

Docket Nos. **08-56668** and **08-56942**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES F. SMALL, Regional Director for Region 21 of the
National Labor Relations Board, for and on behalf of
THE NATIONAL LABOR RELATIONS BOARD

Petitioner/Appellee,

v.

OPERATIVE PLASTERERS' & CEMENT MASONS'
INTERNATIONAL ASSOCIATION, LOCAL 200, AFL-CIO

Respondent/Appellant.

PETITION FOR REHEARING EN BANC

On Appeal from a Temporary Injunction Under Section 10(l)
of the United States District Court for the
Central District of California
Before the Honorable Stephen G. Larson
District Court Case No. 08-cv-1039-SGL(OPx)

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I. WHY EN BANC REVIEW IS NECESSARY

Violating at least two controlling precedents, the panel opinion in this case carves out a single, anomalous exception to the *Noerr-Pennington* doctrine—the doctrine that (until now) required courts to construe *all* federal statutes to avoid burdening the First Amendment right to petition.

The panel opinion affirms an order enjoining two lawsuits, even though the lawsuits are undisputedly reasonably based. The panel’s new *Noerr-Pennington* exception effectively eliminates First Amendment protection for any lawsuit that has the effect of “coercing” an employer in violation of the National Labor Relations Act (“NLRA”)—even if the challenged lawsuit has an objectively reasonable basis in fact and law. Under the new exception, courts may impose prior restraints on such lawsuits by injunction.

The new exception conflicts with the Supreme Court’s decisions in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 535-536 (2002) (“*BE&K*”), *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 55-61 (1993) (“*PRE*”), and *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743-744 (1983). It also contradicts this Court’s decisions in *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) and *Kearney v. Foley and Lardner, LLP*, 590 F.3d 638, 644 (9th Cir. 2009).

In *PRE* and *Bill Johnson’s*, the Supreme Court held that a lawsuit cannot be enjoined unless it is both objectively baseless and brought for an improper purpose.

In *BE&K*, the Court held that the NLRA should not be construed to impose liability on an employer for filing a retaliatory lawsuit that the employer had lost, but which was reasonably based. The Court held there that even unsuccessful lawsuits with objectives that are illegal under the NLRA are protected by the Petition Clause if they are reasonably based in law and fact.

In *Sosa*, 437 F.3d 923, this Court held that the *Noerr-Pennington* doctrine applies in *all* statutory contexts, requiring courts to “construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise.” *Id.* at 931. The *Sosa* Court surveyed case law in fields ranging from antitrust to civil rights to labor relations and concluded that “the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause.” *Id.* at 931-932; *accord*, *Kearney*, 590 F.3d at 644. Only lawsuits that are a “sham” are outside the Petition Clause’s protection. *See Sosa*, 437 F.3d at 938-939.

Brushing these precedents aside, the panel created a special *ad hoc* labor-law exception to the *Noerr-Pennington* doctrine for some, but not all, reasonably based lawsuits that have a purpose that is allegedly unlawful under the NLRA. The panel based this exception entirely on self-described *dicta* in one obscure footnote of a 27-year-old Supreme Court opinion whose *holding* actually is hostile to the exception created here.

Worse, the panel's new *Noerr-Pennington* exception is entirely one-sided. It applies only to union petitioning that is alleged to burden employers' rights under interim work-assignment decisions issued by the NLRB. The exception thus creates two levels of Petition Clause protection under the NLRA—full petitioning protection for employers, who will wield this decision to shut down a host of reasonably based, meritorious state-court actions against them; and a weaker, degraded petitioning right for employees and the organizations that represent them.

The Court should rehear this case en banc to correct the legal conflicts created by the panel opinion and to confirm that there is only one *Noerr-Pennington* doctrine for interpreting every federal statute—and for protecting the petitioning rights of every citizen.

II. STATEMENT OF FACTS

Plasterers Local 200 is a small union of skilled craft workers. It has represented plasterers in Southern California for more than a century.¹

Local 200 is fighting for its life against a large, well-funded predator—the Carpenters Union—which has violated California law by bribing employers to reassign plastering work to its members.² One of those employers is Standard Drywall, Inc., which historically had used Local-200-signatory plastering

¹ ER249.

² ER250-256.

subcontractors on its construction projects. In return for the illegal kickbacks, Standard Drywall began hiring Carpenters members to do its plastering work.³

A. State-Court Litigation.

In 2004, Local 200 sued Standard Drywall in state court for violating the apprentice-employment and prevailing-wage requirements of California Labor Code § 1777.5.⁴ The Superior Court has rejected Standard Drywall's numerous attempts to have the case dismissed.⁵

Local 200 filed a second suit in state court in 2007, alleging that the kickback scheme between the Carpenters and Standard Drywall tortiously interfered with Local 200's business relationships.⁶ There is no dispute that the illicit payments occurred, or that Local 200's complaint sufficiently alleges tortious-interference.⁷

³ ER234-244.

⁴ *Id.* Contrary to the Panel opinion's statement, the wage-and-hour lawsuit predates the unfair labor practice charges at issue here. *Cf.* Slip Op. at

⁵ ER199-247.

⁶ ER248-258.

⁷ The Superior Court dismissed the tortious-interference suit on the erroneous ground that it was preempted by the NLRB's ULP jurisdiction. ER259-262. Local 200's appeal from that judgment is pending, but is stayed by the injunction here.

B. NLRB Proceedings.

After Local 200 filed its wage-and-hour suit, in 2005 and 2006 Standard Drywall filed unfair-labor-practice (“ULP”) charges with the NLRB, asserting that the lawsuit would pressure it to reassign its plastering work to the Plasterers Union. The charge triggered a two-stage administrative proceeding that is still under way.

At the first stage, a non-lawyer NLRB agent held a non-APA hearing under NLRA § 10(k)⁸ to determine which union—Local 200 or the Carpenters—should be awarded Standard Drywall’s plastering work.

The agent excluded the undisputed evidence of the Carpenters’ payments to Standard Drywall as being irrelevant to the jurisdictional dispute.⁹ Had it been admitted, that evidence would have terminated the proceeding, because an employer that participates in creating a jurisdictional dispute—as Standard Drywall did here—is barred from invoking the ULP process.¹⁰

Despite this crucial error, the Board adopted the agent’s evidentiary ruling and issued a “10(k) decision” giving Standard Drywall’s plastering work to the Carpenters.¹¹ A 10(k) decision is a nonbinding, non-reviewable advisory opinion.

⁸ 29 U.S.C. § 160(k).

⁹ ER193 at n.7.

¹⁰ *See Recon Refractory & Constr., Inc. v. NLRB*, 424 F.3d 980 (9th Cir. 2005); *Constr. & General Laborers’ Local Union 190 v. NLRB*, 998 F.2d 1064, 1066 (D.C. Cir. 1993).

¹¹ ER191-198. In “virtually every case,” the Board awards the work in accordance

Plasterers Local Union No. 79 v. NLRB, 404 U.S. 116, 122 n.10, 126 (1971);
Henderson v. ILWU Local 50, 457 F.2d 572, 577 (9th Cir. 1972).

The Board’s 10(k) decision gratuitously noted that there was “no basis for finding collusion” between Carpenters and Standard Drywall—and of course there wasn’t, because all evidence of that collusion had been erroneously excluded.¹²

Local 200 refused to dismiss either of its state-court suits, so in 2007 NLRB Regional Director James Small issued an administrative complaint alleging that the suits—in and of themselves—are unfair labor practices because they contravene the 10(k) decision.¹³ Although the state-court suits seek only lost wages and injunctions against future illegal conduct—not a reassignment of work to Local 200—Small alleges that they *might* pressure Standard Drywall to reassign its plastering work to Local 200.¹⁴ Small never has argued that the 10(k) decision “preempts” either suit, or that either lawsuit is objectively baseless.

Small’s ULP complaint is still pending before the NLRB. If he succeeds there, Local 200 will be forced to pay Standard Drywall’s attorney’s fees from the

with the employer’s preference. *NLRB v. ILWU Local No. 50*, 504 F.2d 1209, 1220 (9th Cir. 1974).

¹² ER195.

¹³ ER146-155.

¹⁴ ER153.

date of the 10(k) decision as a punishment for pursuing the lawsuits.¹⁵

C. This Litigation.

In 2008, Small filed this district-court action against Local 200 to enjoin Local 200's state-court lawsuits until his ULP case is decided. He argued that the NLRB is likely to find the lawsuits to be unfair labor practices because they put pressure on Standard Drywall to hire Local 200 plasterers, and because the cost of defending the suits threatens irreparable harm to Standard Drywall.¹⁶

Local 200 responded that under Supreme Court and Ninth Circuit precedent harmonizing the NLRA with the First Amendment's Petition Clause, a lawsuit cannot be enjoined as illegal unless it is *both* (1) brought for an improper purpose *and* (2) objectively baseless.¹⁷

The district court acknowledged that Local 200's lawsuits are *not* objectively baseless.¹⁸ But on September 30, 2008, it enjoined them anyway.¹⁹

The panel affirmed on July 8, 2010.²⁰ The panel opinion does not apply the analysis of *BE&K*, *Sosa* and *Kearney*. Nor does it mention —much less analyze—

¹⁵ ER180.

¹⁶ ER299.

¹⁷ ER64-65.

¹⁸ ER66:7-9.

¹⁹ ER1-4.

²⁰ See panel opinion (“Slip Op.”), attached.

whether or not Local 200's lawsuits are reasonably based. It does not find the lawsuits to be a "sham" under any test.

Instead, the panel concluded that Local 200's objectively reasonable lawsuits "have an illegal objective" under the NLRA and therefore that "they are not protected by the Petition Clause of the First Amendment." Slip Op. at 9813.

In finding that Small is likely to prevail on the merits before the National Labor Relations Board, the panel ignored the Board's own decision of *BE&K Construction* on remand from the Supreme Court. *BE&K Construction*, 351 NLRB 451 (2007). There the Board adopted Justice Scalia's concurrence in *BE&K*. The Board flatly held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit." *BE&K Construction*, 351 NLRB at 456. The panel opinion never mentions the Board's *BE&K Construction* standard or—for purposes of assessing likelihood of success—Small's chances of meeting it. See Slip Op. at 9814.

III. ARGUMENT

It is undisputed that both of Local 200's lawsuits are reasonably based. Reasonably based lawsuits are protected by the First Amendment's Petition Clause. *Bill Johnson's*, 461 U.S. at 748; *PRE*, 508 U.S. 49, 57; *BE&K*, 536 U.S. 516, 531.

Courts must interpret *all* federal statutes, including the NLRA, to protect the

constitutional right to pursue objectively reasonable lawsuits—even when those lawsuits burden the defendant’s statutory rights. *Sosa*, 437 F.3d at 930; *Kearney*, 590 F.3d at 644. In this case, however, the panel opinion affirms an injunction against Local 200’s reasonably-based state-court lawsuits without even attempting to interpret § 10(k) in a way that would preserve Local 200’s petitioning rights.

- A. The panel opinion contradicts Supreme Court and Ninth Circuit precedent requiring Petition Clause protection for reasonably based petitioning.

The First Amendment immunizes any effort to “petition” the courts through litigation, so long as the litigation is not a narrowly-defined “sham.” *PRE*, 508 U.S. at 55-61; *Sosa*, 437 F.3d at 938-939. Petition Clause immunity originated in antitrust law as the *Noerr-Pennington* doctrine. See *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Since the 1960s, the principle “has been expanded beyond its original antitrust context.” *Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).

In the labor-law context, the doctrine takes the form of the *Bill Johnson’s* rule: “[T]he Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff’s motive, unless the suit lacks a reasonable basis in fact or law.” *Bill Johnson’s*, 461 U.S. at 748.

Citing these precedents, this Court concluded in *Sosa* that “the *Noerr-Pennington* doctrine stands for a generic rule of statutory construction, applicable

to *any* statutory interpretation that could implicate the rights protected by the Petition Clause.” *Sosa*, 437 F.3d at 931 (emphasis added). Indeed, because the rule “ ‘is based on and implements the First Amendment right to petition,’ [it] is not limited to the antitrust context, but ‘*applies equally in all contexts.*’ ” *Id.* (citation omitted) (emphasis added); *accord*, *Kearney*, 590 F.3d at 644. Under this universal rule, courts “must construe federal statutes so as to avoid burdening conduct protected by the Petition Clause unless the statute clearly provides otherwise.” *Sosa*, 437 F.3d at 931; *accord*, *Kearney*, 590 F.3d at 643-644.

Only lawsuits that are a “sham” are unprotected by the Petition Clause. *Sosa*, 437 F.3d at 938 (quoting *Noerr*, 365 U.S. at 144). In *PRE*, the Supreme Court held that “*an objectively reasonable effort to litigate cannot be a sham*, regardless of [its] subjective intent.” *PRE*, 508 U.S. at 57 (emphasis added).

PRE articulated a two-part definition of “sham” litigation. To be a sham, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized . . . , and [a] claim premised on the sham exception must fail. Only if the challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.

PRE, 508 U.S. at 60.²¹ The same test applies in labor law when, as here, the Board

²¹ In *Sosa*, this Court identified several other tests for sham litigation, none of

seeks to enjoin ongoing litigation. *Bill Johnson's*, 461 U.S. at 748.

In *BE&K*, the Court held that even an unsuccessful lawsuit that violates an NLRA provision banning coercive employer practices is entitled to Petition Clause protection if it is reasonably based in law and fact. *Id.* at 535-536. The Court pointed out that the Petition Clause concerns with *enjoining ongoing petitioning*, as the district court did here, are even greater. *BE&K*, 536 U.S. at 530. Avoiding the “difficult constitutional question” posed by this conflict between the NLRA and the Petition Clause, the Court interpreted the NLRA as not reaching all such lawsuits. *Id.* at 536.

Critically, the *Bill Johnson's-PRE* “sham litigation” rule applies even if the lawsuit is intended to—and does—burden statutory rights otherwise conferred by the NLRA. *BE&K*, 536 U.S. at 533.

BE&K addressed the question whether a *completed*, unsuccessful lawsuit violated the NLRA—not, as in *Bill Johnson's* and the instant case, whether an ongoing lawsuit could be enjoined. The *BE&K* Court did not decide whether the two-part *Bill Johnson's-PRE* test for sham litigation applies *categorically* to all completed, reasonably based but unsuccessful lawsuits. *Id.* at 536-537; *cf. id.* at 537-538 (Scalia, J., concurring). But it *did* hold that the Board may not declare a reasonably-based lawsuit to be unlawful simply because it is brought for a purpose

which is applicable to the facts of this case. *See Sosa*, 437 F.3d at 938.

that is illegal under the NLRA. *Id.* at 535-536; *Sosa*, 437 F.3d at 938 (“The [BE&K] Court found that the evidence of an improper purpose was insufficient to impose liability for a reasonably based but unsuccessful lawsuit[.]”).

Here, Regional Director Small has never even argued—nor could he—that Local 200’s lawsuits lack a reasonable basis in law and fact. And the district court found that they are reasonably based.²² Accordingly, Local 200’s lawsuits are fully protected petitioning. Under *Bill Johnson’s* and *PRE*, they cannot be enjoined.

In *BE&K*, the Supreme Court held that a “finding of [a lawsuit’s] illegality is a burden in itself. In addition to the declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties, such as a fee award.” *Id.*, 536 U.S. at 530.

Here the injunction’s harm to Local 200 is far more grave. The injunction doesn’t just strangle Local 200’s petitioning rights, it prevents Local 200 from trying to stop the continuing damage its members suffer from the Carpenters’ scheme of bribery.

Bill Johnson’s, *PRE*, *BE&K* and *Sosa* should have been dispositive here. *Bill Johnson’s* holds that the Board may only enjoin lawsuits that are objectively baseless *and* brought for an improper purpose, which Local 200’s lawsuits

concededly are not. *BE&K* makes clear that the Board may not equate a lawsuit's illegal purpose under the NLRA with a lack of Petition Clause protection. And all of these cases make clear that courts must strive to interpret the NLRA—like any other federal statute—to protect the right to pursue objectively reasonable lawsuits, even when those lawsuits burden the defendant's exercise of NLRA rights.

By departing from these precedents, the panel created a conflict in Ninth Circuit case law that requires en banc review.

B. *Bill Johnson's* footnote 5 does not support the panel's opinion.

Instead of following *Bill Johnson's*, *PRE*, *BE&K* and *Sosa*, the panel took the opposite analytic approach. It relegated Local 200's *constitutional* rights to a lower rung than an employer's *statutory* rights under the NLRA.

The panel did not apply the *Bill Johnson's-PRÉ* two-part sham test to determine whether Local 200's lawsuits were unworthy of constitutional protection and so could be enjoined. Nor did it employ the constitutional-avoidance analysis required under *BE&K*, *Sosa* and *Kearney*.

Instead, the panel said that *dicta* in *Bill Johnson's* permitted it to hold that Local 200's state-court suits are entitled to ***no protection*** under the Petition Clause because they have the “illegal objective” of interfering with the Board's § 10(k) decision, in violation of NLRA § 8(b)(4)(ii)(D). Slip Op. at 9812. This holding

²² ER66: 7-9.

cannot withstand scrutiny.

In *Bill Johnson's*, the Court noted in *dicta* that it was “not dealing with” a suit that “has an objective that is illegal under federal law,” and that the employer there had “concede[d] that the Board may enjoin” that type of suit. *Bill Johnson's*, 461 U.S. at 737 n.5.²³ The panel interpreted footnote 5’s *dicta* to mean that if a lawsuit has an “illegal objective” under the NLRA, as it concluded Local 200’s do, then the suit has no value under the Petition Clause and may be freely enjoined.

This interpretation of *Bill Johnson's* footnote 5 creates an anomalous, *ad-hoc* labor-law exception to the Petition Clause that conflicts with the Supreme Court’s subsequent jurisprudence. In *every other* statutory context, only “sham” lawsuits are outside of the Petition Clause’s protection. A reasonably-based lawsuit that has an unlawful, anti-competitive objective under the Sherman Act, for example, is still protected by the Petition Clause. *PRE*, 508 U.S. at 60-61. So is a reasonably-based lawsuit brought for the otherwise unlawful “purpose of coercing, intimidating, threatening, or interfering with a person’s exercise of rights protected by the [Federal Housing Act].” *White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000).

Only in the labor-law context, according to the Panel, may a non-sham, reasonably based lawsuit be declared unlawful and enjoined simply because it has

²³ *Observing in dicta* that “[w]e are **not dealing with** . . . a suit that has an objective that is illegal under federal law”; but **holding** that the NLRB “may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff’s motive, unless the suit lacks a reasonable basis in fact or law”) (emphasis added).

an illegal purpose under the relevant statute. Indeed, the Panel’s *ad-hoc* Petition Clause exception is even narrower. Under *BE&K*, an **employer’s** unsuccessful but reasonably based lawsuit is entitled to full Petition Clause protection, even though it has the otherwise unlawful purpose of retaliating against employees’ exercise of their statutory rights. But, under the panel opinion here, a **union’s** reasonably based lawsuit may be declared unlawful and enjoined because it allegedly has the “illegal objective” of coercing an employer in its choice between two competing unions in contravention of a 10(k) decision. *See* 29 U.S.C. §§ 158(b)(4)(ii)(D), 160(k). The Panel opinion offers no rationale for granting employers stronger petitioning rights than unions.

Even if this interpretation of footnote 5 could be squared with *PRE*, *BE&K* and *Sosa*, it does not follow from the footnote’s language. In both of the footnote’s examples, the Board had found it an unfair labor practice for unions to sue ex-members for fines based on post-membership conduct.²⁴ The Supreme Court enforced Board orders prohibiting the unions from imposing the illegal fines or suing in court to collect them. In neither case did the Board declare the union’s state-court petitioning itself to be unlawful under the NLRA—so in neither case was the petitioning directly burdened. But once the Board found the fines illegal, there was no reasonable legal basis to keep “petitioning” to enforce them—the

²⁴ *See NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972); *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973). In neither case did the Supreme Court discuss

lawsuits were objectively baseless under the *Bill Johnson's-PRE* test.

Here, by contrast, it is undisputed that Local 200 has a reasonable basis for alleging that Standard Drywall has violated the prevailing wage law and committed state torts. Unlike the cases noted in *Bill Johnson's* footnote 5, here the Board seeks to declare Local 200's lawsuits *themselves* illegal and impose massive sanctions on the Union. Even if footnote 5 were a holding rather than pure *dicta*, it would not support the panel opinion here because Local 200's lawsuits are reasonably based.

C. *ILWU Local 32* does not support the panel's decision.

The panel opinion also relies on *International Longshoremen's Union, Local 32 v. Pacific Maritime Ass'n*, 773 F.3d 1012 (9th Cir. 1985). Slip Op. at 9811. According to the panel, *ILWU Local 32* holds that "a lawsuit which, if successful, would completely undermine a section 10(k) work assignment does have an illegal objective." Slip Op. at 9811.

ILWU Local 32 holds nothing of the sort. The opinion never uses the term "illegal objective" and does not refer to or rely on *Bill Johnson's* footnote 5. Instead, the *ILWU Local 32* Court held that NLRA liability can only be imposed on a lawsuit that contravenes a 10(k) decision if the lawsuit is both improperly motivated *and* objectively baseless. *ILWU Local 32*, 773 F.2d at 1015. Far from

the Petition Clause.

endorsing the panel's reading of *Bill Johnson's* footnote 5, *ILWU Local 32* flatly contradicts the panel opinion and applies the two-part sham litigation test.

At issue in *ILWU Local 32* was a union's federal lawsuit to enforce *private arbitration awards* that directly conflicted with a 10(k) work-assignment decision.²⁵ This Court held that the union's lawsuit to enforce these awards "lacked a reasonable basis in law" because "it is well-established that the supremacy doctrine bars an *arbitrator* from making an award inconsistent with a NLRB determination." *Id.* at 1016 (emphasis added). In other words, a statutory 10(k) decision trumps a private arbitration award that directly contradicts it.

In so holding, however, the *ILWU Local 32* Court took pains to distinguish other sorts of contract-enforcement actions by unions that—even though inconsistent with 10(k) decisions—were not so directly contradictory as to be NLRA violations. 773 F.2d at 1016-1019. Had the panel done likewise here, it would have reached the opposite conclusion.

No doctrine holds that a 10(k) decision trumps *any lawsuit* that could burden the rights adjudicated by that decision. Private arbitrators are not public tribunals with authority to enforce public law, *Cannery Warehousemen Local 748 v. Haig Berberian, Inc.*, 623 F.2d 77, 81-82 (9th Cir. 1980), so arbitration awards are not protected by the Petition Clause. Thus the line of "supremacy doctrine" cases cited

²⁵ The remaining, extra-circuit decisions cited by the Panel also involved judicial enforcement of private arbitration awards that conflicted with § 10(k) decisions.

in *ILWU Local 32* has no application to Local 200's lawsuits, which unlike private arbitration are fully protected by the Petition Clause.

Local 200's suits do not seek to enforce a private arbitration award that conflicts with a 10(k) decision. Indeed, they do not challenge the 10(k) decision or seek reassignment of work at all. Instead, they are based on completely separate state laws that condemn bribery, promote training in skilled construction crafts, and ensure payment of prevailing wages.

Here, unlike *ILWU Local 32*, the Board's 10(k) decision leaves a great deal of objectively reasonable petitioning to be done in state court on wholly independent issues and claims, where Local 200 seeks "a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility.'" *Bill Johnson's*, 461 U.S. at 741 (citation omitted). Nevertheless, the panel opinion outlaws genuine petitioning activity based on a theory that disregards the required analysis and needlessly brings the statute into conflict with the Petition Clause. Nothing in the NLRA or the non-binding 10(k) decision compels the panel's conclusion. And nothing in Supreme Court or Ninth Circuit precedent supports it.

IV. CONCLUSION

This case raises vitally important First Amendment issues. The panel opinion ignores and conflicts with Supreme Court and Ninth Circuit precedent. It creates an anomalous, unsupported exception to the *Bill Johnson's-PRE* doctrine. And it creates two different levels of Petition Clause protection, depending on the identity of the petitioning party—an approach antithetical to First Amendment principles and elementary notions of fairness.

For all of the foregoing reasons, the Court should grant this petition for rehearing en banc.

Respectfully submitted,

Dated: August 19, 2010

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CERTIFICATE OF COMPLIANCE
WITH CIRCUIT RULES 35-4 AND 40-1

I certify that, in compliance with Circuit Rule 35-4 and 40-1, the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4,148 words of text (less than the 4,200-word limit) according to the word-processing program with which it was prepared.

Dated: August 19, 2010

By: *s/ John J. Davis, Jr.*

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CERTIFICATE OF SERVICE
[NOT All Parties Are CM/ECF Participants]

I hereby certify that on August 19, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by prepaid U.P.S. Overnight Delivery, a commercial carrier for delivery within 2 calendar days, to the following non-CM/ECF participants:

s/ John J. Davis, Jr.

JOHN J. DAVIS, JR.

Docket Number: 08-56942

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