Nos. 12-99 and 12-312

In the Supreme Court of the United States

UNITE HERE LOCAL 355, PETITIONER

v.

MARTIN MULHALL, ET AL.

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v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer's compliance with a voluntary recognition agreement between the employer and a labor union, in which the employer agrees to remain neutral on the question of unionization and to provide the union with access to its employees and facilities, violates Section 302 of the Labor Management Relations Act, 29 U.S.C. 186.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 12-99 and the conditional cross-petition for a writ of certiorari in No. 12-312 should be denied.

STATEMENT

1. This case concerns the reach of Section 302 of the Labor Management Relations Act (LMRA or Act), commonly known as the Taft-Hartley Act. Section 302 of the Act makes it a crime "for any employer * * * to

pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization," or officer or employee of such an organization, that seeks to represent the employer's employees. 29 U.S.C. 186(a)(2). The Act also makes it a crime for a labor union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." 29 U.S.C. 186(b)(1).[1]

The purpose of Section 302 is to stop "corruption of collective bargaining through bribery of employee representatives by employers," "extortion by employee representatives," and "abuse [of power] by union officers." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959).

2. It is well-settled that employers and labor unions may enter into voluntary recognition agreements to facilitate labor-management relations. Under a "card-check" agreement, an employer agrees to recognize a union based on a showing of support in the form of cards signed by a majority of employees, rather than through a secret ballot election overseen by the National Labor Relations Board (NLRB). See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43, 46-48 (2001). An employer also may make a promise of "neutrality" during a union organizing campaign, pledging not to oppose its employees' unionization. See *ibid.* And the employer may agree to other ground rules for an organizing campaign, such as that the employer will permit the union to speak with employees or have access to the employer's property. See, *e.g.*, *Adcock* v. *Freight-*

[1] These prohibitions are subject to limited exceptions that are not at issue here. See 29 U.S.C. 186(c).

liner LLC, 550 F.3d 369, 374-375 (4th Cir. 2008), cert. denied, 558 U.S. 932 (2009).

Courts have long enforced these types of voluntary recognition agreements. See, *e.g.*, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 595-598 (1969); *International Union* v. *Dana Corp.*, 278 F.3d 548, 553-554, 558-559 (6th Cir. 2002). The NLRB has upheld the validity of such agreements, see, *e.g.*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999), and it has found that employers have acted unlawfully when they fail to adhere to such agreements, see, *e.g.*, *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1297-1298 (D.C. Cir. 1988). See also p. 10, *infra*.

3. Petitioner Unite Here Local 355 (Unite Here) is a labor union that seeks to become the collective bargaining representative for the employees of respondent Mardi Gras Gaming (Mardi Gras), a gaming company in Florida. Pet. App. 14, 65.[2] Respondent Martin Mulhall is an employee of Mardi Gras who opposes unionization. *Id.* at 3, 14-15, 64.

a. In 2004, Mardi Gras and Unite Here entered into an agreement in which Mardi Gras agreed to recognize the union as the collective bargaining representative of its employees based on a card-check procedure, rather than through an NLRB secret ballot election. Pet. App. 2, 81. Mardi Gras also agreed to provide the union with access to Mardi Gras premises; to provide the union with lists of employee names and addresses; and to remain neutral during the union's organizing campaign. *Id.* at 79-81. In return, Unite Here agreed not to "engage in a strike, picketing or other economic activity" at a Mardi Gras facility during the life of the agreement.

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[2] References to the "Pet. App." are to the appendix to the petition in No. 12-99.

Id. at 82. Mardi Gras and Unite Here agreed to arbitrate any disputes arising out of the agreement. *Id.* at 84. By its terms, the agreement would take effect when slot machines were installed at Mardi Gras gaming facilities and would remain in effect for four years or until Unite Here negotiated a collective bargaining agreement on behalf of Mardi Gras employees, whichever occurred first. *Id.* at 85.

Unite Here also promised Mardi Gras "to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." Pet. App. 2-3, 66. Unite Here spent over $100,000 on a campaign to support a Florida ballot initiative to permit installation of slot machines at gaming facilities like those operated by Mardi Gras. See *id.* at 3, 38-39.

b. In 2006, the ballot initiative passed and Mardi Gras installed slot machines at its facilities, thereby triggering the agreement. Pet. App. 14, 38. Unite Here requested that Mardi Gras comply with the agreement. *Id.* at 38; see Arbitration Op. & Dec. 11 (Aug. 6, 2009) (0:12-cv-61135-RSR Docket entry No. 1-6 (S.D. Fla. June 7, 2012)) (Arbitration Op.).

Mardi Gras complied with the agreement in 2006 and 2007 but refused to provide an updated employee list in 2008. Pet. App. 14, 38. The union sought to enforce the agreement through arbitration. *Id.* at 14. Mardi Gras argued that the agreement was unenforceable because compliance with it would violate 29 U.S.C. 186. Pet. App. 14-15. The arbitrator disagreed and concluded that the agreement was enforceable. See Arbitration Op. 7-12. Mardi Gras challenged the arbitrator's award in federal district court; the district court confirmed that the agreement was enforceable. See Order 8 (S.D.

Fla. Aug. 6, 2010) (0:09-cv-61760-WJZ Docket entry No. 38).

In 2009, Mardi Gras distributed a flier to its employees about the union that the union believed violated the neutrality agreement, and the union initiated arbitration. See Op. & Award 1-2 (Apr. 23, 2010) (0:12-cv-61135-RSR Docket entry No. 1-7, at 1-2 (S.D. Fla. June 7, 2012)). The arbitrator concluded that Mardi Gras had violated the agreement's neutrality provision and ordered, as a remedy, that the agreement be extended by one year. *Id.* at 6-8. The district court confirmed the enforceability of the arbitration award. See Order of Final J. Confirming Arbitration Award 1-2 (S.D. Fla. June 30, 2011) (0:11-cv-60047-WJZ Docket entry No. 11).

In November 2011, the union again sought to compel arbitration, contending that Mardi Gras had violated the agreement by making negative comments about the union and by firing ten union activists. Compl. to Compel Arbitration 4-5 (S.D. Fla. June 7, 2012) (0:12-cv-61135-RSR Docket entry No. 1) (Compl.). Mardi Gras responded that the agreement had expired on October 24, 2011. Answer 4 (S.D. Fla. Oct. 30, 2012) (0:12-cv-61135-RSR Docket entry No. 6). The union contended that the agreement did not expire until December 31, 2011. See Compl. 4. The district court has stayed proceedings in that case pending the outcome of this case. See Order on Mot. to Stay 1-2 (S.D. Fla. Dec. 20, 2012) (0:12-cv-61135-RSR Docket entry No. 11).

4. In the meantime, Mulhall filed this lawsuit in federal district court, seeking injunctive and declaratory relief to prevent enforcement of the agreement. He contended that by complying with the terms of the agreement, Mardi Gras would be "pay[ing], lend[ing], or

deliver[ing]" a "thing of value" to the union in violation of 29 U.S.C. 186(a)(2). Pet. App. 63-65, 67-68. He also contended that by asking the employer to abide by the agreement, the union "request[ed]" and "demand[ed]" a prohibited "thing of value" in violation of 29 U.S.C. 186(b)(1). See Pet. App. 74.[3]

As relevant here, the district court dismissed the complaint for failure to state a violation of 29 U.S.C. 186. Pet. App. 13-23. The court held that "the assistance promised in the [agreement] does not constitute a thing of value" within the meaning of 29 U.S.C. 186. Pet. App. 13. The court noted that two courts of appeals had addressed this issue and concluded that labor-management agreements like the one at issue did not involve delivery of prohibited things of value. See *id.* at 17-19 (citing *Adcock* v. *Freightliner LLC*, *supra*, and *Hotel Emps. & Rest. Emps. Union, Local 57* v. *Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004), cert. denied, 544 U.S. 1010 (2005)). The court explained that "the purpose behind Congress's enactment of § 302" was to prevent corruption of and extortion by union officers, and in this case the court found "no indication of [such] corruption or bribery of Unite Here officials." Pet. App. 18-19.

5. The court of appeals reversed and remanded. Pet. App. 1-9. The court stated that "organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of" 29 U.S.C. 186.

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[3] The district court dismissed Mulhall's complaint for lack of standing, Pet. App. 24-33, and the court of appeals reversed, *id.* at 34-60. The court of appeals declined to address whether 29 U.S.C. 186 provides a private right of action and whether "the disputed organizing assistance is a 'thing of value,' whose provision by Mardi Gras or acceptance by [Unite Here] would violate" the statute. Pet. App. 59-60.

Pet. App. 2. The court first noted that the term "thing of value" generally includes both "tangibles and intangibles." *Id.* at 4-5 (citation omitted).[4] The court then observed that the statute requires a "payment, loan, or delivery," and it stated that while "intangible assistance cannot be loaned or delivered," it can constitute a "payment" under the statute if "its performance fulfills an obligation." *Id.* at 7-8.

The court then focused on the purposes behind the statute—"curbing bribery and extortion"—and concluded that "an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment." Pet. App. 8-9. The court recognized that "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement." *Id.* at 8. In the court's view, however, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Ibid.*

The court therefore held that Mulhall has stated a claim for relief, and it remained for the district court to "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." Pet. App. 9.

Judge Restani dissented. Pet. App. 9-12. In her view, complying with the agreement would not violate Section 302, and "an improper intent on behalf of the union or employer in demanding or offering the types of concessions at issue" does not "transform[] an otherwise 'innocuous' concession into a bribe or constitute[] extortion" in violation of the statute. *Id.* at 9-10. Judge

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[4] The court expressly declined to consider whether a "thing of value" must have "monetary value." Pet. App. 8.

Restani noted that the purpose of the statute is to promote collective bargaining, and that purpose would be thwarted if the employer and union could not agree to ground rules for an organizing campaign. *Id.* at 10-11. Judge Restani also noted that Mulhall's complaint fails even under the standard adopted by the majority, because he "ma[de] no allegations of wrongdoing relating to the formation of the Agreement or Unite's motives at the time of contracting." *Id.* at 11.

6. Unite Here and Mardi Gras both filed petitions for rehearing en banc. The United States submitted a brief as amicus curiae in support of rehearing en banc. While recognizing that the decision below was interlocutory and that the complaint might be dismissed on remand, the United States indicated that the court of appeals had erred in importing a specific intent inquiry into Section 302(a)(2) and (b)(1) and that its decision had the potential to burden labor relations and intrude upon the jurisdiction of the NLRB. See U.S. En Banc Br. 6-15. The court denied rehearing, with no judge in regular active service requesting that the court be polled about rehearing en banc. Pet. App. 61-62.

DISCUSSION

Unite Here and Mulhall both seek review of the court of appeals' decision, in which the court (1) held that employers and unions generally may agree to set ground rules for union organizing campaigns but also that, under certain circumstances, compliance with such an agreement could violate 29 U.S.C. 186, and (2) remanded for an inquiry into the reasons why the parties entered into the agreement at issue in this case. See 12-99 Pet. 7-30; 12-312 Cross-Pet. 5-6. In the government's view, the court of appeals correctly recognized that "[e]mployers and unions may set ground rules for an

organizing campaign" and that such agreements do not violate Section 302 "even if the employer and union benefit from the agreement." Pet. App. 8. But the court of appeals went astray in concluding that the legitimacy of such agreements turns on an inquiry into the parties' intent. *Id.* at 8-9. Such a test provides little guidance and has the potential to undermine the NLRB's role in adjudicating labor disputes. The only two other circuits that have addressed the issue have upheld neutrality agreements against challenges under Section 302 without suggesting that courts must go behind the nature of the agreements to ascertain whether they represent an "improper payment." *Id.* at 9.

While the decision below is therefore troubling, this Court's intervention is not warranted at this time or in this case. Only three courts of appeals have addressed the underlying issues, and further consideration in the lower courts would benefit this Court should review eventually be justified. Further, the contours and implications of the court of appeals' holding are uncertain. Because the case is in an interlocutory posture, further proceedings on remand may clarify the decision's effects. Finally, because the challenged agreement is no longer in force, a substantial question of mootness exists that could prevent this Court from reaching the merits. Under those circumstances, the petition and cross-petition should be denied.

1. Voluntary recognition of a union "predates the National Labor Relations Act and is undisputedly lawful under it." *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at *4-*5 (Aug. 26, 2011) (internal citation omitted). "Voluntary recognition is a favored element of national labor policy" because it minimizes labor-management strife. *NLRB* v. *Broadmoor Lumber*

Co., 578 F.2d 238, 241 (9th Cir. 1978); see also, *e.g.*, *NLRB* v. *Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *NLRB* v. *Broad St. Hosp. & Med. Ctr.*, 452 F.2d 302, 305 (3d Cir. 1971).

As a prelude to possible voluntary recognition, unions and employers commonly agree to ground rules for organizing and recognition, such as a card-check procedure, access rights, and a neutrality policy. See Pet. App. 78-82 (agreement in this case). The NLRB has routinely upheld voluntary recognition and ground-rules agreements of this sort as permissible under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*.[5] The NLRB also has found that employers have committed unfair labor practices when they fail to adhere to such agreements.[6] Further, the federal courts (which have jurisdiction to enforce agreements between unions and employers under 29 U.S.C. 185) have routinely enforced voluntary recognition agreements.[7]

Section 302 of the LMRA makes it a crime for an employer to "pay, lend, or deliver, or agree to pay, lend, or

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[5] See, *e.g.*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999); *Cam Indus., Inc.*, 251 N.L.R.B. 11, 11-12 (1980), enforced, *N.L.R.B.* v. *Cam Indus, Inc.*, 666 F.2d 411, 412-413 (9th Cir. 1982); *Snow & Sons*, 134 N.L.R.B. 709 (1961), enforced, *Snow* v. *NLRB*, 308 F.2d 687, 689-690, 695 (9th Cir. 1962).

[6] See, *e.g.*, *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1297-1298 (D.C. Cir. 1988); *Cayuga Crushed Stone, Inc.*, 195 N.L.R.B. 543, 544, 546 (1972), enforced, *NLRB* v. *Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1384 (2d Cir. 1973).

[7] See, *e.g.*, *Hotel & Rest. Emps. Union Local 217* v. *J.P. Morgan Hotel*, 996 F.2d 561, 563, 568 (2d Cir. 1993); *Hotel Emps., Rest. Emps. Union, Local 2* v. *Marriott Corp.*, 961 F.2d 1464, 1467-1468, 1470 (9th Cir. 1992); *Amalgamated Clothing & Textile Workers Union, AFL-CIO* v. *Facetglas, Inc.*, 845 F.2d 1250, 1252-1253 (4th Cir. 1988).

deliver, any money or other thing of value" to a labor union or its representatives, 29 U.S.C. 186(a)(2), and for a labor union to "request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value," 29 U.S.C. 186(b)(1).

Section 302 was enacted because of congressional "concern[] with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see, *e.g.*, *Caterpillar, Inc.* v. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 107 F.3d 1052, 1057 (3d Cir.) (en banc), cert. granted, 521 U.S. 1152 (1997), and cert. dismissed, 523 U.S. 1015 (1998); *Turner* v. *Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979); *United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964), cert. denied, 380 U.S. 942 (1965).

2. Only three circuits have considered whether an employer's compliance with a voluntary recognition agreement is a "payment, loan, or delivery" of a "thing of value" in violation of Section 302. All three of those courts recognized that employers and unions may voluntarily agree to set ground rules for union organizing campaigns without violating Section 302. The Eleventh Circuit stated, however, that some employer-union agreements could violate Section 302, depending on the parties' intent.

In *Hotel Employees & Restaurant Employees Union, Local 57* v. *Sage Hospitality Resources, LLC*, 390 F.3d

206 (3d Cir. 2004), cert. denied, 544 U.S. 1010 (2005), an employer agreed to recognize a union based on a card-check procedure and the union made a no-picketing promise in return. *Id.* at 209. The court of appeals concluded that compliance with the ground-rules agreement was not payment or delivery of a prohibited "thing of value" under Section 302. *Id.* at 218-219. The court explained that Section 302 was designed to combat "corruption of collective bargaining through bribery," and it would not make sense to read it to criminalize a "valid labor agreement." *Ibid.* (citation omitted). The court also noted that "[i]ssues of labor-unit recognition and bargaining are comprehensively regulated by the NLRA," and reading Section 302 to cover voluntary recognition agreements would upset the "carefully balanced structure of the laws governing recognition of and bargaining with unions." *Id.* at 219.

The Fourth Circuit took a similar approach in *Adcock* v. *Freightliner LLC*, 550 F.3d 369 (2008), cert. denied, 558 U.S. 932 (2009). In that case, the employer agreed to recognize the union based on a card-check procedure, to require employees to attend a presentation about the card-check procedure, to allow the union access to its facilities, and to remain neutral on the question of unionization. *Id*. at 371. The court of appeals held that "an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union" in violation of Section 302. *Id.* at 376. The court noted that Section 302 is "aimed at preventing bribery, extortion, and other corrupt practices," and explained that the concessions at issue were not "a means of bribing representatives of the Union" but instead "serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile

organizing campaigns in the workplace." *Id.* at 375 (citation and internal quotation marks omitted). The court also concluded that an item must "have at least some ascertainable value" to qualify as a "thing of value" under Section 302, and it found that the concession at issue did not have an ascertainable value. *Ibid.* Finally, the court observed that the proper mechanism for challenging organizational assistance agreements was using the remedies available under the NLRA, and it noted that unfair labor practice charges had been filed with the NLRB in that particular case. *Id.* at 376-377.

In the decision below, the court of appeals agreed with the Third and Fourth Circuits that "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement." Pet. App. 5-6, 8. The court stated that although "organizing assistance can be a thing of value," "an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable." *Id.* at 7. But the court decided that it would be "too broad" to hold "that all neutrality and cooperation agreements are exempt" from Section 302. *Id.* at 8. In the court's view, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Ibid.* The court therefore remanded for the district court to consider "the reason why" Unite Here and Mardi Gras decided to enter into the agreement. *Id.* at 9.

3. Although the Eleventh Circuit seemingly diverged from the approaches of the Third and Fourth Circuits, the degree and impact of the different approaches is unclear. All three courts recognized that agreements setting ground rules for union organizing campaigns are

permissible as a matter of federal labor law and generally should not subject an employer to criminal liability under Section 302. Pet. App. 7; *Adcock*, 550 F.3d at 376; *Sage*, 390 F.3d at 218-219. But unlike the Third and Fourth Circuits, the court below envisioned situations in which an employer's compliance with the terms in a voluntary employer-union agreement could violate Section 302. Pet. App. 8-9. In the court's view, whether such an agreement violates Section 302 depends on the legitimacy of the parties' intent. *Ibid.*

An approach that makes the validity of an organizing ground-rules agreement under Section 302 depend on the parties' intent is unsound. Section 302(a)(2) and (b)(1) are prophylactic bans on certain practices that do not require a specific intent to corrupt a union or to extort a benefit from an employer. See 29 U.S.C. 186(a)(2) and (b)(1). By contrast, intent to exert improper influence is required under a different part of the statute. See 29 U.S.C. 186(a)(4) (making it unlawful for an employer to pay any money or any other thing of value to an officer of a labor organization "with intent to influence him in respect to any of his actions, decisions, or duties" as an officer of the labor organization). When Congress wants to make the legality of giving a thing of value contingent on an intent to influence the recipient, it knows how to do so, and Congress did not do so here. Indeed, Congress provided a different remedial scheme for addressing an employer-union agreement that may have an unlawful purpose or effect: an enforcement proceeding before the NLRB. See, *e.g.*, *Adcock*, 550 F.3d at 376-377. Allowing Section 302 to police standard card-check, access, and neutrality agreements based on an inquiry into an improper intent would infringe on the role of the NLRB.

Review is not warranted at this time, however, because substantial uncertainty surrounds the scope and effect of the court of appeals' decision. The court's decision does not clarify what circumstances would violate Section 302. The court stated that an employer could violate Section 302 if it "offer[ed] organizing assistance with the intention of improperly influencing a union." Pet. App. 8. But the court did not explain what type of influence would be "improper[]," except to suggest that "a scheme to corrupt a union or to extort a benefit from an employer" would qualify. *Ibid.* Nor did the court indicate whether the intent inquiry was subjective or objective. The court then remanded the case so the district court could create a factual record for further consideration of whether Section 302 was violated here. As a result, the opinion provides scant guidance on the applicable legal standard. And it is not known at this time whether the decision's potential to hinder labor relations and intrude on the NLRB's role will in fact be realized.

Given these uncertainties, the Court should permit the question of how Section 302 applies to voluntary recognition agreements to percolate in the circuits. At this point, only three circuits have weighed in, and the decision below may be clarified as a result of the court's remand, which would bring into focus any differences in the courts' approaches. It also would be beneficial to allow the courts to consider the application of Section 302 to different types of promises in voluntary recognition agreements. The court below noted, for example, that "[n]o other circuit ha[d] published an opinion involving the precise facts presented on this appeal." Pet. App. 6. Consideration of agreements that contain different terms could illuminate whether any type of

agreement would as a general matter implicate the policy concerns underlying Section 302. Moreover, allowing the issue to percolate may permit a sounder assessment of the impact of the court of appeals' decision on labor-management relations. That process is particularly appropriate before this Court is called upon to establish a nationwide rule.

Review is particularly unwarranted here because the decision is interlocutory. The court of appeals ultimately may conclude that this case does not involve any type of "improper payment" (Pet. App. 9) that could violate Section 302, or the court may find such a violation and explain what makes the employer's actions improper. In either event, it would be beneficial to wait for a final judgment. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings, see, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and that course is advisable here. Whether final judgment is reached through summary judgment or trial, the additional factual development will crystallize the parties' claims, and the parties will be able to raise those claims—together with any other claims that may arise—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

4. Finally, this case would be a poor vehicle to review the question presented because this case may well be moot. Mulhall sued to enjoin the operation of the Mardi Gras-Unite Here agreement and to obtain a declaratory judgment that compliance with the agreement would violate Section 302. See Pet. App. 64 ("Plaintiff seeks an injunction under § 302(e) that prohibits Local 355 from demanding or receiving from his employer 'things of

value' in the form of organizing assistance and a declaration that Local 355's demands violate § 302(b)(1) of the LMRA."); see also *id.* at 75 (prayer for relief). At this point, it seems clear that the only way that Mardi Gras would provide the promised access to its property and employees and neutrality during an organizing campaign is if it were ordered to do so to comply with the agreement. Mardi Gras decided in 2008 that it no longer intended to comply with the agreement, and it now takes the view that it would be illegal to do so under Section 302. See *id.* at 14-15; pp. 4-5, *supra*.

But the agreement is no longer in force. By its terms, the agreement was to remain in effect for no more than four years after Mardi Gras installed slot machines at its Florida casino. Pet. App. 85. The slot machines were installed in 2006, thereby triggering the agreement. *Id.* at 14, 38. That means the agreement should have expired at the end of 2010 at the latest. But an arbitrator extended the agreement for one year as a remedy for Mardi Gras's failure to abide by the agreement, and the federal court upheld that extension. See p. 5, *supra.* That means the agreement would have expired by the end of 2011. The parties dispute the date the agreement expired—Mardi Gras says the date is October 24, 2011, and Unite Here says the date is December 31, 2011, see 12-99 & 12-312 Br. in Opp. 3—but either way, the agreement has expired. Because the remedy Mulhall seeks is to prevent enforcement of the agreement, it appears that his claims may well be moot. See, *e.g.*, *Campbell* v. *PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 781-782 (6th Cir. 2007) (case seeking a declaration that a tax-abatement agreement was unconstitutional was moot because the agreement was "no longer in effect and no party has any continuing obligations

under it"); *Agrigenetics, Inc.* v. *Rose*, 62 F.3d 268, 270-271 (8th Cir. 1995) (former employer's suit for a preliminary injunction to compel a former employee to comply with a non-competition restriction in an employment agreement was moot because the non-competition restriction had expired).

Unite Here and Mulhall make various arguments why this case is not moot. Unite Here notes that an arbitration proceeding is pending, and it suggests that the arbitrator could order extension of the agreement as a remedy for Mardi Gras' breach of the agreement. See Unite Here Cert. Reply Br. 6. It also suggests that Mulhall's complaint seeks to enjoin the union from ever participating in another such neutrality agreement. *Id.* at 7. Mulhall, for his part, suggests that the agreement's terms could be extended, and he also contends that the union would continue to request the access to employer property, employee lists, and neutrality in the absence of an agreement. 12-99 Mulhall Cert. Reply Br. 18. The possibility that an arbitrator in a different proceeding may extend the terms of the agreement seems quite speculative, and this Court has found a case moot under similar circumstances. See *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 367-368 (1960) (injunction against a strike expired by its terms and the pendency of collateral litigation did not save case from mootness); cf. *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam) (a "possible, indirect benefit in a future lawsuit cannot save *this* case from mootness" as a result of expiration of a challenged registration condition). Moreover, the complaint by its terms appears to seek relief limited to the particular agreement that expired sometime in 2011. But regardless of how the Court might ultimately

resolve the mootness question, the point for present purposes is that the question is sufficiently substantial to counsel against granting review in this case. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari in No. 12-99 and the conditional cross-petition for a writ of certiorari in No. 12-312 should be denied.

Respectfully submitted.

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