Nos. 12-99, 12-312

In The Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, ET AL.,

Respondents.

MARTIN MULHALL,

Petitioner,

v.

UNITE HERE LOCAL 355, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT HOLLYWOOD GREYHOUND TRACK, INC.'S BRIEF

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QUESTION PRESENTED

Section 302(a)(2) of the Labor-Management Relations Act prohibits an employer "to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . to any labor organization . . . which represents or seeks to represent . . . any of the employees of such employer[.]" 29 U.S.C. § 186(a)(2). Likewise, Section 302(b)(1), 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 prohibited by [Section 302(a)(2)]."

The question presented is whether Section 302 prohibits a union from requesting and receiving a contract with an employer, whose employees it seeks to represent, whereby the union promises to contribute substantial money and other resources to support a ballot proposition favored by the employer and to refrain from picketing, boycotting or striking the employer, in exchange for the employer agreeing (1) to refrain from opposing the union's efforts to unionize its workforce; (2) to allow the union access to, and use of, non-public areas of its property to conduct its organizing activities; (3) to furnish the union monthly lists of its employees and their addresses to facilitate union organizing; (4) to voluntarily recognize the union as the exclusive representative of its employees based solely on authorization cards and without seeking a secret ballot election supervised by the NLRB;

QUESTION PRESENTED – Continued

and, (5) to agree to allow a third-party arbitrator to set the terms of a collective bargaining agreement establishing the wages, hours and terms and conditions of employment for its employees.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties in the proceedings before the Eleventh Circuit Court of Appeals were Petitioner UNITE HERE Local 355 ("Local 355"), Respondent Martin Mulhall, and Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras").

Mardi Gras is not a publicly-held company. Its parent company is Hartman & Tyner, Inc.

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STATEMENT OF THE CASE

A. Background of Florida Gaming Law

Prior to 2004, the Florida Constitution prohibited the operation of Vegas-style slot machines throughout Florida. *See* Fla. Const. art. 10, § 7. In 2004, Florida voters amended the State's constitution to permit the voters of Broward and Miami-Dade counties to hold county-wide referendums on whether to authorize slot machines within existing licensed pari-mutuel facilities, including greyhound racing tracks. Fla. Const. art. 10, § 23(a). Subsequently, in 2005, the voters of Broward County approved ballot measures authorizing the operation of slot machines.

B. Complaint Allegations and Terms of the Memorandum of Understanding

Mardi Gras operates a greyhound racing track and casino in Hollywood, Florida. (Pet. App. 65).[1] Local 355 is a labor organization seeking to unionize and exclusively represent Mardi Gras' employees. (Pet. App. 65). Respondent Martin Mulhall is a 40-year Mardi Gras employee who opposes Local 355's efforts to become the exclusive representative of himself and other Mardi Gras employees. (Pet. App. 64-65).

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[1] References to materials contained in the Appendix to the Petition for Writ of Certiorari are designated as "Pet. App." and references to materials in the Joint Appendix are designated as "App."

Several months prior to the 2004 election, Mardi Gras and Local 355 entered into a contractual agreement whereby Local 355 agreed not to picket, boycott or strike Mardi Gras' facility and also to financially support the ballot initiatives that would permit Mardi Gras to offer slot machine gaming. (Pet. App. 65-66, 78-86). In exchange, Mardi Gras agreed, *inter alia*, to assist Local 355's efforts to organize its employees, to voluntarily recognize the union as the employees' representative based solely on signed authorization cards and to allow an outside arbitrator to set the wages and terms of employment of its employees. (Pet. App. 65-66, 78-86).

To this end, the Memorandum of Agreement entered into between Mardi Gras and Local 355 on August 23, 2004 (hereinafter referred to as the "Agreement"), required that Mardi Gras take a "neutral approach to unionization" in response to Local 355's efforts to unionize Mardi Gras employees. More specifically, the Agreement provided:

> The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the

> employees acknowledging this agreement and its terms.

(Pet. App. 79, ¶ 4).

In addition to refraining from opposing Local 355's organizational efforts, Mardi Gras also promised to afford Local 355 otherwise unavailable access to its employees and use of its facilities. (Pet. App. 80-81, ¶ 7). In this respect, the Agreement provided that Mardi Gras "shall provide access to its premises and to such Employees" and that "the Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times[.]" The Agreement further mandated that Mardi Gras "furnish the Union with a complete list of Employees . . . showing their job classifications, departments and addresses." (Pet. App. 81, ¶ 8). Mardi Gras was also required to update the list on a monthly basis or as otherwise requested by Local 355. (Pet. App. 81, ¶ 8).

Significantly, the Agreement also required Mardi Gras to recognize Local 355 as the employees' exclusive representative based solely on signed authorization cards. (Pet. App. 81-82, ¶ 9). Under the terms of the Agreement, Mardi Gras is required to waive not only its statutory right to seek a secret ballot election supervised by the National Labor Relations Board, but also its statutory right to contest any unfair labor practices committed by Local 355 in obtaining the authorization cards. (Pet. App. 81-82, ¶ 9).

Finally, once Local 355 is recognized as the employees' exclusive representative, in the event that

Mardi Gras and Local 355 do not reach a mutual agreement within 150 days as to the employees' wages, hours and other terms and conditions of employment, the Agreement authorizes an outside arbitrator to set those terms. (Pet. App. 82, ¶ 10). This provision, typically referred to as an interest arbitration provision, is extremely broad and essentially allows an arbitrator to set all terms of employment for any Mardi Gras employee represented by Local 355, with the exception of employment terms governing retirement and profit-sharing. (Pet. App. 82, ¶ 10). In other words, if an outside arbitrator decided to immediately give a 50% raise to all bargaining unit employees, this provision would permit him or her to do so over Mardi Gras' objections.

In exchange for these commitments by Mardi Gras, Local 355 agreed that it would "not engage in a strike, picketing, or other economic activity at [Mardi Gras'] gaming facility[.]" (Pet. App. 82, ¶ 11). As alleged in the complaint, the *quid pro quo* for Mardi Gras' commitments also included an agreement by Local 355 "to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." (Pet. App. 66). Indeed, in a related case in which Local 355 sued Mardi Gras for enforcement of the Agreement, Local 355 represented that "the time and money the Union and its members spent on the political campaign to obtain a [slot machine] gaming license for Mardi Gras" was "estimated at over $100,000[.]" (App. 24).

The Agreement between Mardi Gras and Local 355 was contingent on passage of the slot machine ballot initiatives and was thereafter effective "for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility[.]" (Pet. App. 85, ¶ 15).

Following passage of the ballot initiatives and Mardi Gras' installation of slot machines, Local 355 sought enforcement of the Agreement by demanding lists of employee names and addresses, demanding access to non-public areas of Mardi Gras' casino, and demanding that Mardi Gras cease making statements opposing Local 355's efforts to organize its workforce. (Pet. App. 67). After Mardi Gras balked at providing these things of value to Local 355 out of a concern over the Agreement's legality and rejected Local 355's demand to arbitrate the matter under the Agreement's arbitration provision, Local 355 sought to compel arbitration.[2] Shortly thereafter, Petitioner Mulhall initiated the present action against both Local 355 and Mardi Gras seeking an injunction precluding enforcement of the Agreement.

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[2] *See UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655-CIV-Seitz/O'Sullivan (S.D. Fla. 2008) (Pet. App. 67, 71).

C. Course of Legal Proceedings and the Eleventh Circuit's Decision

Mulhall's complaint was initially dismissed by the district court for lack of standing. (Pet. App. 24-33). The Eleventh Circuit, in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (2010) (*Mulhall I*), reversed. (Pet. App. 34-60).

On remand, the district court again dismissed the complaint, this time reasoning that Mulhall failed to state a viable claim under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, since "none of the concessions directly benefitted any individual union official or union employee[.]" (Pet. App. 19). On appeal, the Eleventh Circuit again reversed. *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211 (2012) (*Mulhall II*). (Pet. App. 1-12).

In reaching its decision, the Eleventh Circuit held that union organizing assistance of the type promised by Mardi Gras and requested by Local 355 in this case could qualify as a "payment" of a "thing of value" within the meaning of Section 302. *Mulhall II*, 667 F.3d at 1215 (Pet. App. 6-8). Employing a "common sense" approach, the court noted that "value is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances." *Mulhall II*, 667 F.3d at 1215 (Pet. App. 6) (quoting *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964)). As to whether such value constituted a "payment" within the meaning of Section 302, the court held:

> Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 – curbing bribery and extortion – are implicated. . . . [I]nnocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.

Id. (Pet. App. 8).

Noting that Local 355 spent $100,000 on the ballot initiative as consideration for the Agreement with Mardi Gras, the Eleventh Circuit concluded that Mulhall's complaint sufficiently alleged a violation of Section 302. *Id*. at 1216 (Pet. App. 8).

SUMMARY OF THE ARGUMENT

The Labor Management Relations Act was specifically enacted to ensure that employee free choice remained sacrosanct. The LMRA's provisions were principally designed as a limitation on union authority. In furtherance of these ends, the plain language of Section 302(a) of the Act makes it unlawful for an employer to pay or deliver, or agree to pay or deliver, "any money or other thing of value" to a union seeking to represent its employees, except in nine very specific and enumerated exceptions. Section 302(b)

sets forth the reciprocal obligation making it unlawful for a union to request, receive or accept any money or other thing of value.

Although the phrase "other thing of value" is undefined by the statute, the language of the context of the statute as a whole make it clear that "value" is to be defined as a function of the recipient's "desire to have the thing." Moreover, the use of the modifier "any," as well as the broadly worded phrase "other thing" demonstrates the intent of Congress that any other thing of value not be limited to tangible items with a commercially-recognized monetary value.

In contrast to the statutory prohibitions' breadth, the exceptions to Section 302 originally enacted by Congress were very specific. Moreover, since the LMRA's original enactment, it has been amended on a number of occasions to both broaden the prohibition and to enumerate additional exceptions as deemed necessary. Given this history, Local 355's arguments, which essentially advocate a judicially-created and unenumerated exception to Section 302 liability, is unpersuasive.

Viewed against this proper definition of "value," there can be no question that the Agreement between Local 355 and Mardi Gras conveys a thing of value to Local 355. Far from just a "ground rules" agreement as Local 355 insists, the Agreement in this case mandates that Mardi Gras assist Local 355 in organizing the employees; it interferes with the employees' rights to obtain complete and factual information on the

issue of representation, even if requested by the employees; it requires voluntary recognition by Mardi Gras on the basis of authorization cards alone and to forego an NLRB-supervised election; and it requires Mardi Gras to give up its prerogative to set employee wages and employment terms and conditions in favor of permitting an outside arbitrator to set them instead if initial negotiations with Local 355 do not quickly result in an agreement.

Such contractual commitments are of obvious value to Local 355. This conclusion is aptly illustrated by the fact that Local 355 solicited these commitments from Mardi Gras in the first place, that they formed the consideration for Local 355's reciprocal contractual commitments, and that Local 355 spent in excess of $100,000 in exchange for them.

Finally, Local 355's arguments that policy considerations underlying national labor law favor cooperative agreements between employers and labor unions is misplaced. First, such policy considerations are not a valid reason to ignore the plain language of the LMRA. Second, while there is no question that labor policy favors collective bargaining as well as the peaceful resolution of labor issues, it does not follow that precluding employers and unions to bypass employees altogether and agree to terms such as those at issue in this case would undermine such policy considerations. To the contrary, even the policy considerations favoring collective bargaining presupposes that the employees have first been given a voice and voluntarily chose representation. Here, the

employees were given no such voice and did not have an opportunity to choose, or refrain from choosing, to be represented before the Agreement was agreed upon by Local 355 and Mardi Gras. Moreover, the Agreement's provisions are actually inimical to employee free choice, so far as, *inter alia*, it prevents an employer from responding to employee inquiries on unionization, it bars a secret ballot election supervised by the NLRB, and it precludes pursuit to the NLRB of any unfair labor practices conducted during union organizing. Contrary to the argument that the Eleventh Circuit's interpretation of Section 302 undermines the language and intent of the LMRA, such a construction actually supports the statute's goal of elevating employee free choice above employer and union interests.

ARGUMENT

I. A Contractual Agreement in Which a Union Requests and Receives Employer Commitments Not to Oppose Unionization, Access to Employees and Facilities, Voluntary Recognition on the Basis of Authorization Cards and Interest Arbitration Concerning Employment Terms is a "Thing of Value"

The language, structure and intent of Section 302 make it clear that contractual commitments not to oppose unionization efforts, to provide otherwise unavailable access to employees and facilities, to forego an NLRB-supervised secret ballot election in favor of

voluntary recognition of a union based solely on authorization cards, and to agree to permit an arbitrator to set the wages, hours and terms of employment for employees are things of value within the meaning of Section 302.

As detailed herein, contrary to Local 355's arguments, these contractual commitments cannot be dismissed as simple organizing "ground rules." To the contrary, these commitments implicate the precise concerns regarding potential conflicts of interest between unions and the employees it seeks to represent that underlie the enactment of the LMRA. Such agreements specifically circumvent the LMRA's express goal of fostering employee free choice by virtue of the fact that the employees have no voice in the arrangement and, further, by contractually ensuring that the employees are precluded from seeking complete information from their employer to enable them to make an informed choice.

A. Applicable Legal Standard

At the outset, it should be noted that this case is before the Court at the motion to dismiss stage. At this stage, Mulhall's complaint need only contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). In reaching this determination, courts employ a "context-specific task" and should "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678.

As the inquiry in this case turns on the proper interpretation of statutory terms and phrases, including "thing of value" and "payment, loan, or delivery," it necessarily involves a question of law to be defined by the Court. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) ("Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard"). However, to the extent that the issues in a given case are dependent upon the factual context, the inquiry may be more properly characterized as a mixed question of law and fact. *See, e.g.*, *Chandris, Inc.*, 515 U.S. at 369; *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991) (Construing definition of "seaman" in Jones Act case).

B. Section 302 of the Labor-Management Relations Act of 1947

In passing the Labor-Management Relations Act (LMRA) (also commonly referred to as the Taft-Hartley Act), Congress sought to "equalize legal

responsibilities"[3] of both labor organizations and employers by amending the National Labor Relations Act of 1935 (NLRA),[4] which had been criticized as "one-sided legislation, slanted heavily in favor of organized labor." THE DEVELOPING LABOR LAW 32 (John E. Higgins, Jr. ed., BNA Books, 5th ed. 2006); *see also Arroyo v. U.S.*, 359 U.S. 419, 425 (1959) ("[Section 302] was enacted as part of a comprehensive revision of federal labor policy in light of experience acquired during the years following passage of the [NLRA], and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process").

The LMRA emphasizes that the legitimate rights of employees are paramount and declares a policy "to protect the rights of individual employees in their relations with labor organizations[.]" 61 Stat. 136, § 1(b). Reinforcing the sanctity of employee free choice, the LMRA amended the NLRA's provision which guaranteed that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" to also

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[3] 61 Stat. 136 ("AN ACT to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes").

[4] 29 U.S.C. §§ 151-163; 49 Stat. 449 (1935).

include the specific "right to refrain from any or all of such activities[.]" 61 Stat. 136, 140, § 101; 29 U.S.C. § 157.

While the NLRA originally contained no provisions regulating the conduct of labor organizations, the LMRA regulates union conduct by, *inter alia*, adding broad proscriptions on payments to unions and their agents from employers. 29 U.S.C. § 186; 61 Stat. 136, § 302. Specifically, Section 302(a)(2) 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 any labor organization . . . which represents or seeks to represent . . . any of the employees of such employer[.]" 29 U.S.C. § 186(a)(2). Likewise, Section 302(b)(1), 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 prohibited by [Section 302(a)(2)]."

In contrast to these general prohibitions, section 302(c) establishes nine very specific exceptions. 29 U.S.C. § 186(c). These statutory exceptions include, for example, payments to a union in satisfaction of a judgment; remitting employee union dues to the union; and, employer contributions to health, pension, education assistance, and child care trust funds established by the union for the benefit of the employees. 29 U.S.C. § 186(c)(2), (4), (5) and (7).

In this case, the parties agree that none of the enumerated exceptions are applicable to the Agreement between Local 355 and Mardi Gras. Notwithstanding, as detailed below, Congress' decision to meticulously legislate numerous statutory exceptions to the general proscriptions set forth in subsections 302(a) and (b) clearly demonstrates an intent to limit the exceptions to only those enumerated in the statute.

C. The Proper Construction of "Other Thing of Value"

An employer's contractual obligation to assist a specific union in organizing its employees, to recognize that union based solely on authorization cards, and to permit an arbitrator to set employment terms for its employees is most certainly a "thing of value" within the meaning of Section 302 to a union seeking to represent the employees.

"As is true in every case involving the construction of a statute, [the] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Although the LMRA does not define "thing" or "value," the plain language of Section 302 makes it clear that Congress' intended a broad construction. To this end, the statute prohibits its payment of "any money or other thing of value." More broad language is difficult to fathom than the specific inclusion of any "other thing of value." Indeed, in *Arroyo*, this Court characterized Section 302

as a "broad prohibition" with, at the time, only five specifically-enumerated exceptions. *Arroyo*, 359 U.S. at 420. Likewise, in its most recent case involving Section 302, the Court again reiterated that "[t]he prohibitions of subsection (a) and (b)(1) are drawn broadly[.]" *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993).

In addition to the breadth of the statutory language, the Court's prior decisions also make clear that a "literal construction" of Section 302 is required. *Arroyo*, 359 U.S. at 424. In both *Arroyo* and *Demisay*, the Court has rejected arguments to supplement Section 302's language to provide more than what the statutory language actually states. For example, in *Arroyo*, the Court rejected the argument that Section 302 should be extended to prohibit the theft by a union official of trust funds lawfully paid by the employer, recognizing that the statutory language did not cover such conduct. 359 U.S. at 423-24. Likewise, in *Demisay*, the Court rejected the argument that Section 302(e) of the LMRA, which provides for injunctions to restrain violations of Section 302(a) and (b), should be construed to also provide for injunctions to require that trust fund trustees comply with the terms of the trust. 508 U.S. at 587-88. In so holding, the Court rejected the invitation to interpret Section 302 "as authorizing the development of a specialized body of federal common law of trust administration." 508 U.S. at 589.

Local 355's argument that Section 302's juxtaposition of the phrase "other thing of value" alongside

the word "money" demonstrates an intent that "other thing of value" is limited to "things that are monetary equivalents" is unpersuasive. This argument essentially invokes the principle of *ejusdem generis*, which provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir.), *cert. denied*, 131 S.Ct. 3039 (2011) (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003)). However, as the Sixth Circuit aptly noted in rejecting this very argument as applied to Section 302, "that rule applies to 'list[s] of specific items separated by commas and followed by a general or collective term,' not to a 'phrase [that] is disjunctive, with one specific and one general category.'" *Douglas*, 634 F.3d at 858 (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008)).

Aside from the literal language of Section 302(a) and (b), the structure of the statute further supports the conclusion that "things of value" was meant to be construed broadly to ensure the protection of employees from collusion by unions and employers. The fact that Section 302(a) and (b) are phrased in the broadest possible terms, while also specifying nine very specific exceptions, illustrates the breadth intended by Section 302(a) and (b). *Arroyo*, 359 U.S. at 420. As detailed below, that Congress included specific enumerated exceptions, and has amended the LMRA on

several occasions to add more as necessary, counsels against creating additional judicially-created exceptions under the guise of interpreting otherwise unambiguous statutory terms.

The implication of much of Local 355's arguments in this case is that the national labor policy favors cooperative agreements between employers and unions and, consequently, there should be an unfettered ability of employers and unions to do so without implicating Section 302. While no doubt true in many contexts, this argument is unpersuasive in this context. What Local 355's argument fails to recognize is that agreements, such as the one at issue in this case, disregard the interests and voices of the employees involved. In fact, such agreements erect barriers to employee free choice. Contrary to the implicit assumptions in Local 355's arguments, the LMRA was not enacted to make it easier for unions to organize non-union employees. It was enacted to ensure that employees were free to make that choice for themselves. Agreements whereby unions who do not represent the employees but are nonetheless given (1) control over an employer's speech; (2) access to otherwise-unavailable facilities; (3) personal employee information; (4) the ability to become the exclusive representative without the possibility of an election; and (5) a commitment to permit an outside arbitrator to set employment terms if the union is recognized and the parties are unable to quickly negotiate a collective bargaining agreement, are contrary to the LMRA's goal of ensuring that employee

free choice predominates over all other considerations.

Consistent with the "common sense" approach endorsed in *Arroyo*, 359 U.S. at 424, the Eleventh Circuit aptly recognized that whether something has "value" is a function of "the desire to have the 'thing.'" *Mulhall II*, 667 F.3d at 1215; *see also Roth*, 333 F.2d at 453.

Requiring that a "thing of value" have a recognized monetary value or commercial marketplace value substantially eviscerates the purpose of Section 302. Here again, such an interpretation would enable union representatives to trade employee loyalty for items that they subjectively value simply because a marketplace for the item does not exist or a monetary value cannot be readily established. Courts have properly rejected such a narrow interpretation. *See United Douglas*, 634 F.3d at 858-59 (Rejecting the proposition that a "thing of value" must have "monetary value" and holding that union representatives who pressured an employer to give highly sought after jobs to non-qualified relatives of union members violated Section 302); *Roth*, 333 F.2d at 453.[5]

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[5] Limiting a "thing of value" to only tangible items of value is also inconsistent with the body of case law construing the identical phrase in other statutes with similar aims, such as 18 U.S.C. § 1954 (proscribing the offer, solicitation or acceptance of a thing of value to influence operations of an employee benefit plan). *See, e.g.*, *United States v. Schwartz*, 785 F.2d 673, 680-81 (9th Cir.), *cert. denied*, 479 U.S. 890 (1986); *see also United*

(Continued on following page)

Insomuch as it is clear that Section 302 was designed to ensure employees are free to choose whether they wish to be represented by a labor organization or refrain from doing so without employer or union interference, the only construction of "thing of value" within the meaning of Section 302 that comprehensively accomplishes this aim is one in which value is defined as a function of what motivates those involved in the exchange. The Eleventh Circuit's recognition that "value" in this sense must necessarily be tied to the union's "desire to have the 'thing'" properly accounts for the statutory purpose.

D. The Contractual Commitments Exchanged in This Case Are Indisputably Valuable to Unions

The fact that the contractual commitments in this case have value is perhaps best borne out by the fact that Local 355 specifically sought them from Mardi Gras. Indeed, the valuable nature of these commitments is self-evident from the fact that they serve as the consideration for the union's contractual obligations. Without value, such contracts would be unenforceable, a result that not even Local 355 or any of its supporting *amici* are asserting.

States v. Girard, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979) (In a criminal case under 18 U.S.C. § 641, the court noted "[t]he word 'thing' notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles").

As noted above, value is not dependent upon these types of contractual commitments by an employer being tangible or that there exist a recognized commercial marketplace for them. Such artificial limitations are not supported by the plain language of the statute, nor the statute's purpose of preventing undue or improper influence in the relationship between employer and union to the detriment of employee free choice.

While there is no doubt that the payment of money or commercial items can serve to corrupt the labor representation process, this same potential for conflicts of interest is presented by the delivery of intangible things of value, such as promises of desirable job assignments or preferential schedules to employee union stewards. Such intangible benefits have the potential to undermine the loyalty of union officials in much the same manner as money or other tangible things of value. Construing Section 302 narrowly to exclude intangible things would enable employers and unions to avoid its purpose of empowering employees through the creative exchange of items that, though not tangible, nonetheless present clear value to the individuals involved.

Moreover, while there does not appear to be a recognized marketplace for the buying and selling of union organizational assistance, voluntary recognition and the imposition of an interest arbitration provision, is there really any question that such commitments would readily command a market price should a large employer of non-union employees

advertise such a "thing" for sale? Given the resources, financial and otherwise, that labor organizations devote to organizing campaigns, and in light of the fact that Local 355 in this case committed to spend more than $100,000 of its funds to gain such commitments, there is no question that these commitments command a market value.

This Court's decision in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974), supports the proposition that the commitments made by Mardi Gras in this case are valuable to Local 355. In *Linden Lumber*, the Court held that an employer which has not committed any unfair labor practices during a union organizing campaign is not required to voluntarily recognize a union which has obtained signed union authorization cards from a majority of the employees in the bargaining unit it seeks to represent. *Id*. at 310. Rather, the employer may insist that the union seek a secret ballot election supervised by the NLRB. *Id*. In so holding, the Court noted that although union authorization cards "may 'adequately reflect employee sentiment[,]'" the NLRB's "election process had acknowledged superiority in ascertaining whether a union has majority support." *Id*. at 304 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)). Given the employer's right to seek a secret ballot election even where a union has obtained a majority of union authorization cards, it is apparent that a contractual commitment given by an employer, and sought by a union, precluding an election possesses substantial value to the union.

Similarly, courts have repeatedly held that the types of things at issue in this case have significant value. *United States v. Barger*, 932 F.2d 359, 368 (6th Cir. 1991) (Provision of information); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856, n.4 (5th Cir. 1986) (use of property); *United States v. Zimmermann*, 509 F.3d 920, 926-27 (8th Cir. 2007) (Use of property); *United States v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir. 1992) (control over communications).

E. The Prohibition of Agreements Such as the One at Issue in This Case Does Not Undermine the Policy of Fostering Peaceful Relations Between Employers and Unions

Local 355 and its supporting *amici* contend that the construction of Section 302 to prohibit an agreement of the kind executed by it with Mardi Gras in this case is counter to the NLRA's intent to foster peaceful cooperation between employers and unions. This argument presents a false dichotomy. While there is no doubt that one goal of the country's labor laws is to foster peaceful labor relations, the prohibition of these types of union-employer agreements does not inevitably lead to labor unrest, nor would it undermine employee free choice. To the contrary, a prohibition of these types of agreements fosters employee choice.

Conspicuously absent from the arguments by Local 355 and its supporting *amici* is any reference to

the interests of the employees themselves. As this case amply demonstrates, employees have absolutely no voice in the negotiation and formation of agreements of the type at issue here, notwithstanding that the rights of the employees are clearly implicated. Moreover, such agreements are not analogous to collective bargaining agreements as Local 355 argues. In negotiating and implementing a collective bargaining agreement, the employees affected have already agreed to be represented by the union and the employees have a dispositive voice in the negotiation and ratification of the terms agreed upon between their employer and their union. That is not the case with an agreement of the kind at issue in this case.

Moreover, in addition to the employees having no voice in the relationship between the employer and union contrary to the expressed purpose of the LMRA in fostering employee choice, these agreements actually go further and expressly interfere with the employees' ability to seek information from their employer to the extent that the information sought might be adverse to the union's organizational interests. Hence, if an employee sought to discuss the pros and cons of unionization with his or her employer, the agreement would prevent it. Preventing unions from purchasing employer silence in this manner, to the detriment of the employees' right to make an informed choice whether to unionize or refrain from doing so, is precisely the purpose espoused in the LMRA and Section 302 in particular.

Likewise, while the labor laws favor the peaceful negotiation of collective bargaining agreements between employers and unions, it does so only to the extent that the employees involved actually choose to be represented by the union. As noted above, the LMRA specifically amended the NLRA to make it explicit that employees have the right to refrain from union representation. Accordingly, Local 355's implied premise throughout its brief that its interests are one and the same with the employees' interests is unsupported and contrary to the assumption underlying the enactment of the LMRA. To the contrary, the Agreement in this case infringes on the employees' rights to make an informed choice on unionization and to the benefit of an NLRB-supervised election requested by the employer.

F. The Decisions of the Third and Fourth Circuits Are Erroneous

As it did before the Eleventh Circuit, Local 355 contends that the decision of the Third Circuit in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (2004), and the decision of the Fourth Circuit in *Adcock v. Freightliner LLC*, 550 F.3d 369 (2008), represent the proper interpretation of Section 302. To the contrary, these decisions misapprehend the proper issue and reach an erroneous conclusion.

The Third Circuit in *Sage Hospitality* concluded that the employer's promise of neutrality lacked

value, holding that "[t]he fact that a Neutrality Agreement – like any other labor arbitration agreement – benefits both parties with efficiency and costs saving does not transform it into a payment or delivery of some benefit." 390 F.3d at 219. Likewise, the Fourth Circuit in *Adcock* concluded that employer concessions such as access to employees "do not involve the delivery of either tangible or intangible items to the Union." 550 F.3d at 374. To illustrate its conclusion, the Fourth Circuit analogized that "[a] vacuum salesman who is permitted by a company to make a sales pitch to employees does not receive a thing of value from the company." *Id*.

Contrary to these conclusions, as discussed above, there can be no question that contractual commitments of the type afforded to Local 355 in this instance are valuable. Indeed, the value is aptly illustrated in Local 355's case by the fact that it agreed to deliver its own contractual commitments in exchange for them and, as further *quid pro quo*, agreed to spend in excess of $100,000 to secure the commitments. No doubt a vacuum salesperson otherwise lacking access to the customer base would disagree with the Fourth Circuit's contention that the provision of such access possesses no value.

II. Local 355 Is Seeking a Judicially-Created Exception to Supplement Section 302(c)'s Statutorily-Enumerated Exceptions

As the employer's commitments in this case clearly (1) constitutes a "thing"; (2) has value; and, (3) was paid or delivered to the union within the plain meaning of Section 302. What Local 355 is seeking, at its essence, is the judicial creation of an implied exception to supplement the nine statutorily-enumerated exceptions created by Congress. Local 355's argument is inconsistent with the language of the statute itself as well as Congress' treatment of it since its passage.

As originally enacted, Section 302(c) contained five explicit exceptions to the proscriptions set forth in Section 302(a) and (b). 61 Stat. 136, 157-58 (currently codified at 29 U.S.C. § 186(c)(1)-(5). As is readily seen by the statutory language itself, these five exceptions are specifically tailored to the types of exchanges between an employer and a union that Congress at the time sought to foster.

Since the LMRA's passage in 1947, as Congress sought fit to foster additional valuable exchanges between employers and labor organizations, it has acted to amend and add to Section 302(c). Indeed, Section 302(c)'s enumerated exceptions have been amended on five occasions – in 1959, 1969, 1973, 1978 and again in 1990.

In 1959, as part of the Labor-Management Reporting and Disclosure Act of 1959, Congress added

an exception for payments by an employer to trust funds established by a union for purposes of pooled vacation, holiday, severance or other similar benefits, or defraying costs of apprenticeship and training programs. 73 Stat. 519, 539, § 505 (codified at 29 U.S.C. § 186(c)(6)). Thereafter, in 1969, Congress added an exception to permit payments to trust funds for purposes of educational scholarships or dependent child care. 83 Stat. 133 (codified at 29 U.S.C. § 186(c)(7)). In 1973, Congress added 29 U.S.C. § 186(c)(8), to permit employer contributions to trust funds established for purposes of defraying costs of certain legal services. 87 Stat. 314. In 1978, Congress added 29 U.S.C. § 186(c)(9) as part of the Labor Management Cooperation Act of 1978. 92 Stat. 2021, § 6(d). Finally, in 1990, Congress added 29 U.S.C. § 186(c)(7) to permit employer contributions to trust funds for purposes of providing financial assistance for employee housing. 104 Stat. 138.

The specific inclusion of numerous exceptions to Section 302(a) and (b), together with the repeated amendments by Congress when it has deemed it necessary to establish additional exceptions, precludes the judicial creation of any additional exceptions for "ground rules" organizing agreements or otherwise. This conclusion is supported by the well-established principle of *inclusion unius, exclusion alterius*. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

Additionally, not only did the Labor-Management Reporting and Disclosure Act of 1959 add an

additional statutory exception to Section 302(c)'s enumerated list of exceptions, but that Act also amended Section 302(a) by adding subsections (a)(2) and (a)(3). 73 Stat. 519, 537, § 505. Those subsections expanded the already broad language of Section 302 to prohibit not only exchanges of value involving any representative of the employer's employees, but also to prohibit such exchanges involving a labor organization which "seeks to represent" the employer's employees. 29 U.S.C. § 186(a)(2). Thus, not only has Congress acted when it deems appropriate to expand the exceptions set forth in Section 302(c), but it has also acted to ensure that the conduct of unions seeking to organize employees, as was the case here with Local 355, is subject to the prohibitions of Section 302.

As this Court has counseled, "courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." *Brogan v. United States*, 522 U.S. 398, 408 (1988). Even where, as here, the statute involved is a criminal statute, this Court has nonetheless rejected "the proposition that criminal statutes do not have to be read as broadly as they are written[.]" *Id*. at 406; *see also Salinas v. United States*, 522 U.S. 52, 58 (1997) (Rejecting judicially-created "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis for [such a limitation]"). Notwithstanding, this is precisely what Local

355 seeks in this instance. Its invitation to do so should likewise be rejected.

CONCLUSION

The LMRA was enacted by Congress for the explicit purpose of limiting union activities deemed undesirable and reaffirming the importance of employee free choice above all other considerations. Agreements between unions and employers such as the one at issue here, in which the employees themselves lack any input or voice, expressly limit the ability of employees to make informed decisions regarding union representation or to otherwise ensure that their rights are preserved. Contrary to supporting the purpose of the LMRA, such agreements are inconsistent with such goals.

For the foregoing reasons, the Eleventh Circuit's decision should be affirmed.

Respectfully submitted,

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