No. 18-932

In The Supreme Court of the United States

JAMES A. OSBURN and ELIZABETH S. ALVAREZ, as individuals and on behalf of the membership of IATSE PRODUCTION SOUND TECHNICIANS, TELEVISION ENGINEERS, VIDEO ASSIST TECHNICIANS AND STUDIO PROJECTIONISTS, LOCAL 695, a California Nonprofit Labor Corporation,

Petitioners,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, CLC, and its International President, MATTHEW LOEB,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

I) INTRODUCTION

The IATSE and its international president Matthew Loeb resort to falsehoods and diversions to try and convince this Court that Petitioners do not deserve to have these matters heard by the United States Supreme Court or by a jury on remand. Apparently lying to this Court is not beyond Respondents and their counsel[1] as evidenced by their clever tricks in rewriting

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[1] On the firm website, David Rosenfeld "takes particular pride in developing creative and unusual tactics, both in the courts as well as outside of the courts," with "the strategies he has developed . . . used by unions throughout the country as effective weapons against anti-union employers." <http://www.unioncounsel.net/attorneys/D_Rosenfeld.html>.

A federal investigation into Respondents' counsel's financial transgressions involving the Iron Workers Union and its pension fund forced Van Bourg, Weinberg, Roger & Rosenfeld, PC to change to its current name. The restitution agreement and deferral of criminal prosecution of the law firm for fraud, obstruction of justice and related offenses should have been a forewarning that not all creative practices will fly under the radar. <https://www.dol.gov/olms/regs/compliance/criminal_enforce/criminal_actions_2003.htm>.

The latest scheme is to nullify the will of rank and file union members and their elected leaders for daring to oppose a parent labor organization's scheme to generate "*Additional Revenues*" by forcing signatures upon *Dues Check-Off* and *Contract Service Agreements* from some IATSE members denied membership in "closed shop" Studio Mechanics Locals (*SMLs*) while their hard earned health and welfare contributions for work performed in *SML* areas were diverted from the MOPIC Funds to a National Plan in New York under Loeb's control. App.13-16; NLRB Award, App.150, 156; and ER 1528, 1530, 1532, 1549.

Respondents emphasize that the lower court and 9th Circuit opinions sanctifying use of a trusteeship to squelch Petitioners

the questions and changing facts to suit their opposition. Pet.i; BIO i; see Argument II(A), *infra*.

Claiming the Petition does not comply with Rule 10 or Rule 14[2] is a disservice to working men and women across the United States, who are supposed to be protected by the *Labor Management Reporting and Disclosure Act, 29 U.S.C. §§411(a)(2), (5)* and *529* (*LMRDA*). Trampling upon the will expressed at the ballot box on the guise a Trusteeship was imposed, yet only three dissenters, namely Osburn, Alvarez and Striepeke were removed, shows why review must be granted. App.3, 20.

II) ARGUMENT

A) RESPONDENTS MISREPRESENT BASIC FACTS

Respondents concede Local 695 is one of Hollywood's most essential and storied unions, composed of the skilled craftspeople working throughout the United States and Canada for signatory employers. BIO 6. But Respondents cannot legitimately explain why removal and suspension from membership of 695's key official, namely Business Representative

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dissent is available electronically. This sets in concrete a method for other parent labor organizations to squelch dissent, while discouraging ousted leaders from resorting to the courts for redress. BIO 1-2.

[2] Previously the IATSE theme was that the Proposed Amended Complaint seeking to add Alvarez as a plaintiff did not pass "*Grammarly Reports*". Pet.24; ER 4152-4302. Yet, Judge Michael Fitzgerald allowed Alvarez to continue questioning a lack of diversity within the upper echelon of the IATSE, App.17, 23-24.

Osburn, was necessary. Nor is there any explanation as to how Alvarez, the elected Recording Secretary, also employed by the Union was fired, without a single set of charges ever being filed against her nor a trial convened to determine her culpability, if any, for actions taken by Osburn.

> *First and foremost*, Osburn was not and has never been the President of 695. BIO 9. He was the elected Business Representative. ER 4737.
>
> *Secondly*, Respondents now claim for the *first time*, that Loeb rejected the hearing officer's recommendation to expel Osburn as a member when no such recommendation was ever made. BIO 10; ER 1670;[3] and,
>
> *Third*, claiming that none of the issues raised by Petitioners were asserted prior to imposition of the trusteeship nor were dealt with by the district court is patently false. BIO 6, then see App.13-17.

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[3] This is difficult to swallow not only because it contradicts Harbinson's Decision (ER 1670) but also Loeb's loud proclamation in front of the Los Angeles Police Department on February 24, 2014, "*I haven't ever liked you (Osburn). . . . I don't like you now . . . and you are not my friend*". Pet. 8.

Nevertheless, Respondents contradict their own defense that Loeb was not enmeshed in the disciplinary or appellate processes and thus did not influence any outcome against Osburn.

B) NOT A DISPUTE ABOUT FAILURE TO PAY DUES

The IATSE also claims this is a simple dispute about alleged interference preventing *SMLs* from being able to collect dues pursuant to *Article 19, §26*. BIO 1, 5. Efforts to depict Petitioners as attacking an established dues structure is also false. BIO 19.

In her widely distributed swan song, Chandra Miller who filed charges against 695 has now admitted that the Louisiana *SML* and the International were arbitrary when deciding who would have to pay, as follows:

> "*I witnessed . . . invoices being voided, or certain members being handpicked to not be invoiced at all, non-action being taken allowing certain people to work out of their home jurisdiction without having to pay their fare [sic] share of work dues, reinstatement procedures and fees being waived for a select few, residential addresses being changed for some to be able to apply rules for certain people as local hire versus distant hires*." App.182-83.

Furthermore, no dues were owing by a single member when Chandra Miller sought a Trusteeship, with Miller also conceding during the underlying Gandolini hearing that she could not name a single person who caused dues to not be paid. ER 1848-58.

Article 19, §26 mandated Osburn and Alvarez to do precisely what they did, namely seek an invoice of monies demanded by *SMLs* from 695 members so 695

could adjust its billings since *SMLs* were generating "*Additional Revenues*", but conveniently refusing to issue invoices for same. See demand for percentage of equipment rentals and meal penalties from Kate Jesse. App.100-01, 116, 166 and ER 1539-43.

Petitioners, rightfully so, also voiced objections to strong-arm tactics to force some but not all non-*SML* IATSE members to sign "*irrevocable*" *dues check-offs and contract service agreements.* ER 1530, 1549. See *Janus v. AFSCME*, 585 U.S. ___ (2018) and *Fleck v. Wetch*, 585 U.S. ___ (2018).

This undisputed evidence about what happened to non-California residents Kate Jesse, Mark Weber, Richard Hansen, Tom Conrad and Josh Levy, all residing with their families in *SML* states, is ignored by Respondents because these rank and file members were denied *SML* membership while the IATSE and Loeb diverted aggrieved members' health and welfare contributions to the National Plan in which *SML members* but not 695's participated. App.150-51, 182-83. Undoubtedly such monies have come in handy to cover financial shortfalls in the National Plan because of the actions of Loeb and his Administration, while rendering Brett Brewington ineligible as of October 2013 for retina surgery. ER 3736, Pet.7.

C) TITLE I CHALLENGE SURVIVES LIFTED TRUSTEESHIP

Respondents claim for the first time that Petitioners have waived their *Title I* issues by not contesting the trusteeship, BIO i, even though a different avenue

exists to address a *Title III* violation with the 9th Circuit so finding. App.3.

Nor do Petitioners' rights as officers and as members disappear simply because a novel Trusteeship was imposed to squelch dissent and then lifted once Osburn lost eligibility to run for office. BIO 18. As *Pope v. Office and Professional Employees International Union*, 74 F.3d 1492 (6th Cir. 1996), found, evidence surrounding a trusteeship may be submitted to a jury in a Title I case, since:

> *"If evidence regarding the imposition or maintenance of a trusteeship after it has been lifted were inadmissible, national and international unions could impose trusteeships with impunity, including as a means to suppress Title I rights, and remain immune from legal scrutiny as long as they lifted the trusteeship before the plaintiff has his day in court."*

Osburn was targeted since Loeb lifted a "presumptively valid 18 month Trusteeship", 29 U.S.C. §464(c), within less than one year. BIO 4. The answer is obvious since Loeb caused a "new" slate of officers to be included that included virtually everyone else "removed", except for Petitioners. Ironically, Respondents then lied to the Department of Labor and claimed that no election was ever conducted. ER 2213.

Respondents' effort to distinguish *Sheet Metal Workers International Association v. Lynn*, 488 U.S. 347, 352-59 (1989), are also absurd. BIO 19. *Title I* protections were extended to Union officers since

Lynn, like Osburn, was an elected business agent removed for statements made in opposition to a form of a dues increase. Herein, the dues increase was designed to generate *Additional Revenues* for the *SML* and the International, without providing any form of financial accountability or transparency.

Nor can Congressional history cited at Pet.27-28 be ignored since *Sheet Metal Workers*, *supra*, at 355 instructs that "(t)he potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him (or her)."

For that reason, the IATSE and Loeb no longer cite *Maddalone v. Local 17, United Bhd. of Carpenters & Joiners of America*, 162 F.3d 178, 183 (2d Cir. 1998) since a retaliatory removal challenge should be allowed to proceed when dismissal is "part of a series of oppressive acts by the union leadership that directly threaten the freedom of members to speak out". BIO vi; App.37-38. *Maddalone*[4] cites many cases where a long history of dissent raises genuine issues as to the motive for the removal of union officials.

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[4] Having avoided a trial, Respondents abandoned its efforts to cause a "*clear and convincing*" evidence standard that *Maddalone* otherwise used to evaluate these cases. App.8, 37-38. But this case is ripe for application of the "*preponderance of evidence standard*" as espoused in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389, 390 (1983), since "any other standard expresses a preference for one side's interests." App.8.

Thus, Respondents' selective use of facts *while ignoring explicit directives from Congress and the judiciary* is yet another clever trick that cannot be countenanced.

D) DUAL MOTIVE INSTRUCTION APPROPRIATE

In light of the sharply disputed facts and despite Respondents failing to address Petitioners' request to extend the *Dual Motive* Instruction, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), to a *Title I* challenge, this case now presents the best vehicle for now mandating same. BIO v; then see App.36-39 and Pet.10-15, 33.

Also see *Bise v. IBEW*, 618 F.2d 1299, 1304 n.5 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980), a Title I suit may be maintained even if the union action taken is supported by "*some evidence*" of guilt. There can be no doubt that Osburn's membership rights were removed and thus both a *§101(a)(2)* and *§529* challenge are warranted.

E) DUE PROCESS HAS BEEN VIOLATED

The procedures mandated in *Article 16* requiring the timely filing of charges, specificity, and a neutral fact finder are not idle mandates, nor is the Congressional definition of due process easily discarded because Loeb says so. For that reason, Respondents' attack upon Justice Douglas' dissent in *International Boilermakers v. Hardeman*, 401 U.S. 238 (1971) is

misplaced. BIO 22. The oppressive practices utilized by Respondents and their counsel have placed, as Justice Douglas forewarned, "*judicial imprimatur on the union's utter disregard of due process to reach its own ends*." *Id.*, at 250-51.

Loeb's interpretation of the Constitution, including *Articles Seven, Sixteen, Seventeen, Nineteen* and *Twenty* are intolerable and contradicted by the plain meaning of the sections at issue herein. Loeb wrote letters to Kate Jesse in 2010 concerning her alleged nonpayment of dues, knowing full well that if Jesse was not paying dues she was to be summarily expelled from membership rather than "personally tried by Loeb" as he threatened. *Article Sixteen, §2*, App.83. Loeb's decision to then wait close to three years before charging Osburn and Local 695 is unpalatable since Loeb himself gave false assurances to Petitioners that they could reasonably demand invoices for affected 695 members while carrying out their constitutional mandate to credit or refund monies to Local 695 members.

Since no directive was ever issued to Petitioners, and Loeb conceded same, Loeb could not exercise his jurisdiction under *Article Seven*, particularly since his own set of untimely charges against Osburn specified that he (Loeb) was proceeding under *Article Sixteen*. Loeb even denied issuing a *directive* directly to Local 695. ER 2728, 2745-46, 2800-05. Although Respondents claim that a Letter from Loeb to Kate Jesse in February 2011 was a *directive*, it was not addressed to the Union, nor was it referenced in any of the charging documents. ER 1625-27.

Although a union's interpretation of its own constitution is generally entitled to "great deference", such deference will not occur when the interpretation is "patently unreasonable" or in "bad faith". See *Allen v. International Alliance of Theatrical Stage Employees, etc.*, 338 F.2d 309 (5th Cir. 1964), which more than fifty years ago rejected a "*closed shop*" in Alabama, a right-to-work state, just like most of the states where Loeb's *SMLs* now operate. In *Allen*, *supra*, one of Loeb's predecessors, Walter Diehl, was forewarned that "a provision that a specified officer shall have power to interpret the constitution cannot overcome the plain meaning of the language or the rule of strict judicial construction when applied in a penal context, or foreclose the courts from construing the constitution in accordance with that judicial rule of construction." *Gonzales v. International Association of Machinists*, 142 Cal.App.2d 207, 298 P.2d 92 (1956), *affirmed*, 356 U.S. 67.

Similarly, actions against Petitioners should be stricken as "void". *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012, 1016 (4th Cir. 1965). A "void" action therein was defined as an "elastic term," to be "applied to proceedings where no proper notice was given, where the tribunal was biased, where the offense charged was not one specified in the union constitution or where there have been other substantial jurisdictional defects or a lack of fundamental fairness." *Simmons*, *supra*, 350 F.2d at 1016-17.

When bias is raised, motivation to extirpate a union opponent is not needed. If that were all that were

involved, the claim would be completely duplicative of the claim that could be brought under *§101(a)(2)* and *29 U.S.C. §529*, of the *LMRDA*, on the theory that the discipline "infringed" the candidate's free speech rights, see *Sheet Metal Workers*, *supra*, 488 U.S. at 353-54. Yet the cases make quite clear that the due process requirements of *101(a)(5)* apply in addition to the right not to be disciplined for the exercise of free speech rights. *E.g.*, *Black v. Ryder/PIE*, 970 F.2d 1461, 1467-68 (6th Cir. 1992); *Bise v. IBEW*, 618 F.2d 1299, 1304-05 n.5 (9th Cir. 1979).

The same can be said when freedom of association is impacted, as herein, notwithstanding Respondents' failure to address same in its opposition. Pet.31-32.

In light of *Wildberger v. Sturdivant*, 86 F.3d 1188, 1195 (D.C. Cir. 1996) and *Withrow v. Larkin*, 421 U.S. 35, 54 (1975), it should be readily apparent that Loeb did not act with honesty and integrity leading up to the trusteeship of Local 695 and the removal of Petitioners. Pet.39-41. Instead Loeb was clearly enmeshed in these disputes. See Loeb Deposition, ER 2718-22 and ER 2051-59 and App.38-39; Pet.39-41.

F) PATRONAGE AND LOYALTY DEFENSE IS NOW ARCHAIC

In this modern day and age, special insulation of labor organizations to pick and choose who it will employ are no longer needed. Respondents' claim that *Smith v. IBEW, Local Union 11*, 109 Cal.App.4th 1637 (2003) stands for the proposition that absent a

traditional EEO-type challenge, the patronage defense is still viable. BIO 20-21. But *Smith*, *supra*, extensively discusses inappropriate use of the patronage/loyalty defense when terminations contrary to public policy occur. Therein, Smith's refusal to contribute to the Incumbent Business Manager's "war chest", with Marvin Kropke asserting the Fifth Amendment relative to those demands, was clearly noted.

Numerous other cases across the country also question Respondents' reliance upon *Screen Extras Guild v. Superior Court*, 51 Cal.3d 1017 (1990). BIO 21. Using the prior holding in *Bloom v. Gen Truck Drivers, Office, Food & Warehouse Union, Local 952*, 283 F.2d 1356, 1357-60 (9th Cir. 1986), exception to preemption when employee declines to aid in violation or concealment of a violation of a criminal statute, other courts have followed suit. See *Young v. International Bhd. of Locomotive Engineers*, 683 N.E.2d 420, 421-22 (Ohio App.,1996), allowing jury to decide if Young was a policymaking employee; *Montoya v. Local Union III of IBEW*, 755 P.2d 1221 (Colo.,1988), not preempt discharge arising out of criminal misuse of union funds; *Ardingo v. Local 951, United Food Commercial Workers Union*, 333 Fed. Appx. 929 (6th Cir. 2009), wrong to state that *Finnegan v. Leu*, 456 U.S. 431 (1982) stands for the proposition that the *LMRDA* gives union officials unlimited discretion in employment matters. But then see *Packowski v. United Food and Commercial Workers Local 951*, 289 Mich.App. 132 (2010), finding that because plaintiff was a policymaking employee, preemption applied.

Absent a ruling on whether Alvarez was a "policy-making" or "non-confidential" employee, remand is warranted. On the other hand, the special homage paid to Unions as an Employer should be eliminated.

G) LOEB CANNOT REMAIN UNSCATHED

Loeb cannot escape liability when he devised this entire scheme to get rid of Petitioners but refused to undergo cross-examination by Osburn below to prevent the underhanded tactics resorted to, to be placed in the record. Offering to waive a $12,500 fine issued without notice of hearing to Josh Levy or Petitioners certainly warranted interrogation of the mastermind who used Levy as a pawn to accomplish what the *LMRDA* prohibits. App.37-39; Pet.40-41.

CONCLUSION

Accordingly, Petitioners and their counsel pray that certiorari be granted.

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Respectfully submitted,

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