No. 12-99

IN THE
Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL, ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITIONER

Of Counsel
James Oldham,
NAA President
GEORGETOWN LAW
600 New Jersey Ave., NW
Washington, D.C. 20001

Matthew W. Finkin
Counsel of Record
THE UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, IL 61820
(217) 333-3884
mfinkin@illinois.edu

Barry Winograd
1999 Harrison Street,
Suite 1400
Oakland, CA 94612

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes.[1] Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id*.

The Academy's stringent rules assure that only the most active and well-respected practitioners are elected to membership along with scholars specially selected for significant contributions to the understanding of labor law and labor relations. Members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 600 U.S. and Canadian members.

---

[1] Rule 37.6 statement: Counsel for *amicus* are the sole authors of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements—*see*, *e.g.*, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001)—as well as in cases concerning the law of the arbitration of individual statutory claims. *See*, *e.g.*, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

This case presents a question of whether a contract between a company and a union under which the parties structure their relationship in anticipation of potential union recognition and collective bargaining implicates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The contract includes arbitration as an integral component of the system it creates. The system encompasses both a pre-recognitional phase and structures the parties' relationship and obligations should the union secure majority employee support as the exclusive bargaining representative. The Academy's members have considerable experience under such contractual pre-recognition governance systems. In fact, the arbitrators who served under the contract presented here are Academy members; one is a former president of the Academy. The Academy submits that it is particularly well situated to advise the Court about the role of neutral umpireship in an analysis of the § 302 issue.

SUMMARY OF ARGUMENT

The Question Presented is whether an employer's participation in a regime of labor-management relations that structures the parties' relationship, in anticipation of potential union recognition, "pays" or "delivers" a "thing of value" to the union in violation of criminal law. The court below, as have the other courts, focused solely on the rules contained in the agreement. No judicial attention has been devoted to the role of arbitration as a component of the negotiated system as a whole. Once the role of arbitration is considered, it is apparent that what is "paid" or "delivered"—note the awkward statutory usage—is a system of industrial self-government in which arbitration plays a key role in overseeing the meaning, including the lawfulness, of the system. Such a pre-recognitional governance system is no more encompassed by § 302 than is the system of industrial self-government created by a collective bargaining agreement given legal effect through § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

In fact, it is quite impossible to distinguish a pre-recognition exchange of terms, of union access in return for labor peace subject to arbitral oversight, from a post-recognition exchange of terms, of recognition of union and management rights in return for labor peace subject to arbitral oversight. To accept the applicability of § 302 to the former is to extend the potential applicability of criminal law to the latter. Both would be antithetical to well-established labor law and policy.

ARGUMENT

I. A Contract Governed by § 301 of the Labor Management Relations Act May Submit the Lawfulness and Scope of an Employer's Obligations to Arbitration Without Fear of Criminal Sanction.

The Court is presented with an executory contract between an employer engaged in interstate commerce and a union representing employees in that industry. The employer has promised to afford the union access to the employees the union wishes to represent; has promised not to oppose the union in its effort to secure majority support—a promise of non-belligerence; and has promised to recognize the union upon a determination of majority support made by a neutral arbiter. In return, the union has agreed to refrain from coercion or threats of employees, and to refrain from the use of lawful means to bring economic pressure on the employer to secure recognition as an exclusive bargaining representative—a promise of labor peace. The union also agreed to fundamental management rights, including management's right to judge the suitability of applicants for hire, and a ban on union bias in job referrals.

This structure of autonomous self-government by private parties in the matter of representation is made subject to arbitration, available to both sides, and not only by a neutral, but by one of experience and integrity. The arbitrator is charged with deciding any dispute arising under the system, including a dispute on whether the system itself is lawful. The arbitrator's decision is final and binding. There is no severability clause: the system of

arbitration encompassed by the contract is part-and-parcel, an inextricable component of the self-governing system the contract creates. And, in fact, arbitration was invoked in this case. In one proceeding, the employer contested whether the entire system was lawful under § 302. The arbitrator, a noted figure in the profession, analyzed the evidence and the law, and held the system lawful. The federal district court enforced his award. The employer did not appeal. Now Respondent, in his complaint, objects to the arbitrator's decision and seeks to enjoin future arbitration proceedings.

Amicus submits that a pre-recognitional contractual regime that accords arbitration an integral role is exempt from criminal scrutiny under § 302: certainly, as here, after the lawfulness of the contract has been sustained by an arbitrator under § 302(c)(2); but also where arbitration is available though not invoked. The reason is simple: The system of self-government created by the contract, which features and is contingent upon arbitration as a central component of the system, is not—and cannot be—a "thing of value" "paid" or "delivered" to a labor organization within the meaning of § 302.

A. The Instant Contract is Governed by § 301 of the Labor Management Relations Act.

Section 301 of the Labor Management Relations Act confers jurisdiction on federal district courts for a claim that a contract made between an employer and a labor organization has been violated. The Court has held that such a contract need not be a collective bargaining agreement made with a majority representative setting terms and conditions of

employment. It may be a strike settlement agreement made with a union that has lost a majority; it may even be an agreement made with a non-majority representative for its members. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28-29 (1962). The Court explained how that is so in the context of a strike settlement, but in terms that strongly resonate here:

> It is enough that this is clearly an agreement between employer and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within § 301 (a). "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and…industrial peace can be best obtained only in that way."

Id. at 28 (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Lincoln Mills held that § 301 commissioned the courts to create a body of labor-management relations law flowing from agreements made subject to that section. The role of arbitration under § 301 was charted in the *Steelworkers Trilogy* in 1960—*United Steelworkers of America v. American Mtg.*

Co., 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960)—and has remained a pillar of federal labor policy ever since. In a nutshell, it has long been national labor policy under § 301 to accord substantial deference to the system of industrial self-government and to arbitration created by agreements between management and labor, including the resolution by arbitrators of representation issues arising in contractual disputes. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

To be sure, the instant "neutrality" agreement is not a collective bargaining agreement; it does not detail the employees' terms and conditions of employment, though it provides for that eventuality. The agreement deals principally with the pre-conditions for the achievement of a collective bargaining agreement; but it also details how the parties will deal with one another going forward—a promise of non-belligerence in return for a promise of labor peace—and vests umpireship of the regime in a jointly selected neutral arbitrator. The agreement draws sustenance from the teaching in *Lincoln Mills*, the *Trilogy*, and *Lion Dry Goods*, and which the courts have faithfully followed for decades, including application to pre-recognition neutrality agreements, to require arbitration and to confirm awards. *See, e.g.*, *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC,* 390 F.3d 206, 209-210, 219 (3rd Cir. 2004); *AK Steel v. USW,* 163 F.3d 403, 407-409 (6th Cir. 1998); *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel,* 996 F.2d 561, 566-

567 (2d Cir. 1993); *Patterson v. Heartland Indus. Partners, LLP,* 428 F. Supp. 2d 714, 717 (N.D. Ohio 2006). Here, too, the arbitrator is part-and-parcel of a system of industrial self-government[2] that can apply statutory law in the forum agreed upon by labor and management. *Cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (employment discrimination statutory claims); *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The question, then, is whether § 302 can nullify a contract governed by § 301, by relying on the very terms to which § 301 gives full effect, terms that demonstrate a mutual effort to secure peaceful

---

[2] The relevance of this feature of the U.S. law of industrial relations under § 301 is illuminated by the observations of an astute Canadian scholar:

> Labour law has always been distinguishable by the extent to which it permits and encourages employers and unions to develop their own standards and norms, most notably through the mechanisms of collective bargaining and grievance arbitration. The state[]…uses regulation to establish the framework that enables these private norm-producing activities to function effectively, but leaves it to the parties to define most of the substantive rules of employment.…*The state plays a similar role in relation to neutrality agreements*. These agreements are bargained privately, but within specific parameters defined by labour law.…The state establishes an environment in which neutrality agreements can operate and make industrial relations sense, yet leaves it to the parties to decide whether such an agreement will be useful to them and, if so, what its content and form should be.

David Doorey, *Neutrality Agreements: Bargaining for Representation Rights in the Shadow of the State*, 13 Can. Lab. & Emp. L. J. 41 (2006) (footnote omitted) (emphasis added).

relations in the matter of employee representation and which provide for arbitration as part of that self-governing system. An arbitrator, in giving effect to an agreement consonant with the Court's teachings on the meaning of § 301, cannot be "paying" or "delivering" something prohibited by § 302.

B. Section 302(a)(2) Does Not Apply to This Agreement.

Analysis of the relationship of § 302 to § 301, and the texture of law developed under it, is aided by three considerations. First, § 302 exempts the "payment or delivery of any money or other thing of value" in satisfaction of an arbitral award. Second, § 302 defers elsewhere to self-governing umpireship. Third, as a criminal statute, § 302 should be read closely to conform to what the legislature intended in which the fact of deference to a system of industrial self-governance should play a critical role.

1. Section 302(c)(2) Excludes Arbitral Awards From the Reach of § 302(a)(2).

The plaintiff's theory is that the performance of the promises management made in the neutrality-recognition agreement "paid" or "delivered" a "thing of value" to the union. But the employer also agreed to a system of arbitral umpireship within which the employer could—and did—challenge the lawfulness of its promises under § 302. There is no dispute that the arbitrator had the power to consider the claim, just as the district court directed when the employer resisted arbitration. The employer presented the claim. The arbitrator deliberated and was not persuaded. He concluded that the agreement was an

arm's length bargain, without any corruption underlying the parties' action—answering the exact question concerning the intent of the parties that the Eleventh Circuit has posed on remand. The arbitrator's award directed that the contract be performed; and the district court confirmed the award. No appeal was taken. It follows that all further challenge is barred according to the statute, absent a showing of fraud or duress.[3]

The fact that the plaintiff below was not a party to the arbitration is beside the point. The plaintiff's claim is brought under § 302, but, by its plain language, § 302 exempts—"shall not be applicable to"—the payment or delivery of anything of value whose payment or delivery has been arbitrated and awarded. The interplay between this exemption and the other provisions of § 302 was explored by the court in *Humility of Mary Health Partners v. Local 377, Teamsters*, 296 F. Supp. 2d 840, 845-848 (N.D. Ohio 2003) (reviewing authority). As long as the arbitrator resolved the dispute by interpreting the agreement in accord with the teachings of this Court, the award exempts what it orders from the reach of § 302. *Id. See also Washington Post v. Washington-Baltimore Newspaper Guild Local 35*, 787 F.2d 604, 606-607 (D.C. Cir. 1986) and *Paperworkers v. Misco, Inc.,* 484 U.S. 29 (1987); *cf. Labor Relations Div. v. Teamsters Local 379*, 156 F.3d 13 (1st Cir. 1998)

---

[3] Section 302(c)(2) provides:

The provision of this section [302] shall not be applicable…(2) with respect to the…delivery of any…thing of value in satisfaction of a[n]…award of an arbitrator or impartial chairman….in the absence of fraud or duress.

(award that does not interpret the parties' contract in accord with the Court's teaching does not bar the application of § 302). In this case, the award was judicially affirmed. What it awarded, enforcing the agreement, is therefore exempt from § 302 challenge. That is the plain meaning of the Act.

This exemption provides more than a shield to protect the parties; it bars reliance on § 302 as the basis for a collateral attack. This has practical significance in view of the fact that research shows the vast majority of neutrality agreements provide for arbitration to resolve disputes.[4]

In sum, assuming *arguendo* that the company's performance of the contract pays or delivers something of value within the meaning of § 302—which is the plaintiff's theory, but which *amicus* believes to be untenable—it cannot now be challenged under § 302 for the simple reason that § 302, by its terms, does not "apply."[5] Assuming further that the executory promise remains a justiciable question for this Court's attention, *amicus* submits that the better reading is to hold § 302 inapplicable to pre-recognition agreements that include arbitral oversight whether resorted to or not. To rule otherwise would frustrate the mandate of § 301 as interpreted in *Lincoln Mills*.

---

[4] Adrienne Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 47-48 (2001).

[5] The same provision exempts the payment or delivery of a thing of value ordered by a court. Thus it pays to stress for purposes here that Congress accorded arbitration an equal status.

2. A Neutrality-Recognition Contract That Provides for Arbitration as Part of its System of Governance Does Not "Pay," "Lend," or "Deliver" a "Thing of Value" Within the Meaning of § 302.

The principal question here is not whether unions value neutrality-recognition agreements, but whether an employer who enters into a neutrality-recognition agreement with a union is making a "pay[ment]" or "deliver[y]" to the union of any "money or other thing of value" as those terms are used in § 302. It is important to note that section 302 criminalizes not just "demand[s]" by unions presented to employers, but "request[s]" as well. The test under § 302(b) for determining whether a request by a union for an agreement from an employer, such as a neutrality-recognition agreement, is a criminal "request" cannot be whether the union "values" what it is requesting. If the test were one that turned on value to the union of what is requested, then every request by a union made on any subject—wages, benefits, and cause for discharge, to name just a few—would be deemed a request for a "payment" or "delivery" of a "thing of value" to the union and would therefore fall within the basic criminal proscription of § 302(b). *Amicus* submits that an employer that enters into a neutrality agreement subject to arbitral oversight is not making any statutorily prohibited payment or delivery.

At the threshold, it is important to stress that § 302 is a criminal law. Those who must guide their conduct on pain of criminal sanction should have fair

warning of what is proscribed. *Babitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 n. 18 (1995) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)); *United States v. Lanier*, 520 U.S. 259, 226 (1997). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 11 (2004) (on the construction of laws with both criminal and civil effect). Criminal law is a blunt instrument. Even if well intended by the prosecutor, or by the civil plaintiff as the alter ego in this proceeding, the criminal law should not venture into matters not clearly commanded by the text. This is especially so where another legal tool, as here, speaks more specifically to the issue of undue managerial influence on unions and where the power to enforce that law is vested in an expert administrative agency rather than a criminal jury.

Under Section 8(a)(2) of the National Labor Relations Act, it is an unfair labor practice for an employer to "contribute financial or other support" to a labor organization. 29 U.S.C. § 158(a)(2). *A fortiori*, the payment or delivery of anything of value to a union in violation of § 302 would constitute an unlawful contribution of financial or other support to the union in violation of § 8(a)(2). And, *per contra*, forms of financial or other support that constitute permissible labor-management cooperation not violative of section 8(a)(2) could not violate § 302. *See*, *e.g.*, *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986). *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW ANALYSIS AND ADVOCACY, § 9.6 (2013) ("Cooperation Distinguished From Support"). Any person can file a charge of unfair labor practice with the National Labor

Relations Board; he or she need not be a party to the agreement or even claim to be personally aggrieved. Consequently, a remedy for impermissible financial or other support by management to a union already exists without resort to criminal law.

As the above demonstrates, the Board has long evaluated claims of unlawful employer support. In that role, the Board has sustained, with recent judicial approval, a pre-recognitional system similar to the one challenged here as not constituting impermissible support prohibited by the Labor Management Relations Act. *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012) *enf'g Dana Corp.*, 356 NLRB No. 49 (2010). The Eleventh Circuit in this case has opened an avenue that disrupts the role of the administrative agency and disrupts settled law. Section 302, since its passage over 65 years ago, has never been applied in this fashion. The historical record argues powerfully against a novel extension now.

A further problem with § 302 is that it is inexact, to say the least. In some situations, the language is "precise." *Arroyo v. United States*, 359 U.S. 419, 423 (1959). But no precision attaches to the general notion of what a "thing of value" must be, the "payment" or "delivery" of which is made a crime. As a leading academic observed shortly after the Taft-Hartley Act took effect, "just what…section (302) meant to achieve is hard to tell." Charles O. Gregory, Labor and the Law 451 (1949 rev. ed.).

> It is possible, of course, that Congress was not able to describe in positive terms just what it wanted to make unlawful with respect to such payments. Perhaps it got so

> worked up about reported shakedowns of all sorts by union officials that it thought it easier to take a dismal view of all cash transactions between employers and unions, except those enumerated.

Id. at 452. When § 302 was amended in 1969, the House Report tersely summarized its purpose: "This prohibition was enacted to prevent bribery, extortion, shakedowns, and other corrupt practices." H.R. Rep. No. 286, 91st Cong., 1st Sess. *reprinted in* 1 U.S. Code Cong. & Admin. News at 1159-1160 (1969).

The Court is not presented here with bribery, extortion, shakedown, graft, or kickbacks. The Court is presented with a structured labor-management relationship in which umpireship by an experienced neutral selected by the parties plays an integral role. It is impossible to conceive that Congress would have had this in mind as within the compass of § 302.

Guidance can be drawn from two other sources. The first, as the Court has instructed, is the "entire text of § 302." *United States v. Ryan*, 350 U.S. 299, 305 (1956). It is concerned with something that can be paid, lent, or delivered. *Amicus* submits that an entire system of labor-management relations subject to arbitral umpireship is simply not such a thing.

The Labor Management Relations Act included sections 301 and 302. The former embraced the enforcement of agreements for labor arbitration which had matured into a unique feature of American industrial relations. R.W. Fleming, THE LABOR ARBITRATION PROCESS Ch. 1 (1967) ("History and Growth"). Not surprisingly, then, when in the latter, Congress addressed the specific wrong of

money payments to unions, it exempted payments to union-sponsored trust funds which, at first blush, as a cash payment to a union outright, would seem to come under § 302. But Congress exempted such cash payments when two conditions were met—that the funds be jointly administered and that any dispute would be resolved by an "impartial umpire." § 302(c)(5)(B).[6] In other words, Congress decided that even where the payment of money to a union is present, it is exempt from, and cannot be considered corrupt under, § 302(a)(2) when the payment is subject to labor-management cooperation and neutral arbitral umpireship. It follows *a fortiori* that other systems of labor-management cooperation subject to arbitral oversight that do not involve the payment, lending, or delivery of money or anything like money were not and cannot be a subject of that section's concern.

The second source of guidance looks to labor arbitration under § 301 and the deference accorded by national labor policy. It is critical to stress that the challenge presented here is not to a specific payment, gift, or loan to a union agent or officer, but rather to an entire system of pre-recognition governance, an exchange of mutual management-

---

[6] This exemption is noted by the Court in *Arroyo v. United States*, *supra*, at 425-427. It is discussed at length by Harry Mills & Emily Clark Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY 564-568 (1950), and by Charles O. Gregory, LABOR AND THE LAW, *supra* at 452 ("This last part dealing with payments for trust funds is subject to a proviso too complicated to discuss, except to remark that Congress was certainly worried about any of the dough sticking to the fingers of the union boys!").

union obligations subject to arbitral oversight of non-belligerence and labor peace. *See Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., supra. Cf. Montague v. NLRB*, *supra*; *Verizon Information Sys.*, 355 NLRB 558 (2001). When § 302(a)(2) is examined through the lens of the rich body of law and experience under § 301, the conclusion must be that a contract of this nature cannot be a criminal act proscribed by § 302. To reason otherwise would permit any employee opposed to unionization to claim, as the circuit court stated in its first decision, that the facilitating of organization under the neutrality agreement works a wrong as it might well "substantially increase the likelihood that Mulhall will be unionized against his will." *Mulhall v. United Here Local* 355, 618 F.3d 1279, 1289 (11th Cir. 2010). In fact, the court termed this a "'probabilistic harm'." *Id.* But the very same claim could be made for any election in which an employer unilaterally declines to oppose unionization, decides to remain neutral, which it lawfully may, and a majority opts for a union. In other words, the reasoning rests on the assumption that the Labor Act compels employer hostility to employee representation. That is not so. Robert Gorman & Matthew Finkin, LABOR LAW, *supra*, § 9.5 at p. 327-28 ("It is not unlawful assistance for an employer simply to state its preference that employees join a particular union….") (reviewing authority).

Two further considerations lead to the exclusion of § 302. First, the agreement structures the union's relationship to management, not only *after* recognition, requiring negotiation over terms and conditions of employment, the scope of union

recognition, management rights, and the processing of grievances, but also *before* recognition through rules on access, non-belligerence, recognition and labor peace. If the latter were to be a criminal act so, too, would the former; that is, a collective agreement negotiated after certification of majority status by a neutral arbitrator—or even upon voluntary recognition of actual majority status. Judge Restani, in the decision of the court below, recognized the implications were § 302 to apply here: "The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights." (667 F.3d at 1216-17.)

Second, the agreement provides for arbitration of disputes arising under it—including the very lawfulness of the undertaking itself. If an entire regime of labor-management pre-recognitional day-to-day governance that includes neutral arbitral oversight is a crime, so, too, could all other ordinary labor relations structures that include collective bargaining agreements and arbitral oversight. The implications of Respondent's § 302 argument should prompt the Court to read § 302 as inapplicable in this setting. To paraphrase Justice Jackson, certain ends are best avoided by avoiding certain beginnings. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

CONCLUSION

For well over half a century, *amicus* has closely observed the maturation of the American system of industrial relations and worked to advance labor arbitration. The Academy's members are experienced not only with established collective bargaining

relationships, but also with those pre-recognitional regimes of which arbitration is an integral part.[7] In the Academy's experience, such regimes are a well-established feature of healthy labor-management relations. It would be a significant retreat to place them under a cloud of potential criminality. Were the Court to decide that § 302 could apply to these agreements, companies intent on establishing good labor management relations in advance of union recognition would tend to steer clear for fear of potential criminal prosecution or third-party civil litigation. The text of § 302 warrants neither this application nor that result.

August 2013

Respectfully submitted,

Of Counsel
James Oldham,
NAA President
GEORGETOWN LAW
600 New Jersey Ave., NW
Washington, D.C. 20001

Matthew W. Finkin
Counsel of Record
THE UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, IL 61820
(217) 333-3884
mfinkin@illinois.edu

Barry Winograd
1999 Harrison Street,
Suite 1400
Oakland, CA 94612

---

[7] *Amicus* should not be understood to suggest that the contractual establishment of a regime of pre-recognitional governance that lacks an arbitral component would be encompassed by § 302. It is, rather, that *amicus* NAA has neither the constitutional foundation that authorizes it to address, nor any experience with such regimes. *See* text accompanying n. 3, *supra*.