No. 98-1986

In the Supreme Court of the United States

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, ETC., PETITIONER

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the union established that, in its bargaining relationship with a construction industry employer, it had attained the full representative status accorded by Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), rather than the limited representative status accorded by Section 8(f) of the Act, 29 U.S.C. 158(f).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 163 F.3d 209. The decision and order of the National Labor Relations Board (Pet. App. 30a-48a) and the decision of the administrative law judge (Pet. App. 48a-181a) are reported at 323 N.L.R.B. 920.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1999. A petition for rehearing was denied on March 12, 1999 (Pet. App. 182a-183a). The petition for a writ of certiorari was filed on June 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is ordinarily an unfair labor practice for an employer to enter into a collective bargaining agreement with a union that has not been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" pursuant to Section 9(a) of the National Labor Relations Act (Act), 29 U.S.C. 159(a). See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). Section 8(f) of the Act, 29 U.S.C. 158(f), however, creates an exception to that general principle for the building and construction industry. Section 8(f) provides that it is not an unfair labor practice for an employer and a union "to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry * * * because (1) the majority status of such labor organization has not been established under the provisions of section 9" of the Act. 29 U.S.C. 158(f)(1).

In *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), the National Labor Relations Board (Board) substantially revised its interpretation of Section 8(f). Under the Board's previous interpretation, an employer could repudiate an 8(f) agreement any time before the union had gained the support of a majority of the bargaining unit employees, but, under the "conversion doctrine," the union could, with relative ease, establish that it had become the employees' Section 9(a)

representative.[1] In *Deklewa*, the Board decided that it would "no longer apply the so-called conversion doctrine to 8(f) cases." 282 N.L.R.B. at 1384. The Board further held that, although an 8(f) agreement cannot be repudiated during its term (unless the employees "vote to reject or change their representative"), "[b]eyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative." *Id.* at 1387. Accordingly, "[u]nlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement." *Ibid.*[2]

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[1] See *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983); *NLRB* v. *Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971), enforcement denied *sub nom. Local No. 150, Int'l Union of Operating Eng'rs* v. *NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). Under the conversion doctrine, "[t]he achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process." Majority employee support could be established, in litigation before the Board, through such evidentiary factors as "the presence of an enforced union-security clause, actual union membership of a majority of unit employees," or "employee statements and actions that indicate union support." *Deklewa*, 282 N.L.R.B. at 1378.

[2] Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)" of the Act. A union which has been "designated or selected" as a bargaining representative by a majority of the unit employees in accordance with Section 9(a) is entitled to a rebuttable presumption of continued majority status at the expiration of a collective bargaining agreement. Concomitantly, an employer who is party to an agreement with a Section 9(a) union

The Board explained in *Deklewa* that it did not "mean[] to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." 282 N.L.R.B. at 1387 n.53. Therefore, an 8(f) union may attain the status of a full 9(a) representative and thus be entitled to the "normal presumptions" attendant to 9(a) status, by winning a Board-conducted certification election (*id.* at 1385) or by obtaining voluntary recognition from "the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, *e.g.*, a valid card majority." *Id.* at 1387 n.53.

2. Respondent American Automatic Sprinkler Systems, Inc., (American) makes and installs fire sprinkler systems. Pet. App. 51a. Beginning in 1974, American was a party to successive collective bargaining agreements with petitioner Road Sprinkler Fitters Local Union No. 669, United Association, AFL-CIO, through membership in the National Fire Sprinkler Association (NFSA), a multiemployer bargaining association. *Id.* at 4a.[3] On October 12, 1987, during the term of the 1985 NFSA labor agreement, which was a Section 8(f) agree-

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may not refuse to bargain with the union following expiration of the contract unless the employer proves either that a majority of the employees no longer support the union or that it has a good faith doubt as to the union's continued majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

[3] American also had a bargaining relationship with Sprinkler Fitters Local Union No. 536, a sister local of petitioner. Pet. App. 4a; Pet. 3 n.2. Local 536 was a party to the proceedings before the Board but not the court of appeals (Pet. App. 1a), and it has not sought this Court's review of the decision of the court of appeals. Therefore, this brief does not discuss the facts relating to Local 536.

ment, petitioner sent a letter to American and its other signatory contractors. C.A. App. 196.[4] The letter explained that the Board's *Deklewa* decision "may throw into question the nature of the relationship between" American and petitioner and requested American to sign an enclosed "form recognition agreement" reflecting petitioner's "status as the exclusive bargaining representative of [American's] sprinkler fitters." *Ibid.* Petitioner also enclosed with the letter a copy of a recent fringe benefit report filed by American, which, petitioner stated, "accurately confirms that all, or nearly all, of [American's] sprinkler fitter employees are members of and represented by [petitioner]." *Ibid.*

On October 14, 1987, American signed the "form recognition agreement" proffered by petitioner. C.A. App. 195. That agreement stated:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter

[4] Although the 1985 NFSA agreement was not part of the record before the Board in this case, the court of appeals correctly regarded it as an 8(f) agreement. See Pet. App. 22a; *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 730 (11th Cir. 1998) (describing 1985 NFSA contract as a "section 8(f) prehire national agreement"), cert. denied, 119 S. Ct. 795 (1999); *MFP Fire Protection, Inc.* v. *NLRB*, 101 F.3d 1341, 1342 (10th Cir. 1996) (same).

> employees pursuant to Section 9(a) of the National Labor Relations Act.

Ibid.; see also Pet. App. 4a. Petitioner and American later entered into several successor agreements containing similar language. *Id.* at 4a-5a, 32a. Before the expiration of the most recent agreement, American notified petitioner that it was withdrawing from NFSA and wished to bargain independently for future agreements. *Id.* at 5a, 53a. American sent petitioner a proposed new contract that authorized American to operate on a nonunion basis and to subcontract out all of its work. *Id.* at 66a. On August 11, 1994, after several unsuccessful bargaining sessions with petitioner, American unilaterally implemented its proposal and thereafter refused to recognize petitioner as the representative of its employees. *Id.* at 73a-77a.

3. Acting on charges filed by petitioner, the Board's General Counsel issued a complaint alleging, among other things, that American engaged in bad-faith bargaining with petitioner during the 1994 negotiations, in violation of Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 48a, 51a. The Board, in agreement with the administrative law judge (ALJ), first concluded that petitioner "[is] the [Section] 9(a) representative[] of [American's] journeymen sprinkler fitters and apprentices." *Id.* at 31a; see also *id.* at 85a. The Board based that conclusion on the recognition language in the October 1987 "form recognition agreement" and the later agreements. *Id.* at 32a. The Board noted that it had previously found the same 1987 form recognition agreement sufficient to establish petitioner's Section 9(a) status. *Ibid.* (citing *Triple A Fire Protection, Inc.*, 312 N.L.R.B. 1088 (1993), enforced, 136 F.3d 727 (11th Cir. 1998), cert. denied, 119 S. Ct. 795

(1999)). The Board further noted that, "in any event, [American's] challenge to the 9(a) status of [petitioner] was untimely raised." Pet. App. 33a (citing *Casale Indus., Inc.*, 311 N.L.R.B. 951 (1993)). On the merits, the Board found that American had violated Section 8(a)(5) and ordered it to bargain with petitioner and to "rescind any or all unilateral changes in mandatory subjects of bargaining implemented on and after August 11, 1994." Pet. App. 31a, 44a, 80a, 163a.

4. The court of appeals denied enforcement of the Board's order in relevant part. Pet. App. 1a-29a.[5] The court upheld, as a "defensible" construction of the Act, the Board's decision in *Deklewa* to abandon the conversion doctrine and to conclude that "8(f) unions, like their counterparts in nonconstruction industries, would not be precluded from achieving 9(a) status through either a Board-certified election or voluntary recognition based upon a clear showing of majority support." *Id.* at 17a. Because "the Board does not argue that [petitioner] attained 9(a) status through a certified election," the relevant question, in the court's view, was whether petitioner "satisfied the requirements for attaining such exclusive representative status through voluntary recognition." *Id.* at 19a. The court explained that "both the Board and the reviewing courts have required the union's unequivocal demand for, and the employer's unequivocal grant of, voluntary recognition as the employees' collective-bargaining representative based on the union's contemporaneous showing of majority employee support." *Id.* at 21a (internal quotation marks omitted).

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[5] The court of appeals enforced other elements of the Board's order, see Pet. App. 3a, 29a, and that aspect of the court of appeals' decision is not at issue in this Court.

Applying that principle, the court rejected, as unreasonable, the Board's "finding of an effective voluntary recognition of [petitioner's] 9(a) status." Pet. App. 22a. The court concluded that the fringe benefits report proffered by petitioner in support of its demand that American sign the October 1987 form recognition agreement did not "suffice to satisfy the requirement of a contemporaneous showing of majority support." That was so because "the parties' 8(f) contract included a standard union security clause requiring employees, as a condition of employment, to join the union within seven days of being hired." *Ibid.* The court noted that, in *Deklewa*, the Board "not only recognized the unreliability of union membership as a proxy for union support where a [union] security clause is in effect, but in fact based its decision to abandon the conversion doctrine in part on the 'highly questionable' nature of just such an inference." *Id.* at 23a.

The court of appeals also addressed the Board's conclusion that American's "challenge to [petitioner's] 9(a) status is time-barred because it occurs more than six months after voluntary recognition was granted." Pet. App. 19a n.6. The court concluded that "we do not believe that section 10(b) [of the Act, 29 U.S.C. 160(b),] can reasonably be interpreted to prohibit American, the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective voluntary recognition that is the basis of the Board's complaint." *Id.* at 21a n.6.

ARGUMENT

1. Petitioner asks this Court to decide whether the six month statute of limitations in Section 10(b) of the Act, 29 U.S.C. 160(b), applies when an employer in the construction industry seeks to defend against unfair labor practice charges by challenging the validity of a Section 9(a) voluntary recognition agreement. See Pet. i (Question 1), 10-22. That question, however, is not presented by this case, because the court of appeals held that petitioner and American had a Section 8(f) agreement, not a Section 9(a) agreement.

Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b). In *Local Lodge 1424, IAM* v. *NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), a case arising outside the construction industry, this Court held that a collective bargaining agreement, lawful on its face, could not be found unlawful because it was entered into with a minority union, when the charge of illegality was filed more than six months after the contract was executed. *Id.* at 417-419.

The Board and the courts have applied Section 10(b) and its underlying policies to preclude employers in the construction industry from raising, more than six months after the event, defensive claims that the union lacked majority employee support at the time the parties entered into a Section 9(a) bargaining relationship through voluntary recognition. See, *e.g.*, *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 737 (11th Cir. 1998) ("after achieving full section 9(a) status," union was "entitled to full membership in section 9(a) status, including the application of section 10(b)," to bar

employer's challenge to union's majority status at time of voluntary recognition), cert. denied, 119 S. Ct. 795 (1999); *Casale Indus., Inc.*, 311 N.L.R.B. 951, 953 (1993) ("if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition").

The Board has recognized, however, that Section 10(b) does not preclude an inquiry into whether a union had an 8(f) relationship rather than a 9(a) relationship. See *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 979 (1988) ("Section 10(b) as construed in [*Bryan Manufacturing*] does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship" but rather an 8(f) relationship); *Deklewa*, 282 N.L.R.B. at 1387 (status of 8(f) union "as the employees' representative is subject to challenge at any time"). Moreover, "[u]nder *Deklewa*, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship," see *Casale*, 311 N.L.R.B. at 952, and the party claiming that Section 9(a) status has been attained bears the burden of overcoming that presumption, *Deklewa*, 282 N.L.R.B. at 1385 n.41 (party "asserting the existence of a 9(a) relationship [must] prove it").

In this case, the Board first concluded that petitioner's presumptive 8(f) status had been overcome and that a 9(a) bargaining relationship had been established and then applied the six month limitations period reflected in Section 10(b) to bar American's challenge to petitioner's majority status. See Pet. App. 32a-33a. The court of appeals, however, concluded that petitioner had only a Section 8(f) relationship with American. See *id.* at 22a-24a. Because petitioner had only 8(f)

status, the court concluded, American had no obligation to bargain with petitioner upon the expiration of the 8(f) agreement. *Id.* at 28a.

Accordingly, the court did not need to reach the issue on which petitioner seeks this Court's review: whether, had petitioner established that it enjoyed a 9(a) relationship with American, petitioner would have been entitled to invoke Section 10(b) against a challenge to its majority status at the time of voluntary recognition. Indeed, the court stated that it was deciding "only * * * whether the Board's conclusions in *Deklewa* as to the means by which an 8(f) union can attain 9(a) status * * * are permissible." Pet. App. 14a n.4.

Petitioner (Pet. 19-20) would have this Court read the court of appeals' opinion broadly as having concluded that Section 10(b) does not apply to defensive charges of unfair labor practices when employers and unions have entered into 9(a) bargaining relationships in the construction industry. Such a conclusion would be questionable.[6] As discussed above, however, the court's decision can properly be read as having decided only that Section 10(b) does not bar inquiry into whether a bargaining relationship in the construction

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[6] It may be an unfair labor practice in the construction industry (as in other industries) for a union and an employer to enter into an agreement that purports to confer Section 9(a) status upon a union that does not represent a majority of the bargaining unit employees. Cf. *Hovey Elec., Inc.*, 328 N.L.R.B. No. 35 (Apr. 30, 1999) (rejecting, on factual grounds, complaint predicated on theory that granting unwarranted 9(a) status to construction union constitutes unlawful support and assistance in violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2)); see also 29 U.S.C. 158(f) (authorizing employer in construction industry to enter into agreement with minority union that is "not established, maintained, or assisted by any action defined in [Section 8(a)] * * * as an unfair labor practice").

industry is an 8(f) or a 9(a) relationship. Therefore, review by this Court of the issue framed by petitioner—whether Section 10(b) applies when there *is* a 9(a) bargaining relationship in the construction industry—should await a case in which it is clear that the court of appeals was required to reach and actually decided that issue.

2. For similar reasons, petitioner is incorrect in contending (Pet. i (Question 1), 11, 16-17) that the decision of the court of appeals in this case conflicts with the decisions of the Eleventh Circuit in *NLRB* v. *Triple A Fire Protection, Inc.*, *supra*, and the Tenth Circuit in *MFP Fire Protection, Inc.* v. *NLRB*, 101 F.3d 1341 (1996). In both of those cases, unlike in this case, the courts of appeals upheld the Board's finding that the parties had attained a 9(a) bargaining relationship.

In *Triple A*, the employer "[did] not in its brief on appeal challenge the Board's finding that the conversion to full Section 9(a) status was achieved" by petitioner. 136 F.3d at 735. Moreover, the court found that, on the particular facts of that case, the Board had satisfied "the *Deklewa* standard that a 'voluntary recognition . . . [be] based on a clear showing of majority support.'" *Ibid.*[7] Accordingly, the court agreed with the Board that, "after achieving full section 9(a) status," petitioner was "entitled to * * * the application of section 10(b)" to bar the employer's challenge to its majority status based on its claim that

[7] Because the employer in *Triple A* had only eight employees, including the owner and his son, and petitioner had asserted that all eight were union members, the court found that "the Board could reasonably conclude that [the owner] would have actually verified and known that a clear majority of the employees had designated [petitioner] as their exclusive bargaining representative." 136 F.3d at 735.

the employees were coerced to join the union. *Id.* at 737. In this case, by contrast, American challenged the Board's finding that petitioner enjoyed a 9(a) bargaining relationship with American, and the court sustained American's challenge. See Pet. App. 22a-24a. Given the court's finding that petitioner had only an 8(f) relationship with American, there is no conflict over the application of Section 10(b) between the court's decision in this case and the Eleventh Circuit's decision in *Triple A*.

In *MFP*, the Tenth Circuit accepted the Board's finding that petitioner had attained Section 9(a) status because it concluded on equitable grounds that the employer had waited too long to challenge petitioner's representative status. The court held that "the Board did not err in concluding that the passage of six and one-half years after the expiration of the six-month period allowed for protest, during which health and welfare and pension payments were paid by the employer, barred the employer from retrospectively asserting the absence of a § 9(a) relationship." 101 F.3d at 1344. The court in *MFP* did not cite Section 10(b) and did not address whether (much less hold that) Section 10(b) bars inquiry into whether a union has Section 8(f) or Section 9(a) status.[8] Unlike the Tenth Circuit in

[8] Although petitioner states (Pet. 11 n.9) that the Tenth Circuit's decision in *MFP* "followed" that court's earlier decision in *NLRB* v. *Viola Industries-Elevator Division, Inc.*, 979 F.2d 1384 (1992), petitioner does not contend that the decision in this case conflicts with *Viola Industries*. In any event, the *MFP* court did not refer to or cite *Viola Industries*, which involved the question whether Section 10(b) applies to an employer's defensive claim that the union unlawfully coerced it into signing an 8(f) agreement. See 979 F.2d at 1387. The present case does not involve, and the

MFP, the court of appeals in this case did not address any equitable preclusion theory and rejected the Board's determination that petitioner had established 9(a) status.

3. The only question actually presented by this case is whether the court of appeals was correct in its conclusion, contrary to that of the Board, that petitioner never attained Section 9(a) status. Although petitioner contends (Pet. i (Question 2), 22-27) that the court erred, the court's conclusion raises no issue of general importance that warrants this Court's review because it turns on the interpretation of a particular labor agreement in light of the law at the time that the agreement was made.

Petitioner takes issue (Pet. 23) with the view of the court of appeals (see Pet. App. 22a) that a "contemporaneous evidentiary proffer of majority union support among unit employees is required" for an 8(f) union to obtain voluntary 9(a) recognition from an employer. Recent Board decisions support petitioner's contrary view that the validity of an employer recognition agreement instead turns on whether the union "was, *in fact*, the chosen representative of a majority of the employees in an appropriate bargaining unit." *Ibid.*[9] This

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court of appeals here did not address, the application of Section 10(b) to an unlawful coercion claim.

[9] See, *e.g.*, *Oklahoma Installation Co.*, 325 N.L.R.B. No. 140, slip op. at 2 (May 14, 1998) (clarifying that contractual language, standing alone, may be sufficient to establish a 9(a) bargaining relationship between a union and a construction-industry employer although "additional evidence of [the union's] majority status" would be "a relevant factor"), application for enforcement filed, No. 98-9524 (10th Cir. July 1, 1998); *Triple C Maintenance, Inc.*, 327 N.L.R.B. No. 15, slip op. at 1 n.1, 4 (Oct. 30, 1998) (finding a 9(a) bargaining relationship established in construction industry by a

Court has explained, however, that a labor agreement "must be read * * * in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956). The court of appeals was therefore not unwarranted in turning to *Deklewa*, which had just been decided at the time petitioner and American entered into the October 1987 agreement, as the source of law by which to evaluate the parties' bargaining relationship. That is particularly so because petitioner's correspondence with American made clear that petitioner sought the October 1987 agreement in reaction to *Deklewa*, under which American would have been free to repudiate its 8(f) relationship with petitioner upon the expiration of the then-extant NFSA collective bargaining agreement. See pp. 3, 5, *supra*.

The court of appeals also was not unreasonable in concluding that *Deklewa* requires an 8(f) union to base a request for voluntary 9(a) recognition on a contemporaneous showing of majority support (Pet. App. 21a) because *Deklewa* itself and its immediate progeny use those terms. See *Deklewa*, 282 N.L.R.B. at 1387 n.53; *J&R Tile, Inc.*, 291 N.L.R.B. 1034, 1036 (1988) ("Since *Deklewa* * * * a party may prove the existence of a 9(a) relationship either through a Board representation election, or a union's express demand for, and an employer's voluntary grant of, recognition to the union as the bargaining representative based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit."); *Brannan Sand & Gravel Co.*, 289 N.L.R.B. at 980 (describing

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recognition clause that "recites * * * that the Union has shown majority status"), application for enforcement filed, No. 99-9500 (10th Cir. Jan. 19, 1999); *Decorative Floors, Inc.*, 315 N.L.R.B. 188 (1994) (similar holding).

"traditional means of proving 9(a) status" under *Deklewa* and progeny as "a Board conducted election or recognition based on a contemporaneous showing of majority support for the union").[10]

Petitioner further contends (Pet. 24) that the court of appeals erred in concluding that "the existence of a background union security clause is * * * a basis for invalidating a union showing of interest based on the bargaining unit employee union membership." The court's contrary view is not unwarranted, however, judged in light of the state of the law in October 1987, when petitioner made its showing of support. The court rejected petitioner's contemporaneous showing of employee support because its proffer involved the same type of evidence that *Deklewa* deemed an unreliable indicator of actual employee union support, *i.e.*, evidence that a majority of American's employees were members of petitioner pursuant to a seven day union security clause in the parties' 8(f) agreement. See Pet. App. 19a-24a. As the court observed (*id.* at 23a), in *Deklewa*, the Board, explaining why it had decided to abandon the conversion doctrine, seemed to conclude that union membership under a union security clause was not a sufficiently accurate indicator of employee support for the union; rather, such evidence was a "highly questionable factual foundation" upon which to base a conclusion that the union had attained majority 9(a) status, since "[a] union security clause operates to compel new employees to join the union because union membership is the price for obtaining a job." *Deklewa*, 282 N.L.R.B. at 1384 (quoting *Precision Striping, Inc.*

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[10] The contrary authority cited by petitioner (Pet. 23 n.14) either predates *Deklewa* or does not involve the construction industry.

v. *NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981) (internal quotation marks omitted)). See also *J&R Tile, Inc.*, 291 N.L.R.B. 1034, 1037 (1988) ("that employees are union members," even in "a right-to-work state where union membership is voluntary," is "not dispositive of the status of the collective-bargaining agreement"). That rationale may no longer be valid because of subsequent developments in the law, but the court of appeals did not address the potential effect of those developments.[11]

In sum, the court's ruling that petitioner failed to establish that it had attained a 9(a) relationship with American turns on an interpretation of the October 1987 agreement in light of the law at the time. The law respecting the requirements for establishing a 9(a) relationship in the construction industry is undergoing further development. Thus, the court of appeals' decision does not raise an issue of sufficient ongoing importance to warrant review by this Court.[12]

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[11] Those developments include *California Saw & Knife Works*, 320 N.L.R.B. 224, 235 & n.57 (1995) (requiring unions to inform newly hired employees, when presenting them with union membership application forms pursuant to a union security clause, that they have a right under *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), "to be and remain nonmembers" of the union), enforced *sub nom. IAM & Aerospace Workers* v. *NLRB*, 133 F.3d 1012 (7th Cir.), cert. denied, 119 S. Ct. 47 (1998), and *United Paperworkers Int'l Union (Weyerhaeuser Paper Co.)*, 320 N.L.R.B. 349, 349-350 (1995) (establishing similar notification requirement for current union members), enforcement denied on other grounds *sub nom. Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S. Ct. 442 (1998).

[12] Petitioner contends (Pet. 25-27) that the court of appeals should have remanded for the Board to determine in the first instance whether petitioner made an adequate contemporaneous showing of majority employee support. Although remand would have been preferable, see *Florida Power & Light Co.* v. *Lorion*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999

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470 U.S. 729, 744 (1985), it would not have changed the outcome, because the court of appeals had concluded that, under the relevant law, the existence of the union security clause prevented petitioner from relying on union membership to make the requisite showing. Petitioner has not claimed that it made any contemporaneous showing of majority employee support other than the fringe benefit report documenting that a majority of the employees were union members.