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Labor union organizing tactic challenged

By: Sean Lengell – November 8, 2013

The Supreme Court is set to take up a major union-rights case this month that is poised to have broad ramifications on how unions organize as well as a 78-year-old federal labor law.

In Unite Here Local 355 v. Mulhall, the high court will consider whether deals between unions and private-sector employers that set conditions for unionizing a workplace violate anti-corruption provisions in the 1935 National Labor Relations Act. A decision ruling the arrangements illegal would bar unions from an increasingly common organizing tactic.

"This is by far the most important labor case in a generation," said Jamie Raskin, a professor at the American University law school who has closely followed the case. "It's a dagger pointing at the heart of the American labor movement."

The case centers on a 2004 pact between Unite Here, a union that represents hospitality industry workers, and Mardi Gras Gaming, owner of a Florida dog track and gambling casino. The union offered to run ads supporting a gambling ballot initiative the company wanted to pass. It vowed not to strike, protest, picket or otherwise disrupt the company's business.

In exchange, the company promised to make it as easy as possible for the union to organize its workers, including offering access to employee lists so that it could contact and recruit workers.

But the New Deal-era NLRA prohibits employers from providing unions "things of value" — a provision intended to prevent bribes, extortion and collusion. Plaintiff Martin Mulhall, a Mardi Gras employee opposed to the union, contends the employee lists were valuable.

A federal district court ruled against Mulhall, who is getting help from the National Right to Work Legal Defense Foundation, saying there was no "indication" of corruption. But an appeals court reversed the decision, saying "organizing assistance can be a thing of value."

With member rolls dwindling in recent decades, unions increasingly have sought deals with employers as a way to maximize their organizing potential — even if it means giving up key concessions like promising not to strike. And employers like the deals because they curb labor's bargaining power.

While the agreements are mutually beneficial, outlawing them would hurt unions far more than business. And with a conservative-leaning Supreme Court, organized labor faces a daunting challenge.

"The labor movement has taken a number of big hits in the Supreme Court, and this would just be the most massive one," said Raskin, who is a Democratic Maryland state senator.

Yet striking down a significant provision in the NLRA would be a radical move, one the court may be eager to avoid.

"Those that would like to rein in this type of union agreement, whether it be business or conservatives, shouldn't get too overconfident," said Walter Olson, a senior fellow at the libertarian-leaning Cato Institute. "Getting the justices to see the logic of Mulhall's argument is one thing; getting them to act and sign a decision [in his favor] is something else."

Olson added the justices may be looking for a way out of having to make a definitive ruling.

"I think the court's instincts are not to pull too hard at the columns of the temple on labor law, because they're not sure where it's going to fall," he said.