No. 18-3

IN THE

Supreme Court of the United States

ROBBIE OHLENDORF AND SANDRA ADAMS,
Petitioners,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 876,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Sixth Circuit, being the first Circuit to address a question raised by the dissenting Justices in *Unite Here Local 355 v. Mulhall*, 571 U.S. 83 (2013), held that § 302(e) of the Labor Management Relations Act does not authorize private enforcement actions in light of the Court's contemporary views reflected in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The questions presented are:

1. Whether LMRA § 302(e) authorizes private actions to obtain injunctions for violations of § 302 under *Sandoval* and its progeny.

2. Whether a labor union acts in an arbitrary or bad faith manner so as to breach its duty of fair representation when it enforces window termination periods or certified mail restrictions voluntarily agreed to by an employee in a dues checkoff authorization.

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STATEMENT

Petitioners Ohlendorf and Adams were employees at Oleson's Food Stores in Michigan. Pet. App. 5a. The collective bargaining agreement between Oleson's and Respondent Local 876 of the United Food & Commercial Workers Union permitted Oleson's to deduct union dues from employees' paychecks if the employee signed an authorization form (often called a dues checkoff). Pet App. 4a-5a. The authorization form signed by both Petitioners stated that the checkoff authorization would be irrevocable for one year or until the termination date of the collective bargaining agreement, whichever occurred sooner, and thereafter for annual periods unless revoked by certified mail during a 15-day window period each year. Pet. App. 5a.

Petitioners were members of the union and both signed authorization forms in 2013. Three years later, they resigned their union membership and attempted to revoke their dues authorizations. They sent written revocations, but did so outside of the 15-day period for revoking authorization specified in their authorizations and by regular mail. The Union accepted their resignations from union membership, but refused to accept the revocations for that year. The employer continued to deduct union dues from their wages and the Union continued to accept the payments. Pet. App. 5a; Pet. 4.

Petitioners filed a class action lawsuit claiming that the Union violated § 302 of the Labor Management Relations Act by imposing conditions on their ability to revoke their authorization and violated its duty of fair representation by enforcing the conditions. Pet. App. 5a. Petitioners sought injunctive relief and monetary damages. The district court dismissed the complaint on the pleadings and Petitioners appealed.

While the appeal was pending before the Court of Appeals, Adams successfully revoked her authorization and Ohlendorf quit working at Oleson's. Pet. App. 5a; Pet. 6.

Shortly before oral argument, the Court of Appeals *sua sponte* requested supplemental letter briefs addressed to the following question:

> Does § 302 of the Labor Management Relations Act authorize a private right of action? *See Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594, 595 (2013) (Breyer, J., dissenting); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Sixth Cir. Docket No. 31.

After supplemental briefing and oral argument, the Court of Appeals upheld the dismissal of Petitioners' § 302 claims. The basis of its ruling was that § 302 is a criminal statute that does not create a private right of action when analyzed under this Court's modern views reflected in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Court of Appeals also rejected Petitioners' argument that § 302 could give rise to an implied personal right of action. Pet. App. 7a-13a.

The Court of Appeals also upheld the dismissal of Petitioners' duty of fair representation claims under § 9(a) of the National Labor Relations Act. Pet. App. 14a-15a. The Court held that the Union's conduct in enforcing the restrictions cannot be "arbitrary" or in "bad faith" because Petitioners voluntarily agreed to the window period and certified mail provisions when they executed their checkoff authorizations—which nobody forced them to sign—and allege no fraud or dishonesty by the Union. Pet. App. 14a-15a.

Petitioners thereafter filed a petition for rehearing by the Sixth Circuit *en banc*. The original Sixth Circuit panel found that the issues raised in the petition already were fully considered and, upon circulation to the full court, no judge requested a vote on the petition. As such, the petition was denied. Pet. App. 1a.

ARGUMENT

I. THE COURT SHOULD DECLINE TO REVIEW THE SIXTH CIRCUIT'S DECISION THAT LMRA § 302 DOES NOT AUTHORIZE PRIVATE ENFORCEMENT ACTIONS

In *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962), this Court stated that LMRA § 302(e) "permit[s] private litigants to obtain injunctions" for violations of § 302. But that statement was made "long ago and in passing" and "in light of the Court's more restrictive views on private rights of action in recent decades, *see*, *e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001), the legal status of *Sinclair Refining's* dictum is uncertain." *Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting).

This is the first case in which an appellate court has considered whether LMRA § 302(e) authorizes private litigants to obtain injunctions in light of the Court's views on private rights of action expressed in *Sandoval*. It is, in truth, the first case in which that question has been seriously considered at all, as prior decisions allowing private litigants to seek injunctive relief under § 302(e) merely proceeded on the assumption that there was a private cause of action. *See*, *e.g.*, *Int'l Longshoremen's Ass'n, AFL-CIO v. Seatrain Lines, Inc.,* 326 F.2d 916, 919 (2d Cir. 1964).

Whether LMRA § 302(e) permits private enforcement actions is an important question. But the Court

should not address that question in this case for two primary reasons. First, the Petitioners' claims for injunctive relief—and thus their claim under § 302(e)—have become moot. Pet. App. 5a-6a; Pet. 6. Second, it would be premature to address the question before other Circuits have had the opportunity to consider and respond to the Sixth Circuit's sound legal analysis.

A. Petitioners' Claims For Injunctive Relief—The Only Basis For A Claim Under § 302(e)—Are Moot

The text of LMRA § 302 provides for only two methods of enforcement—criminal prosecution under § 302(d) or injunctive relief under § 302(e). There is no Circuit split or serious dispute as to this point. The Circuits uniformly have held, as did the Sixth Circuit here, that § 302 does not permit money damage claims. *See McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 250 (1st Cir. 1982); *Bakerstown Container Corp. v. Int'l Bhd. of Teamsters*, 884 F.2d 105, 108 (3d Cir. 1989); *Am. Commercial Barge Lines Co. v. Seafarers Int'l Union of N. Am.*, 730 F.2d 327, 332 (5th Cir. 1984); *Sellers v. O'Connell*, 701 F.2d 575, 577–78 (6th Cir. 1983); *Central States v. Admiral Merchants*, 511 F. Supp. 38, 46-47 (D.Minn.1980), *aff'd*, 642 F.2d 1122 (8th Cir. 1981); *Souza v. Trs. of W. Conference of Teamsters Pension Trust*, 663 F.2d 942, 945 (9th Cir. 1981).

Petitioners filed this action seeking an injunction allowing them to terminate their authorizations and money damages for dues paid after they unsuccessfully attempted to terminate. Their claim for injunctive relief now is undisputedly moot. Pet. App. 5a; Pet 6. That being so, whether "§ 302(e) . . . permit[s] private litigants to obtain injunctions," *Sinclair*, 370 U.S. at 205, no longer is a live question in this case.

B. It Would Be Premature To Address The Issue Before Other Circuits Have Weighed In

The Sixth Circuit's analysis under *Sandoval* is unassailable and there is no reason to anticipate that it will be rejected by another Circuit. In any event, this Court should not take up the issue unless and until there is a division among the Circuits on the correct application of *Sandoval* to claims under LMRA § 302.

Historical decisions recognizing a private right of action under § 302(e) assume or hold without significant analysis that such a right exists, and were decided against the backdrop of the pre-*Sandoval* approach to private actions under which the Court "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose . . . [and] routine[ly] . . . would imply causes of action not explicit in the statutory text itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017), *citing, J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Under the Court's contemporary and "far more cautious course," *Ziglar*, 137 S. Ct. at 1855, "the 'determinative' question is one of statutory intent" and "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Ziglar*, 137 S. Ct. at 1855-1856, *quoting*, *Sandoval*, 532 U.S. at 286-287.

LMRA § 302 is "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representatives." *United States v. Ryan*, 350 U.S. 299, 305 (1956). *Accord*, *United Mine Workers of Am. Health & Ret. Funds v. Robinson*, 455 U.S. 562, 572 (1982) (Section 302 is "a crimi-

nal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials"). "[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

Section 302(d), entitled "Penalties for violations," provides generally that "any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony" or "guilty of a misdemeanor" depending on "the amount of money or thing of value involved" and "be subject to a fine . . . or imprisoned . . . or both." The Sixth Circuit observed that Section 302(d) sets forth a "standard of criminal liability," Pet. App. 10a, provides for criminal penalties of the type "usually enforced by the federal government, not private parties" and says nothing about civil remedies. Pet. App. 7a. The decision whether to prosecute violations of § 302 under this provision is obviously for the United States Department of Justice. *See, e.g., Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Cox*, 342 F.2d 167, 171-172 (5th Cir. 1965); *United States v. Jones*, 438 F.2d 461, 468 (7th Cir. 1971); *Justice Department's Opinion on Checkoff*, 22 LRRM 46 (1948); *Salant & Salant, Inc. (Paris, Tenn.)*, 88 NLRB 816, 818 (1950).

"Section 302 . . . does not create person-specific rights." Pet. App. 9a. Instead, "it 'focus[es] on the person[s] regulated rather than the individuals protected.' *Sandoval*, 532 U.S. at 289." *Ibid.* As the Sixth Circuit observed in this regard:

> 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 any-

> thing about the individuals protected or their capacity to file a lawsuit.

Id. at 9a-10a (emphasis in original).

While the Petitioners make a half-hearted attempt to imply a civil cause of action from § 302's criminal provisions, Pet. 20-25, their principal argument is that subsection (e) creates an express private cause of action to prosecute violations that the Department of Justice has declined to pursue.

Subsection (e), entitled "Jurisdiction of courts," 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.

29 U.S.C. § 186(e).

Subsection (e) "says nothing about giving private parties the right to sue, and assuredly says nothing about a right to sue for money damages." Pet. App. 11a. Rather, that provision "creates jurisdiction for the courts to restrain violations of § 302 at the request of the Attorney General." *Ibid*. As the Sixth Circuit explained, "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." *Id*. at 11a-12a.

Petitioners contest this interpretation solely on the basis of subsection (e)'s reference to "section 52 of this title," to the anti-injunction provision in the Clayton Act. Pet. 10-11. Asserting that "Section 52 only applies to suits between private employees and employers, and not to suits brought by the government," Petitioners argue that "[t]he inclusion in Section 302(e) of an exemption from Section 52's prohibition of injunctions . . . proves Section 302(e) grants these private litigants an express right of action to restrain violations of the statute." *Id.* at 10.

To establish the major premise of this syllogism—that "Section 52 only applies to suits between private employees and employers"—the Petitioners rely on a glancing citation to *United States v. Mine Workers*, 330 U.S. 258, 270 (1947). Pet. 10. The problem is that *Mine Workers* "consider[ed] the application of the Norris-LaGuardia Act alone" on the grounds that, "[i]f it does not apply, neither does the less comprehensive proscription of the Clayton Act [Section 52]; if it does, defendant's reliance on the Clayton Act is unnecessary." *Mine Workers*, 330 U.S. at 270.

Having put the Clayton Act issue to one side, the *Mine Workers* Court went on to consider at length whether the Norris-LaGuardia Act barred the government's request for injunctive relief. 330 U.S. at 270-89. In the end, the majority concluded that "in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply." *Id.* at 289. Given the limited scope of this holding, the Senate Report on the bill that eventually became the Taft-Hartley Act, cautioned, "It should be remembered that

the Supreme Court decision in *U.S. v. United Mine Workers* (decided March 6, 1947), did not hold in broad terms that the Government was exempted from the Norris-LaGuardia Act." S. Rep. No. 105, 80th Cong., 1st Sess. p. 14 (1947).

In sum, § 302(e)'s references to the anti-injunction provisions of the Clayton and Norris-LaGuardia Acts do not "prove[]"—or even suggest—that "Section 302(e) grants . . . private litigants an express right of action to restrain violations of the statute." Pet. 10. And, without the syllogism based on a misreading of *Mine Workers*, the Petitioners have no statutory argument at all.

If Congress had intended to permit private actions to enforce § 302, it would have said so expressly, not with an oblique reference to one of the acts listed in the "without regard to" provision of its jurisdictional section. LMRA Section 302 is flanked by other sections in the same Act, Sections 301 and 303, that expressly establish private rights of action. *See* Pet. App. 10a-11a; 29 U.S.C. § 185(a); 29 U.S.C. § 187(b). As the Sixth Circuit held, these provisions evidence that "[w]hen Congress wished to provide a private right of action . . . it had no trouble doing so—clearly." Pet. App. 11a. *See*, *also*, *Sandoval*, 532 U.S. at 288-89 (attaching significance to the fact that "rights creating" language in § 601 defining classes protected by the statute was not repeated in § 602); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The "general rule" providing the legal background to § 302(e) is that "courts . . . are reluctant to issue

injunctions against the commission of a crime." 11 A Wright, Miller & Kane, *Federal Practice & Procedure* § 2942, p. 68 (2013). "This hesitance is tied to the notion that for the court to act would interfere with the prosecutor's exercise of discretion to decide whether to prosecute a particular violation." *Ibid.* *See, also, Wayte*, *Cox* & *Jones*, *supra.* There is nothing in the words of § 302(e) or its legislative history to indicate that Congress intended to allow private parties to second guess the Justice Department's decision not to prosecute an alleged violation of LMRA § 302 by bringing a private action for injunctive relief.

II. THE COURT SHOULD DECLINE TO REVIEW THE DUTY OF FAIR REPRESENTATION CLAIM

Given the mootness of Petitioners' injunction claims under § 302, the only thing that kept this case alive is Petitioners' damage claim for breach of the duty of fair representation. The Sixth Circuit affirmed the dismissal of that claim on the basis that the Union did not act in an arbitrary or bad faith manner by holding Petitioners to the window period and certified mail requirements to which they each agreed. Petitioners do not seriously contend that the fair representation issue warrants review. Petitioners also mischaracterize the issue at times by suggesting that the Union unilaterally imposed the conditions at issue.

The required legal standards to establish a breach of a union's duty of fair representation are well-established. Petitioners do not claim a circuit split or raise an important legal question meriting review.

It is unrefuted that Petitioners voluntarily agreed to the checkoff authorizations, Pet. App. 14a-15a, and submitted their unsuccessful revocations outside their

agreed window periods. Pet. 4; Pet. App. 5a. Myriad decisions and authorities, dating back decades, hold that check-off revocations made outside an agreed-upon window period are ineffective. *See, e.g.,* J*ustice Department's Opinion on Checkoff*, 22 LRRM 46 (1948) (Advising that Justice Department will not prosecute for § 302 violation where checkoff clause automatically renews from year to year with a 10-day "escape" period); *Frito-Lay*, 243 NLRB 137 (1979); *NLRB. v. U.S. Postal Serv.*, 833 F.2d 1195, 1196 (6th Cir. 1987), *decision supplemented*, 837 F.2d 476 (6th Cir. 1988); *NLRB v. Indus. Towel & Unif. Serv., Div. of Cavalier Indus., Inc.*, 473 F.2d 1258 (6th Cir. 1973); *NLRB v. Atlanta Printing Specialties & Paper Prod. Union 527, AFL–CIO*, 523 F.2d 783 (5th Cir. 1975); *Hayes v. United Rubber Cork, Linoleum and Plastic Workers of America*, 523 F. Supp. 50, 54 (N.D. Alabama, 1981). Moreover, as the District Court in this case held, a certified mail requirement is a rational method for confirming timely submission given the time-sensitive nature of a window period. Pet. App. 33a-34a.

Petitioners rely primarily on this Court's decision in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959), the only checkoff revocation case they cite, but their reliance is misplaced. *Felter*, unlike the present case, did not involve window periods or conditions *agreed-upon* by each employee. *Felter* involved conditions on revocation that were imposed on employees *without their individual consent,* by a provision in a collective bargaining agreement between the union and employer. Moreover, *Felter* found a violation of the Railway Labor Act, a statute that is inapplicable here, and not a breach of the duty of fair representation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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