2) violation of the agreement; (3) displacement of the union or employer so that the non-signatory party takes control of the union or employer causing or inducing the violation; and (4) damages from the violation. If there is concern that this action could reach a non-signatory that merely supports the objectives of a local union or subsidiary employer, as IBT argues, the moving party could be required to

show that the non-signatory caused the contract violation to procure a benefit for itself, and that "but for" the non-signatory's actions, the breach would not have occurred. (Pet. Br. 37 n. 12.) Contrary to IBT's assertions, courts will not be required to engage in broad inquiries regarding what constitutes "improper" interference, and, except for determining whether the defendant acted for its own gain, the defendant's motive.

Federal courts are well equipped to decide issues that arise in these claims. For example, they have expertise in developing and applying appropriate statutes of limitations to Section 301(a) cases and deciding tort-like claims in the context of labor disputes, and, when exercising supplemental jurisdiction over state-law tort claims joined with Federal Tort Claim Act claims. *See, e.g., DelCostello v. Int'l Bhd. of Teamsters, et al.*, 462 U.S. 151, 165 (1983); *Vaca*, 386 U.S. 171, 182-83; *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707-08 (1966); *Wojciechowicz v. United States*, 582 F.3d 57 (1st Cir. 2009); *Chapa v. United States*, 497 F.3d 883 (8th Cir. 2007); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843 (D.C. Cir. 2006); *Binz v. Brandt Construction Co., Inc.*, 301 F.3d 529 (7th Cir. 2002).

4. Granite Rock's Proposed Claim Will Not Result In Complex Procedural Problems.

IBT posits that litigating the facts involved in an inducement/interference claim in two different fora, federal court and arbitration, will present complicated procedural issues. Although Petitioner

agrees that its proposed action against IBT is not subject to the grievance and arbitration clause in its contract with Local 287 (as would be the case with any non-signatory), nothing prevents a court from staying the action against IBT until an arbitrator has resolved the claim against Local 287, including the amount of damages.[25] Indeed, after the arbitrator's determination, there may be no need for further litigation, but, given the additional elements of the proposed inducement/interference claim, separate litigation concerning IBT's actions may be necessary and appropriate.

E. The Ninth Circuit's Decision Leaves Granite Rock Without A Remedy And Provides A Blueprint For International Unions To Demand Concessions From Employers Despite Their Locals' No-Strike Obligations.

Granite Rock alleges IBT inflicted multi-million dollar harm on Petitioner's business, employees, and families. Prior to the Ninth Circuit ruling, it appears such lawlessness by internationals was rare. Now that the Ninth Circuit's decision provides a blueprint, this misconduct is indisputably lawful subject to this Court's decision. This roadmap and immunity licenses internationals to take aggressive roles in their locals' post-contract formation activity.

IBT argues Granite Rock may obtain relief by pursuing a contractual remedy and by filing an

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[25] In *Wilkes-Barre*, the Third Circuit instructed the district court to stay the claim against the international during the arbitration between the signatory parties. 647 F.2d 372, 383.

unfair labor practice charge against Local 287, despite IBT's blatant misconduct. Although Local 287 should be held liable for its role in violating the contract, the law should not make the Local solely liable for IBT's intentional misconduct. IBT ignores also that local unions, like Local 287, lack the financial means to satisfy a judgment for losses caused by a debilitating, company-wide strike. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 423 n. 10 (1981) (Powell, J., concurring) ("The possibility that the local will be liable may be of little practical benefit, however, because the local is often judgment proof."). IBT's "immunizing" theory would leave employers without any remedy against an international even when the local has no assets or, as in this case, has assets encumbered by a loan from the international. (JA-315.)

Congress did not intend to leave employers at the mercy of self-serving internationals' misconduct. Instead, it enacted Section 301(a) to give courts the authority to enforce labor contracts consistent with national labor policy. It is inconceivable that Congress created federal law preempting state actions, but left employers without remedies for internationals that cause and control company-wide strikes and thereby directly induce a no-strike clause violation. If any legislative action to change Section 301 is necessary, it should be sought by IBT, not Granite Rock. Petitioner's action is consistent with the statute's plain language and Congressional intent, and will effectively prevent the trampling of an innocent party's contractual rights.

III. CONCLUSION

For the foregoing reasons, and as described in the Petitioner's Brief, the Ninth Circuit's decision should be reversed.

Respectfully Submitted,

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