No. 18-

IN THE
Supreme Court of the United States

ROBBIE OHLENDORF, SANDRA ADAMS, AND A PUTATIVE CLASS OF SIMILARLY SITUATED PERSONS,

Petitioners,

v.

LOCAL 876, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Labor Management Relations Act Section 302(e) grants federal courts jurisdiction to restrain violations of the statute. 29 U.S.C. § 186(e). The Court has stated Section 302 expressly provides for a private right of action. In 2011, several Justices questioned this statement in light of *Alexander v. Sandoval*, 532 U.S. 275 (2001). Does Section 302 provide a private right of action?

2) Does a labor organization violate its duty of fair representation by refusing to honor, at the end of the next applicable irrevocability period, employees' check-off authorization revocations that are not sent during an annual fifteen-day window period and by certified mail?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants below, are Robbie Ohlendorf and Sandra Adams.

Respondent, which was Defendant-Appellee below, is Local 876, United Food & Commercial Workers International Union.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's opinion, Pet.App. 3a–15a, review of which is sought, is reported at 883 F.3d 636. That opinion affirmed, in part on other grounds, the United States District Court for the Western District of Michigan's unreported opinion and order granting Respondent's motion to dismiss, Pet.App. 17a–35a, which is available at 2017 WL 4535713. The Court of Appeals' denial of rehearing en banc, Pet.App. 1a, is unreported.

JURISDICTION

The Sixth Circuit entered judgment on February 22, 2018. Pet.App. 2a. On April 2, 2018, the Sixth Circuit denied a petition for rehearing en banc. Pet.App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

1. Labor Management Relations Act ("LMRA") Section 302, 29 U.S.C. § 186, is provided in its entirety at Pet.App. 47a–53a. Its most relevant provision, Section 302(e), states:

> The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party), to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Pet.App. 53a.

The "section 52 of this title," 29 U.S.C. § 52, referenced in Section 302(e) provides, in relevant part:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

Pet.App. 36a–37a.

STATEMENT

This case concerns whether Congress provided a private cause of action in LMRA Section 302(e) and whether a union violates its duty of fair representation by rejecting employees' dues check-off authorization revocations not sent within an annual fifteen-day window period and by certified mail. The district court granted Respondent Local 876, United Food & Commercial Workers' ("Local 876") motion to dismiss, holding Local 876 did not violate Section 302 or breach its duty of fair representation. Pet.App. 17a–

35a. In affirming, the Sixth Circuit upheld the determination that Local 876 did not violate its duty of fair representation, but did not address the merits of Petitioners' Section 302 claim, finding, for the first time on appeal, that Section 302 provides neither an express nor an implied private right of action. Pet.App. 3a–15a.

A. The District Court Held Local 876 Did Not Violate Section 302 or Its Duty of Fair Representation.

1. Petitioner Sandra Adams ("Adams") is, and Petitioner Robbie Ohlendorf ("Ohlendorf") was at relevant times, employed by Oleson's Food Stores ("Oleson") in Michigan. Pet.App. 5a. As Oleson employees, Adams is, and Ohlendorf was, represented exclusively by Local 876. Pet.App. 5a.

In 2013, Adams and Ohlendorf joined Local 876 and signed dues check-off authorizations provided by Local 876 authorizing Oleson to deduct union dues automatically from their paychecks and remit them to Local 876. Pet.App. 5a. The check-off authorization form Adams and Ohlendorf signed stated it "shall be irrevocable . . . unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period, I give the Employer and the Union written notice of revocation via certified mail bearing my signature thereto." Pet.App. 21a.

Three years later, Adams and Ohlendorf resigned their union memberships and revoked their check-off

authorizations. Pet.App. 5a. Local 876 accepted their resignations, but rejected both revocations because they were not submitted during the check-off form's narrow fifteen-day window period or by certified mail. Pet.App. 5a. Local 876 also refused to honor those revocations at the end of the next available irrevocability period. Pet.App. 14a. As a result, Oleson continued to deduct dues from both Adams and Ohlendorf and remit the dues to Local 876, which continued to demand and accept those dues. Pet.App. 5a.

On December 19, 2016, Adams and Ohlendorf filed this lawsuit against Local 876. Pet.App. 5a. The complaint alleges Local 876's refusal to honor employee revocation requests at the end of the next irrevocability period violates Section 302. Pet.App. 5a.

Subsections 302(a) and (b) forbid the "exchange of anything of value between a union and an employer, subject to a strictly limited set of exceptions." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010), *cert. dismissed as improvidently granted*, 571 U.S. 83 (2013). One exception permits the exchange of:

> money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which *shall not be irrevocable for a period of more than one year*, or beyond the termination date of the

> applicable collective agreement, whichever occurs sooner; . . . .

29 U.S.C. § 186(c)(4) (emphasis added). Adams and Ohlendorf allege Local 876's revocation restriction exceeds what this exception permits, rendering its dues deduction authorization form unlawful. Pet.App. 5a.

Adams and Ohlendorf also claim Local 876 violated its duty of fair representation. Pet.App. 5a. Unions that exclusively represent employees under the National Labor Relations Act ("NLRA") owe a duty of fair representation to all employees in the bargaining unit. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Adams and Ohlendorf allege Local 876 breached this duty by acting arbitrarily and in bad faith by maintaining and enforcing the window period and certified mail restrictions. Pet.App. 5a, 22a.

2. On June 30, 2017, the district court entered final Judgment, Pet.App. 16a, after granting Local 876's motion to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), Pet.App. 17a–35a. The district court dismissed Adams and Ohlendorf's statutory claim on the basis that Section 302(c)(4)'s ostensible silence regarding revocation restrictions does not mean such restrictions are prohibited, and because Petitioners voluntarily signed the authorizations containing the revocation restrictions. Pet.App. 23a–30a. The district court dismissed the duty of fair representation claim on the latter ground and because it saw Local

876's window period and certified mail requirements as not arbitrary or in bad faith. Pet.App. 30a–34a.

B. The Circuit Court Held Employees Cannot Bring a Section 302 Claim and Local 876 Did Not Violate Its Duty of Fair Representation.

On July 25, 2017, Adams and Ohlendorf appealed to the Sixth Circuit Court of Appeals. Notice of Appeal, ECF No. 21. While the appeal was pending, Ohlendorf quit working for Oleson and Adams revoked her authorization by certified mail within the window period. Pet.App. 5a.

The Sixth Circuit held Adams and Ohlendorf's claim for economic restitution was still live, but their claim for injunctive relief was moot. Pet.App. 6a. It then affirmed the district court's dismissal, but on an alternative ground for the Section 302 claim. Pet.App. 6a.

1. In addressing Section 302, the court held private parties cannot bring a civil lawsuit to enforce the statute. Pet.App. 7a. According to the court, "[n]othing in § 302 says that private parties may enforce the law," which "imposes federal criminal penalties on parties who willfully violate the statute" but "says nothing about civil remedies." Pet.App. 7a. The court explained away the existence of Section 302(e), which expressly provides courts with jurisdiction to "restrain violations of this section," 29 U.S.C. § 186(e), by asserting a "jurisdictional provision 'creates no cause of action of its own force and effect' and

'imposes no liabilities.'" Pet.App. 11a (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979)). The court reasoned that, because Congress entrusted the "Attorney General to protect the public from criminal violations of § 302, Congress [only] gave the federal courts authority to hear such actions and to permit federal courts (at the behest of the Attorney General) to enjoin violations of this criminal labor law." Pet.App. 11a–12a.

The court further held Section 302 does not lead to an inference that "Congress created a private *right* and private *remedy*" upon which an implied right of action can be found. Pet.App. 8a. In the court's view, Section 302 is not a "clear and unambiguous" rights-creating statute because "[i]t does not create person-specific rights," but rather "'focus[es] on the person[s] regulated rather than the individuals protected.'" Pet.App. 8a–9a (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). Somewhat inconsistently, the court also reasoned the persons Section 302 protects—employees like Adams and Ohlendorf—can protect their rights under Section 302 by contacting the Attorney General or filing an unfair labor practice charge with the National Labor Relations Board ("NLRB").[1] Pet.App. 13a.

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[1] The latter suggestion is puzzling, because the National Labor Relations Board has no jurisdiction to enforce Section 302. *BASF Wyandotte Corp.*, 274 N.L.R.B. 978, 978 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986); *see also Nat'l Fuel Gas Distribution Corp.*, 308 N.L.R.B. 841, 843 (1992).

The court refused to find any analogy in Section 302's sister statutes, Sections 301 and 303, both of which provide a private right of action, on grounds that neither is applicable to Adams and Ohlendorf's claim. Pet.App. 10a–11a.

2. The Sixth Circuit also affirmed the district court's dismissal of Adams and Ohlendorf's duty of fair representation claim. Pet.App. 14a–15a. It found Local 876 could not act arbitrarily or in bad faith when Adams and Ohlendorf "agreed to the window-period and certified-mail requirements when they signed the authorization form." Pet.App. 14a, 16a.

On April 2, 2018, the Sixth Circuit denied Petitioners' March 8, 2018 petition for rehearing en banc. Pet.App. 1a. This Petition presents two questions. The first, which the dissenting Justices raised in *Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85–86 (2013) (Beyer, J., dissenting), is whether Section 302 provides a private right of action to employees, whom the statute is intended to protect. The second is whether a union violates its duty of fair representation by restricting employees' ability to effectuate dues check-off revocations to a narrow annual window period and only by certified mail.

REASONS FOR GRANTING THE WRIT

This Court and lower courts long have recognized Section 302(e) provides for a private cause of action. *See Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 205 n.19 (1962), *overruled on other grounds*, *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235,

237–38 (1970); *infra* Part I.B.1. (citing cases). This recognition is well grounded in the statute's text, which contains an exception—to 29 U.S.C. § 52—that applies only to suits brought by private employees and employers. 29 U.S.C. § 186(e).

Nevertheless, in 2011, several Justices questioned whether Section 302 provides a private right of action, citing *Sandoval*, but left that question for another day. *Mulhall*, 571 U.S. at 85–86 (Beyer, J., dissenting). Taking this cue, the Sixth Circuit raised the question sua sponte in this case, and held Section 302 provides neither an express nor implied private right of action. Pet.App. 6a–13a.

By so doing, the Sixth Circuit has brought itself into conflict with this Court's and several other Circuits' decisions. The court also has undermined a cause of action that employees, employers, and unions have used for decades to protect their rights and interests. The Sixth Circuit also implicated a question raised by several other circuits—whether the four part test enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), is applicable when analyzing whether Congress intended to imply a private right of action. The Court should grant review to restore uniformity to an area of law that impacts thousands of private sector employees, employers, and unions nationwide.

This case also presents the Court with an opportunity to address the extent to which unions may restrict employees' statutory right to revoke their dues check-off authorizations. In *Felter v. Southern Pacific*

Co., the Court held labor unions lack authority "to treat as nullities revocation notices which are clearly intended as such and about whose authenticity there is no dispute." 359 U.S. 326, 335 (1959). Yet, the Sixth Circuit disregarded that precedent by holding unions can restrict employees' rights without violating their duty of fair representation. The writ should be granted on the second question as well.

I. The Court Should Reaffirm Section 302(e) Provides a Private Cause of Action.

A. Section 302(e) Expressly Provides a Private Cause of Action.

Section 302(e) grants "district courts of the United States . . . jurisdiction, for cause shown . . . to restrain violations of this section, ..." 29 U.S.C. § 186(e). This authority is granted "without regard to the provisions of . . . section 52 of this title, ..." *Id.* Section 52 removes a federal court's jurisdiction to issue a restraining order or an injunction in suits between employees and employers. 29 U.S.C. § 52. Section 52 only applies to suits between private employees and employers, and not to suits brought by the government. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 270 (1947).

The inclusion in Section 302(e) of an exemption from Section 52's prohibition of injunctions in suits between "employees" and "employers," 29 U.S.C. § 52, proves Section 302(e) grants these private litigants an express right of action to restrain violations of the statute. If Section 302 did not, the inclusion of

the Section 52 exemption would be superfluous. It is an "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (citation omitted).

a. That Section 302's express private right of action is provided in its jurisdictional section does not lessen its presence, as the Sixth Circuit wrongly believed. Pet.App. 11a. The court's reliance on *Touche Ross*, 442 U.S. 560, for the proposition that "a jurisdictional provision 'creates no cause of action of its own force and effect' and 'imposes no liabilities,'" is misplaced. Pet.App. 11a (quoting *Touche Ross*, 442 U.S. at 577). Courts do not ignore a statute's jurisdictional section in determining whether Congress intended to authorize a private cause of action. *See Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 22 (1979) (noting that analyzing the jurisdictional section provides "one more piece of evidence" whether Congress intended "to authorize a [private] cause of action").

In *Touche Ross*, which predates *Sandoval*, the petitioner claimed an implied private right of action based on the "remedial purpose" of the Securities Exchange Act of 1934, as well as the jurisdictional statute. 442 U.S. at 577–78. Contrary to what the Sixth Circuit indicates, Pet.App. 11a, the Court did not find the lack of a private right of action solely based on the claim it arose from the jurisdictional provision. *Id.* at 569–78. Rather, *Touche Ross* found no

support for a private right of action from both the jurisdictional section and the law's substance, which did not proscribe any conduct as unlawful but merely required regulated businesses to keep records and file reports. *Id.* at 569; *see also Sandoval*, 532 U.S. at 285–86 ("[A] 'private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute].'" (second and third alterations in original) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994))).

Unlike in *Touche Ross*, Congress' provision of a private right of action in Section 302 is evident from its grant of jurisdiction to district courts to "restrain violations of this section"—a clear reference to civil injunctive relief, *see infra* at p. 15—and from Section 302(e)'s exemption from Section 52's restrictions on suits between "employees" and "employers."

b. That Section 302 is enforceable by private parties is further evidenced by the fact its sister statutes, LMRA Sections 301 and 303, 29 U.S.C. §§ 185 & 187, also are enforceable by private parties. The Sixth Circuit's claim that those sister statutes are irrelevant, Pet.App. 10a–11a, ignores basic principles of statutory interpretation. Sections 301, 302, and 303 should be interpreted in the same way to effectuate similar labor law principles protecting employees. *See Sinclair*, 370 U.S. at 204–05 (analyzing and defining Section 301's scope in light of Sections 302 and 303). The three statutes' substantive language varies based on their disparate purposes: Section 301

covers contract breaches; Section 302(e) covers injunctive and declaratory relief over certain prohibited transactions; and Section 303 covers damages for secondary boycotts. But, all three statutes are alike in expressly providing for private rights of action. *See* 29 U.S.C. §§ 185(a), 186(e), & 187(b).

Another part of the statutory scheme also evinces congressional intent to allow private parties to protect their interests under Section 302. Congress made Section 302 violations a covered racketeering activity under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961(1)(C), and made RICO enforceable through a private cause of action. 18 U.S.C. § 1962; *see Marceau v. Int'l Bhd. of Elec. Workers*, 618 F. Supp. 2d 1127, 1156–60 (D. Ariz. 2009). It would make little sense if employees could enforce their Section 302 rights only through RICO suits, but not directly through Section 302(e).

c. The Sixth Circuit's conclusion that Section 302 is enforceable only by the federal government adds a new limitation to Section 302(e) found nowhere in its text. In fact, the conclusion *conflicts* with Section 302(e)'s text because Section 52 does not apply to suits brought by the United States. *See United Mine Workers*, 330 U.S. at 270 (holding the Court "cannot construe the general term 'employer' to include the United States" in Section 52). The Section 52 exemption's inclusion proves Section 302(e)'s private cause of action is not available only for the federal government.

The Sixth Circuit, however, reasoned Section 302(e)'s exemptions indicate courts only have jurisdiction to restrain Section 302 violations if the lawsuit initially is brought under another statutory provision that allows a private right of action. Pet.App. 12a. The inclusion of the exemptions, however, does not show congressional intent that Section 302(e) only provides jurisdiction to private parties via another statute. Rather, the exemptions bolster Congress' express inclusion of a private right of action in Section 302(e).

B. The Sixth Circuit's Section 302 Decision Conflicts with Supreme Court and Federal Court Jurisprudence.

Interpreting Section 302 as providing a private right of action was not called into question until 2010, *Mulhall*, 571 U.S. at 85–86 (Beyer, J., dissenting), nor had any federal court held otherwise (to Adams' and Ohlendorf's knowledge) in the seventy years since Section 302 was promulgated until the Sixth Circuit did so in this case, Pet.App 6a–13a. Notwithstanding Section 302(e)'s plain language, the Court's precedents, and longstanding circuit jurisprudence, the Sixth Circuit determined Section 302 provides neither an express nor an implied private right of action. Pet.App. 4a, 7a, 11a. Yet, without a private cause of action, employees, employers, and unions will lose the ability to protect themselves from unlawful financial dealings between a union

and employer or demands for such unlawful dealings. 29 U.S.C. § 186(a).

1. In 1962, the Court recognized Section 302(e) "expressly permit[s] suits for injunctions . . . to be brought in the federal courts by private litigants . . . ." *Sinclair*, 370 U.S. at 205 n.19. Specifically, the Court found Section 302(e) "permit[s] private litigants to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities." *Id.* at 205. The dissenting Justices agreed on this point, noting "[o]nly in § 302(e) of Taft-Hartley is there found a repeal of Norris-LaGuardia's anti-injunction provisions in favor of a suit by a private litigant." *Id.* at 222 (Brennan, J. dissenting) (footnotes omitted).[2]

Since *Sinclair*, "federal courts have agreed that [Section 302] permits them to grant parties injunctive and, in some instances, declaratory relief in restraining these violations." *Nat'l Stabilization Agreement of Sheet Metal Indus. Tr. Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1224 (D.C. Cir. 1981) (footnotes omitted).

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[2] The Sixth Circuit's assertion that *Sinclair* directly did not involve Section 302, Pet.App. 13a, ignores that the Court's Section 302 interpretation was important to its interpretation of a sister statute, Section 301, and to the case's holding. *See generally Seminole Tribe v. Florida*, 517 U.S. 44, 66–67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

In *Local 144 Nursing Home Pension Fund v. Demisay*, a case brought by a private litigant, the Court held: "[b]y its unmistakable language, § 302(e) provides district courts with jurisdiction 'to restrain violations of this section.' A 'violation' of § 302 occurs when the substantive restrictions in §§ 302(a) and (b) are disobeyed . . . ." 508 U.S. 581, 587–88 (1993).

The circuit courts that have considered the issue also have held Section 302 provides a private right of action. In *International Longshoremen's Ass'n v. Seatrain Lines, Inc.*, the Second Circuit held it is not "improper to adjudicate the scope of Section 302 in a suit between private parties since the Section itself provides for just such adjudication." 326 F.2d 916, 919 (2d Cir. 1964). "While it is true that violation of the Section subjects the violator to penal sanctions, the Section is also enforceable by a civil action at the instance of private persons. Under Section 302(e) an action may be brought to enjoin the performance of an agreement that violates Section 302." *Id.*

The Second Circuit in *Seatrain Lines* noted both the Seventh and Ninth Circuits also had addressed Section 302 civil suits brought by private employees or employers. *Id.* (citing *Local No. 2, Operative Plasterers & Cement Masons Int'l Ass'n v. Paramount Plastering, Inc.*, 310 F.2d 179 (9th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963) (employees); *Employing Plasterers' Ass'n v. Journeymen Plasterers' Protective & Benevolent Soc'y*, 279 F.2d 92, 97–99 (7th Cir. 1960) (employers); *Sheet Metal Contractors Ass'n v. Sheet Metal Workers Int'l Ass'n*, 248 F.2d 307 (9th

Cir. 1957), *cert. denied*, 355 U.S. 924 (1958) (employers). The District of Columbia Circuit can be added to that list. *See Nat'l Stabilization Agreement*, 655 F.2d at 1224 (addressing a Section 302 lawsuit brought by a trust fund and that fund's trustees).

Even the Sixth Circuit previously recognized "section 302 is an independent liability-creating statute enacted by Congress to provide additional judicial remedies for certain wrongful conduct," and that "[i]n section 302 Congress has independently provided a judicial remedy for certain specifically described conduct." *Hosp. Emps.' Div. of Local 79, SEIU v. Mercy-Mem'l Hosp. Corp.,* 862 F.2d 606, 608 (6th Cir. 1988), *judgment vacated on other grounds*, 492 U.S. 914 (1989) (citations omitted)); *see also Sellers v. O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983) (holding Section 302(e) gave the district court jurisdiction to adjudicate cases brought by private litigants); *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (determining, in a suit brought by a union, that an employer's payment into a "steward fund" would violate Section 302); *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264, 267 (6th Cir. 1981) (addressing the legality of dues deduction practices under Section 302(c)(4) where no written check-off authorization exists).

The district courts also have heard dozens of private causes of action under Section 302 over the years. *See generally* W.J. Dunn, Annotation, *Civil Ac-*

tions Involving Union Welfare Funds Subject to § 302 of the Taft-Hartley Act, 88 A.L.R.2d 493 (collecting cases); *see, e.g.*, *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 721–23 (N.D. Ohio 2006) (finding a private right of action under Section 302(e)); *Humility of Mary Health Partners v. Local 377 Chauffeurs, Teamsters, Warehousemen, & Helpers of Am.*, 296 F. Supp. 2d 840, 845–48 (N.D. Ohio 2003) (adjudicating an employer's Section 302 challenge to an arbitration award).

Despite the multitude of Section 302 civil cases brought by private litigants, the Sixth Circuit broke from this Court's and the lower federal courts' precedents. By so doing, the Sixth Circuit created a conflict this Court should resolve.

2. It is important to resolve this conflict in the law because the lower court's holding that Section 302(e) provides no private right of action undermines the ability of thousands of employees, employers, and employee representatives to protect important rights and interests:

> Those members of Congress who supported the amendment [that became Section 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.

Arroyo v. United States, 359 U.S. 419, 425–26 (1959) (footnotes omitted). Depriving employees, employers, and unions of a private cause of action undermines all three Section 302 purposes.

Absent a private cause of action, employees cannot protect themselves from corrupt dealings between their employer and union representatives, such as when a union official accepts payoffs from an employer in exchange for bargaining concessions. This frustrates Section 302's principal purpose, which is to "protect employees in dealings between the union and employer . . . and specifically to protect them from the collusion of union officials and management." *Mulhall*, 618 F.3d at 1290 (quotation marks and citations omitted).

As the Sixth Circuit itself noted in a different case, "[c]orruption in union-employer relationships will often not come to light in the absence of reporting by an insider in the process." *Himmel v. Ford Motor Co.*, 342 F.3d 593, 600 (6th Cir. 2003). "Therefore, to achieve the policy goal of Section 302, employees must be in a position where they are able to articulate their observations and suspicions of such corruption." *Id.*

Absent a private cause of action, employers cannot protect themselves from extortionate union demands for money or things of value as the price for labor peace. Nor can they protect themselves from union demands for contributions to union trust funds that do not comply with Section 302(c)'s exacting legal re-

quirements. In turn, a union cannot protect employees when an employer attempts to improperly pay into a fund that violates Section 302 or attempts to extort the union in exchange for labor peace.

The Sixth Circuit's decision thereby undermines Section 302's principal and secondary purposes. The Court should grant the writ to address this drastic turn of events and resolve whether Section 302 provides a private right of action or allows unions and employers to violate employees' rights without fear of civil enforcement by those they have harmed.

C. Alternatively, Section 302 Implicitly Provides a Private Cause of Action.

Given Section 302(e) expressly provides a cause of action to employees and employers, and to unions as employees' representatives, there is no need to imply such a cause of action from the statute. However, if such implication were necessary, the Sixth Circuit erred in holding Section 302 does not provide an implicit private cause of action.

1. In analyzing whether there is an implied private cause of action, circuit courts have questioned what test is applicable. Because "[t]he Court's opinions have not always announced explicitly when they are overruling (or limiting to their facts) old precedents in this area, . . . it can be difficult to discern to what degree the Court has repudiated old tests as opposed to applying them in a different way to different statutes." *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 297 (3d Cir. 2007).

After some doctrinal shifts, the Court in 1975 established the following four-part test in *Cort v. Ash*:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

Four years later, the Court again addressed whether a statute provides an implied right of action in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Touche Ross*, 442 U.S. 560. In *Cannon*, the Court said the test actually was a "statutory construction" question of whether "Congress intended to make a remedy available." 441 U.S. at 688. The Court, however, then stated, "a court must carefully analyze the four factors that *Cort* identifies as [they are] indicative of such an intent." *Id.*

In *Touche Ross*, the Court shifted the test even more towards one *Cort* factor, by stating, "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private

cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose—are ones traditionally relied upon in determining legislative intent." 442 U.S. at 575–76 (internal citation omitted). After finding no implied right of action under the first two *Cort* factors, the Court declined to apply the remaining two, stating, "the Court did not decide that each of these factors is entitled to equal weight." *Id.* at 576.

Nine years after *Touche Ross*, the Court in *Thompson v. Thompson* noted it has relied on "other tools of statutory construction" in addition to *Cort*'s four factors to discern "Congress' intent in enacting the statute." 484 U.S. 174, 179 (1988). In a concurring opinion, Justice Scalia stated his belief that the *Cort* test was overruled in *Touche Ross* and *Transamerica Mortgage Advisors*, 444 U.S. at 18. 484 U.S. at 189 (Scalia, J., concurring). According to Justice Scalia, the Court had "convert[ed] one of [the *Cort*] four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence." *Id.* at 190.

Further adding to the confusion, the Court in *Sandoval* analyzed whether a statute provided a private right of action *without* applying the *Cort* test, and without resolving whether *Cort* had been overruled, as Justice Scalia suggested. 532 U.S. at 286. Rather, the Court stated, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a pri-

vate right but also a private remedy. Statutory intent on this latter point is determinative." *Id.* (internal citation omitted).

The end result has been several circuits questioning whether the *Cort* test is still applicable in light of *Touche Ross* or *Sandoval*. *First Pac. Bancorp, Inc. v. Helfer,* 224 F.3d 1117, 1121–22 (9th Cir. 2000) (noting "there has even been some suggestion that *Cort* has been overruled" in light of *Touche Ross* and Justice Scalia's concurrence in *Thompson*); *Lindsay v. Ass'n of Prof'l Flight Attendants*, 581 F.3d 47, 52, 52 n.3 (2d Cir. 2009) (noting "*Sandoval,* however, does not purport to overrule *Cort v. Ash*"); *Wisniewski*, 510 F.3d at 298–301 (noting "*Cort* has never been formally overruled" and addressing the history of the *Cort* test in light of *Touche Ross* and *Sandoval*, the latter which "strongly suggests that the Court has abandoned" the *Cort* test).

Whether Section 302 provides a private cause of action presents this Court with an opportunity to clarify what test governs this analysis and whether *Cort* remains good law. The Court should seize the opportunity to end confusion among the circuit courts on this matter.

2. Section 302 meets both the *Cort* four-part test and, in turn, the two-part *Sandoval* test for an implied private cause of action.

First, Adams and Ohlendorf are part of the class "for whose especial benefit the statute was enacted," *Cort*, 422 U.S. at 78. Section 302's purpose is to "pro-

tect employees in dealings between the union and employer." *Jackson Purchase*, 646 F.2d at 267; *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 787 (5th Cir. 1975) (noting Subection 302(c)(4) is "a statutory provision that the Supreme Court has emphatically interpreted as a protection of employee rights"). That the employees are victims whom the Attorney General would be protecting in bringing criminal charges, as the Sixth Circuit points out, Pet.App. 10a, does not alter the fundamental premise that the statute was created for their benefit.

Second, Congress indicated a legislative intent to create such a statutory remedy for private parties by allowing district courts to "restrain violations" of Section 302, an allowance which focuses on the individuals protected rather than the persons regulated. *Sandoval*, 532 U.S. at 289. "When Congress enacted § 302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with problems peculiar to collective bargaining." *Arroyo*, 359 U.S. at 424–25.

In this respect, Section 302 is nothing akin to the statute at issue in *Sandoval*. That statute stated, "'[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [the statute].'" *Sandoval*, 532 U.S. at 288–89 (quoting 42 U.S.C. § 2000d-1) (alterations in original). Section 302, in contrast, focuses on the individuals protected and not the agency regulating the conduct.

Third, implying such a remedy for Adams and Ohlendorf is "consistent with the underlying purposes of the legislative scheme," *Cort*, 422 U.S. at 78, which is to protect employees' rights. Given that Congress provided private rights of action in Section 302's sister statutes—LMRA Sections 301 and 303—it is hard to fathom why Congress would have chosen to withhold such rights from employees in Section 302.

Fourth, Section 302 claims have never been relegated to state law, nor is it an area of concern to states. State laws have little, or no, room to regulate in the dues check-off authorization area where Federal labor law preempts state law. *SeaPak v. Indus., Tech. & Prof'l Emp.*, 300 F. Supp. 1197, 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971) (holding Georgia statute must yield to federal law in union dues check-off authorization area).

The Sixth Circuit's decision is contrary to Congress' intent to create a Section 302 private right of action, if not explicitly, by implication under either the *Cort* or *Sandoval* test. The Court should grant certiorari to settle this vital question.

II. The Court Also Should Resolve Whether a Union Can Restrict an Employee's Right to Revoke a Dues Check-off Authorization.

The Sixth Circuit departed from this Court's precedent to uphold Local 876's notification window period and certified mail restrictions. Pet.App. 14a–15a. It

did so despite finding Local 876's refusal to "credit the revocation for the next open period" lacked common sense. Pet.App. 14a. The Court should issue the writ to make it clear a union violates its duty of fair representation by restricting an employee's statutory right to revoke his or her check-off authorization.

In *Felter v. Southern Pacific Co.*, the Court struck down a union's requirement that all dues check-off revocations had to be on a specific form only available from the union. 359 U.S. at 327–28, 334–36.[3] The Court explained: "[a]dditional paper work or correspondence, after [the employee] once has indicated his desire to revoke in writing, might well be some deterrent, so Congress might think, to the exercise of free choice by an individual worker." *Id.* at 336. The Court rejected the union's justifications for the restriction, including the justifications that the restriction "is necessary in the interests of orderly procedure," "is necessary in the interests of preventing fraud and foregery [sic], and of obviating disputes as to the authenticity of revocation instruments," and is a "necessary protection to the employee from himself . . . and from outside undue influence . . . ." *Id.* at 334–35.

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[3] In *Felter* the Court analyzed whether the union's policy violated the dues deduction provision in the Railway Labor Act, 45 U.S.C. § 152, subd. 11(b), which provision is almost identical to the LMRA's dues deduction provision. *Compare* 29 U.S.C. § 186(c)(4) *with* 45 U.S.C. § 152, subd. 11(b).

Since *Felter*, lower courts have held unions must honor "untimely" employee revocation letters effective at the end of the next available irrevocability period, without the necessity of the employee sending a second, duplicative letter. *Monroe Lodge No. 770, Int'l Ass'n of Machinists & Aerospace Workers v. Litton Bus. Sys., Inc.*, 334 F. Supp. 310, 315–17 (W.D. Va. 1971), *aff'd & remanded sub nom. Machinists Monroe Lodge 770 v. Litton Bus. Sys., Inc.*, No. 71-2063, 1972 WL 3025 (4th Cir. May 15, 1972).

Courts and the NLRB also have struck down union requirements that employees appear in person at a union hall to revoke their dues check-off authorizations, *Newport News Shipbuilding & Dry Dock Co.*, 253 N.L.R.B. 721, 731–32 (1980), *enforced sub nom. Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488 (4th Cir. 1981); appear in person at the union hall with a photo identification and written revocation, *Local 58, International Brotherhood of Electrical Workers (IBEW) v. NLRB*, 888 F.3d 1313, 1318–19 (D.C. Cir. 2018); or notify unions of their dues collection wishes only by certified mail, *see Kidwell v. Transportation Communications International Union*, 731 F. Supp. 192, 205 (D. Md. 1990), *aff'd in part, rev'd in part*, 946 F.2d 283 (4th Cir. 1991) (holding invalid the union's certified mail requirement for objections to an agency fee because "the purpose of assuring that objections are received is outweighed by the burden and cost to the objector"); *Laramie v. Cty. of Santa Clara*, 784 F. Supp. 1492, 1499–1500 (N.D. Cal. 1992) (holding "unconstitutionally burden-

some" a certified mail requirement for objections to the union's reduced agency fee calculation); *see also California Saw & Knife Works*, 320 N.L.R.B. 224, 236–37 (1995) (striking down the certified mail requirement for employees to communicate objections).

Local 876's restrictions on check-off authorization revocations should be unlawful under *Felter*. Yet, the Sixth Circuit never discussed this Court's dispositive opinion, much less attempted to square its decision with *Felter*. The Court should grant review to bring Sixth Circuit law into line with this Court's controlling precedent and other circuits' law.

CONCLUSION

The petition for writ of certiorari should be granted to resolve: (1) the conflict and confusion among the circuits as to whether there is a private cause of action under LMRA Section 302, which primarily is intended to protect employees; and (2) the conflict with this Court's *Felter* decision as to the validity of union restrictions on employees' dues check-off revocations.

Respectfully submitted,

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June 28, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 04/02/2018]

No. 17-1864

ROBBIE OHLENDORF; SANDRA ADAMS,
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 876,

Defendant-Appellee.

ORDER

BEFORE: SUTTON, KETHLEDGE, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 02/22/2018]

No. 17-1864

ROBBIE OHLENDORF; SANDRA ADAMS,
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 876,

Defendant-Appellee.

Before: SUTTON, KETHLEDGE, and
LARSEN, Circuit Judges

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 02/22/2018]

No. 17-1864

ROBBIE OHLENDORF; SANDRA ADAMS,
and all others similarly situated,

Plaintiffs-Appellants,

v.

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 876,

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids
No. 1:16-cv-01439—
Paul Lewis Maloney, District Judge

Argued: February 1, 2018

Decided and Filed: February 22, 2018

Before: SUTTON, KETHLEDGE, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: Amanda K. Freeman, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., Springfield, Virginia, for Appellants. J. Douglas Korney, LAW OFFICES OF J. DOUGLAS KORNEY, Farmington Hills, Michigan, for Appellee. ON BRIEF: Amanda K. Freeman, William L. Messenger, Glenn M. Taubman, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., Springfield, Virginia, for Appellants. J. Douglas Korney, LAW OFFICES OF J. DOUGLAS KORNEY, Farmington Hills, Michigan, for Appellee.

OPINION

SUTTON, Circuit Judge. The Labor Management Relations Act makes it a crime for an employer to deduct union dues from an employee's paycheck and for the union to accept the dues, except if the employee consents by signing an authorization form, often called a dues checkoff. Robbie Ohlendorf and Sandra Adams signed dues checkoff authorizations with their employer in 2013. When they tried to revoke them three years later, they did not follow the protocol for revoking their consent, and the union insisted that they do so. Ohlendorf and Adams sued the union in response. Their putative class action lawsuit seeks damages and injunctive relief on the ground that the union violated the Act and its duty of fair representation. The district court dismissed the complaint as a matter of law. Because this criminal law does not create a private right of action and because the union did not act arbitrarily or in bad faith, we affirm.

I.

Ohlendorf and Adams worked for Oleson's Food Stores in Michigan. The collective bargaining agreement between Oleson's and Local 876 of the United Food & Commercial Workers Union allowed Oleson's to deduct union dues from their employees' paychecks if the employee signed an authorization form. The form provided that the checkoff authorization would be irrevocable for one year or until the termination date of the agreement, whichever occurred sooner, and thereafter for yearly periods unless revoked by certified mail during a 15-day window each year.

Ohlendorf and Adams joined the union in 2013 and signed the authorization forms. Three years later, they resigned their membership and tried to revoke their permission. But they sent their written revocations by regular mail, not certified mail, and did so outside of the 15-day period for revoking authorization. The union refused to accept the revocations for that year. The company thus continued to deduct union dues from their wages, and the union continued to accept the payments.

Ohlendorf and Adams filed a class action against the union, claiming it violated the Labor Management Relations Act by imposing conditions on their ability to revoke their authorizations and violated its duty of fair representation by enforcing those conditions. They sought damages and injunctive relief. The district court dismissed the complaint as a matter of law, prompting this appeal. While the appeal was pending, Adams successfully revoked her authorization and Ohlendorf quit working at Oleson's.

II.

Article III of the United States Constitution empowers the federal courts to hear only cases or controversies, U.S. Const. art. III, § 2, cl. 1, "a cradle-to-grave requirement" that must be satisfied at the time a claimant files a lawsuit and must remain throughout the life of the case, *Fialka-Feldman v. Oakland Univ. Bd. of Tr.*, 639 F.3d 711, 713 (6th Cir. 2011). If something happens that makes it "impossible" to grant "effectual relief" with respect to a claim, that claim must be dismissed as moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992).

Events have mooted one of the claims filed by Ohlendorf and Adams. They asked the district court to enjoin the union from enforcing the window-period and certified-mail requirements. But Ohlendorf no longer works for Oleson's and Adams recently revoked her authorization. An injunction on this score thus would not do them any good. While that forward-looking claim is moot, the employees' backward-looking request for damages—the money they paid to the union after the union refused to honor their attempts to revoke—lives on.

III.

Section 302 of the Labor Management Relations Act makes it a crime for an employer to willfully give money to a labor union, 29 U.S.C. § 186(a), and for a labor union to willfully accept money from an employer, *id.* § 186(b). The prohibition contains several exemptions. Pertinent here, the Act exempts "money deducted from the wages of employees in payment of membership dues in a labor organization" if "the employer has received from each employee, on whose account

such deductions are made, a written assignment." *Id.* § 186(c)(4). Under the exception, written assignments "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." *Id.*

The Attorney General has authority to enforce this criminal statute. But he has not done so with respect to these allegations. Nor have Ohlendorf and Adams filed a charge with the National Labor Relations Board that the union or their employer has committed an unfair labor practice.

What we have instead is a civil lawsuit filed by Ohlendorf and Adams in federal district court to enforce this criminal statute. That is not an everyday event in the federal courts. Before individuals may file such a lawsuit, they must identify a statutory cause of action that allows them to do so. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). They point to no such law, and under basic customs of statutory interpretation no such right of action exists.

"An express federal cause of action states, in so many words, that the law permits a claimant to bring a claim in federal court." *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir. 2010). Nothing in § 302 says that private parties may enforce the law. The relevant language imposes federal criminal penalties on parties who willfully violate the statute: a criminal fine up to $15,000 or imprisonment up to five years. 29 U.S.C. § 186(d). That is a form of relief usually enforced by the federal government, not private parties. The section about "Penalties for violations" says nothing about civil remedies.

That leaves the possibility of an *implied* right of action. But that is an increasingly rare creature, one that requires us to infer that Congress created a private *right* and provided for a private *remedy*, all without taking the conventional route of doing so expressly. *See generally Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–58 (2017); *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119–20 (2005).

Section 302 does not confer any individually enforceable right, "phrased in terms of the persons benefited." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotations omitted). Much less does the provision do so clearly. "[I]f Congress wishes to create new rights enforceable under [an implied private right of action], it must do so in clear and unambiguous terms." *Id.* at 290.

How, one might wonder, does Congress "imply" a right of action in "clear and unambiguous terms"? The answer is that the *rights-creating language* must be "clear and unambiguous." *McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005). "Rights," it also deserves mention, differ from the "broader or vaguer 'benefits' or 'interests'" that some statutes create. *Rancho Palos Verdes*, 544 U.S. at 119–20. Statutes that ban conduct but do not identify specific beneficiaries do not suffice. *Sandoval*, 532 U.S. at 289.

The concrete usually beats the abstract. Some examples may help. On the permissible side of the line: A statute that says "*[n]o person* in the United States shall . . . be subjected to discrimination" on the basis of race creates an individual right to be free from race discrimination. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979). And a statute that reads "*[n]o person* in the United States shall, on the basis of sex, . . . be subjected to discrimination" creates an individual

right to be free from sex discrimination. *Id.* Both statutes clearly spell out the rights and beneficiaries and thus suffice to create implied rights of action.

On the impermissible side of the line: A statute prohibiting the funding of "any educational agency or institution which has a policy or practice of permitting the release of education records" creates no rights at all, even though some people (students) might benefit from the statute and might have an interest in enforcing it. *Gonzaga*, 536 U.S. at 287–88. Neither does a statute that authorizes federal agencies "to effectuate the provisions of [a ban on intentional race discrimination] . . . by issuing rules, regulations, or orders of general applicability." *Sandoval*, 532 U.S. at 288–89. Nor a statute that says "[t]he chief State election official . . . shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority." *Brunner v. Ohio Republican Party*, 555 U.S. 5, 5 (2008) (per curiam). Nor a statute that requires state governments to "substantially comply" with federal requirements to receive federal funds under Title IV-D of the Social Security Act. *Blessing v. Freestone*, 520 U.S. 329, 344 (1997). Nor a statute that requires the federal government to "approve any [state Medicaid] plan which fulfills the conditions specified" in another subsection. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1387 (2015) (plurality opinion).

Section 302 falls on the impermissible side of this line. It does not create person-specific rights. Like the statutes in *Gonzaga*, *Sandoval*, *Brunner*, *Blessing*, and *Armstrong*, it "focus[es] on the person[s] regulated rather than the individuals protected." *Sandoval*, 532 U.S. at 289. The statute makes it a crime for an

employer to willfully give money to a union, 29 U.S.C. § 186(a), and it makes it a crime for the *union* to willfully accept the money, *id.* § 186(b). It does not say anything about the individuals protected or their capacity to file a lawsuit under the standard of care—in truth, standard of criminal liability—created. *See Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) (questioning whether § 302 creates a private right of action "in light of the Court's more restrictive views on private rights of action in recent decades").

Sure enough, one can identify potential beneficiaries of the statute: employees. But that puts them in a category covered by all criminal laws: victims. We do not casually, or for that matter routinely, imply private rights of action in favor of the victims of violations of criminal laws. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994). Quite the opposite is true, as all of the following cases confirm. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, *Inc.*, 552 U.S. 148, 165–66 (2008); *Central Bank of Denver*, 511 U.S. at 190–91; *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979); *Cort v. Ash*, 422 U.S. 66, 80 (1975).

Other indicators of meaning confirm this reading of the statute. Section 302 is flanked by provisions of the Labor Management Relations Act that expressly establish private rights of action. Section 301 says that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court." 29 U.S.C. § 185(a). But that provision—creating a right of action for violations of collective bargaining agreements—does not cover this dispute.

Section 303 says that "[w]hoever shall be injured in his business or property by reason o[f] any violation of [the ban on secondary boycotts] may sue therefor in any district court." 29 U.S.C. § 187(b). That provision has no application here either.

When Congress wished to provide a private right of action, as these provisions indicate, it had no trouble doing so—clearly. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). We should respect its ability to decide when, and when not, to create private rights of action.

Ohlendorf and Adams insist that § 302(e) confers an express cause of action. But that is not so. That provision grants *jurisdiction* to the federal courts "to restrain violations of this section." 29 U.S.C. § 186(e). It says nothing about giving private parties the right to sue, and most assuredly says nothing about a right to sue for money damages. No Supreme Court case during the last four decades has found a private right of action from a jurisdictional provision. That is because a jurisdictional provision "creates no cause of action of its own force and effect" and "imposes no liabilities." *Touche Ross*, 442 U.S. at 577; *see Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583, 592 (6th Cir. 2013). Any such rights must be found in the substantive provisions of the statute, not its jurisdictional provisions. *Touche Ross*, 442 U.S. at 577.

But what does § 302(e) do if it does not create a private right of action, Ohlendorf and Adams ask? Why else allow jurisdiction to restrain violations of the law? Two answers. One: The statute creates jurisdiction for the courts to restrain violations of § 302 at the request of the Attorney General. Having entrusted the Attorney General to protect the public from criminal violations of § 302, Congress gave the federal courts

authority to hear such actions and to permit federal courts (at the behest of the Attorney General) to enjoin violations of this criminal labor law.

Two: Section 302(e) provides the courts with jurisdiction to enjoin violations of § 302 in lawsuits brought under express private rights of action, as a needed exception to the Clayton Act and the Norris-LaGuardia Act's ban on labor-dispute injunctions. *See* 29 U.S.C. § 52; *id.* §§ 101–115. Consider a couple examples. Suppose that a union files a § 301 lawsuit (for breach of a collective bargaining agreement) seeking to enforce a provision of a collective bargaining agreement that violates § 302. In that situation, § 302(e) gives the court the power to enjoin the union from enforcing the collective bargaining agreement notwithstanding the Clayton and Norris-LaGuardia Acts. *Cf. Anheuser-Busch, Inc. v. Int'l Bhd. of Teamsters, Local 822*, 584 F.2d 41 (4th Cir. 1978). Or suppose that an arbitrator finds that an employer breached a provision of a collective bargaining agreement and awards damages to the union. The company might challenge the arbitration award under the Federal Arbitration Act, 9 U.S.C. § 10, by arguing that the provision of the collective bargaining agreement violates § 302 and therefore cannot be enforced. In that situation, the district court may set the arbitration award aside. *See Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264 (6th Cir. 1981). And under § 302(e), it also may enjoin the union from seeking to enforce the agreement notwithstanding the Clayton and Norris-LaGuardia Acts.

Ohlendorf and Adams claim that two Supreme Court decisions already have decided the question in their favor. Not true. *Local 144 Nursing Home*

Pension Fund v. Demisay, 508 U.S. 581 (1993), never addressed today's issue. Plus, the claimants lost the injunction case on the merits anyway, which is why the opinion merely quotes § 302(e) but never analyzes whether it or any other provision creates a private right of action. *Id.* at 587. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), is of a piece, though even less relevant. That claimant too lost on the merits. And all it does is refer to the language of § 302(e) in addressing an issue unconnected to this dispute. *Id.* at 205. Neither case says anything about a money-damages private right of action.

None of this leaves the employees without recourse. They may wait for the Attorney General to prosecute the union for violating § 302. Or they may ask the Attorney General to seek an injunction. Or they may file a complaint with the National Labor Relations Board on the ground that a violation of § 302 or a similar statute amounts to an unfair labor practice under the National Labor Relations Act. *See WKYC-TV, Inc.*, 359 NLRB 286, 289 n.13 (2012); *Int'l Bhd. of Elec. Workers, Local No. 2088, AFL-CIO (Lockheed)*, 302 NLRB 322, 325 n.8 (1991). Many employees, including employees in this circuit, have taken this last route. *See, e.g.*, *Stewart v. NLRB*, 851 F.3d 21 (D.C. Cir. 2017); *United Food & Commercial Workers Dist. Union Local One, AFL-CIO v. NLRB*, 975 F.2d 40 (2d Cir. 1992); *NLRB v. U.S. Postal Serv.*, 833 F.2d 1195 (6th Cir. 1987); *Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488 (4th Cir. 1981); *NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527, AFL-CIO*, 523 F.2d 783 (5th Cir. 1975); *Indus. Towel & Unif. Serv., a Div. of Cavalier Indus., Inc.*, 195 NLRB 1121 (1972); *NLRB v. Penn Cork & Closures, Inc.*, 376 F.2d 52 (2d Cir. 1967).

IV.

Ohlendorf and Adams separately argue that the union breached its duty of fair representation under § 9(a) of the National Labor Relations Act. 29 U.S.C. § 159. To prove such a claim, the employees must show that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The employees claim that the union's enforcement of the window-period and certified-mail requirements satisfies that standard. One feature of the union's conduct, we must acknowledge, is head scratching. Ohlendorf sent his revocation to the union on June 6, 2016, while Adams sent hers on July 14, 2016. Under their authorization forms, Ohlendorf had between July 2–17, 2016 to revoke his authorization, and Adams had between April 14–29, 2017. We can appreciate why the union might refuse to credit a late revocation. But it makes much less sense to refuse to credit a revocation sent in too early: Why refuse to credit the revocation for the next open period?

Be that as it may, we cannot say that the employees have shown arbitrariness or bad faith. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991). The problem with the employees' claim is that they agreed to the window-period and certified-mail requirements when they signed the authorization form. Even if the requirements may seem burdensome, no one forced the employees to sign the checkoff authorizations. Having agreed to the two requirements, they are not in a position to say that the union acted arbitrarily in enforcing them.

For like reasons, the union's decision to enforce the requirements does not qualify as bad faith. To demonstrate bad faith, a plaintiff must show that the union acted with an improper intent, purpose, or motive encompassing fraud, dishonesty, and other intentionally misleading conduct. *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010). The employees have not met that standard. They do not allege that the union's decision to enforce the requirements was misleading or a product of fraud or dishonesty. The authorization form signed by each of them spelled out the requirements they would need to follow to revoke their assignments. In holding the employees and itself to this contract, the union did not act in bad faith.

For these reasons, we affirm the district court's judgment.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 06/30/2017]

No. 1:16-cv-1439

ROBBIE OHLENDORF AND SANDRA ADAMS,

Plaintiffs,

-v-

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 876,

Defendant.

Honorable Paul L. Maloney

JUDGMENT

The Court has resolved all pending claims. As required by Rule 58 of the Federal

Rules of Civil Procedure, JUDGMENT ENTERS.

THIS ACTION IS TERMINATED.

IT IS SO ORDERED.

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Date: June 30, 2017

APPENDIX E

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

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No. 1:16-cv-1439

ROBBIE OHLENDORF AND SANDRA ADAMS,

Plaintiffs,

-v-

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 876,

Defendant.

Honorable Paul L. Maloney

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiffs Robbie Ohlendorf and Sandra Adams are former members of United Food & Commercial Workers International Union, Local 876. In the summer of 2016, Plaintiffs submitted letters to Local 876, resigning their membership and revoking the authorization to have union dues withdrawn from their paychecks. Local 876 accepted their resignations, but did not accept the revocations of dues authorizations. Local 876 explained that the requests to stop deducting dues were not submitted in the proper manner; Plaintiffs' requests were not submitted during the proper window period and were not sent by certified mail.

Plaintiffs filed this lawsuit, alleging that Local 876's revocation policy is unlawful. Plaintiffs assert two claims: (1) breach of duty of fair representation and (2) violation of § 302(c)(4) of the Labor Management Relations Act (LMRA). The underlying premise of the lawsuit is that unions cannot create policies that restrict a member's ability to stop paying dues when they resign their membership. But, in rejecting Plaintiffs' revocations, Local 876 did not enforce one of its own unilateral policies. Instead, Local 876 merely required Plaintiffs to follow the terms and conditions of a voluntary agreement between the employee and the employer, which both Plaintiffs executed. Therefore, Plaintiffs' claims will be dismissed.[1]

I.

Under the notice pleading requirements, a complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *see Thompson v. Bank of America, N.A.*, 773 F.3d 741, 750 (6th Cir. 2014) (holding that to survive a Rule 12(b)(6) motion, the complaint "must comply with the pleading requirements of Rule 8(a)"). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

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[1] This matter comes before the Court on Defendant Local 876's motion to dismiss. (ECF No. 6). Plaintiffs filed a response (ECF No. 7) and Local 876 filed a reply (ECF No. 8). The Court held a hearing on the motion on June 26, 2016.

Although the court considers the well-pled factual allegations in the complaint, a motion to dismiss turns exclusively on questions of law. *See Thomas v. Arn*, 474 U.S. 140, 150 n.8 (1985); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 674–75 (2009) ("Evaluating the sufficiency of the complaint is not a `fact-based' question of law, ...").

To survive a motion to dismiss, "[t]he complaint must 'contain either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). The plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level. *Bell Atl.,* 550 U.S. at 555. And the claim for relief must be plausible on its face. *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citations omitted). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,* 648 F.3d at 369. Naked assertions without further factual enhancement, formulaic recitations of the elements of a cause of action, and mere labels and conclusions will be insufficient for a pleading to state a plausible claim. *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014) (citations omitted).

II.

For the purpose of this motion, the well-pleaded factual allegations in the complaint must be taken as true.

Both plaintiffs work for Oleson's Food Store in Traverse City, Michigan. (ECF No. 1 Compl. ¶¶ 1 and 2 PageID.3.) Ohlendorf works part time as a stocking clerk. (*Id.* ¶ 1.) Adams works as a cashier. (*Id.* ¶ 2.) Local 876 is the exclusive representative for the purpose of collective bargaining for certain Oleson employees. (*Id.* ¶ 4.)

Both plaintiffs are former members of Local 876. (Compl. ¶¶ 1 and 2.) Prior to September 24, 2016, the collective bargaining agreement between Oleson and Local 876 contained an agency shop provision, which required employees to join or financially support Local 876. (*Id.* ¶ 5.) When Ohlendorf started working at Oleson on August 16, 2013, he signed a union membership application, which include a check-off authorization provision. (*Id.* at 6.) Adams began working for Oleson in 2006 and had been a member of Local 876 since then. (*Id.* ¶ 7 PageID.4.) On May 29, 2013, Adams also signed the membership application containing the check-off authorization provision. (*Id.*) The check-off authorization appears at the bottom of the application for union membership.

Voluntary Check-Off Authorization

To Any Employer Under Contract with the
United Food & Commercial
Workers Local Union 876

You are hereby authorized and directed to deduct from my wages, commencing with the next payroll period, an amount equivalent to

> Union dues and initiation fees as shall be certified by Local 876 of the United Food & Commercial Workers International Union, and to remit to the said Local Union.
>
> This authorization and assignment is not contingent upon my present or future membership in the Union. It shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 876, whichever occurs sooner, and from year to year thereafter unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period, I give the Employer and the Union written notice of revocation via certified mail bearing my signature thereto.

(Comp. ¶ 8; ECF No. 1-1 PageID.15.)

Ohlendorf resigned his membership and attempted to revoke his check-off authorization on June 6, 2016. (Compl. ¶ 16 PageID.5.) Ohlendorf sent a letter to Local 876 using regular mail. (*Id.*) He also hand delivered a letter to the inbox for the manager at Oleson. (*Id.*) On June 7, 2016, Ohlendorf emailed the letter to William Crim, Local 876's executive assistant to the president. (*Id.*) In the letter, Ohlendorf wrote that if there was a window period for exercising his revocation, "consider this notice effective the first day of such window period[.]" (ECF No. 1-1 PageID.19.) Ohlendorf also requested a copy of the authorization form he signed and "the actual date of when that window period applies to me and the date at which I can exercise my rights to fully opt out of agency fees under the right to work law." (*Id.*) In a letter dated June 21, 2016, Local 876 informed Ohlendorf that his

"attempt at revocation does not conform with the time and other constraints collaborated [sic] in the authorization." (ECF No. 1-1 PageID.13.) Oleson continues to deduct union dues from Ohlendorf's paychecks. (Compl. ¶ 17 PageID.6.)

On July 14, 2016, Adams mailed a letter to Local 876 in which she resigned her membership and attempted to revoke her check-off authorization. (Compl. ¶ 18.) In a letter dated July 19, 2016, Local 876 informed Adams that her "attempt at revocation does not conform with the time and other constraints elaborated in the authorization." (ECF No. 1-1 PageID.16.) Oleson continues to deduct union dues from Adam's paychecks. (Compl. ¶ 19.)

Plaintiffs bring two claims against Local 876. In Count 1, Plaintiffs allege Local 876 breached its duty of fair representation. In Count 2, Plaintiffs allege Local 876 violated § 302(c)(4) of the LMRA, 29 U.S.C. § 186(c)(4). In both counts, Plaintiffs challenge the conditions necessary to revoke the check-off authorization. Plaintiffs challenge the fifteen-day window period and the requirement that the revocation be sent using certified mail. In Count 1, Plaintiffs assert the two conditions are arbitrary. Plaintiffs also assert that Local 876 has acted in bad faith by maintaining the two conditions. By enforcing those two conditions, Plaintiffs contend Local 876 has breached its duty of fair representation. In Count 2, Plaintiffs assert that the conditions in the check-off authorization are not authorized by § 302 of the LMRA. And, because the conditions are not authorized by statute, Plaintiffs conclude Local 876 violates the LMRA by enforcing the conditions. The Court addresses the two claims in inverse order.

III.

The LMRA generally prohibits payments from an employer to the union representative of its employees.

> It shall be unlawful for any employer . . . to pay, lend or deliver . . . any money or other thing of value—
>
> . . .
>
> (2) to any labor organization . . . which represents . . . the employees of such employer who are employed in an industry affecting commerce;

29 U.S.C. § 186(a)(2). Violations of the general prohibition are enforced by criminal penalties, including fines and a term of imprisonment. *Id.* § 186(d). The statute contains a number of exceptions, including an exception for the deduction of union dues from an employee's paycheck.

> (c) Exceptions
>
> (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner;

Id. § 186(c)(4). These written assignments are frequently called check-offs. The provision, § 186(c)(4), "allows, but does not require, the authorization to be irrevocable, and it places a maximum on the length of permissible irrevocability." *NLRB v. United States*

Postal Serv., 833 F.2d 1195, 1199 (6th Cir. 1987), *supplemented,* 837 F.2d 476 (6th Cir. 1988).

Plaintiffs' characterization of the issue presented by Count 2 establishes two errors, both of which undermines the claim. According to Plaintiffs, the statute "does not permit the Union to make [the authorization] irrevocable unless the revocation request is communicated during a fifteen-day period, by certified mail. Nothing in Section 302(c)(4) permits that additional window period or heightened mail requirement." (ECF No. 7 Response at 9 PageID.99.) To prevail on this claim, Plaintiffs bear the burden of showing that the window period and the certified mail requirement violate the statute, not merely that the statute does not permit those conditions.

Plaintiffs' first error is to infer statutory prohibitions on conditions of revocation from the lack of permission for those condition in the statute language. Plaintiffs are correct that the statute does not authorize window periods or requirements for certified mail. A plain reading of the statute establishes that it is silent about the conditions of which Plaintiffs complain. Section 186(c)(4) clearly authorizes the use of check-off authorization. The provision also allows the authorization to be irrevocable for up to one year. The statute does not speak to the manner in which the revocation can be made.

Plaintiffs' observation about the statute, that it does not address conditions of revocation, does not require the conclusion that the statute prohibits any conditions or even these two conditions. Plaintiffs' reasoning on the proper interpretation of the statute demonstrates variations of a fallacy of informal logic. In one form, the fallacy engages in erroneous reasoning where the absence of evidence become evidence of that

absence. In another form, the fallacy reaches conclusions based on silence (*argumentum ex silentio*). In both cases, the proof supporting one conclusion is the absence of evidence or silence in support of the opposite conclusion. Here, Plaintiffs reason that the lack of permission in the statute for window periods and certified mail requirements necessarily means that the statute prohibits window periods and certified mail requirements. That reasoning is flawed. *See, e.g., Robinette v. Jones*, 476 F.3d 585, 593 (8th Cir. 2007) ("While § 304.155 authorizes law enforcement officers to tow vehicles in a variety of circumstances, it does not prohibit law enforcement officers from towing vehicles not covered by that statute. Section 304.155 is silent about the particular conditions at issue here."). And, Plaintiffs have not identified any presumptions that would require the Court to adopt their interpretation of the otherwise silent statute. *See, e.g., In re Crescent City Estates, LLC*, 588 F.3d 822, 825 (4th Cir. 2009) ("Appellants argue that because § 1447(c) does not explicitly prohibit a fee award against counsel, it thereby permits it. Appellants, however, have the presumption reversed. The proper presumption is that when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it. In short, silence does not equal consent."). Plaintiffs have not identified any policy rationale or identified any part of the larger statutory scheme that would support their interpretation of the otherwise silent statute. *See, e.g., Smiley v. E.I. Dupont De Nemours and Co.*, 839 F.3d 325, 333 (3d Cir. 2016) ("We disagree with DuPont's notion that the FLSA's silence indicates permission. While it is true that the statute does not explicitly set forth this prohibition, the policy rationales underlying the FLSA do not permit crediting compensation used in calculating an employee's regular rate of pay

because it would allow employers to double-count the compensation.").

Plaintiffs' second error is their assertion that Defendant has made the revocations subject to certain conditions. Plaintiffs, not Defendant, voluntarily imposed these conditions on their ability to revoke their check-off authorizations. Plaintiffs voluntarily signed the authorization. Several authorities have held that check-off authorizations are voluntary assignments or contracts. The National Labor Relations Board (NLRB) has held that a check-off authorization permitted by § 186(c)(4) "is a contract between employer and employee, the terms of which are required by statute to be in writing." *Cameron Iron Works*, 235 NLRB 287, 289 (N.L.R.B. 1978), *enforcement denied by NLRB v. Cameron Iron Works, Inc.*, 591 F.2d 1 (5th Cir. 1979). The Sixth Circuit stated "[i]t is well settled that the dues checkoff provisions are intended to be an area of voluntary choice for the employee[,]" and threats by the union or the employer coercing an employee to sign the authorization are prohibited. *Armco, Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987). The Fifth Circuit held that a check-off authorization "is a contract between the employer and the employee, authorizing the employer to withhold dues from the employee's wages, but reserving to the employee the power of revocation at specified periods." *NLRB v. Atlanta Printing Specialties and Paper Prods. Union 527, ALF-CIO*, 523 F.2d 783, 785 (5th Cir. 1975) (finding that when the union directed the employer to refuse to honor timely submitted revocations, the union committed an unfair labor practice).

Because the check-off authorization is a voluntary agreement, the NLRB has held that restrictions in the revocation of the authorization are permitted.

"Checkoff is a means by which employees voluntarily assign a portion of their wages to a union in order to pay their dues and other obligations to the union." *Frito-Lay*, 243 NLRB 137, 137 (N.L.R.B. 1979). And, consistent with the plain language of § 186(c)(4) and the nature of contracts, restrictions on the ability to revoke checkoff authorizations do not violate the statute.

> If checkoff authorizations are irrevocable for stated periods and automatically renewed for like periods, as long as employees are accorded an opportunity to revoke their authorizations at *least* once a year and at the termination of any applicable collective-bargaining agreements. And the limiting of the opportunity to revoke to a reasonable escape period, such as between 20 and 10 days before the expiration of either of these periods, does not require a different result.

Id. at 138.

Although the Sixth Circuit has not considered whether conditions in a check-off authorization violate § 186(c)(4), the circuit has upheld conditions in a check-off authorization under other labor statutes. In *NLRB v. United States Postal Service*, two members of the American Postal Workers Union attempted to resign from the union and asked the Postal Service to stop deducting union dues from their paychecks. Both employees had signed authorization forms for the deductions, which was permitted by the Postal Reorganization Act (PRA). The authorization form signed by the employees, "provided that the deduction authorization would be irrevocable for one year, and would automatically be renewed for an additional year unless revoked during a ten-day period at the end of

each yearly period." *Postal Service*, 833 F.2d at 1197. The Postal Service rejected the resignations from membership and the revocations of dues deductions because the notifications were not received inside the window period. An Administrative Law Judge (ALJ) found the union committed an unfair labor practice by refusing the resignations, but not by refusing the revocations of dues deductions. The NLRB reversed the ALJ on the second issue. *Id.* The NLRB found that 29 U.S.C. § 186(c)(4) was similar to the PRA, 39 U.S.C. § 1205 and concluded that the Postal Service committed an unfair labor practice under 29 U.S.C. § 158 when it refused to stop deducting membership dues as requested. The NLRB followed a previously issued decision, *Postal Service and Dalton*, 279 NLRB 40 (N.L.R.B. 1986), in which it concluded that check-off authorizations were a quid pro quo for union membership and were, therefore, revocable when a member resigned from the union. *Postal Service and Huber and Franklin*, 280 NLRB 1439, 1439 (N.L.R.B. 1986). The NLRB then filed suit in federal court to enforce its decision.

The Sixth Circuit declined to enforce the NLRB's decision.[2] *Id.* at 1196. The court identified critical differences between the NLRA and the PRA, which undermined the NLRB's conclusion that the check-off authorizations in the two statutes were similar. The court also found that because the employees voluntarily signed the authorization with full knowledge that

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[2] The NLRB was also unsuccessful in its attempt to enforce its decision in *Postal Service and Dalton*. Like the Sixth Circuit, the Ninth Circuit declined to enforce the NLRB's decision when it sued to enforce the outcome in *Postal Service and Dalton*. *NLRB v. United States Postal Service*, 827 F.2d 548, 549 (9th Cir. 1987).

it would be irrevocable except at defined intervals, it could not be an unfair labor practice. *Id.* at 1201.

One court has reached a different conclusion. In *Monroe Lodge No. 770, International Association of Machinists and Aerospace Workers, AFL-CIO v. Litton Business Systems, Inc.*, 334 F. Supp. 310 (W.D. Va. 1971), the district court held that the employer should honor revocations submitted after the first anniversary of the date the authorization was signed, even though the revocation was not submitted during the fifteen-day window period required by the authorization. *Id.* at 316-17. The court explained that those revocations became effective during the fifteen-day window of the second year. Because the employees gave the employer and the union notice, "it was unnecessary for the employees to resubmit revocations during the fifteen day period at the end of the second year." *Id.* at 317.

This Court is compelled to follow the Sixth Circuit's holding. The reasoning and the conclusions of the NLRB and the Fifth Circuit are persuasive. Voluntary check-off authorizations are permitted by § 186(c)(4), so long as employees have defined opportunities to revoke the authorization. The terms of the authorization signed by Ohlendorf and Adams are consistent with what the statute permits. The authorizations are voluntary agreements, contracts between the employee and the employer. The district court in *Monroe Lodge* did not consider the possibility that the authorization functioned as a contract, and did not address the ramifications of the authorization as a contract. Furthermore, the opinion was issued prior to the NLRB's opinion in *Frito-Lay* and also prior to the opinions issued by the Fifth and Sixth Circuits.

For these reasons, the Court finds that Plaintiffs have not stated a claim for which relief can be granted. The voluntary check-off authorizations do not violate § 186(c)(4).

IV.

In Count 1, Plaintiffs argue Local 876 breached its duty of fair representation. The duty of fair representation that a labor union owes to its members is a judicially-created doctrine. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *see also Comm'ns Workers of America v. Beck*, 487 U.S. 735, 743 (1988) (noting the "judicially implied duty of fair representation."). The duty arises from § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), which provides that the representatives for collective bargaining are the exclusive representatives of all employees within a unit. *See Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). The duty requires the exclusive agent to serve the interests of all members of the unit "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177; *see Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991). The duty is "akin to the duty owed by other fiduciaries to their beneficiaries." *O'Neill*, 499 U.S. at 75. The duty extends not only to negotiation activities, but also to the union's contract administration and enforcement efforts. *See Beck*, 487 U.S. at 743.

A union can breach its duty of fair representation by failing any of the "tripartite" standards. *Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010). "[T]he three named factors are three separate and distinct possible routes by which a union may be found to have breached it duty." *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573,

584 (6th Cir. 1994). When challenged, the court considers the union's activities "in light of the factual and legal landscape at the time[.]" *O'Neill*, 499 U.S. at 67. To establish that a union breached its duty by acting arbitrarily, the plaintiff must show that the union's action as "so far outside a 'wide range of reasonableness' that it is wholly 'irrational[.]'" *Id.* at 78 (internal citation omitted). "The 'wholly irrational' standard is described in terms of 'extreme arbitrariness.'" *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 539 (6th Cir. 2003). "A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation." *Marquez,* 525 U.S. at 46 (citing *O'Neill*). Negligence, ordinary mistakes and errors, and flaws in judgment will not suffice to meet the arbitrary standard. *Id.* at 538 (citations omitted).

To establish that a union breached its duty by acting in bad faith, the plaintiff must show that the union acted "'with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct.'" *Merritt*, 613 F.3d at 619 (quoting *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)). Several circuit courts have held that the bad faith standard provides a remedy for union members for only the most egregious conduct by a union. *E.g., Int'l Union of Elec., Salaried, Mach. and Furniture Workers, AFL-CIO v. NLRB*, 41 F.3d 1532, 1537–38 (D.C. Cir. 1994) (citing *O'Neill v. Airline Pilot's Ass'n., Int'l*, 939 F.2d 1199, 1203 (5th Cir. 1991) and *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125, 130 (1st Cir. 1990)). While a union's decisions are granted deference when a decision is challenged as arbitrary, no deference is afforded decisions challenged as bad faith. *Merritt*, 613 F.3d at 620–21.

A.

Enforcing the window periods which limit when a check-off authorization may be revoked does not violate a union's duty of fair representation. The enforcement of varying window periods is neither arbitrary nor bad faith.

First, multiple federal courts have found that a union's use of window periods is not arbitrary. *E.g., Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 2569*, 895 F. Supp. 1103, 1114–15 (N.D. Ind. 1995) (finding that the plaintiff failed to show that the window period was arbitrary and summarizing the opinions of two other courts that reached the same conclusion), *aff'd*, 94 F.3d 1107, 1116–17 (7th Cir. 1996) ("Life is full of deadlines, and we see nothing particularly onerous about this one. When people miss the deadline for filing an appeal to this Court, their rights can be lost forever, not just for eleven months, but that does not make time limits for filing appeals in violation of federal law. Other courts that have considered 'window periods' have come to the same conclusion.") (collecting cases). Because courts have sanctioned the use of window periods by a union, those opinions also undermine the conclusion that use of window periods constitute bad faith. Plaintiffs attempt to distinguish *Nielsen* by pointing out that the factual underpinning is different; *Nielsen* involved *Beck* fee-objectors, not check-off authorizations. The reasoning in *Nielsen* applies here, even if the facts are different. *Nielsen* is persuasive because the allegation in that case was that the use of window periods was a breach of the duty of fair representation. The court held that no breach of duty occurred.

Second, the fact that the window period varies from member to member does not require the conclusion

that the use of a window period is arbitrary or bad faith. The window period varies because the members signed the check-off authorizations at different times. Thus, the reason the window period varies from member to member has a rational justification; it is tied to each member's anniversary date.

Third, the use of window periods is not a breach of the duty of fair representation because the window period is not a restriction that Defendant has imposed on its members. Rather, the window period limitation is a condition of revocation that each member who signed the authorization voluntarily assumed. Defendant is merely following the instructions provided by its members.

For these reasons, the use varying of window periods has some rational justification and is not conduct tantamount to fraud and dishonesty. Certainly, the window period may frustrate some former union members who wish to revoke the authorization. The fact that Defendant requires its members or former members to follow the condition to which they voluntarily agreed does not establish that Defendant is acting arbitrarily or in bad faith.

B.

Enforcing the certified mail requirement for notice of revocation does not breach the union's duty of fair representation. The certified mail requirement is neither arbitrary nor bad faith.

First, using certified mail provides a record for when the notification was sent and received. Because the window period defines when a revocation will be accepted, and because the window period is permitted, the certified mail requirement establishes whether the notification was received during the applicable time.

Although there may be other ways of establishing that the revocation was timely, that other methods are available does not render the requirement arbitrary or evidence bad faith.

Second, the certified mail requirement is not a breach of the duty of fair representation because it is not a restriction that Defendant has imposed on its members. The certified mail requirement is a condition of revocation that each member who signed the authorization voluntarily assumed. Defendant is merely following the instructions provided by its members. Again, the fact that Defendant requires its members or former members to follow the condition to which they voluntarily agreed does not establish that Defendant is acting arbitrarily or in bad faith.

Third, the Sixth Circuit's holding in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Labor Relations Board*, 865 F.2d 791 (6th Cir. 1989) is not dispositive. In *International Union*, the court held that the certified mail requirement for resignation of union membership violated § 158(b)(1)(A) of the NLRA. The statute made it an unfair labor practice to restrain employees in the exercise of their right under § 157, which the court held included the right to abstain from union membership. *Id.* at 797. For this claim, Plaintiffs have not established that they have a statutory right to revoke their *check-off authorization* without restrictions. This is a factual difference between the two cases that is meaningful. If there were such a right, Plaintiffs would simply bring a statutory claim, rather than a breach of duty claim. Furthermore, Plaintiffs were successful in withdrawing their union membership.

V.

Plaintiffs Ohlendorf and Adams have not stated claims for which this Court may grant relief. When Plaintiffs voluntarily signed the check-off authorization form, they agreed that the authorization could be revoked only during specified window periods and only by certified mail. Because Plaintiffs voluntarily signed these forms and voluntarily placed restrictions on their ability to withdraw the authorization, Plaintiffs cannot now complain that Defendant is holding them to their choice. Plaintiffs' claim for a violation of § 186(c)(4) fails. Section 186(c)(4) is silent as to how a revocation may be made. The Court cannot infer from the silence that the Congress prohibits window periods and certified mail requirements on the revocation of check-off authorizations. Plaintiffs' claim for breach of duty also fails. Both the window period and the certified mail requirement have legitimate administrative purposes.

ORDER

For the reasons provided in the accompanying Opinion, Defendant Local 876's motion to dismiss (ECF No. 6) is GRANTED. The two claims in the complaint are DISMISSED.

IT IS SO ORDERED.

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

Date: June 30, 2017

APPENDIX F

Clayton Act
(Relevant Provisions)

15 U.S.C. § 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

* * * *

29 U.S.C. § 52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the

application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Norris-LaGuardia Act
(Relevant Provisions)

29 U.S.C. § 101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary

or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, thefollowing definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 103. Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

29 U.S.C. § 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these

terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in

opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be

unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this, section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

29 U.S.C. § 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

29 U.S.C. § 110. Review by court of appeals of issuance or denial of temporary injunctions; record

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving

or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside expeditiously

29 U.S.C. §§ 111, 112. Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

29 U.S.C. § 113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is

sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

29 U.S.C. § 114. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

29 U.S.C. § 115. Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Labor Management Relations Act, 1947

(Relevant Provisions)

29 U.S.C. § 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions,

decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with

respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and

employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents

for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than

$10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.