

KENNEDY, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 97–1056

NAOMI MARQUEZ, PETITIONER v. SCREEN ACTORS
GUILD, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[November 3, 1998]

JUSTICE KENNEDY, with whom JUSTICE THOMAS joins,
concurring.

I join the opinion of the Court and offer these further
observations.

First, the opinion does not address circumstances in
which there is evidence that a security clause such as this
one was used or intended to deceive or injure employees.
Our sole conclusion is that mere recitation of the statutory
language within a security clause does not, without more,
violate the duty of fair representation. The Court of Ap-
peals in this case understood that the record, on further
development at trial, might support a finding that the
union misinformed the petitioner of her membership
obligations. The wording of the clause might well have
some bearing on that determination. The Court of Ap-
peals' remand for trial on the union's conduct toward the
petitioner is not before us. As the issue is not addressed,
our opinion is not inconsistent with the Court of Appeals'
ruling. There is also a suggestion in the record, see, *e.g.*,
App. at 34–35, that the security clause in this case may
have been used or intended to mislead a potential em-
ployer to the petitioner's detriment. If further developed,
evidence to this effect would likely be relevant to the claim
that remains for trial; our opinion should not be misun-
derstood to suggest otherwise.

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The security clause at issue required, as conditions of employment, “member[ship] in good standing,” *id.*, at 28, and payment of “the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union,” *id.*, at 29. As recognized by other courts and by members of the National Labor Relations Board, language like this can facilitate deception. See, e.g., *Bloom v. NLRB*, 153 F. 3d 844, 850–851 (CA8 1998) (“As Bloom can well attest, when an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them. In such a context, ‘member’ is not a term of ‘art,’ . . . but one of deception”); *Wegscheid v. Local 2911, Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers*, 117 F. 3d 986, 990 (CA7 1997) (“[T]he only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union”); *Monsoon Trucking, Inc.*, 324 N. L. R. B. No. 149, pp. 6–8 (Chairman Gould, concurring) (“[A] collective-bargaining agreement that speaks in terms of ‘membership’ or ‘membership in good standing’ without further definition misleads employees into believing that they can be terminated if they do not become formal, full-fledged union members”). As I understand the Court’s opinion, there is no basis in our holding today for an inference that inclusion of the statutory language is somehow a defense when a violation of the fair-representation duty has been alleged and facts in addition to the bare language of the contract have been adduced to show the violation. Rather, our holding reflects only the conclusion that the negotiation of a security clause containing such language does not necessarily, or in all circumstances,

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violate this duty.

Furthermore, we do not have before us the question whether use of this language, in some circumstances, might be an unfair labor practice, even though, without more, it is not a breach of the duty of fair representation. As the Court's opinion makes clear, a claim for breach of the duty of fair representation in circumstances such as those presented here, unlike an unfair-labor-practice claim, must be predicated on more than a simple violation of the National Labor Relations Act.

These issues are matters yet to be determined.