No. 24-_____

In the Supreme Court of the United States

BRENT ELECTRIC COMPANY, INC.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 584,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October 31, 2024

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QUESTION PRESENTED

Brent Electric Company, Inc. ("Brent Electric") was bound by a collective bargaining agreement with the International Brotherhood of Electrical Workers Local Union No. 584 (the "Union") effective from June 1, 2018 through May 31, 2021 (the "2018 CBA"). The 2018 CBA contained an interest arbitration provision, Section 1.02(d), authorizing the Council on Industrial Relations (the "CIR") to adjudicate "[u]nresolved issues or disputes arising out of the failure to negotiate a renewal or modification of" the agreement. App.197a. The CIR issued an award dated May 19, 2021, requiring Brent Electric to sign a new collective bargaining agreement with the Union (the "2021 CBA") which was drafted by the CIR. App.103a. However, over the objection of Brent Electric, the 2021 CBA contained numerous provisions which were nonmandatory subjects of bargaining under the National Labor Relations Act ("NLRA").

From these circumstances and the proceedings below the following question arises, on which the circuit courts of appeals are squarely divided:

Whether a collective bargaining agreement awarded through interest arbitration is enforceable as to nonmandatory subjects of bargaining contained therein.

PARTIES TO THE PROCEEDINGS

Petitioner and
Plaintiff Counter Defendant-Appellant below

Brent Electric Company, Inc.

Respondent and
Defendant Counter Plaintiff-Appellee below

International Brotherhood of Electrical Workers Local Union No. 584

CORPORATE DISCLOSURE STATEMENT

Brent Electric Company, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals, Tenth Circuit

No. 23-5108

Published as 110 F.4th 1196 (10th Cir. 2024)

Brent Electric Company, Inc., *Plaintiff Counter Defendant-Appellant v.* International Brotherhood of Electrical Workers Local Union No. 584, *Defendant Counter Plaintiff-Appellee*

Opinion and Judgment: Aug. 6, 2024

U.S. District Court, N.D. Oklahoma

No. 4:21-cv-00246-CRK-CDL

Brent Electric Co., Inc., *Plaintiff/Counter-Defendant, v.* International Brotherhood of Electrical Workers Local Union No. 584, *Defendant/Counter-Plaintiff.*

Final Opinion and Order: Sept. 6, 2023

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The Opinion of the United States Court of Appeals for the 10th Circuit, dated August 6, 2024, is published at 110 F.4th 1196, and reproduced in the appendix at App.1a. The Opinion and Order of the Northern District of Oklahoma, dated September 6, 2023, is reproduced at App.58a. The Opinion and Order of the Northern District of Oklahoma, dated November 16, 2022 is reproduced at App.87a.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 6, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 10

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> [. . .]
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a

> mutual, final, and definite award upon the subject matter submitted was not made.

29 U.S.C. § 158

> (d) Obligation to bargain collectively
>
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

STATEMENT OF THE CASE

This petition presents an important question concerning the categories of contract provisions an arbitrator may lawfully include in a collective bargaining agreement awarded through interest arbitration. The question was raised and briefed in the courts below. At least six circuit courts of appeals have ruled that in their jurisdictions, an arbitrator exceeds its power by including nonmandatory subjects of bargaining in a new contract award, even pursuant to a broadly worded interest arbitration provision in the pre-existing contract. This rule is grounded in the statutory right, as explicated by this Court, to reject nonmandatory subjects in collective bargaining.

However, the Tenth Circuit in this case consciously departed from the six other circuits and reached the opposite conclusion that there is no limitation on the power of an arbitrator to impose permissive subjects of bargaining. The resulting circuit split makes this important question of national labor policy ripe for review by the Court.

A. Statutory Background

1. The Duty to Collectively Bargain Over Mandatory Subjects and the Right to Reject Nonmandatory Subjects of Bargaining Under 29 U.S.C. § 158(d)

The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, governs labor relations in the United States. Congress enacted the NLRA in 1935 with the purpose of preventing "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining" between employers and the representatives of their employees. *See* 29 U.S.C. § 151. In collective bargaining under the NRLA, three categories of bargaining subjects exist: mandatory, nonmandatory (or "permissive"), and illegal.[1] The bargaining obligation of employers and employee representatives under the NLRA is limited to mandatory subjects of bargaining only. *See* 29 U.S.C. § 158(a)(5), (b)(3), and (d). Section 8(d) of the NLRA provides in relevant part:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and

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[1] Illegal subjects of bargaining "are simply those proscribed by federal or, where appropriately applied, state law." *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

> the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]

29 U.S.C. § 158(d) (emphasis added).

The language of Section 8(d) was carefully crafted with a purpose of making only "a limited category of issues subject to compulsory bargaining." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring). "As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958) (referring to permissive subjects of bargaining); *see also First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981) ("Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment.'").

Accordingly, items that do not fall within the ambit of "wages, hours, and other terms and conditions of employment" are merely permissive subjects "over which the parties have no obligation to bargain[.]" *Nat'l Treasury Employees Union v. FLRA*, 399 F.3d 334, 338 (D.C. Cir. 2005). Indeed, this Court has long held that it is "unlawful to insist upon" nonmandatory subjects of bargaining. *Borg-Warner Corp.*, 356 U.S. at 349. The National Labor Relations Board ("NLRB"), the agency tasked by Congress with enforcement of the NLRA, has ruled consistently. *See, e.g.*, *Service Net, Inc.*, 340 N.L.R.B. 1245, 1253 (2003) ("By so insisting on . . . permissive subjects of bargaining, Respondent has bargained in bad faith in violation of the Act.").

Moreover, "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). This principle acknowledges "[t]he importance of preserving parties' freedom to exclude nonmandatory subjects from labor agreements[.]" *NLRB v. Sheet Metal Workers Int'l Ass'n, Local Union No. 38*, 575 F.2d 394, 399 (2d Cir. 1978) (citing *Allied Chemical*, 404 U.S. at 187); *see also Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1476 (5th Cir. 1993) ("preserving parties' freedom to exclude nonmandatory subjects from labor agreements was an important goal of national labor policy") (citing *Local Union No. 38*, 575 F.2d at 399). Thus, under Section 8(d) of the NLRA, parties to collective bargaining have a well-defined "right to insist on excluding nonmandatory subjects from the collective bargaining agreement." 575 F.2d at 399 (emphasis added).

2. Statutory Grounds for Vacatur of an Arbitration Award Under 9 U.S.C. § 10 and the Public Policy Exception

Under 29 U.S.C. § 185, commonly referred to as Section 301 of the Labor Management Relations Act ("LMRA" or the "Taft-Hartley Act"), "[s]uits for violation of contracts between an employer and a labor organization representing employees" may be brought in a United States District Court with jurisdiction over the parties. "Section 301 of the LMRA" also "governs suits to enforce or vacate an arbitration award arising out of a collective bargaining agreement." *United Steel v. Wise Alloys, LLC*, 642 F.3d 1344, 1352 (11th Cir. 2011).

In reviewing labor arbitration awards in Section 301 cases, courts often refer to the Federal Arbitration Act ("FAA") for guidance. 9 U.S.C. § 1, *et seq*.; *United Paperworks Int'l Union v. Misco*, 484 U.S. 29, 41, n.9 (1987) ("the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"). Section 10 of the FAA sets forth the exclusive statutory grounds upon which a court may vacate an arbitration award under the FAA. *See Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) ("the text compels a reading of the [Section 10] categories as exclusive"). Section 10(a)(4) specifically provides for vacatur of an arbitration award "where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

Courts have also acknowledged grounds for vacatur beyond those specifically enumerated in the FAA. *See, e.g.*, *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997) (noting that a court may vacate an arbitration award "for reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, or for a handful of judicially created reasons," including violation of public policy); *Mercy Hosp., Inc. v. Mass. Nurses Ass'n*, 429 F.3d 338, 343 (1st Cir. 2005) ("a court may vacate an arbitral award that violates public policy"). This Court has recognized that courts may refuse "to enforce an arbitrators' award under a collective bargaining agreement because it is contrary to public policy" under the "general doctrine . . . that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (citing *W.R. Grace &*

Co. v. Rubber Workers, 461 U.S. 757, 766 (1983) and *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)). Arbitrators plainly "exceed their power" within the meaning of Section 10(a)(4) of the FAA, and are thus not entitled to deference, by issuing awards contrary to a well-defined public policy or repugnant to the law. *See, e.g.*, *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-71 (1964) (approving of deference by the NLRB to an arbitral award "provided . . . the results were not repugnant to the Act.").

B. Factual Background

Brent Electric Company, Inc. ("Brent Electric") is an electrical contractor performing work generally in Eastern Oklahoma. Brent Electric signed a letter of assent in 1996 authorizing the National Electrical Contractors Association ("NECA") to act as its representative for purposes of collective bargaining with the International Brotherhood of Electrical Workers Local Union No. 584 (the "Union"). App.3a. Thereafter, Brent Electric was bound to a series of multi-employer collective bargaining agreements negotiated and agreed to between NECA and the Union, including a collective bargaining agreement effective from June 1, 2018 through its expiration on May 31, 2021 ("2018 CBA"). App.3a. Section 1.02(d) of the 2018 CBA allowed for interest arbitration before the Council on Industrial Relations ("CIR") in the event of a failure to negotiate a renewal or modification of the 2018 CBA. Section 1.02(d) provides in relevant part as follows:

> Unresolved issues or disputes arising out of the failure to negotiate a renewal or modification of this agreement . . . may be submitted jointly or unilaterally to the [CIR] for

> adjudication. . . . The [CIR]'s decisions shall be final and binding.

App.197a-198a.

Brent Electric provided timely notice of its termination and revocation of the letter of assent and of NECA's right to negotiate on behalf of Brent Electric prior to the expiration of the 2018 CBA. App.5a. In February of 2021, counsel for Brent Electric sent a letter to the Union indicating Brent Electric's desire to promptly reach a successor collective bargaining agreement with the Union based on direct negotiations between Brent Electric and the Union. App.5a. Brent Electric specifically indicated certain articles and sections from the expiring 2018 CBA which were permissive subjects of bargaining that the Union could not require Brent Electric to agree to or accept under federal law. App.5a. On April 9, 2021, counsel for the Union advised Brent Electric of the Union's intent to submit unresolved issues, including permissive subjects of bargaining, to the CIR for adjudication pursuant to Section 1.02(d) of the 2018 CBA. App.6a.

On April 30, 2021, Brent Electric sent a letter to the CIR indicating that it specifically objected to the Union's unilateral submission of the matter to the CIR. App.6a, 62a-63a. Along with the letter, Brent Electric also submitted a brief to the CIR with extensive arguments and legal authority supporting Brent Electric's objection to the inclusion of permissive subjects of bargaining in a successor collective bargaining agreement. App.63a. Despite Brent Electric's objections, the CIR included with its preliminary decision dated May 19, 2021 a collective bargaining agreement containing permissive subjects of bargaining. App.6a. Brent Electric raised to the CIR numerous errors in

its preliminary decision. On June 28, 2021, Brent Electric received a final decision from the CIR labeled as Decision No. 8735 and backdated to May 19, 2021 ("CIR Decision"), along with a corresponding collective bargaining agreement with an effective period of June 1, 2021 through May 31, 2024 ("2021 CBA"). App.63a, 102a, 106a. Over Brent Electric's objection, the 2021 CBA imposed by the CIR Decision also contained numerous permissive subjects of bargaining, including the requirement to contribute to certain industry funds and a mandate that Brent Electric become a signatory to a separate Memorandum of Understanding between NECA (who no longer had authority to bargain for Brent Electric), the Union, and Brent Electric. App. 132a-133a, 160a-161a, 163a-167a, 190a.

C. Procedural Background

Brent Electric commenced the underlying action in the United States District Court for the Northern District of Oklahoma ("District Court") on June 8, 2021. Brent Electric's amended complaint asked the District Court to vacate the CIR Final Decision or, in the alternative, to modify the same to eliminate permissive subjects of bargaining from the 2021 CBA. The Union counterclaimed for enforcement of the CIR Final Decision and sought dismissal of Brent Electric's claim by separate motion.

The District Court granted the Union's motion to dismiss by its Opinion and Order dated November 16, 2022. App.87a. The District Court held that "[t]he parties chose arbitration to resolve any dispute over the next CBA's terms including the dispute over the inclusion of permissive provisions." App.99a. The District Court acknowledged that a second-generation interest arbitration clause, a permissive subject of

bargaining, would be unenforceable, but reasoned that the finding of other courts that "second-generation interest arbitration clauses violate public policy does not undermine other permissive clauses" imposed by an interest arbitration award. App.98a. The District Court was "unpersuaded" by decisions of the Second Circuit, Fifth Circuit, and Sixth Circuit, which the District Court admitted "held that all permissive clauses imposed by interest arbitration violate public policy." App.99a.

Both parties subsequently moved for summary judgment on the Union's counterclaim. The District Court granted summary judgment in favor of the Union by its September 6, 2023 Opinion and Order. App.58a. Relying again on the language of Section 1.02(d) of the 2018 CBA, the District Court found that "the Union and Brent Electric explicitly agreed to submit to arbitration" permissive subjects of bargaining and that the inclusion of permissive subjects of bargaining in the CIR's award was not contrary to public policy. App.65a, 77a-82a.

On appeal, the Tenth Circuit affirmed both District Court rulings. App.57a. Brent Electric contended that the language of Section 1.02(d) contained no "clear and unmistakable waiver" of its statutory right under Section 8(d) of the NLRA to reject permissive subjects of bargaining. However, the Tenth Circuit declined to apply the "clear and unmistakable waiver" standard and instead applied a presumption of arbitrability to find that "Section 1.02(d) unambiguously covers both permissive and mandatory subjects of bargaining" and thus constituted an agreement by the parties to submit permissive subjects of bargaining to the CIR. App.32a.

Brent Electric also informed the Tenth Circuit, as it did the District Court, of decisions of numerous circuit courts of appeals and other courts which have unambiguously held that arbitrators may not impose permissive subjects of bargaining through interest arbitration. However, the Tenth Circuit declined to join what it perceived to be "a minority of circuits that have held that imposing permissive subjects of bargaining in arbitration violates public policy." App.47a. The Tenth Circuit conceded that the Second, Fifth, and Sixth Circuits had previously ruled consistently with Brent Electric's position that an arbitrator may not include permissive subjects of bargaining in an awarded contract. App.51a. Thus, the Tenth Circuit acknowledged that Brent Electric's "argument may be colorable." App.56a. However, the Tenth Circuit ultimately interpreted the Second Circuit as having since "clarified" its position in a way not contradictory to the Tenth Circuit's holding, and further suggested that "the Fifth and Sixth Circuit decisions . . . rest on dubious foundations" and could thus be ignored. App.56a. The Tenth Circuit attempted to distinguish other cases from various other circuit courts and ultimately concluded that an arbitrator's imposition of permissive subjects of bargaining does not "run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interest[.]" App.48a-49a, 54a-55a.

REASONS FOR GRANTING THE PETITION

It is well-settled that under Section 8(d) of the NLRA, "each party is free to bargain or not to bargain, and to agree or not to agree" regarding permissive subjects of bargaining. *Borg-Warner Corp.*, 356 U.S. at 349. In Section 8(d), "Congress has limited the mandate or duty to bargain to" mandatory subjects of bargaining only. *First Nat'l Maintenance Corp.*, 452 U.S. at 674. The right to exclude permissive subjects of bargaining is fundamental to national labor policy, as evidenced by this Court's holding more than sixty years ago that it is unlawful to insist on a permissive subject of bargaining. 356 U.S. at 349. This remains true even if the parties previously agreed to the permissive subject at issue. *Allied Chemical*, 404 U.S. at 187.

The Second Circuit was the first circuit court to hold that, in light of this established and clear policy, the imposition of permissive subjects of bargaining through interest arbitration "deprives the parties of their right to insist on excluding nonmandatory subjects from the collective bargaining agreement." *Local Union No. 38*, 575 F.2d at 399. An interest arbitration provision is therefore void as applied to permissive subjects of bargaining, and an arbitrator has no power to impose permissive subjects in a successor agreement. *Id.* at 398. As demonstrated below, at least five other circuit courts of appeals with occasion to consider the question have reached the same conclusion.

The Tenth Circuit declined to join the other circuit courts, thus creating a circuit split resulting in uncer-

tainty as to the effect of interest arbitration provisions to which employers and unions across the country are bound. The Tenth Circuit's Opinion depended largely on its attempts and ability to distinguish the holdings of other circuits based on the specific permissive subjects of bargaining at issue in each case. Though the Tenth Circuit conceded some circuit decisions to be directly contrary to its own holding, it erred in its conclusion that the rule against imposing permissive subjects of bargaining and the right to exclude permissive subjects of bargaining under Section 8(d) lacked the requisite support of positive law.

As a result of this error, the Tenth Circuit also erred in finding that Section 1.02(d) of the 2018 CBA constituted an agreement between Brent Electric and the Union to submit permissive subjects of bargaining to the CIR. The Tenth Circuit's holding ignores the fact that nearly all interest arbitration provisions negotiated between multi-employer organizations and unions contain broad language substantially the same as Section 1.02(d) of the 2018 CBA. However, none of the other circuits involved in the present circuit split have found that such language can be read to include permissive subjects of bargaining or constitute a "clear and unmistakable" waiver of a party's Section 8(d) right.

The implications of the Tenth Circuit's decision reach far beyond the parties to the underlying case, as employers and unions across every jurisdiction are bound by the same or similar interest arbitration provisions.[2] The Tenth Circuit's decision creates a

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[2] *See, e.g.*, *Joint Brief of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers, Amici Curiae, in Support of Appellee International*

division among the circuits which only this Court can resolve and which warrants immediate review.

I. The Courts of Appeals Are Squarely Divided on the Question Presented

The circuit split over the question presented exists between the Tenth Circuit, answering the question in the affirmative, and the Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, answering the question in the negative.

A. The Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits Hold That Arbitrators Cannot Impose Nonmandatory Subjects of Bargaining Through Interest Arbitration

At least six circuit courts of appeals—the Second, Fifth, Sixth, Seventh, Eighth, and Ninth—have expressly held that permissive subjects of bargaining in an interest arbitration award are unenforceable.

1. Second Circuit

The Second Circuit so held in *NLRB v. Sheet Metal Workers Int'l Ass'n, Local Union No. 38*, 575 F.2d 394 (2nd Cir. 1978). In *Local Union No. 38*, the employer and union were subject to a collective bargaining agreement which contained an interest arbitration provision for the resolution of "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of" the agreement. *Id.* at

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Brotherhood of Electrical Workers Local Union 584 at 1, No. 23-5108 (10th Cir. Dec. 30, 2023) (admitting that collective bargaining agreements negotiated by NECA "throughout the United States" contain provisions "virtually identical to the interest arbitration provision at issue in this case.").

396. This interest arbitration provision is substantially similar to the one at issue in this case and is typical of those between employers and unions across the country. In negotiations for a successor agreement, the employer in *Local Union No. 38* sought elimination of several permissive subjects of bargaining, including provisions requiring employer contributions to two industry promotion funds and an interest arbitration provision. *Id.* at 397. However, the union insisted on the inclusion of the permissive subjects of bargaining and ultimately submitted the controversy to the National Joint Adjustment Board (the "NJAB"). *Id.* The NJAB's interest arbitration award directed the employer "to execute a contract including the industry fund and interest arbitration provisions." *Id.*

The NLRB found that the union unlawfully insisted on permissive subjects of bargaining and sought enforcement of its order in the Second Circuit Court of Appeals. *Id.* at 396. The union argued that the breakdown in negotiations did not occur at the point of its insistence on permissive subjects of bargaining, but at the later point of the employer's refusal to accept the NJAB's decision. *Id.* at 398. However, the court found it unnecessary to address the question, "because we hold that an interest arbitration provision of a collective bargaining agreement is void and contrary to public policy, insofar as it applies to nonmandatory subjects." *Id.* at 398. In support of its conclusion, the Second Circuit reiterated that "[i]t is an important element of national labor policy that a party need not bargain, and need not agree, concerning nonmandatory issues." *Id.* at 398-99 (relying on this Court's distinction between mandatory and permissive subjects under Section 8(d) of the NLRA in *Borg-*

Warner Corp., 356 U.S. at 349). The Second Circuit found that "[t]he importance of preserving parties' freedom to exclude nonmandatory subjects from labor agreements" is evident in this Court's "'rule that 'by once bargaining and agreeing on a permissive subject, the parties . . . do not make the subject a mandatory topic of future bargaining.'" 575 F.2d at 399 (quoting *Allied Chemical*, 404 U.S. at 187). The Second Circuit thus fairly concluded, from this Court's explication of the policy of Section 8(d), that "as applied to nonmandatory subjects, an interest arbitration provision is contrary to national labor policy because it deprives the parties of their right to insist on excluding nonmandatory subjects from the collective bargaining agreement." *Id.* In doing so, the Second Circuit consciously went beyond the holding of an earlier Fifth Circuit decision, *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161 (1976), which only found one permissive subject of bargaining invalid—a second-generation interest arbitration clause—and "did not reach the question of the validity of interest arbitration clauses as applied to nonmandatory subjects in general." 575 F.2d at 399.

2. Fifth Circuit

Some years later, the Fifth Circuit directly addressed the question of "whether nonmandatory provisions can be imposed after a party invokes interest arbitration" in *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1476 (5th Cir. 1993), *cert. denied*, 510 U.S. 1117 (1994). In *E.F. Etie*, as in Brent Electric's case, the employer was subject to a collective bargaining agreement with the union which was bargained on its behalf by a multi-

employer organization, like NECA. *Id.* at 1468. The existing collective bargaining agreement contained an NJAB interest arbitration provision similar to that in *Local Union No. 38*. *Id*. As Brent Electric did in the present case, the employer in *E.F. Etie* terminated its relationship with the multi-employer organization and subsequently bargained directly with the union. *Id.* at 1469. Over the employer's objection, the union submitted contractual disputes to the NJAB, and the NJAB issued a decision ordering the employer to execute an agreement including permissive subjects of bargaining—specifically, a provision requiring contributions to an industry promotion fund, and a "union signatory" subcontracting clause. *Id.* at 1476-78. A second-generation interest arbitration provision was not included in the NJAB's arbitration award and thus was not at issue in *E.F. Etie*. *Id.* at 1469.

The Fifth Circuit in *E.F. Etie* considered the Second Circuit's decision in *Local Union No. 38*, including its reliance on this Court's precedent, and observed that the Eighth and Ninth Circuits likewise agreed that "an interest arbitration provision [is] void as contrary to public policy insofar as it applied to nonmandatory subjects." *Id.* at 1476 (citing *Sheet Metal Workers Int'l Ass'n Local 14 v. Aldrich Air Conditioning*, 717 F.2d 456 (8th Cir. 1983) and *American Metal Prods., Inc. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 104*, 794 F.2d 1452 (9th Cir. 1986)). The Fifth Circuit found that the rationale of these circuit courts was consistent with its "own more limited precedent" in *Columbus Printing Pressmen*, even though *Columbus Printing Pressmen* did not address the entire category of permissive subjects of bargaining. 1. F.3d at 1476. The Fifth Circuit explicitly

followed the Second, Eighth, and Ninth Circuits and held "that nonmandatory provisions in this NJAB award are not enforceable because [the union] did not have the power to bring them before the Board by use of the interest arbitration clause." *Id.*

3. Sixth Circuit

The Sixth Circuit first addressed the question of an arbitrator's authority to impose permissive subjects of bargaining in *Local 58, Int'l Bhd. of Elec. Workers v. Se. Michigan Chapter, Nat'l Elec. Contractors Ass'n, Inc.*, 43 F.3d 1026 (6th Cir. 1995). In negotiations for a successor collective bargaining agreement, NECA and the union were unable to reach an agreement on the establishment of a "material handlers" classification, by which NECA sought to reduce the employers' costs for unskilled labor involved in moving materials and tools on job sites. *Id.* at 1029. The existing collective bargaining agreement contained an interest arbitration provision negotiated by NECA and the union similar to that which Brent Electric was bound by in the present case:

> Art. I, Sec. 2(D) provides: "Unresolved issues in negotiations that remain on the 20th of the month preceding the next regular meeting of the Council on Industrial Relations, may be submitted jointly or unilaterally by the parties to this Agreement to the Council for adjudication prior to the anniversary date of the Agreement."

Id. at 1029.[3] Accordingly, the parties submitted the dispute to the CIR, which issued a decision ordering

[3] Section 1.02(d) of the 2018 CBA states in relevant part:

the parties to execute a "material handlers agreement[.]" *Id.* at 1030. However, the material handlers agreement included an interest arbitration provision. *Id.*

Contrary to its position in Brent Electric's case, the IBEW in *Local 58* argued that the CIR's decision "improperly included two nonmandatory subjects of bargaining, interest arbitration . . . and the scope of the unit." While the Sixth Circuit disagreed with the union that the materials handler agreement changed the scope of the unit, the court found that the interest arbitration provision in the materials handler agreement was void because it was a permissive subject of bargaining. *Id.* The Sixth Circuit held that "the law is clear that an arbitrator may not use an interest arbitration clause as a means of self-perpetuation" because "interest arbitration as to nonmandatory subjects is 'void as contrary to public policy.'" *Id.* (citing *Local Union No. 38*, 575 F.2d at 394).

The Sixth Circuit maintained this position in *Sheet Metal Workers, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418 (6th Cir. 2001). The employer in that case never formally joined the multi-employer organization which had negotiated a 1994-1997 collective bargaining agreement with the union but did sign a letter of assent. *Id.* at 421. The employer

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> Unresolved issues or disputes arising out of the failure to negotiate a renewal or modification of this agreement that remain on the 20th of the month preceding the next regular meeting of the Council on Industrial Relations for the Electrical Contracting Industry (CIR) may be submitted jointly or unilaterally to the Council for adjudication.

App.197a-198a.

also voluntarily complied with the terms of the 1994-1997 collective bargaining agreement, which included an interest arbitration provision. *Id.* at 420-22. The union ultimately invoked the interest arbitration provision against the employer in 1998, and the NJAB directed the employer to execute a 1997-2000 collective bargaining agreement "that incorporates the same terms and conditions" as the 1997-2000 agreement negotiated by the multi-employer organization and the union. *Id.* at 424.

The Sixth Circuit found that the NJAB's award "was not subject to judicial reassessment, at least regarding the NJAB's importation of the substantive covenants and conditions governing the labor-management relationship contained" in the 1997-2000 master collective bargaining agreement. *Id.* at 430. However, the court, relying on its own *Local 58* precedent and this Court's decision in *Borg-Warner Corp*, 356 U.S. at 342, found that "NJAB did not have the power" to incorporate permissive subjects of bargaining. 259 F.3d at 430 (emphasis in original). The court reiterated that "[t]he law of the Sixth Circuit forbids including, in any arbitrator-fashioned labor contract legitimated by a contractual 'interest arbitration' clause, any contractual term which does not address a legally mandatory subject of collective bargaining[.]" *Id.* (emphasis in original). The Sixth Circuit further held that a permissive subject of bargaining in an interest arbitration award will be void even if a party fails to object to inclusion of the permissive subject:

> Thus, even in the absence of a specific objection, any arbitrator-imposed covenant or condition which does not directly address a mandatory subject of collective bargaining

> must be avoided as against public policy regarding any party which did not explicitly assent to it.

Id. at 430, n.13. This has remained the law in the Sixth Circuit for nearly thirty years.

4. *Seventh Circuit*. In *Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547 (7th Cir. 1989), the Seventh Circuit held that an arbitrator could not include a second-generation interest arbitration clause in a contract award because it was a permissive subject of bargaining. In *Baylor*, the interest arbitration provision invoked by the union related to "any controversy or dispute arising out of the failure of the parties to negotiate a renewal" of the existing agreement. *Id.* at 551. While the court found "no 'well defined and domin ant . . . explicit public policy' that prevents employers and unions from voluntarily agreeing to include an interest arbitration clause[,]" the court concluded that the district court properly found that the "[a]rbitrator did not . . . have authority to include an interest arbitration clause in the new contract." *Id.* at 555-56 (citations omitted). "The [a]rbitrator could not impose an interest arbitration clause, a nonmandatory bargaining item, on the parties against their will." *Id.* at 556 (emphasis added).

5. Eighth Circuit

The Eighth Circuit has followed the same rule for over forty years. In *Sheet Metal Workers Int'l Ass'n Local 14 v. Aldrich Air Conditioning*, 717 F.2d 456 (8th Cir. 1983), the Eighth Circuit affirmed a district court ruling that the inclusion of a second-generation interest arbitration clause in an interest arbitration

award "was repugnant to national labor policy." *Id.* at 456-57. The employer and union were parties to a collective bargaining agreement with an interest arbitration provision providing that "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement" would be submitted to the NJAB. *Id.* at 457. The particular dispute in that case focused on the inclusion of a similar interest arbitration provision in the successor collective bargaining agreement. *Id.* After the union invoked the interest arbitration clause in the existing agreement, the NJAB awarded a contract which also contained an interest arbitration clause. *Id.*

On appeal, the Eighth Circuit first recognized that "interest arbitration clauses generally are enforceable" once included in a collective bargaining agreement. 717 F.2d at 458. The court then observed that several circuit courts had found second-generation interest arbitration clauses unenforceable, and that the Second Circuit specifically "adopted the position that interest arbitration clauses are enforceable only insofar as the disputed contract terms are mandatory subjects of bargaining." *Id.* at 458-59 (citing *Local Union No. 38*, 575 F.2d at 394) (emphasis added). The Eighth Circuit was "persuaded by the reasoning" that "as applied to nonmandatory subjects, an interest arbitration clause is contrary to national labor policy because it deprives the parties of their right to exclude nonmandatory subjects from bargaining." *Id.* at 459 (emphasis added).

6. Ninth Circuit

In *Hotel & Restaurant Employees v. Williams*, 752 F.2d 1476 (9th Cir. 1985), the employer appealed the

district court's order compelling arbitration pursuant to an interest arbitration provision in an expired collective bargaining agreement. *Id.* at 1477. The Ninth Circuit rejected the employer's argument that an interest arbitration clause does not survive the expiration of the collective bargaining agreement. *Id.* at 1478. The court also rejected the employer's argument that to give effect to the interest arbitration clause at issue would "bind them to successive contracts containing the same provision." *Id.* at 1479. As the court observed, the interest arbitration clause in that case applied only to the subjects of wages and fringe benefits. *Id.* In accord with the Eighth Circuit, the Ninth Circuit held that "[e]ven if [the interest arbitration provision] provided otherwise, the provision would be invalid because arbitration can only be required for mandatory subjects of bargaining, and an interest arbitration clause is a non-mandatory subject." *Id.* (citing *Aldrich Air Conditioning*, 717 F.2d at 458-59) (emphasis added). Thus, the Ninth Circuit reasoned from the principle that interest arbitration is not enforceable as to permissive subjects of bargaining, to the conclusion that a second-generation interest arbitration clause would be unenforceable because it is a permissive subject of bargaining. *Id.*

The Ninth Circuit later relied on the above-quoted language of its *Williams* decision in *American Metal Prods, Inc. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 104*, 794 F.2d 1452 (9th Cir. 1986), holding that an interest arbitration award by the NJAB was void as to the permissive subject of bargaining contained therein—a second-generation interest arbitration provision. 794 F.2d at 1456-57. The court rejected the union's argument that *Williams* was merely dicta

and that it was contrary to an earlier decision of the Ninth Circuit. *Id.* at 1457. Like the Sixth Circuit in *Architectural Metal Works*, the Ninth Circuit found unpersuasive the union's argument that the employer's failure to object to the inclusion of the provision in the NJAB award precluded its objection on appeal, as inclusion of the provision "in a successor agreement requires the consent of both parties, not merely the absence of objection." *Id.*

B. The Tenth Circuit Holds That Arbitrators Can Impose Nonmandatory Subjects of Bargaining Through Interest Arbitration

Directly contradicting the Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuit holdings described above, the Tenth Circuit in this case held that "[i]mposing permissive subjects of bargaining in interest arbitration does not violate public policy." App.47a (emphasis added). Considering only the Second, Fifth and Sixth Circuits as potentially contrary to its decision, the court found that "only a minority of circuits. . . have held that imposing permissive subjects of bargaining in arbitration violates public policy." App.47a. The Tenth Circuit then dismissed the Second Circuit's decision in *Local Union No. 38* as inapplicable, and further opined that the Fifth and Sixth Circuit precedents "rest on dubious foundations" and, along with the *Local Union No. 38*, "lack the rigorous inquiry into positive law" required by this Court in *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 63 (2000). App.52a, 55a-56a. While it acknowledged that many circuits reject the inclusion of one type of permissive subject of bargaining, a second-generation interest arbitration provision, the Tenth Circuit declined to find that an arbitrator could not impose

such a provision in the Tenth Circuit. App.49a-50a. Thus, the Tenth Circuit's holding placed no limits on an arbitrator's power to impose permissive subjects of bargaining through an interest arbitration award, while at least six other circuits hold that an arbitrator has no such power as a matter of well-defined public policy. Had Brent Electric's appeal been considered by the Second, Fifth, Sixth, Seventh, Eighth, or Ninth Circuit, all permissive subjects of bargaining imposed by the CIR in the 2021 CBA would have been declared void.

II. The Tenth Circuit's Holding Is In Error

A. The Tenth Circuit Misinterpreted Decisions of the Sixth, Eighth, and Ninth Circuits as Applying Only to Second-Generation Interest Arbitration Provisions

The Tenth Circuit incorrectly concluded that several circuit cases relied upon by Brent Electric were "inapposite" in such a way as to diminish the extent of the circuit split it has created. App.51a. The Tenth Circuit failed to follow the line of reasoning employed by the circuit courts in the cases it deemed "inapposite." For example, the Tenth Circuit found the Sixth Circuit's *Local 58* decision to be among those that only "condemn imposing second-generation interest-arbitration clauses specifically, and do not speak to the imposition of permissive subjects of bargaining in general." App.51a. However, the Sixth Circuit in *Local 58* plainly held that as a consequence of the rule that permissive subjects of bargaining in general cannot be imposed by an arbitrator, a second-generation interest arbitration clause could not be imposed:

> Moreover, interest arbitration as to nonmandatory subjects is "void as contrary to public policy." Consequently, the law is clear that an arbitrator may not use an interest arbitration clause as a means of self-perpetuation[.]

Local 58, 43 F.3d at 1032 (citation omitted) (emphasis added).

The Tenth Circuit likewise wrongly concluded that *Aldrich Air Conditioning* and *American Metal Products* "predominantly reflect the concern that self-perpetuating interest-arbitration clauses not be imposed in arbitration over a party's objection" and thus do not support the conclusion that permissive subjects of bargaining as a category cannot be imposed through interest arbitration. App.54a. As noted above, the Eighth Circuit in *Aldrich Air Conditioning* found that a second-generation interest arbitration provision was unlawfully imposed by an arbitrator on the basis of the Second Circuit's persuasive reasoning "that, as applied to nonmandatory subjects, an interest arbitration clause is contrary to national labor policy[.]" 717 F.2d at 459 (citing *Local Union No. 38*, 575 F.2d at 399). Likewise, the Ninth Circuit in *American Metal Products* rightly concluded that a second-generation interest arbitration clause was improperly imposed based on its *Williams* precedent that "arbitration can only be required for mandatory bargaining subjects, and an interest arbitration clause is a non-mandatory subject." 794 F.2d at 1457 (quoting *Williams*, 752 F.2d at 1479).

The Tenth Circuit's misunderstanding on this point permeates its Opinion, as is evident in its framing of Brent Electric's argument as a defective deduction:

> Brent seems to argue that because imposing a self-perpetuating interest-arbitration clause in arbitration violates public policy, and self-perpetuating interest-arbitration clauses are permissive subjects of bargaining, then the imposition of permissive subjects of bargaining violates public policy. This logical fallacy is easily dismissed.

App.51a. This is an incorrect statement of the position maintained by Brent Electric. Rather, Brent Electric's position is aligned with the Second Circuit's formulation of the widely-accepted rule, which it reiterated in 2002:

> An interest arbitration clause is void as contrary to public policy to the extent that it applies to nonmandatory subjects of bargaining, *i.e.*, subjects other than wages, hours and other terms and conditions of employment; this includes the insertion of a successor interest arbitration clause in a new agreement.

Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 288 F.3d 491, 505 (2d Cir. 2002) (emphasis added), *vacated on other grounds*, 538 U.S. 918 (2003), *adhered to*, 351 F.3d 43, 45 (2d Cir. 2003):

B. The Tenth Circuit's Reliance on *Coca-Cola Bottling Co.* to Distinguish *Local Union No. 38* is Misguided

The Tenth Circuit concluded that "the Second Circuit's caselaw does not help Brent" in light of a perceived limitation of the Second Circuit's *Local Union No. 38* holding in the subsequent case of *Coca-*

Cola Bottling Co. of New York v. Soft Drink & Brewery Workers Union, Loc. 812, Int'l Bhd. of Teamsters, 39 F.3d 408 (2d Cir. 1994). The Tenth Circuit found that although *Local Union No. 38* "ostensibly supports Brent's position, the Second Circuit has since clarified that *Local Union No. 38*'s rule" that an interest arbitration provision is void as to nonmandatory subjects of bargaining "applies only when there is no pre-existing contract." App.52a. It is readily apparent, however, that the Tenth Circuit failed to properly construe *Coca-Cola*, as an interest arbitration provision (for resolution of disputes over the formation of a new contract) can only exist as a provision of a pre-existing contract. The Tenth Circuit's misreading of *Coca-Cola* is also plainly demonstrated by the Second Circuit's later holding in *Mulvaney*, quoted above. *See* 288 F.3d at 505.

In *Coca-Cola*, the district court ordered the employer to participate in arbitration, pursuant to a general arbitration provision in the existing collective bargaining agreement, over the volume of product the employer was obligated to provide to its route-salesmen under an incentive compensation provision in the existing agreement. 39 F.3d at 409. The employer argued that because the amount of product to be delivered to route-salesmen was a permissive subject of bargaining, the issue was not arbitrable. *Id.* at 409-410. The Second Circuit correctly recognized the employer's misguided reliance on *Local Union No. 38* not for the proposition that an arbitrator cannot impose permissive subjects of bargaining in a new contract through interest arbitration, but for the mistaken proposition that an arbitrator cannot decide a dispute

over the meaning of a permissive subject of bargaining already agreed to in the existing contract:

> [*Local Union No. 38*] involved a clause making arbitrable disputes between the parties concerning formation of a new contract. As to such a clause (referred to as an 'interest arbitration provision[],' we said that it covered only disputes as to which bargaining was mandatory. We reasoned that an 'interest arbitration provision' would be void as contrary to public policy to the extent that it applied to nonmandatory bargaining subjects because a contrary ruling would impair the parties' freedom to exclude nonmandatory subjects from bargaining.
>
> That decision, however, did not place a similar limit on the arbitrability of disputes arising under an existing contract. . . . If the parties elect to include in their agreement a provision governing a matter not subject to mandatory bargaining and also adopt a broad arbitration clause, nothing in [*Local Union No. 38*], labor law, or the Arbitration Act precludes arbitration of a dispute concerning the meaning or application of that provision.

Coca-Cola, 39 F.3d at 410 (internal citations omitted).

Thus, the Second Circuit in *Coca-Cola* simply held that an arbitration provision could be invoked for determination of "the meaning or application" of an agreed provision in the existing contract. *Coca-Cola* did not limit the applicability of *Local Union No. 38*, but rather affirmed the central holding of *Local Union No. 38* that an interest arbitration provision cannot be

used by an arbitrator to impose permissive subjects of bargaining in a new contract. This is the same distinction drawn by the Sixth Circuit in *Local 58* between interest arbitration and "grievance arbitration":

> Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. Thus, the arbitrator [in interest arbitration] is not acting as a judicial officer, construing the terms of an existing agreement and applying them to a particular set of facts. Rather, he is acting as a legislator, fashioning new contractual obligations.

Local 58, 43 F.3d at 1030.

C. The Rule Against Imposing Permissive Subjects of Bargaining Through Interest Arbitration is Rooted in Explicit, Well-Defined, and Dominant Public Policy

The Tenth Circuit erred in holding that the imposition of permissive subjects of bargaining through interest arbitration did not "run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." App.48a, 55a (quoting *Eastern Associated Coal Corp.*, 531 U.S. at 63). The term "positive law" as used by this Court is synonymous with the phrase "the laws and legal precedents[.]" *See, e.g.*, *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (public policy must be "well defined and dominant" as "ascertained 'by reference to the laws and legal precedents and not

from general considerations of supposed public interests.'" (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))); *see also Misco*, 484 U.S. at 43. The fundamental public policy at issue here originates not from general considerations of public interest, but from the statutory language of Section 8(d) as interpreted by this Court in cases including *Borg-Warner Corp.* and *Allied Chemical*, establishing the importance of a party's right to refuse permissive subjects of bargaining in accordance with the congressional intent of the NLRA. In consideration of this positive law, at least six circuit courts of appeals have found that the imposition of permissive subjects of bargaining violates explicit, well-defined, and dominant public policy.

Legal precedent expressly forbidding the imposition of permissive subjects of bargaining through interest arbitration has now existed for nearly half a century. In the Tenth Circuit's view, this precedent "collapses under any real scrutiny" upon removing "any discussion of self-perpetuating interest arbitration provisions." App.55a. However, this is not the case, as demonstrated at length above. Rather, the holdings of all of the circuit court decisions presented herein, to the extent a second-generation interest arbitration provision was at issue, rest on the fact that the self-perpetuating interest arbitration provisions undisputably fall within the larger category of permissive subjects of bargaining, which cannot be imposed through interest arbitration. The Tenth Circuit's conclusion that "an arbitral award imposing permissive subjects of bargaining in a CBA" does not "run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law" is therefore

clearly mistaken and fails to appreciate the significant precedent to the contrary.

D. The Interest Arbitration Provision of the 2018 CBA Did Not Include Nonmandatory Subjects of Bargaining

Denying any public policy concern, the Tenth Circuit also found that Brent Electric had agreed to submit permissive subjects of bargaining to the CIR through the broad language of Section 1.02(d) of the 2018 CBA. App.32a. According to the Tenth Circuit, "[t]he key language of this clause is in the first sentence: 'Unresolved issues or disputes arising out of the failure to negotiate a renewal or modification of this agreement . . . . '" App.28a, 197a-198a. However, as Brent Electric argued below, this ignores the holding of this Court that a contractual waiver of a statutorily protected right must be "clear and unmistakable." *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (holding that the Court "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'" (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956))). To construe the general language of Section 1.02(d) of the 2018 CBA as a waiver of the "right to insist on excluding nonmandatory subjects of bargaining from the collective bargaining agreement" protected by Section 8(d) of the NLRA would be contrary to the Court's established rule that such waiver must be explicitly stated. *Local Union No. 38*, 575 F.2d at 399; *Metro. Edison*, 460 U.S. at 708.

Moreover, the Tenth Circuit's holding ignores that the language of the interest arbitration provision

here, Section 1.02(d), is substantially the same as the language considered by the other circuit courts, none of which found that permissive subjects of bargaining were within the scope of the interest arbitration language. *See, e.g.*, *Local 58*, 43 F.3d at 1029 ("Art. I, Sec. 2(D) provides: 'Unresolved issues in negotiations that remain on the 20th of the month preceding the next regular meeting of the Council on Industrial Relations, may be submitted jointly or unilaterally. . . .'"); *Local Union No. 38*, 575 F.2d at 396 (involving an interest arbitration provision which allowed submission to the NJAB "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement[.]"); *Aldrich Air Conditioning*, 717 F.2d at 457 (same); *Baylor*, 877 F.2d at 551 (same). The Tenth Circuit's conclusion that Brent Electric contractually agreed to submit permissive subjects of bargaining without a clear and unmistakable waiver of its statutorily protected right is again irreconcilable with the precedent of the other circuits discussed herein and of this Court.

III. The Question Presented Requires Immediate Review and Only This Court Can Resolve the Circuit Split

The Tenth Circuit directly acknowledged that its Opinion creates a split among the circuit courts of appeal by declining "Brent's invitation to join" the circuits which have answered the question presented in the negative. App.56a. Any subsequent rulings by circuit courts which have not already addressed the issue will only cause the present conflict and split to become even more deeply entrenched. As a result of the disagreement among the circuits as to an arbitrator's authority to impose permissive subjects of

bargaining, employers across the country will now find they have fewer or more rights under Section 8(d) of the NLRA than other employers in relation to their interest arbitration provisions depending on which circuit court has jurisdiction over the matter. The resulting uncertainty and instability is contrary to the purpose of Section 8(d) and the NLRA as a whole.

As NECA and the International Brotherhood of Electrical Workers ("IBEW") stated in their joint *amici curiae* brief to the Tenth Circuit, "[l]ocal chapters affiliated with NECA and local unions affiliated with the IBEW engage in collective bargaining and negotiate collective bargaining agreements throughout the United States. Almost all of those collective bargaining agreements contain interest arbitration provisions virtually identical to the interest arbitration provision at issue in this case."[4] Thus, at present, an arbitrator may impose permissive subjects of bargaining on an employer in the Tenth Circuit pursuant to a NECA-IBEW interest arbitration provision, but may not do so in the Sixth Circuit. This circuit split creates uncertainty and results in inconsistent outcomes based merely on where the employer or union happen to fall from a jurisdictional perspective.

NECA and the IBEW are not the only multi-employer organization and union which have negotiated and bound employers and local unions to interest arbitration provisions like the one at issue in this case. The question presented represents a pressing issue affecting labor relations across the United States and is one which the circuit courts of appeals are not likely to resolve among themselves. This case presents

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[4] *Joint Brief of NECA and IBEW*, *supra* note 2, at 1.

the Court with an ideal vehicle to resolve the circuit split and clarify that the power of an interest arbitrator is limited by the right of parties under Section 8(d) of the NLRA to refuse nonmandatory subjects of bargaining.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2024