No. 18-580

IN THE

Supreme Court of the United States

NU IMAGE, A CALIFORNIA CORPORATION,
Petitioner,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Nu Image, Inc. and respondent International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO ("IATSE") entered into a collective bargaining agreement in 2006 (renewed in 2009 and 2012) which contemplated a continuing relationship and required Nu Image to pay Residual Contributions to fund pension and welfare benefits. When the benefit plans learned that Nu Image had failed to make those contributions, they sued to collect those contributions.

In response, Nu Image filed this lawsuit in the district court seeking to invalidate the collective bargaining agreement, alleging that IATSE had engaged in intentional and negligent misrepresentations regarding the obligation to pay those Residual Contributions by telling Nu Image that notwithstanding the written obligation in the agreement it would not be applied to Nu Image.

Additionally, Nu Image sought declaratory relief with respect to "any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions." Because Nu Image had expressly recognized its obligation to pay the Residual Contributions beginning in October 2012 and because at the time the lawsuit was filed in 2015 there was no further claim pending, the claim for declaratory relief is moot or unripe for adjudication.

The district court dismissed the action and the Ninth Circuit affirmed on the ground that the district court lacked jurisdiction because the only relief Plain-

tiff sought was to invalidate the agreement, not to enforce the agreement.

Thus, the questions presented are:

1. Where a former party to a collective bargaining agreement files a suit seeking damages asserting tort claims and seeking declaratory relief to void an agreement, does the district court have jurisdiction where no party to the litigation seeks to enforce a collective bargaining agreement in the litigation?

2. Where a party to an expired collective bargaining agreement seeks declaratory relief for future violations of that agreement, and for a claim that has not yet been made, is that claim moot or unripe?

3. Where a former party to a collective bargaining agreement seeks relief under a tort claim, does that tort claim provide jurisdiction under 29 U.S.C. 185(a), which provides for jurisdiction in the district courts to enforce collective bargaining agreements?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT RULE 29.6 STATEMENT

Respondent, who was the petitioner in the court below, is International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO ("IATSE"). IATSE is an unincorporated association and labor organization. IATSE is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in IATSE.

Petitioner, who was the respondent in the court below, is NU IMAGE, a California corporation.

Dated: December 26, 2018

WEINBERG, ROGER & ROSENFELD
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I. BRIEF IN OPPOSITION

Respondent International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC ("IATSE") respectfully submits this brief in opposition to the petition for a writ of certiorari.

II. OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-25a) is reported at 893 F.3d 636. The opinion of the district court (Pet. App. 26a-44a) is not published in the Federal Supplement but is available at 2016 WL 917887.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 20, 2018. The petition for a writ of certiorari was filed on November 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

IV. STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of parties.

V. STATEMENT OF THE CASE

Nu Image is an independent motion picture production company, and IATSE is a labor organization representing the crafts and trades that perform the labor of making motion pictures. In May 2006, Nu Image and IATSE agreed to a three year collective bargaining agreement that was comprised of multiple interrelated labor contracts including the industry-standard Producer-IATSE and MPTAAC Basic Agreement ("Basic Agreement") and multiple side letters modifying the Basic Agreement. That agreement was renewed for two successive periods by Nu Image in 2009 and 2012. The last agreement expired on July 31, 2015, and was not renewed by Nu Image. This agreement governs the motion picture industry and many producers.

Article XIX and Article XXVIII of the Basic Agreement required Nu Image and all signatories to pay, as "Residual Contributions," a percentage of the profits from certain secondary markets to the defined retirement and health and welfare benefit plans for IATSE's members (collectively, the "Plans").[1] Despite this obligation, Nu Image did not pay any Residual Contributions to the Plans. The Plans brought suit and shortly thereafter, the Plans' case against Nu Image settled at some expense to Nu Image. The Plans subsequently brought a second suit against Nu Image for another period of unpaid Residual Contributions, but that lawsuit was "dismissed pending the Plans' further audit of Nu Image." Pet. App. 59a. The record does not

[1] The Motion Picture Industry Pension and Health Plans are joint employer benefit plans governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, with an independent Board of Trustees, and thus are legal entities separate from either party to the present action.

establish that any further action was initiated by the Plans or that there is any pending claim.

After the issue of the failure to pay Residual Contributions was raised in 2012, Nu Image entered into a Side Letter[2] on October 15, 2012, in which it expressly recognized its obligation to pay Residual Contributions going forward but reserving its right to contest the obligation to pay Residual Contributions for the period May 2006 through October 15, 2012.

A year later, on September 26, 2013, Nu Image demanded that IATSE execute a side letter to the Basic Agreement and its successor agreements that would excuse Nu Image's obligation to pay Residual Contributions to the Plans to cover periods prior to October 15, 2012. IATSE refused, so Nu Image filed a grievance pursuant to Section XXXII of the Basic Agreement which sought the exact same relief it later sought in the district court in this action (*i.e.,* "indemnification of any amounts that Nu Image may owe the Plans based on its reliance on IATSE's prior contractual promises").[3] Thus, the grievance sought indemnification for contributions owed prior to the effective date of the Side Letter of October 15, 2012. Nu Image did not renew the agreement when it expired on July 31, 2015.

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[2] This Side Letter was acknowledged by separate counsel for Nu Image in letters dated September 26, 2013, and again on October 25, 2013. C.A. E.R. 226-228; C.A. S.E.R. 20-22 and 25-27. The Side Letter is not in the record but is attached as Respondent Appendix 1a-2a

[3] IATSE had no duty to modify the Basic Agreement upon Nu Image's demand. 29 U.S.C. 158(d). *Allied Chem. & Alkali Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 185 (1971).

In summary, the dispute concerns Residual Contributions owed from May 2006 through October 15, 2012, the date of the Side Letter acknowledging Nu Image's obligation to pay the contributions going forward. After the initial steps of the grievance procedure were completed without resolution, Nu Image submitted the dispute for final and binding arbitration. Shortly thereafter, the parties selected an arbitrator, set a hearing date, conducted discovery, entered into a protective order, and otherwise prepared for hearing. On or around May 22, 2015, the parties agreed to vacate the hearing date due to scheduling issues.

IATSE filed its own grievance seeking contributions for the breach of the Basic Agreement with respect to Residual Contributions on March 9, 2015. That grievance is still pending

Several months later, Nu Image retained new counsel and filed the present Complaint a few days before the Basic Agreement expired, alleging the same facts as those at issue in the pending arbitration initiated by Nu Image and seeking the same relief. The arbitration remains pending and has not been withdrawn.

The Complaint claims that Nu Image should be indemnified for its past and future failures to pay the Residual Contributions. Nu Image's theory of relief is that it was fraudulently induced to enter into the Basic Agreement when two Union officers orally promised during the Basic Agreement negotiations that the Plans would not enforce the Basic Agreement's residual contribution provisions. Nu Image does not seek to enforce a right within the Basic Agreement, and it does not allege that any party to the collective bargaining agreement breached the Basic Agreement. All it seeks is to invalidate the agreement *ab initio* and for damages. The only basis for subject matter

jurisdiction Nu Image claimed was Section 301(a) of the LMRA, 29 U.S.C. 185(a). No claim for jurisdiction is made based upon any other federal statute or on a supplementary state law claim.

The first two claims for relief are based upon tort theories of intentional misrepresentation and negligent misrepresentation. The third claim is based upon declaratory relief. That relief, however, seeks only to relieve Nu Image of liability "for any liability it incurs in the future to the Plans arising from the nonpayment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions." See Pet. App. 62a and 63a. Because the disputed contributions on which this lawsuit was based arose before October 15, 2012, almost three years before the lawsuit was filed, and more than six years ago, that claim is now moot since there is no future liability. The claim for indemnification as to any future lawsuit is not ripe since no lawsuit was initiated or threatened at the time the lawsuit was filed or is pending now.

VI. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE THIRD CLAIM FOR RELIEF, WHICH IS STYLED A CLAIM FOR DECLARATORY RELIEF FROM FUTURE VIOLATIONS, IS MOOT AND UNRIPE FOR ADJUDICATION

It is undisputed Nu Image acknowledged its obligation to pay Residual Contributions as of October 15, 2012, on a prospective basis. App., *infra,* 1a-2a. So any claim would be for residuals from the agreements prior to that date. Any residuals due prospectively would be from the written Side Agreement expressly recognizing that obligation.

Furthermore, the claim does not allege that there is any pending lawsuit. The complaint alleges that the Funds filed a second lawsuit for additional periods of time but "[t]he second lawsuit was dismissed pending the Plans' further audit of Nu Image." Pet. App. 59a. The claim for declaratory relief does not seek relief from past violations but only "to indemnify or otherwise compensate Nu Image for any liability it incurs in the future to the Plans arising from the non-payment of Residual Contributions and for the cost of defending against any further lawsuit brought by the Plans seeking Residual Contributions." Pet. App. 62a. See also Pet. App. 63a (the prayer for relief as to the Third Claim). On its face, this claim is moot since there can be no future liability since Nu Image acknowledged and agreed to pay Residual Contributions from October 15, 2012, forward. Furthermore, there was no allegation that any lawsuit was threatened at the time the complaint was filed in late July 2015. The claim for declaratory relief is moot and unripe for this Court's consideration.

B. SECTION 301 DOES NOT PERMIT FEDERAL COURT JURISDICTION OVER THE CLAIMS FOR INDEMNIFICATION FOR TORTIOUS CONDUCT IN THE FIRST AND SECOND CLAIMS FOR RELIEF

The First and Second Claims are not moot since they seek "massive damages" as a result of a "confidential settlement agreement." Pet. App. 58a and 59a. Although confidential, we acknowledge that Nu Image paid some amount to the Plans.

The First and Second Claims for relief are based on tort. There is no doubt that Nu Image alleged these as tort claims because, among other things, it sought punitive damages as to the First Claim because it al-

leged that it was "subjected * * * to cruel and unjust hardship * * * performed with such malice so as to justify an award of exemplary or punitive damages."[4] Pet. App. 60a. As to the Second Claim for negligent misrepresentation, it only sought actual damages. Pet. App. 61a.

These claims fail to pass through any jurisdictional gateway under Section 301, which, by its terms, allows only suits to enforce agreements and says nothing about tort claims.[5] In *Granite Rock Co.* v. *International Brotherhood of Teamsters*, 561 U.S. 287, 311 (2010) (*Granite Rock*), this Court held that Section 301 does not allow the "creat[ion of] a federal common-law tort cause of action," thus further strictly limiting Section 301 jurisdiction to the enforcement of collective bargaining agreements. The employer in *Granite Rock* brought a claim for breach of contract under Section 301, because the local union engaged in a strike in violation of a no-strike obligation (the employer thereby passed through the jurisdictional gateway of *Textron Lycoming Reciprocating Engine Division* v. *United Automobile, Aerospace & Agricultural Implement Workers*, 523 U.S. 653 (1998) (*Textron*), discussed below), and two alleged federal torts of inducement of breach of contract and interference with contract by the International Union, which was not a party to the contract. *Granite Rock*, 561 U.S. at 294-295. This Court held that federal courts cannot create a "federal common-law tort" under Section 301's grant of subject matter

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[4] Under *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), punitive damages are not awardable under Section 301.

[5] Nu Image makes no jurisdictional claim based on 28 U.S.C. 1331 or 1337, governing commerce, or any state law claim relying on supplementary jurisdiction.

jurisdiction because the statute is "not a source of independent rights, let alone tort rights; for section 301 is . . . a grant of jurisdiction only to enforce contracts." *Id.* at 311 (internal quotation marks and citation omitted). Thus, the grant of authority to fashion a body of federal common law inherent to Section 301 was not to create a "federal common law of torts," but rather was constricted to a "federal common law *of collective bargaining agreements* under section 301."[6] *Ibid.* (quoting *Brazinski* v. *Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180 (7th Cir. 1993)).

This holding in *Granite Rock* is fatal to Nu Image's claims and prevents this Court's review of the issue presented. The rights Nu Image seeks to enforce are independent of the Basic Agreement and are not predicated on violations of the Basic Agreement itself. Specifically, the wrongful conduct that is alleged is IATSE's alleged oral misrepresentations that caused Nu Image to enter into the contract which alleged representations occurred prior to the formation of the collective bargaining agreement. Thus, the first two claims for relief are not and cannot be suits to enforce a collective bargaining agreement.

We recognize this Court has decided cases where issues have been left for further resolution by the lower courts. If *Granite Rock* forecloses a federal tort claim, there is no predicate on which to reach the Section 301 jurisdiction issue. Here, the Section 301 issue is de-

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[6] This Court also held that there was no compelling reason to expand Section 301's grant of authority because the employer had a range of other avenues for relief, including an unfair labor practice with the NLRB, and bringing state tort claims under the district court's supplemental jurisdiction. *Granite Rock*, 561 U.S. at 310. Nu Image has done neither. It has, however, initiated a grievance, which is still pending.

pendent upon whether *Granite Rock* bars a claim that is tort based and not contract based.

Granite Rock shows the present action is beyond Section 301's grant of jurisdiction. Nu Image is not seeking to enforce a right in the contract. Instead of a contractual right, Nu Image is seeking relief from allegedly tortious conduct that occurred prior to the formation of the contract. Accordingly, the matter before this Court is beyond the scope of Section 301, and the petition should be denied.[7]

C. FEDERAL LAW DOES NOT CREATE A RIGHT OF INDEMNIFICATION

There is no Section 301 jurisdiction because this Court has held that federal law does not create a general right of indemnification. In *Northwest Airlines, Inc.* v. *Transportation Workers Union*, 451 U.S. 77, 80-82 (1981) (*Northwest Airlines*), an employer sought indemnification from a union for liability under the Equal Pay Act, 29 U.S.C. 206(d), and Title VII, 42 U.S.C. 2000e, *et seq*. This Court held such a claim can be maintained only if Congress intended joint liability, which requires an analysis of the statute, legislative history, the purpose and structure of the statutory scheme, and "the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines*, 451 U.S. at 91. Here,

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[7] The Ninth Circuit did not reach the *Granite Rock* issue. See Pet. App. 23a (Bea, J., dissenting). Irrespective, the *Granite Rock* issue must be resolved before there is Section 301 jurisdiction in this case. This weighs heavily against this Court's consideration of this case because logically there is no "*Textron*" issue unless there is a contractual violation alleged. Here, it is only a tort claim, and there is no jurisdiction under Section 301 for tort claims as settled by *Granite Rock*.

there is no evidence that Congress intended Section 301 to impose liability upon unions when third-party beneficiaries of a labor contract, such as the Plans, bring suit against the employer for violation of the collective bargaining agreement. This Court further held that federal courts have a strictly limited capacity to recognize a common law contribution claim, and that courts should not do so if there is a "comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* at 97. The labor laws certainly constitute such a scheme, and thus Nu Image lacks a statutory or common law basis to obtain the relief it seeks in its declaratory relief claim.[8] See, *e.g.*, *Travelers Cas. & Sur. Co. of Am.* v. *IADA Servs., Inc.*, 497 F.3d 862, 864 (8th Cir. 2007) (holding no federal common-law right of contribution under ERISA).

D. THERE IS NO JURISDICTION UNDER SECTION 301 BECAUSE NO PARTY SEEKS TO ENFORCE THE COLLECTIVE BARGAINING AGREEMENT

This Court held in *Textron* that "'[s]uits for violation of contracts' under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Textron*, 523 U.S. at 657. Like Nu Image, the plaintiff in *Textron* claimed the defendant fraudulently induced it to enter a collective bargaining agreement by intentionally withholding

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[8] Underscoring this point is that Nu Image does not rely on any contractual theory for indemnification which would allow jurisdiction. Cf. *Pittsburgh Mack Sales & Servs., Inc.* v. *Int'l Union of Operating Eng'rs, Local Union No. 66*, 580 F.3d 185 (3d Cir. 2009). See also *Cummings* v. *John Morrell & Co.*, 36 F.3d 499, 507 (6th Cir. 1994) (rejecting indemnification in hybrid duty of fair representation claim).

information that the defendant knew would have dissuaded the plaintiff from entering into the contract. *Id.* at 655. As in Nu Image's suit, the complaint in *Textron* did not allege that either the union or the employer had "ever violated the terms of the collective-bargaining agreement." *Ibid.* Nevertheless, the plaintiff invoked Section 301 as the sole basis for federal subject matter jurisdiction and sought both compensatory damages and a declaratory judgment just as Nu Image has in the case before the Court. *Ibid.*

Based on these facts, this Court held that Section 301 grants subject matter jurisdiction only to cases where one party accuses the other of violating the terms of a labor contract. *Textron*, 523 U.S. at 658 ("Indeed, as far as the [plaintiff] Union's complaint discloses, both parties are in absolute compliance with the terms of the collective-bargaining agreement. Section 301(a) jurisdiction does not lie over such a case."). The *Textron* court explicitly rejected the plaintiff's argument (as joined by the Government in an amici brief) that Section 301 "is broad enough to encompass not only a suit that 'alleges' a violation of contract, but also one that concerns a violation of contract, or is intended to establish a legal right to engage in what otherwise would be a contract violation." *Id.* at 656. Rather than allowing suits "concerning" or "involving" a violation of contract, this Court clarified that the broadest possible interpretation of the phrase "suits for violation of contract" would permit suits only with the "purpose or object" of remedying a violation of contract. *Id.* at 656-657.

The *Textron* decision held that Section 301 "cannot possibly bear the meaning ascribed to it by the Government" because the word "for" has a "backward-looking connotation," which limits the scope of Sec-

tion 301's jurisdiction to violations of contract that have actually occurred. *Textron*, 532 U.S. at 567. This Court concluded, "'Suits for violation of contracts' under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." *Ibid*.

Nu Image claims that the phrase "suits for violation of contract" creates subject matter jurisdiction as long as "there is an antecedent claim that a party violated the labor agreement." Pet. 10. Nu Image relies on the dicta in *Textron*, citing to Justice Scalia's example that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid." *Id.* at 12 (emphasis omitted) (quoting *Textron*, 523 U.S. at 658). Nu Image claims that the dispositive jurisdictional question in *Textron* is whether there is any antecedent claim by the union or anyone that the contract has been breached. This is simply incorrect, as noted by the court below. Pet. App. 10a-13a.

This Court in *Textron* recognized that a federal court might have power to adjudicate a labor contract's validity, but only "ancillary to, and not independent of, its power to adjudicate 'suits for violation of contracts.'" *Textron*, 523 U.S. at 658. To that end, the Court recognized two possible scenarios where the validity of a labor contract could be litigated under Section 301: 1) as an affirmative defense to a suit to enforce a contract, and 2) if a party accused of violating a collective-bargaining agreement sought declaratory relief. In Justice Scalia's words, Section 301 "erects a [jurisdictional] gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse." *Ibid.*

The paragraph on which Nu Image relies stands for the unremarkable proposition that Section 301 does not preclude federal courts from ever hearing attacks on the validity of labor contracts, but such attacks may be heard only if there is an independent basis for jurisdiction. *Peacock* v. *Thomas*, 516 U.S. 349, 355 (1996) ("Ancillary jurisdiction may extend to claims having a factual and logical dependence on 'the primary lawsuit,' but that primary lawsuit must contain an independent basis for federal jurisdiction.") (citation omitted). In other words, standard principles of supplemental jurisdiction apply to Section 301 suits. See 28 U.S.C. 1367. Nu Image ignores this context. Pet. 12-13.

Nu Image's proposed re-interpretation of the word "ancillary" lacks any basis in either the language of *Textron* or common sense. Every textual cue in *Textron* suggests the term "ancillary" refers to a claim that lacked an independent basis for jurisdiction but nevertheless may be heard. The primary issue in *Textron* was jurisdiction. The sentences immediately prior to the dicta identified a jurisdictional "gateway." The following sentence stated that a federal court's power to hear a certain claim is "ancillary." In fact, the first hypothetical means to attack the validity of a contract—an affirmative defense of invalidity to a suit for a breach of contract—was inarguably predicated on supplemental jurisdiction and thus ancillary to the primary suit for a violation of a labor contract.

Nu Image ignores this textual evidence. Instead, it focuses on the second example—*i.e.,* "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a court to declare the agreement invalid"—and claims it is impossible for such an action to occur under ancillary jurisdiction. This is incorrect as a matter of law. The Federal Rules

of Civil Procedure do not provide an independent basis for jurisdiction, but nonetheless allow for "the introduction of new parties, including declaratory relief plaintiffs, through impleader (Rule 14), joinder (Rules 19, 20) and intervention (Rule 24)." 16 James Wm. Moore et al., *Moore's Federal Practice* § 106.03[4] (3d ed. 2018); see also 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3523 (Supp. 2016). If a suit has already established federal subject matter jurisdiction, the court may hear related "ancillary" claims brought through those rules that would otherwise lack a basis for jurisdiction.[9]

Textron's holding that "the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violation of contracts'" is nothing more than an affirmation of a federal court's supplemental jurisdiction. 28 U.S.C. 1367. Once a plaintiff has properly alleged a suit under Section 301, a federal court may hear cross-complaints, counter-complaints, and cases brought from third-party plaintiffs. The threshold requirement, however, is that a party must have inde-

[9] The now-governing doctrine of supplemental jurisdiction supplants ancillary jurisdiction and the related doctrine of pendant jurisdiction as federal courts may exercise supplemental jurisdiction to hear "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. 1367. However, the fact remains that these supplemental or ancillary claims require that a party has already provided an independent basis for jurisdiction. *Aldinger* v. *Howard*, 427 U.S. 1, 10 (1976) (holding that "ancillary jurisdiction" meant "the joining of parties with respect to whom there was no independent basis of federal jurisdiction"), superseded by statute, Judicial Improvements Act of 1990, Pub.L. 101-650, § 310(a), 104 Stat. 5089, as recognized by, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005).

pendently established subject matter jurisdiction through a suit for a violation of a labor contract.

E. THERE IS NO DIRECT CONFLICT WITHIN THE CIRCUIT COURTS

Nu Image relies on asserted conflict in the circuits to request this Court to grant certiorari. There is no conflict in the circuits with respect to tort claims for intentional or negligent misrepresentation. If there is no jurisdiction with respect to the tort claims or for indemnification, there can be no conflict because the *Textron* issue is not reached.

The only apparent conflict is whether the Ninth Circuit decision conflicts with a decision of the Seventh Circuit in *J.W. Peters, Inc.* v. *Bridge, Structural & Reinforcing Iron Workers*, *Local Union 1*, 398 F.3d 967, 973 (7th Cir. 2005) (*Peters*). Although we agree that, on its surface and as treated by the court below, there is a conflict, close examination shows that there is no real conflict because the Seventh Circuit case dealt with a special type of contract known as a pre-hire agreement authorized by Section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(f), in the construction industry only. In such cases, the courts do have jurisdiction over disputes about whether an employer or union has repudiated the agreement, not whether the court has jurisdiction to invalidate the agreement due to tortious conduct.

This Court addressed pre-hire agreements in *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983) (*McNeff*), in a similar posture. There, the trust funds sued an employer "to compel an accounting and payment of any contributions found to be due the trust funds." *McNeff*, 461 U.S. at 264. Jurisdiction was based on Section 301. The employer claimed that the agreement was unen-

forceable on the ground that the union never established majority status that it actually represented the workers. This Court rejected that claim, holding that a pre-hire agreement is effective until it is "repudiated" by an employer. The term "repudiation" is a term specifically applicable to such pre-hire agreements.

This Court held that an employer is obligated to comply with such a pre-hire agreement until it properly repudiates the agreement. But the agreement remains in effect until the employer repudiates the contract. This Court expressly did not decide "what specific acts would effect the repudiation of a pre-hire agreement." *McNeff*, 461 U.S. at 270 n.11. That case easily passed through the jurisdictional gateway since the funds alleged a breach of the contact.

After this Court's decision, the National Labor Relations Board ("Board" or "NLRB") changed its position on the enforceability of pre-hire agreements in *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987) (*Deklewa*), enforced *sub nom.*, *International Association of Bridge, Structural & Ornamental Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir. 1988). The Board held that a contract was enforceable for its term and that it could not be repudiated during its term without the union needing to prove majority status. *Peters* involved "a recognized exception to the *Deklewa* rule in situations involving bargaining units of one or no employees." *Peters*, 398 F.3d at 973. Under that rule, a pre-hire agreement is not enforceable because of a doctrine imported from the interpretation of the National Labor Relations Act that the Board will not certify one-person bargaining units.

The important principle underlying *Peters* is that the courts are responsible for determining when a construction industry employer or union has repudi-

ated and thus terminated a contractual obligation. But equally important is that the agreement is valid and enforceable until that repudiation occurs.[10] This is not a determination that the agreement was void because of conduct in obtaining the agreement.

Rather, the lawsuit in *Peters* sought a determination that by virtue of an implied term in the contract, namely, that in a one person circumstance, either party (union or employer) may repudiate the agreement. This requirement is imposed by Section 8(f) and this Court's decision in *McNeff*. Seen in this light, it is a contractual matter[11] or a statutory[12] matter imposed on a contract, not a tort matter. Viewed in that light, there is Section 301 jurisdiction because the question of repudiation is inherently contractual in nature and the party seeking repudiation (union or employer) is enforcing its contractual right to repudiate, that is, end the agreement.

Thus, in *Peters*, the question was a federal law question of the enforceability under the one person exception to the *Deklewa* rule that such agreements are enforceable for their term until repudiated. In those cases, where the question is contractual termination of the agreement or whether the employer has contractually waived the right to repudiate, it becomes

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[10] The one-man rule has the effect in some courts of repudiating the obligation retroactively. In some cases, the contract is valid and then the bargaining unit evaporates, at which point the "one-man rule" is invoked to repudiate.

[11] *E.g.*, *Baker Concrete Constr., Inc.* v. *Reinforced Concrete Contractors Ass'n*, 820 F.3d 827, 830 n.2 (6th Cir. 2016) (holding that repudiation is both a contractual and legal question).

[12] If statutory, there might be jurisdiction under 28 U.S.C. 1331 or 1337.

purely a contractual matter subject often to resolution through arbitration.[13]

In this case, the Nu Image Basic Agreement is not a pre-hire agreement. It is a full agreement under Section 9(a) of the NLRA, 29 U.S.C. 159(a), not subject to the repudiation doctrine.

Viewed in the property light, *Peters*, thus, does not create any conflict in the circuits. It stands for the uncontested proposition that the repudiation of a Section 8(f) pre-hire agreement may be decided by a court[14] or the NLRB. The question is not whether the agreement was invalid, the question always is whether it was properly terminated relieving the employer of future obligations.[15]

The decision of the Ninth Circuit does not create the kind of conflict that this Court needs to resolve. There is not the clear conflict that petitioner relies upon be-

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[13] Had the issue been a tort claim, the Seventh Circuit would have dismissed it even before *Granite Rock*. See *Kimbro* v. *Pepsico, Inc.*, 215 F.3d 723 (7th Cir. 2000) ("[S]ection 301 creates a right of action only for breach of a collective bargaining agreement; it is not a tort statute.").

[14] In some cases, the parties can arbitrate the question.

[15] Petitioner accurately notes that there is dicta in *Houston Refining, L.P.* v. *United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union*, 765 F.3d 396 (5th Cir. 2014), indicating that the court would have jurisdiction to entertain a claim of invalidity of a contract. It is pure dicta because, in that case, the employer sought to vacate an arbitration award and the court certainly had "gateway" jurisdiction under Section 301 to determine whether the arbitration award would be vacated. See *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957). Here, should Nu Image be dissatisfied with the arbitrator's decision, a district court could assert jurisdiction to vacate the award.

cause the *Peters* issue arises under a different statutory context, where the courts have jurisdiction to determine repudiation under the "one-man" rule.

F. NU IMAGE FAILS TO RESPOND TO THE DECISIONS OF MULTIPLE OTHER CIRCUIT COURTS

The Ninth Circuit and the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have all recognized that *Textron* means that there must be jurisdiction in the case before any ancillary claim is brought. See, *e.g.*, *Da Silva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000) ("[*Textron* reasoned] that the text of section 301(a) provided jurisdiction over suits 'for violation of contracts' and that this jurisdictional grant did not include suits to declare contracts invalid."); *Voilas* v. *Gen. Motors Corp.*, 170 F.3d 367, 375 n.1 (3d Cir. 1999) ("The [*Textron*] court held that because the suit alleged only the invalidity of the collective bargaining agreement, and did not allege an actual violation of the collective bargaining agreement, there was no federal jurisdiction."); *Taylor* v. *Siemens VDO Auto. Corp.*, 157 F. App'x 557, 561 (4th Cir. 2005) ("The pertinent language of § 301(a) excludes from federal court jurisdiction suits challenging the validity of a [collective bargaining agreement]. Indeed, a 'plaintiff must allege breach of an existing collective bargaining contract in order to avail itself of jurisdiction under § 301 of the Act.'") (citation omitted) (quoting *A.T. Massey Coal Co.* v. *Int'l Union, United Mine Workers*, 799 F.2d 142, 146 (4th Cir. 1986)); *CNH Am. LLC* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 645 F.3d 785, 790-791 (6th Cir. 2011) ("*[P]re-contractual* conduct, the Court held, amounted to a tort claim, not a breach-of-contract claim, and accordingly did not come within

§ 301."); *Gerhardson* v. *Gopher News Co.*, 698 F.3d 1052, 1058 (8th Cir. 2012) (*Gerhardson*) ("Under *Textron* and *Kaiser Steel*, the invalidity of a contract may be raised defensively in a contract enforcement action, but federal courts are not authorized to provide other relief based on the same invalidity."); *United Food & Commercial Workers Union, Local 1564* v. *Albertson's, Inc.*, 207 F.3d 1193, 1194 (10th Cir. 2000) (recognizing that *Textron* changed the law and rejected the Tenth Circuit's prior interpretation under Section 301); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union* v. *Wise Alloys, LLC*, 642 F.3d 1344, 1350 n.1 (11th Cir. 2011) (*Wise Alloys*) ("Because such claims do not turn on the terms of the agreement or require an interpretation of the agreement, the courts held that the fraud claims were insufficient to create federal subject matter jurisdiction under § 301.").[16]

Accordingly, the universe of post-*Textron* decisions is much wider than Nu Image represents. The fact remains that *Textron* and *Granite Rock* hold Sec-

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[16] District courts have avoided the mistake Nu Image urges the Court to now make. See, *e.g.*, *Doran Main, LLC* v. *N. Cent. States Reg'l Council of Carpenters*, No. CIV. 13-1721 MJD/FLN, 2014 WL 836100 (D. Minn. Mar. 4, 2014) (applying *Gerhardson*); *Bedrock Servs.* v. *Int'l Bhd. of Elec. Workers Local Union Nos. 238, 342 & 495*, 285 F. Supp. 2d 693, 701 (W.D.N.C. 2003) (dismissing a case because it "was not 'filed *because a contract has been violated*' but because [the employer] has determined it is invalid and seeks a declaration of the same") (quoting *Textron*, 523 U.S. at 657); *Wheeler* v. *Johnson Controls, Inc.*, No. CIV-06-1288-C, 2007 WL 1409752 (W.D. Okla. Apr. 10, 2007) ("[T]he Supreme Court has made explicitly clear that Plaintiffs cannot pursue a claim challenging the validity of the Settlement Agreement under § 301."). We acknowledge the cases cited by Nu Image. See Pet. 16 n.8. Many are Seventh Circuit cases. Some are pre-*Granite Rock*.

tion 301 jurisdiction only applies to suits to enforce contractual rights, and claims for declaratory relief may only be heard as ancillary claims once a party has established an independent basis for jurisdiction. Because Nu Image has not established this independent basis for jurisdiction, its case was properly dismissed.

G. NU IMAGE HAS FILED A GRIEVANCE AND AGREED TO ARBITRATE THE SAME ISSUES PRESENTED IN THE LAWSUIT

Because Nu Image has filed a grievance against the Union and the Union has a grievance against Nu Image, it would be inappropriate for this Court to decide the issue presented by Nu Image. Nu Image has already presented the same issue to the arbitration procedure it has raised in this Court. Its new counsel apparently thought both arbitration and the action in the district court could remedy Nu Image's dispute, and Nu Image therefore has not withdrawn the arbitration request. Nu Image can also raise this issue to the arbitrator as a defense to any claims that the Union may put forth as to Residual Contributions for the May 2006 through October 15, 2012 period. *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010) ("[P]arties can agree to arbitrate * * * whether their agreement covers a particular controversy."). Thus, because Nu Image has already submitted this issue to arbitration, this Court should respect that choice and allow that process to be completed.[17] If the arbitra-

[17] Nu Image is correct that an arbitration provision could prohibit the consideration of issues that Nu Image has already presented to the arbitrator. Pet. 18-19. But Nu Image has already decided to submit those issues to arbitration and has not withdrawn that grievance on the theory that it was an erroneous submission. This Court long ago recognized that employers may file grievances against unions and invoke the arbitration provisions

tor's ruling is not to Nu Image's satisfaction, Nu Image can petition to vacate the award under Section 301, and the district court will likely have jurisdiction to entertain the action.

H. THIS CASE DOES NOT PRESENT THE KIND OF IMPORTANT ISSUE THAT REQUIRES THIS COURT'S DECISION

This case does not present the important issues relied upon by petitioner because these kinds of circumstances are not likely to arise. There are several reasons why these circumstances are less important than asserted by Nu Image. Almost all of these cases arise in the construction industry and are governed by the unique repudiation rights created by *McNeff*.[18] Second, *Granite Rock* will make these cases extinct because no federal claim exists under Section 301 for tort claims. Third, this kind of action for indemnification is not allowed under federal law, which does not create a federal right of indemnification. Fourth, as illustrated here, the parties will resolve these issues through arbitration. Finally, as a policy matter, expanding juris-

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of a collective bargaining agreement. *Drake Bakeries, Inc.* v. *Local 50, Am. Bakery & Confectionary Workers Int'l*, 370 U.S. 254 (1962).

[18] It is likely the National Labor Relations Board will modify the circumstances under which repudiation will be allowed based on contractual provisions in collective bargaining agreements because of a conflict in the circuits on this issue. See NLRB Office of Public Affairs, *Board Invites Briefs Regarding Whether Section 9(a) Bargaining Relationships in the Construction Industry May Be Established by Contract Language Alone* (Sept. 11, 2018), https://www.nlrb.gov/news-outreach/news-story/board-invites-briefs-regarding-whether-section-9a-bargaining-relationships. The Board has cancelled briefing in this case, but the issue will have to be resolved.

diction to allow these tort claims will be an end run around the NLRB, which has jurisdiction over these claims through bad faith bargaining charges.

Contrary to Nu Image's suggestion that it has no remedy other than by this action, it could have filed an unfair labor practice with the National Labor Relations Board. The Board has the power to make employers whole for the bad faith conduct of a union. See, *e.g.*, *Graphic Arts Int'l Union, Local 280*, 235 N.L.R.B. 1084 (1978) (requiring union to make employer whole where union unlawfully induced employer to withdraw from a multiemployer association), enforced, 596 F.2d 904 (9th Cir. 1979); *Bhd. of Teamsters, Local No. 70*, 295 N.L.R.B. 1123 (1989) (ordering union to comply with agreement and to make both the employer and the employees whole for any losses as a result of the unlawful repudiation). Second, Nu Image may have had a defense to the lawsuit on the ground of fraud in the execution as opposed to fraud in the inducement. See 29 U.S.C. 1145. Finally, as is evident from this case, the grievance procedure can be an adequate remedy. Ultimately, Nu Image may not have suffered any damages since it obtained the skills and unique crafts of the highly talented members of IATSE for the disputed period of May 2006 through October 15, 2012 (when it acknowledged its obligation to pay the Residual Contributions going forward). Nu Image made many movies during that period, which it could not have done without labor peace and the skilled members of IATSE.

VII. CONCLUSION

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

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for Respondent
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO

Dated: December 26, 2018

APPENDIX

APPENDIX A

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA
1430 Broadway, 20th Floor, New York, NY 10018 • (212) 730-1770 • Fax: (212) 730-7809 • Finance Dept. Fax: (212) 921-7699

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MATTHEW D. LOEB
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JAMES B. WOOD
General Secretary-Treasurer

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First Vice President

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MICHAEL F. MILLER, JR.
Sixth Vice President

JOHN T. BECKMAN, JR.
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DANIEL DI TOLLA
Eighth Vice President

JOHN FORD
Ninth Vice President

JOHN M. LEWIS
Tenth Vice President

CRAIG P. CARLSON
Eleventh Vice President

WILLIAM E. GLARNS, JR.
Twelfth Vice President

PHIL S. LOCICERO
Thirteenth Vice President

October 15, 2012

Avi Lerner
NU IMAGE, INC.
6423 Wilshire Blvd.
Los Angeles, CA 90048

Re: *Sideletter - Successor Agreements*

Dear Mr. Lerner:

This will confirm the understandings reach during the meeting between the parties on September 4, 2012 concerning the successor agreements to the Producer-IATSE 2012 Basic Agreement ("BA") and the 2012 Area Standards Agreement ("ASA") as set forth below.

1. Producer and IATSE shall be signatory to the 2012 BA and 2012 ASA.

2. Producer acknowledges that all product produced under the BA is subject to the provisions of Articles XIX and XXVIII of the BA, and Paragraph 5 of the Trust Acceptance.

3. The parties acknowledge that there is a pending dispute between the Producer and the MPIPHP over past residuals.

4. The IATSE and Producer agree that nothing herein in any way waives the claims of the MPIPHP for residual contributions due and owing, including but not limited to residuals, plus interest, and other remedies provided by the Trust documents or as a matter of law, to the MPIPHP.

5. Producer agrees, that without waiving whatever position or defense it might have as to past residuals, that prospectively all contributions, including residual contributions shall be made in a complete and timely manner to the MPIPHP.

6. Producer agrees to execute any documents necessary for implementation of this agreement.

If the foregoing comports with your understanding of our agreement then kindly so indicate on the signature line provided below.

Sincerely,

INTERNATIONAL PRESIDENT

ACCEPTED & AGREED:

By: _____

Print Name: Avi Lerner

Title: President

Dated: Oct. 15, 2012

MDL:sr
cc: Michael F. Miller, Jr.,
International Vice President/Dept. Director,
Motion Picture & Television Production, IATSE