No. 24-511

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

BRIEF IN OPPOSITION

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STATEMENT

Brent Electric Company, Inc. (Brent) and International Brotherhood of Electrical Workers Local Union No. 584 (Local 584 or Union) have a long-standing collective bargaining relationship. Pet. App. 3a. From 1996 until May 2021, Brent was covered by a series of agreements negotiated by the Eastern Oklahoma Chapter of the National Electrical Contractors Association (Contractors Association), acting as the representative of covered employers, and Local 584. *Ibid.* Before the expiration of the 2018-21 agreement, Brent notified the Contractors Association and Local 584 that the Company would henceforth represent itself in collective bargaining. *Id.* at 5a.

The collective bargaining agreements between Brent and Local 584 were negotiated pursuant to Section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(f). Pet. App. 3a. "[Section] 8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for workers hired by the signatory employer without the union's majority status first having been established in the manner provided for under § 9 of the Act." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983). The statutory duty to bargain imposed on employers and unions by the NLRA is "subject to the provisions of section [9(a)]," 29 U.S.C. §§ 158(a)(5) and 158(b)(3), and thus does not apply to the negotiation of Section 8(f) agreements.

In the interest of industrial peace, the National Labor Relations Board (NLRB or Board) "adopt[ed] a rule that constitutes a *limited* application of Section 8(a)(5)'s contract enforcement mechanisms by virtue of the strictly limited 9(a) representative status that [it] believe[s] a 8(f) signatory union necessarily possesses."

John Deklewa & Sons, 282 NLRB 1375, 1387 (1987) (emphasis in original), *enforced sub nom., International Ass'n of Bridge, Structural & Ornamental Workers, Local 3 v. NLRB* (3d Cir. 1988), *cert. denied,* 488 U.S. 889 (1988). "[T]he obligations [the Board] impose[s] on an 8(f) employer through [its] application of Section 8(a)(5) to 8(f) agreements are limited to prohibiting the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative." *Ibid.* "Beyond the operative term of the [8(f)] contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative . . . and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement." *Ibid.*

Because there is no statutory duty to engage in collective bargaining upon the expiration of an 8(f) agreement, it is not uncommon for such agreements to include contractual requirements for changing the terms of the agreements. Section 1.01 of the 2018-21 agreement negotiated on Brent's behalf by the Contractors Association provided that upon the agreement's expiration date of May 31, 2021, it "shall continue in effect from year to year thereafter, from June 1 through May 31 of each year, unless changed or terminated in the way later provided herein." Pet. App. 197a. Section 1.02, headed "Changes," described in detail the agreed-upon procedures for amending the agreement. *Id.* at 197a-198a.

Section 1.02 provided that "[e]ither party . . . desiring to change . . . th[e] Agreement must provide written notification at least 90 days prior to the expiration date" and that "the nature of the changes desired must be specified . . . no later than the first negotiating meeting." Pet. App. 197a, Sec. 1.02(a) and (b). In

the event that the parties cannot agree on changes to the agreement, Section 1.02 provided that "[u]nresolved issues or disputes arising out of the failure to negotiate a renewal or modification of th[e] agreement . . . may be submitted jointly or unilaterally to the Council [on Industrial Relations for the Electrical Contracting Industry (CIR)] for adjudication" and that "[t]he Council's decisions shall be final and binding." *Id.* at 197a–198a, Sec. 102(d).

"[I]n February 2021, Brent wrote to the Union, expressing its purported desire[] to reach a prompt successor Agreement with the Union." Pet. App. 5a (internal quotation marks omitted). "[I]n the letter, Brent listed twenty-one Articles/Sections from the expiring 2018 CBA that it asserted were permissive subjects of bargaining," and "Brent omitted th[ose] sections from its proposed agreement." *Id.* at 5a-6a (internal quotation marks omitted). After negotiations failed to resolve the differences between the parties in April, Local 584 made a "unilateral submission" to the CIR of the "unresolved issues that remain between the parties in accordance with the interest arbitration clause in Section 1.02(d) of the 2018 CBA." *Id.* at 6a (internal quotation marks omitted).

"In May 2021, before the 2018 CBA expired, the CIR issued its preliminary decision, which included a new CBA" that "[t]he CIR directed the parties 'to sign and implement immediately.'" Pet. App. 6a. "Brent wrote the CIR, objecting to the inclusion of what it asserted were permissive subjects of bargaining." *Ibid.* In issuing its final decision, the CIR explained that "[t]hose provisions have not been deleted," because "they are among the '[u]nresolved issues or disputes' that [the] company explicitly agreed to submit to arbitration." *Id.* at 7a. "The 2021 CBA [attached to the CIR's final

decision] contained a different interest arbitration provision than the 2018 CBA" in that "[t]he 2021 version required mutual agreement before any future interest arbitration could be submitted to the CIR." *Ibid.*

"In June 2021, Brent filed a complaint in federal district court seeking to vacate and set aside the CIR award," and "the Union counterclaimed to enforce the award." Pet. App. 8a. The district court dismissed Brent's amended complaint and "partially granted the Union's motion for summary judgment on its counterclaim for enforcement [by] confirm[ing] the CIR award." *Ibid.*

Brent "appeal[ed] the district court's enforcement of an arbitration award that imposed on Brent a renewed three-year collective-bargaining agreement . . . object[ing] that [the agreement] contain[ed] permissive subjects of bargaining, arguing that it did not clearly and unmistakably waive its purported statutory right to refuse the imposition of permissive subjects, and that such an award violates public policy." Pet. App. 2a. The court of appeals rejected those arguments, finding that "by agreeing to the interest-arbitration clause in the 2018 CBA, Brent consented to submit both permissive and mandatory subjects of bargaining to arbitration, if the parties could not agree on the terms of a new CBA." *Ibid.*

The arbitration award that Brent seeks to vacate imposed a collective bargaining agreement with an expiration date of May 31, 2024. Pet. App. 106a. On that date, Brent gave Local 584 a 10-day notice of termination pursuant to Section 1.02(d) (Pet. App. 99a n. 7), and the agreement thus terminated on June 10, 2024. Brent and Local 584 undertook negotiation of a successor agreement. Because Local 584 was certified as the exclusive representative of

Brent's employees in September 2021, those negotiations are *not* being conducted pursuant to NLRA Section 8(f). *Id*. at 3a n. 2. On June 19, 2024, Local 584 commenced a strike against Brent in support of its contract demands. Brent responded by hiring replacement workers. Some Brent employees then filed a petition with the NLRB to decertify Local 584. *Brent Electric Co., Inc.*, NLRB Case No. 14-RD-353895. The petition is being held in abeyance pending resolution of Local 584's charges that Brent had failed to bargain in good faith. *Brent Electric Co., Inc.*, NLRB Case No. 14-CA-344617.

ARGUMENT

I. THIS CASE IS MOOT.

The only dispute presented by this case is whether the CIR's arbitration award imposing on Brent and Local 584 the 2021-24 CBA should be vacated or enforced. That is no longer a live dispute, because the 2021 agreement has expired, and the parties had complied with its terms while it was in effect. *See Bus Employees v. Wisconsin Emp't Relations Board*, 340 U.S. 416, 418 (1951) (finding the case moot because the one-year collective bargaining agreement awarded in interest arbitration had lapsed).

The court of appeals recognized that the "appeal [came] too late to affect Brent's compliance with the 2021 CBA," but concluded that "Brent's request for relief, though framed in declaratory or injunctive terms, still has real-world consequences" that keep the case from being moot. Pet. App. 15a and 17a, respectively. In this regard, the circuit court asserted that "Brent may still try to recover reimbursements or monetary damages stemming from its compliance if we rule in its favor and invalidate the CIR award." *Id*. at 15a. In

particular, the court speculated that, "[i]f we invalidate the 2021 CBA, Brent could claim reimbursement of a $750 premium for a surety bond, plus interest" and "could also seek reimbursement of around $5,156.48 in contributions it has made to the Labor-Management Cooperation Committee (LMCC) and National Labor Management Cooperation Committee (NLMCC) funds 'pursuant to unlawfully imposed permissive provisions' in the 2021 CBA. Appellant Suppl. Br. at 5." *Ibid.*

The court of appeals did not assert that Brent had actually made either of these claims and did not even attempt to describe any possible legal bases for such claims. Pet. App. 15a. The court concluded that "[n]one of the[] uncertainties—regarding the forum before which any remand proceedings may occur, the likelihood of success of such proceedings, or what the most appropriate remedy would be—affect our jurisdiction," because "[i]f we decide in Brent's favor, then Brent may seek such relief and initiate those proceedings[, and] without such a decision, Brent may not." *Id.* at 16a. "This [wa]s enough of a real-world consequence to persuade [the court] that Brent's appeal [wa]s not moot." *Id.* at 16a.

Leaving aside the wholly undefined nature of the claims that the court of appeals hypothesized Brent "may" bring if it ruled in the Company's favor, the court offered no explanation of why such a ruling would be a precondition to the Company advancing such claims. Presumably, Brent may now be unable to establish that it had incurred expenses "'pursuant to unlawfully imposed permissive provisions' in the 2021 CBA. Appellant Suppl. Br. at 5," Pet. App. 15a, because of the estoppel effect of the district court's judgment that the provisions had been lawfully im-

posed.[1] But, "[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990). *See Board of License Comm'rs v. Pastore*, 469 U.S. 238, 239-40 (1985) (rejecting notion that conceivable consequences of a merits decision avoid mootness, as "speculative contingencies afford no basis for . . . passing on the substantive issues . . . in the absence of evidence that this is a prospect of immediacy and reality")(citations omitted). The possible effect of a reversal on Brent's ability to advance undefined claims that the Company has never actually made is not enough to keep this case alive. That by itself is sufficient grounds for denying the petition.

II. THE DECISION BELOW CORRECTLY HELD THAT THE ARBITRATION AWARD IS NOT CONTRARY TO PUBLIC POLICY.

In the courts below, Brent advanced two reasons for challenging the arbitration award: first, "that it did not clearly and unmistakably waive its purported

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[1] "When a civil suit becomes moot pending appeal," the "'established' (though not exceptionless) practice . . . is to vacate the judgment below." *Camreta v. Greene*, 563 U.S. 692, 712 (2011). "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what [has been] called a 'preliminary' adjudication." *Id*. at 713, quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950). Thus, if there were valid concerns about the estoppel effect of the lower court judgment on Brent's ability to bring the undefined reimbursement claims, the proper course would have been to reverse and remand the case to be dismissed as moot. Significantly, Brent, itself, has not requested such relief in its petition.

statutory right to refuse the imposition of permissive subjects" through arbitration; and second, "that such an award violates public policy." Pet. App. 2a. At this stage, Brent has abandoned its contract interpretation argument and asserts only that, even if it had "consented to submit both permissive and mandatory subjects of bargaining to arbitration," *ibid*, an award imposing permissive subjects would be void as against public policy.

The instant case "aris[es] under § 301 of the Labor Management Relations Act," 29 U.S.C. § 185. Pet. App. 60a. An arbitration award can be vacated in an action brought under Section 301 on public policy grounds only if it "run[s] 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." *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 63 (2000). In this regard, Brent argues that the arbitration award violates the Company's asserted "right to exclude permissive subjects of bargaining," which it would derive from the ruling in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), that "it is unlawful to insist on a permissive subject of bargaining." Pet. 12 (emphasis in original). Brent's argument rests on a fundamental misunderstanding of *Borg-Warner*.

Borg-Warner sustained the NLRB's ruling that it was an unfair labor practice for an "employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining" as defined in NLRA Section 8(d), 29 U.S.C. § 158(d). 356 U.S. at 349. Where a union has been chosen as the exclusive representative of a unit of employees pursuant to NLRA Section 9(a), 29 U.S.C. § 159(a), Sections 8(a)(5) and 8(b)(3), 29 U.S.C.

§158(a)(5) and (b)(3), make it an unfair labor practice for either the employer or the union "to refuse to bargain collectively." Section 8(d), in turn, defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . [and] the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d). The *Borg-Warner* Court "agree[d] with the Board" that a refusal to enter into an agreement on the grounds that it does not include some proposal that does not pertain to terms and conditions of employment "is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." 356 U.S. at 349.

The *Borg-Warner* Court emphasized that its ruling "does not mean that bargaining is to be confined to the statutory subjects." *Ibid.* A contract clause on a matter unrelated to terms and conditions of employment "is lawful in itself" and "would be enforceable if agreed to by the [parties]." *Ibid.* It follows, as Brent acknowledges, "that an arbitrator can[] decide a dispute over the meaning of a permissive subject of bargaining already agreed to in an existing contract." Pet. 28-29, citing *Coca-Cola Bottling Co. of New York v. Soft Drink Workers Union, Local 812*, 39 F.3d 408, 410 (2d Cir. 1994).

Unlike in *Borg-Warner*, no party in this case has been accused of violating the NLRA by refusing to bargain over terms and conditions of employment. "Brent does not directly accuse the Union of insisting on or bargaining to impasse over permissive subjects of bargaining." Pet. App. 40a n. 15. And, even if the Union had, it could not be charged with an unfair labor practice under Section 8(b)(3), because it was not at the

time of the arbitration a "representative of [Brent's] employees subject to the provisions of section 9(a)." 29 U.S.C. §158(b)(3). That Local 584 was not guilty of the unfair labor practice described in *Borg-Warner* is confirmed by the fact that "nothing in the record suggests that Brent charged the Union with an unfair labor practice before the NLRB." Pet. App. 40a n. 15.

Local 584 merely followed the contractually agreed-upon procedure for changing the terms of its collective bargaining agreement with Brent by submitting the "unresolved issues that remain[ed] between the parties in accordance with the interest arbitration clause in Section 1.02(d) of the 2018 CBA." Pet. App. 6a (internal quotation marks omitted). "Brent Electric does not challenge the validity of the interest arbitration provision itself." *Id.* at 99a. The fact that the arbitration panel rejected most of Brent's proposals to delete various provisions of the agreement on the grounds that they addressed permissive subjects of bargaining does not make the award contrary to public policy. Rather, "dominant public policy favors holding parties to their contractually agreed obligations." *Id.* at 56a.

III. THERE IS NO SUBSTANTIAL CIRCUIT CONFLICT.

A. In the end, Brent's argument that the arbitration award violates public policy rests entirely on a string of cases holding that interest arbitration awards imposing "a *second-generation* interest-arbitration clause (also known as a self-perpetuating interest-arbitration clause) *would* violate public policy." Pet. App. 48a-49a. (emphasis in original).[2] "Many courts

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[2] See Pet. 16-24, citing *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161, 1169 (5th Cir. 1994) (finding "a new contract arbitration clause should not be enforceable to perpetuate inclu-

have held that public policy prevents such clauses from being imposed," because it would make "the interest-arbitration process . . . self-perpetuating." *Id.* at 49a. The rulings in those cases do not apply here, because "the CIR did not impose a self-perpetuating, or second-generation interest-arbitration clause in the 2021 CBA." *Id.* at 49a-50a.

The reason given by those courts for "why a new contract arbitration clause should not be enforceable to perpetuate inclusion of the clause in successive bargaining agreements" is that "[t]he contract arbitration system could be[come] self-perpetuating: a party, having once agreed to the provision, may find itself locked into that procedure for as long as the bargaining relationship endures." *NLRB v. Columbus Printing Press-*

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sion of the clause in successive agreements"); *Local 58, IBEW v. SE Mich. Chap., NECA*, 43 F.3d 1026, 1028-29 (6th Cir. 1995) (finding "interest arbitration decision" ordering parties to execute a collective bargaining agreement "comported with federal statutes and national labor policy except for the inclusion of an interest arbitration clause"); *Sheet Metal Workers, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418, 430 (6th Cir. 2001) (finding interest arbitration panel "did **not** have power to add any 'interest arbitration clause,' or 'extension clause' to the new . . . labor agreement") (emphasis in original); *Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc.*, 877 F.2d 547, 555-56 (7th Cir. 1989) (finding "the Arbitrator did not . . . have authority to include an interest arbitration clause in the new contract"); *Sheet Metal Workers' International Asso., Local 14 v. Aldrich Air Conditioning, Inc.*, 717 F.2d 456, 459 (8th Cir. 1983) (holding "an interest arbitration clause is unenforceable insofar as it applies to the inclusion of a similar clause in a new collective bargaining agreement"); *American Metal Products, Inc. v. Sheet Metal Workers Intern'l Ass'n, Local Union No. 104*, 794 F.2d 1452, 1456-57 (9th Cir. 1986) (finding "an interest arbitration clause cannot be included, over a party's objection, in a collective bargaining agreement resulting from interest arbitration").

men, 543 F.2d 1161, 1169 (5th Cir. 1994).[3] "[T]he perpetuation of contract arbitration clauses in successive contracts may well serve to increase industrial unrest" as "[t]he likelihood that one party will feel aggrieved by a contract arbitration award increases as parties move from contract to contract." *Id.* at 1170.

As events have demonstrated, the arbitration award imposing the 2021-24 collective bargaining agreement did not lock the parties into any sort of relationship. Upon the expiration of the 2021-24 agreement, the parties commenced bargaining under the normal NLRA regime.

B. Brent does cite one case that conflicts with the Tenth Circuit's decision here—*Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464 (5th Cir. 1993). While *Etie* vacated one provision in an interest arbitration award on the grounds that it addressed a permissive subject of bargaining, the stated basis for that holding is erroneous. Accordingly, *Etie*'s holding in that regard has never been followed by any court in the more than thirty years since that decision was issued.[4]

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[3] *See Local 58, IBEW*, 43 F.3d at 1032 (explaining "an arbitrator may not use an interest arbitration clause as a means of self-perpetuation"); *Architectural Metal Works*, 259 F.3d at 430 (same); *Milwaukee Newspaper & Graphic Communications Union Local No. 23 v. Newspapers, Inc.*, 586 F.2d 19, 21 (7th Cir. 1978) ("the policy behind this rule is aptly stated in *Columbus Printing Pressmen*"); *American Metal Products*, 794 F.2d at 1457 ("interest arbitration cannot perpetuate itself").

[4] One district court cited *Etie*'s holding without needing to apply it. *See Robert S. Bortner, Inc. v. Sheet Metal Workers Int'l Ass'n Local Union No. 19*, 2006 U.S. Dist. LEXIS 20040, *27 (M.D. Pa. 2006) (parties agreed that award could not include permissive subject of bargaining).

Etie justified its partial vacation of the interest arbitration award with little more than a reference to the holding in *NLRB v. Sheet Metal Workers Int'l Ass'n, Local Union No. 38*, 575 F.2d 394, 398 (2d Cir. 1978), that "an interest arbitration provision [was] void as contrary to public policy insofar as it applied to nonmandatory subjects." 1 F.3d at 1476.[5] However, *Local No. 38* did not hold, as the *Etie* court assumed, that all interest arbitration clauses are void as applied to nonmandatory subjects regardless of the particular circumstances.

The Second Circuit's *Local No. 38* decision enforced the NLRB's decision in *Sheet Metal Workers, Local 38*, 231 NLRB 699, 700 (1977), holding that a union had violated its statutory duty to bargain in the manner described in *Borg-Warner*. In that case, the parties had agreed upon all the terms of their agreement, except for the union's demand for "provisions for industry funds and interest arbitration." 231 NLRB at 700. Declaring that the parties "were at a deadlock," the union submitted its demands to a previously agreed-upon interest arbitration panel, which ruled that the employer "was required to execute a contract with provisions requiring interest arbitration and industry funds." *Ibid.*

Acting on the employer's unfair labor practice charges, the NLRB General Counsel issued a com-

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[5] *Etie* also cited several circuit court decisions involving interest arbitration awards that imposed second-generation arbitration clauses without noting the rationale for declaring such awards contrary to public policy. 1 F.3d at 1476. And, *Etie* incorrectly characterized, *ibid*, the NLRB's decision in *Sheet Metal Workers Local No. 9*, 301 NLRB 140 (1991), which actually held that a union committed an unfair labor practice by invoking an interest arbitration clause that the employer had not agreed to. 301 NLRB at 144-45.

plaint alleging "that interest arbitration and industry funds are nonmandatory subjects of bargaining and that, by insisting upon these subjects to impasse, [the union] violated Section 8(b)(3) of the Act." *Ibid.* The Board found "that [the union] violated Section 8(b)(3) of the Act by insisting on the inclusion of provisions for interest arbitration and industry funds in the bargaining agreement as a precondition for signing the agreement." *Ibid.* Of particular pertinence here, the Board further found that, "[*s*]*ince* the [union] violated Section 8(b)(3) of the Act by insisting to a point of impasse for the inclusion in a contract of nonmandatory subjects of bargaining, and *since* the obligation to bargain continues after an impasse, the further insistence that the nonmandatory subjects of bargaining be arbitrated [wa]s, in effect, a *continuation* of the same violative conduct." *Id.* at 701 (emphasis added).

Neither of the preconditions to *Local No. 38*'s holding that the union's "further insistence that the nonmandatory subjects of bargaining be arbitrated," *ibid*, was an unfair labor practice is present here. In the first place, Local 584 did not "insist[] to the point of impasse for the inclusion in a contract of nonmandatory subjects of bargaining." *Ibid.* *See* Pet. App. 40a n. 15. Moreover, there was no statutory "obligation to bargain" following the expiration of the 2018-21 agreement. *See Deklewa*, 282 NLRB at 1387. The only legal obligation to bargain at that point was the agreed-upon procedures for changing the terms of the expired agreement, which Local 584 followed.

* * *

The Tenth Circuit's decision in this case is the only fully reasoned discussion of whether an interest arbitration award violates public policy merely by retaining in the parties' collective bargaining agreement

terms that addressed permissive subjects of bargaining. The Tenth Circuit's reasoning is unimpeachable, and there is thus no reason for this Court to review the decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

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