No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(a), provides that certain union officials owe fiduciary duties to their union and its membership. Section 501(b) then provides *union members* with a cause of action (upon leave of the court and for good cause shown) to sue for the breach of those duties if their union has failed or refused "to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization." *Id.* § 501(b).

The question presented in this case is whether Congress implied a cause of action for *unions* to sue their officials under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, despite limiting the express cause of action under that section to suits by union members.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 563 F.3d 276. The judgment of the district court (App., *infra*, 27a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2009. On May 13, 2009, Justice Stevens granted an extension of the time to file the petition until August 14, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 501, provides:

> (a) * * * The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any

matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) * * * When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the

instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

STATEMENT

Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 501, provides *union members* with an express cause of action to sue union officials who breach their fiduciary duty to the union, *id.* § 501(b). As the Seventh Circuit remarked in its decision below, however, "[d]istrict and circuit courts alike are divided" on whether Congress *also* intended to provide an *implied* cause of action to the unions themselves. App., *infra*, 14a & n.6 (collecting cases). This Court has similarly recognized that "[c]ourts have reached inconsistent positions" on that question. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374 n.16 (1990).

In this case, the district court concluded that Congress did not intend to imply a cause of action for unions under Section 501. App., *infra*, 36a. In reversing that decision, the Seventh Circuit held that Congress did imply such a cause of action despite having limited Section 501's express cause of action to union members. App., *infra*, 25a-26a. In so holding, the Seventh Circuit joined the Eleventh Circuit in direct conflict with the Ninth Circuit. District courts, moreover, have long been hopelessly divided on the issue.

Congress enacted the LMRDA "to combat corruption on the part of union officials and to protect the interests of the membership." *Guidry*, 493 U.S.

at 370. At the time, congressional investigations had revealed "a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures." 29 U.S.C. § 401(b). As part of its response, Congress stated in Section 501(a) that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group," and went on to list a number of specific fiduciary duties that those union officials owe to their union and its membership: to hold money and property solely for the benefit of the organization, to refrain from dealing with the union as an adverse party, and to account to the union for any profits received in connection with union business. *Id.* § 501(a).

In Section 501(b), Congress expressly provided a federal remedy for the breach of those fiduciary duties. A union member alleging that a union official committed such a breach must first request that the union "sue or recover damages or secure an accounting or other appropriate relief." *Id.* § 501(b). If the union fails to do so "within a reasonable time," the member may bring suit in state or federal court "for the benefit of the labor organization" and "upon leave of the court obtained upon verified application and for good cause shown." *Ibid.* Recovery in such an action belongs to the union, less any reasonable legal fees and expenses allotted to the litigating member by the trial judge. *Ibid.*

A. The District Court Proceedings

The International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150" or "the Union"), represents approximately 22,000 members mostly

located in the Midwest. See Compl. ¶ 4. In January 2007, the Union filed a complaint in the United States District Court for the Northern District of Illinois against its Treasurer, Joseph P. Ward, who at the time was campaigning to unseat Local 150's incumbent President-Business Manager, William E. Dugan. The complaint alleged that thirteen years earlier, when Ward and a group of investors purchased land adjacent to a Local 150 district office in Joliet, Illinois, Ward breached his fiduciary duty to the Union. The Union charged that, before making that 1994 land purchase, Ward knew that Dugan was interested in buying the property for the Union, but that Ward told the seller that the Union was no longer interested and told Dugan that the property was no longer for sale. See App., *infra*, 28a; Compl. ¶¶ 9-14.

The Union brought two claims. First, it alleged that Ward violated Section 501 of the LMRDA, and claimed that the district court had jurisdiction over such a claim brought by the Union pursuant to 28 U.S.C. § 1331. Second, it brought a state law breach of fiduciary duty claim, and asserted the district court's supplemental jurisdiction under 28 U.S.C. § 1367. Ward moved to dismiss the Complaint on the ground that Section 501 does not create a right of action for unions, but only (under the specified conditions) for union members. See App., *infra*, 27a-29a.

The district court agreed and granted Ward's motion to dismiss. See App., *infra*, 27a-37a. Judge Ruben Castillo recognized that the "[f]ederal courts are divided on the issue of whether Section 501 gives a union, as opposed to a union member, a private

right of action" and that "[t]he Supreme Court declined to resolve the issue" in *Guidry*. App., *infra*, 31a; see also *id.* at 32a, 34a (collecting cases). After examining the conflicting views on this question, the court found "persuasive the analysis of courts holding that the plain language of Section 501 does not support a private right of action for unions," App., *infra*, 31a-32a, and rejected the position taken by "courts [that] have looked beyond the plain language * * * to find an implied right of action for unions," App., *infra*, 34a.

The court explained that "Section 501's language—providing an express remedy to union *members*—weighs heavily against finding legislative intent to give a cause of action to unions." App., *infra*, 35a (internal quotation marks omitted). Applying the "'elemental canon of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies,'" the court said that "'in the absence of strong indicia of contrary congressional intent, [it was] compelled to conclude that Congress provided precisely the remedies it considered appropriate.'" App., *infra*, 32a (quoting *Karahalios* v. *Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989)). "If Congress had wanted to give the union the same right of action that it explicitly provided to union members" the court continued, "it could have done so." App., *infra*, 33a.

Furthermore, the district court concluded, Section 501 lacks sufficient indicia that Congress intended to imply a cause of action in addition to the one that it provided expressly. Indeed, explained the court, "neither the statute's structure or legislative

history support finding an implied right of action for unions." App., *infra*, 35a. When it provided a cause of action for union members but not unions, Congress "could conceivably have intended to relegate unions to sue in state court due to the federal policy of noninterference in internal union affairs." App., *infra*, 33a. The provision preventing a union member's suit until the union refuses to bring its own suit simply reflects that "[u]nions still have the right to sue in state court for breach of fiduciary duty by its officers or other representatives." *Ibid.*

For these reasons, the court stated that it would not "enlarge its jurisdiction by permitting the union to sue in federal court" because Section 501 admits of no "explicit authorization from Congress." App., *infra*, 32a. Having dismissed the Section 501 claim, the district court declined to exercise supplemental jurisdiction over the Union's state law breach of fiduciary duty claim, and dismissed it without prejudice to its renewal in state court. See App., *infra*, 36a-37a.

B. The Court of Appeals' Decision

The Union appealed the district court's decision to dismiss its complaint, and the United States Court of Appeals for the Seventh Circuit reversed. See App., *infra*, 1a-26a.

Like the district court, the court of appeals noted that "[d]istrict and circuit courts alike are divided on whether § 501 creates an implied federal cause of action for labor organizations" and that "the Supreme Court * * * declined to resolve the issue" in *Guidry*. App., *infra*, 14a-15a & n.6 (collecting cases). In particular, "the Ninth and Eleventh Circuits, have

addressed the question, and they have reached opposite conclusions." App., *infra*, 15a; see also *Bldg. Material & Dump Truck Drivers, Local 420* v. *Traweek*, 867 F.2d 500 (9th Cir. 1989) (holding there is no implied cause of action for unions); *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO* v. *Statham*, 97 F.3d 1416 (11th Cir. 1996) (holding there is an implied cause of action for unions).

The Seventh Circuit first considered the Ninth Circuit's "four grounds" for rejecting a union's Section 501 claim in *Traweek*.

> First, the court focused on the plain language of subsection (b), stating that '[t]he clear language of the statute does not contemplate a suit brought by a union.' [867 F.2d] at 506. Second, the court claimed adherence to 'the federal policy of noninterference in the internal affairs of unions and labor matters.' *Id.* Third, the court believed its decision to be consistent with 'the general principle . . . that the scope of federal jurisdictional statutes should be construed narrowly.' *Id.* at 507. And fourth, the Ninth Circuit found evidence of Congress's intent to grant the remedy solely to the union members in § 501(b)'s requirement that union members request leave of the court before suing. *Id.* at 506.

App., *infra*, 15a-16a. The court of appeals then examined the Eleventh Circuit's contrary decision in *Statham* "that Congress intended labor organizations to have access to the federal courts for suits to enforce the fiduciary duties imposed by § 501(a)." App., *infra*,

16a. First, the Eleventh Circuit concluded that "the duty-creating language of § 501(a) * * * 'would make no sense'" without a corresponding implied cause of action for unions. *Ibid.* (quoting 97 F.3d at 1420). Second, "[t]he Eleventh Circuit also looked to the LMRDA's legislative history for evidence of Congress's intent" and "noted that the Act was a broad and wide ranging attempt to reign in corruption within union leadership." App., *infra*, 17a (citing 97 F.3d at 1420-21).

The court of appeals elected to "break the tie" between the split circuits, and agreed with the Eleventh Circuit. App., *infra*, 18a. The Seventh Circuit held that Section 501(a)'s "series of specific fiduciary duties" implies "corresponding rights in the [union] beneficiaries" and that "[t]he statutory language implied the creation of a federal remedy for the union as well." App., *infra*, 20a-21a. Because the express cause of action provided to union members in Section 501(b) is a "derivative action," the court reasoned that its existence "reinforces rather than undermines the implication" that Section 501(a) also creates a cause of action for labor organizations. App., *infra*, 22a. The court "part[ed] company," however, "with the Eleventh Circuit's use in *Statham* of the LMRDA's legislative history." App., *infra*, 25a n.9 (citing 97 F.3d at 1420).

The Seventh Circuit thus concluded "that labor organizations have an implied cause of action under § 501(a) to sue in federal court for violation of the fiduciary duties imposed by the statute." App., *infra*, 26a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS ARE DEEPLY DIVIDED AS TO WHETHER UNIONS HAVE AN IMPLIED CAUSE OF ACTION UNDER SECTION 501 OF THE LMRDA

There is a longstanding and deep divide among the courts of appeals and district courts over whether Congress provided unions with an *implied* cause of action in Section 501 of the LMRDA, 29 U.S.C. § 501, in addition to the *express* cause of action it provided union members, *id.* § 501(b). In reversing the district court and concluding that such an implied cause of action exists, the Seventh Circuit joined the Eleventh Circuit, see *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO* v. *Statham*, 97 F.3d 1416, 1418-1421 (1996), in direct conflict with the Ninth Circuit, *Bldg. Material and Dump Truck Drivers, Local 420* v. *Traweek*, 867 F.2d 500, 506-507 (1989). The court of appeals recognized that "[d]istrict and circuit courts alike are divided on whether § 501 creates an implied federal cause of action for labor organizations," App., *infra*, 14a; it considered the Ninth and Eleventh Circuits' "opposite conclusions," App., *infra*, 15a, and by "break[ing] the tie" it deepened that circuit split, App., *infra*, 18a.

In *Traweek*, a union sued two of its former officers for, *inter alia*, violating Section 501 by withdrawing union fees without proper authorization in order to reimburse another officer's legal fees. 867 F.2d at 503-505. The Ninth Circuit reversed a judgment for the union, holding that it lacked subject matter jurisdiction because Section 501 does not provide unions with a cause of action. *Id.* at 505-507.

The court noted as an initial matter that the "literal language of the statute is clear—it authorizes an *individual union member* to bring suit if a union refuses or fails to sue." *Id.* at 506. That express cause of action included a "requirement that the individual member request leave of the court to bring suit" on the union's behalf, and that requirement "offers proof," the court said, "that Congress intended that this remedy be available solely to individual union members." *Ibid.* The court determined that the "better-reasoned and more persuasive interpretation" of the statute was that it contained only the limited cause of action for union members, which was "created by Congress to address abuse of position by union officers in situations where members have no effective remedy for such abuse except to petition the federal courts for help." *Ibid.* It found such an interpretation of congressional intent to be consistent with "the federal policy of noninterference in the internal affairs of unions and labor matters," *id.* at 506, and "with the general principle * * * that the scope of federal jurisdictional statutes should be construed narrowly," *id.* at 507.

The Ninth Circuit concluded, therefore, that because "[t]he clear language of the statute does not contemplate a suit brought by a union, but only addresses the availability of a suit when the union refuses to sue," it lacked subject matter jurisdiction over the union's suit. *Id.* at 506-507.

The Eleventh Circuit arrived at the opposite conclusion in *Statham*. See 97 F.3d 1416. Recognizing that the question had been "thoroughly examined by many courts, and [that] they have arrived at opposite conclusions," *id.* at 1418 & n.2

(collecting cases), the court concluded that, although "[s]ubsection 501(b) does not itself confer jurisdiction over suits by [a] union, * * * it assumes that a union can sue its officials" because "otherwise, it would be futile for individuals to request the union to sue and senseless to make the individuals engage in a futile act," *id.* at 1419. Responding to the obvious counterpoint—that Congress could well have intended for unions to pursue existing tort remedies in state courts—the court relied on "[t]he legislative history of the LMRDA" as showing that Congress believed "existing state law remedies for union officials' misconduct were inadequate." *Id.* at 1420. "[F]rom this background," the court concluded that an implied cause of action existed "to supplement the remedies available to unions" under state law. *Ibid.*

Reflecting the split among the circuits, district courts routinely arrive at conflicting conclusions on the question presented in this case. On one side, many courts have taken the view adopted by the district court below, App., *infra*, 27a-37a, and by the Ninth Circuit in *Traweek*, 867 F.2d at 506-507, that the plain language, purpose, and drafting history of Section 501 demonstrate that Congress did *not* intend to imply a cause of action for unions. See *Int'l Union, Sec., Police, and Fire Prof'ls of Am.* v. *United Gov't Sec. Officers of Am. Int'l Union*, No. Civ. A. 04-2242-KHV, 2004 WL 3019430, at *2-4 (D. Kan. Dec. 30, 2004); *Local 15 of the Int'l Bhd. of Elec. Workers* v. *O'Reilly*, No. 02 C 6464, 2003 WL 29896, at *1-3 (N.D. Ill. Jan 2, 2003); *Dunlop-McCullen* v. *Pascarella*, No. 97-Civ.-0195(PLK)(DFE), 2002 WL 31521012, at *7-9 (S.D.N.Y. Nov. 13, 2002); *Local 1150 Int'l Bhd. of Teamsters* v. *SantaMaria*, 162 F. Supp. 2d 68, 75-81 (D. Conn. 2001); *United Transp. Union* v. *Bottalico*,

120 F. Supp. 2d 407, 407-410 (S.D.N.Y. 2000); *Int'l Longshoremen's Ass'n, AFL-CIO* v. *Spear, Wilderman, Borish, Endy, Spear & Runckel*, 995 F. Supp. 564, 566-573 (E.D. Pa. 1998); *Local 443, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.* v. *Pisano*, 753 F. Supp. 434, 435-436 (D. Conn 1991); *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); *Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO* v. *Freeman*, 683 F. Supp. 1190, 1191-1193 (N.D. Ill. 1988); *Crosley* v. *Katz*, Civ. A. No. 88-2437, 1988 WL 94283, at *1-3 (E.D. Pa. Sept. 9, 1988); *Local 624, Int'l Union of Operating Eng'rs* v. *Byrd*, 659 F. Supp. 274, 275-276 (S.D. Miss. 1986); *Graphic Arts Int'l Union, AFL-CIO* v. *Graphic Arts Int'l Union, Local No. 529*, 529 F. Supp. 587, 594 (W.D. Mo. 1982); *Truck Drivers, Warehousemen & Helpers of Jacksonville, Local Union No. 512* v. *Baker*, 473 F. Supp. 1120, 1122-1124 (M.D. Fla. 1979); *Stanton* v. *Shields*, No. C-79-1211, 1979 WL 2009, at *1 (N.D. Cal. July 20, 1979); *Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 20* v. *Leu*, No. C 76-221, 1976 WL 1685, at *1 (N.D. Ohio Oct. 22, 1976); *Safe Workers' Org., Chapter No. 2* v. *Ballinger*, 389 F. Supp. 903, 906-908 (S.D. Ohio 1974).

Other courts have taken the contrary position, adopted in this case by the court of appeals, App., *infra*, 1a-26a, and by the Eleventh Circuit in *Statham*, 97 F.3d 1416, that Section 501 provides unions with an implied cause of action despite Congress's decision to omit unions from the express cause of action set forth in Section 501(b). See *Int'l Longshoremen's Ass'n, Steamship Clerks Local 1624* v. *Va. Int'l*

Terminals, 914 F. Supp. 1335, 1338-1340 (E.D. Va. 1996); *Morris* v. *Scardelletti*, C.A. No. 94-3557, 1995 WL 120224, at *5-7 (E.D. Pa. Mar. 14, 1995); *Teamsters, Chauffeurs, Warehousemen and Helpers, Local 764* v. *Greenawalt*, 880 F. Supp. 1076, 1079-1081 (M.D. Pa. 1995); *Operative Plasterers & Cement Masons Int'l Ass'n of the U.S. and Canada, AFL-CIO* v. *Benjamin*, 776 F. Supp. 1360, 1363-1366 (N.D. Ind. 1991); *Glenn* v. *Mason*, No. 79 Civ. 3918 CES, 1980 WL 140904, at *1-2 (S.D.N.Y. Aug. 18, 1980); *Bhd. of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *Orr*, No. CIV-1-76-86, 1977 WL 1661 (E.D. Tenn. May 18, 1977); *Nat'l Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Div. of the Laborers' Int'l Union of N. Am.* v. *Johnson* (*In re Johnson*), 139 B.R. 163, 171-172 (Bankr. E.D. Va. 1992).

The division among the circuit and district courts on the sole question presented in this case is both deep and longstanding. It has been nearly two decades since this Court recognized that split of authority in *Guidry*, and the intervening years have brought only further confusion and conflict among the lower courts. Guidance from this Court is necessary to resolve finally whether federal courts are free to entertain fiduciary duty claims by unions against their officials.

II. THIS COURT SHOULD CLARIFY THE WEIGHT OF THE PRESUMPTION THAT STATUTES CONTAINING AN EXPRESS CAUSE OF ACTION DO NOT ALSO IMPLY ADDITIONAL CAUSES OF ACTION

A. The Court Of Appeals Failed To Apply The "Elemental Canon" Presuming Against Implied Additions To A Statute's Express Remedies

This Court has been especially reluctant to discern causes of action out of congressional silence where the statute Congress enacted *does* specify *other* remedies. "[I]mplied causes of action are disfavored" as a general matter, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009), and that disfavor grows substantially when a statute already expresses a particular remedial scheme.

The Seventh Circuit's decision did not reflect that reluctance; there is simply no evidence that it heeded the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979); see also *Karahalios* v. *Nat'l Federation of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989); *Nw. Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 94 n.30 (1981); *Univs. Research Ass'n* v. *Coutu*, 450 U.S. 754, 773 & n.24 (1981); *Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). To the contrary, the court of appeals reasoned that Congress's creation of an express cause of action for union members "neither opens nor closes the federal courthouse to the unions themselves," and

therefore could be "further evidence" that Congress implied an additional cause of action for unions. App., *infra*, 23a. A statute's expression of particular remedies carries with it a negative implication, however. See *Nat'l R.R. Passenger Corp.*, 414 U.S. at 458 ("'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'") (quoting *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929)).

The court of appeals read very little into the fact that Section 501 "openly declares that union members may sue in federal court for violations of the duties that it establishes" but is "silent * * * on whether it creates a similar federal cause of action for unions." App., *infra*, 7a-8a. Because it failed to start with the presumption that Congress intended Section 501 to be enforced only by the remedy it expressly created—and nothing more—the Seventh Circuit gave short shrift to clear indications that Congress actually intended that unions would employ their existing state law tort remedies and other avenues for obtaining appropriate relief against officers who breached a fiduciary duty, and that the federal courts would get involved only when a member's union had failed or refused to do so. By so casually discounting such a likely explanation for Section 501's text, the court of appeals made "implying a private right of action on the basis of congressional silence" an all the more "hazardous exercise." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

Statutes containing an express cause of action are not simply agnostic as to whether additional causes of action are implied, however. The presence of express remedial provisions instead creates a

strong presumption that Congress has defined a statute's intended enforcement mechanisms with precision. As this Court explained in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001),

> The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. Sometimes the suggestion is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted') suggest the contrary.

Id. at 290 (citations omitted); see also *Touche Ross & Co.*, 442 U.S. at 574 ("[W]e are *extremely reluctant* to imply a cause of action * * * that is significantly broader than the remedy that Congress chose to provide." (emphasis added)); *Nw. Airlines*, 451 U.S. at 93-94 ("The statutes make express provision for private enforcement in certain carefully defined circumstances. * * * The comprehensive character of the remedial scheme expressly fashioned by Congress *strongly evidences* an intent not to authorize additional remedies." (emphasis added)). The limitations that Congress places on a statute's express remedies are not simply one among many co-equal factors to ponder when weighing whether an implied cause of action also exists; this Court has stated plainly that when determining whether Congress intended to create an implied cause of action, one must look "*particularly* to the provisions made therein for enforcement and relief." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) (emphasis added).

In sharp contrast to the Seventh Circuit's reasoning, many of the courts that have *declined* to recognize a cause of action for unions under Section 501 have highlighted the significance of that statute's express cause of action. In this case, for example, the district court held that "Section 501's language—providing an express remedy to union members—'weighs heavily against finding legislative intent to give a cause of action' to unions." App., *infra*, 35a (quoting *SantaMaria*, 162 F. Supp. 2d at 80-81); see also *O'Reilly*, 2003 WL 29896, at *3 (applying the "elemental canon"). In another case, Judge Mukasey, in rejecting an implied cause of action for unions under Section 501, explained that "the absence of one specific remedy in a statute, when others are provided, creates a presumption that Congress did not intend to provide that remedy. Here, Congress expressly created a right of action for union members, but did not do so for unions." *Bottalico*, 120 F. Supp. 2d at 409; see also *id.* at 410 ("Congress's inclusion of a private action for union members but not for unions is *strong evidence* that Congress did not intend to create one for unions." (emphasis added)).

B. Congress Intended To Provide A Federal Cause Of Action Only To The Members Of Unions That Have Refused To Exercise Their Existing State Law Remedies Or To Seek Other Appropriate Relief

Had the Seventh Circuit begun by presuming that Section 501's express cause of action for union members is the precise remedy the Congress intended, and required strong evidence of contrary intent before implying an additional cause of action for unions, it likely would have concluded (as have

many other courts) that the statute's structure, purpose, and legislative history *reinforce* the conclusion suggested by the text: Congress intended to limit the federal cause of action it created to union members who face a particular set of circumstances. Congress's concern was for union members whose union had failed—despite the members' urging—to pursue state law or other appropriate remedies against an allegedly self- or double-dealing official.

First, Section 501's purpose—like that of the LMRDA generally—was to provide *employees* and *union members* with federal protection from miscreant unions and unscrupulous union officials. The LMRDA's declared purpose, after all, was to "protect *employees'* rights" and to "afford necessary protection of the *rights and interests of employees* and the public generally as they relate to the activities of labor organizations * * * and their officers and representatives." 29 U.S.C. § 401(a), (b) (emphasis added). Therefore, "it is the individual employee, not the union" that Congress mentioned specifically as the "focus of [its] solicitude." *Bottalico*, 120 F. Supp. 2d at 410. As the Ninth Circuit recognized in *Traweek*, Congress enacted Section 501 in the context of a "federal policy of noninterference in the internal affairs of unions and labor matters." 867 F. 2d at 506. As such, that Circuit concluded that the "better-reasoned and more persuasive interpretation" was that the statute addressed only those "situations where members have no effective remedy for such abuse [of position by union officers] except to petition the federal courts for help." *Ibid.*

Section 501's drafting history also demonstrates that Congress focused on providing remedies for

union *members*, and not for unions. For example, an early proposal for what became Section 501(b)'s express cause of action extended the right of action both to a union's *officers* and to its members. See S. 748, 86th Cong. § 301(b), *reprinted at* 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 109-110 (NLRB Legislative History). Section 501(b) as enacted, however, is limited to union members; it is unlikely (to say the least) that Congress rejected providing an *express* cause of action to union officers while at the same time intending to establish an *implied* cause of action for the unions themselves. See *Crosley*, 1988 WL 94283, at *3.

Second, Congress enacted Section 501 against a backdrop of existing state law remedies—in particular, the common law tort remedies that unions already enjoyed to enforce the obligations of their fiduciaries. It has long been true that where a "cause of action [is] one traditionally relegated to state law" it is generally "inappropriate to infer a cause of action based solely on federal law." *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Contemporaneous scholarship, one district court has noted, recognized that union officials were considered fiduciaries at common law, and that unions enjoyed common law remedies for any breach of those officials' corresponding duties. See *SantaMaria*, 162 F. Supp. 2d at 77 n.5 (collecting authorities). Then as now, state law spoke to a union official's fiduciary duties and provided sufficient avenues for their enforcement. See, *e.g.*, N.Y. Labor Law §§ 722, 723, 725 (providing for fiduciary obligations and their enforcement in state court); *Local No. 163, Int'l Union of United Brewery, Flour,*

Cereal, Soft Drink and Distillery Workers of Am. v. *Watkins*, 207 A.2d 776, 781 (Pa. 1965) (explaining that a union's "officers and similar agents" were "held to standards of good faith" under state law akin to those in Section 501). Indeed, in this case the union pressed a cause of action for breach of fiduciary duty under Illinois state law that was practically identical to its purported claim under Section 501. See App., *infra*, 36a-37a.

The Seventh Circuit assumed, however, that "[i]t would be anomalous indeed to read this statutory scheme as remitting the union's own suit * * * to state court." App., *infra*, 24a-25a. Congress did not see any such anomaly, however. Indeed, even the Seventh Circuit "part[ed] company" with the Eleventh Circuit's reliance on the LMRDA's legislative history for the supposition that Congress believed that the state remedies available to unions were inadequate. App., *infra*, 25a n.9 (citing *Statham*, 97 F.3d at 1420); see also *Bottalico*, 120 F. Supp. 2d at 409 ("The Eleventh Circuit * * * concluded that 'relegating' the union to suing under state law in state court would frustrate the purpose of § 501. * * * Wholly apart from the well documented hazards of relying on legislative history, the Eleventh Circuit's perceived authority is not persuasive." (internal citation omitted)). In fact, that legislative history is replete with indications that members of Congress intended for unions to continue pursuing their internal procedures and existing state law remedies, and that Section 501(b)'s express cause of action would provide a federal backstop only where a union has refused to do so. As one district court concluded after a detailed examination of the legislative history,

> it appears more likely based on the legislative history that Congress anticipated that unions often would be able to resolve problems internally or through state common law remedies, but, based on Congressional findings of widespread corruption in union leadership, granted members a federal remedy in those situations where the union failed to act to protect its interests and the interests of its members.

SantaMaria, 162 F. Supp. 2d at 80; see also *id.* at 77 ("[T]he legislative history demonstrates that Congress believed that state common law remedies were available for breach of fiduciary duty, even if not ideal."); *id.* at 77-78 ("Congress contemplated that the unions could bring suit in state court.").

For example, as senators debated a floor amendment that suggested language akin to what became Section 501(a), Senator Javits noted that such language "*will still leave the question of the remedy open*" and suggested that the Senate consider whether it wanted "to leave the question of the remedy open to any suit *aside from a Federal court suit which might lie by reason of diversity of citizenship* or any other ground outside the statute" or rather "to have a section of the bill which concerns itself with the right to sue, and to provide in that section a right *to the individual member* to sue when the union itself does not act, given a decent period of time." 86 Cong. Rec. S5858, *reprinted at* 2 NLRB Legislative History 1132 (emphasis added). Immediately after that statement, Senator McClellan introduced another amendment "dealing with the right to bring suits" that used language very similar to that now found at § 501(b). *Ibid.*

The Seventh Circuit's reliance on a misperceived "anomal[y]" in the statute if unions' suits are "remitt[ed] * * * to state court" also ignores a crucial part of § 501(b)'s text. App., *infra*, 24a-25a. Section 501(b)'s express cause of action is not conditioned only on the union refusing or failing "to sue"; the union must also have brushed off *all* of its possible remedies against the breaching officer—including internal or informal ones—to "recover damages or secure an accounting or other appropriate relief." 29 U.S.C. § 501(b). For example, many unions have procedures through which to secure restitution or an accounting from its officers; the successful pursuit of such efforts upon a member's demand would obviate the need for a federal lawsuit. See, *e.g.*, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, Constitution of the International Union art. 48, § 5 (adopted June 2006), *at* http://www.uaw.org/constitution/article48.cfm (providing a process for seeking the restitution of funds that a local union official received or spent improperly). The union's remedies at common law were just one arrow the union could loose against a duplicitous official; for a union member's suit to trigger federal jurisdiction, the union had to have refused to reach into its quiver entirely.

Finally, the court of appeals jumped too quickly to the conclusion that "[t]he statutory language implies the creation of a federal remedy for the union" from the fact that Section 501 benefits unions. App., *infra*, 21a. That unions stand to benefit from the duties listed in Section 501 does not mean Congress intended for unions to be the enforcer; "the language of the statute" must still indicate that Congress intended *that particular mode of*

enforcement. See *Univs. Research Ass'n* 450 U.S. at 771. Neither of the provisions that the court of appeals pointed to—namely, an official's duty to account for certain personal profits, and the avoidance of contracts that purport to exculpate a union official from his fiduciary obligations, see App., *infra*, 21a-22a—speak to whether Congress intended to permit unions to sue in federal court.

In *Transamerica*, for example, it was not enough that Section 206 of the Investment Advisers Act "establishes federal fiduciary standards to govern the conduct of investment advisers" and was "intended to benefit the clients of investment advisers." 444 U.S. at 17 (internal quotation marks omitted). Although "the Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations," this Court emphasized that it "is a different question" whether Congress intended to provide a private right of action to the beneficiaries of those obligations. *Id.* at 17-18. "[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." *Id.* at 24. Instead, this Court concluded, "[i]n view of [the] express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* at 20 (quoting *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).

So too here. Congress surely believed that unions and their membership would benefit from an increased respect for fiduciary obligations among union officials. The express cause of action that

Congress provided to union members in Section 501(b), coupled with unions' existing internal and state law remedies, is sufficient to fulfill that purpose; nothing about the text or structure of the statute requires the implication of a federal cause of action for unions or the rebuttal of the presumption that Congress did not provide one.

III. THIS IS A RECURRING AND IMPORTANT ISSUE REGARDING THE SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

As evidenced by the depth of the split among the lower courts on the question presented, it arises quite frequently. In the period since this Court recognized that split in *Guidry*, 493 U.S. at 374 n.16, courts have continued to reach "opposite conclusions" on the issue, see App., *infra*, 15a, and in doing so they routinely allude both to that division of authority and to the absence of a definitive resolution by this Court. See, *e.g.*, *Statham*, 97 F.3d at 1418 & n.2 ("The question of whether a union may assert a cause of action under section 501 of the [LMRDA] has been thoroughly examined by many courts, and they have arrived at opposite conclusions."); *Int'l Union, Sec., Police, and Fire Prof'ls of Am.*, 2004 WL 3019430, at *3 ("Courts have disagreed whether unions may bring suit under Section 501(b). * * * The Supreme Court has recognized the conflict but has not resolved it."); *O'Reilly*, 2003 WL 29896, at *2 ("There is a split of authority * * * as to whether Section 501(a) provides for a private right of action by a union."); *Pascarella*, 2002 WL 31521012, at *8 n.8 ("The Supreme Court has noted the split of authorities on this issue but has not resolved it."); *SantaMaria*, 162 F. Supp. 2d at 75 ("The circuits are split on this issue."); *Bottalico*, 120

F. Supp. 2d at 408 ("Two United States Courts of Appeals have considered whether a union may sue under § 501, and have reached differing conclusions."); *Spear, Wilderman, Borish, Endy, Spear & Runckel*, 995 F. Supp. at 568 ("The lower courts considering the issue * * * have reached different conclusions."); *Va. Int'l Terminals*, 914 F. Supp. at 1339 ("Courts have reached inconsistent positions on the question of whether § 501, standing alone, confers a cause of action on the union."); *Benjamin*, 776 F. Supp. at 1363 ("Several district courts also have relied on the statute's plain language to find that § 501(b) did not give a union the right to sue an individual union member in federal district court. * * * Other federal courts * * * have exercised jurisdiction over claims brought by unions.").

The sole question presented is both significant and important, involving nothing less than whether Congress intended that the federal courts would become the default forum in which unions would bring (or to which defendants could remove) bread-and-butter breach of fiduciary duty lawsuits against union officials. This case provides an opportunity for this Court to clarify whether the express cause of action in Section 501(b) is merely adjunct to a broader, implied cause of action through which any union may challenge the actions of its fiduciaries in federal court, or provides a stand-alone and limited supplement to a union's internal and common law remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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