No. 09-196

In the Supreme Court of the United States

JOSEPH P. WARD,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

I. THE SPLIT AMONG THE CIRCUITS IS WIDELY ACKNOWLEDGED, AND NINTH CIRCUIT LAW PLAINLY REJECTS AN IMPLIED CAUSE OF ACTION FOR UNIONS UNDER SECTION 501

1. Respondent does not contest that this case presents an important and substantial question of federal jurisdiction, nor could it deny that both the Seventh Circuit and district court below—along with numerous other federal courts (see Pet. 10-14)—recognized the circuits' "opposite conclusions" on that question. Pet. App. 15a; see also Pet. App. 31a. Respondent's sole argument against *certiorari* (aside from its views on the merits, see Opp. 5-10) is premised on a single district court opinion that plainly misreads Ninth Circuit law.

In *Service Employees International Union* v. *Rosselli* (*Rosselli II*), No. C 09-00404 WHA, 2009 WL 1382259 (N.D. Cal. May 14, 2009), the district court inexplicably suggested that, when the Ninth Circuit, in *Building Material & Dump Truck Drivers, Local 420* v. *Traweek*, 867 F.2d 500 (1989), dismissed, for lack of subject matter jurisdiction, a union's claim that its officials breached fiduciary duties under 29 U.S.C. § 501(a), the court was applying only *Section 501(b)*, and neglected to consider the implications of *Section 501(a)*. As a result, the *Rosselli II* court surmised, the *Traweek* decision is not controlling in a case in which a union alleges a private cause of action under Section 501(a).

That view attributes to the *Traweek* court a perversely myopic approach to statutory construction. Indeed, one need look no further than another district court's decision *in related litigation between the same*

parties to find a well-reasoned rejection of the odd position taken in *Rosselli II*, and now advanced by respondent. In *Service Employees International Union* v. *Rosselli* (*Rosselli I*), No. CV 08-2777-JFW, 2008 WL 3342721, at *2-*3 (C.D. Cal. July 22, 2008), the district court explained that

> In interpreting [Section 501], the Ninth Circuit has held that labor organizations or unions cannot bring suit under this statute. * * * Although Plaintiff argues that the Ninth Circuit only precluded a union suit under section 501*(b)*, and not under section 501*(a)*, the Court disagrees. *The Ninth Circuit clearly meant to preclude suit under section 501 in its entirety*.

Id. at *3 (citing *Traweek*, 867 F.2d at 506) (final emphasis added). The *Rosselli I* district court acknowledged that the Eleventh Circuit had reached a contrary conclusion. *Id.* at *3 n.1 (citing *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO* v. *Statham*, 97 F.3d 1416, 1420 (11th Cir. 1996)). But the district court recognized that it was "bound by the Ninth Circuit's decision in *Traweek*" and therefore dismissed the union's claim with prejudice. *Id.* at *3 & n.1.

That is the only plausible reading of *Traweek*. It borders on frivolity to characterize the Ninth Circuit's decision as "'pertain[ing] only to Section 501(b) and *not* to Section 501(a).'" Opp. at 4 (quoting *Rosselli II*, 2009 WL 1382259, at *2). Indeed, in *Traweek* itself, the Ninth Circuit said that "[t]he issue posed" was "whether a union * * * *can bring a § 501 suit*"—not, as respondent (and *Rosselli II*) suggest, a Section 501(b) suit in particular. 867 F.2d at 506 (emphasis

added). Unlike the Seventh Circuit in this case, the Ninth Circuit answered that question in the negative, holding that a union "does not need * * * the operation *of § 501* to sue for recovery" from its own officials. *Ibid.* (emphasis added). The court invoked "the federal policy of noninterference in the internal affairs of unions and labor matters," *ibid.*, which would have been a strange ground on which to rely if the court held open the possibility that the very same federal interference was called for by *another part of the same section of the same statute*.

It is not altogether surprising that the district court in *Rosselli II* so plainly misread the holding in *Traweek*, since it likewise mischaracterized *Traweek*'s underlying dispute, and on that faulty premise concluded that the decision was not even on-point. See 2009 WL 1382259, at *2. In *Traweek*, the court of appeals reversed, for lack of subject matter jurisdiction, a $55,000 judgment in favor of a union against two of its former officials—one who had been the union's CEO and secretary-treasurer, and another who had been its vice president. See 867 F.2d at 503-505. The judgment was in the amount of various checks the officials had written against union funds to cover the attorneys' fees that a third union official incurred while under indictment for arson. See *ibid.* But in *Rosselli II*, the district court asserted that *Traweek* involved only "a union suit against a mere member (for unpaid dues)," 2009 WL 1382259, at *2, and based on that misreading it concluded that "*Traweek* had no occasion to consider the fact pattern here at issue": a union's challenge to its former officers for a breach of fiduciary duty. *Ibid.* Having fundamentally misread the facts in *Traweek*, it is not

surprising that *Rosselli II* misread the holding as well.

Respondent's exceedingly narrow view of *Traweek* also swims against a torrent of federal cases reading that decision to hold that unions do not have a cause of action to sue their officials for breach of the duties described in Section 501(a). In this case, the Seventh Circuit explained that "[d]istrict and circuit courts alike are divided on whether § 501 creates an implied federal cause of action for labor organizations"; and although it recognized such a cause of action, it conceded that *Traweek* had reached the "opposite conclusion." Pet. App. 14a & n.6. The district court in this case likewise explained that "the Ninth Circuit construed *Section 501* of the LMRDA as not creating a right of action for unions '[b]ecause of the federal policy of noninterference in the internal affairs of unions and labor matters.'" Pet. App. 33a (quoting *Traweek*, 867 F.2d at 506) (emphasis added).

In addition to the decisions below, the Eleventh Circuit also recognized that *Traweek* holds "that *section 501* does *not* create a cause of action that can be asserted by a union." *Statham*, 97 F.3d at 1418 n.2 (first emphasis added). This Court, too, has pointed to *Traweek* as an example of where courts have taken "inconsistent positions on the question whether a union may bring suit *under § 501*." *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374 n.16 (1990) (emphasis added). Similarly, many of the district courts that have struggled with the question presented in this case have acknowledged that *Traweek* bars union lawsuits to enforce Section 501(a) in the Ninth Circuit. As one such court explained, *Traweek* "emphasiz[ed] the

plain language of § 501(b) and [held] that *unions could not pursue a claim under § 501(a).*" *Int'l Longshoremen's Ass'n, Steamship Clerks Local 1624, AFL-CIO* v. *Va. Int'l Terminals, Inc.*, 914 F. Supp. 1335, 1340 n.3 (E.D. Va. 1996) (emphasis added); see also *Dunlop-McCullen* v. *Pascarella*, No. 97-Civ.-0195(PLK)(DFE), 2002 WL 31521012, at *8 (S.D.N.Y. Nov. 13, 2002) (describing *Traweek*'s "holding that unions cannot sue under § 501"); *United Transp. Union* v. *Bottalico*, 120 F. Supp. 2d 407, 408 (S.D.N.Y. 2000) (recognizing that the Ninth and Eleventh Circuits "have considered whether a union may sue under § 501, and have reached different conclusions"); *Int'l Longshoremen's Ass'n, AFL-CIO* v. *Spear, Wilderman, Borish, Endy, Spear & Runckel*, 995 F. Supp. 564, 568 n.7 (E.D. Pa. 1998) (calling *Traweek* a case "finding no jurisdiction for § 501 suits brought by unions").

In short, the Ninth Circuit's decision in *Traweek* is flatly at odds with the Seventh Circuit's holding below and the Eleventh Circuit's holding in *Statham*. Respondent's tortured distinction of *Traweek* is merely an attempt to evade this Court's review of an important question of federal law.

2. Contrary to respondent's wishful thinking (Opp. 4), nothing about *Rosselli II* makes it "all but certain" that the Ninth Circuit will reconsider *Traweek*. *Rosselli II* itself has yet to be resolved on the merits, and there is no reason to believe that the threshold jurisdictional question will ever be appealed in that case. Moreover, even if a case squarely presenting the issue someday finds its way to the appellate court, only the *en banc* court can overrule *Traweek*, and there is no reason to assume

that Ninth Circuit is "certain" to do so. This Court's review is the far surer path to providing needed guidance on the question presented.

II. RESPONDENT'S DEFENSE OF THE DECISION BELOW ON THE MERITS ONLY UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

The bulk of respondent's brief simply previews its arguments on the merits (see Opp. 5-10), and thus provides no reason to deny further review. Respondent does not—nor could it—contend that the Seventh Circuit faithfully applied the presumption that statutes containing an express cause of action do not imply additional causes of action. See Pet. 15-18. Instead, respondent blithely asserts that no such "negative inference" exists (Opp. 6), and that Section 501 "cannot support any other reading" (Opp. 5) than the one adopted by the court of appeals below. But those contentions are the subject of vigorous debate among the lower courts—debate that calls out for this Court's review.

1. Respondent's primary argument on the merits is that Sections 501(a) and (b) can *only* be read to imply a cause of action for unions. Opp. 6-8. The Ninth Circuit in *Traweek*, and a plethora of well-reasoned district court opinions, have reached the contrary conclusion, however, holding that respondent's preferred construction of the statute is *not even the more natural one* (let alone the "only" one). Section 501's text, those courts have explained, provides no evidence that Congress intended to imply a cause of action for unions. See, *e.g.*, *Local 15, Int'l Bhd. of Elec. Workers* v. *O'Reilly*, No. 02 C 6464, 2003 WL 29896, at *3 (N.D. Ill. Jan. 2, 2003) ("[A] *plain*

reading of Section 501(a)'s language does not create a cause of action for unions. Section 501(a) only sets forth fiduciary duties.") (emphasis added); *Local 1150 Int'l Bhd. Of Teamsters* v. *SantaMaria*, 162 F. Supp. 2d 68, 76 (D. Conn. 2001) ("[T]he statutory language * * * provide[s] *no basis* for the implication of a cause of action for [a union] under § 501(a).") (emphasis added); *Bottalico*, 120 F. Supp. 2d 407, 408 ("The *plain language* of § 501 cannot be read to create a claim for unions.") (emphasis added).

Moreover, it is not the case that "the petition says barely a word about the text of § 501(a)." Opp. 6. As the Petition contends at length (at 23-25), the Seventh Circuit inappropriately assumed that, by listing a set of fiduciary duties in Section 501(a), Congress necessarily intended to grant *unions* (as opposed to *union members*) a federal right of action to enforce them. Respondent thinks that such a leap is warranted, and then implausibly suggests that the onus shifts *to petitioner* to support an "infer[ence] that § 501 *does not* create a labor organization cause of action from the fact that § 501(b) creates a limited cause of action" for union members. Opp. 6 (emphasis added). That gets the analysis exactly backward, however, and highlights the court of appeals' failure—mirrored by respondent's brief—to address forthrightly the presumption that Congress intended only the cause of action it created in Section 501(b) as a federal remedy to enforce the duties listed in Section 501(a). See Pet. 15-18.

2. Also unpersuasive is respondent's view (Opp. 6-8) that, by prescribing certain preconditions on a union member's cause of action in Section 501(b), Congress intended to confer on unions as well the

right to file a *federal* cause of action to sue their officials for a breach of fiduciary duty. To be sure, a union member cannot bring a claim under Section 501(b) unless the union has declined to pursue its own remedies within a reasonable time after the member demanded that it do so. But it begs the question to assert that those remedies *must* include a cause of action *under the federal statute*. As one district court has explained, Section 501(b) operates perfectly well without any implication that Congress intended to provide unions with a federal cause of action, given that "the union could sue the officer under state law in state court." *Bottalico*, 120 F. Supp. 2d at 409; see also *Local 191, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.* v. *Rossetti*, Civ. A. No. B-90-74(WWE), 1990 WL 128241, at *2 (D. Conn. Aug. 23, 1990) ("Under § 501, the union member must first request that the union, *in state court or pursuant to some other federal statute*, sue the union official suspected of wrongdoing.") (emphasis added). Section 501(b) also provides that a union may seek "other appropriate relief"—a recognition by Congress that "a labor organization might pursue a remedy in a non-judicial forum, *i.e.*, charges brought pursuant to the union's constitution." *Spear, Wilderman, Borish, Endy, Spear & Runckel*, 995 F. Supp. at 572; see also Pet. 20-21, 23.

3. Finally, respondent does not deny that Section 501's legislative history indicates that Members of Congress who shepherded Section 501(a)'s fiduciary duties (and its precursors) through the legislative process recognized that Congress would need to address *separately* whether—and in what form—a federal remedy should exist to enforce

those duties. See Pet. 21-23. Those examples of how Members understood the statute do not "obfuscate" some allegedly "clear meaning of the statutory text" (Opp. 8); instead, they demonstrate that—to many of the statute's drafters and proponents—the effect of enacting Section 501(a) without Section 501(b) would have been to provide no federal cause of action for anyone. Contra Opp. 6.

Nor does respondent's own "resort" to so-called "bits and pieces of the legislative history" (Opp. 8) undermine that observation. As an initial matter, contrary to respondent's assertion (at 8-9) Congress was not of a single mind that the common law dealt "inadequate[ly]" with a union official's fiduciary duties. See, *e.g.*, 105 Cong. Rec. S5858, reprinted at 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1132 (NLRB Legislative History) ("In my opinion, the State laws * * * are adequate.") (statement of Sen. Kennedy).

Respondent also quotes Senator Goldwater at some length (Opp. 9), but he, too, explained that had Section 501 not included Section 501(b), it would have lacked *any federal remedy at all*. Upon passage of the LMRDA, Senator Goldwater compared the final bill to earlier Senate consideration of an amendment akin to a stand-alone Section 501(a): "On the Senate floor, an amendment was adopted imposing a fiduciary status on union officials * * *. *No remedy for breach of such obligation was provided*. * * * [The final bill] *provided such a remedy*—as described below." 105 Cong. Rec. A8518 (emphasis added), reprinted at 2 NLRB Legislative History 1852. The Senator then described the precise remedy found

in Section 501(b), before reiterating that "at no stage of the Senate bill was a remedy for breach of fiduciary duty provided. It is in both the [House] bill and the [final legislation.]" *Ibid.* Senator Goldwater, like many of his colleagues (see Pet. 22-23), recognized that Section 501(b)'s express cause of action is required in order for *any* party to bring an action in federal court to enforce Section 501(a)'s list of fiduciary duties. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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