No. 12-99

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL AND HOLLYWOOD GREYHOUND TRACK, INC. D/B/A MARDI GRAS GAMING,

Respondents.

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

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE* [1]

The Council on Labor Law Equality (COLLE) is a trade association founded over 30 years ago for the purpose of monitoring and commenting on developments in the interpretation of the National Labor

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* states that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office.

Relations Act (NLRA). Through the filing of amicus briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and in recent decades has filed amicus briefs in nearly every significant labor case before the National Labor Relations Board (NLRB), the federal courts of appeals, and the U.S. Supreme Court.

COLLE represents employers in virtually every business sector, all of whom are subject to the NLRA. COLLE members have a vital interest in the procedures that govern organizing activities under the NLRA and in ensuring that those procedures provide fairness both to employees and employers and minimize the opportunities for corruption, coercion, and extortion. COLLE is uniquely situated to brief the Court concerning the issues raised by the type of pre-recognition agreement that is at issue in this case and the vast implications that this Court's interpretation of Section 302 of the Labor Management Relations Act (LMRA) in applying it to such agreements will have to the business community beyond the immediate concerns of the parties to this case.

Respondents' briefs provide compelling reasons to affirm the Eleventh Circuit's judgment.[2] The purpose

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[2] COLLE respectfully notes that its position in this brief may not be fully congruent with that of Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming (Mardi Gras) to the extent that Mardi Gras's brief may be construed as suggesting that pre-recognition agreements are unlawful under Section

of this brief is to provide additional background information regarding unions' increasing reliance on pre-recognition agreements similar to the one at issue in this case and regarding some unions' highly aggressive use of "corporate campaigns" to pressure employers to enter into such agreements. As set forth below, although not all pre-recognition agreements are unlawful, when such agreements are the product of extortionate corporate campaigns, they should be held to violate Section 302(b)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1).

SUMMARY OF ARGUMENT

A pre-recognition agreement between a union and an employer can, under some circumstances, constitute a thing of value to the union that is paid or delivered in violation of Section 302.[3] In recent years,

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302 even when they do not involve extortion, bribery, or similar misconduct.

[3] As used in this brief, "pre-recognition agreement" refers to an agreement under which an employer waives certain rights that it might otherwise invoke to oppose a union's organizing efforts or agrees to render assistance to the union's efforts that it would not otherwise be required to give, including agreements that require an employer (1) to recognize the union as the exclusive collective bargaining representative of its employees based on a card check procedure rather than an NLRB conducted secret ballot election; (2) to provide the union with access to the employer's premises during non-working times; (3) to provide the union with lists of employee names and addresses; and/or (4) to remain neutral during the union's organizing campaign. Two other types of employer-union agreements are not at issue in this proceeding and are not to be confused with the "pre-recognition agreement" referred to in this brief. The first of these is the so-called "pre-hire" agreement authorized by Section 8(f) of the NLRA, 29 U.S.C. §158(f), which permits only construction industry employers and unions to enter into collective bargaining agreements

as union membership has fallen steeply, many unions have shifted organizing tactics to focus on obtaining pre-recognition agreements from targeted employers. Such pre-recognition agreements constitute an employer's delivering to the union various contractually enforceable waivers of the employer's speech, property, and statutory rights, which the employer otherwise could use to oppose the union's organizing efforts. Some unions believe that they will have a greater chance of being designated as employees' exclusive collective bargaining representatives under such agreements than pursuant to a secret-ballot, NLRB-supervised election as provided for under the NLRA.

Unions regularly launch "corporate campaigns" against employers to compel them to enter into such pre-recognition agreements. Corporate campaigns are designed to impose financial and social pressures on an employer by means of various lawful and, at times, unlawful conduct with the understanding that the union will terminate the campaign only if the employer enters into the pre-recognition agreement demanded by the union.

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even before the construction industry employer has hired any employees. The second of these, also not at issue here, is addressed in *Dana Corp*., 356 NLRB No. 49, 2010 WL 4963202 (Dec. 6, 2010). That agreement was entered into by an employer and a union with a longstanding collective bargaining relationship to establish procedures for purely voluntary recognition utilizing a card check procedure at a facility not covered by one of the nine collective bargaining agreements executed by the parties; this agreement also contained a list of the substantive issues to be addressed by collective bargaining if and when the union was recognized. In *Dana*, the NLRB determined it would "leave for another day the adoption of a general standard for regulating prerecognition negotiations between unions and employer[s]". 2010 WL 4963202, at *5.

Corporate campaigns can constitute extortionate conduct by unions. A number of courts have already found that employers have stated claims for extortion under state law and for the violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*., relating to union corporate campaigns designed to pressure employers to enter into pre-recognition agreements and/or make other concessions.

In light of the context in which pre-recognition agreements like the one at issue in this case are obtained, and in light of case law already finding that union tactics to pressure employers to enter such agreements can constitute extortion under some circumstances, the Eleventh Circuit's decision in this case was correct. Respondent Martin Mulhall (Mulhall) sufficiently stated a claim that the union violated Section 302 by demanding and seeking to enforce a pre-recognition agreement with the employer.

ARGUMENT

When a union that does not represent an employer's employees demands that an employer grant the union a contractual right to enforce that employer's waiver of property, speech, and statutory rights, which the employer could otherwise use to oppose that union's organizing efforts, does the union request or demand that the employer "pay[]" or "deliver[]" a "thing of value" to the union in violation of Section 302(b)(1)?[4] 29 U.S.C. § 186(b)(1). In this case, the Eleventh

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[4] Or, alternatively, when a union, after having obtained such an agreement, seeks to enforce the employer's contractual waiver of its property, speech, and statutory rights, does the union "request" or "demand" the "payment" or "delivery" of a "thing of value"?

Circuit held that the answer to this question depended on the purpose of the union's and employer's exchange and on whether that exchange was part of "a scheme to corrupt a union or to extort a benefit from an employer." Pet. App. 8.[5] The Eleventh Circuit therefore remanded the case for the district court to "determine the reason why [the union] and [the employer] agreed to cooperate with one another" in this way. Pet. App. 9.

Recent experience shows that pre-recognition agreements like the one at issue in this case can violate Section 302 in some circumstances. The Eleventh Circuit therefore correctly directed the district court to determine whether the particular agreement in this case implicates Section 302's concerns with preventing union bribery and extortion.

To assist the Court in understanding how, as a practical matter, pre-recognition agreements can ever constitute "thing[s] of value" to a union that could be paid or delivered in violation of Section 302, COLLE respectfully submits this brief to provide a more complete account of the factual context in which such agreements often arise. Petitioner and its amici characterize all pre-recognition agreements – agreements under which an employer waives its right to an NLRB-supervised election, waives its property right to exclude third-parties, and waives its right to free speech under Section 8(c) of the NLRA and the First Amendment – as nothing more than agreements whereby unions and employers set ground rules for an organizing campaign and voluntary recognition in accord with the NLRA's goals of "avoid[ing] industrial

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[5] References to materials contained in the Appendix to the Petition for Writ of Certiorari are cited as "Pet. App."

strife and promot[ing] employee free choice." *See, e.g.*, U.S. Amicus Br. 6-7 (Aug. 2013). But these are platitudes. Indeed, notably absent from the briefs of Petitioner and its amici is any discussion of how employers often come to enter into such pre-recognition agreements in reality, why unions have come to demand such agreements with increasing frequency, or how some unions at times attempt to exact such agreements by applying extreme "pressure" on employers in the form of no-holds-barred "corporate campaigns" designed to inflict harm on employers that fail to acquiesce to union demands. This factual context helps make clear that there can be a real and substantial risk that some pre-recognition agreements are things of value to a union that it obtains through extortionate conduct in violation of Section 302.

Petitioner and its amici are also hyperbolic in claiming that the Eleventh Circuit's decision is the death knell of all pre-recognition agreements, will criminalize arbitration as a means for resolving pre-recognition agreement disputes, and will gut settled interpretations of labor agreement union security clauses (29 U.S.C. § 158(a)(3)) and the LMRA secondary boycott (29 U.S.C. § 158(b)(4)(B)) and recognitional picketing (29 U.S.C. § 158(b)(7)) provisions. These exaggerations ignore the fact that the Eleventh Circuit did not conclude that Section 302 had even been violated, only that a claim for relief had been stated. All the Eleventh Circuit's decision did was reverse the district court's grant of a motion to dismiss the complaint and remand the case for a determination as to the reason why the employer and the union agreed to cooperate, namely, whether bribery or extortion, the key predicates for a Section 302 violation, occurred.

I. INTRODUCTION

Section 302(a)(2) of the LMRA makes it unlawful for an employer "to pay, lend or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a union that "represents [or] seeks to represent" the employer's employees. 29 U.S.C. § 186(a)(2). Section 302(b)(1) similarly makes it unlawful for a union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" as prohibited by Section 302(a)(2). 29 U.S.C. § 186(b)(1).

To avoid repeating at length arguments made in the parties' briefs, COLLE notes that it generally endorses the constructions of Section 302 offered by Respondents and adopted by the Eleventh Circuit below. In light of Section 302's purpose to prevent union bribery and extortion, *see Arroyo v. U.S.*, 359 U.S. 419, 425-26 & n.8 (1959), the phrase "thing of value" as used in Sections 302(a)(2) and (b)(1) logically means a "thing of value" (i) to the union and (ii) in the union's institutional, rather than in its representative, capacity. 29 U.S.C. § 186(a)(2) & (b)(1). This common-sense reading stands in contrast to the strained interpretations offered by Petitioner and its amici.

First, the contention of Petitioner's amicus that Sections 302(a)(2) and (b)(1) must refer only to assets that have "general commercial value in the marketplace" makes little sense in light of the purpose of the statute. *See, e.g.*, AFL-CIO Amicus Br. 6-7. Limiting the reach of Section 302's prohibitions to the transfer of things that have value to individuals and entities *other* than unions would not be consistent with the statute's focus on preventing *union* bribery and extortion. Section 302 is concerned with employers providing to unions "things" that have value to the

union under circumstances that could cause the union's institutional self-interests to diverge from the interests of the employees whom the union represents or seeks to represent. *Cf. Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010) (noting that "[s]ection 302 is 'a conflict-of-interest statute'" that serves to protect employees "from the collusion of union officials and management" (citations omitted)); *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."). Money, which has an "objective" value, obviously could have such an effect. But so, too, could things that have value only to the union and to no one else. Whether a thing that a union demands or receives from an employer also has value to someone other than the union is irrelevant for Section 302 purposes.

Second, in addition to the Eleventh Circuit's observation that the performance of an obligation may qualify as a payment for Section 302 purposes, Pet. App. 8, an employer's providing a union the contractual right to enforce the employer's waiver of its property, speech, and statutory rights should constitute a "delivery" to the union. *Cf.* BLACK'S LAW DICTIONARY (9th ed.), delivery ("The formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another."). Indeed, it is commonplace to refer to contracts' being "delivered." *Cf. 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2011) ("A contract is frequently said to be executed when the document has been signed,

or has been signed, sealed, and delivered." (internal quotation marks and citation omitted)).

Finally, Petitioner and its amici wrongly claim that under Respondent Mulhall's theory in this case and under the Eleventh Circuit's decision, Section 302 could prohibit all employer/union agreements that provide any things that unions value, including all voluntary recognition agreements and even collective bargaining agreements. *See, e.g*., Pet. Br. 64; AFL-CIO Amicus Br. 26. But this is not the case. The Eleventh Circuit held that the lawfulness of neutrality and cooperation agreements under Section 302 hinges on whether those agreements are part of a corrupt or extortionate scheme. Pet. App. 8. Consistent with this holding, Section 302 should reasonably be read to distinguish between those payments and things of value that a union receives in the union's *institutional capacity* on behalf of itself and those that it receives in its *representative capacity* on behalf of employees.[6] It is only an agreement that the union makes while operating in the former capacity – before the union becomes employees' designated bargaining representative or while the union otherwise is acting outside the scope of its agency relationship with employees – that would potentially run afoul of Sections 302(a)(2) and (b)(1). Indeed, Section 302 expressly permits a union to receive certain payments in the union's representative capacity. *See* 29 U.S.C. § 186(c)(5)-(8).

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[6] *Cf. A. Terzi Productions, Inc. v. Theatrical Protective Union*, 2 F.Supp.2d 485, 506 (S.D.N.Y. 1998) (Sotomayor, *J.*) ("It is a basic tenet of federal labor law that a union has no right to demand that an employer recognize or bargain collectively with the union unless it has first obtained the majority backing of that employer's employees and been certified as their bargaining representative.").

To the extent Sections 302(a)(2) and (b)(1) generally cover other "things of value," they reasonably should be read as excluding those "things" that a union seeks or receives in its representative capacity for the benefit of the employees whom the union represents or seeks to represent, including the granting and enforcement of valuable contractual commitments from an employer. Collective bargaining agreements, which unions negotiate as employees' exclusive bargaining representatives, plainly fall within this category. Pre-recognition agreements may also reasonably be viewed as excluded from Section 302's coverage, so long as those agreements are negotiated for employees' benefit and not obtained by a union through extortionate conduct.

Here, the Eleventh Circuit's decision presumes that (1) a pre-recognition agreement can have value to a union in its self-interested, institutional capacity rather than solely in its representative capacity, thereby raising the possibility of union self-dealing, and (2) such an agreement can also be the product of union extortion. Recent developments in the labor field show that these presumptions are correct.[7]

[7] The Third and Fourth Circuits, the only other circuits to address the question presented here, have held that a pre-recognition agreement is not a "thing of value" under Section 302. *See Adcock v. Freightliner, LLC*, 550 F.3d 369, 373-376 (4th Cir. 2008); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality*, 390 F.3d 206, 218-219 (3d Cir. 2004). The *Sage* court appeared to misconceive of such agreements as primarily a form of arbitration agreement and refused even to consider whether such agreements can undermine the interests of the employees whom the union seeks to represent. *See* 390 F.3d at 219. The *Adcock* court unreasonably rejected the notion that "access" to employees, including access to an employer's property, can ever have value to a union, contrary to decades of case law

II. OVER THE PAST TWO DECADES, PRE-RECOGNITION AGREEMENTS HAVE BECOME HIGHLY VALUED BY MANY UNIONS.

Union membership has fallen steadily for decades. In 1945, more than a third of non-agricultural workers were union members.[8] In 1983, union membership was at 20.1 percent.[9] By 2012, the rate of union membership had plummeted to 11.3 percent as a whole and within the private sector stood at a meager 6.6 percent.[10] As unions' fortunes have fallen, unions have increasingly turned to pre-recognition agreements – which bypass traditional means for organizing under the NLRA and provide a somewhat greater likelihood of union success in campaigns – to try to stanch their steep decline.[11]

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recognizing, at least impliedly, the great value that non-employee union organizers place on such access. 550 F.3d at 374. *C.f., e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock*, 351 U.S. 105 (1956). The Third and Fourth Circuits' decisions also failed to consider the broader context in which pre-recognition agreements are often demanded by unions, including the substantial efforts and expense that unions undertake to attempt to obtain such agreements. These two decisions holding that a pre-recognition agreement can never be a "thing of value" should be rejected.

[8] Gerald Mayer, "Union Membership Trends in the United States" at CRS-12 (CRS [Congressional Research Service] Report for Congress, August 31, 2004), *available at* http://www.digitalcommons.ilr.cornell.edu/key_workplace/174/.

[9] Bureau of Labor Statistics, Economic News Release, Union Members – 2012 (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

[10] *Id.*

[11] *See generally* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90

A. Traditional campaigns under the NLRA occur on a level playing field.

In a traditional campaign, a union first attempts to collect signed cards from employees designating the union as employees' exclusive collective bargaining representative. This card collection may be conducted in secret without the employer being aware of the organizing drive and without it taking the opportunity to express its own views on the merits of unionizing. If the union obtains signed cards from a majority of employees in a proposed bargaining unit, the union will usually present them to the employer and ask that the employer recognize the union. 29 U.S.C. § 159(a). Ordinarily, an employer will decline to agree to such recognition based on the union-collected cards alone and instead will exercise its right under the NLRA to demand a representation election supervised by the NLRB. 29 U.S.C. § 159(c)(1)(B). During the period leading up that election, an employer will also often exercise its right under Section 8(c) of the NLRA to express its views on unionization and, in many cases, will urge employees to vote against the union. 29 U.S.C. § 158(c). An election then occurs during which "laboratory conditions" are created under the supervision of the NLRB and employees are permitted to vote secretly to express their free choice for or against union representation. *See, e.g., General Shoe Corp.*, 77 NLRB 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").

IOWA L. REV. 819, 824-831 (Mar. 2005) (describing the rise of neutrality and card check agreements since the mid-1990s).

B. Pre-recognition agreements often tilt the playing field substantially in unions' favor.

Unions' pre-recognition agreements seek to re-write the ground rules for organizing campaigns in significant ways. These agreements typically consist of some combination of commitments by an employer requiring it to remove itself from the process, including: (1) a pledge of employer neutrality on the issue of unionization (i.e., a waiver of the employer's right to speak non-coercively on the issue of unionization under Section 8(c) of the NLRA and the First Amendment[12]); (2) the obligation to use only card check procedures (i.e., a waiver of the employer's right under the NLRA to seek an NLRB-supervised, secret-ballot election to determine whether a majority of employees support the union); (3) a pledge to provide employee lists to the union so the union may contact employees directly outside the workplace to obtain their signatures on the cards; and (4) a promise to grant the union physical access to the employer's property to solicit employees on-site during their breaks and other non-working hours.[13] In exchange, a union may agree to forego the right to picket or strike and/or pledge not to publicize the labor dispute beyond the scope of organizing.

In short, pre-recognition agreements often represent an employer's capitulation with respect to the

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[12] *Cf. Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008) (Section 8(c) of the NLRA both "implements the First Amendment" and manifests a "congressional intent to encourage free debate on issues dividing labor and management").

[13] *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47-48 (Oct. 2001).

means by which it might oppose the union, including giving up the opportunity even to inform employees of the benefits of remaining union free in counterpoint to the other side's unqualifiedly pro-union message.

C. Pre-recognition agreements can serve unions' self-interests rather than the interests of employees.

There is a substantial question whether pre-recognition agreements primarily benefit unions in their institutional, self-interested capacity at the expense of employees. Critics charge that unions' rejection of NLRB secret-ballot elections in favor of card check procedures and mandated employer neutrality undermines employees' interests in making fully informed, free choices as to unionization.[14] In a traditional campaign, employees typically receive information from both the union and the employer regarding the relative merits of unionization, and employees can then register their own opinions anonymously by secret ballot in elections closely supervised by a federal agency to ensure fairness. In stark contrast, card-check campaigns are carried out

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[14] *See, e.g.*, Brudney, *supra* note 11, at 841-844 (recounting hearings in the U.S. House of Representatives in 2002 and 2004 during which scholars, attorneys, employees, and others testified regarding instances of union coercion during card check/ neutrality campaigns); Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. on Workforce Prots. of the House Comm. on Educ. & the Workforce, 107th Cong. 6-7 (2002), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg82142/content-detail.html; Comment, *Union Authorization Cards*, 75 YALE L. J. 805 (Apr. 1966) (providing a comprehensive critique of the use of authorization cards in place of secret-ballot elections to determine whether a majority of employees choose union representation).

without governmental supervision or employee protections, often without any perspectives being presented to employees other than the union's, without employees' being allowed to make their decisions anonymously and privately, and with union representatives repeatedly pressing employees for their signatures should they fail to sign the first time, even coming to employees' homes to do so.[15]

Card check procedures create conditions favorable for the coercion of employees in their selection of union representation. Indeed, experience shows that when there is an NLRB-supervised election, it is common for a substantial percentage of employees who had signed union authorization cards at the outset of the campaign to vote against the union once employees are given the privacy of the secret ballot voting booth to do so.[16] In light of such concerns, this Court in *NLRB v.*

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[15] *See, e.g.*, James Sherk, *How Union Card Checks Block Workers' Free Choice*, HERITAGE FOUNDATION *WEBMEMO* NO. 1366 (Feb. 21, 2007), *at* http://www.heritage.org/research/reports/2007/02/how-union-card-checks-block-workers-free-choice.

[16] *See, e.g.*, Comment, *supra* note 14, at 826-827 & 829 (noting that an employee might agree to sign a union authorization card to insure himself against the possibility of possible retaliation by the union should it prevail all the while "planning to vote against the union" by secret ballot and providing data showing a disparity between the percentages of employees who signed union authorization cards and the percentages who ultimately voted in favor of unions in elections); *see also Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1163 (7th Cir. 1990) (Easterbrook, *J.*, concurring) (noting that "we expect to see – and do see – substantial slippage between the cards and the votes in a simon-pure election" and that "[w]hen unions get between 50% and 70% of the cards, they win only 48% of the elections"); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards

Gissel Packing Co., 395 U.S. 575, 602-603 (1969), noted that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," acknowledged the "superiority of the election process," and remarked that the collection of authorization cards is "admittedly inferior to the election process."

Despite legitimate concerns about the diminishment of employees' access to information and right of free choice, unions seek pre-recognition agreements for a simple reason: because they believe they can win recognition in some card-check campaigns where they would otherwise lose an NLRB-supervised, secret ballot election. According to one study published in 2001, unions won 78.2 percent of surveyed campaigns involving pre-recognition agreements mandating employer neutrality and card-check procedures compared with unions' average campaign success rate of only 45.64 percent in NLRB elections between 1983 and 1998.[17] And obviously the more campaigns a union wins, the more dues-paying members it will have.

Within this broader context, it is evident that a pre-recognition agreement can have significant value to a union directly, outside of its representative capacity, as a means to increase the union's size, power, and treasure. A pre-recognition agreement certainly can

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not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing . . . ."); *NLRB. v. Gorbea, Perez & Morell, S. En C*., 300 F.2d 886, 888 (1st Cir. 1962) (noting that "a man might sign a union card as a hedge if it [thus] costs him nothing, and yet on a secret ballot not vote for the union").

[17] Eaton & Kriesky, *supra* note 13, at 51-52.

constitute a thing of value to the union within the meaning of Section 302.

III. PRE-RECOGNITION AGREEMENTS OBTAINED BY UNIONS THROUGH "CORPORATE CAMPAIGNS" CAN BE THE PRODUCTS OF EXTORTION.

> *"Employers may claim that union members are violating laws on secondary boycott, libel, slander, or extortion. . . . [K]eep in mind that the laws are written primarily to protect employers, and that our union might never have been established in the first place if our founders had not used tactics which violated those laws. Union members sometimes must act in the tradition of Dr. Martin Luther King and Mohatma Gandhi and disobey laws which are used to enforce injustice against working people."*
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> Service Employees International Union AFL-CIO, CLC, CONTRACT CAMPAIGN MANUAL, Chapter 3, "Pressuring The Employer," at page 3-47.[18]

The Eleventh Circuit correctly held that a union and employer do not violate Section 302 by merely entering and enforcing pre-recognition agreements. Pet. App. 8. Rather, the creation and enforcement of such agreements "become illegal payments" only "if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Id.*

The Eleventh Circuit's decision to remand the case for the district court to determine why the employer

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[18] Compl., Ex. 8, *Sodexo, Inc. v. Service Employees International Union et al.*, Case No. 1:11-cv-00276 (E.D. Va Mar. 17, 2011), ECF No.1-8.

and union entered the agreement at issue makes sense in light of Respondent Mulhall's well pled allegations in his complaint and unions' actual practices in labor organizing. Recent experience shows that pre-recognition agreements can, in some circumstances, constitute "valuable consideration" that unions seek through extortionate conduct, in particular, as tribute to curtail a union's all-out war against an employer in the form of a "corporate campaign." Lower courts have already held that some of unions' "corporate campaign" tactics may rise to the level of extortion under various state laws and potentially violate RICO.

A. Unions' corporate campaigns threaten harm to employers' businesses to pressure employers to enter pre-recognition agreements.

"Corporate campaigns" are a relatively new approach to organizing that unions have pursued with increasing frequency since the 1990s.[19] The goal of such campaigns frequently is to place pressure on an employer to agree to a pre-recognition agreement such as those described above.[20]

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[19] *See, e.g.,* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621-2622 (May 2011); James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 738-39 (2010); Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (The U.S. Chamber of Commerce, 2005); 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, 782-783 (Summer 1999).

[20] *See, e.g., Executive Mgmt Servs., Inc.*, 355 N.L.R.B. No. 33, 2010 WL 1903993, at *5-6 (May 11, 2010) (describing one union's

There are various definitions of the term "corporate campaign," but as the D.C. Circuit has explained:

> What is clear is that the term encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.

Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997).

Professor James J. Brudney describes corporate campaigns generally as "union attempts to influence company practices that affect key union goals . . . by generating various forms of extrinsic pressure on the company's top policymakers."[21] He explains that "conflict escalation" plays a central role in these campaigns

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"three cities, one future" campaign in which the union sought to pressure targeted employers in three cities to enter pre-recognition agreements providing that the employers would not oppose the union in act or speech, provide the union a list of the names and addresses of employees, waive any right to file a representation petition with the NLRB, and agree to certain terms for a master collective bargaining agreement); David A. Bego, THE DEVIL AT MY DOORSTEP (2009) (describing in detail a union's multiyear campaign involving picketing, filing of unfair labor practice charges, contacting the employer's clients and prospective clients, creating and coordinating with public interest organizations, and generating ongoing negative publicity in an attempt to force Executive Management Services, Inc. to sign a pre-recognition agreement).

[21] Brudney, *supra* note 19, at 738. *See also* Compulsory Union Dues, *supra* note 14 (statement of Jarol B. Manheim, Professor,

during which unions typically assert "that the company's overall business conduct renders it a corporate outlaw."[22] In their own words, union officials have stated that corporate campaigns are designed to "swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow."[23]

Several features of unions' corporate campaigns are particularly noteworthy. First, such campaigns often do not focus exclusively, or even primarily, on the target employer's labor and employment practices. Rather, such campaigns seek to turn investors, customers, regulators, lenders, other key stakeholders, and/or the public generally against a company on any ground available to the union. To this end, unions may join with non-labor groups and focus on "the concerns of the civil rights, environmental, and consumer protection movements, among others, which sometimes conveys the impression that those organizations—and not the labor union—are the driving force behind the various rallies, press releases and campaign events."[24]

George Washington University) ("One of the most common uses of the corporate campaign is to pressure non-union companies to accept representation of their employees without a secret ballot election.").

[22] Brudney, *supra* note 19, at 738.

[23] Jarol B. Manheim, *Corporate Campaigns: Labor's Tactic of The "Death of a Thousand Cuts"*, CRC [Capital Research Center], Labor Watch (Jan. 2002), *available at* capitalresearch.org/pubs/pdf/x3760036252.pdf (quoting AFL-CIO secretary-treasurer Richard Trumka).

[24] Garden, *supra* note 19, at 2622.

Second, according to the late Wharton School Professor Herbert R. Northrup and attorney Charles H. Steen, the hallmark of many corporate campaigns is "regulatory harassment," a term used by the United Steelworkers of America.[25] Regulatory harassment involves a union's coordinating or making complaints about the target employer to various federal, state, and local authorities responsible for regulating the employer, triggering formal investigative processes. Regulatory harassment "snowballs the agencies' investigative processes with professionally-executed publicity to maximize on as many interlocking fronts as possible the distraction and compliance costs that must be borne by the target company."[26]

Third, corporate-campaign organizing is often distinctly top down rather than bottom up, initiated and run by a union that targets a particular employer for the union's own purposes rather than by an employer's employees who have reached out to the union to support their own organizing efforts.[27] In

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[25] Northrup & Steen, *supra* note 19, at 783 (citing United Steelworkers of America, A Union for the 21st Century 7 (1995)) & 803.

[26] *Id.* at 784.

[27] *See* Joe Crump, *The Pressure is On*: *Organizing without the NLRB*, 1 LAB. RES. REV. #18, at 35-37 (1991), *available at* http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss18/8 (advising unions to "organize employers, not employees" because "[e]mployees are complex and unpredictable [and] [e]mployers are simple and predictable"). Mr. Crump further explains:

> I don't believe we have the luxury of sitting around and hoping that employees trapped in a 'union free environment' will come knocking on our door looking for a solution to their problems. If organizing is the lifeblood of the labor movement, then we have to create our own reality, by

contrast to traditional organizing efforts, a union's goal in a corporate campaign is often *either* to obtain the employer's agreement to neutrality, card-check, and other pre-recognition concessions *or* to put the employer out-of-business. As one union organizer explained:

> My local, UFCW 951 in Michigan, subscribes to this policy [of not using the NLRB in organizing] by defining successful organizing in one of two ways: either a ratified, signed collective bargaining agreement with a previously non-union employer or a significant curtailment of a non-union operator's business, including shutting the business down. Neither of these outcomes will occur by relying on the NLRB.[28]

Remarkably, a union's driving a non-unionized employer out of business does not benefit the employees of that employer in any way, even though these are the very employees whose interests the union is ostensibly seeking to represent. But destroying non-unionized businesses can benefit the union. The elimination of non-unionized competitors within a marketplace will inevitably aid the targeted employer's unionized competitors, if any, and their employees who are already members of the union. Shutting down non-union businesses within a marketplace therefore solidifies and expands the union's power, influence, and financial foundation irrespective

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> making our own breaks. And that means focusing on employers and making them pay for operating non-union.

Id. at 37-38.

[28] *Id.* at 34.

of the interests of the employees of the targeted employers.[29]

Finally, "[f]or all of these activities [involved in a corporate campaign], the union signals that the campaign need not continue if the company acquiesces to the union's labor relations objectives," i.e, entering a pre-recognition agreement providing for neutrality and card check procedures.[30]

B. Unions' practices during corporate campaigns can cross the line to become extortionate.

Although some union "corporate campaigns" may consist of lawful applications of permissible economic and social pressure, others involve threatened or actual harm to employer property interests, the willful abuse of regulatory and legal processes, and a malicious intent to destroy a business if it fails to enter a pre-recognition agreement or other agreement with the union. When union corporate campaigns cross the line, employers have responded with lawsuits charging unions with extortion, RICO violations, and other state and federal violations. These cases demonstrate the unlawful extremes to which some unions will go in their efforts to exact pre-recognition

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[29] *Id.* at 35 ("After a three-year struggle, the battle with Family Foods is over. Do we represent the employees? No. The company went out of business. . . . A couple of stores are empty, but I am sure that many of their former patrons are now shopping in unionized stores."); *id.* at 42 (one advantage to using corporate campaigns is that *"[y]ou don't have to wait for a 'hot shop' to organize" but rather you "determin[e] what nonunion company is hurting your organized shops and [take] action to protect your members' working conditions*" (emphasis added)).

[30] Brudney, *supra* note 19, at 743-44.

agreements like the one at issue here or similar concessions. These cases show that union conduct in seeking such agreements by way of a corporate campaign can become extortionate within the meaning of state law or RICO. Certainly, if allegations about a union's misconduct in demanding pre-recognition agreements in exchange for calling off a corporate campaign can state claims under these other laws, then the allegations should similarly be sufficient to state a claim for the violation of Section 302, the very purpose of which is to root out union extortion and bribery.[31]

The following cases provide examples of the types of misconduct in which unions may engage during corporate campaigns and which may give rise to claims of extortion or similar claims.

1. *Bayou Steel Corp. v. United Steelworkers of America*

After enduring the first two years of what turned out to be a three-year corporate campaign led by the union, the employer, Bayou Steel Corp., filed a RICO suit against the union on August 10, 1995 in the U.S. District Court for the District of Delaware. *See Bayou Steel Corp. v. United Steelworkers of Am.*, No. 95-496-RRM, 1996 WL 76344, at *1 (D. Del. Oct. 1998).[32]

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[31] Even where a union's misconduct in a particular case would not satisfy the technical requirements for making out an extortion claim under state law or RICO, the misconduct may nevertheless implicate Section 302's purpose of prohibiting extortion-like behavior that undermines the integrity of the collective bargaining process. *Cf. Arroyo*, 359 U.S. at 425-26.

[32] Although the union's "corporate campaign" against Bayou Steel focused on obtaining a collective bargaining agreement rather than a pre-recognition agreement, Northrup & Steen,

According to the employer's allegations, the union's corporate campaign consisted of, among other things:

- inundating federal and state governmental agencies with complaints about the employer's alleged environmental practices and regulatory non-compliance, which complaints in turn served as the basis for union press releases attacking the company and creating negative publicity;
- interfering with the company's efforts to refinance its mortgage bonds by notifying the Securities and Exchange Commission of the various governmental agency investigations that had been instigated by the union;
- dissuading potential investors from investing in the company (e.g., by placing a tombstone advertisement in the Wall Street Journal relating to the company's financial status);
- erecting a billboard with an unflattering photograph of the company's president near his home;
- initiating protest parades in the president's neighborhood and videotaping his family as they came and left their home; and
- engaging in the same conduct regarding various members of the company's Board of Directors.[33]

Bayou Steel's suit against the union contended that the union was "engaging in a 'Corporate Campaign' of

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supra note 19, at 794, the case illustrates the potentially extortionate quality of such campaigns.

[33] *See* Northrup & Steen, *supra* note 19, at 787-790 & 829.

harassment and violence as a result of failed labor negotiations between plaintiff and defendants, with the intention of taking over or destroying plaintiff." *Bayou Steel Corp*., 1996 WL 76344, at *1. The employer alleged that the union's conduct violated RICO and state tort laws, among others. The district court denied the union's motion to dismiss the RICO and state tort claims, *id.*, and the parties settled the case at the summary judgment stage.[34]

2. *Food Lion Inc. v. UFCW*

The UFCW waged a series of attacks on a non-unionized grocery store chain as part of a larger effort by the union to eliminate competition.[35] According to one academic commentator, as part of this campaign, the union:

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[34] Northrup & Steen, *supra* note 19, at 773

[35] *See Food Lion, Inc. v. Capital Cities/ABC, Inc*., 887 F.Supp. 811, 814 (M.D.N.C. 1995) ("The UFCW has been trying unsuccessfully to organize Food Lion employees for more than a decade. The UFCW has publicly acknowledged that it has been conducting an intense 'corporate campaign' with the stated goal of unionizing Food Lion or putting it out of business. The UFCW has instigated administrative or legislative investigations by various governmental authorities by alleging violations of law or regulations on the part of Food Lion. In addition, it has financially supported litigation against Food Lion, and has courted and utilized the media to get widespread publicity for its charges."); *see also* Thomas J. DiLorenzo, *Labor Unions & 'Consumers United with Employees': The Corporate Campaign Against Food Lion*, Organization Trends (Capital Research Center, November 1995); Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J.L. & PUB. POL'Y 55, 107-109 (Fall 1995).

- created a surrogate entity called "Consumers United With Employees" ("CUE"), described as an association of consumer, labor, religious and civil liberties organizations;[36]
- engineered and planted a media story—culminating in an ABC PrimeTime Live broadcast on November 5, 1992—which claimed that the employer's stores routinely sold rotten fish and ham and covered up the spoilage by bathing the meats in Clorox;[37] and
- used other tactics that included issuing a press release regarding an alleged "independent" investigation in which it was "discovered" the employer allegedly was selling outdated infant formula at its stores.[38]

In addition, the employer claimed that the union "exploited the discovery process in certain collateral litigation to gain irrelevant information about Food Lion's policies and structure."[39] The employer alleged that the union then improperly used this information to file additional charges, disrupt management, and generate bad publicity to aid in the union's organizational efforts.[40] Ultimately, in February 1993, the employer sued the union, claiming that the union's collateral use of litigation constituted an abuse of process.[41] The employer's claim, as amended, survived

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[36] DiLorenzo, *supra* note 35, at 4.

[37] *Id.* at 3.

[38] *Id.* at 4.

[39] Northrup & White, *supra* note 35, at 108.

[40] *Id.*

[41] *Id.*; *see also Travelers Indem. Co. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 983-984 (D.C. 2001)

the union's motion to dismiss.[42] According to a filing with the Securities and Exchange Commission, the case eventually settled, with the union agreeing to discontinue its corporate campaign against the employer.[43]

3. *Smithfield Foods, Inc. v. UFCW*

In September 2005, after more than a decade trying unsuccessfully to organize an employer's hourly workers at a pork processing plant in North Carolina, a union launched a corporate campaign against the employer with the goal of obtaining the employer's "voluntary" recognition of the union. The employer filed an action in late 2007 in the Eastern District of Virginia alleging RICO violations by the union and state law claims for extortion arising from the union's misconduct during the campaign. The complaint alleged in relevant part that the union:

- repeatedly published false, misleading, baseless, negative, and damaging information about the employer to third parties, including the company's customers;[44]
- released a report in print to the public entitled: "Packaged With Abuse: Safety and Health

(generally describing the employer's lawsuit and claims against the union).

[42] Northrup & White, *supre* note 35, at 109 (citing Order, *Food Lion v. United Food & Commercial Workers Int'l Union*, No. 6:93-0582-LAJ (D.S.C. June 24, 2008).)

[43] Paul Batista, CIV. RICO PRAC. MANUAL, Form 2-B ("Model Civil RICO Complaint No. 4") (Aspen Publishers, 2013).

[44] 1st Am. Compl. ¶ 3, *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union et al.*, Civil Action No. 3:07CV641 (E.D. Va. Feb 4, 2008), ECF No. 52.

Conditions at Smithfield Packing's Tar Heel Plant" that contained false accusations;[45]

- sponsored and initiated protests at the locations of the employer's largest customers and even at the homes of officials of those customers;[46]
- solicited support for the protests, by publishing in print and on the internet false information about the Company, including in a document entitled "There's Blood on Smithfield Products" that included false accusations that the employer used "violence, threats and intimidation against workers," was a dangerous workplace, "routinely fire[d] injured workers," and "stir[red] racial tensions'"[47]
- lobbied various public bodies to pass resolutions "condemning Smithfield and banning the sale of its products;"[48]
- sent letters to financial analysts inviting them to view the union's website attacking the company and containing false information about it;[49]
- wrongfully interfered with the employer's shareholder meetings;[50]
- wrongfully caused an environmental commission to deny the employer's application to

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[45] *Id.* ¶ 88.

[46] *Id.* ¶ 97.

[47] *Id.* ¶ 99.

[48] *Id.* ¶ 141-154.

[49] *Id.* ¶ 155-158.

[50] *Id.* ¶ 159-167.

renew and expand its National Pollutant Discharge Elimination System permit;[51] and

- filed numerous frivolous and objectively baseless regulatory claims.[52]

Based on these allegations, the employer claimed that the union had engaged in extortion under North Carolina and Virginia law and violated RICO. The union moved to dismiss, contending, among other things, that the pre-recognition agreements that it sought by way of its corporate campaign did not constitute valuable property that could be extorted. The district court disagreed and denied the motion. *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 633 F.Supp.2d 214, 232 (E.D. Va. 2008). The district court found:

> [T]he right to recognize (or not) a union as bargaining representative is among the most valuable and important of rights possessed by business owners. The very existence of the Corporate Campaign concept is founded on the recognition that the exercise of that right is of great import and of great consequence. [T]he right of voluntary recognition cannot, standing alone, be bought or sold or exercised by a third party. That certainly does not mean . . . that the right is not valuable . . . .

Id. at 224. Accordingly, the court held that "[b]ecause the Complaint adequately alleges that the Defendants are attempting to extort from Smithfield . . . its right to refrain from recognizing unions, the Complaint

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[51] *Id.* ¶ 168.

[52] *Id.* ¶ 168-188.

adequately alleges that the Defendants have committed predicate acts of extortion." *Id*. at 225.

In October 2008, the district court also denied the union's motion for summary judgment. *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp.2d 789 (E.D. Va. 2008). The court held that the employer had "presented sufficient evidence for a jury to conclude that the Defendants acted with a 'wrongful purpose' (i.e., wrongful means) through their corporate campaign, namely, that the campaign sought to force [the employer] to give up valuable property rights in recognizing the Union and agreeing to a first contract." *Id.* at 802. Shortly after the district court's decision, the union and employer entered a settlement agreement.[53]

4. *Sodexo Inc. v. SEIU*

In an effort to represent more than 80,000 Sodexo employees, the SEIU demanded that Sodexo allow the union to unionize as many of its employees as the union desired or else be subject to "perpetual assault."[54] When the company did not accede, the union launched a corporate campaign that the employer alleged included, among other things:

- union supporters' infiltrating Sodexo-catered events and throwing plastic cockroaches onto food being served at those events;[55]

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[53] Settlement Agreement, *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union et al.*, Civil Action No. 3:07CV641 (E.D. Va. Oct 31, 2008), ECF No. 295.

[54] Compl. ¶¶ 2, 10 & 138-58, *Sodexo, Inc. v. Service Employees Int'l Union et al*., Civil Action No. 1:11-cv-00276 (E.D. Va. Mar. 17, 2011), ECF Nos. 1 & 1-1.

[55] *Id.* ¶¶ 261-62.

- intruding into Sodexo's computer network and embedding internet links that lead to the Union's own, anti-Sodexo propaganda;[56]
- staging disruptive protests and intentionally being arrested in order to maximize media coverage of their attacks;[57]
- sneaking into hospitals and distributing bogus "surveys" to patients asking them whether the food served there by Sodexo contained bugs, rat droppings, mold and flies;[58] and,
- threatening individual Sodexo employees and distributing "Wanted" posters of Sodexo managers.[59]

SEIU indicated it would stop the corporate campaign only if Sodexo capitulated to the union's demands, which included, among other things: (1) foregoing an NLRB-supervised secret ballot election and entering into a "neutrality" agreement requiring Sodexo to remain silent on the issue of unionization during the campaign; (2) agreeing to allow the Union into Sodexo's places of business at any time of their choosing to say whatever they wanted to Sodexo employees; and (3) agreeing to predetermined collective bargaining terms.[60]

In March 2011, after having endured more than a year of the union's corporate campaign, Sodexo filed a 125-page complaint in the Eastern District of Virginia

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[56] *Id.* ¶¶ 264-67.

[57] *Id.* ¶¶ 193, 199 & 246-51.

[58] *Id.* ¶¶ 225-26.

[59] *Id.* ¶¶ 202(a).

[60] *Id.* ¶¶ 85, 129.

alleging, among other things, RICO violations. The union moved to dismiss the complaint, contending, among other things, that the allegations failed to constitute "attempted extortion" under RICO.[61] The district court disagreed and denied the motion.[62] In September 2011, prior to the conclusion of discovery, the parties reached a settlement.[63]

C. The Eleventh Circuit's decision to remand is consistent with the developing law governing unions' new campaign tactics.

Some pre-recognition agreements between employers and unions are truly voluntary, represent cooperative efforts to set mutually acceptable ground rules for organizing campaigns, and are not subject to Section 302. Here, however, the Eleventh Circuit's decision to deny the union's motion to dismiss and to remand the case to the district court to determine whether the agreement at issue involved extortionate conduct is the right one in light of the changing landscape of union organizing, as the above-referenced cases demonstrate.[64] When a union that does not

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[61] Mem. P. & A. Supp. Defs.' Mot. Dismiss at 1 – 2, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. June 6, 2011), ECF No. 28.

[62] Order, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. July 26, 2011), ECF No. 52.

[63] Stipulation of Dismissal and attached letter, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. Sept 19, 2011), ECF Nos. 77 & 77-1.

[64] *See also* U.S. Amicus Br. 15 – 16 (May 24, 2013) (opposing the petition for a writ of certiorari and the conditional cross-petition for a writ of certiorari on ground that it "would be

represent an employer's employees targets that employer with a corporate campaign to compel the employer to grant the union contractually enforceable waivers of the employer's rights to oppose the union's organizing efforts, the union is clearly demanding a thing of great value to the union itself. Whether such campaigns cross the line to become extortionate, and whether the pre-recognition agreements that unions exact as a result of such campaigns violate Section 302 and are unenforceable, will depend on the particular facts of the case, as the Eleventh Circuit here correctly determined.

CONCLUSION

For all of the reasons set forth above, a pre-recognition agreement granting a union that does not represent the employer's employees the contractual right to enforce the employer's waiver of its property, speech, and statutory rights, which the employer might otherwise use to oppose the union, can constitute a "thing of value" under Sections 302(a)(2) and (b)(1). The Court should affirm the judgment of the court of appeals.

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beneficial to allow the courts to consider the application of Section 302 to different types of promises in voluntary recognition agreements" and that "[c]onsideration of agreements that contain different terms could illuminate whether any type of agreement would as a general matter implicate the policy concerns underlying Section 302").

Respectfully submitted,

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