No. 08-1214

In The Supreme Court of The United States

GRANITE ROCK COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,

Respondents.

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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

STATEMENT

Petitioner Granite Rock Company respectfully submits this Reply Brief in support of its petition for a writ of certiorari. Respondents' briefs in opposition highlight the entrenched Circuit division over two interrelated issues of national importance: first, whether an arbitrator may preempt the courts in determining the threshold question of whether a labor or commercial contract has been formed; and second, whether a federal cause of action exists against a non-signatory that induces the breach of a collective bargaining agreement for its own gain.

I. A CLEAR CIRCUIT SPLIT EXISTS REGARDING FEDERAL COURTS' JURISDICTION TO DETERMINE IF A CONTRACT WAS FORMED EVEN IF NO PARTY SEPARATELY CHALLENGES THE VALIDITY OF THE ARBITRATION PROVISION.

As discussed at length in the petition, two lines of jurisprudence exist regarding courts' jurisdiction over issues of arbitrability. (Pet. 10-11). *AT&T Tech. v. Comm. Workers*, 475 U.S. 643, 649, (1986) (absent clear, unmistakable contractual language stating otherwise, the court must decide whether the parties agreed to arbitrate the dispute); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (absent a separate challenge to the validity of the arbitration clause when a party raises contractual defenses, such as

fraud, the arbitrator should decide the merits). In *Buckeye*, 546 U.S. at 444 n.1, the Court expressly declined to apply its holding to the issue raised here – courts' jurisdiction to decide issues of contract formation.

Lacking clarification, Circuits have attempted to reconcile the aforementioned lines of jurisprudence, resulting in a clear, mature Circuit split. With this case, the split has widened such that in the Ninth Circuit courts must refer any contract formation disputes to arbitration if the proposed contract includes an unchallenged arbitration provision.

A. The Third And Ninth Circuits Have Reached Directly Opposite Conclusions About Courts' Jurisdiction To Determine Disputes Over Contract Formation When The Proposed Contract Includes An Unchallenged Arbitration Provision.

Local 287 admits that the Ninth Circuit's decision squarely conflicts with the Third Circuit's decision in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000). Local 287's strained attempts to distinguish *Sandvik* from the Ninth Circuit's decision only serve to demonstrate the seriousness of the conflict.

Local 287 attempts to distinguish *Sandvik* because the contract in that case was covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA) 9 U.S.C. § 201, *et seq.* This is a distinction without a difference.

Sandvik rested its decision on the Federal Arbitration Act (FAA), in which the CREFAA is incorporated, and made clear it interpreted an arbitration agreement covered by the FAA. *Sandvik,* 220 F.3d at 100-01; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Likewise, Local 287's argument that *Buckeye* limited *Sandvik* fails. (Local 287 Opp. 8). *Buckeye* cited *Sandvik* and expressly declined to address the precise issue presented, i.e., does the court decide the threshold issue of whether a contract containing an arbitration provision was formed. 546 U.S. at 444 n.1. Since *Buckeye*, courts continue to apply *Sandvik's* logic when considering arbitrability of contract formation disputes. *See Toledano v. O'Connor*, 501 F.Supp.2d 127, 140 (D.D.C. 2007); *Griffin v. Gutter Grate of Troy Birmingham LLC*, 546 F.Supp.2d 469, 471 n.2 (E.D. Mich. 2008); *Fox Int'l Relations v. Fiserv Securities, Inc.*, 418 F.Supp.2d 718, 723-24 (E.D. Penn. 2006); *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, A.B.N.*, 343 Mont. 392, 399, 185 P.3d 332, 337 (2008); *Rowe Enterprises LLC v. Int'l Systems & Electronics Corp.*, 932 So.2d 537, 541 (Fla. Ct. of Apps. 2006).

Local 287 also fails to distinguish effectively other Circuit decisions that hold courts must resolve disputes over whether a contract was formed. *Sphere Drake Ins. Ltd v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 1995) ("[A]s arbitration depends on a valid contract, an argument that the contract does not exist can't logically be resolved by the arbitrator."); *Chastain v. Robinson-Humphrey* Co., 957 F.2d 851, 856 (11th Cir. 1992) (when the

existence of a contract is disputed, the court should decide whether a ratified contract exists). These Circuit decisions also directly conflict with the Ninth Circuit.

B. Granite Rock Did Not Explicitly Or Implicitly Consent To Arbitrate The Formation Of The Contract By Alleging Its Validity.

Local 287 asserts Granite Rock assented to arbitration because it filed a lawsuit alleging Local 287 breached the collective bargaining agreement. (the "CBA"). (Local 287 Opp. 4). Granite Rock, however, never conceded that an arbitrator under the CBA would have authority to decide whether the CBA was formed.[1] Granite Rock maintained that the court must first decide whether the CBA existed. Only if the court found a valid, binding CBA, could there be an arbitration.

In *AT&T Tech.*, 475 U.S. at 649, this Court made clear courts have jurisdiction to determine

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[1] Local 287 mischaracterizes Granite Rock's complaint. To enjoin a strike that violates a labor contract, the party seeking the injunction must establish that a labor contract exists, and that the strike is over an issue that should be resolved by arbitration. *Boys Markets, Inc. v. Retail Clerks Union, Local 70*, 398 U.S. 235, 254 (1970). Defending against Granite Rock's efforts to obtain injunctive relief, Local 287 alleged that the CBA did not exist. Granite Rock never claimed the arbitrable issue was whether the contract was formed. Granite Rock alleged that a valid CBA existed and that the strike was unlawful because it was over an issue that the arbitrator must resolve. The arbitrable issue was the only issue Granite Rock agreed to arbitrate as it must to seek an injunction against the strike.

whether parties consented to arbitrate their dispute. *See also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (contract formation issues may not be referred to arbitration unless parties "clearly and unmistakably" agree). More recently, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. ___, 129 S.Ct. 1456, 173 L.Ed.2d 398 (April 1, 2009), the Court reaffirmed this principle, holding that courts must honor clear, unmistakable agreements to arbitrate statutory discrimination claims. Sl. Op. at 15. Contrary to Local 287's claim, *Buckeye* does not diminish courts' authority to make this threshold determination. *Buckeye* expressly declined to address whether contract formation disputes must be decided by the court or the arbitrator absent contractual language requiring arbitration of such disputes. 546 U.S. at 444 n.1.

The arbitration provision in this case contains no clear, unmistakable language that could be read to grant an arbitrator authority to decide contract formation issues. Like most, it obligates the parties to arbitrate disputes "arising under" the CBA. (Pet., A-176). That language assumes a contract exists. *A fortiori*, it is not clearly and unmistakably to the contrary.[2] *See Adam v. Suozzi*, 433 F.3d 220, 227-28 (2d Cir. 2005) (the court must first determine whether a binding labor contract existed before compelling arbitration); *Will-Drill Res., Inc. v.*

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[2] The Ninth Circuit ignored its precedent in which it interpreted commonly used arbitration language, such as "arising under" and/or "arising out of" narrowly to exclude from arbitration disputes that do not require interpretation of provisions of an existing agreement. *Tracer Research Corp. v. Nat'l Environmental Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994).

Samson Res. Co., 352 F.3d 211, 216-17 (5th Cir. 2003) (where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve the dispute). The Circuit conflict thus requires this Court's review.

C. The Ninth Circuit's Decision Will Have A Vast Impact As It Applies To All Labor And Commercial Contracts With An Arbitration Provision.

Local 287 attempts to define this case as "narrow and unusual," by claiming Granite Rock "consented" to arbitrate the formation issue. (Local 287 Opp. 4). The Ninth Circuit similarly concluded "Granite Rock implicitly [consented] by suing under the contract containing the arbitration clause . . . . ." *Granite Rock Co. v. Int'l Brotherhood of Teamsters, Freight Construction, General Drivers, Warehousemen & Helpers, Local 287 (AFL-CIO), et al.*, 546 F.3d 1169, 1178 (9th Cir. 2008). This decision means that any party claiming a contract exists, "implicitly" agrees to arbitration merely by filing a lawsuit for enforcement. *Id.* Of course, to enforce a contract, one or both of the parties must, however, assert the validity of the underlying contract. The Ninth Circuit's holding runs contrary to every other Circuit, and means that no party to a labor or commercial contract may request a court to decide contract formation unless the party separately disavows the arbitration provision.

The Ninth Circuit's decision guarantees further division among the Circuits and impacts thousands of labor contracts and hundreds of

thousands of commercial contracts. The Ninth Circuit equates the act of claiming a valid contract exists with "clear and unequivocal" consent to arbitration. The Ninth Circuit thus expands arbitration further than *14 Penn Plaza*, 556 U.S. ___, 129 S.Ct. 1456, 173 L.Ed. 2d 398 (April 1, 2009), and *Buckeye*, 546 U.S. at 444 n.1, raising the important question of where is the jurisdictional line between courts and arbitrators on contract formation disputes. The Ninth Circuit answers this question by overturning a unanimous jury decision that a binding CBA had been formed.

The issue presented here necessarily threatens stability of labor and commercial relationships. A party, who seeks to enforce a non-existent contract with an arbitration provision, may now compel the other party, who never agreed to the putative contract, to arbitrate disputes about whether a binding contract exists. In the labor context, the Ninth Circuit's decision provides a profound disincentive to enter into tentative agreements during negotiations because an employer or union may be obligated to arbitrate disputes even though no valid, binding agreement exists.

The Ninth Circuit's decision leads to illogical results. By referring contract formation questions to arbitration, the Ninth Circuit authorizes arbitrators to determine their own jurisdiction. *See Sandvik*, 220 F.3d at 111 (by referring contract formation questions to arbitrators, courts would permit "arbitrators to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration"). If the arbitrator

concludes that no contract was formed, the arbitrator effectively determines he or she had no jurisdiction to make that determination. The illogical effect of this decision clearly merits review by this Court.

II. A CLEAR CIRCUIT SPLIT EXISTS AS TO WHETHER SECTION 301(A) PROVIDES A CAUSE OF ACTION AGAINST A NON-SIGNATORY THAT INDUCES A BREACH OF A LABOR CONTRACT FOR ITS OWN GAIN.

Each Circuit approaches Section 301(a) jurisdiction analysis over non-signatories differently. (Pet. 21-36). Again, a clear difference exists between the Third and Ninth Circuits, which clash over whether Congress intended to regulate the conduct of non-signatory international unions that induce breaches of a CBA by causing a devastating strike. In light of the division between the Third and Ninth Circuits, and the multiple variations among other Circuits on an issue important to uniform national labor policy, this Court's review is necessary.

A. IBT Admits A Circuit Split Exists Concerning The Scope Of Section 301(a) While Ignoring Other Fundamental Differences Between The Circuits.

IBT admits the Ninth Circuit irreconcilably split from the Third Circuit on federal courts' jurisdiction over causes of action against non-signatories under Section 301(a). *See Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre,*

Local 120, 647 F.2d 372, 381 (3d Cir. 1981).[3] Although this conflict alone justifies this Court's clarification, the IBT mistakenly asserts that virtually all other Circuits interpret Section 301(a) similar to the Ninth Circuit's interpretation.[4] IBT's argument minimizes the conflict between the Third and Ninth Circuits and is contradicted by other Circuits' authority.

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[3] IBT essentially ignores that a conflict exists between the Ninth and Eleventh Circuits. In *United Association of Journeymen and Apprentices v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982), the Eleventh Circuit recognized a claim for "tortious interference with a [CBA]." Five years later, the Eleventh Circuit held, with no reference to *Georgia Power*, Section 301(a) provides jurisdiction "only against those who are parties to the contract in issue." *Xaros v. U.S. Fidelity & Guarantee Co.*, 820 F.2d 1176, 1181 (11th Cir. 1987) (emph. in orig.) Since neither *Georgia Power* nor its rationale was overruled, the Eleventh Circuit may still recognize a cause of action to reach the extreme misconduct alleged here.

[4] IBT also wrongly labels this case as a choice whether Section 301(a) recognizes only causes of action based on contract law or whether it includes a "tort." (IBT Opp. 3-4). The above dichotomy distorts Congress's intent that courts create federal common law to carry out the purpose of Section 301(a) to minimize work stoppages during the term of labor contracts. Section 301(a) jurisdiction "reaches not only suits on labor contracts, but also suits seeking remedies for violations of such contracts." *Wilkes-Barre*, 647 F.2d at 380. *See also Teamsters Nat'l Auto Transportation Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir. 2003) ("When the purpose of the lawsuit effectuates the goals of § 301(a), then it is appropriate for federal common law to embrace such suits."); *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 771 (6th Cir. 1989) (applying under Section 301(a), Ohio tort claims law of contractual interference). The label of "tort" or "contract" should not interfere with courts' ability to carry out Section 301(a)'s intent.

The petition sets forth a comprehensive analysis of various Circuits, demonstrating fundamental differences over Section 301(a) jurisdiction, federal common law, and remedies. (Pet. 25-34). Similar to the Ninth Circuit, some Circuits now refuse to exercise any jurisdiction over non-signatories. *See United Food & Commercial Workers Union, Local No. 1564 v. Quality Plus Stores, Inc.*, 961 F.2d 904, 906 (10th Cir. 1992). Other Circuits allow jurisdiction for specific purposes, such as subpoena power. *See Am. Fed. of TV & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009-10 (6th Cir. 1999). Still others apply fact-intensive inquiries about what rights or duties a labor contract may give to non-signatories. *See Whelan v. Colgan*, 602 F.2d 1060, 1061-62 (2d Cir. 1979).[5] The aforementioned cases make clear that questions concerning Section 301(a)'s applicability to non-signatories are far from resolved.

B. The Ninth Circuit Decision Is A Blueprint For Industrial Chaos.

IBT refers to, but fails to grapple with Granite Rock's and *Amicis'* position that the Ninth Circuit decision is a formula for significant industrial strife. As discussed in the petition and acknowledged by IBT, the Ninth Circuit's decision effectively permits international unions to act with impunity to induce violations of labor contracts, without concern that an employer would pursue any remedy for the

[5] Even if this Court were to side with Circuits that limit Section 301(a) jurisdiction over non-signatories to those with rights and duties under the CBA, this case qualifies since the breach was engineered for the explicit purpose of acquiring a right to indemnity under the CBA.

international's wrongdoing. (Pet. 34-35). Obviously, such a result undermines Section 301's intent to promote enforcement of contracts and preserve labor peace. *See Textile Workers of Am. v. Lincoln Mills*, 353 U.S. 448, 453 (1957).

IBT's suggestion that this massive loophole in Section 301(a) was a calculated, intended decision by Congress is belied by the objective and plain language of Section 301(a). Congress's intent under Section 301(a) was to rein in irresponsible unions that found ways to avoid the no-strike provisions in their labor contracts. Likewise, IBT's suggestion that its actions were "uncharacteristic" of labor union strategy ignores the reality of the prospective effect the Ninth Circuit's decision. Often new legal strategies evolve from decades old statutes. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-04 (3d Cir. 2000), *cert. denied,* 532 U.S. 941 (2001) (recounting the history of the Alien Tort Claims Act, 28 U.S.C. § 1350, originally adopted in 1789, which "[f]or almost two centuries, lay relatively dormant" as a basis for federal jurisdiction until 1980). As organized labor attempts to expand its political and economic role, the Ninth Circuit created the foundation for a new form of "legal" access to use of economic force during the term of CBAs with mutually agreed upon no-strike clauses. Internationals may sacrifice under-funded locals to apply pressure for concessions such as the immunity agreement sought from Granite Rock.

Finally, IBT mischaracterizes the facts. (IBT Opp. 10, n. 9). This case involves much more than the presence of closely aligned entities. It involves an International that inserted itself into negotiations

for a CBA, required its proxy, Local 287, to insist on language that would benefit the International and then caused the Local to breach the CBA's no-strike provision when the employer refused to agree to the International's demand.[6] IBT fomented and participated in this unlawful strike and should be held responsible for its actions, regardless of whether it was legally an alter-ego of the local.

CONCLUSION

Granite Rock respectfully requests this Court grant review of both of the Ninth Circuit's holdings as they are in conflict with the decisions of other Circuits, threaten the uniformity of national arbitration policy, and violate public policy by granting immunity for the act of causing the breach of a labor contract.

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[6] In its opposition, IBT attributes the continuation of the strike to its local. IBT's facts are flawed as the Complaint attributes the continuation of the strike to IBT. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (in the event of a dismissal, all allegations in the complaint must be presumed true and viewed in the light most favorable to the defendant).

Respectfully Submitted,

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