No. 98-909

In the Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12, PETITIONER

v.

GARY A. BLOOM AND THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether a union security clause that tracks the language of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), is facially valid.

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OPINIONS BELOW

The opinion of the court of appeals of which petitioner seeks this Court's review (Pet. App. 1a-14a) is reported at 153 F.3d 844. The supplemental decision and order of the National Labor Relations Board (NLRB or Board) at issue in that opinion (Pet. App. 18a-41a) is reported at 325 N.L.R.B. No. 49. An earlier NLRB decision and order in this case (Pet. App. 42a-55a) is reported at 323 N.L.R.B. 251. The initial decision of the court of appeals in this case (Pet. App. 56a-63a) is reported at 30 F.3d 1001. The NLRB's initial order in this case (Pet. App. 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1998. Pet. App. 15a-16a. Petitions for rehearing and suggestions for rehearing en banc were denied on October 15, 1998. Pet. App. 17a. The petition for a writ of certiorari was filed on December 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." That same paragraph, however, permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." The paragraph further provides that membership must be equally available to all employees on the same terms and conditions and may require employees to do no more than "tender the periodic dues and the initiation fees uniformly required."

This Court has held that, under that paragraph, "'[m]embership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). All that may be required as a condition of employment is "payment of initiation fees and monthly dues." *Ibid.* An employee may resign full union membership without suffering discharge and may not be discharged for failing to abide by union rules or policies with which he disagrees. *Pattern Makers' League of N. Am.* v. *NLRB*, 473 U.S.

95, 106 (1985). Finally, this Court has made clear that employees who are not full union members need not pay fees or dues to the extent they "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 745 (1988).

2. In 1991, respondent Gary A. Bloom filed unfair labor practice charges with the NLRB against his former employer, Group Health, Inc., and his former collective bargaining representative, petitioner Office and Professional Employees International Union, Local 12 (Union). Pet. App. 8a, 57a. Based on those charges, the NLRB General Counsel issued a complaint against Group Health and the Union. *Id.* at 58a. The complaint alleged that Group Health had violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3), and the Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2). The allegedly unlawful conduct comprised (1) Group Health's and the Union's maintaining and enforcing in their collective bargaining agreement a union security clause that required covered employees to "become and remain members in good standing in the Union" as a condition of employment; (2) the Union's failure to advise covered employees of the right to refrain from full union membership and instead to pay agency fees, as well as the right of an agency fee payer to object to paying the "nonrepresentational" portion of the agency fee; and (3) the Union's threats to terminate Mr. Bloom's employment if he declined full union membership, and the unauthorized deduction of dues from Mr. Bloom's wages. Bloom C.A. App. 23-24.

Rather than contest that complaint, Group Health and the Union each entered into a settlement agree-

ment with the NLRB General Counsel to remedy the alleged unfair labor practices. Pet. App. 58a. The parties agreed that they would not maintain a "member in good standing" union security clause without explaining in the clause that employees "need only pay the Union's periodic dues and initiation fees." Bloom C.A. App. 55, 57. The Union also agreed to inform all Group Health employees of the percentage of its expenditures spent on "non-representational activities" and of the right of agency fee payers to object to paying for those activities. *Id.* at 57. The Union agreed that it would not tell "employees that they are required to sign [a] membership application or checkoff authorization form[ ]" as a condition of employment. *Ibid.* And the parties agreed that they would not deduct dues or fees from an employee's pay without prior written authorization. *Id.* at 55, 57.[1]

Mr. Bloom, as the charging party, did not agree to the settlement agreements. Pet. App. 58a. The settlement agreements were therefore submitted by the General Counsel to the Board for review under the standards in *Independent Stave Co.*, 287 N.L.R.B. 740, 743 (1987).[2] On September 29, 1993, the Board entered an order approving the settlement agreements. Pet. App. 64a-65a.

Mr. Bloom petitioned the Eighth Circuit for review of the NLRB's decision approving the settlement agreements. Pet. App. 58a. On July 27, 1994, the Eighth Circuit reversed the Board's decision on the ground

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[1] The dues deducted from Mr. Bloom's pay had been returned to him prior to the settlement agreements, and the Union agreed to notify the other employees of that action. Bloom C.A. App. 58.

[2] The *Independent Stave* standards are set forth at Pet. App. 49a.

that "an adequate remedy in this case requires expunction of the offending clause." *Id.* at 63a. The court of appeals "remand[ed] the case to the Board for further proceedings consistent with [the court's] opinion." *Ibid.*

3. a. On remand, the settlement agreements were revised to provide, *inter alia*, for a substitute union security clause in the collective bargaining agreement and union notice to all covered employees explaining that employees who choose to be agency fee payers have the right to object to paying the "nonrepresentational" portion of the fee and that the Union will honor objections by reducing the required agency fee and providing a detailed explanation of the basis for the reduction. Pet. App. 46a.

The substitute union security clause, which was negotiated by Group Health and the Union, included "additional explanatory language" intended to "settle this case without additional litigation * * * [by] meet[ing] the standard for union-security clauses set forth in the Sixth Circuit's *Buzenius* decision[3] even on the most strict reading of that case." Pet. App. 21a. The new clause reads as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees

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[3] See *Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S. Ct. 442 (1998).

> which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion * * * of the Union's total expenditures that support representational activities.

Ibid.

Mr. Bloom objected to the revised settlement agreements. Pet. App. 22a. On February 2, 1998, the Board approved the agreements. *Id.* at 18a-41a. Mr. Bloom once again petitioned for review.

b. In the decision on which petitioner now seeks certiorari, the Eighth Circuit reversed the NLRB's decision approving the revised settlement agreements. Pet. App. 1a-14a. The court of appeals ruled that the "membership" language of the new union security clause is "misleading and coercive" and that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the *unqualified command* expressed in the first sentence of the challenged provision." *Id.* at 11a-12a. In remanding the case, the court of appeals instructed the Board to order the inclusion of court-specified language in the union security clause. *Id.* at 13a. The court of appeals added that "we will no longer uphold or enforce a union security clause that does not contained this language or reflect its undiluted equivalent." *Ibid.*

ARGUMENT

In *Marquez* v. *Screen Actors Guild, Inc.*, 119 S.Ct. 292, 296 (1998), this Court held that a union does not breach its duty of fair representation by negotiating a union security clause that tracks the language of Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). In so holding, the Court rejected the contention that the use

of the statutory language without an explanation in the collective bargaining agreement of this Court's interpretation of that language in *General Motors* and *Beck* rendered the clause facially invalid. 119 S.Ct. at 300-301.

The Court noted that it had "granted certiorari to resolve the conflict over the facial validity of a union security clause that tracks the language of § 8(a)(3)" (119 S.Ct. at 298-299) that existed between the Ninth Circuit's ruling (which the Court upheld in *Marquez*) and the decisions of two other courts of appeals. *Id.* at 298 (citing *Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S.Ct. 442 (1998); and *Bloom* v. *NLRB*, 30 F.3d 1001 (8th Cir. 1994), the initial decision of the court of appeals in this case). Accordingly, on November 9, 1998, the Court granted the petition for certiorari in *United Paperworkers Int'l Union* v. *Buzenius*, No. 97-945, and entered an order providing that "[the] judgment [in that case is] vacated and the case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Marquez* v. *Screen Actors Guild*." 119 S.Ct. 442 (1998).

The Union then filed this petition for review of the Eighth Circuit's decision and judgment in *Bloom*. We agree with petitioner that the Court should vacate the judgment of the court of appeals in this case and remand for further consideration in light of *Marquez*. This case arises in the context of a Board decision approving settlement agreements to remedy purported violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) allegedly committed by the employer and the Union in entering into a union security clause that tracks the language of Section 8(a)(3). This Court's decision in *Marquez* makes clear that a union security clause that

tracks the statutory language does not violate the Act. 119 S.Ct. at 300-301. Although this case differs from *Marquez* in that it does not involve an allegation that the Union breached its duty of fair representation, the decision of the court of appeals cannot be reconciled with this Court's decision in *Marquez*.

The decision of the court of appeals rests on the proposition that a union security clause that states that covered employees "shall * * * become * * * members in the Union" is "misleading and coercive," because "[i]n such a context, 'member' is not a term of 'art,' * * * but one of deception." Pet. App. 11a-12a. *Marquez* directly rejects that proposition. This Court reasoned there that "the relevant provisions of § 8(a)(3) have become terms of art; the words and phrasing of the section now encompass the rights that we announced in *General Motors* and *Beck*." 119 S.Ct. at 300-301.

In addition, the Eighth Circuit held here that a standard form union security clause tracking the language of Section 8(a)(3) is so "misleading and coercive" that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the *unqualified command* expressed in the first sentence of the challenged provision." Pet. App. 11a-12a. *Marquez* also rejects that proposition: "It is difficult to conclude," this Court held, "that a union acts in bad faith by notifying workers of their rights through more effective means of communication and by using a term of art to describe those rights in a contract workers are unlikely to read." 119 S.Ct. at 301.

Finally, the court of appeals in this case not only overturned the settlement agreements at issue but prescribed detailed contract language of its own devising to replace the negotiated language in standard-form

"membership" union security clauses. The court of appeals then declared that the Eighth Circuit "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent." Pet. App. 13a. The decision of the court of appeals cannot stand in the face of this Court's ruling in *Marquez*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Eighth Circuit should be vacated, and the case should be remanded to that court for further consideration in light of *Marquez* v. *Screen Actors Guild, Inc.*, 119 S.Ct. 292 (1998).

Respectfully submitted.

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