

In the  
Supreme Court of the United States

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COLUMBIA EXPORT TERMINAL, LLC,

*Petitioner,*

v.

THE INTERNATIONAL LONGSHORE  
AND WAREHOUSE UNION, ET AL.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

Petitioner Columbia Export Terminal, LLC brought claims under the Racketeer Influenced Corrupt Organizations Act (“RICO”) against an international union and individual members of two local unions affiliated with the international union. On a motion to dismiss, the district court held that § 301 of the Labor Management Relations Act (“LMRA”) preempted the RICO claims. A divided panel of the Ninth Circuit Court of Appeals affirmed. Judge Ikuta dissented, and Judge Bennett, joined by judges Ikuta, Nelson, Bumatay, and VanDyke dissented from the Ninth Circuit’s denial of rehearing en banc.

The questions presented are:

1. Does § 301 of the LMRA preempt claims brought in federal court under federal statutes, like the RICO claims in this case?
2. In interpreting the arbitration provisions in a collective bargaining agreement, may a federal court apply a presumption that the claims asserted are arbitrable without first finding the arbitration provisions to be ambiguous?
3. Must, as the panel majority held in this case, statutory claims be arbitrated if a collective bargaining agreement contains arbitration provisions that do not expressly exclude statutory claims from arbitration?

## PARTIES TO THE PROCEEDINGS

### **Petitioner and Plaintiff-Appellant Below**

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Columbia Export Terminal, LLC

### **Respondents and Defendants-Appellees Below**

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The International Longshore and Warehouse Union, together with the following individual local union members: Kane Ahuna, Jason Andrews, Jesus Arango, Brian Banta, Keith Banta, Andre Barber, Crystal Barnes, Craig Bitz, Lisa Blanchard, Randy Booker, Brad Boyd, Larry Broadie, Felix Brown, Jimmy Brown, Jon Budiselic, William Burris, Douglas Carey, Greg Carse, Anthony Cerrutti, Hugh Colson, Tim Copp, James Cothren, Steven Cox, Bobby Cranston, James Daw, Adam Day, James Degman, Torrae De La Cruz, Frank De La Rosa, Thomas Demuth, James Dinsmore, Brian Dirksen, Terrence Dodson, Gary Dotson, Oliver Ede, Ray Elwood, Todd Englert, Chris Eubanks, David Fambro, Larry Fast, James Finch, Greg Flannery, Mike Gardner, Brett Gebhard, Richard Gilstrap, Ted Gray, Kurtis Hanson, Mike Harms, Randy Harper, Terry Hickman, James Holland, Bruce Holte, Nathan Hyder, Troy James, Sam Jauron, Anthony Jeffries, Kevin Johnson, Pat Johnson, Tim Jones, Jon Julian, Leroy Kadow, George Kelly, Eric King, Wayne King, Kevin Knoth, Mike LaChapelle, Jimmy Lai, Tom Langman, Ken Lee, Dan Lessard, Shanti Lewallen, Thomas Love, Wilfred Luch, Karl Lunde, Craig Magoon, Rickie Manning, Jay Mantei, Pat Maronay, Angela Martin, Garry Matson, Pat McLain, Mathew McMahon, Mike McMurtrey, Donald Mehner, Curtis Meuler, Karl Minich, Josh Morris,

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## **CORPORATE DISCLOSURE STATEMENT**

Neither Columbia Export Terminal, LLC’s (“CET”), nor its parent company Kalama Export Company, LLC is a publicly traded company; however, CET is an indirect subsidiary of the following publicly-held corporations, each of which indirectly owns 10% or more of CET: Archer-Daniels-Midland Company (NYSE: ADM) and Marubeni Corporation (OTC: MARUF).

## LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit  
No. 20-35037

Published at 23 F.4th 836

Columbia Export Terminal, LLC, *Plaintiff-Appellant*,  
*v.* International Longshore and Warehouse Union, et  
al., *Defendants-Appellees*.

Date of Final Opinion: January 5, 2022

Date of Rehearing Denial: January 5, 2022

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United States District Court for the District of Oregon  
Case No. 3:18-cv-2177-JR

Columbia Export Terminal, LLC, *Plaintiff*, *v.*  
International Longshore and Warehouse Union, et  
al., *Defendants*.

Date of Final Order: December 20, 2019

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Columbia Export Terminal, LLC (“CET”), respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.



## **OPINIONS BELOW**

The opinion of the Ninth Circuit (App.1a) is published at 23 F.4th 836. Judge Ikuta dissented from this opinion (App.26a) and Judge Bennett dissented from the order denying a petition for rehearing (App. 45a). The opinion of the District Court for the District of Oregon (App.58a) and found at 2019 WL 6976033. The Findings and Recommendations of the United States Magistrate Judge (App.66a) and found at 2019 WL 3763764.



## **JURISDICTION**

The Ninth Circuit issued an opinion on June 28, 2021. CET filed a petition for rehearing en banc. On January 5, 2022, the Ninth Circuit issued a new opinion, withdrew the June 28, 2021 opinion, and denied the petition for rehearing en banc. (App.5a). This petition for a writ of certiorari is timely filed within ninety (90) days of the Ninth Circuit’s January 5, 2022 opinion and

order. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## **STATUTORY PROVISIONS INVOLVED**

### **Section 301 of the LMRA**

Section 301 of the Labor Management Relations Act provides:

#### **(a) Venue, Amount, and Citizenship**

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 in controversy or without regard to the citizenship of the parties.

### **29 U.S.C. § 185**

### **Racketeer Influenced Corrupt Organizations Act**

Relevant provisions of the Racketeer Influenced Corrupt Organizations Act (“RICO”) are reproduced in the Appendix. (App.90a).

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## INTRODUCTION

CET brought claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) against the International Longshore and Warehouse Union (“ILWU”) and individual union members for fraudulently billing CET for millions of dollars of unworked time. In a decision that threatens to preempt federal statutory rights for employers and employees alike, and threatens to undermine thousands of carefully negotiated collective bargaining agreements (“CBAs”), a divided panel of the Ninth Circuit held that § 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185, preempted CET’s RICO claims. The panel majority concluded that CET’s RICO claims were subject to the arbitration provisions of the CBA between CET and ILWU and thus needed to be arbitrated. (App. 6a). As the panel dissent explains, the panel majority opinion contains “serious errors that will throw our LMRA jurisprudence into disarray.” (App.26a). This Court should grant the writ for three reasons.

First, the panel majority’s opinion imposed an incorrect and unnecessary analysis under § 301 of the LMRA for this case and future cases asserting federal statutory claims in federal court. CET brought only federal statutory claims under RICO. (App.91a-114a). CET filed in federal court. CET asserted no state-law claims, and CET’s complaint did not refer to or assert any violation of a CBA. (App.94a-114a). The panel majority, however, mistakenly applied a two-part test the Ninth Circuit had derived from precedents this Court has developed for determining when § 301 preempts state-law claims. In so doing, the panel

majority created a split between the Ninth Circuit and the Sixth and Tenth Circuits. The Sixth and Tenth Circuits have both held that § 301 preemption is inapplicable when a federal-law claim is brought in federal court. That is because preemption of federal-law claims is inconsistent with the purpose of § 301. Section 301 is primarily a jurisdictional statute intended to ensure the uniform interpretation of CBAs. Congress intended that § 301, by providing a federal forum, would eliminate inconsistent state and local interpretations of CBAs and allow for the development of a uniform body of federal common law to govern CBAs. The panel majority, by preempting CET’s RICO claims, denied CET a federal judicial forum for a federal statutory claim even though the case was pending in federal court and therefore presented no risk to § 301’s goal of a uniform federal common law. In addition to creating a split between the circuits and confusion in the Ninth Circuit, the panel majority’s decision also sets a dangerous precedent. It allows federal courts to preempt federal-law claims asserted under important federal statutes, and will deny access to federal courts for employees and employers alike who seek to enforce their rights under those federal statutes.

Second, the panel majority erroneously applied a presumption of arbitrability, in direct conflict with this Court’s admonition, made in reversing the Ninth Circuit in *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287 (2010), that a court may apply such a presumption only where the agreement to arbitrate “is ambiguous about whether it covers the dispute at hand.” *Granite Rock*, 561 U.S. at 301. Other United States courts of appeals have easily followed this Court’s directive in *Granite Rock* and have applied

the presumption only when arbitration provisions are ambiguous as to the covered disputes. *See, e.g., Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 270 (2d Cir. 2015) (“*Granite Rock* . . . made clear that the presumption of arbitrability is a tool for resolving genuine ambiguity, not a bias in favor of arbitration.”). But in this case, contrary to *Granite Rock*, the panel majority applied a presumption of arbitrability to the admittedly “plain text” of the CBA without first finding ambiguity. (App.18a). The panel majority imposed on CET the “burden of demonstrating how the language in the collective bargaining agreement excludes a particular dispute from arbitration” and insisted that “[a]ny doubts should be resolved in favor of coverage.” (App.19a emphasis added). The panel majority applied the presumption of arbitrability to expand the arbitration provisions in the CBA, even though the plain text of those provisions limited the arbitration requirement to disputes between CET and the “Local Unions” and do not require arbitration of disputes between CET and the international union or individual members, the defendants in this case.

Third, the panel majority created a new standard under which statutory claims, like CET’s RICO claims, are subject to arbitration unless a CBA expressly excludes statutory claims from the CBA’s arbitration procedures. (App.18a). This new standard flips a long line of cases from this Court upside down. This Court has long held that a CBA may require arbitration of a statutory claim, but only if the intent to arbitrate the statutory claim is “clear and unmistakable.” *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79-80 (1998). *See also, Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“[W]e will not infer from a

general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.”); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009) (CBA at issue met the “clear and unmistakable” standard when it expressly identified specific statutory claims and stated the parties’ intent to arbitrate claims under those statutes).

The panel majority’s new standard requires a CBA to expressly exclude statutory claims from arbitration and, absent an express exclusion, statutory claims must be arbitrated. Under *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*, the reverse is true: statutory claims are not subject to arbitration unless the CBA clearly and unmistakably sends those statutory claims to arbitration. Labor and management have negotiated, drafted, and are doing business under hundreds, perhaps thousands of CBAs in reliance on *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*. Other circuits have easily applied these precedents, holding that statutory claims are not subject to arbitration when a CBA’s arbitration provisions are written in general terms that do not clearly and unmistakably assign statutory claims to arbitration. *See, e.g., Mathews v. Denver Newspaper Agency*, 649 F.3d 1199, 1207 (10th Cir. 2011). The Ninth Circuit in this case, however, splits with these circuits and throws existing CBAs into a state of uncertainty. If courts apply the panel majority’s new standard of requiring express exclusion of statutory claims from arbitration, then employers and employees alike will find themselves forced to arbitrate statutory claims despite having drafted arbitrations provisions intended to preserve judicial forums

for those statutory claims. As the dissent explained, the panel majority's new standard "defeats the point of negotiating a CBA" and as a consequence that decision "will lead to a mass of arbitrations never contemplated by a CBA." (App.54a-55a).

For these reasons, as discussed further below, CET asks that the Court grant the writ.



## **STATEMENT OF THE CASE**

### **A. Factual Background**

CET operates a grain export terminal at the Port of Portland in Portland, Oregon. (App.98a-99a). CET employs members of two local unions on an hourly basis to perform the grain handling work. (App.105a). The two local unions are chartered under the international union, defendant ILWU. *Id.* The local unions are not parties in this case. (App.94a-97a).

In 2018, CET learned that the ILWU and individual union members were committing mail and wire fraud against CET. (App.105a-107a). CET had reviewed guard logs at the terminal and learned that members were not at the terminal at times for which they had claimed hours worked. (App.106a). The defendants had understaffed jobs and, using interstate wires and mail, had submitted timesheets claiming time worked by employees who had not actually performed work and who were not even present at the terminal during the time they claimed they had been working. (App.106a). Members split shifts in which one member worked the first half of the shift, and another member worked the second half, but both members sub-

mitted time cards indicating falsely that both had worked the full shift. (App.106a). Members also failed to show up for work at all, but submitted time cards falsely representing that the absent members had worked a full shift. (App.106a). The defendants' fraudulent overbillings exceeded five million dollars. (App. 106a).

CET is a party to a CBA with ILWU and the local unions. (App.115a). The CBA provides for the resolution of "grievances" through a set of grievance-arbitration procedures. (App.139a-145a). The CBA defines the grievances subject to those procedures as follows:

A grievance shall be defined as any controversy or disagreement or dispute between the applicable ILWU Local Union and the Employer [CET] for the particular grain elevator(s) involved as to the interpretation, application, or violation of any provision of this Agreement.

(App.140a) (emphasis added). The CBA limits "grievance" to controversies, disagreements, or disputes between CET and the applicable "Local Union." The CBA's definition of "grievance," and the arbitration procedures that flow from that definition, do not cover disputes between CET and any of the defendants in this case, the international union, ILWU, and the individual members. (App.140a). In addition, even as to claims that might be brought against the local unions, the arbitration provisions do not mention or require arbitration of statutory claims, like CET's RICO claims. (App.140a). Rather, the clause is limited to disputes over the "interpretation, application, or violation" of the CBA. (App.140a).

## B. Procedural History

After learning of the fraud, CET filed federal RICO claims against ILWU and the individual members, in the federal district court for the District of Oregon. (App.94a). CET's complaint alleged that the ILWU and the members, with specific intent to defraud, jointly entered into a conspiracy and scheme to defraud CET through the overbilling practices described above. (App.106a). The complaint alleged no state-law claims. The complaint did not rely upon, mention, or allege a violation of a CBA. (App.94a-114a).

In the district court, defendants moved to dismiss under Fed. R. Civ. P. Rule 12, arguing that § 301 of the LMRA preempted the RICO claims. (App.58a-59a). The district court incorrectly applied the Ninth Circuit's two-part test for determining whether § 301 preempts state-law claims as found in cases like *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024 (9th Cir. 2019). (App.71a-77a). The Ninth Circuit had derived *Kobold*'s test from Supreme Court cases addressing when § 301 preempts state-law claims, including *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). *Kobold*, 832 F.3d at 1032-33. The district court determined that § 301 treats federal-law claims the same as state-law claims. (App.61a-62a). The court then applied the two-part test and dismissed CET's RICO claims, ruling that § 301 of the LMRA preempted the claims and that the RICO claims were subject to the CBA's arbitration procedures. (App.61a-65a).

CET appealed. A divided panel for the Ninth Circuit affirmed. Like the district court, the panel majority applied the two-part *Kobold* test, a test for whether § 301 preempts a state-law claim even though CET's complaint asserted no state law claim and was

filed in federal court. (App.9a-10a). Like the district court, the panel majority held that § 301 treats federal-law claims the same as state-law claims. (App.10a-13a). The only difference the panel majority recognized was nominal, changing “preempted” to “precluded.” (App. 12a).<sup>1</sup>

Next, the majority, contrary to this Court’s holding in *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, applied a presumption of arbitrability, without first finding the CBA’s arbitration provisions to be ambiguous. (App.18a-19a). The panel majority then compounded its misapplication of the presumption of arbitrability by creating a new standard under which statutory claims must be arbitrated unless the arbitration provisions of a CBA expressly exclude statutory claims from arbitration. As the majority reasoned, because the “CBA does not say, as it could, that RICO —or any other statutory claims—is excluded from the grievance process” the case had to be sent to arbitration. (App.18a). This new standard is directly contrary to *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*. The panel majority did not cite any of those cases.

Judge Ikuta dissented, citing “serious errors” in the Ninth Circuit’s decision. (App.26a). First, Judge Ikuta noted that the Ninth Circuit decision in this case conflicted with the Sixth Circuit’s decision in *Watts v. United Parcel Service, Inc.*, 701 F.3d 188 (6th Cir.

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<sup>1</sup> The doctrine of “preclusion” applies to conflicts between federal statutes, but it is very different from preemption. Preclusion applies only if two federal statutes present an irreconcilable conflict and, if so, the more recently enacted statute precludes the older statute. *See Lockhart v. U.S.*, 546 U.S. 142, 149 (2005) (Scalia concurring). The LMRA cannot preclude RICO because there is no conflict and because Congress enacted RICO after the LMRA.

2012), because the Ninth Circuit had applied § 301 preemption even though CET brought federal statutory claims in federal court. (App.51a). As Judge Ikuta pointed out, the majority’s two-step analysis only applies when a plaintiff brings a state-law claim in state court. (App.27a-28a). Second, Judge Ikuta noted that the Ninth Circuit, despite having been reversed on the same issue in *Granite Rock*, continued to apply a presumption of arbitrability in violation of *Granite Rock*. (App.31a-32a; 36a-37a). Third, Judge Ikuta noted that the panel majority’s new standard would require arbitration of federal statutory claims even though the CBA contained no language “clearly and unmistakably” assigning those claims to arbitration, contrary to *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*. (App.31a-32a; 36a-37a).

CET sought *en banc* review, which the Ninth Circuit denied, but Judge Bennett, joined by Judges Ikuta, Nelson, Bumatay, and VanDyke dissented from that denial. (App.45a). The dissent recognized that the panel majority’s decision created a circuit split by incorrectly applying § 301 analysis to federal statutory claims filed in federal court (App.51a), and that the panel majority’s “new standard” violates controlling precedent of this Court by creating a presumption of arbitrability in “which statutory claims are subject to arbitration unless a CBA expressly excludes statutory claims from the CBA’s arbitration procedures.” (App. 54a-55a). As the dissent noted, that new standard, if left standing, “will lead to a mass of arbitrations never contemplated by a CBA” an “erroneous change [that] will harm both labor and management.” (App.55a-56a).



## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT CREATED A CLEAR CIRCUIT SPLIT BY APPLYING SECTION 301, A STATUTE DESIGNED TO EXPAND FEDERAL COURT JURISDICTION, TO STRIP FEDERAL COURTS OF JURISDICTION OVER FEDERAL CLAIMS.

Congress, in enacting § 301 of the LMRA, “intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.” *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). To that end, LMRA § 301 (a) creates federal jurisdiction for claims asserting violations of CBAs, providing that “[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States.” 29 U.S.C. § 185(a). In addition to its express grant of federal court jurisdiction, this Court has interpreted § 301 as directing federal courts to create and apply a federal common law for interpreting CBAs, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957), so as to ensure a uniform federal labor law prevails over inconsistent interpretations of CBAs by state courts. *Teamsters*, 369 U.S. at 104-105). If a plaintiff brings a state-law claim in state court, courts including the Ninth Circuit, have applied a two-part test, asking whether (1) the claim alleges a breach of a CBA or (2) requires the interpretation of a CBA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-07 (1988); *Alaska Airlines, Inc. v. Schurke*, 898 F.3d. 904, 920-921 (9th Cir. 2019). If so, the state-law claim is said to be “preempted” and defendants may remove the case to federal court through the jurisdictional doctrine of “complete pre-

emption.” *See, e.g., Caterpillar*, 482 U.S. at 393-394 (1987). Once the case reaches federal court, whether by removal or by being filed originally in federal court, the only remaining question is one of contract interpretation to determine whether the federal claims must be arbitrated. *Granite Rock*, 561 U.S. at 310-11.

Until this case, the Ninth Circuit has never applied § 301 to “preempt” or “preclude” a federal statutory claim. Preemption or preclusion of federal claims is inconsistent with the purpose of § 301, which is primarily a jurisdictional statute intended to ensure the uniform interpretation of CBAs. As the dissent phrased the issue, “[a] statute passed by Congress to help maintain a uniform body of federal labor law does not somehow nullify a different statute passed by Congress to, among other objectives, eradicate organized attempts to defraud through a pattern of racketeering activity.” (App.46a). *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974) (“In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress.”).

A federal statutory claim brought in federal court will necessarily be consistent with § 301’s goal of ensuring a federal forum. If the federal claim required the federal court to interpret the CBA, then the court would just apply federal common law to ensure the uniform body of federal law governing CBAs and eliminate the risk of inconsistencies, consistent with Congress’s intent in enacting § 301. *See Textile Workers Union of Am.*, 353 U.S. at 451, 456 (1957).

This is all well-established. As the Sixth Circuit correctly held, when a claim is based on a federal cause of action and is in federal court, there is no danger of inconsistent interpretations of a CBA's provisions by different state courts, and in those circumstances, § 301 does not apply. *Watts*, 701 F.3d at 191-92 (6th Cir. 2012). In *Watts*, the plaintiff brought a claim under the Americans with Disabilities Act ("ADA") against her employer for failure to accommodate a back injury with light-duty work. *Id.* at 189-190. The employer argued the plaintiff was not eligible for the light-duty under the terms of the CBA. *Id.* The district court agreed, holding that § 301 preempted the ADA claim because the claim required interpretation of the CBA. The Sixth Circuit reversed, explaining that:

Congress's power to preempt state law is rooted in the Supremacy Clause of the United States Constitution. *Allis-Chalmers [Corp. v. Lueck]*, 471 U.S. [202] at 208, 105 S.Ct. 1904 [85 L.Ed.2d 206] [(1985)] The animating purpose of § 301 preemption is to ensure that federal labor law uniformly prevails over inconsistent interpretations of CBAs by state courts. *Lucas Flour*, 369 U.S. at 103-04, 82 S.Ct. 571; *see also Valinski v. Detroit Edison*, 197 Fed. Appx. 403, 407-08 (6th Cir. 2006) (unpublished). When a claim asserts a right arising under federal law, and is filed in federal court, that rationale does not apply. *See Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999) ("The preemption doctrine *per se* does not govern questions relating to the compatibility of two or more federal laws."); *cf. Proctor v.*

*United Parcel Service*, 502 F.3d 1200, 1205 n.2 (10th Cir. 2007) (“Mr. Proctor’s ADA claim is clearly not preempted by § 301 because one federal statute cannot preempt another[.]”). Because Watts’s claim is based on a federal cause of action and is in federal court, there is no danger of divergent application of a CBA’s provisions by state courts; thus, the motivating purpose of § 301 preemption simply does not apply.

*Id.* at 191-192. The Tenth Circuit reached the same conclusion in *Proctor v. United Parcel Service*, 502 F.3d 1200 at 1205 n.2, where the defendant argued that § 301 preempted an employee’s claim under the ADA. There, the Tenth Circuit found that the employee’s claim “is clearly not preempted by § 301 because one federal statute cannot preempt another. . . .” *Id.*

In the face of this well-established authority, the two-judge majority in the instant action, upended this consensus. It held that LMRA § 301 preempted a federal law—RICO—and not a state law, improperly applying the two-part *Kobold* test to a federal claim. In doing so, the panel majority’s decision ran squarely into the contrary authority established by the Sixth and Tenth Circuits.

In addition to creating a circuit split, the panel majority also sets a dangerous precedent on an important topic. At its heart, § 301 is a jurisdiction-expanding statute. Congress intended § 301 to open the doors of the federal courts to suits alleging violations of CBAs. The panel majority’s decision has the opposite effect. If left standing it will allow the Ninth Circuit, and encourage other circuits, to decline to hear, and instead “preempt” claims brought under important

federal statutes if those claims are between parties to a CBA. The decision will cut off access to federal courts for employees and employers alike. As the dissenting characterized the danger:

[T]he LMRA does not bar a federal statutory claim brought in federal court. Today, the barred claim is a Racketeer Influenced and Corrupt Organizations Act (“RICO”) claim alleging a \$5.3 million mail and wire fraud racketeering scheme. Tomorrow, the barred claim may be based on the Americans with Disabilities Act (“ADA”) or Title VII of the Civil Rights Act of 1964.

(App.45a-46a). It is easy to add other federal statutory claims to the dissent’s list. For example, claims under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51 et seq., and other statutes, are all at risk of being preempted by the panel majority’s decision.

There is no indication that Congress intended that result when enacting § 301 in 1947, or that Congress, when it enacted RICO 23 years later in 1970, intended that RICO would not apply to parties to a CBA.<sup>2</sup> This Court has not previously answered the question whether § 301 preempts a federal statutory claim brought in federal court. The Ninth Circuit has now held that it does, contrary to results reached in the Sixth and Tenth Circuits. The Court should grant the

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<sup>2</sup> To the contrary, when enacting RICO, Congress made express findings that crime and “fraud” had infiltrated “labor unions” and enacted RICO to add to the legal tools available to combat that corruption. (App.90a-91a).

writ to eliminate the conflict between the circuits and the risk that the panel majority's decision will lead to preemption of important, federal statutory claims.

## **II. THE NINTH CIRCUIT CONTINUES TO APPLY A PRESUMPTION OF ARBITRABILITY CONTRARY TO THIS COURT'S ADMONITION IN *GRANITE ROCK*.**

The Court has held consistently that “[a]rbitration is strictly ‘a matter of consent’ . . . and thus [arbitration] ‘is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration.’” *Granite Rock*, 561 U.S. at 299. This is true, even with CBAs governed by the LMRA. *Granite Rock*, 561 at 299. In other words, “a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.” *Id.* at 297 (original emphasis). *Granite Rock*, in addition to reaffirming the “first principle” that arbitration is a matter of consent, also held, again consistent with the need for consent, that a court may apply a presumption of arbitrability “only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand,” and “only when that presumption is not rebutted.” *Id.* at 301. Circuit courts of appeals that have considered this second principle from *Granite Rock* have routinely limited the presumption of arbitrability to cases in which the arbitration provisions are ambiguous as to whether they required arbitration of the particular dispute in question,<sup>3</sup> making the Ninth Circuit’s decision in this case the outlier.

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<sup>3</sup> For examples from the Second, Third, Tenth and Eleventh Circuits see, *Int'l Bhd. of Elec. Workers, Loc. 113 v. T & H Servs.*, 8 F.4th 950, 958 (10th Cir. 2021)(“There is a presumption in

Despite having been reversed in *Granite Rock*, the panel majority insisted on applying a presumption of arbitrability without first finding ambiguity in the CBA. (App.18a). The panel majority misinterpreted *Granite Rock*. Instead of finding ambiguity, the panel majority purported to interpret the “plain text” of the CBA’s arbitration clause while simultaneously insisting that *Granite Rock* “directs” courts “to resolve any doubts concerning the scope of issues to be referred to arbitration in favor of arbitration.” (App.21a). Citing two Ninth Circuit cases that pre-dated *Granite Rock*, the panel majority imposed on CET the “burden of demonstrating how the language in the collective bargaining agreement excludes a particular dispute from arbitration” and then doubled down on its insistence that “[a]ny doubts should be resolved in favor of coverage.” (App.19a, emphasis added). In short, contrary to *Granite Rock*, the panel majority applied a presumption of arbitrability to the plain text of the CBA, and with no finding or discussion of whether the CBA’s arbitrations provisions were ambiguous. They are not.

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favor of arbitrability . . . but a court “appl[ies] the presumption . . . only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and . . . [the court] adher[es] to the presumption and order[s] arbitration only where the presumption is not rebutted.”); *Lloyd*, 791 F.3d at 270 (2d Cir. 2015) (“*Granite Rock* . . . made clear that the presumption of arbitrability is a tool for resolving genuine ambiguity, not a bias in favor of arbitration”); *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115 (11th Cir. 2014) (“Further, the presumption applies when an arbitration agreement is ambiguous . . .”); *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 173 (3d Cir. 2014) (“[T]he presumption of arbitrability applies only where an arbitration agreement is ambiguous about whether it covers the dispute at hand.”).

The arbitration provisions are plainly limited to disputes with the local unions, and do not apply to the defendants in this case.<sup>4</sup> The CBA's arbitration procedures apply only to "grievances," and the CBA defines "grievance," and limits the scope of the reach of arbitration, to "any controversy or disagreement or dispute between the applicable ILWU Local Union and the Employer [CET] for the particular grain elevator(s) involved as to the interpretation, application, or violation of any provision of this Agreement." (App.140a, emphasis added). The grievances subject to arbitration do not include the disputes between CET and any of the defendants in this case, the international union, ILWU, and the individual members. (App.140a). Despite extensive briefing and two dissenting opinions discussing this issue, the panel majority simply ignored this plain text of the CBA. The panel majority not only failed to discuss or give meaning to the words "Local Unions," the majority actually replaced those two words with an ellipsis when quoting the CBA's definition of "grievance." (App.18a). In doing so, and in imposing a presumption of arbitrability where no presumption was warranted, the panel majority extended the scope of the arbitration provisions beyond the scope the parties had agreed to. As Judge Ikuta noted in her dissent, "it is immediately apparent that the arbitration provision does not cover CET's claims against ILWU," that on this point the CBA is "unambiguous," and that "CET's claims against ILWU falls outside of the definition of a grievance." (App.36a).

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<sup>4</sup> As shown in the following section, the arbitration provisions also are limited to disputes over the "interpretation, application, or violation" of the CBA, not RICO and other statutory claims.

This Court in *Granite Rock*, placed important limits on the application of any presumption of arbitrability. The Ninth Circuit did not get the message. This Court should grant the writ to reinforce *Granite Rock*'s limits, correct the erroneous application of the presumption and, as discussed below, reverse the new standard the panel majority created, under which statutory claims must be expressly excluded or are presumed to go to arbitration.

### **III. THE NINTH CIRCUIT'S NEW STANDARD REQUIRING ARBITRATION OF STATUTORY CLAIMS UNLESS THE CBA EXPRESSLY EXCLUDES STATUTORY CLAIMS TURNS THIS COURT'S PRECEDENT ON ITS HEAD AND WILL CREATE CHAOS.**

In requiring arbitration of CET's statutory RICO claims, the panel majority created a new standard, a standard directly at odds with this Court's decisions in *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*. Those cases hold that statutory claims like CET's RICO claims are subject to arbitration only if the parties to the CBA express a "clear and unmistakable" intent to arbitrate those statutory claims. Here, the panel majority created a new standard that flips this Court's precedents upside down.

The arbitration provisions extend only to disputes over the "interpretation, application, or violation" of the CBA. (App.140a). This wording is common in CBAs and other Circuits, like the Tenth and Fourth Circuits, have had little difficulty applying this Court's precedents, holding that general arbitration provisions that require arbitration of disputes involving the "interpretation" or "application" of a CBA, do not require

arbitration of statutory claims.<sup>5</sup> But not so the Ninth Circuit. Here, the panel majority wrote: “[t]he text of the CBA does not say, as it could, that RICO—or any other statutory claims—is excluded from the grievance process” and, as a consequence, the majority sent the claims to arbitration. (App.18a). The panel majority failed to cite or discuss *Wright, Metropolitan Edison*, or *14 Penn Plaza* despite extensive briefing from the parties on those cases and dissenting opinions that also focused on those cases. Instead of searching the CBA for clear and unmistakable intent to arbitrate statutory claims, the panel majority set a new stan-

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<sup>5</sup> See, e.g., *Mathews v. Denver Newspaper Agency, LLP*, 649 F.3d 1199 at 1207 (agreement to arbitrate disputes “as to the interpretation, application or construction of this contract [i.e. the CBA]” resulted in “no waiver of the right to litigate statutory claims . . . even though the “contractual rights and statutory rights were coterminous”); *Brown v. Trans World Airlines*, 127 F.3d 337, 341 (4th Cir. 1997) (statutory claims not subject to arbitration where “instead of mandating arbitration of all employment-related disputes or, more specifically, of statutory disputes, the collective bargaining agreement submits to arbitration only disputes that ‘grow out of the interpretation or application of any of the terms of this Agreement’ even if “the facts underlying Brown’s claims of statutory violation might also give rise to a claim for breach of the” CBA). See also, *Harrell v. Kellogg Co.*, 892 F.Supp.2d 716, 724 (E.D. Pa. 2012) (statutory claims not subject to arbitration where clause compelled arbitration of “disputes or disagreements concerning the interpretation and application’ of the CBA.”); *LaChance v. Northeast Pub., Inc.*, 965 F.Supp. 177, 184 (D. Mass. 1997) (“As in *Gardner-Denver*, the arbitration agreement between Northeast and the union is limited to matters involving the interpretation, application, administration or alleged violation of the CBA” and “where the arbitration agreement only agrees to arbitrate claims arising from rights provided in the CBA, an employee cannot be precluded from bringing separate statutory claims, even when the two claims arise out of the same factual scenario.”).

dard that now requires parties to a CBA to expressly exclude statutory claims from arbitration. Under the Ninth Circuit's new standard, if a standard arbitration clause covering only disputes under the CBA does not go on to expressly exclude statutory claims then statutory claims must go to arbitration. This is backwards, at complete odds with this Court's precedents, and should be corrected by granting the writ.

In *Wright*, this Court addressed whether a general arbitration provision in a CBA required arbitration of a claim under the ADA. The Court held that the ADA claim was not subject to arbitration and not subject to a presumption of arbitration: “[n]ot only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear.” *Wright*, 525 U.S. at 79-80. *Wright* relied on *Metropolitan Edison*. In *Metropolitan Edison* this Court had rejected a standard much like the panel majority's new standard: “[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.” *Metropolitan Edison*, 460 U.S. at 708. More recently, in *14 Penn Plaza*, this Court identified the type of language a CBA must contain to satisfy the “clear and unmistakable” standard needed to send statutory claims to arbitration. The CBA in *14 Penn Plaza* identified a number of statutory claims by title, including claims under the Age Discrimination in Employment Act, and provided that “[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations.” *14 Penn Plaza*, 556 U.S. at 252. This Court

treated this language, which identified the statute by name and expressly sent claims under that statute to arbitration, as satisfying the “clear and unmistakable” standard. *Id.* at 251. Collectively, these cases hold, first, that there is no presumption of arbitrability for statutory claims and, second, that statutory claims are not subject to arbitration unless the arbitration agreement clearly and unmistakably identifies those claims and includes those claims as claims subject to arbitration.

In this case, it is undisputed that the CBA did not discuss statutory claims in general and importantly, unlike *14 Penn Plaza*, the CBA did not expressly earmark any specific statutory claims for arbitration. As Judge Ikuta noted in dissent:

It is immediately apparent that the parties did not agree to arbitrate federal statutory claims in general, or RICO claims in particular. . . . The CBA’s grievance and arbitration provisions here do not expressly agree to arbitrate RICO claims, or any other statutory claims, or authorize the arbitrators to resolve such claims.

(App.36a).

The panel majority set a dangerous and confusing precedent. Under the majority’s new test, a general arbitration provision, meaning an arbitration provision with no exclusions for statutory claims, results in a presumption of arbitrability and in the arbitration of all statutory claims. Under the majority’s standard, employers and unions must now draft their CBAs to exclude statutory claims from arbitration, because the parties “could” do so if they wished, and if the

parties do not draft exclusions for statutory claims, then all statutory claims go to arbitration. This Court decided *14 Penn Plaza* in 2009. Since then, hundreds, perhaps thousands of CBAs have been drafted in light of the seemingly straight-forward standards set in *Wright*, *Metropolitan Edison*, and *14 Penn Plaza*.<sup>6</sup> If the parties drafting those CBAs did not clearly and unmistakably send statutory claims to arbitration, then the parties knew those statutory claims were not subject to arbitration. The panel majority's new standard—that statutory claims are arbitrable unless expressly excluded—turns the key cases upside down. If a court follows the panel majority's new standard, then the legal consequences of a general arbitration provision will be the opposite of what the parties intended. The parties may have intended that important statutory claims, like claims under the ADA, would have access to a judicial forum and not be subject to arbitration. To achieve that intent, they could have relied on a general arbitration provision that did not clearly and unmistakably send statutory claims to arbitration. Application of the panel majority's decision will now produce a legal result contrary to the parties' intent: all statutory claims will go to arbitration because the CBA "could have" excluded them, but did not.

As the dissent stated, recognizing the harm:

[T]he panel opinion "creates a new standard under which statutory claims are subject to

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<sup>6</sup> See, U.S. Department of Labor, *Office of Labor-Management Standards*, Online Public Disclosure Room at [https://olmsapps.dol.gov/olpdr/?&\\_ga=2.172429216.2064346664.1648248446-377010195.1645653817#CBA%20Search/CBA%20Search/](https://olmsapps.dol.gov/olpdr/?&_ga=2.172429216.2064346664.1648248446-377010195.1645653817#CBA%20Search/CBA%20Search/).

arbitration unless a CBA expressly excludes statutory claims from the CBA's arbitration procedures." . . . The notion that any claim that is not expressly excluded is arbitrable largely defeats the point of negotiating a CBA; the scope of arbitration would become comprehensive no matter what the CBA says, unless it explicitly excludes from arbitration a laundry list of claims. And typical CBAs (those without a laundry list of exclusions) will prove no less troublesome in litigation, forcing courts to deduce parties' arbitration intent from what they didn't say, rather than read the written agreement to determine what they specifically agreed to arbitrate. The panel's opinion will lead to a mass of arbitrations never contemplated by a CBA.

(App.55a). In short, the panel majority's aberrant decision leaves the enforcement of existing arbitration provisions in doubt, and employers and unions negotiating new arbitration provisions are left guessing, with no consistent federal guidance, on what language must be used to draft those provisions to achieve an enforceable scope of arbitration coverage that is commensurate with their contractual intent.



## CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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