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ARBITRABILITY OR DELEGATION: A COMMENT ON *SEIU LOCAL 121RN v. LOS ROBLES REG'L MED. CTR.*

By  
Tim Mangan\*

I. INTRODUCTION

In *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, the Ninth Circuit Court of Appeals held that a court, not the arbitrator, will decide the issue of arbitrability if the arbitration provision in the collective bargaining agreement (“CBA”) is silent or unclear on who is to make the arbitrability determination.<sup>1</sup> The decision in *Los Robles* overturned nearly a quarter century of precedent on whether courts or arbitrators decide questions of arbitrability in collective bargaining cases in the Ninth Circuit.<sup>2</sup>

In 1995, the Supreme Court held in *First Options of Chi., Inc. v. Kaplan*, that questions of arbitrability in disputes where the arbitration provision is silent on the issue is to be decided by courts.<sup>3</sup> Soon afterwards, in 1996, the Ninth Circuit’s decision in *United Bhd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace* held that the Supreme Court’s decision in *First Options* only applied to commercial disputes.<sup>4</sup> The Ninth Circuit held in *Desert Palace* that arbitrability disputes in collective bargaining cases would be decided by the arbitrator.<sup>5</sup> In 2010, the Supreme Court clarified its *First Options* decision in *Granite Rock Co. v. Int'l Bhd. of Teamsters*. *Granite Rock* held that there is no difference in the resolution of questions of arbitrability in commercial and collective bargaining disputes.<sup>6</sup> Ten years after the Supreme Court’s decision in *Granite Rock*, the Ninth Circuit was given an opportunity to clarify its’ holding from *Desert Palace*. In a two to one decision, *Los Robles* simplified the rule over which party answers questions of arbitrability if the arbitration provision is silent on the issue in the Ninth Circuit: the courts.<sup>7</sup>

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1. *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849 (9th Cir. 2020).

2. *Id.*

3. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995).

4. *United Bhd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace*, 94 F.3d 1308 (9th Cir. 1996).

5. *Id.*

6. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847 (2010).

7. *SEIU Local 121RN*, 976 F.3d at 849.

## II. CASE BACKGROUND

In 2014, Los Robles Regional Medical Center (the “Hospital”) entered into a CBA with the Service Employees International Union Local 121RN (“SEIU”).<sup>8</sup> The SEIU is a union that represents registered nurses who work at the Hospital.<sup>9</sup> The CBA was a three year contract beginning on September 16, 2014; the CBA created the terms and conditions for the registered nurses’ employment at the Hospital.<sup>10</sup> These terms and conditions formalized the amount of hours that nurses were to work each week, as well as the number of and type of patients that the nurses were to care for.<sup>11</sup> The issues in this case arose from the interpretation of Article 38 of the CBA.<sup>12</sup> Article 38 provided grievance procedures between the Hospital and the SEIU, with the final step being arbitration.<sup>13</sup> Article 38 defined “grievance” as, “a dispute or disagreement involving the interpretation, application or compliance with specific provisions of this Agreement (including Article and Section) or a dispute or disagreement concerning whether or not discipline including discharge was for just cause.”<sup>14</sup> Article 38 stated that if a grievance reached the arbitration stage in the grievance procedures, the arbitrator was not allowed to “modify the terms of the CBA.”<sup>15</sup>

In September 2017, one week before the CBA expired, the SEIU filed a grievance against the Hospital claiming that the Hospital assigned certain patients to nurses despite knowing that those nurses did not have the training to care for those patients.<sup>16</sup> The SEIU also asserted that the Hospital violated nurse-to-patient ratios that were set and mandated by California state law.<sup>17</sup> The SEIU claimed that these practices violated three sections of

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8. *Id.* at 850.

9. *Id.* at 851.

10. *Id.*

11. *Id.*

12. *SEIU Local 121RN*, 976 F.3d at 851.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *SEIU Local 121RN*, 976 F.3d at 852 (Meaning that nurses in California were only allowed to care for a certain number of patients during their shifts. The number of patients that a nurse could care for a shift varied based on the unit or department that nurse was assigned to.).

the CBA including the Articles on “Safety” and “Job Descriptions,” as well as California state and federal laws.<sup>18</sup> Two months later, after failed attempts to resolve the grievances between the Hospital and the SEIU, the SEIU notified the Hospital that it was planning on pursuing arbitration to resolve the grievances.<sup>19</sup> The Hospital claimed that the grievances stemmed from an issue covered by the staffing provision of Article 25 and therefore was not arbitrable.<sup>20</sup> The Hospital neatly summarized the dispute in an email sent to the SEIU: "confirm[ing] we continue to disagree that this matter is substantively arbitrable AND disagree that an arbitrator has the authority to decide that issue."<sup>21</sup>

In May 2018, the SEIU filed a motion to compel arbitration, which was granted by the district court on January 15, 2019.<sup>22</sup> The district court identified two major questions raised by the motion.<sup>23</sup> The first question was whether the parties were bound by the arbitration provision of the CBA.<sup>24</sup> The court determined there was no argument about the validity of the first question, so it moved to the second and crucial question.<sup>25</sup> The second question was whether the grievance fell within the scope of the arbitration provision within the CBA.<sup>26</sup>

The district court then began its analysis on whether the grievance fell within the scope of the arbitration provision of the CBA.<sup>27</sup> To make that decision, the district court first determined that it would need to decide if the arbitration agreement in the CBA gave the arbitrator or a court the authority to decide who had jurisdiction.<sup>28</sup> The district court analyzed the precedent related to this issue mainly through two cases: *United Bhd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace* from the Ninth Circuit and *Granite Rock Co. v. Int'l Bhd. of Teamsters* from the Supreme Court.<sup>29</sup> The district

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 852.

22. *SEIU Local 121RN*, 976 F.3d at 852.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *SEIU Local 121RN*, 976 F.3d at 852.

28. *Id.*

29. *Id.*; *see also* *United Bhd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace*, 94 F.3d 1308 (9th Cir. 1996); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847 (2010).

court reasoned that the basis of the decision in *Desert Palace* was overturned by the Supreme Court’s decision in *Granite Rock*, but it could not overturn *Desert Palace* because *Desert Palace* was still controlling for district courts in the Ninth Circuit. The district court explained that the appellate court would need to overturn *Desert Palace* because the district court did not have the authority to do so.<sup>30</sup> Therefore, the district court found that the arbitration provision in the CBA was broad enough to allow the arbitrator the ability to determine if the grievance was arbitrable.<sup>31</sup> Following this decision, the Hospital appealed to the Ninth Circuit.<sup>32</sup>

### III. APPELLATE COURT ANALYSIS AND DISSSENT

The Ninth Circuit began its review of the district court’s decision *de novo*.<sup>33</sup> The Ninth Circuit decided that the case implicated three types of arbitral disputes:

“1) the *Merits Question*—a dispute between the parties regarding the merits of an issue (e.g., whether the Hospital’s conduct, as set out in the grievance, violates the CBA); (2) the *Arbitrability Question*—a dispute regarding whether the parties agreed to arbitrate the *Merits Question* (e.g., whether the arbitration provision in the CBA requires the Hospital and SEIU to arbitrate the grievance); and (3) the *Delegation Question*—a dispute regarding whether an arbitrator or a court is tasked with deciding the *Arbitrability Question*.”<sup>34</sup>

The Ninth Circuit first decided that the first two questions, the *Merits Question* and the *Arbitrability Question* were not in debate in this case, so those questions were not analyzed.<sup>35</sup> The Ninth Circuit explained that the resolution of the most important question, the *Delegation Question*, depended on the analysis of three cases: *First Options*, the Supreme Court decision from 1995, the Ninth Circuit’s 1996 decision in *Desert Palace*, and the Supreme Court decision from 2010, *Granite Rock*<sup>36</sup>

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30. *SEIU Local 121RN*, 976 F.3d at 852.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *SEIU Local 121RN*, 976 F.3d at 852.

36. *Id.*

First, the Ninth Circuit discussed the decision in *First Options*.<sup>37</sup> The Ninth Circuit stated that in *First Options*, the Supreme Court held that courts were the proper entity to answer who determines if an agreement is arbitrable when the parties "did not clearly agree to submit the question of arbitrability to arbitration."<sup>38</sup> The Supreme Court held that a court "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."<sup>39</sup>

Next, the Ninth Circuit discussed its own decision from 1996 in *Desert Palace*.<sup>40</sup> The court in *Desert Palace* began its opinion by explaining that courts should decide arbitrability in cases where there is debate over whether an arbitrator or a court should decide questions of arbitrability.<sup>41</sup> Later in the Ninth Circuit's opinion, however, the court began to cite earlier cases than *First Options* and ultimately came to the conclusion that in labor situations, the arbitrator should decide arbitrability, not the courts.<sup>42</sup> The court in *Desert Palace* distinguished the *Desert Palace* case from the decision in *First Options* by claiming that the decision in *First Options* was a dispute in commercial arbitration, while the dispute in *Desert Palace* was a labor or collective bargaining dispute.<sup>43</sup> The Ninth Circuit in *Desert Palace* argued that "parties entering into a collective bargaining agreement know they are granting the arbitrator tremendous power . . ." <sup>44</sup> Therefore, the Ninth Circuit held that the decision in *First Options* was not binding for collective bargaining disputes and ruled that the arbitrator had the power to decide questions of arbitrability.<sup>45</sup>

The Ninth Circuit then argued that the Supreme Court seemingly clarified arbitrability questions for both commercial and collective bargaining disputes in *Granite*

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37. *Id.*

38. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995) ; *SEIU Local 121RN*, 976 F.3d at 853.

39. See *First Options of Chi., Inc.*, 514 U.S. at 947; *SEIU Local 121RN*, 976 F.3d at 853.

40. *SEIU Local 121RN*, 976 F.3d at 853; *United Bhd. of Carpenters & Joiners of Am., Local No. 1780*, 94 F.3d at 1310.

41. *SEIU Local 121RN*, 976 F.3d at 853; *United Bhd. of Carpenters & Joiners of Am., Local No. 1780*, 94 F.3d at 1310.

42. *SEIU Local 121RN*, 976 F.3d at 853; *United Bhd. of Carpenters & Joiners of Am., Local No. 1780*, 94 F.3d at 1310-11.

43. *SEIU Local 121RN*, 976 F.3d at 853; *United Bhd. of Carpenters & Joiners of Am., Local No. 1780*, 94 F.3d at 1311.

44. *SEIU Local 121RN*, 976 F.3d at 853; *United Bhd. of Carpenters & Joiners of Am., Local No. 1780*, 94 F.3d at 1310.

45. *SEIU Local 121RN*, 976 F.3d at 853.

*Rock*.<sup>46</sup> The court stated that *Granite Rock* was a dispute over a collective bargaining agreement between an employer and a labor union over when its CBA was ratified and if the court or an arbitrator had the ability to answer that question.<sup>47</sup> The Court explained in its opinion that a court should determine the question of arbitrability; it took the holding from *First Options* and applied it to both commercial and collective bargaining disputes.<sup>48</sup> The Supreme Court clarified multiple times in its analysis that arbitrability should be decided by courts in both commercial and collective bargaining disputes.<sup>49</sup>

Here, the Ninth Circuit then applied its analysis by implementing the Supreme Court's previous holdings and applying them to the facts of the dispute between the Hospital and the SEIU. The Ninth Circuit clearly stated that the Supreme Court's decision in *Granite Rock*, on applying the same arbitrability framework to both commercial and collective bargaining disputes, "is clearly irreconcilable with the reasons that this court in *Desert Palace* relied on to distinguish *First Options*."<sup>50</sup> The Ninth Circuit then began to analyze if *Desert Palace* is still good law in the Ninth Circuit.<sup>51</sup> The SEIU argued that *Granite Rock* answered a different question than the question addressed in *Desert Palace*.<sup>52</sup> SEIU contended that *Desert Palace* answered the *Delegation Question* while the Supreme Court's decision in *Granite Rock* answered the *Arbitrability Question*, so *Granite Rock* should not overturn the Ninth Circuit's decision in *Desert Palace*.<sup>53</sup> The court explained that the SEIU's argument was not persuasive because the issue decided from the higher court does not need to be "identical in order to be controlling" over a prior circuit decision; rather, the Supreme Court "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."<sup>54</sup>

The Ninth Circuit opined in *Los Robles* that even though the Supreme Court in *Granite Rock* answered the *Arbitrability Question*, and not the *Delegation Question* that was answered in *Desert Palace*, the cases at their core were answering the same

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46. *SEIU Local 121RN*, 976 F.3d at 854.; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847 (2010).

47. *Id.*

48. *SEIU Local 121RN*, 976 F.3d at 854; *Granite Rock Co.*, 561 U.S. at 297.

49. *SEIU Local 121RN*, 976 F.3d at 854; *Granite Rock Co.*, 561 U.S. at 301.

50. *SEIU Local 121RN*, 976 F.3d at 854.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 854-55.

question.<sup>55</sup> The key question answered in both cases “was what did the parties agree to have the arbitrator decide?”<sup>56</sup> Because the Supreme Court answered the same *Delegation Question* that was asked in *Desert Palace*, the Ninth Circuit determined that the decision in *Granite Rock* would control the decision here.<sup>57</sup>

The SEIU also claimed that *Desert Palace* is distinguishable from *First Options* because the courts in those two cases decided different questions of silence in regard to the *Delegation Question*.<sup>58</sup> The silence in the *Delegation Question* in *First Options* was because there was no arbitration clause in the agreement; the silence in *Desert Palace* was in regard to whether an arbitration clause, that was in the contract, covered the *Delegation Question*.<sup>59</sup> The Ninth Circuit contended that the decision in *Desert Palace* was based on the difference between commercial and labor-based arbitration, not the differences in the type of silence in the *Delegation Questions*.<sup>60</sup> Therefore, the Ninth Circuit determined that the difference between *First Options* and *Desert Palace* was “that policy differences justify different application of the arbitrability framework in commercial versus labor disputes.”<sup>61</sup> The Ninth Circuit finished by stating that this was the exact argument that the Supreme Court rejected in *Granite Rock*.<sup>62</sup>

The SEIU then changed its argument by asking the Ninth Circuit to find that its’ post-*Granite Rock* decision in *Int’l Alliance of Theatrical Stage Emple. v. Insync Show Prods., Inc.*, was indistinguishable from the current facts being litigated.<sup>63</sup> There the Ninth Circuit found that a question over a “broad arbitration clause” was to be decided by the arbitrator, not the courts.<sup>64</sup> The SEIU claimed that if the Ninth Circuit decided that a court, not an arbitrator, should decide arbitrability, then the Ninth Circuit would essentially overturn *Insync* without Supreme Court precedent.<sup>65</sup> The SEIU argued that this case should be governed by the decision in *Insync* but the Ninth Circuit explained

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55. *SEIU Local 121RN*, 976 F.3d at 857.

56. *Id.*

57. *Id.*

58. *Id.* at 858.

59. *Id.*

60. *SEIU Local 121RN*, 976 F.3d at 858.

61. *Id.* at 857.

62. *Id.* at 858.

63. *SEIU Local 121RN*, 976 F.3d at 858; *Int’l All. of Theatrical Stage Emp.s v. Insync Show Prods., Inc.*, 801 F.3d 1033 (9th Cir. 2015).

64. *SEIU Local 121RN*, 976 F.3d at 858.

65. *Id.*



that *Insync* was distinguishable from this case because *Insync* determined the arbitrability of a termination clause, not the arbitrability of the arbitration requirement itself.<sup>66</sup>

The Ninth Circuit finally explained “that the Supreme Court’s reasoning in *Granite Rock* is clearly irreconcilable with *Desert Palace*, and thus *Desert Palace* was abrogated.”<sup>67</sup> Because *Desert Palace* was no longer good law, the court determined that there was no “clear and unmistakable” evidence that the parties wanted an arbitrator to decide arbitrability.<sup>68</sup> Because the arbitration clause was silent regarding who should determine arbitrability, the Ninth Circuit followed precedent from *First Options* and *Granite Rock* and held that the question was subject to judicial determination.<sup>69</sup> The case was then reversed and remanded back to the district court.<sup>70</sup>

In Judge Lee’s dissent, he explained why he thought that *Granite Rock* did not overturn *Desert Palace* and why the Ninth Circuit’s decision was incorrect.<sup>71</sup> Judge Lee began his argument by acknowledging that *Desert Palace* was a flawed decision.<sup>72</sup> He argued that *Desert Palace*’s holding was “that a broad arbitration agreement in the collective bargaining context reflects ‘clear and unmistakable evidence’ that the parties agreed to arbitrate arbitrability—even though the contract is silent on that issue.”<sup>73</sup> He stated that this line is counterintuitive because it is construing silence to be “clear and unmistakable evidence.”<sup>74</sup> Judge Lee further argued that although the basis of the decision in *Desert Palace* was rocky, he thought that it should not be overturned because it addressed a different issue than *Granite Rock*.<sup>75</sup> Judge Lee claimed that *Desert Palace* dealt with who decides arbitrability (the *Delegation Question*) while *Granite Rock* dealt with whether a specific issue was arbitrable (the *Arbitrability Question*).<sup>76</sup>

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66. *Id.* at 859.

67. *Id.* at 861.

68. *Id.*

69. *SEIU Local 121RN*, 976 F.3d at 861

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *SEIU Local 121RN*, 976 F.3d at 861.

75. *Id.*

76. *Id.*

Judge Lee also argued that the Supreme Court in *Granite Rock* appeared to have implicitly recognized that its decision does not apply to the *Delegation Question*.<sup>77</sup> Judge Lee argued this because *Granite Rock* appears to hold that the courts are required to compel arbitration if they find that the an arbitration agreement was validly formed and it covered the question in dispute.<sup>78</sup> He inferred that because *Granite Rock* discussed a requirement for courts to compel arbitration if they find the arbitration agreement to be valid, *Granite Rock* was only referring to the *Arbitrability Question*.<sup>79</sup> Judge Lee thought that *Granite Rock*'s decision did not cover the *Delegation Question* so it did not overturn *Desert Palace* meaning that *Desert Palace* should have controlled here and the question of arbitrability should be left to the arbitrator not the courts.<sup>80</sup>

#### IV. SIGNIFICANCE

The Ninth Circuit's decision in *Los Robles* is significant in collective bargaining arbitration because it overturns a well-established precedent that the arbitrator determines the question of arbitrability for collective bargaining disputes.<sup>81</sup> *Los Robles* now requires that courts determine if an arbitrability clause is valid in both commercial and collective bargaining contexts.<sup>82</sup> This is important to labor unions who in the past have used arbitrators to determine if their disputes are arbitrable.<sup>83</sup> If arbitrability disputes are to be decided by the arbitrator, it is likely that the dispute will stay in arbitration which could allow for a faster and cheaper resolution for labor unions and their employers.<sup>84</sup>

Because *Los Robles* overturns *Desert Palace*, there is now a foreseeable situation where labor unions and employers will be required to spend more money than necessary on determining if issues are arbitrable by going through a court system before going back to the arbitrator to resolve the actual dispute.<sup>85</sup> This inefficiency could make arbitration less effective overall because parties frequently choose arbitration to stay out of the court system. This decision, however, requires parties in the Ninth Circuit to go to courts to

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77. *Id.* at 863.

78. *Id.*

79. *SEIU Local 121RN*, 976 F.3d at 863.

80. *Id.*

81. Vin Gurrieri, *9th Circ. Tasks Court Over Arbitrator to Weigh SEIU Grievance*, Law360, Sept. 18, 2020, <https://www.law360.com/articles/1311793>.

82. *SEIU Local 121RN*, 976 F.3d at 863.

83. Appellee SEIU Local 121RN's Answering Brief, *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, No. 19-55185, 2019 WL 2551836.

84. *Id.*

85. *Id.*

determine arbitrability of disputes, when they previously could have the arbitrator decide.<sup>86</sup> Once a court determines that the dispute is arbitrable, the court is required by *Granite Rock* to send the case back to arbitration.<sup>87</sup>

Ultimately, reversing, and remanding *Los Robles* may not have an effect on the actual outcome of the grievance.<sup>88</sup> It is likely that a court will find that the SEIU's argument was persuasive and that the substantive dispute between the Hospital and the SEIU is arbitrable. The grievance should be covered by three arbitrable articles of the CBA including the Safety, Job Descriptions and In-Service Education mandates.<sup>89</sup> The terms of the grievance are not explicitly removed from arbitration clause like other potential grievances such as the Hospital violating the staffing provision.<sup>90</sup> The SEIU dropped the nurse to patient ratio staffing provision complaint because it was clearly not arbitrable.<sup>91</sup> Therefore, the only substantive issue, the training dispute, will likely be considered arbitrable by the district court and the arbitrator will then decide the outcome of that question.<sup>92</sup>

## V. CRITIQUE

The decision by the Ninth Circuit in *Los Robles* clarifies the Ninth Circuit's earlier interpretation of *First Options* from their decision in *Desert Palace*.<sup>93</sup> *Los Robles* was a debatable decision because, as Judge Lee stated in the dissent, this case blurred the lines between the "Delegation Question" from *Desert Palace* and the "Arbitrability Question" decided in *Granite Rock*.<sup>94</sup> That viewpoint would indicate that this decision

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86. Appellant *Los Robles* Regional Medical Center's Reply Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 3763928.

87. Appellee SEIU Local 121RN's Answering Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 2551836.

88. Appellee SEIU Local 121RN's Answering Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 2551836; *see also* Appellant *Los Robles* Regional Medical Center's Reply Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 3763928.

89. Appellee SEIU Local 121RN's Answering Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 2551836.

90. *Id.* at 31.

91. Appellant *Los Robles* Regional Medical Center's Reply Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 3763928.

92. Appellee SEIU Local 121RN's Answering Brief, SEIU Local 121RN v. *Los Robles* Reg'l Med. Ctr., No. 19-55185, 2019 WL 2551836.

93. Vin Gurrieri, *9th Circ. Tasks Court Over Arbitrator to Weigh SEIU Grievance*, Law360, Sept. 18, 2020, <https://www.law360.com/articles/1311793>.

94. *SEIU Local 121RN*, 976 F.3d at 849.

violated a Ninth Circuit decision in *FTC v Consumer Def., Ltd. Liab. Co.* that stated: "if we can apply our precedent consistently with that of the higher authority, we must do so."<sup>95</sup> Some, including Judge Lee, would argue that this decision may have been made in the sake of convenience because *Los Robles* brought the Ninth Circuit in line with arbitrability decisions in other circuits.<sup>96</sup> Judge Lee made a strong enough case in the dissent to indicate that *Desert Palace* did not necessarily need to be overturned based on *Granite Rock*.

The majority and potentially other jurisdictions would likely believe that overturning *Desert Palace* is a decision that makes sense based on the Supreme Court's decision in *Granite Rock*.<sup>97</sup> Although *Los Robles* provides consistency to an inconsistent answer from the Ninth Circuit, some will argue that the Ninth Circuit's decision in *Granite Rock* was actually based on policy considerations not contract principles.<sup>98</sup> If that is the case and the Ninth Circuit wanted arbitrators to resolve arbitrability questions in collective bargaining disputes, then this case would negatively impact the Ninth Circuit's opinion on the efficiency of arbitration.<sup>99</sup> Collective bargaining disputes feature sophisticated parties on both sides.<sup>100</sup> It is likely that this decision will push determining questions of arbitrability into the CBA negotiation phase.<sup>101</sup> If the contract "clearly and unmistakably" states that the arbitrator will decide issues of arbitrability then a court must determine that the arbitrator has the ability to determine questions of arbitrability as well.<sup>102</sup> Proponents of arbitration would argue that even though this decision would be easy to get around by contracting out who determines arbitrability, it is a waste of time and resources for the parties. The majority stated that a decision did not need to be "identical in order to be controlling" over a prior circuit decision.<sup>103</sup> In *Los Robles*, it was apparent that the facts were not identical to *Granite Rock* but now a real debate exists over whether the court took too much of a creative liberty in overturning its own decision in *Desert Palace*. Overall, the majority built their decision around the controversial

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95. *FTC v. Consumer Def., Ltd. Liab. Co.*, 926 F.3d 1208 (9th Cir. 2019).

96. Appellee SEIU Local 121RN's Answering Brief, *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, No. 19-55185, 2019 WL 2551836.

97. Appellant *Los Robles Regional Medical Center's* Reply Brief, *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, No. 19-55185, 2019 WL 3763928.

98. *SEIU Local 121RN*, 976 F.3d at 862.

99. Appellee SEIU Local 121RN's Answering Brief, *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, No. 19-55185, 2019 WL 2551836.

100. *SEIU Local 121RN*, 976 F.3d at 852.

101. *Id.*

102. *Granite Rock Co.*, 561 U.S. at 267.

103. *SEIU Local 121RN*, 976 F.3d at 854.

differences between the *Arbitrability Question* and the *Delegation Question*, resulting in an unconvincing opinion to the SEIU, Judge Lee and potentially many others.

## VI. CONCLUSION

The decision in *Los Robles* grants discretion to the courts to determine the arbitrability of disputes in cases where the arbitrability agreement is silent on who should answer that question.<sup>104</sup> This decision simplifies who answers questions of arbitrability in the Ninth Circuit: the courts will determine disputes over arbitrability unless the arbitration agreement clearly and unmistakably says otherwise.<sup>105</sup>

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104. *Id.* at 852.

105. *SEIU Local 121RN*, 976 F.3d at 852; *see also Granite Rock Co.*, 561 U.S. at 267.