No. 18-3

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

PETITIONERS' REPLY BRIEF

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I. Section 302 Provides A Private Cause Of Action.

A. Adams and Ohlendorf's Section 302 Claim Properly is Before the Court.

1. Local 876 argues the Court need not address whether Section 302 provides a private right of action because Adams and Ohlendorf's claim for injunctive relief is moot. Resp.Br. 4.

This argument, however, places the cart before the horse. "The question whether a federal statute creates a claim for relief is not jurisdictional." *Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 365 (1994). "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). "Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy." *Id.* Consequently, what relief Adams and Ohlendorf can recover is an issue to be determined only after the Court addresses whether courts have jurisdiction over Section 302 private causes of action.

Morever, Local 876's argument ignores Adams and Ohlendorf's request includes both equitable restitution and injunctive relief. As the Sixth Circuit held when rejecting Local 876's position, "[w]hile th[e] 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." Pet.App. 6a.

2. Local 876 argues Section "302 does not permit money damage claims." Resp.Br. 4. To the contrary,

the Third Circuit held that, while Section 302 "does not allow for a private cause of action for damages to be implied," it "encompasses . . . those civil remedies necessary to 'restrain violations,' which may, however, include damages incidental to equitable relief." *Bakerstown Container Corp. v. Int'l Bhd. of Teamsters*, 884 F.2d 105, 108 (3d Cir. 1989); *see also 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) (holding Section 302 allows district courts to "grant parties injunctive and, in some instances, declaratory relief in restraining these violations"). To the extent other circuit courts have reached contrary opinions, that circuit split only supports granting review.

B. The Time Is Right for the Court to Reaffirm Section 302's Private Cause of Action.

The Court need not wait for other circuits to further weigh in on whether Section 302(e) provides a private cause of action because this Court and a number of lower courts already have found one to exist. Pet. 14–20 (citing cases). For more than seventy years, unions, employers, and employees have relied upon Section 302(e) to protect themselves from violations of their Section 302(c) rights. Yet, the Sixth Circuit departed from this to hold Section 302 provides no private cause of action. Pet.App. 6a–13a.

Local 876's brief highlights the circuit split, as the decisions Local 876 relies upon for its mootness ar-

gument, *see* Resp.Br. 4, analyzed and addressed whether Section 302(e) provided courts with jurisdiction over private causes of action brought by employers and unions. *See McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 250 (1st Cir. 1982) (addressing whether the court had jurisdiction over Section 302); *Bakerstown Container Corp.*, 884 F.2d at 106–08 (same); *Am. Commercial Barge Lines Co. v. Seafarers Int'l Union of N. Am., Atl., Gulf, Lakes & Inland Waters Dist.*, 730 F.2d 327, 332 (5th Cir. 1984) (same); *Cent. States, Se. & Sw. Areas Pension Fund v. Admiral Merchs. Motor Freight, Inc.*, 511 F. Supp. 38, 46–47 (D. Minn. 1980), *aff'd sub nom. Cent. States, Se. & Sw. Areas Pension Fund v. Jack Cole-Dixie Highway Co.*, 642 F.2d 1122 (8th Cir. 1981) (same).

1. Section 302 provides for both criminal prosecution and civil remedies for violations of the statute. *See* 29 U.S.C. §§ 186(d) & 186(e). "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." *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 919 (2d Cir. 1964).

Local 876 recognizes Section 302(e) authorizes suits for injunctive relief, but claims only the Attorney General can seek that relief. Resp.Br. 5–7. Nothing in Section 302(e)'s text, however, limits its civil cause of action only to the Attorney General. Local 876's limitation not only is extra-statutory, but is *contrary* to Section 302(e)'s exemption to Section 52 of the Clayton Act, 29 U.S.C. § 52, which applies only to

suits between employees and employers. *See* Pet. 10–13. The exemption to Section 52 proves Section 302(e) must allow for suits by employees because, otherwise, that exemption would be superfluous. *Id*.

Local 876 argues Section 52 applies to suits by the federal government. Resp.Br. 8–10. This is incorrect. The Court held in *United States v. United Mine Workers of America,* 330 U.S. 258, 270 (1947), that "employer" in Section 52 cannot be construed to include the United States. Contrary to Local 876's claim, *United Mine Workers* was not limited to the Norris-LaGuardia Act. Resp.Br. 8–9. While the Court addressed "the application of the Norris-LaGuardia Act alone," it only did so after finding the "less comprehensive proscription of the Clayton Act" would not apply if the Norris-LaGuardia proscription did not because "the proscription on injunctions found in the Clayton Act is [not] in any respect broader than that in the Norris-LaGuardia Act." *United Mine Workers*, 330 U.S. at 270.

In addition, the Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). This Court already had determined the Clayton Act is applicable to employers and employees to the exclusion of the government when Congress enacted Section 302, and the legislative history does not alter that despite Local 876's claim of legislative caution. Resp.Br. 8–9.

In support of its claim, Local 876 takes out of context a narrow slice of legislative history addressing the government's authority to intervene and "secure judicial relief" in strikes or lock-outs that "imperil[] the national health or safety." S. REP. NO. 105, 80th Cong., 1st Sess., at 14–15 (1947), *reprinted in* STAFF OF SUBCOMM. ON LABOR, COMM. ON LABOR AND PUB. WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE LABOR MGMT. RELATIONS ACT, 1947, at 420–21 (1974). In addressing *United Mine Workers*' exemption of the government from being an "employer," the legislative history notes the exemption was not a broad one removing the government's ability to act either in a national emergency or when the need arises. *Id.*

Local 876's argument also misses the forest for the trees. Even assuming the federal government is considered an "employer" under the Clayton Act, Section 52 is not applicable solely to the federal government. By its plain terms, Section 52 applies to "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 . . . ." 29 U.S.C. § 52. Congress's exemption to Section 52 in Section 302(e) plainly shows Congress contemplated that "employees" and "employers" could bring suit under Section 302(e).

2. Turning a blind eye to the circuit confusion over the applicable test for an implied cause of action, *see*

Pet. 20–23, Local 876's remaining argument is that Section 302 focuses on the person regulated and not the individual protected. Resp.Br. 6–7.

Even under the more cautious approach utilized today, be it the *Alexander v. Sandoval*, 532 U.S. 275 (2001) test, or the *Cort v. Ash*, 422 U.S. 66 (1975) test, *see* Pet. 20–23, Congress focused on the individual protected in passing Section 302 as its purpose is to "protect employees in dealings between the union and employer." *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); *see* Pet. 23–25.

II. The Duty of Fair Representation Prohibits Local 876's Revocation Restrictions.

Local 876 attempts to distance itself from the check-off authorizations it drafted by stating Adams' and Ohlendorf's signatures on their respective check-off authorizations removes any possible arbitrary or bad faith conduct on its part. Resp.Br. 10–11. Individual consent, however, no matter how voluntary, cannot override the law or legalize Local 876's revocation restrictions. If it did, a union could incorporate into a check-off authorization any term it wanted (e.g., permanent irrevocability) in derogation of Section 302's requirements.

As this Court held in *Felter v. Southern Pacific Co.*, private parties cannot agree to contract terms that violate the law. 359 U.S. 326, 334–35 (1959). Although *Felter* was a Railway Labor Act claim, it is applicable here as this Court recognized Section 302

and the Railway Labor Act's sister provision are "quite similar," *id.* at 332 n.10, and other circuits have relied upon *Felter* to hold Section 302(c)(4) does not permit unions to restrict employees' revocation rights. *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 786–87 (5th Cir. 1975) (requiring a union to honor employees' check-off revocations at expiration of one-year period); *Monroe Lodge No. 770, Int'l Ass'n of Machinists & Aerospace Workers v. Litton Bus. Sys., Inc.*, 334 F. Supp. 310, 316–17 (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) (same); *see also Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488, 493 (4th Cir. 1981) (relying on *Felter* to hold it unlawful for unions to compel individuals to appear in person at the union hall to use and sign a specific form to revoke their dues deduction). As in *Felter*, unions, employers, and employees cannot agree amongst themselves to ignore Section 302's strictures.

Local 876's citation to other cases and Board decisions for support, Resp.Br. 11, is to no avail as those cases did not address or uphold the window period and certified mail restrictions at issue here.[1]

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[1] *NLRB v. U.S. Postal Serv.,* 833 F.2d 1195, 1199 (6th Cir. 1987), *decision supplemented*, 837 F.2d 476 (1988) (analyzing whether a check-off authorization voluntarily signed when no union security clause was in place could be irrevocable for one year under the Postal Reorganization Act, which is "crucially

Local 876's argument that the certified mail requirement is a rational method for confirming timely submission within the window period restriction assumes the window period is legal in the first instance. Resp.Br. 11. Yet, one wrong cannot justify another. *Felter*, 359 U.S. at 334–35 (rejecting arguments that revocation restrictions were justified).

Whether restrictions are imposed via a collective bargaining agreement, a dues check-off authorization, or any other avenue, there is "no authority given by the Act to carriers and labor organizations to restrict the employee's individual freedom of decision

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different" from Section 302(c)(4)); *Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 786–87 (5th Cir. 1975) (addressing whether a premature collective bargaining agreement extension could block check-off revocations); *NLRB v. Indus. Towel & Unif. Serv.*, 473 F.2d 1258 (6th Cir. 1973) (addressing whether an employee's alleged employment severance invalidated her check-off authorization); *Hayes v. Local No. 12, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 523 F. Supp. 50, 51 (N.D. Ala. 1981) (addressing whether an individual immediately could effectuate a revocation based on the current collective bargaining agreement's termination date, and whether the arbitrator properly determined which date the collective bargaining agreement terminated, triggering the termination date); *Frito-Lay, Inc.*, 243 N.L.R.B. 137 (1979) (stating the "application of Section 302(c)(4) to the facts of this case [is] inappropriate" and addressing whether the check-off authorizations were revocable at any time after the collective bargaining agreement's expiration); Justice Dep't Op. on Checkoff, 22 L.R.R.M. 46, 47 (1948) (noting the legality of the use of an automatic renewal provision with an annual ten (10) day escape period "is properly a matter for judicial interpretation").

by such regulations as were agreed upon in the Dues Deduction Agreement." *Id.* at 334; *see also NLRB v. Local 73, Sheet Metal Workers' Int'l Ass'n*, 840 F.2d 501, 506 (7th Cir. 1988) (citation omitted) ("[A] union member *can* be coerced and restrained by a condition voluntarily accepted when compliance with that condition would interfere with the employee-member's exercise of his section 7 rights.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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