Case No. 08-56963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN CHAVEZ; WES BERTALAN; JOSEPH NIGBOR; ASSOCIATED BUILDERS AND CONTRACTORS OF SAN DIEGO, ELECTRICAL UNILATERAL APPRENTICESHIP COMMITTEE; SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, ELECTRICAL UNILATERAL APPRENTICESHIP COMMITTEE,

Plaintiff-Appellants,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT; THE LOS ANGELES AND ORANGE COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL,

Defendants-Appellees.

On Appeal From The United States District Court
For The Central District of California
District Court Case 8:04-cv-00280-JVS-MLG

AMICUS BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

The National Right to Work Legal Defense Foundation has no parent corporation and no publicly held company owns 10% or more of the Foundation's stock.

/s/ William L. Messenger
William L. Messenger

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation is nonprofit, charitable organization that provides free legal aid to employees whose rights are infringed upon through compulsory union representation or membership. Foundation attorneys have frequently represented the interests of individual employees before the Supreme Court, Ninth Circuit, and other courts and administrative agencies. *See, e.g.*, *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

The Foundation has an interest in this case because it concerns the legality of government mandated project labor agreements (" PLAs") that impose union representation and " membership" on employees who work on public construction projects. The Foundation has participated as an amicus in cases regarding the legality of PLAs, e.g., *Building and Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), and government mandated union agreements, e.g., *MMAC v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005). The Foundation has moved for leave to file an amicus brief in this case in support of Appellants.

SUMMARY OF ARGUMENT

The issue presented is whether a public owner-developer of a construction project can enter into a PLA without running afoul of federal preemption under the National Labor Relations Act (" NLRA"), 29 U.S.C. § 151 *et seq*. The District Court held that the Rancho Santiago Community College District (" District") could enter into such an agreement because it was not acting as a regulator, but as a market participant. (JA1).

The District Court erred because an analogous private market participant could *not* lawfully enter into a PLA under §§ 8(e) and (f) of the NLRA, 29 U.S.C. §§ 8(e) and (f). Section 8(f) of the NLRA permits only employers " engaged primarily in the building and construction industry" to enter into pre-hire agreements, i.e., agreements entered into before the union represents the covered employees. 29 U.S.C. § 158(f). Section 8(e) of the NLRA permits only " employer[s] in the construction industry," that have a collective bargaining relationship with a union, to enter into agreements with unions to " cease doing business" with other employers. 29 U.S.C. § 158(e); *see Connell Constr.*

Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616, 633 (1975).

The District is not an employer in the construction industry and does not have a representational relationship with the union. If it was a private entity, the District would have violated the NLRA by entering into the PLA.

Indeed, the District's scheme is functionally identical to that found unlawful in *Connell*. It is an agreement by a "stranger" employer—i.e., an employer that lack a collective bargaining relationship with a union—to impose a union contract on those with which it does business. *Id*. at 632-33. The Supreme Court found this type of "top-down organizing" scheme repugnant to § 8(e) of the NLRA. *Id*. at 632.

In short, the District did not act as a market participant when it entered into the PLA because an analogous private market participant would violate the NLRA if it executed such an agreement. As such, the District's actions are preempted by the NLRA.

STATEMENT OF FACTS

I. The District Entered Into a Pre-Hire Agreement With a Union Signatory Clause Notwithstanding Its Lack of A Collective Bargaining Relationship With The Union

Appellants' brief provides a full statement of the facts. The facts relevant to this brief are undisputed and stated below.

First, the District is a party to a " Project Stabilization Agreement" (" PSA") with the Los Angeles/Orange Counties Building and Construction Trades Council (" Union") that governs construction projects funded by Measure E. (ER 817). The PSA is a so-called " pre-hire" agreement because it is a" collective-bargaining agreement[ ] providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees." *Building & Constr. Trades Council v. Associated Builders*, 507 U.S. 218, 231-32 (1993) (" *Boston Harbor*").[1]

[1] *See* PSA Art. 8.1 (ER 824) (recognition of Union as the exclusive representatives of employees; *id.*, Art. 8.2 (ER 824) (employees must pay union dues as a condition of employment); *id.,* at Art. 9 (ER 825) (employees must be hired primarily through union hiring halls).

Second, the PSA contains two clauses that require that the District make execution of the union agreement a condition of doing business on the projects. *See* PSA Art. 4.2,[2] 6[3] (ER 822, 824). This requirement—to do business only with signatories to a union contract—is known as a "union signatory" clause. *See, e.g.*, *Chicago Dining Room Employees (Clubmen)*, 248 N.L.R.B. 604, 606 (1980).

Third, the Union does not exclusively represent the District's employees. *See* Dist. Ct. Op. at 8 (ER 8) ("The District concedes that the PSA was not reached in the context of a collective bargaining relationship"). Indeed, the PSA does not govern the District's

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[2] "By accepting the award of a Covered Contract for a Covered Project or Projects, whether as a contractor or subcontractor, the Contractor agrees to be bound by each and every provision of the Agreement, including the appendices, bid documents, and contract terms." PSA Article 4.2 (ER 822).

[3]

> This Agreement shall be included in the District's bid specification package for covered Project work and each Contractor ("of any tier") who becomes a successful bidder shall be required to execute a copy of this Agreement and sign, prior to the start of the Project, any necessary documents to implement the Agreement, including the "Trust Agreements" referenced in Article 10 hereof.

PSA Article 6 (ER 824).

employees at all. The District's sole obligation under the PSA is to impose a union contract on others. The District's lack of a collective bargaining relationship with the Union makes the District a so-called "stranger" employer. *See Connell,* 421 U.S. at 627, 631.

Finally, the District is not engaged primarily in the building and construction industry. *See* District Court Op., 10 n.5 (ER 10) ("The District does not qualify as such an employer"). The District is a school district, not a contractor. Yet, the District entered into a pre-hire construction agreement that contains union signatory clauses. The issue presented is whether a private entity could lawfully do the same, for, if not, neither can the District.

ARGUMENT

I. The District's Agreement is Preempted by the NLRA Unless An Analogous Private Owner-Developer Could Lawfully Enter Into A Similar Agreement Under the NLRA

The NLRA preempts regulation of private sector labor relations by a state or local government except where the government acts as a "market participant." *See Boston Harbor*, 507 U.S. at 226-27. The District's agreement to require contractors to execute a union contract

to do business on its public construction projects clearly regulates labor relations in a manner inconsistent with the NLRA.[4] Consequently, the District's PSA is preempted unless the District can prove that it is acting as a "market participant."

But the "market participant" defense requires that the District prove that "analogous private conduct would be permitted." *Boston Harbor*, 507 U.S. at 231-32. Only to "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement," should "a public entity as purchaser . . . be permitted to do the same." *Id.* at 231.[5]

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[4] Among other things, § 8(d) of the NLRA expressly provides that employers are not obligated to execute *any* agreements with unions. 29 U.S.C. § 158(d) (obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession"). "[T]he Act does not compel agreements between employers and employees. It does not compel any agreement whatever." *NLRB v. Jones & Laughin Steel Corp.*, 301 U.S. 1, 45 (1937). Even the National Labor Relations Board ("NLRB") lacks the authority to compel employers to execute agreements with unions. *Id*; *see also H. K. Porter Co. v. NLRB,* 397 U.S. 99, 102-07 (1970).

[5] Indeed, the converse conclusion would be absurd: that an entity acts as a market participant when acting in a manner unlawful for a market participant to act. That would turn the doctrine on its head.

This case presents an issue not resolved in *Boston Harbor*: can a private purchaser of construction services (i.e., an " owner-developer") lawfully enter into a pre-hire agreement that requires that it only do business with signatories to union contracts? The *Boston Harbor* Court recognized that *contractors* engaged primarily in the construction industry can lawfully enter into such agreements under §§ 8(e) and 8(f) of the NLRA. *Id.* at 230-31. But the Court never addressed whether an *owner-developer*, that is not a contractor engaged primarily in the construction industry (here, the District), can lawfully enter into such agreements under the NLRA.[6] As demonstrated below, the answer to

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[6] Specifically, in *Boston Harbor*, a public owner-developer (the Massachusetts Water Resources Authority) made execution of a PLA negotiated by a general contractor (Kaiser) a condition of obtaining work on a project. 507 U.S. at 221-22. The Court held that " [i]t is undisputed that the Agreement *between Kaiser* and [the union] is a valid labor contract under §§ 8(e) and (f)" because " those sections explicitly authorize this type of contract between a union and an *employer like Kaiser, which is engaged primarily in the construction industry*." *Id.* at 230 (emphasis added). The Court never addressed whether the owner-developer in the case—the Massachusetts Water Resources Authority—could lawfully enter into such an agreement if it were a private entity. Indeed, the Water Authority did not actually enter into the union agreement (unlike the District here), but merely included the agreement in its bid specifications.

this question is " no."

II. The District Did Not Act as a Market Participant When Entering Into the PSA Because It Is Not an " Employer Primarily Engaged in the Building and Construction Industry" under § 8(f) of the NLRA

Section 8(f) of the NLRA permits only employers " engaged primarily in the building and construction industry" to enter into pre-hire construction agreements like the PSA. 29 U.S.C. § 158(f).[7] But for the

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[7] It shall not be an unfair labor practice under subsections (a) and (b) of this section *for an employer engaged primarily in the building and construction industry* to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in

(continued...)

safe harbor of § 8(f), it is an unfair labor practice for an employer to enter into substantive agreements with a union before a majority of unit employees select the union as their representative under § 9(a) of the NLRA, 29 U.S.C. § 159(a) (permitting exclusive representation only by " representatives designated or selected for purposes of collective bargaining by a majority of the employees").[8] It is also unlawful under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), for employers to require employee membership in a union that is not their § 9(a) representative

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[7](...continued)
the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.
29 U.S.C. § 158(f) (emphasis added).

[8] *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003) (" an employer that signs a collective bargaining agreement recognizing a minority union as the exclusive representative of its employees will generally be deemed to have committed an unfair labor practice") (citing *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 736-38 (1961)); *see also Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966) (unfair labor practice for employer and union to negotiate contract before union establishes majority employee support).

or within seven days of an employee's employment.[9] Such conduct is only lawful under the NLRA if permitted by § 8(f).

Here, the District is *not* " engaged primarily in the building and construction industry" under § 8(f). *See* Dist. Ct. Op. at 10 n.5 (" The District does not qualify as such an employer") (ER 10). Indeed, a majority of the District's overall operations would have to be construction to satisfy this requirement. *See Frick Co.*, 141 N.L.R.B. 1204, 1209 (1963).

Yet, the District entered into a pre-hire agreement with the Union permitted only under § 8(f). The PSA contains each of the four clauses that only construction contractors may enter into under § 8(f) in the absence of majority employee support for the union: (1) recognition of the Union as the employees' exclusive representative, PSA Art. 8.1 (ER 824); (2) mandatory employee membership in the Union within seven

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[9] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to require union membership as a condition of employment *unless*: (1) " such labor organization is the representative of the employees as provided in [§ 9(a)] of this title," and (2) membership is only required " on or after the *thirtieth day* following the beginning of such employment." 29 U.S.C. § 158(a)(3) (emphasis added).

days, *id.,* Art. 8.2 (ER 824); (3) referral from the Union as a condition of employment, *id.,* Art. 9 (ER 825); and (4) training and experience qualifications for employment, *id.,* Art. 9.1, 9.4 (ER 825).

If it were a private entity, the District would certainly violate the NLRA by entering into the PSA. Only " employer[s] engaged primarily in the building and construction industry" can enter into such pre-hire agreements under § 8(f). Because the District would not qualify as such an employer, it cannot claim to be acting as a market participant.

III. The District is Not Acting as a Market Participant Because Its Union Signatory Agreements Would Also Violate § 8(e) of the NLRA If It Were a Private Owner Developer

A. The Union Signatory Clauses Violate the Basic Prohibition of § 8(e) Because They Are Agreements to " Cease Doing Business"

Section 8(e) of the NLRA makes it unlawful for employers to enter into agreements with unions to " to cease doing business with any other person." 29 U.S.C. § 158(e).[10] The union signatory clauses of Articles 4.2

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[10] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, *or*

(continued...)

and 6 of the PSA are agreements to " cease doing business" under § 8(e), because, by making execution of the PSA a condition of doing business with the District, the clauses inherently prohibit the District from doing business with contractors that do not execute the PSA.[11]

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[10](...continued)
to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

29 U.S.C. § 158(e) (emphasis added).

[11] *See NLRB v. HERE Local 531*, 623 F.2d 61, 66-68 (9th Cir. 1980) (clause stating that union contract " shall be applicable to and binding upon" lessees and subcontractors violates § 8(e) because it establishes condition precedent for leasing or subcontracting); *Local 277, Int' l Bhd. of Teamsters (J&J Farms Creamery Co.)*, 335 N.L.R.B. 1031, 1032-33 (2001) (requirement that employer " subcontract work only to an employer who is a signatory to a collective-bargaining agreement" is " a 'union signatory' clause" and violates § 8(e) because it " plainly limits subcontracting to union 'signatory' employers"); *HERE Local 274 (CHC Hotel)*, 326 N.L.R.B. 1058, 1058-59 (1998) (clause making union contract " applicable to and binding upon any successor, assignee, lessee or concessionaire" violates § 8(e) because employer is " prohibited from doing business with such potential lessee or concessionaire who refused to be bound by that agreement"); *Teamsters Local 631 (Reynolds Elec. & Eng.)*, 154 N.L.R.B. 67, 69 (1965) (clauses that " permit the subcontracting of unit work to companies observing all the terms of the instant contract" violate § 8(e) because they " limit the choice of subcontractors to those which recognize and have collective-bargaining agreements with a union"); *Local 814, Int' l Bhd. of Teamsters v. NLRB,* 512 F.2d 564, 567 n.5 (D.C. Cir. 1975) (collecting cases).

" It is well settled that contract clauses which purport to limit leasing or subcontracting to employers who are signatories to union contracts, so called union signatory clauses, are proscribed by § 8(e)." *Chicago Dining Room Employees (Clubmen)*, 248 N.L.R.B. 604, 606 (1980).[12] The District's agreement with the Union to make execution of the PSA a condition doing business with the District would certainly violate § 8(e)'s prohibition if the District were a private entity.

B. The District's Union Signatory Clauses Do Not Qualify for § 8(e)'s Construction Industry Exception

The PSA's union signatory clauses violate § 8(e) unless saved by the statute's " construction industry proviso," which states:

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[12] *See also Truck Drivers Union, Local 413, v. NLRB*, 334 F.2d 539, 548 (D.C. Cir. 1964) (a " clause would be a union-signatory clause if it required subcontractors to have collective bargaining agreements with . . . unions" and thus would violate § 8(e)); *District 2, Maritime Eng' rs (Grand Bassa Tankers)*, 261 N.L.R.B. 345, 349 (1982) (" A more blatant union signatory clause would be difficult to imagine" than a clause stating that " any operator employed by [the employer] to operate its U.S. flag ships shall have labor agreements with [the union"); *Chemical Workers Local 6-18 (Wisconsin Gas)*, 290 N.L.R.B. 1155, 1155-56 (1988) (clause stating that " [w]henever the Company shall contract work . . . the work so contracted shall be done by Union labor" is" a classic union-signatory clause," because it " precludes the Employer from doing business with any other employer who does not have a labor agreement with a union").

> That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

29 U.S.C. § 158(e). In addition to its stated terms, the Supreme Court has held that the proviso applies only to employers with a collective bargaining relationship with the union. *See Connell,* 421 U.S. at 632.

The construction industry proviso is inapplicable here because the District: (1) is not " an employer in the construction industry;" and (2) lacks a representational relationship with the Union.

1. The Construction Industry Proviso Is Inapplicable Because the District Would Not Be an " Employer in the Construction Industry" If It Were a Private Entity

Section 8(e)' s construction industry proviso applies only to " employer[s] in the construction industry." 29 U.S.C. § 158(e). This means entities that actively exercise control over labor relations at a construction site. *See Carpenters Local 743 (Longs Drug)*, 278 N.L.R.B. 440, 442-43 (1986).[13] Here, there is no evidence that the District plays

[13] Unlike § 8(f), an employer need not be " primarily" engaged in the construction industry to satisfy § 8(e)' s proviso. *See Longs Drug*, 278 N.L.R.B. at 442. Section 8(e) focuses on the employer' s role on a

(continued...)

any direct role in managing the labor relations at the sites of construction work.

That the District forces contractors to execute the PSA is, in and of itself, insufficient to make the District an " employer in the construction industry." *See, e.g., id.* at 440-42 (owner-developer that required execution of union contract not an " employer in the construction industry" because of lack of direct involvement in onsite labor relations). Indeed, § 8(e)' s " employer in the construction industry" requirement would be superfluous if employers could satisfy it by merely entering into subcontracting clauses.[14] This is contrary to the settled rule that every word in a statute have operative effect. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004).

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[13](...continued)
specific project, rather than the primary business of the employer. *Id.*

[14] The reason is that § 8(e)' s proviso exempts agreements made by an " [1] employer in the construction industry [2] relating to the contracting or subcontracting of work to be done at the site of the construction." If any agreement " relating to the contracting or subcontracting of work . . . at the site of the construction" was itself sufficient to make an entity an " employer in the construction industry," the first clause would be superfluous. The statute would operate the same if the words " employer in the construction industry" were omitted from the statute.

Active and direct involvement in labor relations at a construction site is necessary to satisfy the § 8(e) proviso. The District lacks such involvement and, as such, would not be an " employer in the construction industry" if it were a private entity.

2. The Construction Industry Proviso Is Inapplicable Because the District is a " Stranger" Employer That Lacks a Representational Relationship With the Union

The Supreme Court has twice held that § 8(e)' s construction industry exemption is not available to " stranger" employers—i.e., those that lack a representational relationship with the union. *See Connell,* 421 U.S. at 631-33; *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 653 (1982). Here, " the District concedes that the PSA was not reached in the context of a collective bargaining relationship." Dist. C.t Op. at 8 (ER 8). Accordingly, the District' s union signatory clauses are not saved by the proviso.

The District' s scheme is almost identical to that found unlawful in *Connell*. In that case, Connell Construction entered into a union signatory clause functionally identical to those in the PSA. 421 U.S. at

620.[15] Like the District, Connell was a stranger employer, in that its employees were not represented by the union. *Id*. at 620, 627. Also like the District, Connell's only obligation to the union was to force contractors with which it did business to execute a union contract.

The union in *Connell* argued that the clause was protected by § 8(e)'s proviso because Connell was an "employer in the construction industry." *Id*. at 627. Connell argued that "Congress intended only to allow subcontracting agreements within the context of a collective -bargaining relationship; that is, Congress did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors." *Id*. at 627-28. The Supreme Court agreed with Connell.

The Court held that "one of the major aims" of § 8(e) and related provisions was "to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer

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[15] The agreement stated that:" if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with [the union]." 421 U.S. at 620.

regardless of the wishes of his employees." *Id*. at 632. The " careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements" from stranger contractors. *Id*. at 633. Thus, the Court held that § 8(e)' s proviso " extends only to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id*. at 633. The Court concluded that Connell' s union signatory clause was unlawful under § 8(e). *Id*. at 635.

In *Woelke & Romero,* the Supreme Court twice reiterated its holding in *Connell*, but made noreference to the common-situs dicta. The *Woelke & Romero* Court held that § 8(e)' s " proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship," 456 U.S. at 653, and that " the protection of the proviso 'extends only to agreements in the context of collective bargaining relationships.' " *Id*. at n.8 (*quoting Connell*, 421 U.S. at 633).

The District is doing *exactly* what the Supreme Court held to be unlawful under § 8(e) in *Connell* and *Woelke & Romero*. The District agreed to force contractors to execute union contracts as a condition of doing business, notwithstanding the District's lack of a collective bargaining relationship with the Union. This is precisely the type of "top-down" organizing pressure from a stranger employer that the Supreme Court held repugnant to § 8(e) in *Connell*. As such, the District cannot claim that it acted as a market participant when entering into the union signatory clauses of the PSA.

3. The District Court's Conclusion is Erroneous

The District Court erroneously concluded the PSA was saved by § 8(e)'s construction industry proviso, notwithstanding the District's lack of a collective bargaining relationship with the Union, because the PSA was supposedly intended to reduce jobsite friction between union and nonunion employees. *See* Dist. Ct. Op. at 8-10 (ER 8-10). The issue of jobsite friction is often called the "common situs" or "*Denver Building Trades"* problem.[16] The District Court relied heavily on *Woelke*

[16] *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (continued...)

& Romero in reaching its conclusion. But *Woelke & Romero* supports the opposite conclusion—that a collective bargaining relationship is required to satisfy § 8(e)' s proviso.[17]

First, *Woelke & Romero* stated *twice* that *Connell* requires a collective bargaining relationship to satisfy § 8(e)' s proviso.[18] The opinion made no reference to any common-situs exception to this

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[16](...continued)
(1951), held that " picketing a general contractor' s entire project in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott." *Woelke & Romero*, 456 U.S. at 661.

[17] The District Court also relied on *Glens Falls Building & Constr. Trades Council (Indeck Constr.)*, 350 N.L.R.B. 417 (2007). This was certainly erroneous, as the NLRB stated in *Indeck* that it was *not* deciding whether union-signatory clauses might be protected by § 8(e)' s proviso if directed at the common situs problem. " The Board has yet to determine whether an alternative basis for proviso coverage exists under this *Connell* common-situs dictum, *and we find no need to do so here*." *Id*. at 421 (emphasis added); *see also id*. at n.13. *Indeck* thus offers no support whatsoever to the District or Union.

[18] *Woelke & Romero,* 456 U.S. at 653 (" the [*Connell*] Court decided that the proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship, even though they were covered by the plain language of the statute."); *id*. at 653 n.8 (" The [*Connell*] Court concluded, however, that the protection of the proviso 'extends only to agreements in the context of collective bargaining relationships.' ") (*quoting Connell*, 421 U.S. at 633).

requirement. This omission appears to be intentional, as the Court discussed the common-situs issue at length. *See id.* at 661-63.

Second, *Woelke & Romero* reiterated that § 8(e) was intended " to restrict the ability of unions to engage in top-down organizing campaigns," *id.* at 663, and that such pressure is permissible only in the context of a collective bargaining relationship. " [W]e believe that Congress endorsed subcontracting agreements *obtained in the context of a collective bargaining relationship*—and decided to accept whatever top-down pressure such clauses might entail." *Id.* (emphasis added).

Third, a common situs exception would not address the problem peculiar to " stranger" employers that *Woelke & Romero* held was the basis for the *Connell* decision.

> In *Connell*, the Court was confronted with a novel and apparently fool-proof organizational tactic: " stranger" picketing aimed at pressuring employers with whom the union had no collective bargaining relationship, and whose employees it had no interest in representing, into signing union signatory subcontracting agreements. Because there was no recognitional objective to the picketing, it did not violate § 8(b)(7), 29 U.S.C. § 158(b)(7). And because the subcontracting clause appeared to be protected by the construction industry proviso, the picketing was arguably not prohibited by § 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A), which bans picketing to secure agreements made unlawful by § 8(e). The Court concluded, however, that the protection of the proviso 'extends only

to agreements in the context of collective bargaining relationships.' " *Id.* at 653 n.8 (*quoting Connell*, 421 U.S. at 633).

Connell itself makes clear that the Supreme Court's chief concern was union organizing pressure brought on and through stranger employers. The Court feared that " if we agreed . . . that the construction industry proviso authorizes subcontracting agreements with 'stranger' contractors . . . our ruling would give construction unions an almost unlimited organizational weapon." 421 U.S. at 631. " The union would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors." *Id.* The Court required a collective bargaining relationship to stop this from occurring.

A common situs exception would *do nothing* to address the problems with stranger employers identified in *Connell* and *Woelke & Romero*. It would not prevent unions from coercing stranger employers to enter into subcontracting clauses under §§ 8(b)(7) or 8(b)(4) of the NLRA. Nor would it reduce the top-down pressure unions could wrongfully impose through stranger employers. Instead, a common situs exception would grant unions the very " unlimited organizational weapon" that the

Connell Court sought to prohibit: subcontracting agreements with stranger employers. 421 U.S. at 631.

Finally, *Woelke & Romero* held that § 8(e) was *not* primarily aimed at the common situs issue. *See* 456 U.S. at 662. In dicta, the *Connell* Court flirted with the proposition that § 8(e)' s proviso may " *possibly* [extend] to common-situs relationships on particular jobsites as well," due to " congressional references to the *Denver Building Trades* problem." 421 U.S. at 633 (emphasis added). But in *Woelke & Romero*, the Court rejected this proposition as " rest[ing] on faulty premises." *Id*. at 662. " [T]he proviso was not designed solely as a response to the *Denver Building Trades* problem" and " is only partly concerned with jobsite friction." 456 U.S. at 662. Indeed, " the problem of jobsite friction between union and nonunion workers received relatively little emphasis" from Congress when it enacted § 8(e). *Id*.[19] The *Woelke & Romero* Court ultimately held that a subcontracting clause that was *not*

[19] The Court identified the principal purpose of § 8(e) as eliminating a loophole in existing law that permitted unions and employers voluntarily to agree to engage in otherwise illegal secondary boycotts. *Id*. at 654-55.

aimed at reducing friction on a particular jobsite, but that was obtained within the context of a collective bargaining relationship, was saved by § 8(e)' s proviso.

The District Court turned *Woelke & Romero* on its head by citing it for the proposition that § 8(e)' s proviso protects union signatory clauses negotiated outside of a representational relationship if aimed at reducing jobsite friction. The case stands for the *exact opposite conclusion*—that the proviso requires a collective bargaining relationship and not a common situs objective.

Here, the District lacks a collective bargaining relationship with the Union. Accordingly, if it were a private entity, it could not lawfully enter into the union signatory clauses with the Union under *Connell* and *Woelke & Romero*.

CONCLUSION

Only employers engaged primarily in the construction industry that have a collective bargaining relationship with a union can enter into pre-hire agreements that contain union signatory clauses under §§ 8(f) and (e) of the NLRA. The District is not a construction-industry

contractor and lacks a representational relationship with the Union. If the District was a private entity, it would violate the NLRA by entering into the PSA. Accordingly, the District cannot claim market participant status and its conduct is preempted by the NLRA.

Respectfully submitted this 1st day of July 2009.

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STATEMENT OF RELATED CASES

There are no related cases pending in the Ninth Circuit Court of Appeals.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation of Fed. R. App. P. 29(d) because it contains 5,452 words, and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Wordperfect v.11.0 in a 14 point New Century Schoolbook typeface.

Respectfully submitted this 1st day of July 2009.

/s/ William L. Messenger
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CERTIFICATE OF SERVICE

I hereby certify that on 1 July 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On 1 July 2009, I have caused the foregoing document to be mailed by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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