

Opinion of SOTOMAYOR, J.

SUPREME COURT OF THE UNITED STATES

No. 08–1214

GRANITE ROCK COMPANY, PETITIONER *v.*
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 24, 2010]

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

I join Part III of the Court’s opinion, which holds that petitioner Granite Rock’s tortious interference claim against respondent International Brotherhood of Teamsters (IBT) is not cognizable under §301(a) of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. §185(a). I respectfully dissent, however, from the Court’s conclusion that the arbitration provision in the collective-bargaining agreement (CBA) between Granite Rock and IBT Local 287 does not cover the parties’ dispute over whether Local 287 breached the CBA’s no-strike clause. In my judgment, the parties clearly agreed in the CBA to have this dispute resolved by an arbitrator, not a court.

The legal principles that govern this case are simpler than the Court’s exposition suggests. Arbitration, all agree, “is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.” *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960). Before ordering parties to arbitrate, a court must therefore confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute. See *ante*, at 9. In determining the scope of an arbitration agreement, “there

Opinion of SOTOMAYOR, J.

is a presumption of arbitrability in the sense that “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 650 (1986) (quoting *Warrior*, 363 U. S., at 582–583); see also *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543, 550, n. 4 (1964) (“[W]hen a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, national labor policy requires, within reason, that an interpretation that covers the asserted dispute . . . be favored” (emphasis deleted; internal quotation marks omitted)).¹

The application of these established precepts to the facts of this case strikes me as equally straightforward: It is undisputed that Granite Rock and Local 287 executed a CBA in December 2004. The parties made the CBA retroactively “effect[ive] from May 1, 2004,” the day after the expiration of their prior collective-bargaining agreement. App. to Pet. for Cert. A–190. Among other things, the CBA prohibited strikes and lockouts. *Id.*, at A–181. The CBA authorized either party, in accordance with certain grievance procedures, to “refe[r] to arbitration” “[a]ll disputes arising under this agreement,” except for three

¹When the question is “‘*who* (primarily) should decide arbitrability’” (as opposed to “‘*whether* a particular merits-related dispute is arbitrable’”), “the law reverses the presumption.” *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 944–945 (1995). In other words, “[u]nless the parties clearly and unmistakably provide otherwise,” it is presumed that courts, not arbitrators, are responsible for resolving antecedent questions concerning the scope of an arbitration agreement. *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649 (1986). As the majority correctly observes, *ante*, at 7, n. 5, this case does not implicate the reversed presumption because both parties accept that a court, not an arbitrator, should resolve their current disagreement about whether their underlying dispute is arbitrable.

Opinion of SOTOMAYOR, J.

specified “classes of disputes” not implicated here. *Id.*, at A–176 to A–179.

Granite Rock claims that Local 287 breached the CBA’s no-strike clause by engaging in a work stoppage in July 2004. Local 287 contests this claim. Specifically, it contends that it had no duty to abide by the no-strike clause in July because it did not vote to ratify the CBA until August. As I see it, the parties’ disagreement as to whether the no-strike clause proscribed the July work stoppage is plainly a “disput[e] arising under” the CBA and is therefore subject to arbitration as Local 287 demands. Indeed, the parties’ no-strike dispute is indistinguishable from myriad other disputes that an employer and union might have concerning the interpretation and application of the substantive provisions of a collective-bargaining agreement. These are precisely the sorts of controversies that labor arbitrators are called upon to resolve every day.

The majority seems to agree that the CBA’s arbitration provision generally encompasses disputes between Granite Rock and Local 287 regarding the parties’ compliance with the terms of the CBA, including the no-strike clause. The majority contends, however, that Local 287’s “formation-date defense” raises a preliminary question of contract formation that must be resolved by a court rather than an arbitrator. *Ante*, at 15. The majority’s reasoning appears to be the following: If Local 287 did not ratify the CBA until August, then there is “no valid basis” for applying the CBA’s arbitration provision to events that occurred in July. *Ibid.*

The majority’s position is flatly inconsistent with the language of the CBA. The parties expressly chose to make the agreement effective from May 1, 2004. As a result, “the date on which [the] agreement was ratified” does not, as the majority contends, determine whether the parties’ dispute about the permissibility of the July work stoppage

Opinion of SOTOMAYOR, J.

falls within the scope of the CBA's arbitration provision. *Ante*, at 14. When it comes to answering the arbitrability question, it is entirely irrelevant whether Local 287 ratified the CBA in August (as it contends) or in July (as Granite Rock contends). In either case, the parties' dispute—which postdates May 1—clearly “aris[es] under” the CBA, which is all the arbitration provision requires to make a dispute referable to an arbitrator. Cf. *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U. S. 190, 201 (1991) (recognizing that “a collective-bargaining agreement might be drafted so as to eliminate any hiatus between expiration of the old and execution of the new agreement”).²

Given the CBA's express retroactivity, the majority errs in treating Local 287's ratification-date defense as a “formation dispute” subject to judicial resolution. *Ante*, at 13. The defense simply goes to the merits of Granite Rock's claim: Local 287 maintains that the no-strike clause should not be construed to apply to the July work stoppage because it had not ratified the CBA at the time of that action. Cf. *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 942 (1995) (distinguishing a disagreement that “makes up the *merits* of the dispute” from a disagreement “about the *arbitrability* of the dispute”). Accordingly, the defense is necessarily a matter for the arbitrator, not the court. See *AT&T*, 475 U. S., at 651 (“[I]t is for the arbitrator to determine the relative merits of the parties' sub-

²Notably, at the time they executed the CBA in December 2004, the parties were well aware that they disagreed about the legitimacy of the July work stoppage. Yet they made the CBA retroactive to May and declined to carve out their no-strike dispute from the arbitration provision, despite expressly excluding three other classes of disputes from arbitration. Cf. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584–585 (1960) (“In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail”).

Opinion of SOTOMAYOR, J.

stantive interpretations of the agreement”). Indeed, this Court has been emphatic that “courts . . . have no business weighing the merits of the grievance.” *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 568 (1960). “When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the [arbitration provisions] of collective bargaining agreements, it usurps a function . . . entrusted to the arbitration tribunal.” *Id.*, at 569; see also *AT&T*, 475 U. S., at 649 (“[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims”); *Warrior*, 363 U. S., at 582, 585 (“[T]he judicial inquiry under [LMRA] §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance”; “the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement”).

Attempting to sidestep this analysis, the majority declares that Local 287 waived its retroactivity argument by failing in the courts below to challenge Granite Rock’s consistent characterization of the parties’ dispute as one of contract formation. See *ante*, at 16. As a result of Local 287’s omission, the District Court and Court of Appeals proceeded under the understanding that this case presented a formation question. It was not until its merits brief in this Court that Local 287 attempted to correct this mistaken premise by pointing to the parties’ execution of the December 2004 CBA with its May 2004 effective date. This Court’s rules “admonis[h] [counsel] that they have an obligation to the Court to point out in the brief in opposition [to certiorari], and not later, any perceived misstatement made in the petition [for certiorari]”; nonjurisdictional arguments not raised at that time “may be deemed waived.” This Court’s Rule 15.2. Although it is regrettable and inexcusable that Local 287 did not present its

Opinion of SOTOMAYOR, J.

argument earlier, I do not see it as one we can ignore. The question presented in this case presupposes that “it is disputed whether any binding contract exists.” Brief for Petitioner i. Because it is instead undisputed that the parties executed a binding contract in December 2004 that was effective as of May 2004, we can scarcely pretend that the parties have a formation dispute. Consideration of this fact is “a ‘predicate to an intelligent resolution’ of the question presented, and therefore ‘fairly included therein.’” *Ohio v. Robinette*, 519 U. S. 33, 38 (1996) (quoting *Vance v. Terrazas*, 444 U. S. 252, 258, n. 5 (1980); this Court’s Rule 14.1(a)). Indeed, by declining to consider the plain terms of the parties’ agreement, the majority offers little more than “an opinion advising what the law would be upon a hypothetical state of facts.” *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 241 (1937). In view of the CBA’s effective date, I would hold that the parties agreed to arbitrate the no-strike dispute, including Local 287’s ratification-date defense, and I would affirm the judgment below on this alternative ground. Cf. *Dandridge v. Williams*, 397 U. S. 471, 475, n. 6 (1970) (“The prevailing party may, of course, assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court”).