GRANTED

No. 99-1038

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

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

BRIEF OF EXXON MOBIL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Exxon Mobil Corporation ("ExxonMobil") is a leading oil and gas company with facilities and operations throughout the world.[2] Given the nature of ExxonMobil's business, many of its employees perform jobs

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amicus curiae, has made a monetary contribution to the preparation and submission of this brief.

[2] Prior to November 30, 1999, Exxon Mobil Corporation was known as Exxon Corporation. On that date, it acquired Mobil Corporation, and changed its name.

that are highly safety-sensitive. ExxonMobil is committed to preventing drug and alcohol use by such employees. To that end, ExxonMobil not only has adopted a strict drug and alcohol policy but also has repeatedly gone to court to ensure that employees terminated for drug or alcohol use are not reinstated by labor arbitrators. Indeed, ExxonMobil has been a party to six of the court of appeals cases addressing whether a reinstatement award violated a well-defined and dominant public policy.[3] ExxonMobil urges the Court to confirm the power of federal courts to refuse to enforce awards that reinstate employees who test positive for drugs to safety-sensitive positions.

In addition, ExxonMobil's experience before, during, and after the highly publicized oil spill resulting from the grounding of the tanker Exxon Valdez in 1989 is an object lesson in the conflicts that can and do arise among the important and competing public policies at stake when drug and alcohol issues arise in the workplace. These policies cannot be fully reconciled, but need to be balanced on the basis of the overall public interest. Recognizing that no solution is perfect, ExxonMobil submits that the job of balancing the competing public policies is beyond the scope of responsibilities assigned to a traditional labor arbitrator and that the ultimate decision must be made by a judge authorized to determine the overall public interest.

[3] *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir. 1996); *Exxon Shipping Co. v. Exxon's Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Gulf Coast Indust. Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether the Court should adopt a blanket rule that would prohibit courts reviewing arbitration awards reinstating employees in safety-sensitive positions who have tested positive for drug and alcohol abuse from considering the needs of public safety and other public interests. The answer is no, but not because there is only one uniform public policy that demands termination in every case. To the contrary, as ExxonMobil's experience shows, there are in fact *several* important and competing public policies at stake when drug and alcohol issues arise in the workplace. From its earliest federal labor arbitration cases onward, this Court has made clear that the job of balancing competing *public* policies is beyond the scope of responsibilities assigned to a traditional *private* labor arbitrator.

ARGUMENT

EXXONMOBIL'S UNIQUE EXPERIENCE SHOWS THE NEED FOR JUDICIAL RECONCILIATION OF THE IMPORTANT AND COMPETING PUBLIC POLICIES AT STAKE IN THE AREA OF DRUG AND ALCOHOL POLICY IN THE WORKPLACE.

Congress has repeatedly told employers that public policy favors the rehabilitation and treatment of employees with substance-dependency problems. Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12114 (1994), and its predecessor the Rehabilitation Act, 29 U.S.C. § 793 (1994), employers are specifically directed to make reasonable accommodations to employees with disabilities. Courts and the enforcement agencies have held that some persons with substance dependency problems can qualify as disabled. *See Williams v. Widnall*, 79 F.3d 1003, 1005 (10th Cir. 1996) ("Alcoholism is a covered disability."); 29 C.F.R. Part 1630 app. § 1630.16(b) (2000) ("Individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under [the ADA].").

The practical problem for employers in this area is that, even after drug users or alcoholics go through treatment and are rehabilitated, the nature of their illness is such that one can never be sure whether, when, or under what circumstances they may relapse. Employment in a safety-sensitive position increases the statistical risk of an accident. Yet some courts have held that requirements imposed on a recovering alcoholic for safety reasons (because of the risk of a relapse) but not on other employees discriminate based on a disability. *See, e.g., Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387-88 (D. Mass. 1994) (ADA violated by policy against on-the-job intoxication enforced more strictly against an alcoholic); *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 1000, 1002 (D. Or. 1994) (discharge of alcoholic driver of 50-ton truck for showing up drunk impermissible unless company policy applied to all employees, not just alcoholics). *Compare* 42 U.S.C. §12112 (1994) *with* 42 U.S.C. § 12114(c)(4).

Prior to 1989, ExxonMobil's drug and alcohol policy was consistent with these policies. It provided that employees would not have their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort. An employee who volunteered for treatment, and went through rehabilitation, was in effect guaranteed a return to the same job upon successful completion of the rehabilitation process, notwithstanding that no rehabilitation program for drug or alcohol use, however successful, can guarantee 100% that there is no risk of a relapse. Under this policy, employees were entitled to be returned to safety-sensitive positions as well as to other positions. The policy reflected a judgment that encouraging employees to seek treatment was, on balance, the best way to reduce drug and alcohol-related accidents. To be sure, in some instances accidents would occur as a result of relapses by employees who had been through apparently successful rehabilitation. But ExxonMobil thought that the risk of relapse by a rehabilitated employee was outweighed by the

risk of accidents from the much larger number of employees who would never come forth, and whose conditions would go undetected, if the price of coming forth was dismissal or transfer.

On March 24, 1989, the tanker Exxon Valdez ran aground in Prince William Sound, Alaska, spilling 258,000 barrels of crude oil. The accident was widely, although in ExxonMobil's view falsely, attributed to alcohol abuse by Captain Joseph Hazelwood,[4] who had been treated for alcohol abuse (not alcoholism) four years earlier and who had (unknown to any of his supervisors) resumed social drinking about a year before the accident.

In the aftermath of this accident, commentators pilloried ExxonMobil and its drug and alcohol policy, ignoring the policies of rehabilitation and treatment that it served and Congress had endorsed. The Department of Justice brought criminal proceedings against ExxonMobil; one of the charges was that ExxonMobil's drug and alcohol policy was criminally negligent in that it had allowed for the restoration of Captain Hazelwood to the command of a vessel following his treatment.[5] Accordingly, ExxonMobil changed its policy.

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[4] In fact, Hazelwood was not even on the bridge at the time of the grounding, but had turned over the "conn" – the active command of the vessel – to the Third Mate, after giving the latter clear instructions to turn right at a specified point. If those instructions had been carried out, the grounding would not have occurred. As Admiral Yost, the Commandant of the United States Coast Guard, has testified, "[t]he primary cause . . . of that grounding was a perfectly qualified third mate on the bridge of a ship that, through a period of a few minutes' inattention to duty . . . ran the ship aground on a clear night with all the navigational aids watching him." Trial Transcript (May 27, 1994) at 2177:13-19, *In re the Exxon Valdez*, No. 89-095-Civ (D. Alaska).

[5] Bill of Particulars, filed July 31, 1990, at 19, ¶ 3(c), *United States v. Exxon Corporation, et al.*, No. A90-015-1CR (D. Alaska).

ExxonMobil's new policy precludes any employee who has had problems with substance abuse from serving in any safety-sensitive position. Had this policy been in effect when Captain Hazelwood reported his problem, he would not have been restored to his position as captain of a tanker, but would have been given some non-safety-sensitive position. When ExxonMobil ultimately reached a plea bargain with the United States, the Justice Department praised the new policy, and urged the Court to remit any fine to be imposed on the ground that the new policy ensured that employees with histories of alcohol or drug abuse could not occupy safety-sensitive positions.[6] As expressed by the Department of Justice, the public policy of the United States was that safety and environmental concerns outweighed both the desirability of rehabilitation and treatment and the policy against discrimination against employees with a history of alcohol or drug abuse.

Notwithstanding this apparently definitive statement of public policy, and notwithstanding the praise of ExxonMobil's new policy by the Department of Justice, other agencies of the federal government balanced the relevant public policies differently. The Office of Federal Contract Programs Compliance ("OFCCP") challenged ExxonMobil's new policy as a violation of the Rehabilitation Act, arguing that it unlawfully discriminated against employees with the disability of alcoholism. *OFCCP v. Exxon Corp.*, 1996 WL 662445 (Dep't of Labor 1996). In its administrative opinion in that case, the Department of Labor specifically took ExxonMobil to task for subordinating one of the goals behind ExxonMobil's *old* policy – encouraging employees to seek rehabilitation – to safety concerns. The Equal Employment Opportunity Commission ("EEOC") also questioned the new policy. It sued ExxonMobil under the

[6] Government's Memorandum in Aid of Sentencing, filed Sept. 30, 1991, at 10; Reporter's Transcript of Change of Plea Hearing, October 8, 1991, at 31. *United States v. Exxon Corporation, et al.*, No. A90-015-1CR (D. Alaska).

ADA, arguing that excluding recovering substance abusers from safety-sensitive positions could be justified only by proof that the excluded employees posed a "direct threat" to the health or safety of other individuals in the workplace. The district court agreed with the EEOC, and only this year did ExxonMobil succeed in persuading the Fifth Circuit that this ruling was wrong. *EEOC v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000). The matter has now been remanded for consideration of the EEOC's other challenges to ExxonMobil's policy.

While litigation against ExxonMobil by the Department of Labor and the EEOC was pending, the question of ExxonMobil's culpability for the oil spill was submitted to an Alaska jury in federal district court in Anchorage. Plaintiffs' counsel told the jury that ExxonMobil's old alcohol policy had been reckless because it did not forbid the return to a job as tanker captain of any person with a history of alcohol abuse. Recklessness, in other words, was predicated on ExxonMobil's failure to adopt the very policy that the Department of Labor and the EEOC considered illegal. The jury awarded $5 billion in punitive damages against ExxonMobil; ExxonMobil's appeal from the judgment is currently pending in the Ninth Circuit.

The point of this history is not to argue about whether ExxonMobil's policy was right then, or is right now,[7] or whether the policies expressed by the Department of Justice in 1991, or the contrary policies expressed by the OFCCP and the EEOC in 1996, reflect the "true" public policy of the United States. It is not even to argue whether a rational judicial system can allow a jury to award billions of dollars in punitive damages for an employer's failure to have a policy that two federal agencies consider illegal. The point is rather that there are many public policies in this area, and

[7] ExxonMobil believes that *both* of its policies reflect reasonable alternative choices, in a difficult area, and that neither policy should be cause for the imposition of liability.

that they are very difficult to reconcile. Federal agencies are in conflict. Employers do their best to guess right, and are subject to millions or billions of dollars in punitive damages if plaintiffs' lawyers can persuade a jury that they have guessed wrong. Even judges do not always agree about what is right.

ExxonMobil submits that the delicate and difficult task of reconciling competing *public* policies is too important to be left to a labor arbitrator who by definition is not charged with ascertaining the true public interest from among conflicting public policies. This is a task for a court, as the Court has repeatedly held. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) ("the public's interests in confining the scope of private agreements to which it is not a party *will go unrepresented* unless the judiciary takes account of those interests when it considers whether to enforce such agreements" (emphasis added)); *W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers*, 461 U.S. 757, 766 (1983) ("the question of public policy is ultimately one for resolution by the courts").

This is not to say that arbitrators are jurisdictionally excluded from consideration of the public interest. In determining whether an employer has "just cause" under the terms of a collective bargaining agreement to terminate an employee who poses a safety risk, an arbitrator can and should consider the public interest in safety and accident-avoidance. But the fact remains that a labor arbitrator emphatically "is *not* a public tribunal." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (emphasis added) (internal quotation marks omitted). "He has no general charter to administer justice for a community which transcends the parties. He is rather part of the system of self-government created by and confined to the parties." *Id.* (internal quotation marks omitted). *See also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (arbitrators "sit to settle disputes at the plant level"); *id.* at 597 (arbitrator's authority "is confined to

interpretation and application of the collective bargaining agreement"). Under the *Steelworkers Trilogy*, private labor arbitrators are presumed best situated to resolve run-of-the-mine, "common law of the shop" disputes confined to the parties' private collective bargaining relationship, and are given near-conclusive authority over such disputes. But when it comes to the public interest, *W.R. Grace* and *Misco* make clear that *courts*, not private arbitrators, are the ultimate authority on questions of public policy. That is true when public policy is clear. And it is even more so when, as in this area, several different and important public policies are in conflict.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and hold that courts have the authority, under the public policy exception to traditional deference to labor arbitration awards, to refuse to enforce awards reinstating to safety-sensitive positions employees who test positive for drugs or alcohol.

Respectfully submitted,

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