No. 18-1415

IN THE
Supreme Court of the United States

ASARCO, LLC,

Petitioner,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO, CLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court must afford deference to a labor arbitrator's decision finding that the arbitrator has authority to order reformation of a collective bargaining agreement to correct a mutual mistake.

PARTIES TO THE PROCEEDINGS

Petitioner ASARCO, LLC was the petitioner and counter-defendant in the district court and the appellant in the court of appeals.

Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC was the respondent and counterclaimant in the district court and the appellee in the court of appeals.

RULE 29.6 STATEMENT

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC is a labor organization and unincorporated association. It is not publicly held and has no parent corporation.

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INTRODUCTION

This is a routine case in which the Ninth Circuit correctly applied decades of Supreme Court precedent requiring courts to afford substantial deference to the awards of labor arbitrators. The Ninth Circuit's decision is not in conflict with the decision of any other circuit court and there is no issue of national importance for this Court to resolve. For these reasons, the petition for a writ of certiorari should be denied.

Petitioner ASARCO, LLC ("ASARCO") and Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") are parties to a collective bargaining agreement. In 2011, they negotiated a three-page extension to that agreement which changed a limited number of contractual provisions. The short extension agreement did not change, among other things, a bonus program which constitutes a large portion of all employees' compensation. Two weeks following the execution of the extension, ASARCO discovered a scrivener's error and sought to take advantage of that error, contrary to the parties' actual agreement and mutual intent, to deny the bonus to newly-hired employees. The Union filed a grievance and the parties submitted the matter to arbitration, stipulating that the grievance was properly before the

Arbitrator and that he had jurisdiction to hear the case.

The Union argued from the outset that the operation of the language rendering new hires ineligible for the bonus constituted a mutual mistake and that the parties' agreement should be reformed to correct that mistake so that the parties' actual intent could be implemented. The Arbitrator ultimately agreed, ordering the reformation of the collective bargaining agreement to require the payment of the bonus to new hires. ASARCO then petitioned the District Court to vacate the award, while at the same time conceding that it could not challenge the Arbitrator's finding of a mutual mistake or his application of the doctrine of reformation. Instead, ASARCO argued – as it had before the Arbitrator – that a "no-add" provision in the arbitration clause of the collective bargaining agreement deprived the Arbitrator of authority to order reformation, even in the face of an uncontested mutual mistake. The District Court upheld the Arbitrator's decision and the Ninth Circuit affirmed, finding that the award "was grounded in [the Arbitrator's] reading of [the agreement]." App. 10a.

As this Court has long recognized, the Arbitrator's decision, including his construction of his authority under the agreement's arbitration clause and his selection of a remedy, are entitled to extraordinary deference. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 765

(1983); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 41 (1987). Moreover, the Arbitrator's application of the venerable contract doctrines of mutual mistake and reformation conforms with this Court's recent admonition that collective bargaining agreements be applied "according to ordinary principles of contract law[,]" and that "[i]n this endeavor, as with any other contract, the parties' intentions control." *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015).

ASARCO attempts to manufacture a circuit split, but none of the cases it cites implicates the ordinary contract principles of mutual mistake or reformation. To support a separate basis for its petition, ASARCO mischaracterizes the Ninth Circuit's holding, claiming that the Court of Appeals found that ASARCO waived the right to challenge the Arbitrator's jurisdiction. In fact, the Ninth Circuit expressly declined to reach that issue in its final and controlling opinion.

In summary, this is an unremarkable case in which the Court of Appeals correctly applied long-settled authority affording deference to the awards of labor arbitrators. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Legal Framework

This Court has long held that the awards of labor arbitrators are entitled to an extraordinary degree of deference. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). "As long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (quoting *Enterprise Wheel*, 363 U.S. at 597)).

As a result, the Court has warned broadly against the substitution of a court's judgment for that of an arbitrator. *Misco*, 484 U.S. at 40 n.10.

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the

> arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960); *see also AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649-50 (1986); *Misco*, 484 U.S. at 36-37. Thus, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco,* 484 U.S. at 38; *see also Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

Collective bargaining agreements are interpreted and applied "according to ordinary principles of contract law[,]" and "[i]n this endeavor, as with any other contract, the parties' intentions control." *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015). The doctrine of mutual mistake and its remedy of reformation exist to conform a writing to the parties' actual agreement as mutually intended. *Restatement (Second) of Contracts* § 155; *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918). Hence application of these ordinary contract principles falls squarely within an arbitrator's wide discretion to interpret and apply a collective bargaining agreement.

B. Facts and Procedural History

This petition for a writ of certiorari originates from ASARCO's attempt to vacate a labor arbitration award in favor of the Union. Since 2007, ASARCO and the Union have been parties to a collective bargaining agreement called the Basic Labor Agreement ("BLA"). App. 4a; App. 68a-69a. During 2011 negotiations to modify and extend the BLA, the parties agreed to exclude newly-hired employees from participating in ASARCO's defined benefit pension plan in favor of an expanded defined contribution pension benefit. App. 4a; App. 70a-71a. This change was part of a three-page extension agreement which, other than specified changes, continued in force the nearly 150-page BLA, a labor agreement which includes a "Copper Price Bonus" program. App. 4a; App. 70a-71a. Neither party intended for this briefly noted and singular change to BLA provisions concerning the pension plan to affect the eligibility of new employees to receive the "Copper Price Bonus." App. 70a-71a. During the relevant time period, the bonus amounted to as much as $8,000 per employee per year. App. 4a; App. 69a.

Existing language in the BLA provided that employees who were eligible to participate in the defined benefit pension plan would also be eligible to receive the Copper Price Bonus. Weeks after executing the extension agreement, the Company discovered for the first time that the extension agreement, which provided that new hires would not

participate in the defined benefit pension plan, could be read in a manner neither party intended to cancel the eligibility of new hires for the bonus program. App. 70a-71a. For months, the Company hid this discovery from the Union and even told all new and prospective employees that they were eligible for the bonus. App. 71a. The Company then informed the Union and attempted to leverage the issue to obtain additional post-bargaining concessions. When the Union refused, ASARCO relied on the pre-existing language to deny the bonus to all new hires. *Id.*

The Union filed a grievance, and the parties submitted the matter to arbitration. App. 5a. The BLA's grievance and arbitration procedure broadly covers any "complaint by the Union which involves the interpretation or application of, or compliance with, the provisions of this or any other Agreement between the Company and the Union" and provides that "[t]he decision of the arbitrator shall be final and binding upon the Company, the Union, and all Employees concerned." ASARCO and the Union "stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance." App. 5a.

Over six days of hearing, the Union presented documentary and testimonial evidence demonstrating that neither party intended for the change in the pension to limit eligibility for the Copper Price Bonus. App 70a-71a. The Union argued from the outset that in drafting the short extension agreement, the parties simply overlooked – in a mutual mistake – the

language in the preexisting BLA tying bonus eligibility to pension eligibility, and that the proper remedy was to reform the written contract to conform to the parties' actual agreement that all employees, including new hires, were eligible for the bonus. App. 5a. ASARCO did not contest any of the evidence establishing a mutual mistake. *Id.* Indeed, the Company presented no evidence at all, resting immediately after the Union rested its case. App. 110a. Instead, it argued that a clause in the BLA's arbitration provision barring the Arbitrator from "add[ing] to, detract[ing] from or alter[ing] in any way the provisions of this Agreement" (the "no-add" clause) deprived the Arbitrator of authority to reform the BLA. App. 5a. The Company thus submitted *to the Arbitrator* the sole argument it presents in its petition for certiorari.

The Arbitrator issued a decision in favor of the Union and ordered the BLA reformed to reflect the parties' actual bargain, allowing new hires to receive the quarterly Copper Price Bonus payment. App. 134a-135a. The Arbitrator discussed the limits on his authority, including the BLA's "no-add clause," and held that the Union had a "heavy burden" to establish a mutual mistake warranting reformation. App. 124a. He ultimately concluded that the Union carried that burden and that the Arbitrator had authority to reform the BLA "to correct what appears to be an obvious mutual mistake." App. 125a.

ASARCO petitioned the District Court to vacate the award, conceding that the Arbitrator's

"findings of fact" and "conclusions of law" were not subject to challenge (App. 83a), and the Union cross-petitioned for enforcement. ASARCO's sole argument was that the BLA's "no-add" clause deprived the Arbitrator of jurisdiction to reform the written document to reflect the parties' true agreement. App. 83a.

When ASARCO lost, it appealed to the Ninth Circuit. In a decision issued on June 19, 2018, the Ninth Circuit held (1) that ASARCO waived its right to contest the Arbitrator's jurisdiction by submitting that question to the Arbitrator, and (2) that even if the objection had been preserved, the Arbitrator's award drew its essence from the BLA and therefore the court was bound to uphold it. App. 35a.

ASARCO then petitioned for rehearing *en banc*. App 3a. On December 4, 2018, the Ninth Circuit panel withdrew its prior decision and issued a new opinion, again holding that the Arbitrator's award drew its essence from the BLA, but now declining to rule on the alternative argument that ASARCO waived the right to challenge the Arbitrator's jurisdiction. App. 16a.

In upholding the Arbitrator's award, the Ninth Circuit expressly applied this Court's longstanding and bedrock principle that courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." App. 6a (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). Instead, the award of a labor arbitrator must be confirmed so long as it "draw[s] its essence from the

collective bargaining agreement." App. 7a (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." App. 12a (quoting *Misco*, 484 U.S. at 38).

The Arbitrator's award easily passed muster, as it "[a]ppl[ied] ordinary principles of contract law …[to] conclude[] that the proper remedy for the parties' mutual mistake was to reform the BLA to make it reflect the terms the parties actually agreed upon." App. 12a. Moreover, the court was required to "defer to the arbitrator's determination of whether and the extent to which the no-add provision limited the arbitrator's authority to fashion a remedy." App. 14a.

ASARCO subsequently filed a new petition for panel rehearing or rehearing *en banc*, which was denied on January 10, 2019. No active Ninth Circuit judge, including the panel's dissenting judge, sought a vote on whether to grant rehearing *en banc*. App. 33a-34a. On May 10, 2019, ASARCO filed its petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's Decision Is Consistent With this Court's Well-Settled Deference to the Awards of Labor Arbitrators

ASARCO badly mischaracterizes the Ninth Circuit's holding on the authority of labor arbitrators. The Ninth Circuit did *not* hold that there are no "contractual limits on an arbitrator's power … to 'fashion a remedy.'" Pet. 14 (quoting App. 14a). On the contrary, the Court of Appeals simply applied longstanding authority, fully consistent with the decisions of this Court, that a court must "defer to the arbitrator's determination of whether and the extent to which the no-add provision limited the arbitrator's ability to fashion a remedy." App. 14a (citing *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 955 (4th Cir. 1971); *Kraft Foods, Inc. v. Office & Professional Employees Int'l Union, AFL-CIO, CLC, Local 1295*, 203 F.3d 98, 101 (1st Cir. 2000)).

Here, the Arbitrator construed the "no-add" clause just as he would any other contract provision, quoting it as a pertinent provision of the collective bargaining agreement (App. 99a), describing in detail the arguments of both parties concerning the effect of the provision (App. 112a, 115a), and finding that "arbitrators, including the present one, generally recognize that our authority does not normally permit us to rewrite a collective bargaining agreement or

ignore its provisions." App. 124a. He went on to hold, however, that where a party "me[e]t[s] its heavy burden of showing that there was a mutual mistake," "it has been recognized by numerous, but not all, arbitrators and other authorities that in the interest of justice and fairness, the arbitrator can rewrite a contract to correct what appears to be an obvious mutual mistake." App. 125a. The Arbitrator then found, in a lengthy analysis of the evidence, that the Union carried its burden of proving a mutual mistake, and acting within ordinary principles of contract law, ordered the reformation of the BLA to correct that mistake. App. 125a-135a.

As the Ninth Circuit found, the Arbitrator's award is entitled to deference under this Court's decades-long policy of refusing to second-guess the decisions of labor arbitrators. The Ninth Circuit's application of this policy was routine and unexceptional, breaking no new ground and raising no issue of national importance.

First, this Court has made clear that an arbitration tribunal's construction of its own authority under the arbitration clause of a collective bargaining agreement is entitled to just as much deference as its interpretation of any other provision of the agreement. "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." *W.R. Grace & Co. v. Local Union 759, Int'l*

Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 765 (1983). A court may not usurp this delegation of authority "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *see also AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 650 (1986).

This principle holds particular force where, as here, the party attacking the arbitrator's authority acknowledges that at least some of the issues placed before the arbitrator are within his or her purview. "[W]here … parties concede that they have agreed to arbitrate *some* matters pursuant to an arbitration clause, the 'law's permissive policies in respect to arbitration' counsel that 'any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 (2010) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)) (other citations omitted) (emphasis in original).

Here, ASARCO stipulated that the Arbitrator had jurisdiction and that the Union's grievance was properly before the Arbitrator (App. 5a), and ASARCO did "not challenge the general authority of the Arbitrator to decide the grievance filed by the Union on behalf of new employees regarding eligibility for the [Copper Price] Bonus." App. 83a. ASARCO argued

to the Arbitrator that the "no-add" clause precluded him from ordering reformation of the BLA, and the Union argued to the contrary. App. 5a, 72a. As discussed above, the Arbitrator considered the "no-add" clause and held that he had authority to order reformation upon finding that there appeared to be "an obvious mutual mistake." App. 125a.

Under this Court's decisions, the Arbitrator's construction of his authority under the BLA's arbitration provision is entitled to the same deference as his decision on the merits of the contractual claim.

Second, contrary to ASARCO's assertions in its petition for certiorari (Pet. 12), the Arbitrator's discussion of his authority under the "no-add" clause was more than sufficient under the deferential standards applied by this Court.

"A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). "It is not enough to show that the arbitrator committed an error – or even a serious error." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (internal quotation omitted). "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."

Id. (quoting *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000); *Enterprise Wheel*, 363 U.S. at 599; *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). "That is because both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language[.]" *Eastern Associated Coal*, 531 U.S. at 61. Therefore, "the sole question for [the Court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health*, 569 U.S. at 569.

Here, as discussed above, the Arbitrator expressly described the "no-add" clause as a relevant contract provision (App. 99a), summarized in detail the arguments of both parties concerning the effect of the clause (App. 112a, 115a), and noted that "arbitrators, including the present one, generally recognize that our authority does not normally permit us to rewrite a collective bargaining agreement or ignore its provisions." App. 124a. The Arbitrator held, however, that he had authority under the BLA to reform the written document to correct a mutual mistake and conform the document to the parties' actual agreement. App. 125a.

It is therefore indisputable that the Arbitrator at least "arguably … interpreted" the "no-add" clause, far exceeding the minimal standards required by this Court. *See Oxford Health*, 569 U.S. at 569.

Finally, the Arbitrator is entitled to particular deference in his application of the mutual mistake

doctrine and his choice of the remedy of reformation. *See Misco*, 484 U.S. at 38. "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *Id.* at 41. In choosing to resolve their disputes through arbitration, the parties bargained for the "informed judgment" of an arbitrator, not a court. *Enterprise Wheel*, 363 U.S. at 597. "*This is especially true when it comes to formulating remedies*." *Misco*, 484 U.S. at 41 (quoting *Enterprise Wheel*, 363 U.S. at 597) (emphasis in original); *see also Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 405 (1976).

In light of this authority, the Arbitrator's determination that the "no-add" clause should not be interpreted to prohibit the remedy of reformation in the face of "an obvious mutual mistake" (App. 125a) is surely entitled to deference. This conclusion accords with the Court's mandate that collective bargaining agreements be interpreted and applied "according to ordinary principles of contract law[,]" and that "[i]n this endeavor, as with any other contract, the parties' intentions control." *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)).

Mutual mistake and reformation are undoubtedly ordinary contract principles. "A mutual mistake in the formation of a contract occurs where both parties understand that the real agreement is

what one party alleges it to be; then, unintentionally, a contract was drafted and signed but it did not express their true agreement." *Williston on Contracts 4th* § 70:13. Reformation is the applicable remedy "where, owing to mutual mistake, the language used [in a contract] did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918); *see also Restatement (Second) of Contracts* ch. 6, intro. note (reformation is "exclusive remedy" for mutual mistake). "Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement[.]" *Id.* at § 155; *see also Williston on Contracts 4th* § 70:33 ("Reformation of a contract will be permitted for a material, mutual mistake.").

Here, the Arbitrator found that there was an "obvious mutual mistake" (App. 125a) in that neither party "intended to abolish the Copper Price Bonus for the new hires because they were not eligible for the pension plan." App. 133a. ASARCO does not challenge the Arbitrator's factual finding of the parties' intentions or his application of the mutual mistake doctrine. App. 83a.

The Arbitrator's construction of the "no-add" clause to permit reformation therefore is wholly consistent with this Court's directive to apply and construe collective bargaining agreements based on

"ordinary principles of contract law" and "the parties' intentions." *M & G Polymers*, 135 S.Ct. at 933. Indeed, the "agreement" to which the "no-add" provision applies is not the "written instrument [that] fails to express the intention of the parties." *Williston on Contracts 4th* § 70:126. Rather, the agreement the Arbitrator is prohibited from modifying is the parties' genuine meeting of the minds – in this case, their mutual intention to continue paying the Copper Price Bonus to all employees, including new hires. The Arbitrator's award of reformation therefore *advanced* the "no-add" clause's purpose of ensuring that the parties' true agreement was given effect, notwithstanding the parties' mistake in reducing that agreement to writing. The award "added" nothing to the parties' actual agreement.

In sum, this is a routine case involving the application of this Court's decades-long jurisprudence extending extraordinary deference to the awards of labor arbitrators, including arbitrators' decisions regarding their own authority and the appropriate remedies. Notwithstanding ASARCO's attack on this jurisprudence and its many incorrect characterizations of the decision below, the petition implicates none of the Court's bases for granting certiorari.

B. There Is No Circuit Split on Whether Arbitrators Must Abide by Contractual Limits on Their Authority or on Whether an Arbitrator May Interpret Unambiguous Contract Provisions

Unable to attack the Arbitrator's award by applying this Court's longstanding and foundational authority affording deference to the decisions of labor arbitrators, ASARCO mischaracterizes the Ninth Circuit's holding and makes a futile attempt to manufacture a circuit split. *See* Pet. 15-16, 20. None of the cases cited by ASARCO implicate the ordinary contract principles of mutual mistake or reformation, and they in no way conflict with the Ninth Circuit's decision here.

1. First, ASARCO claims that the Court of Appeals "held that contractual limits on an arbitrator's power do not extend to its ability to 'fashion a remedy.'" Pet. 14 (quoting App. 14a). This characterization of the Ninth Circuit's holding is inaccurate. As noted above, the Ninth Circuit merely affirmed that a court must "defer to the arbitrator's determination of whether and the extent to which the no-add provision limited the arbitrator's ability to fashion a remedy." App. 14a (citing *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 955 (4th Cir. 1971); *Kraft Foods, Inc. v. Office & Professional Employees Int'l Union, AFL-CIO, CLC, Local 1295*, 203 F.3d 98, 101 (1st Cir. 2000)). In other

words, as this Court has explained, "the scope of the arbitrator's authority" – surely including any limitation on such authority imposed by a "no-add" clause – "is itself a question of contract interpretation that the parties have delegated to the arbitrator." *W.R. Grace*, 461 U.S. at 765.

For this reason, the Ninth Circuit's principle of deference does not conflict with the Seventh Circuit's decision in *Anheuser-Busch, Inc. v. Beer Workers Local Union 744*, 280 F.3d 1133 (7th Cir. 2002), the Third Circuit's decision in *Pa. Power Co. v. Local Union No. 272 of the IBEW*, 276 F.3d 174 (3d Cir. 2001), or the Tenth Circuit's unpublished decision in *CP Kelco US, Inc. v. Int'l Union of Operating Eng'rs*, 381 Fed. Appx. 808 (10th Cir. 2010). *See* Pet. 14-17.

In each of these cases, the court vacated the award of a labor arbitrator because the arbitrator found a contract violation unsupported by any language in the agreement, or even worse, in the face of language that was directly contrary to the arbitrator's decision. Unlike here, in none of these cases did any party argue that there was an error in the written agreement resulting from a mutual mistake. Nor did any party assert that the agreement should be reformed to correct such a mistake.

In *Anheuser-Busch*, the Seventh Circuit held that an arbitrator improperly ordered the employer to pay the same commission rate for certain work requiring two employees as it paid for the same work requiring only one employee. 280 F.3d at 1134-35. The collective bargaining agreement expressly addressed

these circumstances, providing that different commission rates would be paid depending on the number of employees performing the work. *Id.* Unlike here, the arbitrator's decision was not based on a finding that this express language mistakenly failed to effectuate the parties' true agreement. Rather, the arbitrator held that the commission provision was overridden by the employer's existing practice of paying identical commission rates, even though it was unquestionably the mutual intent of the parties to include the differentiated rates in their agreement. *Id.* at 1135-36. In rejecting the arbitrator's reasoning, the Seventh Circuit's lead opinion relied in part on a "no-add" clause. *Id.* at 1144.

Nothing in *Anheuser-Busch*'s lead opinion conflicts with the Ninth Circuit's decision deferring to the Arbitrator's construction of the BLA's "no-add" provision, which permitted reformation to correct a mutual mistake and to give effect to the parties' genuine agreement. As noted, because the parties' actual agreement here was effectuated by the reformation remedy, the "no-add" clause clearly was not violated by the award because nothing was added to the parties' true agreement.

Further, as the Seventh Circuit later acknowledged, the lead opinion in *Anheuser-Busch* is not even controlling in that circuit because "the three members of the panel wrote separately, and none spoke for a majority." *Int'l Union of Operating Engineers, Local 139 v. J.H. Findorff & Son, Inc.*, 393 F.3d 742, 747 (7th Cir. 2004) (Easterbrook, J.). Indeed,

the Seventh Circuit subsequently rejected the lead opinion's "view that judges may override arbitrators' decisions by calling the [agreement's] language 'clear' or 'plain.'" *Id.* "Any such rule would be incompatible with [Supreme Court precedent.]" *Id.*

Thus, ASARCO's claim that the "no-add" clause "plainly" limited the Arbitrator's authority to order reformation (Pet. 12), even if true, would not be a basis to vacate his award in the Seventh Circuit.

In the Third Circuit's decision in *Pa. Power*, the employer provided an early retirement benefit to non-union plant supervisors but declined to provide the same benefit to unionized employees. In its view, the unionized employees had not met the efficiency requirements contained in the labor agreement that triggered eligibility for the benefit. 276 F.3d at 176-77. The arbitrator agreed that employees had not met the efficiency requirements, but notwithstanding that recognition, held that the employer must still provide the benefit. *Id.* at 177. He grounded his decision in a general non-discrimination clause in the parties' agreement, holding that providing the benefit to supervisors but not employees violated that provision. *Id.*

The Third Circuit vacated the arbitrator's award, finding that he "wrote into the contract that the Plant production and maintenance employees shall have the same benefits as the supervisory employees." *Id.* at 179. This action violated "the National Labor Relations Act … [which] excludes supervisors from the bargaining unit or from inclusion

in a collective bargaining agreement." *Id.* Moreover, the court explained, requiring parity between supervisors and other employees "has no basis in reality, law, or industry practice" and "would wreak consternation and havoc throughout American industry." *Id.* at 181.

Again, unlike the instant matter, neither party in *Pa. Power* sought reformation or argued that applicable contract language was the result of a mutual mistake. Likewise, unlike here, the Third Circuit found that the arbitrator's decision violated a federal statute and could "wreak havoc" on prevailing business practices.

Finally, ASARCO relies on *CP Kelco*, an unpublished decision which, under Fed. R. App. P. 32.1 and Tenth Circuit Rule 32.1, is "not precedential." There, the management rights provision of the collective bargaining agreement expressly authorized the employer to unilaterally implement certain rules and policies. 381 Fed. Appx. at 814-15. The arbitrator "imposed a new condition on these rights" by requiring the employer "to negotiate to an impasse" before implementing a new policy. *Id.* at 815. The Tenth Circuit vacated the decision because it found that the arbitrator "amend[ed] the Management Rights Article." *Id.*

Yet again, there was no argument that the management rights provision was the product of a mutual mistake or that the collective bargaining agreement should be reformed to effectuate the parties' true agreement as mutually intended. The

arbitrator simply "impos[ed] an additional requirement" conflicting with the express language of the agreement. *Id.*

Given that none of these cases implicated a mutual mistake or reformation and that none relied entirely – or even principally – on a "no-add" clause, and given that two of the three cases are not actually *stare decisis* in their respective circuits, *Anheuser-Busch*, *Pa. Power*, and *CP Kelco* in no way conflict with the Ninth Circuit's decision here.

2. Next, ASARCO claims that the Ninth Circuit held "that an arbitrator can interpret unambiguous CBA provisions," and that this holding "creates an entirely separate conflict" with the Sixth, Seventh, and Tenth Circuits, citing *Morgan Servs., Inc. v. Local 323, Amalgamated Clothing & Textile Workers Union*, 724 F.2d 1217 (6th Cir. 1984) and *Tootsie Roll Indus., Inc. v. Beer Workers Local Union 744*, 832 F.2d 81 (7th Cir. 1987) as well as *Anheuser-Busch* and *CP Kelco*, both discussed above. Pet. 20.

This assertion, once again, depends on a mischaracterization of the Ninth Circuit's decision. In fact, the word "unambiguous" does not appear even once in the Court of Appeals' opinion; nor does the opinion otherwise suggest a conclusion that the "no-add" provision is unambiguous. The Ninth Circuit instead acknowledged that an arbitrator is permitted to "range afield of the actual text of the collective bargaining agreement" and use various sources "in his effort to give meaning to the BLA." App. 11a-12a (citing *Stead Motors of Walnut Creek v. Automotive*

Machinists Lodge No. 1173, 866 F.2d 1200, 1206 (9th Cir. 1989); *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Service*, 241 F.3d 1177, 1183 (9th Cir. 2001); *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 595 (9th Cir. 1992)). These principles were cited only to support the court's conclusion that the Arbitrator had authority to apply the contract doctrine of reformation to correct a mutual mistake. App. 11a-12a. *See M & G Polymers*, 135 S.Ct. at 933 (holding that collective bargaining agreements must be applied "according to ordinary principles of contract law").

Moreover, such averments merely restate the Court's teaching in *Warrior & Gulf* that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82. Almost 60 years later, this holding remains one of the bedrock principles of the interpretation and application of collective bargaining agreements; indeed, it has been cited repeatedly by the very courts ASARCO claims are now in conflict with the Ninth Circuit. *See, e.g., Local 15, Int'l Broth. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 785 (7th Cir. 2007); *Int'l Broth. of Teamsters, Local 519 v. United Parcel Service, Inc.*, 335 F.3d 497, 507 (6th Cir. 2003); *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1243-44 (10th Cir. 1998) (all quoting *Warrior & Gulf*, 363 U.S. at 581-82).

In reality, none of the cases cited by ASARCO are at odds with the Ninth Circuit's decision here. As discussed above, *Anheuser-Busch* and *CP Kelco* are not even precedential in their respective circuits, and even if they were, neither case involves the application of the doctrines of mutual mistake or reformation. *Morgan Servs.* and *Tootsie Roll Indus.* likewise do not implicate these ordinary principles of contract law.

In *Morgan Servs.*, the collective bargaining agreement provided that an "employee may be discharged without redress if proven guilty of … insubordination." 724 F.2d at 1223. The arbitrator found that an employee committed an insubordinate act, but nonetheless ordered that he be reinstated. *Id.* at 1220. The Sixth Circuit vacated the award, finding that the agreement expressly empowered the employer to discharge employees for insubordination. *Id.* at 1223. As in *Anheuser-Busch* and *CP Kelco*, the union did not argue that the applicable provision was the result of a mutual mistake or that the contract should be reformed.

Likewise, in *Tootsie Roll Indus.*, a "last chance agreement" provided that an employee would be discharged if she were absent more than one day per month during a six-month period. 832 F.2d at 82.[1] The employee violated the agreement and was terminated.

[1] A "last chance agreement" is an agreement providing an exception for one employee to a collective bargaining agreement's ordinary discipline protections, typically as an alternative to immediate discharge.

Id. The Seventh Circuit vacated the arbitrator's award reinstating her, finding that the "last chance agreement" was "clear and unambiguous." *Id.* at 84. Once again, no party argued that there was a mutual mistake or that reformation was warranted.

In short, these cases simply are not in conflict with the Court of Appeals' decision here. Obviously, the Ninth Circuit did not hold that the "no-add" clause *unambiguously* prohibited reformation, and therefore its decision was not premised on whether the Arbitrator had authority to interpret an "unambiguous" contract provision. On the contrary, the Ninth Circuit implied otherwise, finding that "[t]he standard arbitration clause in the BLA provided that the arbitrator had authority to decide all issues of contract interpretation, which, of course, would include the scope of the no-add provision." App. 11a.

In other words, the Arbitrator was empowered to determine that the "no-add" provision permits, or even requires, reformation when necessary to correct a mutual mistake and give effect to the parties' genuine agreement – a result in which nothing is actually "added" to that agreement by the reformed language. One could say that this determination was simply the Arbitrator's view of how an unambiguous "no-add" provision should be correctly applied to the case before him, or one could say that the Arbitrator was resolving an ambiguity in the "no-add" provision to permit reformation upon a finding of mutual mistake.

Regardless, as noted above, even if the Arbitrator could have been clearer about his precise reasoning, this Court's decisions establish that ambiguity in an award is no basis for setting aside the award where the arbitrator was even arguably interpreting or applying the parties' agreement. *Oxford Health Plans*, 569 U.S. at 569; *W.R. Grace & Co.*, 461 U.S. at 764; *Enterprise Wheel*, 363 U.S. at 598.

Here, the Court's clear precedents, therefore, accord with the BLA's submission to arbitration of all matters "which involve[] the interpretation or application of, or compliance with, the provisions of *this or any other* Agreement between the Company and the Union." (emphasis added). The courts are bound to defer to the Arbitrator's award because it plainly was an exercise of his contractual authority.

C. The Ninth Circuit's Controlling Opinion Does Not Hold that ASARCO Waived the Right to Challenge the Arbitrator's Jurisdiction

ASARCO again mischaracterizes the Ninth Circuit's decision in a futile attempt to generate a non-existent conflict with the decisions of this Court and to manufacture another illusory circuit split. Specifically, ASARCO claims that the Court of Appeals held "that ASARCO submitted the scope of relief to the arbitrator's discretion by arguing that the

No Add Provision limited his authority to fashion a remedy." Pet. 21 (citing App. 14a-15a).

In reality, the Ninth Circuit expressly reserved the question of whether ASARCO waived the right to challenge the Arbitrator's authority, rendering no judgment on that issue. App. 15a-16a n.6. As discussed above, the Ninth Circuit merely held that a court must "defer to the arbitrator's determination of whether and the extent to which the no-add provision limited the arbitrator's ability to fashion a remedy." App. 14a. It did not find that ASARCO waived the right to argue the issue by initially submitting it to the Arbitrator. On the contrary, as the Court of Appeals explained, "ASARCO argued to the arbitrator that he lacked contractual authority to fashion an award. The arbitrator disagreed. His decision is entitled to deference." App. 15a.

It is true, of course, that the Union argued "that ASARCO had waived any argument regarding the limits of the arbitrator's jurisdiction." App. 6a. And in its initial decision, issued on June 19, 2018, the Court of Appeals agreed, holding both that ASARCO waived the right to challenge the Arbitrator's jurisdiction (App. 47a) and that even if ASARCO's objection had been preserved, the Arbitrator's decision was entitled to deference. App. 49a.

But on December 4, 2018, after ASARCO filed a petition for rehearing *en banc*, the Ninth Circuit withdrew its prior opinion and issued a new opinion. App. 3a. While the prior opinion contained a lengthy discussion of the waiver issue (*see* App. 43a-47a), that

question was omitted entirely from the new, controlling opinion. Instead, the Ninth Circuit noted in a footnote:

> In light of our disposition [that the Arbitrator's award drew its essence from the BLA], we need not address the Union's alternative waiver argument. Further, as we point out in the text, the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance, *supra* section I. There is therefore no need for us to address the dissent's discussion of this issue. *See* Dissent at section II.

App. 15a-16a n.6.

ASARCO mischaracterizes the Ninth Circuit as holding "that ASARCO consented to submit the No Add Provision to arbitration" and then goes on to cite circuit court cases addressing whether a party waives the right to challenge arbitrability in court by making the jurisdictional argument to the arbitrator in the first instance. Pet. 23 (citing *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003); *Opals on Ice Lingerie v. Bodylines*, 320 F.3d 362, 369 (2d Cir. 2003); *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 (1st Cir. 2000); *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000); *Van Waters & Rogers v. Int'l Bhd. of Teamsters,*

Local 70, 913 F.2d 736, 740-41 (9th Cir. 1990).

But as discussed above, the Ninth Circuit's controlling opinion did not hold that ASARCO waived the right to contest the Arbitrator's jurisdiction. It expressly reserved that issue, and applying the Court's longstanding precedent, afforded deference to the Arbitrator's construction of his authority under the "no-add" clause, just as it would under any other contract provision. For this reason, there is no conflict with the decisions of this Court or with any circuit court, and no issue of national importance is raised. Therefore, certiorari is not warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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