No. 22-761

In the Supreme Court of the United States

Todd Bowers,
Petitioner,
v.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO
Respondent.

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

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent International Brotherhood of Boilermakers states that no publicly held company owns 10% or more of any stock of the International Brotherhood of Boilermakers. Respondent is not a subsidiary or affiliate of a publicly traded corporation. Respondent is a labor union.

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INTRODUCTION

Recognizing Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, (the "LMRA") not only provides federal jurisdiction over controversies between parties to a collective bargaining agreement, but also "authorizes federal courts to fashion a body of federal law for the enforcement" of such agreements, courts have long held that state law claims that are "inextricably intertwined" with a collective bargaining agreement, are completely preempted by the LMRA. *Textile Workers v. Mills*, 353 U.S. 448, 451 (1957); *see also Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (holding that state law claims are preempted when they are "inextricably intertwined with consideration of the terms of the [collective bargaining agreement]"). Any such preempted claim, even if couched solely in terms of a state law cause of action, "is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987); *see also Avco Corp. v. Aero Lodge No. 735*, 490 U.S. 557, 560 (1968).

Petitioner, Todd Bowers ("Petitioner"), asserted claims against the International Brotherhood of Boilermakers (the "International"), arising out of and relating to obligations under a collective bargaining agreement (the "CBA") between the parties. Specifically, Petitioner's claims involve the International's alleged actions after Petitioner attempted to terminate the CBA, including alleged actions taken to enforce Petitioner's obligations

pursuant to the CBA's terms, such as the exclusive referral provisions and fringe benefit contribution provisions.

The United States District Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit Court applied well-established precedent and held that Section 301 of the LMRA preempted each of Petitioner's claims, as the claims are inextricably intertwined with the CBA, and resolving such claims would require analyzing the CBA's terms. Because any claim brought under the LMRA's statute of limitations would further bar any claim, and because the Petitioner failed to exhaust remedies the CBA's grievance and arbitration procedures, the lower courts dismissed the Complaint with prejudice.

Significantly, the lower courts additionally determined Petitioner pled insufficient facts to state a claim for which relief may be granted and further held that, in any event, the West Virginia criminal statutes under which Petitioner sought to bring claims provided no private right of action.

As explained herein, nothing justifies granting review in this matter. Petitioner never provides a single compelling reason to grant review. Rather, contrary to Petitioner's arguments, the Fourth Circuit correctly applied well-established law in holding that Petitioner's claims were preempted by the LMRA, and that dismissal was thus proper in that, even if Petitioner alleged sufficient facts to properly state his claims, such claims would be time-barred by the

applicable statute of limitations, and precluded by his failure to exhaust remedies under the CBA.

Moreover, the Petition fails to assert any error with respect to the lower courts' holding concerning Petitioner's failure to allege sufficient facts to state a claim. Review would accordingly be futile.

Finally, arguments concerning due process which were raised for the first time in this Petition should not be considered. Thus, for the foregoing reasons, the Petition should be denied.

STATEMENT OF FACTS

Petitioner, Todd Bowers, is the sole owner of a welding company, Elite Mechanical and Welding, LLC ("the Company"). Pet. App. 2. The Company entered into a collective bargaining agreement with the International (the "CBA"). Pet. App. 2. Among other obligations, the CBA provides for an exclusive hiring hall, under which the Company agreed to employ employees exclusively through the referral provisions of the CBA, and remit contributions to fringe benefit funds based on hours of covered work such employees performed. Pet. App. 2.

In or around 2017, the Company allegedly attempted to withdraw from the CBA. Pet. App. 3. Thereafter, in 2020, third-party fringe benefit funds, to which Petitioner was contractually obligated to contribute, filed a lawsuit against the Company, alleging it failed to properly remit contributions to the

funds for hours of covered work performed by its employees. Pet. App. 2.

Petitioner filed this action in West Virginia state court on February 19, 2021. Pet. App. 3. The Complaint's sparse allegations assert the International tried to harass and intimidate the Company's employees, and put the Company out of business by "filing meritless lawsuits" and "falsely reporting" the Company to unnamed oversight organizations. Pet. App. 3. Based on those allegations, the Complaint included five (5) counts: tortious interference of business, abuse of process, intentional infliction of emotional distress, and two (2) counts for violation of West Virginia criminal code, including criminal extortion (W.VA. CODE § 61-2-13) and criminal harassment (W.VA. CODE § 61-2-9a). Pet. App. 3.

The International removed the case to the United States District Court for the Northern District of West Virginia (the "District Court"), asserting the LMRA preempted Petitioner's claims. Pet. App. 3. The International thereafter moved to dismiss, arguing: (1) the LMRA preempts the Petitioner's claims; (2) LMRA's statute of limitations barred the claims; (3) Petitioner never exhausted contractual remedies; (4) no civil cause of action exists under the West Virginia criminal statutes cited by Petitioner; and (5) the Complaint lacked sufficient factual allegations to state a claim. Pet. App. 4.

The District Court concluded "every asserted basis" in the International's Motion to Dismiss

"warranted dismissal," noting that "nothing . . . came close to alleging a factual basis to support a lawsuit," and that, even if such factual basis were asserted, the LMRA preempted Petitioner's claims. Pet. App. 12-19.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). In an unpublished per curiam opinion, the Fourth Circuit affirmed the District Court's decision, holding Petitioner's claims were preempted, and dismissal was proper because Petitioner failed to exhaust his contractual remedies, and any properly stated claim was time-barred. Pet. App. 8. Despite the Fourth Circuit's sound decision, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS TO DENY THE PETITION

Petitioner's arguments present no compelling justification for granting review. Rather, the issues before this Court, even as framed by the Petitioner, amount only to whether the Fourth Circuit properly applied well-established rules in affirming the Complaint's dismissal with prejudice. This is something that only rarely warrants review. Moreover, Petitioner omits any question relating to the lower courts' dismissal with prejudice based on Fed. R. Civ. P. 12(b)(6), rendering any review futile. For all these reasons—individually and collectively—review should be denied.

I. The Petition Raises No Issues Warranting the Court's Review

The Petitioner failed to identify any issues warranting this Court's review. As the Court is well aware, Rule 10 emphasizes that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. Rule 10 then outlines three (3) compelling reasons that warrant review: (1) a circuit split; (2) a split on an important federal issue between a state court of last resort and either another state court of last resort or a federal court of appeals; and (3) a state court of last resort or federal court decided an important federal question that either has not been settled by this Court or conflicts with the relevant decisions of this Court. *Id.*

More notably, the Rule admonishes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* In fact, Chief Justice Taft stated nearly a century ago that "[i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. W. Well Works*, 261 U.S. 387, 393 (1923).

Here, no split of authority exists on any of the questions at issue, nor does Petitioner assert that one exists. Further, the Petitioner never asks this Court to decide an important federal. Thus, as explained herein, Petitioner's arguments each amount to

nothing more than an assertion that the lower court misapplied a properly stated and well-settled rule of law. As such, the Petition fails to raise any issues justifying this Court's review, and it should be denied.

A. The Decision Below Properly Applies Settled Law Concerning LMRA Preemption

Contrary to Petitioner's assertions, the Fourth Circuit's Decision properly applies settled law and well-established LMRA preemption precedent.

Section 301 of the LMRA, 29 U.S.C. § 185(a), provides

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , 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.

Over six (6) decades ago, this Court held Section 301 not only provides federal jurisdiction over controversies involving collective bargaining agreements, but also "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Mills*, 353 U.S. at 451.

Accordingly, pursuant to Section 301 of the LMRA, this Court has long preempted state-law claims which "depend upon" interpreting a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (citing *Lueck*, 471 U.S. 202). Thus, it has long been recognized that

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law.

Lueck, 471 U.S. at 220.

Courts have consistently applied these rules to preempt state law claims when such claims are "inextricably intertwined" with analyzing the collective bargaining agreement's terms. Stated differently, if resolving such state law claims depends upon interpreting the meaning of a collective bargaining agreement, then Section 301 preempts the claims. *Id.*; *see also Lingle*, 486 U.S. 399 (1988); *see also McCormick v. AT&T Techs., Inc.*, 934 F.2d 531, 534 (4th Cir. 1991) (holding that the question in preemption analysis is not "whether the source of a cause of action is state law, but whether the resolution of the cause of action requires interpretation of a collective bargaining agreement"); *see also Oberkramer v. IBEW-NECA Serv. Ctr., Inc.*, 151 F.3d 753, 756 (8th Cir. 1998) ("state law claims that are 'substantially dependent' upon an analysis of the

terms or provisions of a collective bargaining agreement or are 'inextricably intertwined' with consideration of the terms or provisions of a collective bargaining agreement . . . are preempted by § 301").[1]

The Fourth Circuit, applying these well-settled standards, appropriately found Petitioner's claims are "inextricably intertwined" with the CBA, as each requires analyzing the CBA's provisions. For example, Petitioner's "abuse of process" and "interference with business" claims, stemming from Petitioner's allegations concerning the International bringing so-called "meritless" lawsuits via the third-party fringe benefit funds, depend upon analyzing the CBA's fringe benefit contribution provisions and covered work provisions. This is because if Petitioner was obligated to remit contributions on behalf of employees pursuant to such provisions, such lawsuits would have merit. Thus, these allegations are "inextricably intertwined" with the CBA and consequently preempted.

Similarly, Petitioner's interference with business claim apparently stems from the International allegedly attempting to convince Petitioner's employees to quit. Such a claim depends on evaluating the CBA's exclusive referral and jobsite access provisions, as interpretation of such provisions would be necessary to determine whether the

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[1] Petitioner cites *Lingle* and *Lueck* for the proposition that a cause of action is only preempted if a court must "construe disputed terms" of an agreement. However, this misstates the law. In fact, the term "construe" never appears in *Lingle*, *Lueck*, or in any other case cited by Petitioner.

International was within its rights to discuss such matters with Petitioner's employees.

Furthermore, Petitioner's intentional infliction of emotional distress claim similarly relies on analyzing the above provisions of the CBA, as analyzing this claim requires reviewing whether the International was legally entitled to take actions against the Petitioner for breaching such provisions. *See Foy v. Giant Food, Inc.*, 298 F.3d 284 (4th Cir. 2002) (finding a state law cause of action was preempted because resolving the claim required an inquiry into whether the defendant was legally entitled to act as it did under the terms of the relevant collective bargaining agreement.).

Finally, assuming, *arguendo*, a private right of action existed under the two (2) criminal statutes cited in the Complaint, federal law would nevertheless preempt such actions. Contrary to Petitioner's argument, the allegations asserted for criminal harassment and criminal extortion implicate various CBA's provisions, such as: (1) whether the CBA obligated Petitioner to comply with its terms regarding applicant referral and fringe benefit contributions; (2) the International's or the Funds' rights to pursue delinquent contributions; and (3) whether Petitioner effectively terminated the CBA. Because resolving these counts requires interpreting and construing these CBA provisions, such claims are preempted. As such, review should be denied.

In addition to the above provisions, in resolving Petitioner's claims, the Court would be required, as a

threshold matter, to interpret the terms of the CBA's termination and withdrawal provisions, as it would be necessary to determine whether the Petitioner remained bound by the terms of the CBA following his attempted termination.

The fact that Petitioner's claims are inextricably intertwined with the analysis of the above CBA provisions is further demonstrated by the Complaint's factual allegations. Despite the Complaint's sparse factual allegations, it contains several specific references to the CBA and specific provisions thereof. Pet. App. 2; Pet. App. 12.

Petitioner supposedly argues the Court need not analyze the CBA's terms because he already offered *his* interpretation of the CBA's relevant portions. Pet. 9. Petitioner further asserts no dispute concerning the provisions' meanings exists, and as such, his claims should not be preempted. Pet. 9.

As a practical matter, it is unclear the basis on which Petitioner asserts no dispute exists regarding any of the above provisions, as this matter was dismissed prior to the International filing an answer. Nonetheless, this misstates the law. The relevant test is not whether any portions of the CBA are "disputed;" rather, the test is whether the claims are inextricably intertwined with analyzing the CBA's provisions. Petitioner's various purported interpretations of the CBA riddled throughout his Petition demonstrate analyzing these terms is necessary in resolving his claims. As such, the claims are preempted.

Ultimately, the Fourth Circuit properly applied long-standing legal precedent in finding that each of the above claims are intrinsically intertwined with analyzing the CBA's terms.[2] As such, the Fourth Circuit appropriately held such claims are preempted. Because any properly stated claim would additionally fall outside LMRA's the six-month statute of limitations, and because Petitioner failed to exhaust contractual remedies, dismissal with prejudice was proper. Thus, the lower courts never misapplied this well-settled law, so nothing herein merits review, and the Petition should accordingly be denied.

B. Petitioner's Jurisdictional Arguments Fail to Justify Granting Review

Petitioner argues the Fourth Circuit "erred in affirming the District Court's assumption of jurisdiction in this matter based on [the International's] assertion of federal question authority under 29 U.S.C. § 185(a)." (Petition p. 8). In supporting this argument, Petitioner argues the well-pleaded complaint rule allows the plaintiff to be the

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[2] Notably, Petitioner, when addressing LMRA preemption, ignores stated law in favor of his own imaginary precedent. In the Petition, he alleges the International attempted to use a less stringent standard—the inextricably intertwined standard—as opposed to the purportedly current substantially dependent standard. Pet. 18. But, as the Fourth Circuit noted in affirming the dismissal with prejudice, "[c]ourts use [the inextricably intertwined] term interchangeably with 'substantially dependent' in the context of Section 301 preemption." Pet. App. 18. Thus, Petitioner again misstated the law in attempt to cobble together a claim. As such, the Petition should be denied review.

"master" of his complaint, and may plead only state-law claims, even if a federal claim is available, to avoid federal jurisdiction. *Id.* Again, Petitioner apparently argues review should be granted because the lower courts purportedly misapplied the law. Again, this Court rarely grants review for errors of this nature, and more notably, no misapplication occurred.

In fact, Petitioner ignores the corollary to the well-pleaded complaint rule; a plaintiff "may not defeat removal by omitting to plead necessary factual questions." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). Under this "artful pleading" rule, removal may be appropriate where "federal law completely preempts a plaintiff's state-law claim," even if no federal question appears on the face of a plaintiff's complaint. *Id.* (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)). This is because Congress may "so completely pre-empt a particular area that any civil complaint raising this select group of claims is *necessarily federal in character*." *Taylor*, 481 U.S. at 63-64 (emphasis added).

This Court has consistently "singled out claims preempted by § 301 of the LMRA for such special treatment." *Id.* (citing *Avco Corp.*, 390 U.S. 557 (1968)). Ultimately, where Section 301 of the LMRA completely preempts an area of state law, "any claim purportedly based on that preempted state law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc.*, 482 U.S. at 393-94.

Under these long-established rules, claims that require analyzing a CBA's provisions cannot escape Section 301's preemptive force by simply masquerading as state law claims. *Foy*, 298 F.3d at 287 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)).

As discussed above, Section 301 of the LMRA completely preempts state law when state law claims are inextricably intertwined with analyzing a collective bargaining agreement's terms. *See Mills*, 353 U.S. at 451. Furthermore, as explained above, Section 301 completely preempts Petitioner's claims because they each is "inextricably intertwined" with analyzing the Collective Bargaining Agreement. As such, the Fourth Circuit appropriately exercised subject matter jurisdiction over the matter, regardless of how the claims were described on the face of the Complaint. *See* 28 U.S.C. § 1441(b) (federal courts have jurisdiction over a removed case if such court would have had original jurisdiction over the case); *see also* 28 U.S.C. § 1331 (federal courts have original jurisdiction over all civil actions arising under the laws of the United States).

Petitioner further argues that the Fourth Circuit and District Court erred in in reviewing the CBA's terms to determine whether it had subject matter jurisdiction with respect to deciding his Motion to Remand, as the CBA purportedly fell outside the pleadings. Pet. 11-12. In doing so, Petitioner argues that while a court may look to outside documents that are "integral to the complaint and authentic" for the purposes of Fed. R. Civ. P. 12(b)(6) motions, courts

must only review a complaint's allegations in ruling upon a motion to remand. As in other areas of his Petition, this misstates the law. Contrary to Petitioner's assertions, courts have held that, in determining issues concerning subject-matter jurisdiction, "courts are permitted to look to materials outside the pleadings" such as "documents appended to a notice of removal or a motion to remand that convey information essential to the court's jurisdictional analysis." *Romano v. Kazacos*, 609 F.3d 512, 520 (2d Cir. 2010).

Furthermore, Petitioner's argument is moot; the District Court was entitled to review matters outside of the pleadings, such as the CBA, in ruling on the Motion to Dismiss. In reviewing a motion to dismiss, a court may properly consider documents that are either attached to the complaint or attached to the motion to dismiss, "so long as they are integral to the complaint and authentic." *Phillips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citing *Blankenship v. Manchin*, 471 F.3d 523, 526 n. 1 (4th Cir. 2006); *see also Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (holding a court may consider a document attached to a motion to dismiss "when determining whether to dismiss the complaint if it was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity.") (internal citations removed).

The Fourth Circuit properly determined the CBA was integral to the Complaint because: (1) the Complaint explicitly references the CBA; (2) the

Complaint specifically references the parties' specific obligations pursuant to the CBA; and (3) resolving Petitioner's claims requires analyzing the parties' rights and obligations under various provisions of the CBA. As such, the lower courts properly considered matters outside of the pleadings, namely the CBA.

Lastly, this Court has held that failing to remand an improvidently removed case "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 64 (1996). Here, because federal question jurisdiction existed at the time that the District Court dismissed the Complaint with prejudice, even if, *assuming arguendo*, remand was appropriate, the District Court's failure to do so is moot, and does not justify review. Accordingly, since no misapplication of law occurred, this argument does not justify review, and the Petition should consequently be denied.

C. Petitioner's Due Process Argument is Fundamentally Flawed, as Petitioner Enjoys no Property Interest in a Nonexistent Cause of Action.

Petitioner's third argument once again merely asserts a misapplication of settled law as the basis for requesting review. In his Petition, he states "[t]he District Court's Order of dismissal ran afoul of the express West Virginia statutory law . . . ." Pet. 24. This is in reference to the two (2) counts of Petitioner's Complaint, rooted in alleged violations of West

Virginia criminal statutes, specifically statutes outlawing harassment (W. VA. CODE § 61-2-9a) and extortion (W. VA. CODE § 61-2-13).

Petitioner purportedly suggests that because the District Court, and subsequently the Fourth Circuit, determined no private right of action existed under the two cited criminal statutes, that the lower courts deprived him of due process. Thus, Petitioner effectively cries foul because he allegedly maintains a constitutionally-protected property interest in nonexistent causes of action.

Petitioner essentially argues the lower courts improperly applied relevant state statutes, and as such, his argument can only be characterized as objecting to an alleged misapplication of a rule of law, something this Court rarely finds worthy of review. Regardless, Petitioner's argument contains fundamental flaws because the lower courts properly determined he asserted no recognized cause of action via the West Virginia criminal statutes. As a result, the Court should exercise discretion and deny the Petition.

The Court, in determining whether a due process violation occurred is "faced with . . . a familiar two-part inquiry. . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). First, the Court evaluates whether the Petitioner "was deprived of a protected interest. . . ." *Id.* If the Court answers the first question affirmatively, it then considers what process is due. *Id.*

The lower courts, in properly applying settled law, determined that two cited West Virginia criminal statutes—harassment and extortion—created no civil causes of action. Pet. App. 7. ("the plain language of these statutes—and other statutes in the same chapter—provide only for criminal penalties; neither the statutory text or nor scheme suggests any intent to create a private cause of action"); Pet. App. 15. ("[t]he Plaintiff cannot state a claim for criminal extortion in this civil action. Similarly, the Plaintiff cannot state a claim for criminal harassment"). As a result, Petitioner claims the lower courts deprived him of a protected property interest. Pet. 24 ("Petitioner maintains a statutory property interest in recovering damages . . . for any injuries he suffers as a result of any violations of § 61-2-13 and § 61-2-9A"). Accordingly, the first question is whether Petitioner enjoyed a protected interest in these purported causes of action. Based on this Court's precedent, it is apparent that no protected interest exists, and this argument presents no justification for review.

It is well-settled that causes of action constitute property interests that cannot be deprived without due process of law. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Logan*, 455 U.S. at 430 ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"); *and Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988) ("Appellant's interest is . . . a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment"). However, that property

interest is not all-encompassing, but instead must constitute something more than "an abstract need or desire for it . . . ." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Notably, all the cited cases address causes of action that *actually exist*. For instance, *Mullane* addressed judicial settlements of accounts by the trustee of a common trust fund. 339 U.S. at 307. *Logan* similarly addressed a claimant's discrimination charge pursuant to Illinois Fair Employment Practices Act. 455 U.S. at 426-27. Finally, *Pope* addressed recovering unpaid debts from an estate. 485 U.S. at 479.

Here, the District Court and the Fourth Circuit both determined the West Virginia criminal statutes Petitioner cited created no private rights of action. Pet. App. 7; 17. In essence, the District Court dismissed the extortion and harassment counts because the Complaint asserted nonexistent torts. Unlike *Mullane*, *Logan*, or *Pope*, which all plainly involved recognized causes of action, the lower courts determined Petitioner's Complaint did not plead a recognized civil claim. Pet. App. 7. 14-15.

Accordingly, because Petitioner never asserted a recognized cause of action, he never asserted a property interest capable of deprivation. Rather, Petitioner simply pled a desire for a private right of action. *Roth*, 408 U.S. at 577. Overall, the Fourth Circuit never violated the Fourteenth Amendment because Petitioner never asserted a constitutionally-

protected property interest, and the inquiry ends here. *Logan*, 455 U.S. at 429.

Even assuming, *arguendo*, Petitioner had a recognizable property interest in his claims based on West Virginia criminal code, the International is compelled to highlight the misstatements of law relied upon by Petitioner. For instance, Petitioner goes against stated precedent and common sense to argue a West Virginia statue allows *any* criminal statute to imply a private right of action unless expressly disavowed. The Court should not allow such misstatements to falsely color the Petition's merits.

The District Court, and subsequently the Fourth Circuit, held W.VA. CODE §§ 61-2-9a and 61-2-13 provide no private right of action. (Appx. 6; 14-15). In determining this, the District Court relied on its previous decision in *Horton v. Vinson*, No. 1:14-cv-192, 2015 WL 4774276, at *22 (N.D.W.V. Aug. 12, 2015), in which it concluded that nothing in W.VA. CODE § 61-2-13 even hinted that a private right of action exists. *See also Cunningham Energy, LLC v. Outman*, No. 2:13-cv-20748, 2013 WL 5274361, at *5 (S.D.W.V. Sept. 18, 2013). The District Court extended *Horton*'s reasoning in finding W.VA. CODE § 61-2-9a created no private right of action. Pet. App. 14-15.

Despite this clear precedent, Petitioner continues arguing W.VA. CODE § 55-7-9 allows a plaintiff to assert a claim under *any* West Virginia criminal statute. Simply stated, this argument misstates the statute's meaning. Instead, W.VA. CODE § 55-7-9 creates a presumption of negligence, not an

implied intentional tort. *Arbaugh v. Bd. of Educ.*, 591 S.E.2d 235, 238-39 (W.Va. 2003) (in construing W.VA. CODE § 55-7-9 the West Virginia Supreme Court has "consistently held that a violation of a statute is prima facie evidence of negligence, providing that such violation is the proximate cause of the injury."). Contrary to Petitioner's argument, the West Virginia Supreme Court has noted that "whether a *private cause of action* exists under a particular statute is determined by applying the four-part test set forth in *Hurley* . . . ." *Id.*, at 239 (emphasis added). Thus, Plaintiff's assertion that W.VA. CODE § 55-7-9 creates a private cause of action under any West Virginia criminal statute by default is incorrect.

The lower courts appropriately applied the *Hurley* factors, and, relying on precedent in *Horton*, *supra*, determined that no private cause of action existed under either criminal extortion or criminal harassment statutes. Petitioner's reliance on W.VA. CODE § 55-7-9 is wholly unfounded, and accepting Petitioner's arguments would only create the illogical situation in which *any* West Virginia criminal statute could create a private right of action, rendering the *Hurley* analysis entirely superfluous. Because the statutory scheme and above decisions clearly did not intend that result, Petitioner's arguments should be rejected because no misapplication of law occurred, and the Petition should be denied.

II. The Petition Should Further be Denied Because it Fails to Address the Lower Courts' Holdings With Respect to Fed. R. Civ. P. 12(b)(6) and Raises Issues Herein for the First Time.

Beyond failing to provide a compelling justification for granting review, the Petition omits any discussion relating to the lower courts' dismissal with prejudice based on Fed. R. Civ. P. 12(b)(6), so any review by this Court would prove futile. Moreover, Petitioner raised his due process argument for the first time before this Court such that it should be ignored. Consequently, the Petition should be denied.

A. The Petition Neglects to Refute That his Complaint Fails to State a Claim for Which Relief can be Granted, and Accordingly, the Lower Courts' Dismissal Would Stand.

Even if, assuming *arguendo*, Petitioner provided sufficient justification to warrant review, Petitioner failed to allege any error concerning the lower courts' holdings with respect to dismissing his Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). As such, the dismissal with prejudice on this ground would remain unchanged. The Petition consequently does not rise to a level worthy of review.

This Court's rules state "[o]nly questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Thus, where a petition for writ of certiorari fails to raise an issue decided by the lower courts, this Court rarely reviews such issue. *See Izumi Seimitsu Kogyo*

Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31-32 (1993) (refusing to address an intervention issue that was "neither presented as a question in the petition for certiorari nor fairly included therein"). Thus, because Petitioner failed to raise any issue with respect to the lower courts' Fed. R. Civ. P. 12(b)(6) holdings, these issues are not properly before the Court. As such, regardless of how the Court would determine the issues Petitioner actually raised, the lower courts' dismissal based on Rule 12(b)(6) would stand; therefore, review would be futile.

Even so, properly stated complaints must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To meet this standard, a complaint should state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facts are facially plausible when they "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

While the pleading standard "does not require detailed factual allegations," the Supreme Court has noted that it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* A complaint is insufficient when it offers "labels and conclusions or a formulaic recitation of the elements of a cause of action," or tenders only "naked assertion[s] devoid of further factual enhancement." *Id.* (internal quotations omitted).

The Complaint contains ten (10) vague paragraphs, introducing the parties and providing limited details. The facts the Complaint does include simply establish that the parties were signatory to a collective bargaining agreement, that Petitioner attempted at some point to terminate the agreement, and that thereafter, Petitioner ceased honoring the agreement, resulting in a lawsuit between Petitioner and fringe benefit funds to which Petitioner was contractually obligated to contribute.

The Complaint generally contains claims in a formulaic "the-defendant-unlawfully-harmed-me" manner. Count I, for instance, is for a "tortious interference of business," and contains only two (2) paragraphs, each including only the elements of the cause of action with no factual allegations whatsoever. As such, the pleadings are insufficient to state a claim under Count I.

Petitioner's next count (abuse of process) contains only two (2) paragraphs, each consisting of only legal conclusions and conclusory statements related to the elements of the cause of action. Beyond facially conclusory and illogical allegations that the International filed the suit "through" the funds, no facts plead in the Complaint show the International filed any lawsuit to coerce or intimidate Petitioner. As such, the lower courts properly determined these conclusory and vague statements failed to state a claim for which relief may be granted.

Petitioner's third count asserts a claim for intentional infliction of emotional distress, and contains only three (3) paragraphs, each alleging

conclusory statements. Under West Virginia law, a plaintiff can only recover for intentional infliction of emotional distress if he proves: (1) extreme and outrageous conduct; (2) an intent to inflict emotional harm; (3) the actions caused emotional distress; and (4) the distress was so severe that no reasonable person could endure it. *Hatfield v. Health Mgmt. Assocs.*, 672 S.E.2d 395, 404 (W. Va. 2008).

Under West Virginia law, intentional infliction of emotional distress requires outrageous conduct—*i.e.*, conduct that defies societal norms. *Travis v. Alcon Labs., Inc.*, 504 S.E.2d 419, 425 (W.Va. 1998). However, "conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct." *Courtney v. Courtney*, 413 S.E.2d 418, 423 (W.Va. 1991) (reversed on other grounds).

Here, the alleged conduct falls far short of that standard. None of the conduct alleged is remotely improper, much less defies social norms. As such, the Complaint fails to state a claim for relief under this count.

The next two counts are for actions under West Virginia Criminal Code §§ 61-2-13a and 61-2-9a. As previously explained, neither statute provides for a civil cause of action. However, even if such civil actions did exist, the Complaint fails to state a claim for relief under each statute, as it contains nothing more than a barebones recitation of the elements of each claim, in a conclusory "the-defendant-unlawfully-harmed-me" manner. As such, the Complaint fails to state a claim for relief under each count.

Ultimately, as the lower courts properly observed, once stripped of legal conclusions, the allegations set forth in the Complaint lack factual support required to state a claim for which relief may be granted. Thus, the District Court properly dismissed the Complaint, and the Fourth Circuit properly affirmed. Because this holding would remain unchanged, the Petition does not justify granting review.

B. Petitioner Raised Arguments for the First Time Before This Court That Should be Ignored.

This Court previously stated it does "not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). In other words, the Court will normally "refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986).

Notably here, Petitioner's appeal to the Fourth Circuit lacked any mention of the Fourteenth Amendment, much less a deprivation of the Petitioner's due process rights. In fact, the Fourth Circuit succinctly outlined Petitioner's arguments on appeal, and no argument even hinted that dismissing the extortion and harassment counts deprived Petitioner of his due process protections. Pet. App. 1-8. As a result, this argument constitutes an issue raised for the first instance before this Court. Thus, on this point alone, the Petition should be denied.

CONCLUSION

For the reasons stated herein, the Court should deny the Petition for Writ of Certiorari, and grant all other relief the Court deems just and proper.

Respectfully submitted,

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