No. 12-99

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT MARTIN MULHALL'S MEMORANDUM IN SUPPORT OF THE PETITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act ("LMRA") makes it unlawful for an employer to pay or deliver "any money or other thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). Can the following three types of employer assistance with organizing nonunion employees constitute a "thing of value" to a labor organization under § 302:

1. lists of personal information about nonunion employees;

2. use of private property for organizing; and

3. control over an employer's communications regarding unionization?

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STATEMENT OF THE CASE

This is an action by an employee, Martin Mulhall, to stop a union from demanding assistance from his employer with unionizing him and his co-workers. The case is before the Court on the union's petition for review of the United States Court of Appeals for the Eleventh Circuit's decision that the district court erroneously granted a motion to dismiss.

Mr. Mulhall's employer, Mardi Gras Gaming, entered into a Memorandum of Agreement with a union, Unite Here Local 355, agreeing to assist Unite with unionizing its employees in exchange for promises of labor peace and Unite's support for a ballot initiative regarding casino gaming. (Compl., ¶¶ 9-11; Pet. 66a); (Agreement; Pet. 78a-86a). Unite demanded that Mardi Gras enforce the Agreement's organizing provisions against its employees and, when the employer refused, twice attempted to compel enforcement through arbitration. (*Id*. at ¶¶ 12-13; Pet. 67a); *see also* (Pet. 38a-39a). Unite continues to demand that Mardi Gras enforce the Agreement, most recently filing suit on 7 June 2012 to again compel arbitration. *See Unite Here Local 355 v. Hollywood Greyhound Track, Inc.*, No. 12-61135 (S.D. Fla. 2012).

Mulhall alleges that Unite is violating § 302(b)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1), by demanding from his employer three "thing[s] of value . . . to any labor organization," the giving of which is prohibited under § 302(a)(2), 29 U.S.C. § 186(a)(2): (1) confidential information about Mardi Gras' nonunion employees, including their home addresses and job classifications; (2) use of Mardi Gras' private property for organizing; and (3) a gag-clause on any speech or action by Mardi Gras that states or implies opposition to unionization. (Compl., ¶ 37; Pet. 74a).

The complaint explains in detail why these things, both individually and cumulatively, have significant value to Unite, including monetary value. (*Id*., ¶¶ 17, 20, 25, 26; Pet. 68a-71a). Unite confirmed the validity of these allegations, pleading in a parallel legal proceeding that Mardi Gras' refusal to comply with

the Agreement resulted in "increased organizing expenses and lost revenues for the Union," (*id*., ¶ 27; Pet. 71a), and that the union and its members spent more than $100,000 campaigning for the ballot initiative in return for the Agreement. (Pet. 38-39a).

The district court dismissed Mulhall's complaint for lack of standing. (Pet. 29a-33a). The Eleventh Circuit reversed in *Mulhall v. Unite Here*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*") (Pet. 34a-60a). In so ruling, the court of appeals recognized that "Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the MOA is valuable, and indeed essential, to Unite's effort to gain recognition," (Pet. 46a), and that "UNITE ultimately spent $100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary sense." (*Id*. at 48a).

On remand, the district court dismissed the complaint on the merits. (*Id*. at 13a-23a). The Eleventh Circuit reversed again in *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2011) ("*Mulhall II*") (Pet. 1a-12a). The court also denied Unite's petition for rehearing en banc. (Pet. 61a-62a).

In *Mulhall II*, the panel majority reasoned that "[i]t seems apparent that organizing assistance can be a thing of value." (Pet. 7a). Although § 302 does not necessarily require proof of monetary value, "a jury could find that Mardi Gras's assistance had monetary value" based on the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance." (*Id*. at 8a-9a). However, the court found that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items," but that an intangible can act as a

"payment" if "its performance fulfills an obligation." (*Id*. at 7a-8a). Thus, according to the court, intangible forms of organizing assistance violate § 302 only "if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." (*Id*. at 8a).[1] Overall, the court found "Mulhall's allegations . . . sufficient to support a § 302 claim." (*Id*.).

The principle that Unite finds most objectionable is the Eleventh Circuit's conclusion that "[i]t is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302." (*Id*.). Unite seeks this Court's review in the hope of establishing such a blanket exemption to the statute.

REASONS FOR GRANTING THE WRIT

Although Unite's arguments on the merits are invalid—indeed, the union ignores § 302's actual language as if it did not exist[2]—this case nevertheless satisfies the criteria for certiorari under Supreme Court Rules 10(a) and (c). The Eleventh Circuit's decision conflicts with decisions of others courts of

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[1] Mulhall disagrees that intangibles cannot be "deliver[ed]" under § 302, and is filing a conditional cross-petition for a writ of certiorari on this issue.

[2] Section 302 prohibits employers from paying or delivering "any money or other thing of value . . . to any labor organization," subject to exceptions stated at § 302(c). 29 U.S.C. §§ 186(a)(2) and (c). Unite clearly violates the statute's plain language, as it does not even attempt to argue that information, use of property, and control over communications are not "thing[s] of value," or that any of the statute's explicit exemptions apply. Moreover, Unite's assertion that "Plaintiff must show that the neutrality agreement somehow corrupts the union's representation of employees" to prove a violation of § 302 (Pet. 9), has no basis in § 302's text.

appeals on an important question of federal law. However, as discussed below, Unite both understates and overstates the circuit split, and misconstrues the importance of the issue presented.

I. CONFLICT AMONGST THE CIRCUITS

A. The Third and Fourth Circuit's Decisions Are Inconsistent with Not Only the Decision Below, But Also with How Most Circuits Interpret "Thing of Value"

While Unite is correct that the Eleventh Circuit's decision conflicts with *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 219 (3d Cir. 2004) and *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), it understates the extent of the circuit split. The Third and Fourth Circuit's crabbed construction of "thing of value," which excludes such common things as information, use of property, and communications, also conflicts with holdings of other courts of appeals.

The phrase "thing of value" is a statutory "term of art" used in numerous federal statutes. *See United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979).[3] The phrase is consistently interpreted across statutes to be broad in scope and to encompass intangibles. *See, e.g.*, *United States v. Marmolejo*, 89

[3] This includes, in addition to § 302, conflict of interest statutes that govern federal officials, 5 U.S.C. § 7353(a), public officials, 18 U.S.C. § 201(b), recipients of federal funds, 18 U.S.C. § 666, trustees of employee benefit plans, 18 U.S.C. § 1954, and real estate transactions, 12 U.S.C. § 2607, as well as statutes that prohibit conversion of public property, 18 U.S.C. § 641, extortion by mail, 18 U.S.C. § 876(b), and procurement of a "thing of value" by false pretenses, 18 U.S.C. § 912.

F.3d 1185, 1191 (5th Cir. 1996); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995); *Nilsen*, 967 F.2d at 543; *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986); *United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985); *Girard*, 601 F.2d at 71; *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974). This expansive interpretation extends to § 302, whose "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993); *see also United States v. Ryan*, 350 U.S. 299, 305 (1956) (§ 302 a "broad prohibition"); *Arroyo v. United States*, 359 U.S. 419, 420 (1959) (same).

In addition to the decision below, courts have repeatedly held that the types of things at issue here constitute a "thing of value": (1) information, *see United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980); *Girard*, 601 F.2d at 71; *see also Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("[c]onfidential business information has long been recognized as property."); (2) use of physical property, *see NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.4 (5th Cir. 1986)[4]; *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977); *United States v. Zimmermann*, 509 F.3d 920, 926-27 (8th Cir. 2007); *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000); and (3) control over the communications of adverse parties, s*ee Nilsen*, 967 F.2d at 542-43; *Zouras*, 497 F.2d at 1121; *cf. United*

[4] In *BASF*, the Fifth Circuit recognized that use of company property is a "thing of value" under § 302(a), but held that the exemption at § 302(c)(1) applied because the union officials who used the property at issue were company employees. 798 F.2d at 856. This exemption is inapplicable here.

States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969) (non-competition agreements constitute "property" under 18 U.S.C. § 1951). *Sage* and *Adcock* are inconsistent with all of these cases.

Moreover, the Sixth Circuit recently held that a "thing of value" in § 302 is not limited to monetary value. *See United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011); *see also United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (under § 302 "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstance."). This holding conforms with the general consensus among lower courts that the phrase "thing of value is not limited in meaning to tangible things with an identifiable commercial price tag." *Schwartz*, 785 F.2d at 679; *see also Zouras*, 497 F.2d at 1121; *Nilsen*, 967 F.2d at 543. The Fourth Circuit's erroneous holding in *Adcock* that a "thing of value" must have an ascertainable monetary value, 550 F.3d at 372, conflicts with these decisions, as well as the text of § 302. *See* 29 U.S.C. § 186(a) ("any money *or other* thing of value") (emphasis added).

Overall, *Sage* and *Adcock* are dramatic departures from how federal courts interpret the phrase "thing of value." These two anomalous decisions have created a conflict among the circuits that this Court should resolve.

B. The Decision Below Does Not Conflict with Decisions Holding That Labor Contracts Are Enforceable Under § 301

Unite's contention that *Mulhall II* conflicts with cases holding that organizing agreements are procedurally enforceable under § 301 of the LMRA is erroneous. (Pet. 12-16). Section 301 grants federal

courts jurisdiction to enforce all "contracts between an employer and labor organization." 29 U.S.C. § 185. That labor contracts are generally enforceable under § 301 does not mean that all of their terms are lawful under § 302 or any other statute. Notably, none of the § 301 cases Unite cites address whether the agreement's terms violate § 302.

In fact, § 302 expressly makes it unlawful for employers and unions to "*agree*" to deliver and receive a thing of value. 29 U.S.C. §§ 186(a) & (b) (emphasis added). The statute is intended to invalidate noncompliant terms of labor contracts, such as collective bargaining agreements, that are otherwise enforceable under § 301.[5] Unite's contention that terms of contracts enforceable under § 301 are somehow exempt from § 302's prohibition is baseless.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

This case presents an important question, but for reasons opposite from those stated by Unite. To preserve the statute's integrity, protect legitimate labor relations, and prevent the undermining of the National Labor Relations Act, 29 U.S.C. § 151 et seq., this Court must uphold the Eleventh Circuit's con-

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[5] *See, e.g., BASF Wyandotte*, 798 F.2d at 854 (it "is inescapably correct . . . that no employer may be required to bargain over or engage in illegal activity even if that activity is necessary to comply with the terms of the bargaining agreement"); *Jackson Purchase Rural Elec. Co-op. Ass'n v. IBEW*, 646 F.2d 264, 267-68 (6th Cir. 1981) (striking down term of labor agreement under § 302); *Costello v. Lipsitz*, 547 F.2d 1267, 1278 (5th Cir. 1977) (same); 92 Cong. Rec. 4893 (Sen. Byrd) (under § 302, "the representatives of the employees, which means the union, shall not receive a tribute of this kind, even though it may be provided for in a collective bargaining contract").

clusion that things valuable to unions for organizing are not exempt from § 302, and must reject the Third and Fourth Circuit's contrary conclusions.

A. Creating a Judicial Exemption to § 302 for Things Valuable to Unions for Organizing Does Violence to the Statute's Plain Language

This Court has warned that "courts may not create their own limitations on legislation." *Brogan v. United States*, 522 U.S. 398, 408 (1988). It has also disavowed the "proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions." *Id*. at 406; *see also Salinas v. United States*, 522 U.S. 52, 58 (1997) (rejecting judicially-created "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis for limiting [18 U.S.C.] § 666(a)(1)(B) to bribes affecting federal funds.").

The Eleventh Circuit heeded this precedent by refusing "to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302." (Pet. 8a). By contrast, the Third and Fourth Circuits in *Sage* and *Adcock* carved an unwritten exemption into § 302 for "thing[s] of value" provided to unions in organizing agreements. In so doing, those courts have done violence to § 302's text that this Court should rectify.

First, "[a] literal construction of § 302 does no violence to common sense." *Arroyo*, 359 U.S. at 424. The statute simply makes it unlawful "for an employer to give to a union representative, and for a union representative to receive from an employer, anything

of value." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 408-09 (1999); *see also Ryan*, 350 U.S. at 305. It is beyond peradventure that information about nonunion employees, use of private property for organizing, and a gag-clause on company speech opposing unionization are each a "thing of value . . . to any labor organization" within the plain meaning of that phrase. 29 U.S.C. § 186(a)(2). To decree that they are not—i.e., that these things are somehow nonexistent or utterly worthless to unions—is to deny the obvious.

Second, Congress enacted nine specific exemptions to § 302's prohibitions at § 302(c)(1-9). An organizing exemption is not among them. Consequently, it is clear that Congress intended no such exemption—*expressio unius est exclusio alterius*.

Finally, § 302 expressly applies to union organizing. When first enacted, the statute prohibited only employer delivery of money or things to current union "representatives." In 1959, Congress extended the statute's prohibitions to: (1) "any labor organization" that "*seeks to represent*, or would admit to membership, any of the employees of such employer," 29 U.S.C. § 186(a)(2) (emphasis added); and, (2) "any employee or group or committee of employees . . . for the purpose of causing such employee or group or committee . . . to influence any other employees in the exercise of the *right to organize* and bargain collectively through representatives of their own choosing." 29 U.S.C. § 186(a)(3) (emphasis added); *see* S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330. The notion that this statute harbors an unwritten union-organizing exemption is incompatible with congressional directive.

B. Exempting Organizing Assistance from § 302 Will Undermine the Statute's Purpose of Preventing Union Extortion and Protecting Collective Bargaining

Unite attempts to invert reality when it contends that organizing agreements are a favored form of labor-management cooperation because unions provide employers with consideration for the agreements. (Pet. 26-30). The opposite is true. That unions will provide a *quid pro quo* to employers for valuable organizing assistance is only reason for enforcing § 302 as written.

Foremost, Unite's admission that "[t]he employer always receives consideration for a neutrality agreement" from a union, (Pet. 27), proves that organizing assistance has "value" to unions under § 302. Value is commonly established by the provision of consideration. *See United States v. Townsend*, 630 F.3d 1003, 1011-12 (11th Cir. 2011); *Marmolejo*, 89 F.3d at 1193-94. Thus, here a "jury could find that Mardi Gras' assistance had monetary value" to Unite, if that were required under § 302, based on the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance." *Mulhall II*, 667 F.3d at 1216 (Pet. 8a).[6] Unite's contrary position—that organizing assistance cannot be a "thing of value" to

[6] Unite's bald assertions that Mulhall did not adequately allege that the organizing assistance has value to the union (Pet. 23), and that Unite agreed to expend resources to support the ballot initiative (*id*. at 28), is refuted by the detailed language of the Complaint (*see id*., ¶¶ 17, 20, 25, 26; Pet. 68a-71a), and by Unite's own admissions (*id*. at ¶ 27; Pet. 71a). *See Mulhall I*, 618 F.3d at 1288-89 (Pet. 46a-48a).

unions *because* they value it enough to provide consideration for it—is counterintuitive.

Second, that unions will guarantee employers "labor peace," such as not striking or boycotting the employer, in exchange for organizing assistance indicates that these things are within § 302's intended ambit. "The legislative history of § 302 demonstrates that the provision was intended to 'prohibit, among other things, the buying and selling of labor peace,' something that the MOA at issue here at least arguably does." *Mulhall* I, 618 F.3d at 1290-91 (Pet. 52a) (quoting S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477).

Unions often engage in economic actions and comprehensive "corporate campaigns" to coerce employers into organizing agreements.[7] The latter action involves a "'wide and indefinite range of legal and potentially illegal tactics," including "'litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.'" *Smithfield Foods*, 585 F. Supp. 2d at 795-97 (quoting *Food Lion, Inc. v.*

[7] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1592-93 (2008); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); Herbert R. Northrup & Charles H. Steen, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999) (describing tactics of a corporate campaign); *Pichler v. UNITE*, 228 F.R.D. 230, 234-40 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d Cir. 2008) (corporate campaign for an organizing agreement); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (same).

UFCW, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)). Congress intended that § 302 curb such union misconduct, as the statute was enacted, in part, "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426 n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Finally, union self-dealing for organizing assistance is inimical to the collective bargaining process that § 302 protects. This process involves a union bargaining with an employer as its employees' "exclusive representative" after being so selected by a majority of employees. *See* 29 U.S.C. §§ 159(a) & 158(d). The union acts strictly as an agent of *employees* in collective bargaining, in a fiduciary relationship akin to that between attorney and client. *See Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991). The subject of this bargaining are the wages, benefits, and other things that the employer provides to its employees. 29 U.S.C. § 158(d).

Collective bargaining does *not* involve a union dealing with an employer for its own self-interests. Such self-dealing creates an inherent conflict of interest, and is strictly prohibited by § 302 to ensure union fidelity to employee interests. As the Eleventh Circuit correctly stated, "[s]ection 302 is a conflict-of-interest statute," whose "purpose is to protect employees in dealings between the union and employer . . . and specifically to protect them from the collusion of union officials and management." *Mulhall*, 618 F.3d at 1290 (citations omitted); *see also Arroyo*, 359 U.S. at 425-26 (discussing purpose of § 302); *United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972) (same).

Thus, organizing agreements are not a form of labor-management cooperation favored by federal

law, as Unite erroneously asserts. Unions deal strictly for themselves when negotiating these collusive arrangements, and not for employees as in collective bargaining. By requiring employers to provide valuable things to unions, rather than to employees they represent in collective bargaining, many terms of organizing agreements will violate § 302.[8]

Union self-dealing for organizing assistance threatens legitimate collective bargaining, as unions often make wage and benefit concessions at employee expense to satiate their desire for employer assistance. (Compl., ¶ 28; Pet. 72a).[9] *Adcock* is a prime example. There, the UAW agreed to freeze wages and increase

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[8] By contrast, collective bargaining does not violate § 302 because nothing is delivered to the union itself under § 302(a) that is not permitted by § 302(c). Section 302(a) "does not prohibit the employee himself from accepting money or other things of value if it is directly paid to the employee by the employer." 92 Cong. Rec. 4891 (Sen. Byrd). Section 302(c) exempts those few legitimate employee benefits that also result in the delivery of something to their union representative.

[9] *See Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union") (moot on appeal); *Dana Corp. (Int'l Union, UAW)*, 356 NLRB No. 49, at *22-23 (2010) (union agreed to health benefit and other concessions in exchange for organizing assistance); *Plastech Eng'd Prod., Inc.* (*Int'l Union, UAW*), 2005 WL 4841723, at *1-2 (NLRB Div. of Advice Memo. 2005) (same); Charles I. Cohen et al., *Resisting its Own Obsolescence–How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 533-35 (2006) (unions pre-negotiate concessions for organizing assistance).

benefits costs at the expense of employees it already represented, and secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of employees it sought to represent, to obtain the employer's assistance with unionizing the latter employees. 550 F.3d at 375. A union sacrificing employee interests at the bargaining table to satiate its self-interest in gaining more dues-paying members is an egregious breach of fiduciary duty, *cf. Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993), and is one of the harms that § 302 exists to prevent.

In short, that unions will provide employers with a *quid pro quo* for assistance with organizing their employees, including guarantees of labor peace and bargaining concessions, only highlights why § 302 must be enforced with respect to these "thing[s] of value." 29 U.S.C. § 186(a)(2).

C. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures

It is said that "chutzpah" is exemplified by killing your parents and then begging for the court's mercy on the grounds of being an orphan. Unite's contention that organizing agreements must be exempted from § 302 to protect the NLRA (Pet. 21-26), aptly fits that description. An organizing agreement's very purpose is to supplant the NLRA's representational procedures and nullify its employee protections.

To effectuate employee free choice during union organizing campaigns, the NLRA provides for secret-ballot elections in § 9(c), 29 U.S.C. § 159(c), and guarantees free speech by employers and unions in

§ 8(c), 29 U.S.C. § 158(c), to ensure an "uninhibited, robust, and wide-open debate" about unionization. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (quotation omitted). The NLRA does *not* grant a union a right to employer assistance with organizing employees, such as use of its private property, *Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), or information about its nonunion employees absent an election petition, *see Always Care Home Health Service*, 1998 WL 2001253 (NLRB GC 1998).[10] Indeed, "[b]y its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532.

Union organizing agreements are specifically designed to replace the NLRA's preferred organizing procedures with a private process that favors the union.[11] They generally ban secret-ballot elections conducted by the National Labor Relations Board (Agreement ¶ 9; Pet. 81a),[12] and gag employer speech

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[10] Contrary to Unite's assertion (Pet. 20-21), enforcing § 302 in this case will not make it unlawful for the NLRB to require that employers provide certain information to unions, such as during elections, because § 302(c)(2) exempts from the statute's prohibitions things provided pursuant to Board orders. 29 U.S.C. § 186(c)(2); *see J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 328 (4th Cir. 1980).

[11] *See* Cooper, 83 Ind. L.J. at 1593-94; Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522; *see also* Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (AFL-CIO General Counsel urging unions to "use strategic campaigns to secure recognition . . . outside the traditional representation processes").

[12] As Unite twice admits, Mulhall does not challenge the legality of employer recognition without an election under NLRA § 9(a), 29 U.S.C. § 159(a). (Pet. 22-23). Unite's contention that enforcing § 302 against three types of employer assistance somehow conflicts with this statutory option is baseless, as employers

about unionization to deprive employees of their "right to receive information opposing unionization." *Brown*, 554 U.S. at 68.[13] Here, the Agreement even prohibits Mardi Gras from filing charges with the Board to remedy violations of employee rights under the NLRA. (Agreement ¶ 9; Pet. 81a). The Act's employee protections are replaced with employer assistance to the union. (*Id*. at ¶¶ 4,7,8; Pet. 79a-81a). The NLRA's organizing procedures are turned on their head in an organizing agreement.

Accordingly, enforcing § 302 to prohibit employers from materially assisting unions with organizing employees will serve only to protect the NLRA's "bottom-up" organizing process from being replaced with a private "top-down" process. This beneficial result is fully consistent with Congress' intent to prohibit top-down union organizing when amending § 302 to apply to unions that "seek[ ] to represent" an employer's employees. 29 U.S.C. § 186(a)(2); *see* p. 10, *supra*.

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can recognize unions that enjoy majority employee support without materially assisting their organizing campaigns.

[13] Unite's contention that enforcing § 302 against gag-clauses will somehow force employers to speak against unionization is baseless. (Pet. 18-19). Employers are free unilaterally to speak or not speak as they desire. Only when they grant a union contractual control over their communications is a "thing of value" delivered to a union in violation of § 302. *See Mulhall II*, 667 F.3d at 1216 (Pet. 8a-9a) (rejecting claim that "employers will be required to actively oppose unionization in order to avoid criminal sanctions under § 302").

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CIRCUIT SPLIT AND DECIDING WHETHER AN ORGANIZING EXEMPTION SHOULD BE CARVED INTO § 302

Unite's petition fails to mention an issue that may bear on this Court's disposition of its petition. Mardi Gras has taken the position that the Agreement has expired by its terms. Unite contends that an arbitration decision extended the agreement's duration, and is currently seeking enforcement of the Agreement in *Unite Here Local 355*, Case No. 12-61135.

Irrespective of the Agreement's status, this case presents a case and controversy. Section 302(b)(1) makes it unlawful for Unite to "request" or "demand" a "thing of value" from Mardi Gras. 29 U.S.C. § 186(b)(1). Mardi Gras' agreement to deliver the assistance that Unite demands is not required for a violation. Given that Unite continues to request and demand that Mardi Gras provide it with "thing[s] of value" for organizing, this case remains ripe for review.

CONCLUSION

For these reasons, the petition satisfies the criteria for granting a writ of certiorari.

Respectfully submitted,

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