No. 18-580

IN THE

Supreme Court of the United States

NU IMAGE, INC., 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, CLC,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its Petition for a Writ of Certiorari ("Petition"), Nu Image, Inc. ("Nu Image") presented the following issue:

> Do federal courts have subject matter jurisdiction pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) over a complaint for intentional and negligent misrepresentation and declaratory relief, where the lawsuit seeks relief from claims that the plaintiff violated the parties' collective bargaining agreement?

In *Textron Lycoming Reciprocating Engine Div. v. United Auto., Aerospace and Agriculture Implement Workers of America*, 523 U.S. 653, 118 S.Ct. 1626, 140 L.Ed. 2d 863 (1998), this Court, in explanatory *dicta*, noted that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a [federal] court to declare the agreement invalid." *Id.* at 658. Consistent with this language, the Seventh Circuit has held that an employer or a labor union accused by the other of breaching a collective bargaining agreement can sue in federal court to invalidate the agreement. In this case, however, the Ninth Circuit disagreed and affirmed the district court's dismissal of Nu Image's Complaint seeking that relief.

In its Petition, Nu Image argued that the Court should grant certiorari to address the misapplication of its decision in *Textron* and resolve the circuit split that has ensued. In response, IATSE goes to extraordinary lengths to avoid review, raising disingenuous and legally spurious arguments to the effect that: (a) Nu Image's declaratory relief claim is both moot and not yet ripe; and (b) IATSE would likely win the

merits argument if it were decided by this Court. On the issue actually presented by the Petition, IATSE argues that (i) the language quoted above from Justice Scalia's *Textron* opinion was imprecise or wrong; and (ii) the Seventh Circuit's decision could have been based on a theory not even mentioned by that court and, thus, there is no circuit split. IATSE's arguments are baseless, as explained below. Indeed, several of IATSE's arguments highlight why this Court should grant certiorari – there is confusion on an important issue that affects employers and labor unions alike, and this Court should resolve it.

ARGUMENT

I. Nu Image's Declaratory Relief Claim Is Neither Moot Nor Unripe

IATSE argues that because Nu Image agreed to pay residuals from October 15, 2012 forward, "there can be no future liability," and so IATSE's claim for declaratory relief "is moot and unripe." (Brief in Opposition ("Opp") at 6.) This argument is internally inconsistent and utterly disingenuous.

Nu Image's declaratory relief claim is not related to the period after October 15, 2012. Rather, as IATSE points out, "the dispute concerns Residual Contributions owed from May 2006 through October 15, 2012." (Opp. at 4.) For that period, the Plans assert that Nu Image breached the CBA by failing to pay residual contributions. The Plans filed two lawsuits to address a portion of that period; the first one settled, but the second one was dismissed without prejudice so that the Plans could audit Nu Image and quantify their damages claim. Nu Image alleges that it has incurred and will in the future incur attorneys' fees and other costs to respond to the Plans' audit and second lawsuit.

Further, IATSE itself filed a grievance against Nu Image seeking the difference between the residuals claimed by the Plans and any settlement that was or will be reached between Nu Image and the Plans. That grievance is still pending. As a result, Nu Image's claim for declaratory relief – to establish its rights and obligations under the CBA with respect to any obligation to pay residuals for the period from May 2006 to October 15, 2012 and to determine whether IATSE is liable for any damages that Nu Image suffers in connection with the Plans' claim for that same period – is neither moot nor premature.

II. IATSE's *Granite Rock* Argument Is Baseless And Irrelevant To Whether The Court Should Grant Certiorari

IATSE argues that this Court's decision in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010) "is fatal to Nu Image's claims and prevents this Court's review of the issue presented." (Opp. at 8.) IATSE's argument is baseless: *Granite Rock* stands for the proposition that a cause of action against a third party for tortious interference with a CBA does not fall within the jurisdictional grant of Section 301(a). Because Nu Image has not asserted a claim for tortious interference with contract against a third party, *Granite Rock* does not apply.[1] In any event, IATSE's *Granite Rock* argument is irrelevant to whether this Court should grant certiorari. It is a

[1] Nu Image responded to IATSE's *Granite Rock* argument in the district court and the Ninth Circuit. Neither of those courts based its decision on *Granite Rock* or addressed IATSE's argument. App. 13a (Ninth Circuit decision); App. 43a (district court decision).

merits argument that, in theory, could be raised if this Court grants review.

III. IATSE's Federal Common Law Argument On Indemnity Is Also Baseless And Irrelevant To Whether The Court Should Grant Certiorari

Citing *Northwest Airlines, Inc. v. Transportation Workers Union*, 451 U.S. 77 (1981), IATSE argues that "federal law does not create a general right of indemnification," and so there "is no Section 301 jurisdiction" here. (Opp. at 9.) That is a red herring. Nu Image has not attempted to create a new federal common law right of indemnification. Rather, Nu Image seeks relief for whatever sums it may incur in the future to defend against and resolve the claims asserted by the Plans. In any event, this argument is another merits argument that is irrelevant to whether this Court should grant certiorari.

IV. IATSE's Argument Regarding *Textron* Confirms That Certiorari Should Be Granted

In *Textron*, this Court held that, where neither the employer nor the labor organization asserts that there has been a *prior* breach of a labor agreement, federal courts do not have jurisdiction over a suit seeking to invalidate the agreement. In this case, both the Plans and IATSE have asserted that Nu Image has breached the CBA. As a result, this case presents a much different issue than *Textron*.

That said, the *Textron* opinion addressed this issue in explanatory *dicta*, noting that "a declaratory judgment plaintiff accused of violating a collective-bargaining agreement may ask a [federal] court to

declare the agreement invalid." 523 U.S. at 658. Nu Image's Complaint fits squarely within this language.

IATSE ignores the import of Justice Scalia's decision for the majority. Instead, IATSE cites the following sentence from *Textron* – "But in these cases, the federal court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate 'suits for violation of contracts'," *id.* – and argues that unless a party asserts a breach of the labor agreement in the litigation itself, there can be no "ancillary" jurisdiction over the declaratory judgment plaintiff's claim.

This argument is flawed for two reasons. First, if IATSE's argument were correct, the language cited above would be meaningless. A declaratory judgment plaintiff accused of breach that files suit to invalidate a labor agreement would never be asserting a breach in the first instance; rather, the defendant would be asserting the breach and the declaratory judgment plaintiff would be seeking to avoid any liability. If federal court jurisdiction hinged on whether a breach was asserted by *the plaintiff in the litigation*, there could never be jurisdiction over a declaratory judgment plaintiff's claims. Thus, the very lawsuit for which this Court contemplated jurisdiction in *Textron* would be an impossibility under IATSE's interpretation of the decision.

Second, IATSE's argument is based on the assumption that Justice Scalia was actually referring to the doctrine of *supplemental* jurisdiction when he used the word "ancillary," even though the concept of "ancillary jurisdiction" was obsolete by the time *Textron* was decided (28 U.S.C. § 1367(a) (1990)) and the opinion in no way suggests that the references to "ancillary" were intended to invoke the doctrine of supplemental

jurisdiction. Judge Bea addressed this issue in dissent below:

> The parties vehemently disagree over what Justice Scalia expressed when he used the word "ancillary." IATSE argues that Justice Scalia was referring to the court's "ancillary jurisdiction," thereby implying that there had to be an independent basis for jurisdiction to allow the court to reach a declaratory judgment action. That interpretation is unpersuasive for a number of reasons. First, Justice Scalia did not specifically invoke the doctrine of "ancillary jurisdiction," which allowed federal courts to exercise jurisdiction over certain claims because they were closely related to claims over which the court had subject matter jurisdiction and was ultimately replaced by statute by the doctrine of supplemental jurisdiction. More importantly, by the time *Textron* was decided, the concept of "ancillary jurisdiction" had been replaced with "supplemental jurisdiction," which would make a reference to a legal doctrine that was defunct at the time odd at best. *See* 28 U.S.C. § 1367(a) (1990). It would be uncharacteristic of a punctilious wordsmith such as Justice Scalia to use a superseded term, without adding at least an "obs." (for obsolete) after "ancillary." Finally, Justice Scalia's statement regarding declaratory judgment plaintiffs came in the context of his examples of when a court could "adjudicate the validity of a contract under § 301(a)." 523 U.S. 657–58. This context indicates that these examples, including that of a declaratory judgment

> plaintiff, are examples where the court has jurisdiction under section 301(a).

App. at 22a-23a.

In any event, whether Nu Image or IATSE is correct in its interpretation of *Textron* is a merits argument. The circuit split, and the misapplication of *Textron* by certain circuits, strongly militates in favor of review.

V. A Direct Conflict Exists That This Court Should Resolve

In its Petition, Nu Image identified three decisions from the Seventh Circuit and one from the Fifth Circuit that conflict with the Ninth Circuit's opinion here. *See* Pet. at 13-16 *citing J.W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Worker, Local Union 1, AFL-CIO*, 398 F.3d 967, 973 (7th Cir. 2005); *Newell Operating Co. v. Int'l Union of United Auto., Aerospace, and Agricultural Implement Workers of America,* 532 F.3d 583, 590 (7th Cir. 2008) (overruled on other grounds by *NewPage Wis. Sys. v. United Steel, Paper & Forestry*, 651 F.3d 775, 778 (7th Cir. 2011); *Stevens Constr. Corp. v. Chi. Reg'l Council of Carpenters*, 464 F.3d 682, 684 (7th Cir. 2006); *Houston Refining, L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 406, n. 16 (5th Cir. 2014).

In response, IATSE ignores the Seventh Circuit's opinions in *Newell Operating Co.* and *Stevens Constr.*, and agrees that "there is *dicta*" in the Fifth Circuit's opinion in *Houston Refining* that conflicts with the Ninth Circuit's decision (*see* Opp. at 18, n. 15). These cases alone create a direct conflict with the Ninth Circuit's decision here.

With respect to *J.W. Peters*, Nu Image's argument is again disingenuous. In *J.W. Peters*, the plaintiff

"was accused of violating the terms of the collective bargaining agreement by attempting to terminate the collective bargaining relationship without providing proper notice." *J.W. Peters*, 398 F.3d at 973. The defendant did not file a lawsuit in response to the claimed breach, but filed a grievance, just like IATSE did here. In response, the plaintiff initiated a federal court proceeding and "sought declaratory relief from this alleged violation." *Id.* In that posture, which is identical to the posture here, the Seventh Circuit (citing *Textron*) held that "the district court . . . had jurisdiction to resolve the legal issues and decide whether Peter's unilateral repudiation was valid. . . ." *Id.*

IATSE claims that the Seventh Circuit's opinion could be limited to "pre-hire" agreements, a special type of labor agreement in the construction industry. Citing *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983) and *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), IATSE argues that the "important principle underlying *Peters* is that the courts are responsible for determining when a construction industry employer or union has repudiated and thus terminated a contractual obligation." (Opp. at 16-17.) But, in *Peters*, the Seventh Circuit did not cite either *McNeff* or *Deklewa* in connection with its holding that it had jurisdiction under Section 301; nor did it base its finding of jurisdiction on any principles espoused in those cases. Instead, the Seventh Circuit cited *McNeff* and *Deklewa* when addressing the merits of the action and whether the repudiation itself was valid (as opposed to whether the court could exercise jurisdiction over the dispute in the first place).

In addition to the circuit court conflict, there is conflict in the district courts. In its Petition, Nu Image

cited six district court decisions that have interpreted *Textron* and Section 301(a) consistent with Nu Image's position and in conflict with the Ninth Circuit's decision. (Pet. at 16-17 *citing Needham Excavating, Inc. v. Int'l Union of Operating Engs., Local 150*, 2016 WL 9450447, at *2-3 (S.D. Iowa Jan. 5, 2016); *J.F. New & Assoc., Inc. v. Int'l Union of Operating Engineers, Local 150, ALF-CIO*, 2015 WL 1455258, at *4 (N.D. Ind. Mar. 30, 2015); *Stanker & Galetto, Inc. v. The New Jersey Regional Council of Carpenters of the United Bhd. of Carpenters and Joiners of America*, 2013 WL 4596947, at *2 (D.N.J. Aug. 28, 2013); *Vulcan Constr. Materials, L.P. v. Int'l Union of Operating Engineers, Local Union No. 150*, 2009 WL 5251889, at *4 (N.D. Ill. Nov. 25, 2009); *Joseph W. Davis, Inc. v. Int'l Union of Operating Engineers, Local 542*, 636 F. Supp. 2d 403, 410-11 (E.D. Penn 2008); *The Painting Co. v. District Council No. 9*, 2008 WL 4449262, at *4, *12 (S.D. Ohio Sept. 30, 2008).) IATSE does not address these authorities, but instead "ackowledge[s] the cases cited by Nu Image" and notes that "[m]any are Seventh Circuit cases" and "[s]ome are pre *Granite Rock*." (Opp. at 20.)

IATSE's retorts are irrelevant to whether review should be granted – if anything, IATSE concedes that there is a conflict that needs to be resolved.[2]

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[2] IATSE also cites two district court decisions that purportedly are consistent with the Ninth Circuit's decision. (*See* Opp. at 20 *citing 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); *Bedrock Servs. V. Int'l Bhd. Of Elc. Workers Local Union Nos. 238, 342 & 495*, 285 F. Supp. 2d 693 (W.D.N.C. 2003)). Nu Image disagrees with IATSE's analysis of these cases, but to the extent those cases can be read to favor IATSE's position

Finally, IATSE cites decisions from the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, seemingly to assert that those decisions comport with the decision of the Ninth Circuit. Nu Image addressed the Eighth Circuit case in its Petition. (*See* Pet. at 17.) With respect to the remaining cases cited by IATSE, two involve facts identical to *Textron*, where neither party to a labor agreement asserted that a prior breach had occurred (*Taylor v. Siemens VDO Automotive Corp.*, 157 Fed. Appx. 557, 562 (4th Cir. 2005) (unpublished); *United Food & Commercial Workers Union, Local 1564 v. Albertson's*, 207 F.3d 1193, 1196-97 (10th Cir. 2000)); three involved preemption under Section 301 of claims not relevant here (*Voilas v. GMC*, 170 F.3d 367, 375 n.1 (3d Cir. 1999); *CNH America LLC v. Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 645 F.3d 785, 791-92 (6th Cir. 2011); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union v. Wise Alloys, LLC*, 642 F.3d 1344, 1349-51 (11th Cir. 2011)); and one is entirely irrelevant (*Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000) (addressing whether an employer with fifteen employees was a prerequisite to jurisdiction under Title VII and citing *Textron* as an example of statutory interpretation)).

Thus, there is a direct conflict over the question presented by the Petition. This Court should grant certiorari to resolve it.

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on the merits, they merely underscore the need for this Court to resolve any confusion, purported or real.

VI. The Pending Arbitration Between IATSE And Nu Image Is Irrelevant To This Court's Review

IATSE argues that "because Nu Image has filed a grievance against [IATSE]" in arbitration and has "already submitted this issue to arbitration, this Court should respect that choice and allow that process to be completed." (Opp. at 21.) This is yet another red herring. The arbitration has been dormant pending resolution of this federal proceeding. Moreover, Nu Image cannot effectuate a dismissal of IATSE's claims in the arbitration. Finally, Nu Image may not be able to obtain relief in the arbitration: IATSE has made clear that it is going to argue that the arbitrator cannot adjudicate Nu Image's claims because they are purportedly beyond the scope of the arbitration provision. IATSE foreshadowed this in its Opposition, noting that "Nu Image is correct that an arbitration provision could prohibit the consideration of issues that Nu Image has already presented to the arbitrator." (Opp. at 17.)

VII. The Petition For Certiorari Presents An Important Issue That Should Be Decided

IATSE attempts to minimize the importance of the question presented. To do so, IATSE first reiterates its defective arguments concerning *Granite Rock*, common law indemnification, the construction industry, and the arbitration proceeding. Nu Image has addressed those arguments above. Then, IATSE argues that Nu Image could have filed an unfair labor practice claim with the National Labor Relations Board, but the Board "is not authorized to award full compensatory or punitive damages to individuals affected by the unfair labor practice" (*Gurley v. Hunt*, 287 F.3d 728, 731-32 (8th Cir. 2002)).

The Ninth Circuit's decision, if left untouched, would give parties to a labor agreement (whether the employer or the union) an unfettered license to commit fraud, with no fear of reprisal. That is why the issue presented by the Petition is important – which IATSE conveniently ignored in its brief.

CONCLUSION

Nu Image respectfully requests that the Court grant its Petition and reverse the judgment.

Respectfully submitted,

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