No. 12-99

IN THE
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, 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 FOR RESPONDENT MARTIN MULHALL

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QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act makes it unlawful for an employer to "pay, lend, or deliver any money or other thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). Do the following three things, when demanded by a labor organization to help it unionize employees, constitute a "thing of value" to the labor organization under Section 302:

1. lists of personal information about nonunion employees;

2. use of the employer's private property for organizing; and,

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

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STATEMENT

A. Section 302

Federal law grants unions an extraordinary power: if a union meets certain qualifications, it can become the "exclusive representative" of a group of employees for collective bargaining with their employer. 29 U.S.C. § 159(a). That power creates a fiduciary relationship between the union and employees, similar to that between trustee and beneficiary, or attorney and client. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991). And, as Congress long ago recognized, that fiduciary relationship carries the potential for abuse because of the power with which the union is entrusted. *See* S. Rep. No. 86-187 (1959),

reprinted in 1959 U.S.C.C.A.N. 2318, 2330. "For centuries," one Senate report observed, "the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve." *Id.* Or, as Senator Carl Hatch explained by analogy: "[A] lawyer knows full well that he, representing a client, would not take a gift from the opposition." 92 Cong. Rec. 5428.

Determined to forbid such conflicts of interest in labor relations, Congress enacted Section 302 of the Labor Management Relations Act ("LMRA"). Section 302(a)(2) makes it "unlawful *for any employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization*, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added). Section 302(b) reciprocally makes it "unlawful for any person to request, demand, receive, or accept . . . any money or other thing of value prohibited by subsection (a)." *Id.* § 186(b)(1). Section 302(c) states nine exceptions to these prohibitions. *Id.* § 186(c). The provision carries criminal penalties and is enforceable through civil actions. *Id.* §§ 186(d)-(e).

Section 302 is designed to prevent "conflict[s] of interest" and protect employees "from the collusion of union officials and management." Pet. App. 52. As the Solicitor General observes, Congress wanted to "'prevent employers from tampering with the loyalty of union officials.'" S.G. Br. 22-23 (quoting *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979)). It also wanted to "prohibit[ ] . . . the buying and selling of labor

peace[.]" S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477.

As originally enacted, Section 302 applied only to unions that were already the "representative" of the "employees" at issue. *See Arroyo* v. *United States*, 359 U.S. 419, 423 (1959). In 1959, however, Congress amended the provision in the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519, to apply to union organizing activities. The amendment extended the prohibition against receiving "thing[s] of value" to any union that "*seeks to represent* . . . any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added).

B. Modern Union Organizing Practices

Notwithstanding Section 302's prohibitions, in recent years unions have taken to demanding from employers "thing[s] of value"—namely, assistance with unionizing employees—to circumvent the traditional organizing process provided for under the National Labor Relations Act, 29 U.S.C. § 151 *et seq*.[1]

1. In the traditional, or "bottom up," organizing process, the union tries to gain employees' support before attempting to deal with their employer.[2] If thirty percent of employees choose to support the

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[1] *See, e.g.*, James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731, 740-42 (2010); Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 175-76 (2007); Charles I. Cohen, et al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006).

[2] *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 713-15 (2012); Brudney, 83 S. Cal. L. Rev. at 742-43.

union, it can petition the National Labor Relations Board for a secret-ballot election under 29 U.S.C. § 159(c), which is "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Alternatively, if more than fifty percent of employees support the union, it can request the employer's voluntary recognition under 29 U.S.C. § 159(a), although an employer can refuse or demand a secret-ballot election. *Id.* § 159(c)(1)(B). Only after establishing that it has majority employee support does the union become their monopoly bargaining representative. *Id.* § 159(a).

To effectuate employee free choice, Congress enacted rules aimed at preventing misconduct and spurring the free flow of information during organizing. For one, it enacted free-speech protections, *see* 29 U.S.C. § 158(c), to encourage "'uninhibited, robust, and wide-open debate in labor disputes.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008) (citation omitted). It also enacted unfair-labor-practice procedures to protect employees from union and employer misconduct. 29 U.S.C. §§ 158(a) & (b).

Notably, however, Congress did not grant unions a right to employer assistance with organizing their employees. For example, unions have no statutory right to use an employer's private property for organizing. *See Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992). Nor do they have a statutory right to information about the employer's nonunion employees before filing a valid NLRB election petition. *See NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 766 (1969). Indeed, "[b]y its plain terms . . . the NLRA confers rights only on *employees,* not on unions or

their nonemployee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original).

2. "Over the past twenty-five years," however, "unions have turned increasingly to strategies outside the traditional framework of the [NLRA]."[3] The primary new tactic is "top-down" organizing, in which a union, instead of first seeking employee support, coerces or induces the employer to enter into an organizing agreement. As Unite puts it, "neutrality agreements privatize the organizing process" in order to avoid what it calls "the NLRB's lengthy and expensive processes." Unite Br. 25.

Although the terms of organizing agreements vary, common features prohibit employers from speaking about unionization, ban NLRB-run secret ballot elections, prohibit the filing of unfair-labor-practice charges with the NLRB, and require that employers give union organizers confidential information about their workforce and free use of their property for organizing.[4] Unsurprisingly, this employer assistance dramatically increases a union's odds of organizing the targeted employees.[5] For example, "unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections."[6]

To obtain these benefits, some unions agree in advance to make wage, benefit, or other concessions at

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[3] Brudney, 83 S. Cal. L. Rev. at 732; *see also* authorities at fn. 1, *supra*.

[4] Eigen & Sherwyn, 63 Hastings L.J. at 721-22; Carter & Burton, 25 Hofstra Lab. & Emp. L.J. at 177; Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23.

[5] Eigen & Sherwyn, 63 Hastings L.J. at 722.

[6] *Id.*

the expense of the employees they seek to represent. *Adcock v. Freightliner,* 550 F.3d 369 (4th Cir. 2008), is illustrative. In that case, in exchange for organizing assistance from an employer, the union secretly agreed that any future collective bargaining agreement would contain, among other things, "no provisions for severance pay . . . in the event of a layoff or plant closure"; "no wage adjustments provided at any newly organized facility prior to mid–2003"; and "no guaranteed employment or transfer rights between Business Units or Plants." *Id.* at 372.

In addition, unions often pressure employers for assistance with unionizing their employees. Unions utilize a variety of economic and political tactics, including systematic "corporate campaigns," to threaten and harm employers to such a degree that they enter into organizing agreements to make the union relent.[7]

Although examples of earlier organizing agreements exist, it was not until the 1990s that unions made top-down organizing their primary tactic for acquiring more members and forced-dues payers.[8] The question presented here is whether three components of this new tactic—namely, union demands for employee information, free use of employer property, and control over employer speech—violate Section 302(a)(2)'s prohibition of a union demanding any "thing of value" from an employer whose employees it seeks to represent.

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[7] Brudney, 83 S. Cal. L. Rev. at 737-44; *see infra* at 34.

[8] Carter & Burton, 25 Hofstra Lab. & Emp. L.J. at 175-76; Brudney, 83 S. Cal. L. Rev. at 740-42; Cohen, Notre Dame J.L. Ethics & Pub. Pol'y at 522.

C. Proceedings Below

This case is before the Court on a motion to dismiss. Accordingly, the facts stated in the Complaint must be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1. Mardi Gras Gaming operates a racetrack-casino in Hollywood, Florida. Pet. App. 65. In 2004, it entered into an organizing agreement with Unite Here Local 355 in which Mardi Gras agreed to help Unite unionize its employees in exchange for promises of "labor peace" and Unite's support for a ballot initiative promoting casino gaming. *Id.* at 66.

Specifically, Mardi Gras agreed to provide Unite with three types of organizing assistance: (1) lists of confidential information about Mardi Gras' nonunion employees, including their "job classifications, departments, and addresses"; (2) use of Mardi Gras' private property for organizing; and (3) control over Mardi Gras' communications to nonunion employees regarding unionization. *Id.* at 79-81. The last provision stated that "[t]he Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer" to unionization or any particular union. *Id.* at 79.

In addition, Mardi Gras agreed to recognize Unite as its employees' exclusive representative if the union produced authorization cards from a majority of employees. *Id.* at 81-82. The company agreed not to petition the NLRB for a secret-ballot election regarding union representation or to file charges with the NLRB "in connection with any act or omission occurring within the context of this agreement." *Id.* After unionization, the Agreement provides for

binding arbitration that guarantees Unite a collective bargaining agreement. *Id.* at 82.

In exchange, Unite promised Mardi Gras that it would not strike, picket, or take other economic actions against Mardi Gras during the organizing process. *Id.* at 79, 82. Unite also promised that it would campaign in support of a ballot initiative expanding casino gaming. *Id.* at 66. Unite estimates that Mardi Gras would have lost over $100,000 in business from a Unite boycott, and that the time and money the union and its members spent on the ballot initiative exceeded $100,000. J.A. 24.

2. In 2006, the ballot initiative passed and Mardi Gras installed slot machines, triggering the organizing agreement. Pet. App. 14, 38. Mardi Gras initially complied with the agreement, but refused to provide an updated employee list to Unite in 2008. *Id.* The union sought to enforce the agreement through arbitration and largely prevailed. *Id.* at 39.

In 2009, Mardi Gras distributed a flier critical of the union that Unite believed violated the agreement, and Unite again initiated arbitration. *See* S.G. Br. 3-4. The arbitrator enforced the agreement's gag-clause and extended the agreement's terms by one year. *Id.*

The neutrality agreement expired on or before December 31, 2011. However, Unite continues to demand that Mardi Gras provide it with the assistance specified in the agreement, and filed suit in 2012 to compel arbitration for alleged violations of the agreement that occurred in 2011. *Id.* at 4. That proceeding has been stayed pending the outcome of this case. *Id.*

3. Martin Mulhall is a groundskeeper employed by Mardi Gras. Pet. App. 65. He filed suit, alleging that Unite is violating Section 302(b)(1) by requesting and demanding three "thing[s] of value" from his employer: lists of employee information, free use of Mardi Gras' property for organizing, and control over Mardi Gras' actions and communications regarding unionization. *Id.* at 74.

Mulhall's Complaint explains in detail why these things have significant value to Unite, including monetary value. *Id.* at 68-71. For example, the Complaint alleges that delivery of the three requested benefits "will result in a significant monetary benefit to the union because, among other things, it will reduce the expense of conducting an organizing campaign against Mardi Gras employees and likely result in an increase in dues revenues for the union." *Id.* Unite confirmed the tangible value of Mardi Gras' promises in parallel legal proceedings, pleading that Mardi Gras' refusal to comply with the organizing agreement has resulted in "increased organizing expenses and lost revenues for the Union," *id.* at 71, and that Unite conducted a $100,000 political campaign in exchange for the agreement. J.A. 24.

The district court dismissed Mulhall's Complaint for lack of standing. Pet. App. 29-33. The Eleventh Circuit reversed in *Mulhall v. Unite Here*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). The court held that "Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the [agreement] is valuable, and indeed essential, to Unite's effort to gain recognition," and that Unite's willingness to spend "$100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary

sense." Pet. App. 44, 48. The court separately explained that Mulhall had prudential standing because Section 302 "'prohibit[s], among other things, the buying and selling of labor peace,' something that the [organizing agreement] at least arguably does." *Id.* at 52 (citation omitted).

On remand, the district court dismissed the complaint on the merits. *Id.* at 13-23. The Eleventh Circuit again reversed, holding "that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302." *Id.* at 2. The court reasoned that it "seems apparent that organizing assistance can be a thing of value." *Id.* at 7. It believed that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." *Id.* It held, however, that an intangible can act as a "payment" if "its performance fulfills an obligation." *Id.* at 7-8. Here, the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance" rendered "Mulhall's allegations . . . sufficient to support a § 302 claim." *Id.* In reaching this result, the Eleventh Circuit rejected Unite's contention that "all neutrality and cooperation agreements are exempt from the prohibitions in § 302." *Id.*

SUMMARY OF ARGUMENT

Section 302(a)(2) prohibits employer payment or delivery of "any money or other thing of value . . . to any labor organization," save as permitted by Section 302(c). Information about nonunion employees, use of private property for organizing, and control over employer communications regarding unionization are each "things" of great "value" to unions. None of them are exempt under 302(c). When an employer

provides those three things to a union in exchange for valuable consideration, it has "paid" and "delivered" them.

Unite and its amici nonetheless insist that, whatever the statute's plain language may provide, organizing assistance is not forbidden by Section 302 because it "implicates none of the concerns animating" the provision. S.G. Br. 30. That is quite wrong. The experience of the last two decades demonstrates that unions have been willing to sacrifice employee interests—such as by agreeing in advance to make wage and other concessions at the expense of employees they seek to unionize—to obtain the organizing assistance they covet. Enforcing Section 302 in these circumstances thus fulfills Congress' purpose of protecting employees from union self-dealing in collective bargaining. In contrast, to *not* enforce Section 302 here would tear a gaping hole in the statute. It would allow unions to demand from employers the thing many now value most—assistance that helps them sign up more dues-paying members—to the detriment of the employees whom Section 302 is supposed to protect.

Unite and its amici also aver that Section 302 should not be enforced against terms of organizing agreements out of deference to the NLRA. Again, they have it backwards. The entire point of an organizing agreement is to *circumvent* the NLRA's employee protections. Such agreements attempt to silence the robust debate Congress intended to foster with NLRA Section 8(c), to avoid the secret ballot elections favored under NLRA Section 9(c), and to grant unions employer assistance to which they have no statutory right. The NLRA does not help Unite.

Nor is there any merit to Unite's most aggressive claim: that enforcing Section 302 here would mean by extension that union recognition and collective-bargaining agreements themselves will become unlawful. Unite Br. 12, 14-15. Collective bargaining regards the money and things that employers deliver to their *employees*, not to their union representative. Section 302 permits the former, while strictly forbidding the latter to protect employees from conflicts of interest and union self-dealing. Given that unions will compromise employee interests at the bargaining table in exchange for things valuable to the union for organizing, there is every reason to enforce Section 302 pursuant to its unambiguous language.

ARGUMENT

I. UNITE'S DEMANDS FOR ORGANIZING ASSISTANCE VIOLATE SECTION 302's UNAMBIGUOUS LANGUAGE.

"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). Unite disregards this principle, burying its textual analysis in Part IV of its brief. That is telling.

Section 302 unambiguously bans the exchange of any "thing of value" between an employer and union, subject to a strictly limited set of exceptions. 29 U.S.C. § 186(a). The three types of organizing assistance at issue—data about nonunion employees, use of private property, and a gag clause on employer speech—are each a "thing of value." Each can be "paid or delivered." None is covered by the exceptions in Section 302(c). Given that "a literal construction of this statute does no violence to common sense," *Arroyo*, 359 U.S. at 424, that is the end of the matter.

A. Information, Use of Property, and Gag Clauses Are "Thing[s] of Value."

Section 302(a)(2) makes it "unlawful for any employer . . . to pay, lend, or deliver, *any money or other thing of value* . . . to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added). As the Solicitor General correctly recognizes, S.G. Br. 15-17, the three "things" at issue here are "things of value."

1. The word "value" is defined as the "significance, desirability, or utility of something." *Black's Law Dictionary* 1690 (9th ed. 2009). Thus "in the ordinary sense *thing of value* is not limited in meaning to tangible things with an identifiable commercial price tag." *United States v. Schwartz,* 785 F.2d 673, 680 (9th Cir. 1986) (emphasis in original).

The federal courts have recognized as much for decades. "Congress's frequent use of 'thing of value' " in a variety of statutes, including several conflict-of-interest statutes,[9] "has evolved the phrase into a term of art which the courts generally construe to envelop[ ] both tangibles and intangibles." *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992); *see, e.g.*, *United States v. Marmolejo*, 89 F.3d 1185, 1191-92 (5th Cir. 1996), *aff'd Salinas v. United*

[9] "Thing of value" or "anything of value" is used in conflict-of-interest statutes that govern federal officials, 5 U.S.C. § 7353(a), public officials, 18 U.S.C. § 201(b), recipients of federal funds, *id.* § 666, trustees of employee benefit plans, *id.* § 1954, and real estate transactions, 12 U.S.C. § 2607. The term is also used in laws that prohibit conversion of public property, 18 U.S.C. § 641, embezzlement at lending institutions, *id.* § 657, extortion by mail, *id.* § 876(b), procurement of a "thing of value" by false pretenses, *id.* § 912, and robbery and extortion of banks, *id.* § 2113(a)-(c).

States, 522 U.S. 52 (1997); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995); *Schwartz,* 785 F.2d at 680; *United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979); *United States v. Zouras,* 497 F.2d 1115, 1121 (7th Cir. 1974).

That interpretation is "based upon a recognition that monetary worth is not the sole measure of value." *Nilsen*, 967 F.2d at 542-43. Thus the courts have held that internal agency records and information are "things of value." *Girard*, 601 F.2d at 70-71. So are "a promise to reinstate an employee," "an agreement not to run in a primary election," "[t]he testimony of a witness," and "the content of a writing," just to offer a few examples. *Id.* at 71 (collecting cases); *see also* S.G. Br. at 17 n.3 (citing other examples). As the Solicitor General puts it, "[c]ourts have found a wide variety of goods, services, and benefits to be 'things of value' within the meaning of the criminal laws." S.G. Br. 16-17.

"Thing of value" is used the same way in Section 302 as in other statutes. This Court has repeatedly recognized that Section 302's "prohibitions . . . are drawn broadly." *Local 144 Nursing Home Pension Fund v. Demisay,* 508 U.S. 581, 585 (1993); *see Arroyo*, 359 U.S. at 420; *United States v. Ryan*, 350 U.S. 299, 305 (1956). One aspect of that breadth is the phrase "things of value." As the Second Circuit explained: "Congress gave the broadest possible scope to the statute by adding to the word 'money' the words 'or other thing of value,'" because "favors may be conferred in many ways under many circumstances." *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964). The statute's use of the word "any" to modify "thing of value" also indicates "an expansive

meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)).

2. The three "things" at issue here fit easily within the phrase "things of value." Indeed, while the statutory phrase is broad enough to capture items without monetary value, *see infra* at 18-21, the Court need not go that far here, because the types of things at issue in this case are commonly bought and sold.

First, Unite demands lists of confidential information about Mardi Gras' nonunion employees. Pet. App. 67-68. "Confidential business information has long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26 (1987). And courts regularly hold that information is a "thing of value" under the federal statutes discussed above. *See, e.g.*, *United States v. Jordan*, 582 F.3d 1239, 1246-47 (11th Cir. 2009); *United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980); *Girard*, 601 F.2d at 71.

The particular type of information at issue here—lists of people, with contact information and other data about them—has both objective and monetary value. Organizations commonly purchase such lists so they can solicit the listed individuals to buy their products or support their cause. *See*, *e.g.*, *Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 811-12 (D.C. Cir. 2001). So too here, Unite values information about Mardi Gras' employees because it facilitates the union's ability to solicit those employees, including by sending union organizers to employees' homes. Pet. App. 68; *see also Pichler v. UNITE,* 228 F.R.D. 230, 236-37 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380, 383-84 (3d Cir. 2008) (Unite's parent union

sought and compiled information about employees it wanted to organize by, among other means, illegally "tagging" employees' license plate numbers and accessing their motor vehicle records).

Second, Unite demands that Mardi Gras let it use the company's private property to solicit Mardi Gras' employees. Pet. App. 68-69. The right to use physical facilities is a quintessential property right, c*f. Truax v. Corrigan*, 257 U.S. 312, 327 (1921), and is a "thing of value" under any construction of that term. *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.4 (5th Cir. 1986) (use of in-plant office a "thing of value" under Section 302(a), but exempted by 302(c)(1) because union officials using the property were company employees); *see also Marmolejo*, 89 F.3d at 1191-94; *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000). Indeed, it is akin to a right-of-way, which this Court has long acknowledged to be a property interest with value, including monetary value. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302 (1976). And of course, many organizations pay to use property such as retail space or convention booths so they can solicit prospective customers. *See*, *e.g.*, *Gibson v. F.T.C.*, 682 F.2d 554, 558 (5th Cir. 1982).

The facts of this case underscore the point. Mardi Gras "hosts groups and group events on its property." Pet. App. 65. And the organizing agreement contemplates that other enterprises may do business in Mardi Gras' racetrack-casino pursuant to contracts, leases, or franchise agreements. *Id*. at 83. The right to use these facilities is plainly a thing of value.

Third, Unite demands that Mardi Gras commit to "not do any action nor make any statement that will directly or indirectly state or imply any opposition"

to Unite. *Id*. at 69. Control over another party's speech is a "thing of value." *See Nilsen*, 967 F.2d at 542-43 (testimony of adverse witness that defendant wished to silence a "thing of value" under 18 U.S.C. § 876(b)); *Zouras*, 497 F.2d at 1121 (same). It is a thing with monetary value that is often the subject of business contracts. "[P]rivate gag orders appear to be fairly common" when businesses are sold, *EEOC v. Severn Trent Servs*., 358 F.3d 438, 440 (7th Cir. 2004), and disputes settled, *see, e.g*., *Rain v. Rolls-Royce Corp*., 626 F.3d 372, 375 (7th Cir. 2010) (non-disparagement clause between competitors enforceable by liquidated damages of at least $1,000,000 and attorney fees).

Noncompetition agreements that forbid the seller from interfering with the buyer's newly-acquired rights, such as by soliciting customers, are also common when business rights are transferred or sold. *See generally* 45 A.L.R.2d 77 (law on enforceability of such covenants). That sort of agreement is certainly of value to the contracting parties. *See Vendo Co. v. Lektro-Vend Corp*., 433 U.S. 623, 626-27 (1977) (noncompetition agreement entered into in exchange for money and other consideration); *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893 (8th Cir. 2010) (noncompetition agreement was supported by valuable consideration and enforceable by liquidated damages). In fact, noncompetition agreements are intangible assets whose value is depreciable for tax purposes. 26 U.S.C. § 197(d)(1)(E); *see Recovery Group v. Commissioner of Internal Revenue*, 652 F.3d 122 (1st Cir. 2011) ($400,000 paid for noncompetition agreement must be amortized over 15 year period). Similarly, a noncompetition agreement regarding unionization is something of great value to a union.

A simple example illustrates the value of the three types of organizing assistance here. Assume a company wants to solicit Mardi Gras' employees to buy a product, such as insurance policies. Information about these employees, the right to use Mardi Gras' property to solicit them, and a commitment by Mardi Gras to not speak ill of the product would certainly be things of value to that company. So too are they "thing[s] of value" to Unite.

3. The three "things" at issue here accordingly have value irrespective of the context. But Mulhall actually need not show that much to proceed with his lawsuit. The key point is that the "things" must have value to a labor union like Unite. *Cf. United States v. Ostrander*, 999 F.2d 27, 31 (2d Cir. 1993) (holding under 18 U.S.C. § 1954 that the "thing of value" requirement is fulfilled "if the item received was regarded as a benefit by the recipient, whether or not others might have taken a different view of its value"). The Complaint explains why this organizing assistance has subjective, objective, and monetary value to Unite: it increases the chances that Unite will obtain more dues-paying members and reduces the expense of an organizing campaign. Pet. App. 68-71. Indeed, Unite itself has said as much, alleging in another proceeding that Mardi Gras' failure to honor the organizing agreement would mean "*increased organizing expenses and lost revenues for the Union*." *Id.* at 71 (emphasis added). Given that the Complaint must be accepted as true on a motion to dismiss, Mulhall has established "value" at this stage of the proceedings.

4. Unite contends that "thing of value" in Section 302 is limited to things with "objective, market-based value." Unite Br. 27. That argument does not even

convince Unite's own amicus. *See* S.G. Br. 15-17. Moreover, it gets the union nowhere even if accepted.

a. Relying on the canon *ejusdem generis*, Unite argues that "money" in Section 302(a) modifies "thing of value" like an adjective, thus limiting "thing of value" to "monetary equivalents." Unite Br. 31-32. That interpretation is untenable because the disjunctive "or" separates "money" and "thing of value" in Section 302(a)—"any money *or* other thing of value," 29 U.S.C. § 186(a) (emphasis added). This Court has made clear that "terms connected by a disjunctive [should] be given separate meanings, unless the context dictates otherwise." *Reiter*, 442 U.S. at 338-39 (rejecting argument that "business" modifies "property" in phrase "business or property"); *accord Garcia v. United States*, 469 U.S. 70, 73 (1984). It likewise has held that the *ejusdem generis* canon applies to "list[s] of specific items separated by commas and followed by a general or collective term," but not to a "*phrase [that] is disjunctive, with one specific and one general category*." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (emphasis added) (refusing to apply canon to the phrase "any officer of customs or excise or any other law enforcement officer").

That precisely describes the phrase at issue here, as the Sixth Circuit recently recognized. In *United States v. Douglas*, 634 F.3d 852 (6th Cir. 2011), the court agreed with the position of the United States that *ejusdem generis* does not apply to Section 302(a). *Id.* at 858. Citing *Ali*, the court held that "thing of value" in Section 302 is not limited to "things of monetary value." *Id.*

Unite next argues that giving "thing of value" a broad meaning will render the word "money" super-

fluous. Unite Br. 31. But the same can be said of Unite's own interpretation. If "thing of value" means "things with market-based value," as Unite believes, the preceding word "money" is still "superfluous" in the sense Unite uses that term. Moreover, Unite's superfluity argument cannot be reconciled with *Ali*. In *Ali*, one could have understood the broad phrase "any other law enforcement officer" to render the preceding enumeration of *specific* law enforcement officers superfluous, and yet this Court refused to narrow the broader term. 552 U.S. at 225. The Court instead recognized that Congress sometimes drafts phrases with "one specific and one general category"; where the phrase is disjunctive, the Court gives full effect to both. *Id.* The same principle applies to Section 302. For example, the word "money" also appears before "thing of value" in 18 U.S.C. § 1954 ("any fee, kickback, commission, gift, loan, money, or thing of value") and 18 U.S.C. § 876(b) ("any money or other thing of value"). Yet, neither statute is limited to monetary value. *See Schwartz*, 785 F.2d at 679-81; *Nilsen*, 967 F.2d at 542.

Finally, construing "thing[s] of value" to require "market-based value," Unite Br. 27, is at odds with Section 302(c)(3), which exempts from the statute's prohibitions "the sale or purchase of an article or commodity at the prevailing market price[.]" 29 U.S.C. § 186(c)(3). This shows that Congress knew how to refer to tangible items with a "market price" when it wanted to do so. If Congress wanted Section 302(a)'s prohibitions to be so limited, as Unite claims, it would have used language akin to that in Section 302(c)(3), and not the far more expansive "thing of value." "It is well settled that "'[w]here Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).[10]

Unite's market-value argument also is in tension with Section 302's purpose, which is not to prevent unions from becoming wealthy, but to protect employees from union self-dealing and employers from extortion. *See infra* at 30-35. Anything that *a union* values from an employer can lead to these harms. Its market value to third-parties is beside the point.

b. Even if Section 302 required monetary value, which it does not, that would not help Unite. The Complaint alleges that the organizing assistance "will result in a significant monetary benefit to the union," and Unite admits that it incurred "increased organizing expenses and lost revenues" as a result of Mardi Gras' refusal to comply with the organizing agreement. Pet. App. 71. In addition, the fact that "UNITE ultimately spent $100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary sense." Pet. App. 48.

Market value is determined by what a willing buyer and seller will accept to exchange something. *See United States v. Townsend*, 630 F.3d 1003, 1011-12 (11th Cir. 2011) (surveying cases). Here, the "mar-

[10] For the same reason, that Section 302(d) provides for lesser penalties if the value of the money or thing "does not exceed $1,000," 29 U.S.C. § 186(d), does not import a monetary-value requirement into Sections 302(a) and (b), as Unite claims. Unite Br. 35. Congress did not use that language in the latter sections, which suggests that this omission was intentional.

ket" for organizing assistance consists of Unite and other unions, which often compete to organize employees. *See*, *e.g.*, *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 723 (N.D. Ohio 2006) (employer assisted union with organizing its employees and opposed rival union). Thus, the "market value" of Mardi Gras' assistance can be set by what Unite gave in exchange for it—a $100,000 political campaign—and by evidence regarding what Unite and other unions have provided for similar types of assistance in other circumstances.

Moreover, even if the ostensible "market" were limited to entities *other* than unions (which would make no sense under Section 302), market value would still exist here. As previously stated, a company that wished to solicit Mardi Gras' employees to buy a product or service would pay for the types of assistance that Unite demands. *See supra* at 18.

To find "value" not pled here, even under Unite's unduly pinched "market-based value" approach, the Court would have to accept that the three types of assistance at issue are not worth even one dollar. Given that Unite and other unions aggressively seek this assistance from employers, provide consideration for it, and use it to increase their membership ranks (and concomitantly their treasuries), that conclusion is impossible. Employer assistance with gaining more members has great "value" to unions, no matter how that term is construed.

B. Organizing Assistance Can Be Both "Paid" And "Delivered" under Section 302.

The three items at issue are not only "things of value." 29 U.S.C. § 186(a). They also fulfill the other statutory requirements because they can serve as a

"payment," and can be "deliver[ed]," to a union. *Id.* §§ 186(a), 186(b)(1). The contrary arguments of Unite and its amici miss the mark.

1. *Organizing Assistance Can Be a "Payment."*

a. The Eleventh Circuit correctly held that organizing assistance can be a "payment" to a union under Section 302 because it "fulfills an obligation." Pet. App. 8-9. "Payment" is defined as "[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation." *Black's Law Dictionary* 1243 (9th ed. 2009) (emphasis added). An employer can "pay" a union for its performance of a task, such as conducting a political campaign (as here), or making wage and benefit concessions (as in *Adcock*), with in-kind services just as easily as it can with money.

The three types of organizing assistance here are naturally understood as "payments." Mardi Gras agreed to give Unite these "thing[s] of value" in exchange for it conducting a political campaign and agreeing to not picket the employer. The organizing assistance is thereby a "valuable thing" that Unite accepted as consideration. *Black's Law Dictionary*, *supra*. It accordingly is a payment. And that does no violence to the language. One can say, in common parlance, that "Party A paid Party B for his service by giving him confidential information," or a right-of-way,[11] or a non-competition agreement, just as easily

[11] There is no question that one party could "pay" another by giving the second party a right of way or easement; courts have used that terminology for well over a century. *See*, *e.g.*, *Feeney v. Chester*, 63 P.192, 193 (Idaho 1900) ("[t]he defendant . . . paid the consideration by giving the right of way for the ditch through his land "); *In re Flint & P.M.R. Co.*, 63 N.W. 303, 304

as one can say that "Party A paid Party B by giving him football tickets," or a hotel room, or stock, or any of the other "monetary equivalents" that Unite acknowledges would fall within Section 302's prohibition, Unite Br. 31.

b. Unite opposes this conclusion, but its brief supports Mulhall's position. Unite begins by conceding that "it is possible to interpret 'payment' figuratively as any fulfillment of an obligation." *Id*. at 29. It then tries to walk back that fatal concession by proffering a handful of dictionary definitions of "payment"—but every definition Unite cites actually reaches the organizing assistance at issue here. One provides that payment is performance of an obligation "'by the delivery of money *or other value*,'" while the others say payment involves the delivery of money, "'*services*,'" or "'*some other thing*.'" *Id*. at 29-30 (emphases added). How these definitions help Unite is a mystery. At most, they make Unite's "payment" argument rise or fall with its "thing of value" argument, which is insubstantial for the reasons set forth above.

2. *Organizing Assistance Can Be "Delivered."*

a. The organizing assistance at issue here can also be "delivered." "Delivery" is "[t]he formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another." *Black's Law Dictionary* 494 (9th ed. 2009); *see Webster's Dictionary* 481 (unabridged) (2d ed. 1980) ("to give or transfer; to put into another's possession or power, to commit, to pass from one to another"). In

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(Mich. 1895) (parties "paid the notes" they had granted to their counter-parties "by granting rights of way").

the context of Section 302, it refers to that which a union can "receive" or "accept." 29 U.S.C. § 186(b)(1).

Contrary to the opinion of the court below, the term "deliver" applies to more than "tangible items." Pet. App. 7. For example, it is commonly said that a person or entity "delivers" a service, *see, e.g., Nixon v. Missouri Municipal League*, 541 U.S. 125, 135-37 (2004) (using phrases "deliver electric and water services" and "deliver telecommunications service"), or "delivers" a communication. Indeed, this Court's opinions start by saying that a certain Justice "delivered the opinion of the Court."

Turning to the things at issue here, a list of information about employees obviously can be delivered; it is a tangible document or electronic file. *See*, *e.g.*, *Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1023 (9th Cir. 2008) ("Sustaire's attorney delivered the list to the Department of Homeland Security"). Indeed, Unite's organizing agreement states that "the Employer will *furnish* the Union with a complete list of employees" and that "the Employer will *provide* updated complete lists monthly." Pet. App. 81 (emphases added). Mardi Gras actually delivered such a list to Unite on at least two occasions. J.A. 46.

Mardi Gras also can "deliver" the right to use its property and control over its communications to Unite, as both result in "giving or yielding possession *or control* of something to another." *Black's Law Dictionary* 494 (9th ed. 2009) (emphasis added). The organizing agreement states that it is enforceable by arbitration. Pet. App. 81. It accordingly provides Unite with the right to use portions of Mardi Gras' property, like the right transferred in rental agreements, and the right to control the employer's communications, like the right often transferred in

confidentiality and noncompetition agreements.[12] The notion that one can "deliver" such control to another is consistent with long-established English usage. *See*, *e.g.*, *Atlanta, K. & N. Ry. v. Southern Ry.*, 153 F. 122, 123 (6th Cir. 1907) (court erred in requiring a railway "to *deliver possession of the disputed right of way* and desist from interfering with the use and occupation of same") (emphasis added).

The organizing assistance also can be thought of as a valuable service by Mardi Gras that is susceptible to delivery. For example, if Unite hired a consultant to acquire information about employees it wants unionized, set up places to meet with them, and implement a communications campaign that targets them, the consultant could "deliver" these services to Unite. *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 200 (2009) ("Northwest Austin Municipal Utility District Number One was created in 1987 to *deliver city services*") (emphasis added). Here, Unite demands delivery of similar services from Mardi Gras, and the company has delivered many of them.

b. Unite does not bother to contest that one can "deliver" an employee list. Instead, it focuses on the use-of-property clause, arguing that "[a] person can 'deliver' *possession* of property, but only in the sense of formally transferring a title or deed." Unite Br. 28. But that is not the sole meaning of "deliver"; the word also denotes "yielding . . . *control*." *Black's Law Dictionary* 494 (9th ed. 2009) (emphasis added). Unite ignores that portion of the definition. A party

[12] Unite has actually exercised its control over Mardi Gras' communications. In response to a Mardi Gras flier, Unite obtained an arbitration award compelling Mardi Gras to abide by the agreement's gag clause. *See supra* at 8.

can deliver to another limited control over its property, such as a right of way, just as much as it can deliver permanent control over that property.

The Solicitor General, for his part, concedes that delivery means "yield[ing] . . . control," and further concedes that "providing a list of employees could be described as 'delivering' such a list." S.G. Br. 18. However, he argues that the canon *noscitur a sociis* should be applied to the phrase "pay, lend, or deliver," so as to limit the final term, "deliver" to "a financial transfer focus." *Id*. But the canon is inapplicable because these three verbs do not constitute a self-restricting list. *Cf. Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288-89 (2010) (word "administrative" in phrase "congressional, administrative, or Government Accounting Office report" not limited by other terms to federal administrative materials). Moreover, even if the canon applied, "pay" or "lend" apply to far more than simply financial transfers, as already demonstrated. *See supra* at 23-24.

Unnaturally restricting "deliver" to only physical things or financial transfers is not only inconsistent with the word's meaning, but also with Section 302's purpose. The statute does not exist to prevent unions from acquiring tangible assets, but to protect employees from union self-dealing and employers from extortion. Union demands for valuable services, uses of property, and intangibles are just as capable of causing these harms as demands for physical possessions. For example, it is just as corrupting for an employer to give union officials use of a vacation property as it is to give them the deed to that property. To limit "deliver" to only physical items would leave a major gap in this conflict-of-interest statute.

Sekhar v. United States, 133 S. Ct. 2720 (2013), is not to the contrary. In *Sekhar*, the government argued that a defendant was "obtaining . . . property from another" under the Hobbs Act, 18 U.S.C. § 1951(b)(2), when he compelled a lawyer to make a recommendation to his government employer. The government's theory was that the "property" the defendant obtained was the lawyer's "intangible property right to give his disinterested legal opinion." 133 S. Ct. at 2727. This Court rejected that theory, pointing out that even if the lawyer *lost* such property, the defendant could not *obtain* it for himself; it was not transferable. *Id.* Here, by contrast, the "things of value" at issue—lists of information, the right to use property, and contractual control over communications—can be transferred, and thus delivered and obtained. *See supra* at 23-26. And Unite seeks to obtain these valuable things for itself and its own use.[13]

In the end, Unite's contention that nothing of value is delivered to a union under an organizing agreement is untenable. Why would unions demand organizing assistance from employers if they cannot receive it? Specifically here, why would Unite conduct a $100,000 political campaign, and then hound Mardi Gras for years, for something unattainable? As its conduct suggests, Unite seeks to "receive" something of value from Mardi Gras under Section 302(b); it follows that that thing can be delivered.

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[13] *Sekhar* also is distinguishable because, unlike Section 302, the Hobbs Act requires that the "property" be something that can be "exercised, transferred, or sold" by the defendant. 133 S. Ct. at 2726.

C. Section 302(c) Does Not List an Exception for Organizing Assistance.

Unite makes no claim that organizing assistance is covered by any of the nine statutory exceptions in Section 302(c). This is significant. That Congress did not exempt organizing assistance means that no such exemption is intended—*expressio unius est exclusio alterius*. Such exemptions cannot be implied into the statute. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013). Accordingly, Unite's demands for three "thing[s] of value" from Mardi Gras for organizing its employees violates Section 302's plain language.

D. The "Strict Construction" Doctrine Does Not Help Unite.

As a last-ditch gambit, Unite argues that Section 302 must be construed strictly—which, according to Unite, means that it reaches only monetary equivalents—because it carries criminal penalties. Unite Br. 35. But the rule of lenity "does not apply when a statute is unambiguous." *Salinas v. United States*, 522 U.S. 52, 66 (1997). The phrase "any . . . thing of value" is not ambiguous; it is merely broad. There is no basis to limit it to subcategories of things of value, as this Court has recognized. *See id.* at 58 (rejecting a "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).

Unite suggests throughout its brief that Congress could not have intended to make the provision of organizing assistance a federal crime. There are good reasons to question that assertion; as discussed below, unions have engaged in grievous violations of their fiduciary duty in exchange for organizing assistance. And it is common for conflict-of-interest

statutes to contain criminal penalties. *See*, *e.g.*, 5 U.S.C. § 7353(a); 18 U.S.C. § 201(b); 18 U.S.C. § 666; 18 U.S.C. § 1954. Here, Congress believed the threat to the integrity of collective bargaining serious enough to justify criminal penalties as a prophylactic measure. *See United States v. Ryan*, 232 F.2d 481, 483 (2d Cir. 1956); *United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972); S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477 (stiffening Section 302's criminal penalties to prevent "the buying and selling of labor peace").

Moreover, Section 302 is often civilly enforced against conduct that usually does not lead to criminal prosecution. This includes employer provision of special leave or benefits to union officials, *see e.g., Caterpillar, Inc. v. Int'l Union, UAW,* 107 F.3d 1052, 1056-57 (3d Cir. 1997) (listing similar cases), *cert. granted*, 521 U.S. 1152 (1997), *cert. dismissed due to settlement*, 523 U.S. 1015 (1998), dues deduction practices, *see e.g., Jackson Purchase Rural Elec. Co-op. Ass'n v. IBEW*, 646 F.2d 264 (6th Cir. 1981), and employer contributions to union trust funds, *see e.g.*, *Demisay,* 508 U.S. 581; W.J. Dunn, Annotation, *Civil actions involving union welfare funds subject to § 302 of the Taft Hartley Act*, 88 A.L.R.2d 493 (collecting dozens of civil actions). So too can Section 302 be civilly enforced against union demands for organizing assistance.

II. SECTION 302's PURPOSE SUPPORTS MULHALL'S INTERPRETATION.

Section 302 must be enforced as written against "thing[s] of value" to organizing to prevent two of the three harms the section addresses: "corruption of collective bargaining through bribery of employee representatives by employers" and "extortion by

employee representatives." *Arroyo*, 359 U.S. at 425-26. As established below, to obtain employer assistance with organizing, unions betray the interests of employees and extort employers. The assertions of Unite and its amici that organizing assistance "implicates none of the concerns animating" Section 302, S.G. Br. 30, are demonstrably wrong.

A. Section 302 Must Be Enforced Because Unions Compromise Employee Interests to Obtain Organizing Assistance.

Section 302's primary purpose is "to insure honest, uninfluenced representation of employees." *United Steelworkers v. U.S. Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974); *see also Ryan*, 232 F.2d at 483 ("The chief, if not only, purpose of the section was to put a stop to practices that, if unchecked, might impair the impartiality of union 'representatives.'"); 29 U.S.C. § 186(a)(4) (unlawful for employer to deliver thing of value to union official "with intent to *influence him*" regarding his duties) (emphasis added). Organizing assistance is within the statute's ambit because, just like money or any other thing of value, employers can use it to influence a union's conduct as an employee representative in collective bargaining.

Unite implicitly concedes as much, stating that an "employer always receives consideration for a neutrality agreement" from a union, and that Unite wanted an organizing agreement from Mardi Gras enough "to give up its right to take economic action against the employer." Unite Br. 61-63. Unite misses the point, however, when it argues that this case falls outside Section 302 because its political campaign was not corrupt. *Id.* at 61. The point is that, if an employer's promise of organizing assistance is capable of inducing a union to conduct a $100,000

political campaign, then it is also capable of inducing a union to compromise employee interests in collective bargaining or to sell "labor peace" to the employer (which Unite did here).

In fact, there is a sordid history of unions secretly making wage and benefit concessions at employee expense to obtain employer assistance with organizing more employees. *See*, *e.g.*, Pet. 72; *Patterson*, 428 F. Supp. 2d at 716 (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union"); *Dana Corp.,* 356 N.L.R.B. No. 49, at *22-23 (2010) (union agreed to benefit concessions in exchange for organizing assistance), *petition for review denied, Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

Adcock's facts provide a particularly disheartening example. There, to obtain an employer's organizing assistance, the United Auto Workers made massive concessions at the expense of employees it already represented: it agreed to a three-year wage freeze, to cancel their profit-sharing bonus, and to increase employee benefit costs. It also secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of any employees it later organized. 550 F.3d at 372.

A union sacrificing employee interests in collective bargaining to receive their employer's assistance with gaining more dues-paying members is an egregious breach of fiduciary duty. *See Aguinaga v. UFCW*, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (union breached duty by secretly agreeing to allow employer to close employees' facility, and pay lower wages after the facility reopened, in exchange for

unionizing the reopened facility). It is as wrongful as an attorney sacrificing a client's interests in exchange for an opposing party's assistance with recruiting more paying clients.

The conclusion is straightforward: organizing assistance is just as capable of influencing a union's conduct as cash payments, and it is therefore within Section 302's intended ambit. In fact, a union accepting "thing[s] of value" from an employer to support its organizing campaigns is functionally indistinguishable from a union accepting money from an employer to pay for its organizing campaigns.

Schwartz is instructive on this point. The court there held that "assistance in arranging for the merger of [two unions]" is a "thing of value" to union trustees of an employee benefit plan under 18 U.S.C. § 1954. 785 F.2d at 679. It reasoned that "[a] violation of trust which is influenced by the offer of an intangible service is no less damaging to trust fund beneficiaries than if the influence was in the form of a cash kickback. The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position." *Id.* at 680. So too here. The "significant factor" is that unions covet employer organizing assistance enough to compromise employee interests in exchange.

B. Section 302 Must Be Enforced to Prevent Unions from Extorting Employers for Organizing Assistance.

Enforcing Section 302 against the "thing[s] of value" at issue here also advances the provision's second purpose: protecting employers from "'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426 n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Here, in exchange for the organizing assistance, Unite agreed to not "engage in a strike, picketing, or other economic activity." Pet. App. 82. Unite estimates that the "business Mardi Gras would have lost from a boycott" would have been "over $100,000." J.A. 24. Thus, the union sold labor peace to Mardi Gras. That is squarely within Section 302's intended scope. "The legislative history of § 302 demonstrates that the provision was intended to 'prohibit, among other things, the buying and selling of labor peace,' something that the [Agreement] at issue here at least arguably does." *Mulhall I*, 618 F.3d at 1290-91 (Pet. App. 52) (quoting S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477).

Moreover, since the 1990s unions have increasingly resorted to extorting employers for assistance with unionizing their employees through so-called "corporate campaigns" or "comprehensive campaigns." *See* Brudney, 83 S. Cal. L. Rev. at 738-43. These campaigns involve a wide range of "legal and potentially illegal tactics" including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Smithfield Foods v. UFCW,* 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (quoting *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see Pichler,* 228 F.R.D. at 234-40 (describing corporate campaign for an organizing agreement); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999) (same). The objective is to inflict such severe economic and regulatory

distress that the employer will enter into an organizing agreement to make the union stop.

Union pursuit of organizing assistance is thereby proving disruptive to labor peace. These are unnecessary disruptions manufactured by unions themselves, as the targets of their extortionate campaigns are necessarily employers of employees who have not chosen to support the union (if the employees did, the union could just petition for an NLRB election) and whom the unions could solicit through traditional means. Enforcing Section 302 to stop unions from shaking down employers for "thing[s] of value" for organizing will go far to promote the "labor peace" Congress wished to foster in the LMRA.

C. The Legislative History Supports Section 302's Applicability Here.

1. The legislative history of Section 302 demonstrates two important points favoring the application of the section to organizing assistance.

First, it shows that Section 302's supporters knew it was drafted broadly. *See generally Lanni*, 466 F.2d at 1104-05 (reiterating Section 302's legislative history). For example, the House Report on the 1959 amendment states that the statute makes it "illegal for an employer to pay or deliver *anything of value* to a representative of his employees, except in those instances permitted by subsection (c)." H.R. Rep. No. 86-741 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2469 (emphasis added). One legislator explained that "under the language of the amendment, it would be unlawful for any representatives of employees . . . to receive *anything of benefit* or value from the management." 92 Cong. Rec. 4900 (Sen. Pepper) (emphasis added). Another stated that "[t]his language clearly goes so far as to make the employer guilty of

violation of the law if he contributed anything to the union for the benefit of the union." 92 Cong. Rec. 4895 (Sen. Wheeler). The list goes on. *See Lanni*, 466 F.2d at 1104-05. This "[l]egislative history confirms that a literal construction of this statute does no violence to common sense." *Arroyo*, 359 U.S. at 424.

Second, the LMRDA's legislative history shows that Section 302 was intended to reach union organizing activities. The Senate Report explains that the statute was amended to apply to any union "which is seeking to represent or would admit to membership any of the employees of the employer," thus closing a loophole a court had opened by holding that Section 302 applied only to incumbent unions that represented an employer's workforce. *See* S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330. Section 302's prohibitions were also extended in the LMRDA to reach transactions intended to cause an "employee or group or committee to influence any other employees in the exercise of the *right to organize* or bargain collectively through representatives of their own choosing," 29 U.S.C. § 186(a)(3) (emphasis added), and to any "request" or "demand" for money or thing of value. *Id*. § 186(b)(1). Section 302 was plainly intended to prohibit unions from demanding any "thing of value" from employers whose employees the unions seek to organize.

2. Unite argues that the 1947 and 1959 legislative histories do not specifically mention the three types of organizing assistance at issue here. Unite Br. 36. This says nothing about Congress' intent because unions did not begin seeking such organizing agreements in significant numbers until the 1990s, decades after the legislative enactments at issue. *See*

supra at 5-6.[14] In any event, this Court has rejected relying on an *absence* of legislative history to prove an affirmative point. *See Mansell v. Mansell*, 490 U.S. 581, 592 (1989).

Unite and its amici next argue that Section 302 "was intended, primarily, as a 'stopgap' measure to regulate employer payments to union welfare funds." Unite Br. 37; S.G. Br. 21-22. That was merely one purpose of the provision. Even before the LMRDA amendments, this Court recognized that it cannot "be contended that . . . Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section." *Ryan*, 350 U.S. at 305. The LMRDA amendments remove any doubt that Section 302 is aimed primarily at the conflict-of-interest problem. *See Lanni*, 466 F.2d at 1104-05 (reiterating Section 302's legislative history).

Finally, Unite offers a legislative-history argument remarkable for its chain of logical leaps: according to Unite, (i) the "second purpose" of Section 302 is to prevent extortion, and therefore (ii) "[t]he antecedent of Congress' use of 'any money or thing of value' . . . was common-law extortion," and therefore (iii) Section 302 must be limited to the "wrongful taking of money or some tangible, valuable property." Unite Br. 37-39. This argument is wrong on every count. First, Unite ignores that Section 302 does not use the word "extortion," and has other purposes beyond combatting that practice—namely, preventing inducement of union representatives and protecting trust funds. *See Arroyo*, 359 U.S. at 425-26. Second,

[14] The Solicitor General says such agreements first appeared in the 1970s. S.G. Br. 28. If so, the point remains the same, as they still post-date the Section 302 amendments in question.

there is "not the slightest indication that section 302 was intended to duplicate state criminal laws." *Id*. at 422. This statute is wholly unlike the Hobbs Act in this respect. *See Sekhar,* 133 S. Ct. at 2725. Third, the offense of extortion is not limited to obtaining tangible things, but broadly extends to services and most intangibles under both common law, *see id*. at 2728 (Alito, J., concurring), and federal law, *id*; *see Nilsen*, 967 F.2d at 542-43 (construing 18 U.S.C. § 876). Unions do engage in extortion when they try to force employers to give them things valuable for organizing their employees. *See supra* at 33-35.

III. ENFORCING SECTION 302 AS WRITTEN LEADS TO NO ABSURD RESULTS.

Unite and its amici claim that a parade of horribles will befall federal labor law if Section 302 is enforced to prohibit employers from providing organizing assistance. Most dramatically, they argue that Section 302 would outlaw many important aspects of the collective-bargaining process, from employer recognition to arbitration to collective-bargaining agreements themselves. These specters are illusory. Enforcing Section 302 here will not conflict with any other labor statute, but will serve only to effectuate federal labor policy.

A. Enforcing Section 302 by Its Terms Does Not Outlaw Voluntary Recognition, Collective Bargaining Agreements, or Common Terms of Such Agreements.

1. *Voluntary Recognition*.

Unite admits that "[t]he complaint does not allege that the employer's promise to recognize the union upon a showing [of] majority status violates § 302." Unite Br. 55. Nevertheless, Unite and its amici argue

at length that giving Section 302 its full meaning will make voluntary recognition unlawful. Not so. If it ever were challenged, employer recognition cannot be prohibited by Section 302's general prohibition because it is specifically permitted by NLRA Section 9(a), 29 U.S.C. § 159(a). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012). This is not an issue with organizing assistance, however, because nothing in the NLRA gives unions any right to those "thing[s] of value." *See infra* 45-46.

Unite and its amici also attempt a related gambit: they conflate organizing assistance with voluntary recognition and suggest that if the former is unlawful, the latter will be as well. Unite Br. 54-57; S.G. Br. 26-30. Unite asserts that that conclusion follows because "[v]oluntary recognition is the very object of the neutrality agreement." Unite Br. 54. The Solicitor General does not even offer that fig leaf; he simply conflates voluntary recognition and organizing assistance with no explanation of why that makes sense. S.G. Br. 26-30.[15]

It makes no sense at all. First, that employer recognition is lawful does not mean "any money or other thing of value" delivered to the union during the run-up to that recognition must be lawful. To the

[15] The Solicitor General also incessantly mischaracterizes organizing assistance as mere "ground rules." This euphemism is inapt. The three things at issue here are not innocuous rules of conduct for an organizing campaign. They are valuable forms of employer assistance that rig the game in the union's favor and dramatically increase its odds of unionizing the targeted employees.

contrary: Section 302 expressly applies to unions that "seek to represent" employees, 29 U.S.C. § 186(a)(2), and makes no exception for things valuable to unions for organizing. In fact, under Section 302, it does not matter *why* Unite values Mardi Gras' assistance. It only matters *that* Unite values it (which it clearly does).

Second, employers can recognize unions that have the voluntary support of a majority of their employees without affirmatively helping the union gain that support. In fact, before the recent rise of top-down organizing, that is how employer recognition usually occurred. Enforcing 302 against organizing assistance simply will not prohibit employer recognition.

2. *Collective Bargaining*.

a. Unite next claims that enforcing Section 302 by its terms will make collective bargaining agreements unlawful. Unite Br. 15. The argument fails because collective bargaining involves a union demanding money and other valuable things for *employees* it exclusively represents, not for the union itself. *See* 29 U.S.C. § 158(d) (defining collective bargaining); *Wallace Corp. v. NLRB,* 323 U.S. 248, 255 (1944). Such demands are perfectly lawful because Section 302(a) "does not prohibit the employee himself from accepting money or other thing of value if it is paid directly to the employee by the employer." 92 Cong. 4891 (Sen. Byrd). And Section 302(c) exempts those employee benefits that result in delivery of something to their union representative that Congress believed should be permissible. This includes employer contributions to union trusts that provide health, retirement, apprenticeship, vacation, holiday, severance, scholarship, child care, housing, and legal-service benefits to employees. *See* 29 U.S.C.

§§ 186(c)(5)-(8). In this manner, Section 302 permits legitimate collective bargaining for employees, while prohibiting union self-dealing.

That explains why Unite is wrong that enforcing Section 302 by its terms would outlaw common provisions of collective bargaining agreements. Unite Br. 12, 14-15, 34. The agreements provide things to employees, and deliver nothing to their union representative under Section 302(a) that is not permitted by Section 302(c).

Grievance and arbitration clauses deliver nothing to a union in and of themselves; they merely provide for a dispute-resolution process. Only if the result of either process requires payment or delivery of something to a union is Section 302(a) implicated, and this result may be exempted by Section 302(c). For example, grievance awards regarding wages owed to a union steward, or contributions properly owed to a union retirement plan, would be exempt under Sections 302(c)(1) and (c)(5).

Union-shop clauses authorized by 29 U.S.C. § 158(a)(3) do not violate Section 302(a) because they require that *employees*, not employers, pay monies to a union. Moreover, Section 302(c)(4) exempts employer deduction of union dues.

Super-seniority and other special benefits for union stewards are exempt under Section 302(c)(1) if the benefit is "for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). This is often the case, *see Caterpillar,* 107 F.3d at 1056-57 (listing similar cases), but sometimes not, *see National Union of Healthcare Workers v. Kaiser Found. Health Plan Inc.*, ___ F. Supp. 2d. ___, 2013 WL 2645708 (N.D. Cal. June 12, 2013). Where it is

not, such benefits are unlawful. *See id.* (employer granting employees who are union agents special leave to campaign against rival union not exempted by Section 302(c)(1)).

b. The three "things" at issue in this case bear no resemblance to those Unite trots out in its parade of horribles. Unlike permissible terms of collective bargaining agreements that provide benefits to employees, here Unite seeks valuable things from Mardi Gras strictly for *itself*. This self-dealing is incompatible with Section 302 and the collective bargaining process it protects, because it creates the danger that the union and employer will collude to satiate their self-interests at employee expense. That is precisely what occurred in *Adcock* and other cases discussed above, in which unions agreed to make employee wage and benefit concessions as *quid pro quo* for organizing assistance. *See supra* at 31-33.

It is also what occurred here. Mardi Gras and Unite satisfied their respective self-interests—Mardi Gras gained political clout and labor peace, and Unite gained assistance in organizing more dues-paying members—at the expense of Mulhall and his co-workers, who bear the negative aspects of the organizing agreement. These employees will be deprived of information from their employer about the effects of unionization, and be precluded from voting in a secret-ballot election over whether they want Unite as their representative. That self-dealing violates Section 302, and this Court can so hold without imperiling legitimate terms of collective bargaining agreements.

c. If anything, it is Unite's interpretation of Section 302 that threatens the integrity of collective bargaining. Its narrow statutory reading permits unions and

their officials to self-deal with employers both before and during collective bargaining not only for things valuable for organizing, which is bad enough, but also for any other valuable service, use of property, or intangible that is not a "monetary equivalent." Unite Br. 31. That will undermine Congress' intent in Section 302 to prevent "conflict[s] of interest," Pet. App. 52, and ensure complete union fidelity to the employees the union has a fiduciary duty to represent in collective bargaining. Accordingly, Unite's interpretation must be rejected.

B. Enforcing Section 302 by Its Terms Does Not Conflict with the NLRA.

Unite also asserts that enforcing Section 302 by its terms will conflict with the NLRA. Unite Br. 18-24, 48-60. This assertion is rather galling, as the entire point of an organizing agreement is to circumvent the NLRA's employee protections; for Unite to seek safe harbor from Section 302 in the very statute it seeks to supplant is audacious, to say the least. It is also without legal merit. The conflicts Unite identifies are not conflicts at all.

1. *The Section 301 Cases Are Irrelevant.*

Section 301 of the LMRA grants federal courts jurisdiction to enforce "contracts between an employer and labor organization." 29 U.S.C. § 185. Unite argues that Mulhall's interpretation of Section 302 is "at war with settled interpretation" of Section 301 because "[t]here is a long, unbroken line of cases under [Section] 301 enforcing neutrality agreements like the one at issue here." Unite Br. 18-24.

The fatal flaw with this argument is that not one of the Section 301 cases on which Unite relies so much as mentioned Section 302. They instead enforced

organizing or similar types of agreements against other challenges. This includes *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962), which merely addressed whether courts have subject-matter jurisdiction under Section 301 to enforce labor contracts other than collective bargaining agreements. Mulhall's interpretation of Section 302 thus creates no conflict at all. The mere fact that courts enforced these agreements in the absence of a Section 302 claim does not mean they would reach the same result if Section 302 were raised.

To the extent Unite is arguing that contracts subject to Section 301 are somehow exempt from Section 302's prohibition, the argument is untenable. Section 302 makes it unlawful for employers and unions to "*agree*" to deliver and receive a thing of value. 29 U.S.C. §§ 186(a) & (b) (emphasis added). The prohibition invalidates noncompliant terms of agreements that are otherwise enforceable under Section 301.

For example, collective bargaining agreements are certainly contracts enforceable under Section 301. Yet, "[t]he courts will not enforce an illegal collective bargaining agreement provision" that violates Section 302. *Bugher v. Cons. X-Ray Serv. Corp.*, 705 F.2d 1426, 1435 (5th Cir. 1983). As Senator Byrd, a proponent of Section 302, stated: "the representatives of the employees, which means the union, shall not receive a tribute of this kind, even though it may be provided for in a collective bargaining contract." 92 Cong. Rec. 4893. Similarly here, unions cannot receive a "thing of value" from an employer merely by making it a term of an organizing agreement.

2. *The NLRA Does Not Give Unions Any Right to Organizing Assistance.*

a. Unite also argues that each of the "thing[s] of value" at issue here "has been approved and occupies a long-standing and well-established place in labor law." Thus, Unite suggests, enforcing Section 302 against them would "destabiliz[e]" practice under the NLRA. Unite Br. 48-53.

The argument misses the mark. "By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original). The NLRA does not grant Unite any right to use Mardi Gras' private property for organizing, *id.* at 537-38;[16] to receive employee lists from it before filing a valid election petition with the NLRB, *see Wyman-Gordon Co.,* 394 U.S. at 766; or to control Mardi Gras' speech and actions regarding unionization, *see* 29 U.S.C. § 158(c) (protecting employers' non-coercive speech about unionization). Accordingly, enforcing Section 302 against these three things cannot conflict with the NLRA.

More generally, "labor-peace agreements . . . are not recognized by the [NLRA]." *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee Cnty*, 431 F.3d 277, 282 (7th Cir. 2005). The Act authorizes collective bargaining *after* a majority of employees choose a union to be their exclusive representative, but not before. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-39 (1961). A

[16] *Lechmere* recognized that, in unusual situations where employees live and work in an extremely isolated setting like a logging camp, employees have a right to be visited on company property by union agents. 502 U.S. at 539-40. That is not the situation at Mardi Gras' racetrack.

special exception is made only for the construction industry, 29 U.S.C. § 158(f), which proves the general rule. Although organizing and other pre-recognition deals are not necessarily illegal under the NLRA—it depends on their specific terms—nothing in the NLRA affirmatively authorizes them.

b. Unite, however, claims that enforcing Section 302 here could prohibit *other* transfers of information, uses of property, and communications that the NLRA requires or permits. Unite Br. 49-54. These claims are unfounded.

First, voter lists distributed in NLRB elections do not violate Section 302(a) because the NLRB, not the employer, delivers the list to the union. NLRB Casehandling Manual ¶ 11312.1. Moreover, even if Section 302(a) were implicated, things that employers must provide to a union pursuant to NLRB orders are exempt under Section 302(c)(2). *See J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 328 (4th Cir. 1980). Thus, an employer "supplying the Board with information, pursuant to a Board order" does not violate Section 302. *Wyman-Gordon v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968), *rev'd on other grounds* 394 U.S. 759 (1969).[17]

The NLRB also requires that employers deliver information relevant to collective bargaining to exclusive representatives of their employees under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5).

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[17] Unite falsely claims that this Court "considered Mulhall's argument" and "rejected it completely" in *Wyman-Gordon*, 394 U.S. at 767. Unite Br. 14. *Wyman-Gordon* merely held that the NLRB has the authority to order an employer to "submit a list of the names and addresses of its employees for use by the unions in connection with the election." 394 U.S. at 766. The Court did not pass upon any issue relating to Section 302.

See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301, 302-03 (1979). This, too, is covered by Section 302(c)(2)'s exemption because this statutory duty is enforceable by court order.[18] Unite's suggestion that "*all* information an employer is required to give a union as part of the bargaining process" would somehow be illegal if Section 302 is enforced by its terms, Unite Br. 53, is demonstrably incorrect.

Second, enforcing Section 302 here will not require that employers bar their employees' union representatives from company property. Section 302(c)(1) generally allows employers to grant union officials who are their employees free use of company property to implement terms of collective bargaining agreements. *See BASF Wyandotte,* 798 F.2d at 856-57. Incidental access for non-employee union officials' provides nothing of value to those officials.

To the extent that a union representative's use of company property goes beyond these boundaries, Section 302 prohibits it, and rightfully so. An employer giving an incumbent union free use of property for its own purposes—such as for internal union administration or conducting political operations—would be giving a "thing of value" to that union, both monetarily and otherwise. It is proper to enforce Section 302 in these circumstances. *Cf. United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) (union officials receiving discounted rooms from unionized hotel violated Section 302). So doing would

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[18] Even if this exemption did not apply, Section 8(a)(5)'s specific requirements would control over Section 302's general prohibition. *See RadLAX,* 132 S. Ct. at 2071; *Morton*, 417 U.S. at 550-51. This is not an issue here, however, because neither Section 8(a)(5), nor any other term of the NLRA, gives Unite any right to the information it demands from Mardi Gras.

not conflict with the NLRA because the Act does not grant union representatives any right to use an employer's property for their own purposes.

Third, enforcing Section 302 against gag clauses on employer speech will not interfere with employers' free-speech rights or compel them to speak against unionization. Unite Br. 48-49. Employers can unilaterally speak, or not speak, about unionization without fear of violating Section 302 because nothing in that circumstance is delivered to the union. Only when an employer grants a union *control* over its speech is a "thing of value" delivered to the union in violation of Section 302(a).

For example, a business (say Coca-Cola) does not deliver something of value to a competitor (say Pepsi) every time it independently decides not to run advertising or compete in a market. However, Coca-Cola certainly delivers something of great value to Pepsi if it enters into a noncompetition agreement that bars it from advertising or competing against Pepsi in a particular market. The same principle applies here.

Far from impeding NLRA Section 8(c), as Unite claims, enforcing Section 302 to protect employer freedom of speech from union control effectuates Section 8(c)'s purpose of encouraging open debate during organizing campaigns, *see Brown*, 554 U.S. at 68, and facilitating employees' "underlying right to receive information opposing unionization." *Id.* "It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971); *see also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986).

In contrast, gag clauses deprive employees of potentially useful information about unionization. "It is difficult, if not impossible to see . . . how an employee could intelligently exercise [her] rights, especially the right to decline union representation, if the employee only hears one side of the story—the union's." *Healthcare Ass'n v. Pataki,* 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006). "[H]indering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes." *Id.* (citation omitted).

3. *NLRA Section 8 Does Not Help Unite.*

Unite and its amici also contend that Section 302's prohibitions must be narrowly construed to avoid overlapping with Sections 8(a) and (b) of the NLRA, 29 U.S.C. §§ 158(a)-(b). *See* Unite Br. 40, 58. This contention fails both generally and in its particulars.

a. It is common for two or more statutory prohibitions to govern the same conduct. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws . . . a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

This principle applies to the interaction of the NLRA and independent federal labor laws, such as LMRA Sections 301-03. Under Section 301, for example, unions can file suit to remedy employer noncompliance with collective bargaining agreements, even though that is also an unfair labor practice under NLRA Section 8(a)(5), 29 U.S.C. § 158(a)(5). And, under LMRA Section 303, 29 U.S.C. § 187, employers can file suit to recover damages resulting from secondary union boycotts that violate

NLRA 8(b)(4), 29 U.S.C. § 158(b)(4), even though unfair-labor-practice charges could also be filed directly under NLRA 8(b)(4). *See ILWU v. Juneau Spruce Corp*, 342 U.S. 237, 244 (1952).

Similarly here, "[b]oth section 302 of the LMRA and section 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy. Section 8 is a general provision. In section 302 Congress has independently provided a judicial remedy for certain specifically described conduct." *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Memorial Hosp.*, 862 F.2d 606, 608 (6th Cir. 1988), *further proceedings*, 492 U.S. 914 (1989) (judgment vacated on other grounds). Thus, the NLRA does not preempt enforcement of Section 302, even against conduct that the NLRB's General Counsel determines not to violate the NLRA. *Id.*

A contrary conclusion would "effectively repeal section 302 because the conduct proscribed by section 302 is almost always arguably subject to sections 7 or 8 of the NLRA and, therefore, subject to the jurisdiction of the NLRB in an unfair labor practice proceeding." *Id.* Making Section 302 a moribund letter out of deference to the NLRB would be absurd given that Congress deliberately placed the provision outside the agency's jurisdiction. *See BASF Wynadotte Corp.*, 274 N.L.R.B. 978 (1985).

b. More specifically, giving Section 302 its ordinary meaning will not render superfluous Sections 8(b)(4) and 8(b)(7) of the NLRA, which regard secondary boycotts and recognitional picketing, respectively. 29 U.S.C. §§ 158(b)(4), 8(b)(7). Both provisions apply to union conduct that does not violate Section 302, such as a secondary boycott aimed at pressuring an employer to provide better wages to employees or pick-

eting to secure employer recognition after a majority of employees choose to support the union. *See supra* at 38-42. Only secondary boycotts or picketing the objective of which is acquiring *for the union* any nonexempt "money or other thing of value" from an employer will violate 302(b).

But that minor overlap is consistent with "[o]ne of the major aims of the 1959 Act," which was to "limit 'top-down' organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Connell Const. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 632 (1975). "Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns." *Id*. At the same time, Congress also made Section 302 applicable to union organizing by enacting Sections 302(a)(2) and (a)(3). These provisions work together as part of a comprehensive statutory scheme to restrict top-down union organizing. Giving full effect to all of them is consistent with congressional intent.

c. Enforcing Section 302 as written will also not subsume Section 8(a)(2) of the NLRA, which makes it unlawful for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2). Section 302 does not overlap with Section 8(a)(2)'s primary prohibition regarding domination and interference, but only its secondary prohibition regarding "support." But this partial overlap, which will exist under *any* reading of the statutes, was understood and accepted during Section 302's enactment. For example, Senator Carl

Hatch explained Section 302's purpose to Senator James Tunnell as follows:

> Mr. HATCH: The Senator is familiar with the provisions of the Wagner Act against contributions, is he not?
>
> Mr. TUNNELL: That purpose is very clear. It is to prevent the employer from controlling the union, as against the employees. There is a sensible explanation for such a prohibition.
>
> Mr. HATCH: Might there not be a similar purpose in the restrictions placed in this amendment?

92 Cong. Rec. 5426; *see also* 92 Cong. Rec. 4893 (Sen Byrd).

Unite avers that enforcing Section 302 here could lead to liability in some cases where there would be no violation of Section 8(a)(2). Unite Br. 58.[19] But that is not grounds for neutering Section 302. To establish a statutory conflict, it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Indeed, to effectively allow the NLRB to carve exemptions into Section 302 through its interpretation of Section 8(a)(2) would be inconsistent with Congress' decision not to grant the NLRB any jurisdiction over Section 302. If anything, given that Section 302 was enacted after Section 8(a)(2), and is a more specific statute, its provisions have precedence.

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[19] The NLRB has not directly ruled on whether employer assistance provided in an organizing agreement constitutes unlawful support under Section 8(a)(2), but a strong argument can be made that it does. *See* Eigen & Sherwyn, 63 Hastings L.J. at 729-30.

Enforcing Section 302 here will serve only to effectuate the NLRA's "clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *IAM v. NLRB*, 311 U.S. 72, 80 (1940). As *Adcock* and similar cases dramatically illustrate, employers can use promises of organizing assistance to select and control their employees' bargaining representative. "[C]ollective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals." *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (quoting H.R. Rep. No. 74-1147, 18 (1935)).

* * *

Contrary to Unite's claims, the sky will not fall if Section 302 is enforced to prohibit employers from providing organizing assistance. Instead, it will simply mean employers cannot provide organizing assistance—nothing more, nothing less. This result effectuates Section 302's purpose of protecting employees from union self-dealing and employers from extortion. And, it protects the NLRA's representational procedures, particularly its guarantees of free speech, from being subsumed by private union organizing agreements. There accordingly is no call to deviate from Section 302's plain text. "Thing of value" in Section 302 should be interpreted as broadly as it is in other federal statutes, and held to encompass the three things of value at issue here—lists of information, use of property, and a gag clause.

CONCLUSION

The Eleventh Circuit was correct that it is "too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in

§ 302." Pet. App. 8. Its decision should be affirmed, except that portion regarding whether intangibles can be "delivered" under Section 302, which should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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