No. 09-709

Supreme Court of the United States

JEFFREY J. REED,

Petitioner,

v.

INTERNATIONAL UNION, AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondent.

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

Brief *Amicus Curiae* of the Center for Constitutional Jurisprudence in Support of Petitioner

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QUESTIONS PRESENTED

1. Title VII requires unions to reasonably accommodate employees' religious beliefs. Must an employee suffer discharge or discipline as a prerequisite to challenging the reasonableness of a labor union's religious accommodation?

2. The lower courts have uniformly agreed that employees who have religious objections to supporting labor unions may, as a reasonable accommodation under Title VII, redirect their compulsory union fees to charity. Where a labor union requires that the religious objector must pay more than any other member of the bargaining unit to retain employment, is that a reasonable accommodation?

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Interest of *Amicus Curiae* [1]

Amicus curiae, the Center for Constitutional Jurisprudence, is an educational, litigation and advocacy program in constitutional law and jurisprudence located at Chapman University School of Law. Founded in 1999 as the public interest litigation arm of The Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this action raises issues appropriate for Supreme Court review, first, to resolve conflicts among the circuits concerning the legal standards applicable to accommodation by labor unions of employees who have conscientious religious objections to union membership and, second, to address important questions of federal law concerning the statutory limits on the maximum union dues that can be charged to an objecting employee under the National Labor Relations Act as construed by this Court in *Communications Workers of America*

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[1]The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

v. Beck (1988) 487 U.S. 735.

The maximum agency fee that a labor union can charge a non-member employee was set by this Court in *Beck* as limited to the costs of collective bargaining and employee representation. *Beck* at 487 U.S. at 759, 760, 762-763. The respondent union and the courts below have permitted the petitioner to be charged full union dues as the price of his religious accommodation. That violates the *Beck* construction of the National Labor Relations Act. The fact that the petitioner is being charged more than a political objector also raises potential constitutional considerations, but this action can be decided more simply by making explicit the application of the rule of *Beck* to religious accommodation agency fees.

The conflict among the circuits should be resolved in favor of the approach taken in the First, Second, Seventh, Eighth and Ninth Circuits, where the issue of "adverse employment action" is decided on the facts and circumstances of each case, rather than the "discharge or discipline" standard used in the Third, Fourth, Fifth, Tenth and Eleventh Circuits, and now the Sixth Circuit, particularly in the context of a religious accommodation claim against a labor union, which has no authority or capacity to "discharge or discipline" employees.

ARGUMENT

I. REQUIRING RELIGIOUS OBJECTORS TO UNION MEMBERSHIP TO PAY THE EQUIVALENT OF FULL UNION DUES IS NOT A REASONABLE ACCOMMODATION UNDER *COMMUNICATIONS WORKERS OF AMERICA V. BECK* AND THE NLRA.

Employers are required not to discriminate against employees on the basis of religion and to provide reasonable accommodation to the religious convictions and practices of their employees under Title VII of the Civil Rights Act of 1964, at 42 U.S.C. §2000e-2(a) and §2000e(j). Labor unions are required not to discriminate against their members on the basis of religion under Title VII at 42 U.S.C. §2000e-2(c), and, as acknowledged by the Sixth Circuit Court of Appeals decision in this matter, case law also has extended to labor unions the requirement to provide reasonable accommodation to the religious convictions and practices of their members. *Reed v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* (6th Cir. 2009) 569 F.3d 576, at 579, citing *Wilson v. NLRB* (6th Cir. 1990) 920 F.2d 1282, 1286 and *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico* (1st Cir. 2002) 279 F.3d 49, 55 n. 7.

The petition in this action presents an issue of the proper standard for religious accommodation by the respondent union for an employee, like the petitioner, who conscientiously objects to union membership on religious grounds. In *Communications Workers of*

America v. Beck (1988) 487 U.S. 735, this Court made two rulings that bear on this question. First, this Court construed Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(a)(3), to permit labor unions to require non-member employees to pay an agency fee equivalent to the dues paid by union members, to avoid "free riders" from obtaining the advantages of union representation without paying the dues required of union members for these services. 487 U.S. at 738, 744-756.

But, second, this Court ruled in *Beck* that the agency fees that labor unions can require from non-members under the NLRA are limited to the costs of collective bargaining and employee representation. 487 U.S. at 759 ("Congress understood §8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities"), 760 ("the rationale underlying § 8(a)(3) . . . prohibit[s] the collection of fees that are not germane to representational activities").

> We conclude that § 8(a)(3) . . . authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."

Beck, 487 U.S. at 762-763, quoting *Ellis v. Railway Clerks* (1984) 466 U.S. 435, at 448 (construing the substantially identical language in the Railway Labor Act) (*Beck* at 742).

A letter agreement addendum to the collective bargaining agreement in this action provides that the accommodation offered to employees who object to

union membership on religious grounds is payment of an amount equivalent to full union dues to one of three charities mutually selected by the union and the employer. *Reed,* 569 F.3d at 578. The amount of this agency fee ("union security fee") is the central issue in this case.

Under *Beck* the law is clear that a union is limited to charging a non-member an agency fee equal to the amount of each union member's dues that go toward collective bargaining and representation. *Beck* at 487 U.S. at 759, 760, 762-763. But in this action the courts below have permitted the respondent union to charge the petitioner the full amount of union dues as the price of his religious accommodation, not just the portion attributable to collective bargaining and representation. The respondent union and the lower courts have isolated the rule of *Beck* to union members and non-members who object to supporting the union's political activities. *Reed* 569 F.3d at 578. That is inconsistent with this Court's analysis and holding in *Beck.*

Although the specific objection to the union dues in *Beck* addressed union political expenditures, the majority opinion of this Court in *Beck* did not rely on the First Amendment cases prohibiting compulsory support for union political expression in violation of principles of freedom of speech (e.g., *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 235-242). "Like the majority, I do not reach the First Amendment issue raised below by respondents. . . ." Justice Blackmun, joined by Justice O'Connor and Justice Scalia, concurring in part and dissenting in part, *Beck,* 487 U.S. at 763, footnote 1. The holding in *Beck* is entirely a statutory construction of the NLRA.

The practice of the respondent union of charging the petitioner an agency fee equal to the full amount of the union dues, including the portion used for political expenditures, violates the NLRA as construed in *Beck*.

II. THE CONFLICT AMONG THE CIRCUITS SHOULD BE RESOLVED IN FAVOR OF A FINDING THAT A RELIGIOUS ACCOMMODATION THAT VIOLATES *BECK* IS AN ADVERSE EMPLOYMENT ACTION AND *PER SE* UNREASONABLE.

The lead and concurring opinions in the Sixth Circuit decision below enshroud the *Beck* violation in a tangle of procedural obstacles and fail to reach the merits of the case, asserting that "Because Reed has not shown any material adverse employment action, much less discharge or discipline, his religious accommodation claim fails" (Justice Batchelder, lead opinion) and "Reed has not made out a prima facie case" (Justice Guy, concurring). 569 F.3d at 582.

But the petitioner is surely correct that this Sixth Circuit panel has chosen the wrong side of the issue in the conflict among the circuits over what constitutes an "adverse employment action" and whether "discharge or discipline" are required elements for such a showing. As cogently and succinctly presented in the Petition, the Third, Fourth, Fifth, Tenth and Eleventh Circuits, and now the Sixth Circuit, require some showing of "discharge or discipline" as the required adverse employment action before an employee can demonstrate that he or she has been a victim of religious discrimination and therefore entitled to reasonable accommodation. Whatever logic this

approach may have in the context of a religious accommodation complaint against an employer, it is wholly illogical in the context of a religious accommodation complaint against a labor union, which admittedly cannot either "discharge or discipline." The more functional and rational approach is that taken in the First, Second, Seventh, Eighth and Ninth Circuits, where the adverse employment action is a question of fact not limited to "discharge or discipline." See Petition, pages 11-18.

By being charged the amount of the full union dues as his mandatory alternative contribution to a charity under the collective bargaining agreement between the union and the petitioner's employer as the price of his religious accommodation, rather than only the portion of the dues attributable to collective bargaining and employee representation as required by *Beck* and the NLRA, the petitioner has satisfied the adverse employment action standard, as the dissenting opinion of Justice McKeague acknowledges:

> As discussed above, I believe that a materially adverse employment action is the appropriate standard for all religious accommodation claims. Reed satisfied that standard. The UAW required Reed to make larger payments than secular objectors. This disparity constitutes an adverse employment action.

Reed, 569 F.3d at 586.

However the elements of a cause of action and the standard of proof are characterized, an agency fee that violates the limits set by this Court in *Beck* is unlawful and *per se* unreasonable.

CONCLUSION

The Center for Constitutional Jurisprudence, as *amicus curiae,* respectfully urges this Court to grant the Petition herein and to hear and decide these important issues.

Respectfully submitted,

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