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1 P R O C E E D I N G S

2 (10:59 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 08-1214, Granite Rock  
5 Company v. the International Brotherhood of Teamsters.  
6 Mr. Mathiason.

7 ORAL ARGUMENT OF GARRY G. MATHIASON  
8 ON BEHALF OF THE PETITIONER

9 MR. MATHIASON: Mr. Chief Justice, and may  
10 it please the Court:

11 This case involves two questions. Taking  
12 them in the order that the Ninth Circuit addressed  
13 them, we look first at whether the complaint contained  
14 sufficient facts to support a cause of action against  
15 a non-signatory international union that engages in a  
16 company-wide strike that violates the no-strike clause  
17 of a contract between the local and the employer.

18 This is not a strike for higher wages,  
19 better benefits; it's a strike for an amendment to the  
20 contract that would provide immunity for the  
21 international and other locals with regard to past  
22 wrongdoing. The --

23 CHIEF JUSTICE ROBERTS: It's a tort action,  
24 right?

25 MR. MATHIASON: It is a tort action by being

1 structured as inducement and interference. It is  
2 grounded in contract. Specifically, what you would  
3 look for, for jurisdiction, is to --

4 CHIEF JUSTICE ROBERTS: I suppose --  
5 grounded in contract. I suppose the existence of a  
6 contract is an evidentiary matter that you have to  
7 establish, but the cause of action is still tort, and  
8 of course 301(a) is limited to violations of  
9 contracts.

10 MR. MATHIASON: Your Honor, 301(a) provides  
11 jurisdiction if there's a suit for a breach -- if  
12 there's a suit for violation of a contract, and that  
13 can be between a nonparty and a party, and then the  
14 contract is between the union and the employer.

15 CHIEF JUSTICE ROBERTS: I don't see how  
16 somebody who is not a party to the contract can  
17 violate the contract. They can be liable for all  
18 sorts of things, but I don't see that they can be  
19 liable for violating the contract.

20 MR. MATHIASON: Mr. Chief Justice, the  
21 concept that we are advancing is the plain language of  
22 the statute. Violation of a contract is right at the  
23 heart of this suit. You have for 150 years,  
24 jurisprudence where in enforcing contracts, which is  
25 the central mission of the statute, there --

1 CHIEF JUSTICE ROBERTS: I suppose you can  
2 have tortious interference with the contract. Can  
3 you, without the -- establishing the existence of a  
4 contract?

5 MR. MATHIASON: I can't imagine how you  
6 would. You might have a different --

7 CHIEF JUSTICE ROBERTS: Yes, I suppose  
8 that's --

9 MR. MATHIASON: -- kind of tort.

10 CHIEF JUSTICE ROBERTS: -- tortious  
11 interference with -- what is it, the ability to enter  
12 into a contract, I think, is recognized in some  
13 jurisdictions.

14 MR. MATHIASON: That's -- that's cognizable.  
15 That's certainly not here.

16 What we're doing is looking at a very minor  
17 adjustment in what would otherwise be a  
18 straightforward contract action; and that is that you  
19 have a situation where the international displaced the  
20 local after the contract was entered into, took  
21 control, and that control we manifested in several  
22 specific points within our complaint. And another way  
23 -- it's effectively an agency relationship between the  
24 -- at that point between the international and the  
25 local, but it's an agency relationship to control them

1 to effect the breach.

2 JUSTICE ALITO: Well, then you could have  
3 sued on an agency claim, couldn't you?

4 MR. MATHIASON: We did originally look at an  
5 agency claim. The problem with that is that under an  
6 agency claim, at the time the contract was formed,  
7 it's clear the local was not operating on behalf of  
8 the international. It was --

9 JUSTICE KENNEDY: Well, but I mean -- if  
10 you're coming up and saying, well, we have a  
11 principal-agent here, I could understand that, but  
12 that's I didn't think the question we are here to  
13 decide.

14 MR. MATHIASON: The question to decide is  
15 whether there's a cause of action.

16 JUSTICE KENNEDY: On -- on the tortious  
17 interference as to whether or not that's under 301.  
18 Sure, agent-principal, I understand that. But that --  
19 that's a new argument so far as I'm concerned.

20 MR. MATHIASON: Your Honor, that argument  
21 really isn't new at all. With regard --

22 JUSTICE KENNEDY: Is it your briefs? Is it  
23 part of the question?

24 MR. MATHIASON: It is in our briefs. It is  
25 directly in our briefs. With regard to a footnote, we

1 actually say that --

2 JUSTICE KENNEDY: Well, but the -- the basic  
3 question is -- the Chief Justice began with it --  
4 isn't this -- isn't this a tort action? You say,  
5 well, it's grounded in contract. I -- I really have a  
6 problem with the word "grounded." If you say it  
7 necessarily implicates or it's entangled, then I could  
8 understand that. But grounded in contract -- we ask  
9 what the source of the original obligation is. And  
10 these parties were not -- or the international was not  
11 part of the -- part of the -- part of the contract.

12 MR. MATHIASON: We take the position that  
13 the contract has within it the protection of the  
14 contract. In other words, if you have a party that is  
15 in a position to control one of the signatories to the  
16 contract and they cause that signatory to breach the  
17 contract, and -- then in every regard that is the  
18 equivalent of a violation of contract. They are the  
19 responsible party. They -- to --

20 JUSTICE BREYER: So suddenly it's all a lot  
21 of things that would have been pre-empted to go to the  
22 board. For example, you have a labor dispute on a  
23 construction business, and one union's out there  
24 telling the other: Keep on going. And then some  
25 other group comes in and says: Don't let them do that

1 to you. And another says: You don't have to do that  
2 under your contract. And there are 19 unions and they  
3 are all fighting about -- each other, and everybody is  
4 going to end up suing each other in Federal court.

5 I thought the purpose of the LMRA was to  
6 stop that. The purpose of the Labor Act, the Wagner  
7 Act was to stop that. They didn't want Federal courts  
8 any more than State courts interfering in that kind of  
9 thing. So why should we read an exception into this?

10 MR. MATHIASON: Your Honor --

11 JUSTICE BREYER: It would reproduce the  
12 situation that led all the Congresses and Presidents  
13 in the 1930s to stop it.

14 MR. MATHIASON: Your Honor, the very essence  
15 of section 301 was to deal with midterm contract  
16 strikes.

17 JUSTICE BREYER: Yes, that's right, and they  
18 said: Here's how we'll deal with that. We'll deal  
19 with that by giving the employer and the union a right  
20 to go into court and enforce the contract or get  
21 damages for its violation. That we figure furthers  
22 labor relations.

23 But it's pretty hard for me to see how it  
24 could further labor relations by letting any third  
25 party under the sun come in and say everything that

1 went on during a labor dispute is a -- is a tort in  
2 respect to the contract that might not even have been  
3 signed yet.

4 MR. MATHIASON: Your Honor, what you have  
5 just described in terms of the impact on labor  
6 relations is exactly what we are focused on here.  
7 This is not any party. This is the international that  
8 effectively displaces, takes control, tells the  
9 employer that they have the independent ability to  
10 resolve the dispute --

11 JUSTICE SOTOMAYOR: You are not arguing us  
12 creating Federal common law for tortious interference.  
13 You are saying they're the actual party to the  
14 contract. So which theory are you -- are you arguing?

15 MR. MATHIASON: We originally made the  
16 argument that they were -- they were the moving party,  
17 the undisclosed principal, that actually caused the  
18 contract to come into existence. We can't factually  
19 support that. They were upset with the decision to  
20 enter into the contract.

21 JUSTICE SOTOMAYOR: So you've given up the  
22 agency argument?

23 MR. MATHIASON: We abandoned it only with  
24 regard to formation. We absolutely did not and do not  
25 abandon that argument thereafter for the breach.

1    Thereafter, what happened is you have the  
2    international taking control of the local and causing  
3    the local to breach the contract.  And that  
4    differentiates it from many, many other circumstances  
5    where you have third parties.

6                   JUSTICE KENNEDY:  Well, it seems to me the  
7    strongest argument you have is that this tortious  
8    interference is pre-empted under State law.  So we  
9    have a -- a vacuum if we don't accept -- accept your  
10   view.

11                   Let me ask you this:  My understanding is --  
12   correct me if I am wrong, please -- this Court has not  
13   said that they -- that the State law cause of action  
14   for interference with contract relations is pre-  
15   empted.  This Court has not said that.  Am I correct  
16   about that?

17                   MR. MATHIASON:  This Court would --

18                   JUSTICE KENNEDY:  The circuits have said  
19   that, but we haven't said that.  Am I right about  
20   that?

21                   MR. MATHIASON:  Your Honor, with all due  
22   respect, I think this cause of action would clearly be  
23   pre-empted under Allis-Chalmers and subsequent  
24   decisions.

25                   JUSTICE KENNEDY:  No, no.  I'm talking --

1 I'm talking specifically that -- interference with  
2 advantageous business relations or interfering with an  
3 existing contract -- that, we have not addressed in  
4 this Court.

5 MR. MATHIASON: In Allis-Chalmers, the Court  
6 did address the pre-emption doctrine and indicated  
7 that it would extend to torts.

8 JUSTICE KENNEDY: But -- but it did not --  
9 it did not include interference with a -- with a  
10 contractual relation. We have not, as a specific  
11 holding -- tell me if I'm wrong. I will look at  
12 Allis-Chalmers.

13 MR. MATHIASON: No, Your Honor, I think  
14 you're correct, but --

15 JUSTICE SCALIA: Allis-Chalmers involved the  
16 two parties to the contract, a tort claim by one party  
17 to the contract against the other party to the  
18 contract, right?

19 MR. MATHIASON: That's correct, Your Honor.

20 JUSTICE SCALIA: And this involves a tort  
21 claim by one party to the contract against a third  
22 party. It seems to me it's quite -- quite different  
23 from Allis-Chalmers.

24 JUSTICE KENNEDY: It -- it would seem to me  
25 that one of your strongest points is that this is pre-

1   empted by State law.  If -- if that's not true, then  
2   we would be deciding the case based on a premise that  
3   is -- is unclear.

4               MR. MATHIASON:  Your Honor, we have taken  
5   the strong position that it is pre-empted by 301.  It  
6   will involve an interpretation of the contract and an  
7   application of the contract.  To view that as  
8   otherwise not pre-empted would be to start attacking  
9   301 in terms of a uniform national system of  
10  administering contracts in Federal labor law.

11              JUSTICE STEVENS:  Well, what is -- what is  
12  the contractual issue?  What is the issue of  
13  interpreting the contract that this case presents if  
14  you let the 301 case go forward?

15              MR. MATHIASON:  The issue would be whether  
16  the action of engaging in the strike violates the no-  
17  strike clause of the collective bargaining agreement.

18              JUSTICE STEVENS:  Is there any dispute about  
19  that?

20              MR. MATHIASON:  I think there is a dispute  
21  about that.  I think there's a dispute about the  
22  underlying existence of the contract, and then the --  
23  the no-strike clause is complex.

24              JUSTICE SOTOMAYOR:  How is that issue still  
25  alive?  Wasn't there an NLRB order in May of '06 that

1 said -- or directed that the contract become effective  
2 as of July 2nd?

3 MR. MATHIASON: That's correct, Your Honor.

4 JUSTICE SOTOMAYOR: Did anybody appeal that  
5 order or challenge it?

6 MR. MATHIASON: Yes. That order was  
7 appealed to the Ninth Circuit, and the Ninth Circuit  
8 affirmed it. From our perspective, it's a final  
9 determination that July 2nd is the starting date of  
10 the contract. However, you still have a formation  
11 issue.

12 JUSTICE SOTOMAYOR: So did -- but how -- if  
13 you lost in your appeal to the Ninth Circuit and the  
14 contract is effective July 2nd, what issue remains for  
15 anybody to decide with respect to contract formation?

16 MR. MATHIASON: We --

17 JUSTICE SOTOMAYOR: Because there has been a  
18 final adjudication of the question of the effective  
19 date of the contract.

20 MR. MATHIASON: That's our position. We  
21 succeeded on that issue before the Ninth Circuit.

22 JUSTICE SOTOMAYOR: So now the only question  
23 that appears to be extant in my mind is whether or not  
24 there was a breach of the no-strike clause. So why  
25 isn't that subject to arbitration by the very terms of

1 the arbitration clause?

2 MR. MATHIASON: We agree that that would go  
3 to arbitration, and it's scheduled to go to  
4 arbitration between the local and the company. The  
5 second question that was brought to play in this  
6 particular case is whether the formation question goes  
7 to an arbitrator or goes to --

8 JUSTICE BREYER: Yes, but what -- there is  
9 no doubt about the formation, just as Justice  
10 Sotomayor said. There is a contract, the contract  
11 that was signed on December 17th. It is formed. You  
12 don't doubt that it's formed. They don't doubt that  
13 it's formed. And that contract has an arbitration  
14 agreement in it. And one of the questions that will  
15 be arbitrated, I take it, is whether that December  
16 17th contract, because of its retroactivity  
17 provisions, provides damages for what happened in  
18 July. And part of that will require the arbitrator to  
19 interpret the December 17th contract --

20 MR. MATHIASON: Your Honor --

21 JUSTICE BREYER: -- to decide whether it  
22 does cover that event of July 2nd. Now, what has this  
23 got to do -- I mean, I would have thought -- is that --  
24 - I mean, what is your argument?

25 MR. MATHIASON: Your Honor, the critical

1 issue isn't the NLRB ruling, although that's going to  
2 have to be drawn upon. There is a denial that a  
3 contract was formed on July 2nd that continues to  
4 today. And the question is: Where does that get  
5 decided? Does it get decided in a court, as we did  
6 before with a unanimous jury verdict? Or does that  
7 now get vacated and sent to an arbitrator with no  
8 agreement --

9 JUSTICE GINSBURG: But why is there -- is  
10 there anything, any question about formation, given  
11 that there is a contract? The contract is retroactive  
12 to May, so if the contract is retroactive to May, then  
13 certainly a contract was formed and that issue is --  
14 is academic, but --

15 MR. MATHIASON: You're -- Justice Ginsburg,  
16 this is right at the center of the analysis in that we  
17 contend, the company, that there was a formation on  
18 July 2nd. The other side contends that something  
19 happened on August 22nd that would constitute the  
20 formation event. There was no -- if our contract --

21 JUSTICE GINSBURG: But why does it matter?  
22 Why does it matter if we have a contract? A contract  
23 has been formed; everybody agrees about that. And  
24 everybody agrees that the effective date is May.

25 MR. MATHIASON: It's of critical importance

1 which contract was formed, because there's a quid pro  
2 quo in labor law that's critical, and that is that you  
3 agree to arbitration in exchange for a no-strike  
4 clause. That happened on the 2nd. If we had not had  
5 formation on July 2nd and the first formation was on  
6 the 22nd of August, then we would have been denied all  
7 of the benefit of the contract. We never would have  
8 made the same deal.

9 JUSTICE BREYER: So, why isn't --

10 CHIEF JUSTICE ROBERTS: I suppose it's a  
11 question for your friends on the other side whether  
12 they think the ratification or the contract that was  
13 entered into in December that's effective in May -- if  
14 that makes them liable for violating the no-strike  
15 clause, right?

16 MR. MATHIASON: Mr. Chief Justice, there's a  
17 critical issue in labor relations, and that is clearly  
18 when it's ratified brings into effect the no-strike  
19 clause. That's embedded --

20 CHIEF JUSTICE ROBERTS: So what happens if  
21 it's ratified retroactively? Is the no-strike clause  
22 in effect?

23 MR. MATHIASON: The no --

24 CHIEF JUSTICE ROBERTS: You want to say yes,  
25 right?

1 MR. MATHIASON: Well, it would be -- it  
2 would be completely imprudent for to us say that in  
3 May the no-strike clause was in effect. It wasn't,  
4 because the parties were still in a labor dispute and  
5 negotiating. July 2nd, that's when the no-strike  
6 clause came into effect.

7 JUSTICE BREYER: I think people are not  
8 communicating. Imagine on December 17th you and I  
9 enter into a contract and it's all written in red, all  
10 right? And one of these red sentences says: I will  
11 pay you \$32 extra an hour from the moment that the  
12 blue contract went into effect. See?

13 Now, whether -- that moment when the blue  
14 contract went into effect is a question, isn't it,  
15 that we would turn over to the arbitrator, the person  
16 who is arbitrating the meaning and application of the  
17 red contract. That's simply a question of fact and  
18 contractual meaning like any other.

19 Now, what have I said that's wrong?

20 MR. MATHIASON: Your Honor, what's really  
21 central is the fact that when we signed in December,  
22 we signed the agreement of July 2nd. That is  
23 critical. If there had been no ratification on July  
24 2nd, there would be no contract. And when the union  
25 signed, they take the position that they signed a

1 contract ratified on August 22nd. Those are radically  
2 different events, and the -- the real issue then is,  
3 where do you determine this core initial issue?

4 JUSTICE BREYER: Why is that a difficult  
5 issue? I can easily modify the hypothetical. The red  
6 contract says: Joe Smith will be paid \$32 extra an  
7 hour from the moment when this red contract takes  
8 effect.

9 Okay? And, now we have an issue, when  
10 everybody's agreed, we'll send the meaning of the  
11 contract to arbitration. We'll send the application  
12 of the contract to -- to arbitration. One of the  
13 questions is: When, for purposes of the \$32, did this  
14 contract, which we have admittedly signed, take  
15 effect? Why isn't that question for an arbitrator?

16 Is there any authority at all --

17 MR. MATHIASON: Yes --

18 JUSTICE BREYER: -- anywhere that says it  
19 isn't -- I can't -- I can't even know what authority -  
20 - what reasoning it would be.

21 MR. MATHIASON: Justice Breyer, the second  
22 contract, if it's the contract as proposed by the  
23 other side, never would have had a clause with that  
24 much money in it because we would have had to absorb  
25 for the strike. We signed the contract on the

1 assumption that it was the contract entered into July  
2 2nd, and --

3 JUSTICE ALITO: Am I correct that neither  
4 you, neither Granite Rock nor the local, thinks that  
5 the December collective bargaining agreement really  
6 was fully retroactive? They don't think it was --

7 MR. MATHIASON: That's correct.

8 JUSTICE ALITO: -- it meant that the no-  
9 strike clause was in effect on the day when the old  
10 collective bargaining agreement expired, and you don't  
11 think that the new arbitration clause was in effect on  
12 the day when the old collective bargaining agreement  
13 expired, or do I not understand your positions?

14 MR. MATHIASON: Justice Alito, that's  
15 exactly right. We agree with that. It wasn't. I  
16 mean, there is a crystal-clear understanding between  
17 the parties that the time of ratification is the time  
18 that the no-strike clause came into effect, and if  
19 there was no ratification on July 2nd, we wouldn't  
20 have signed the contract with the wage levels that are  
21 described in December. When we signed it, we signed it  
22 with the assumption that it was the contract that was  
23 formed on July 2nd.

24 And the issue of formation was never given  
25 to arbitration. The arbitration clause in this

1 particular case is what arises under the contract.  
2 It's a much narrower clause than this Court has seen  
3 in other cases and was not submitted --

4 JUSTICE SOTOMAYOR: But I keep going back  
5 to: That issue was decided. It was decided by the  
6 NLRB, and that was affirmed by a court of law, and so  
7 -- by the Ninth Circuit. I don't understand what the  
8 extant issue is. The -- the -- now what's left is  
9 applying that in arbitration to the question of the  
10 effectiveness of the no-strike clause.

11 But it has nothing to do with whether or not  
12 the issue of ratification has been decided and by  
13 whom.

14 MR. MATHIASON: Justice Sotomayor, we take  
15 the position, much like you've indicated in your  
16 hypothetical or actual description, that the NLRB  
17 decision is definitive. But there has to be a body,  
18 an entity, that actually adjudicates whether this is  
19 preclusive, and the question is: Does that go to a  
20 court, as it already has, with a unanimous jury  
21 verdict finding that it was ratified, or does it go to  
22 an arbitrator, who then looks at the NLRB decision and  
23 says, I guess I am bound by it?

24 We never agreed to submit the formation  
25 question to arbitration. There is no clear and

1 unmistakable agreement to do that, and so,  
2 consequently, it's the forum issue of where that's  
3 decided. We couldn't agree more that it's a futile  
4 act. In other words, the contract is now final and  
5 over, it starts on July 2nd, and we should go right  
6 into the issue of whether there's a breach of  
7 contract.

8           But there's this interim step because we  
9 don't yet have agreement from the other side that that  
10 issue is moot and resolved.

11           JUSTICE GINSBURG: If the contract had read,  
12 not simply "claims arising under this contract," but  
13 in addition said "including the formation or breach  
14 thereof," if the -- if the arbitration clause had  
15 included formation, then you would have no argument.

16           MR. MATHIASON: There would be no --

17           JUSTICE GINSBURG: It would go to the  
18 arbitrator.

19           MR. MATHIASON: Justice Ginsburg, there's no  
20 question that the parties could agree to have  
21 formation arbitrated if they do so in a clear and  
22 unmistakable way. The problem that we have here -- we  
23 agree with that -- the clause, if -- if the clause  
24 included formation, then that issue would go to the  
25 arbitrator. But the issue then becomes is there a

1 contract? And that's a threshold issue, that you have  
2 to bring life to the agreement to get subject matter  
3 jurisdiction.

4 JUSTICE BREYER: I thought of another way of  
5 putting this because I am having a hard time with it.  
6 You and I could do this, couldn't we? We could try to  
7 enter into a contract on May 1, and who knows what  
8 happens, we disagree about what happened, and by the  
9 way that had an arbitration clause in it. Now,  
10 whether -- since we disagree about it, that would go  
11 to the judge, whether we formed that contract with its  
12 arbitration clause, because everything's up in the  
13 air.

14 A year later, we enter into another  
15 contract, and what that contract says is, we are going  
16 to arbitrate every dispute between us, including that  
17 old dispute about whether there was that old contract,  
18 okay? And we could do that, and then you would -- you  
19 would certainly arbitrate the issue of contract  
20 formation, even for the old one, because we said we  
21 would do it, right?

22 MR. MATHIASON: If --

23 JUSTICE BREYER: Okay. So why isn't the  
24 December 17th contract that second contract in respect  
25 to the July 2nd?

1 MR. MATHIASON: Your Honor, if that had  
2 been, let's say, 4 years later, and we entered into a  
3 new contract willingly and getting the exchange, the  
4 no-strike clause for the arbitration, and that new  
5 contract said, this is going to deal with all past  
6 disputes, including prior contracts, fine.

7 When we executed that contract in December,  
8 we executed the contract that we believed was formed  
9 in July. There is no meeting of the minds. In other  
10 words, the union's execution was on a contract they  
11 say was formed on the 22nd.

12 There is a major, major issue here, and that  
13 is on July 2nd we made the concessions on wages,  
14 working conditions, and the rest of it, with the  
15 explicit understanding that it would be ratified at  
16 that time. Stipulated fact number 16, I think it's in  
17 the joint appendix 377, has that qualification in it.

18 If it wasn't ratified on July 2nd, then what  
19 happened is it was withdrawn, it exploded, there was  
20 nothing, there was nothing to be signed in December.  
21 We only signed what was agreed to on July 2nd and  
22 maintained that position because we believe we got the  
23 benefit and the protection of a no-strike clause all  
24 the way through that time period.

25 And so that is the critical distinction.

1 And now I couldn't agree more with this Court that  
2 it's an academic exercise to go to either an  
3 arbitrator or a court on whether it is in effect as of  
4 July 2nd. We believe the NLRB decision is preclusive  
5 in that regard.

6 But there is underneath it, there has to be  
7 a forum. There has to be somebody to say that. If an  
8 arbitrator got the case, looked at it, said, well, I'm  
9 not sure I really agree with the NLRB, and I think I'm  
10 going to decide it differently, and that then went to  
11 review in a court, and the arbitrator made a mistake  
12 of law, a mistake of fact, it's not completely clear  
13 to me that we would be able to come back to this Court  
14 and get it effectively changed.

15 We are saying that the issue of formation  
16 was submitted to the court, it was litigated.

17 And I would like to very much, Chief  
18 Justice, reserve the rest of my time for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
20 Mr. Bonsall.

21 ORAL EXAMINATION OF ROBERT BONSALL

22 ON BEHALF OF RESPONDENT

23 TEAMSTERS LOCAL 287

24 MR. BONSALL: Mr. Chief Justice, may it  
25 please the Court:

1 I'd like to turn to some questions that were  
2 just raised. This is not a question of whether there  
3 is a contract dated July 2nd, nor is this a question  
4 of whether there was a contract dated August 22nd.  
5 Those are issues of contract ratification.

6 There is only one collective bargaining  
7 agreement. That collective bargaining agreement was  
8 attached as an exhibit to the employer's first amended  
9 complaint. The trial court recognized this fact, in  
10 joint appendix page 231.

11 The contract was attached to the -- to the  
12 complaint lodging a breach of contract against this  
13 labor organization. There can be no doubt that that  
14 collective bargaining agreement says, on the very  
15 first page and the very last page, that the effective  
16 date is May 1st, 2004, and its expiration date is  
17 April 30th of 2008.

18 CHIEF JUSTICE ROBERTS: So, if there was a  
19 contract beginning May 22nd, then that included the  
20 no-strike clause?

21 MR. BONSALL: The issue, Your -- Mr. Chief  
22 Justice, would be whether the parties when they  
23 entered into that agreement and made that entire  
24 agreement retroactive to May 1st of 2004, whether the  
25 parties intended that the retroactivity clause would

1 apply for all purposes to any disputes arising to the  
2 parties. For example --

3 CHIEF JUSTICE ROBERTS: So -- so you don't  
4 think -- I guess this is following up on Justice  
5 Alito's question. You don't think it included the no-  
6 strike clause --

7 MR. BONSALL: Well --

8 CHIEF JUSTICE ROBERTS: -- for -- that would  
9 apply to July 2nd?

10 MR. BONSALL: We contend that it would not,  
11 and here's the reason why. If --

12 CHIEF JUSTICE ROBERTS: Well, if it doesn't  
13 -- I'm sorry to interrupt you. But if it doesn't  
14 include the no-strike clause and the question is  
15 whether the July 2nd one does, all this talk about the  
16 December agreement being retroactive to May is really  
17 kind of beside the point.

18 MR. BONSALL: Well, I think that it's  
19 important for two reasons. First, factually, if the  
20 Court places itself in the position of the parties on  
21 July 1st, at that point in time some things are clear.  
22 The union and its members have been out on strike for  
23 approximately 3 weeks, and they have engaged in tough  
24 negotiations at the bargaining table trying to reach a  
25 new contract, because that old contract had expired

1 almost 2 months ago. And the parties reach a  
2 tentative agreement on all the wages, hours, and terms  
3 of conditions of employment. But then the parties  
4 also incorporate a retroactivity clause, to make sure  
5 that all these rights and benefits would inure to the  
6 union members beginning May 1, the day after the last  
7 contract expired.

8           The Court should ask itself that -- when the  
9 union and its members are engaging in lawful,  
10 protected, concerted activity, a strike, on July 1,  
11 did they intend to convert that lawful economic  
12 activity into a breach of contract?

13           JUSTICE ALITO: And you say no, but what do  
14 you say about the -- but you say that the arbitration  
15 clause was intended to be retroactive.

16           MR. BONSALL: Excuse me, Your Honor.

17           JUSTICE ALITO: But you say that the  
18 arbitration clause -- or do you? -- in the later -- in  
19 the agreement that was ratified in December was  
20 retroactive?

21           MR. BONSALL: No, I think --

22           JUSTICE ALITO: Neither one is retroactive?

23           MR. BONSALL: On July 2nd, as counsel has  
24 indicated, there is a real dispute, a continuing  
25 dispute, between the parties whether the contract was

1 ratified on July 2nd.

2 JUSTICE ALITO: No, I understand that. I've  
3 having difficulty -- can we just put the December --  
4 in the view of both sides, can we just put the  
5 December agreement aside? It has nothing to do with  
6 the argument that's before us.

7 The argument before us has to do with the --  
8 whether there was a ratification on July the 2nd.

9 MR. BONSALL: We think that the -- there is  
10 only one contract, Your Honor. That contract was  
11 executed on December 14th by management's  
12 representative and December 17th by the union's  
13 representative. That's the labor agreement. Now --

14 CHIEF JUSTICE ROBERTS: Well -- I'm sorry,  
15 but that's the central issue. Your friend says no, we  
16 had a contract on July 2nd, and that's for the court  
17 to determine, not the arbitrator, because it's a  
18 question of formation.

19 MR. BONSALL: Well, the fact that counsel  
20 has reiterated over and over again that this is a  
21 question of contract formation -- in fact there is no  
22 formation issue when the Court is being asked to  
23 decide whether there is an arbitral issue. The Court  
24 needs to look at the collective bargaining agreement;  
25 and the contract that was in effect at the time that

1 the party -- the union -- made its demand for  
2 arbitration clearly indicated that there was a  
3 contract in place, and it contained a -- an -- excuse  
4 me -- extremely broad arbitration provision, that  
5 requires that all disputes -- all disputes arising  
6 under the collective bargaining agreement would be  
7 subject to the grievance and arbitration provision.

8 JUSTICE GINSBURG: I thought that the  
9 union's initial position was that there was no  
10 agreement, and it refused to arbitrate. Isn't that  
11 what -- wasn't the union's refusal to arbitrate what  
12 precipitated this case?

13 MR. BONSALL: That is not correct, Your  
14 Honor.

15 On July 26th of 2004, the union was  
16 confronting a Boys Markets injunction that was being  
17 sought by the employer. The issue before the trial  
18 court was whether the union should be enjoined, its  
19 strike should be enjoined. And counsel for the union  
20 took the clear position that there was not a contract  
21 in place at that time on July 26th, but even if there  
22 was, the injunction should not issue because of this  
23 Court's decision in Buffalo Forge.

24 The matter that was continuing to be an  
25 issue in conflict did not arise under the collective

1 bargaining agreement because it involved other labor  
2 organizations and essentially a back-to-work  
3 agreement. So on July 26th, the union did take the  
4 position that there was no contract, but the reason  
5 why an injunction was not appropriate was because of  
6 Buffalo Forge.

7 I don't know if that addresses --

8 JUSTICE GINSBURG: I thought that at that  
9 time the union refused to arbitrate.

10 MR. BONSALL: No. There was no question  
11 about arbitrating anything. The employer didn't ask  
12 to have arbitration at all at the July 26th hearing.  
13 The only question at that point in time was whether  
14 there was ratification or not. The employer insisted  
15 that the union's representative had made a  
16 communication to the employer's representative that  
17 the contract had been ratified.

18 Having the witnesses for both labor and  
19 management in the courtroom, Judge Ware said, well,  
20 I'll take evidence regarding whether this  
21 communication occurred. Did George Netto represent to  
22 Bruce Woolpert that in fact a contract had been  
23 ratified?

24 That was the very narrow issue decided by --

25 JUSTICE GINSBURG: But, at least now that we

1 have had the NLRB's -- the NLRB has weighed in and  
2 said that there was a contract as of July 2nd, why  
3 isn't that conclusive?

4 MR. BONSALL: We think that there's still an  
5 issue that is being sent to the arbitrator, the breach  
6 of contract and damages, but as a precursor to that,  
7 we contend that the issue never should have been  
8 litigated at all by the trial court about whether  
9 there was formation, because there was no question of  
10 formation at that time. It was only a question of  
11 contract ratification, and that issue falls within the  
12 scope of the broad arbitration provision under the  
13 collective bargaining agreement. When we go back --

14 JUSTICE SOTOMAYOR: I thought you answered  
15 Justice Alito "no," but I thought his question was a  
16 very simple one. You're taking the position, I think,  
17 that there's no dispute that on -- in December a  
18 contract was formed.

19 MR. BONSALL: Correct.

20 JUSTICE SOTOMAYOR: It was made retroactive  
21 to a date before July. It started in May --

22 MR. BONSALL: Yes.

23 JUSTICE SOTOMAYOR: -- and it covers a time  
24 frame.

25 MR. BONSALL: Uh-huh.

1 JUSTICE SOTOMAYOR: The dispute between the  
2 parties is what that retroactivity under the contract  
3 means and which provisions are in effect or not.  
4 Isn't that what your argument is -- that this is not  
5 contract formation; this is a question of -- of the  
6 applicability of individual provisions to a set of  
7 facts?

8 MR. BONSALL: Absolutely correct, Your  
9 Honor. The employer is alleging that there is a  
10 breach of the no-strike clause. The union is alleging  
11 a defense to that allegation by asserting a merits-  
12 based issue regarding whether, in a certain narrow gap  
13 period, falling in between the effective date of the  
14 contract --

15 JUSTICE SOTOMAYOR: So your answer to  
16 Justice Alito should have been: We are arguing that  
17 the no-strike clause was not in effect, but we do take  
18 the position that the arbitration clause was --

19 MR. BONSALL: That's --

20 JUSTICE SOTOMAYOR: -- made retroactive.

21 MR. BONSALL: That's exactly correct, Your  
22 Honor. And --

23 CHIEF JUSTICE ROBERTS: And what do you  
24 expect the arbitrator to do? The arbitrator -- since  
25 you agree that there's a contract in effect --

1 MR. BONSALL: Yes.

2 CHIEF JUSTICE ROBERTS: -- the arbitrator is  
3 not going to decide whether the contract is there or  
4 not.

5 MR. BONSALL: He will not.

6 CHIEF JUSTICE ROBERTS: And the contract has  
7 a no-strike clause.

8 MR. BONSALL: That's correct, Your Honor.

9 CHIEF JUSTICE ROBERTS: So you expect the  
10 arbitrator to say you get the benefit of the contract  
11 that lets me decide something, and even though there's  
12 a no-strike clause in the contract, you want the  
13 arbitrator to say that no-strike clause is not  
14 operative on July 2nd?

15 MR. BONSALL: We expect the arbitrator to  
16 take a look at the facts that existed on July 2nd and  
17 make a determination whether in fact at that point in  
18 time the union has a meritorious claim that the  
19 contract was not ratified, and therefore the no-strike  
20 clause --

21 CHIEF JUSTICE ROBERTS: Even though -- I'm  
22 sorry to interrupt you. But even though the later  
23 agreement was that it would be retroactive?

24 MR. BONSALL: Absolutely. Both parties  
25 openly negotiated and hammered out and had their

1 representatives sign a collective bargaining  
2 agreement. The employer was entirely free, if it was  
3 inclined to do so, to suggest that they would not sign  
4 an agreement unless the union consented.

5 JUSTICE ALITO: So in substance, you -- you  
6 think that the arbitrator would decide the issue of  
7 contract formation, whether --

8 MR. BONSALL: No.

9 JUSTICE ALITO: Well, I thought you just  
10 said that the arbitrator would decide whether there  
11 was an agreement on July the 2nd.

12 MR. BONSALL: The arbitrator would not be  
13 deciding contract formation. The arbitrator would be  
14 deciding within the scope of the collective bargaining  
15 agreement whether the no-strike clause was effective  
16 to bind the employer -- excuse me -- to bind the union  
17 from a short period of time from July 2nd to August  
18 22nd. That would be the only real claim, because the  
19 union actually -- there's no question -- was out on  
20 strike. This is not in dispute.

21 What the trial court did in this case was to  
22 usurp the function of the arbitrator. The parties  
23 selected one arbitrator.

24 JUSTICE GINSBURG: Well, perhaps you can  
25 clarify one thing for me. I thought that these two go

1 together -- two things that go together: One is the  
2 no-strike clause, and one is the arbitration clause.

3 MR. BONSALL: Yes.

4 JUSTICE GINSBURG: And you are trying to  
5 uncouple them, and so, even though one is quid pro quo  
6 for the other, you would say the union wants to keep  
7 what favors it, that is the arbitration clause, but  
8 reject what favors the employer, that is the no-strike  
9 clause.

10 It seems to me that if you have one, you  
11 have the other, but you can't say, oh, yes, we have  
12 the arbitration clause, but we don't have the no-  
13 strike clause.

14 MR. BONSALL: Yes, I -- I think this Court  
15 has addressed that very issue, Justice Ginsburg, in  
16 Drake Bakeries. An employer was confronted with a  
17 strike. The employer immediately went into Federal  
18 court and filed a breach of contract action against  
19 the labor organization, and it insisted that these two  
20 contract provisions, the right -- the no-strike clause  
21 and the grievance procedure, were inextricably tied.  
22 And this Court pointed out that they are not in all  
23 circumstances exact counterweights.

24 JUSTICE STEVENS: Well, they're not in all  
25 circumstances, but will you respond to your opponent's

1 argument? Why in the world would they have signed on  
2 -- on July 2nd if they didn't think they were going to  
3 get the benefit of the no-strike clause?

4 MR. BONSALL: When they signed the  
5 agreement, Your Honor, they absolutely did get the  
6 benefit of it. There was no strike at all after  
7 August 22nd that was --

8 JUSTICE STEVENS: If they had the benefit of  
9 the no-strike clause --

10 MR. BONSALL: -- in violation of the  
11 collective bargaining agreement.

12 JUSTICE STEVENS: -- then any subsequent  
13 strike would have violated the contract?

14 MR. BONSALL: Absolutely. If there was a  
15 subsequent strike at any time in --

16 JUSTICE STEVENS: Well, there was a  
17 subsequent strike.

18 MR. BONSALL: There was not, Your Honor.  
19 After -- after --

20 CHIEF JUSTICE ROBERTS: Is that an issue for  
21 the arbitrator? Now that we know there was an  
22 agreement on July 2nd, is the question whether the  
23 strike continued or not for the arbitrator?

24 MR. BONSALL: I'm not sure that I understand  
25 your question. The -- I think the arbitrator will be

1 --

2 CHIEF JUSTICE ROBERTS: Well, you say there  
3 was no strike, and I -- I thought the other side said  
4 there was.

5 MR. BONSALL: There absolutely was a strike.  
6 It began in the early weeks of June.

7 CHIEF JUSTICE ROBERTS: Right.

8 MR. BONSALL: And it continued, actually,  
9 through September 22nd of 2004. That was the duration  
10 that the union was on strike.

11 CHIEF JUSTICE ROBERTS: Right, but their  
12 position is that there was a contract on July 2nd that  
13 included a no-strike clause --

14 MR. BONSALL: Yes.

15 CHIEF JUSTICE ROBERTS: -- that you  
16 violated.

17 MR. BONSALL: That's correct.

18 CHIEF JUSTICE ROBERTS: Okay. And your  
19 answer is, one, that there is no contract, right?

20 MR. BONSALL: Our defense to the allegation  
21 of the no-strike clause before the arbitrator would be  
22 that at that time the parties had not ratified the  
23 agreement, and that ratification did not occur until  
24 August 22nd, which also appears as a concession by the  
25 employer in paragraph 27 of their third amended

1 complaint. They also say that the contract was  
2 ratified on August 22nd.

3 JUSTICE ALITO: But that would be an issue  
4 for the -- you think that that would be an issue for  
5 the arbitrator to decide, whether there was a contract  
6 ratified on July the 2nd?

7 MR. BONSALL: Or August 22nd, yes, Your  
8 Honor.

9 JUSTICE ALITO: And if the arbitrator  
10 thought that it was in existence on July 2nd, then --

11 MR. BONSALL: Then --

12 JUSTICE ALITO: -- you would lose?

13 MR. BONSALL: I think that's correct, Your  
14 Honor.

15 JUSTICE ALITO: So that's an issue of  
16 contract formation; is it not? In substance it is.

17 MR. BONSALL: If I may finish?

18 CHIEF JUSTICE ROBERTS: Oh, sure.

19 MR. BONSALL: In substance it's contract  
20 formation if you can place yourself back in time on  
21 July 2nd or August 22nd. It is moot and entirely  
22 academic when the parties ratify an agreement at some  
23 point in time and sign the contract in December.  
24 There is no question of contract formation in this  
25 case. There's only a question of contract

1 ratification during a very narrow period.

2 CHIEF JUSTICE ROBERTS: And that -- and that  
3 position depends upon your answer to Justice  
4 Ginsburg's question, that you are severing arbitration  
5 and the no-strike obligation?

6 MR. BONSALL: Under Drake Bakeries, we do  
7 not believe that we are severing at all. We think  
8 that when an employer brings a breach of contract  
9 claim in Federal court under a collective bargaining  
10 agreement that contains a broad arbitration clause,  
11 their remedy is to seek that breach of contract and  
12 damage claim before the arbitrator.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. BONSALL: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Nussbaum.

16 ORAL ARGUMENT OF PETER D. NUSSBAUM

17 ON BEHALF OF THE RESPONDENT

18 INTERNATIONAL BROTHERHOOD OF TEAMSTERS

19 MR. NUSSBAUM: Thank you, Mr. Chief Justice,  
20 and may it please the Court:

21 There are three basic points that I would  
22 like to discuss with the Court this morning with  
23 regard to the section 301 issue.

24 The first is that, in our view, the issue as  
25 to whether or not a tort claim can be brought under

1 301 begins and ends with the clear language of section  
2 301, which talks about suits for violation of  
3 contract.

4           The second point I'd like to make is that  
5 allowing the tort action, as Granite Rock is urging,  
6 would work a big change in the structure that Congress  
7 has established by which it has decided that major  
8 issues of labor law, such as the weapons -- economic  
9 weapons that parties can use, should be decided by  
10 Congress through statute and by the National Labor  
11 Relations Board through the application of the  
12 statute.

13           JUSTICE KENNEDY: Do you take the position  
14 that the cause of action for interference with a  
15 contract has been pre-empted insofar as State law is  
16 concerned?

17           MR. NUSSBAUM: That's, of course, not an  
18 issue in this case because it was never attempted --

19           JUSTICE KENNEDY: What is your position on  
20 that point?

21           MR. NUSSBAUM: The law in most of the  
22 circuits is that any case which involves the  
23 interpretation of a contract is pre-empted. I'm not  
24 sure that this Court has --

25           JUSTICE KENNEDY: Do you -- do you -- does

1 your client take the position that that law is  
2 correct, that the Federal law has pre-empted State law  
3 actions for interference with -- with contract  
4 relations?

5 MR. NUSSBAUM: Yes.

6 JUSTICE KENNEDY: All right. So then you  
7 are submitting to this Court that the purpose of the  
8 National Relation -- Labor Relations Act and its  
9 effect was to give immunity to unions for intentional  
10 interference with contractual relations?

11 MR. NUSSBAUM: No, that is not what I  
12 believe happened.

13 JUSTICE KENNEDY: Well, isn't that the  
14 effect of your argument here?

15 MR. NUSSBAUM: No, I do not believe it is.  
16 Let me just first clarify something, that the pre-  
17 emption of State torts is not dependent on section  
18 301. State torts for interference with contract would  
19 have been pre-empted prior, under Garmon or Machinists  
20 pre-emption, because of those two doctrines, that it  
21 would interfere with conduct that is arguably  
22 prohibited or arguably protected, or that it is in an  
23 area unregulated by Congress. But it doesn't leave  
24 the employer remediless in a situation like this, far  
25 from it.

1           This employer had a breach of contract  
2 action under the contract that it is pursuing --

3           CHIEF JUSTICE ROBERTS: Not against the  
4 international?

5           MR. NUSSBAUM: Not against the  
6 international. That's correct.

7           JUSTICE GINSBURG: If it's true -- if it's  
8 true, which we can take for purposes -- for the  
9 current purpose, that the international really did  
10 induce the local to continue the strike, you said  
11 there's no action in State court because that's pre-  
12 empted. Unfair labor practice proceedings is against  
13 the local, not the -- not the international. So  
14 there's nothing.

15           It is in your view, you -- you said, well,  
16 there's relief against the local, but there's no  
17 remedy at all against the international, even if the  
18 allegation is true that this strike would never have  
19 occurred if it hadn't been for the pressure from the  
20 international.

21           MR. NUSSBAUM: No, I disagree. There is an  
22 avenue that Granite Rock could have pursued but did  
23 not pursue, and that was to have filed a charge  
24 against the international with the National Labor  
25 Relations Board, which is the body that should be

1 making this precise decision as to whether this action  
2 by the international, an economic weapon, is  
3 permissible or is outlawed by the National Labor  
4 Relations Act. Granite Rock chose not to file an  
5 unfair labor practice, but it could have.

6 And we cited -- it's cited, actually, in the  
7 amicus brief by the AFL-CIO, the Paperworkers case,  
8 which demonstrates that an international union that  
9 interferes with the bargaining of local unions can  
10 itself be guilty of an unfair labor practice.

11 CHIEF JUSTICE ROBERTS: Counsel, I'd like  
12 your broader perspective as a representative of the  
13 international, because I think it's an important issue  
14 of labor policy. If I think that the cause of actions  
15 available under 301(a) and the pre-emptive effect of  
16 301(a) ought to be coextensive, which -- which do you  
17 prefer, a broader 301(a) or a narrower pre-emption? I  
18 think it makes a difference.

19 MR. NUSSBAUM: I'm not -- I'm sorry -- I'm  
20 not sure I understand the question.

21 CHIEF JUSTICE ROBERTS: I think 301 -- I  
22 think whatever -- I don't think there should be a no-  
23 man's land between you can bring your action under 301  
24 and it's pre-empted by 301.

25 In other words, if -- if you are right, that

1 they cannot bring a tortious interference action under  
2 301, I don't think it should be pre-empted. If you  
3 are wrong and they can bring it, then I can understand  
4 that it should be pre-empted.

5 MR. NUSSBAUM: Let me -- let me try to  
6 answer your question, as I'm -- as I'm understanding  
7 it. First, the issue as to whether or not they could  
8 bring a 301 action under -- a tort action under 301,  
9 it was not pre-empted by 301.

10 The question is whether 301 allows that type  
11 of claim at all, whether Congress intended that, and I  
12 think the language of the statute, violation of  
13 contract, indicates no, because a violation of  
14 contract, you can only violate a contract against --  
15 bring an action against someone who --

16 CHIEF JUSTICE ROBERTS: So it was pre-empted  
17 by 301, and they cannot bring it under 301?

18 MR. NUSSBAUM: Not a Federal court claim  
19 under 301.

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. NUSSBAUM: A State claim, a State tort  
22 action under 301, would be pre-empted. What will  
23 happen then is -- is similar to what happened in the -  
24 - in the Rawson case. What happens if a State court  
25 tort is brought?

1           It would be pre-empted because of complete  
2 pre-emption because it involves a contract and the  
3 interpretation of a contract. That doesn't mean that  
4 the -- that it's gone. What the Federal court does  
5 then is look at the claim and say, with what was pled  
6 in the complaint, does that fall within the parameters  
7 of 301? And that's exactly what the Court did in  
8 Rawson. It said the State court tort action was pre-  
9 empted. Now, we have to look and see, is there a  
10 claim under 301?

11           CHIEF JUSTICE ROBERTS: And so if Granite  
12 Rock brought this claim in State court, you would say  
13 it's pre-empted by 301?

14           MR. NUSSBAUM: Yes, but we'd be in exactly  
15 the same position.

16           CHIEF JUSTICE ROBERTS: And then, if they  
17 turned around and brought it in Federal court under  
18 301, you would say, no, there is no cause of action  
19 under 301?

20           MR. NUSSBAUM: Yes, you would get to the --

21           CHIEF JUSTICE ROBERTS: Okay.

22           MR. NUSSBAUM: You would get to the same  
23 result, and the process is exactly the same.

24           CHIEF JUSTICE ROBERTS: So it is in a no-  
25 man's land. Their claim for tortious interference

1 with contract just can't be brought anywhere?

2 MR. NUSSBAUM: It -- it -- for tortious  
3 interference, no, you cannot -- you cannot bring that  
4 claim, but what I was saying before is, it doesn't  
5 leave them remediless, even with regard to a claim  
6 against the international because a charge could be  
7 filed --

8 CHIEF JUSTICE ROBERTS: They could always go  
9 to the NLRB --

10 MR. NUSSBAUM: -- under 8(b)(3), and the  
11 board would decide, the -- the conduct in this  
12 context, and the board is always looking at the  
13 context of it, is this something which is prohibited,  
14 something which is protected, something which is  
15 unregulated? And it is the board that Congress  
16 entrusted that -- that job to.

17 JUSTICE SOTOMAYOR: What remedies -- I'm  
18 sorry.

19 JUSTICE STEVENS: What is the remedy --

20 JUSTICE BREYER: Just before you finish,  
21 Chief, is it all right if you -- I'm not quite clear  
22 on how this pre-emption works, and I perhaps didn't  
23 have it right. But imagine 301 had never been  
24 enacted. I thought, had that never been enacted,  
25 certain kinds of State claims, particularly tort

1 claims of interference with labor contracts, for  
2 example, might have been pre-empted anyway by the  
3 Labor Relations -- by the -- by the LMRA.

4 I thought that did the basic pre-emptive  
5 job. And then where it is pre-empted by the LMRA, 301  
6 creates an exception to the pre-emption, so that it  
7 isn't pre-empted, if you have a suit. Now, my  
8 thinking is probably out-of-date and wrong, so I would  
9 like you to explain how it works.

10 MR. NUSSBAUM: I -- I think perhaps we are  
11 saying the same thing --

12 JUSTICE BREYER: No, no, because I think  
13 that your response to the Chief Justice's question,  
14 which is why I became uncertain, is that it is the  
15 LMRA -- not the LMRA at all that pre-empts tort  
16 actions and State activities that interfere with labor  
17 relations, as this might. It is, rather, section 301  
18 itself that pre-empts it, and then it is odd because  
19 it pre-empts it, but it says, we won't give you any,  
20 and -- and that's why I became uncertain.

21 MR. NUSSBAUM: Let me try because I think I  
22 understand why I confused you. I think, before 301, a  
23 tort action would have been pre-empted by either the  
24 doctrines of Garmon pre-emption or Machinists pre-  
25 emption.

1 CHIEF JUSTICE ROBERTS: In State court or in  
2 Federal court?

3 MR. NUSSBAUM: In -- in State court.

4 CHIEF JUSTICE ROBERTS: But you bring it in  
5 Federal court?

6 MR. NUSSBAUM: No -- well, no, it would have  
7 been -- it would have been pre-empted in Federal court  
8 also. It would have been within the primary  
9 jurisdiction of the National Labor Relations Board.  
10 That's where -- who it goes to.

11 What I think has happened, Justice Breyer,  
12 is, since the enactment of 301, and particularly with  
13 this Court's doctrine of complete pre-emption for  
14 removal purposes, which I know there's some debate  
15 about, when courts look at State law torts, they tend  
16 to look at 301, rather than going back to Garmon and  
17 Machinists pre-emption.

18 JUSTICE STEVENS: May I ask you, what is the  
19 remedy for an unfair labor practice? Can they get a  
20 damage remedy?

21 MR. NUSSBAUM: Yes. It would be, first, a  
22 cease-and-desist order.

23 JUSTICE STEVENS: Right.

24 MR. NUSSBAUM: And then a make-whole remedy.

25 JUSTICE STEVENS: A make-whole remedy --

1 MR. NUSSBAUM: Yes.

2 JUSTICE STEVENS: -- for -- okay.

3 MR. NUSSBAUM: Yes.

4 CHIEF JUSTICE ROBERTS: What would the make-  
5 whole -- I gather a cease-and-desist wouldn't make any  
6 sense because this is over, but what would the make-  
7 whole remedy entail?

8 MR. NUSSBAUM: It would have to be a proof  
9 of damages that resulted from the unfair labor  
10 practice, from the unfair conduct, which, in this  
11 situation, would have been the interference into the  
12 bargaining process. And how the NLRB would decide  
13 what the damages would be, for the international as  
14 opposed to the local union, I'm really not sure, but  
15 there is certainly the capacity under the NLRA for  
16 there to be a make-whole remedy.

17 JUSTICE SCALIA: So you -- while saying that  
18 there's no cause of action for this tort claim, you  
19 nonetheless say that the tort claim can be considered  
20 an unfair labor practice by the labor board. Why does  
21 that make any sense?

22 MR. NUSSBAUM: Because what Congress -- what  
23 Congress did in 301 was to create limited jurisdiction  
24 for one type of claim and one type of claim only,  
25 violation of contract, breach of contract, an action

1 against the party that has the obligations under it.

2 But that doesn't mean that there isn't any  
3 claim outside of 301 against a third party. In this  
4 case, the third party is the international, and the  
5 claim could be made under the National Labor Relations  
6 Act. The Paperworker case is an example.

7 JUSTICE KENNEDY: But if it's outside 301,  
8 where does pre-emption come from, Garmon?

9 MR. NUSSBAUM: The pre-emption -- well, in  
10 this case --

11 JUSTICE KENNEDY: If I could interrupt just  
12 for a moment? Allis-Chalmers was 301. Allis-Chalmers  
13 says 301 covers contract, and, therefore, there's a  
14 pre-emption. So I take it you're not talking about  
15 Allis-Chalmers pre-emption. You are talking about  
16 Garmon or Machinists or something.

17 MR. NUSSBAUM: Well, both of them end up  
18 pre-empting a State law tort. In this case --

19 JUSTICE KENNEDY: But if you say both of  
20 them, then we're back where we started. If 301 pre-  
21 empts, then it should be within the ambit of 301's  
22 jurisdiction to the Federal court.

23 MR. NUSSBAUM: No, it pre-emptes exactly for  
24 the purpose that this is an issue that should be  
25 decided by the regulatory agency, which Congress

1 entrusted with making exactly these decisions. What  
2 economic weapons can an international union, can a  
3 parent employer use in a labor dispute?

4 For the courts to be getting involved in  
5 that would be directly contrary to what Congress has  
6 been doing since 1935, of saying those decisions of  
7 economic weapons are not to be decided by courts  
8 applying common law tort principles. We tried that,  
9 and we didn't like it.

10 CHIEF JUSTICE ROBERTS: Well, but that  
11 applies in 301. They're not touching the contract.  
12 They're not touching the parties to the contract.  
13 This is outside the contract. So why should it be  
14 pre-empted?

15 MR. NUSSBAUM: It's -- well, again, the  
16 claim that they brought in Federal court was not pre-  
17 empted. It was a claim. You looked at the claim.  
18 You read the complaint, and you said, you don't have a  
19 claim under 301 because it's not one for violation of  
20 contract, good-bye.

21 CHIEF JUSTICE ROBERTS: I understand that.

22 MR. NUSSBAUM: End of it. The question that  
23 Justice Kennedy was -- was addressing to me was: Does  
24 that leave them without any remedy? And my answer is,  
25 no, it doesn't. Aside from the remedies they have

1 against the local, they also had a potential remedy  
2 against the international through the National Labor  
3 Relations Act.

4 And that -- that was the basic point that I  
5 was making.

6 JUSTICE SCALIA: Has -- has the board, in  
7 fact, declared a party who is not a party to the labor  
8 contract guilty of an unfair labor practice in prior  
9 cases?

10 MR. NUSSBAUM: The Paperworkers case that we  
11 cite -- the answer to your question is: I'm not aware  
12 of a case. The one we cited, the international was a  
13 party to the case. However, it's clear that the fact  
14 that it was a party to the case was not the  
15 determinative factor, because what the NLRB did was  
16 instruct the international union to strike the pooled  
17 voting provision that was in the constitution.

18 So they didn't say: It's just no good in  
19 this case where you are a party to the contract. They  
20 said: You can't do it in any situation. That clearly  
21 showed that the -- that the NLRB was focusing on the  
22 broader type of interference where they didn't have to  
23 be a party to the contract.

24 But even if the NLRB -- and I want to stress  
25 this -- were to find that there wasn't a remedy under

1 the -- the facts of the particular case, that would  
2 simply mean that it is protected conduct under the  
3 National Labor Relations Act. And the NLRB has made  
4 that decision, and it is the agency that should be  
5 doing it, rather than having courts get involved in  
6 this area of law making up rules, because when you  
7 talk about interference, as we know, the tort isn't  
8 for all interference; it's for improper interference.

9 As the Associated General Contractors  
10 indicates, that would call into play the courts  
11 looking at various factors such as societal values,  
12 and that's exactly what Congress didn't intend.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. NUSSBAUM: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Mathiason, you  
16 have 5 minutes remaining.

17 REBUTTAL ARGUMENT OF GARRY G. MATHIASON

18 ON BEHALF OF THE PETITIONER

19 MR. MATHIASON: Categorically, Your Honor,  
20 the NLRB has no jurisdiction over this case. In  
21 footnote 18 of our reply brief, we recount the  
22 history. That Paperworkers' case that was just  
23 referenced, the international was a signatory. It was  
24 the exclusive bargaining representative, and,  
25 therefore, it had status under section 8(b)(3).

1 CHIEF JUSTICE ROBERTS: I'm sorry. Where is  
2 that again? Footnote 18?

3 MR. MATHIASON: It's footnote 18 of our  
4 reply brief, and we recount the history that was  
5 litigated both at the Ninth Circuit and beyond. There  
6 is no remedy before the NLRB --

7 JUSTICE BREYER: Well, that may be, but then  
8 you might have -- then you'd have a remedy in State  
9 court. I think the argument was that -- anyway, I  
10 have this argument: 301 doesn't pre-empt anything but  
11 the contract claim.

12 Now, go bring your claim in State court.  
13 You might have a good claim in State court that isn't  
14 pre-empted. Suppose one of their employees hit  
15 somebody over the head. You'd have a great claim, and  
16 that isn't going to be pre-empted. Now, yours might  
17 be, because there is a set of tort actions in State  
18 court that the labor acts pre-empt; in particular,  
19 those that involve conduct that is arguably protected  
20 or arguably forbidden by the labor acts.

21 So, if you fall outside that category, you  
22 are not pre-empted. And if you fall inside the  
23 category, you should be pre-empted; not by 301, but by  
24 the labor law which gave this kind of decision to the  
25 labor board to make. What is -- is that argument

1 sensible? Is it right? What do you think?

2 MR. MATHIASON: Justice Breyer, there is a  
3 fundamental aspect of that that's just not right, and  
4 that is that the conduct involved here was causing a  
5 violation of a contract. The international took  
6 control of the local and forced the breach. This is  
7 the -- this conduct would never be sanctioned if the  
8 jurisdiction of the NLRB had access to it, but the --  
9 wisely, I think, the structure of the National Labor  
10 Relations Board is -- the 8(b)(3) remedy is against an  
11 exclusive agent. They have to be the bargaining  
12 agent. International is not the bargaining agent.

13 And so, consequently, if we accepted the position  
14 of the international, you would create a no-man's zone  
15 that would apply throughout this country, whereby  
16 collective bargaining agreements entered into by  
17 locals could be destroyed, violated, by an  
18 international that would choose to impose itself on  
19 the local and cause that to happen. Most  
20 internationals are responsible.

21 JUSTICE SOTOMAYOR: Do you seriously think  
22 that if that becomes a problem, that the NLRB won't  
23 declare it an unfair labor practice, or if they don't,  
24 that they won't go to Congress and say: There is a  
25 no-man's land; now give a remedy like you did in 301?

1           You're -- you're begging Justice Breyer's  
2 question, which is: If the law pre-empts this claim  
3 and it's doing so unjustly, who should make that  
4 determination? Should it be you in a State court, you  
5 in a Federal court, or should it be in the first  
6 instance the NLRB who says this is or isn't an unfair  
7 labor practice, and if it rules it's not because the  
8 law doesn't cover it, or it's not authorized to issue  
9 this --

10           MR. MATHIASON: Your -- Your Honor, I think  
11 it's well-established this is not an unfair labor  
12 practice, because you don't have jurisdiction under  
13 section 8(b)(3).

14           What is suggested here is that maybe there  
15 is a no-man's zone that Congress should go to and  
16 regulate, but if you back up to 1947 and the passage  
17 of section 301, it's inconceivable that in passing  
18 that statute Congress intended to leave all  
19 international unions, or anybody that controlled a  
20 party, completely free from any reach of law.

21           JUSTICE SCALIA: Why -- why isn't it under  
22 8(b)(3)? How does 8(b)(3) read? What is it in  
23 8(b)(3) that would exclude this from the labor board's  
24 --

25           MR. MATHIASON: Well, it is not an exclusive

1 representative. In other words, 8(b)(3) contemplates  
2 a bargaining obligation on the part of an exclusive  
3 representative, and the international is not in that  
4 capacity.

5           They had control, but they aren't designated  
6 in that manner, and there's not one NLRB case in the  
7 history of that agency that deviates from that, or we  
8 would have been on it immediately. And it just isn't  
9 there.

10           So we were looking at our options, and State  
11 court appeared to be very clearly pre-empted by Allis-  
12 Chalmers and a row of cases. So that meant that the  
13 Federal law, section 301, as suggested by Lincoln  
14 Mills, would absorb.

15           Please recognize that what we are seeking  
16 here -- the labels of tort and contract create, I  
17 think, a false distinction. We are effectively  
18 bringing a contract action for violation of a  
19 contract. The linkage is strictly to add in the  
20 international as the acting party.

21           CHIEF JUSTICE ROBERTS: Thank you, counsel.

22           The case is submitted.

23           (Whereupon, at 12:01 p.m., the case in the  
24 above-entitled matter was submitted.)

25

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