No. _____

In the Supreme Court of the United States

RAY ALLEN AND JAMES DALEY, PETITIONERS,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS
DISTRICT 10 AND ITS LOCAL LODGE 873, RESPONDENTS

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

Whether this Court should overrule its summary affirmance in *Sea Pak v. Industrial, Technical, and Professional Employees, Division of National Maritime Union*, 400 U.S. 985 (1971) (mem.), and hold that federal law does not prohibit States from giving employees the right to withdraw dues-checkoff authorizations.

PARTIES TO THE PROCEEDING

Petitioners are Ray Allen, in his official capacity as Secretary of the Wisconsin Department of Workforce Development, and James Daley, in his official capacity as Chairman of the Wisconsin Employment Relations Commission, who replaced James R. Scott, in his official capacity as Chairman of the Wisconsin Employment Relations Commission, as defendants-appellants in the proceedings below.

Respondents are International Association of Machinists District 10 and its Local Lodge 873, who were plaintiffs-appellees in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

It has been settled law for over 70 years that States may "enact so-called 'right-to-work' laws," which forbid unions from forcing employees to pay dues (or "agency fees"). *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 (1976). Twenty-seven States and the Territory of Guam have passed such laws. They have done so with the explicit blessing of the Taft-Hartley Act, which confirms that States may regulate "agreements requiring [union] membership," 29 U.S.C. § 164(b)—including even requirements that employees pay agency fees, or merely maintain union membership for a year upon joining.

For decades, however, labor unions have exploited a loophole, accomplishing indirectly what they cannot do directly. Forbidden in right-to-work States from making a deal with employers requiring workers to pay dues, unions seek to ensnare employees with irrevocable wage assignments whose terms permit the union to deduct (or "check off") dues directly from paychecks. As unions well know, these assignments function as right-to-work repeals, good for at least one year: A worker who wishes to cancel the assignment by the next day is out of luck. So is the employee who, like Ms. Lisa Aplin, signed her assignment *before* her State had even enacted a right-to-work law. The irrevocable checkoff is thus an "obvious[ ]" and "extreme[ly] importan[t]" method for boosting unions' bottom lines in right-to-work jurisdictions. Richard

G. McCracken, *Success Despite Right to Work: Techniques to Increase Union Membership* 4 (2017), https://perma.cc/SJA2-XHGP.

Wisconsin law attempts to head off this right-to-work workaround by allowing employees to cancel a checkoff at any time with 30 days' notice, Wis. Stat. § 111.06(1)(i), but a federal district-court opinion from 1969, summarily affirmed by this Court in an unwritten order two years later, stands in its way, *Sea Pak v. Indus., Tech. & Prof'l Emps., Div. of Nat'l Maritime Union*, 400 U.S. 985 (1971) (mem.). Incorrect the day it was decided, *Sea Pak* is even more indefensible under modern doctrines.

This Court should overrule *Sea Pak*, restoring the free-association rights of workers across the country. This case is an ideal vehicle, and further percolation will accomplish nothing in light of this Court's summary affirmance in *Sea Pak*, which ended development of the law in this area.

OPINIONS BELOW

The opinion of the Seventh Circuit, Appendix B, is reported as *International Association of Machinists District Ten and Local Lodge 873 v. Allen*, 904 F.3d 490 (7th Cir. 2018). The Seventh Circuit's order denying the State's petition for rehearing or rehearing en banc, Appendix A, is unreported. The amended opinion and order of the United States District Court for the Western District of Wisconsin,

Appendix C, is unreported, but is available at 2016 WL 7475720.

JURISDICTION

The Seventh Circuit entered its judgment on September 13, 2018. App. 3a; R. 37.[1] The State timely petitioned for rehearing or rehearing en banc, R. 40, 42, which petition the Seventh Circuit denied on November 21, 2018, App. 1a–2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, the relevant provisions of Wisconsin's right-to-work law, 29 U.S.C. § 164, and 29 U.S.C. § 186 are reproduced at App. 83a–85a.

STATEMENT

A. Wisconsin Act 1 is Wisconsin's "right-to-work" law. 2015 Wis. Act 1. Right-to-work laws generally restrict or ban union-security agreements, which are "contract[s] between an employer and a union requiring workers to make certain payments (called 'agency fees') to the union as a condition of getting or

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[1] Citations of the Seventh Circuit's docket appear as "R. [ECF Number]:[page number]." Citations of the district court's docket appear as "Dkt. [ECF Number]:[page number]."

keeping a job." *Union Security Agreement*, Wex Legal Dictionary, Cornell University Law School Legal Information Institute, https://perma.cc/FS7N-4DD4. Twenty-seven States and the Territory of Guam have enacted right-to-work laws, many of which predate the Taft-Hartley Act. *See Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 100 (1963) ("*Retail Clerks II*"); National Right to Work Legal Defense Foundation, *Right to Work Frequently-Asked Questions* (2018), https://perma.cc/HX9D-VZVU; National Right to Work Legal Defense Foundation, *Right to Work States: Guam* (2018), https://perma.cc/X93F-2LAF.

Wisconsin's right-to-work law's central provision provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . [p]ay any dues, fees . . . or expenses of any kind or amount . . . to a labor organization." *See* 2015 Wis. Act 1, § 5, *codified at* Wis. Stat. § 111.04(3)(a)3 & (3)(a)4. This provision "prohibit[s] unions from collecting any fees and dues from unwilling employees," even if the employees were once willing to pay such dues in the past. *Sweeney v. Pence*, 767 F.3d 654, 660 (7th Cir. 2014). The law applies only to collective-bargaining agreements made after its enactment. 2015 Wis. Act 1, § 13.

To enforce this central provision, Wisconsin's right-to-work law also regulates dues-checkoff authorizations, which are wage assignments—*without consideration*—permitting an employer to

deduct an employee's union dues from the employee's paycheck and pay them to the union. *See City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 283–84 (1976). Wisconsin's right-to-work law makes it "an unfair labor practice for an employer . . . [t]o deduct labor organization dues or assessments from an employee's earnings," except when "the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by the employee giving to the employer at least 30 days' written notice of the termination." Wis. Stat. § 111.06(1)(i). In other words, Wisconsin law allows employees to authorize dues checkoff, but guarantees them the right to cancel that authorization 30 days after notifying their employer.

B. Federal law contains two statutory provisions relevant to the issues in dispute here.

First, the Taft-Hartley Act contains a federal criminal antibribery provision, which makes the collection of funds pursuant to a dues-checkoff provision unlawful when the check-off agreement is not revocable within a year. Pub. L. No. 80–101, § 302, *codified at* 29 U.S.C. § 186. This provision provides that "[i]t shall be unlawful for any employer . . . to pay . . . any money or other thing of value . . . to any labor organization . . . which represents . . . any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. § 186(a)(2). The employer's collection and payment of dues pursuant to a dues check-off authorization falls

within this prohibition, since the "employer" would be "pay[ing]" a "labor organization" "money." The statute contains an exception from this criminal prohibition for dues check-off provisions that are revocable in less than a year: "[t]he provisions of this section shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year." *Id.* § 186(c)(4).

Violators of Section 186 are guilty of either a felony or a misdemeanor, depending on the amount of money at issue or the value of the given "thing of value." *See id.* § 186(d)(2). The punishment for a felony violation is "a fine of not more than $15,000, or imprison[ment] for not more than five years, or both," while the punishment for misdemeanor violations is "a fine of not more than $10,000, or imprison[ment] for not more than one year, or both." *Id.* Section 186 is "concerned with [eliminating the] corruption of collective bargaining through bribery of employee representatives by employers, [ ] extortion by employee representatives, and [ ] the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425–26 (1959) (footnotes omitted); *see also Unite Here Local 355 v.*

Mulhall, 134 S. Ct. 594 (2013) (Breyer, J., dissenting from dismissal of writ as improvidently granted).

Second, the Taft-Hartley Act provides that "[n]othing" in the Act "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b). An agreement requiring employees to pay dues (or "agency fees") to a union, regardless of whether they have formally joined the union, confers "membership." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). This Section makes clear that the States retain the "power to enforce their laws restricting the execution and enforcement of union-security agreements" and to "legislate in th[is] field," including by passing right-to-work laws that ban agency-fee arrangements. *Retail Clerks II*, 375 U.S. at 98–102. Historically, dues-checkoff authorizations qualified as such agreements. *E.g.*, Orme W. Phelps, *Union Security* 21–28 (Irving Bernstein ed. 1953), https://hdl.handle.net/2027/mdp.39015065516562.

C. The International Association of Machinists District 10 is a labor organization in Milwaukee, Wisconsin, which includes Local Lodge 873 (collectively "the Union"). App. 68a–69a. The Union represents employees at a John Deere plant in Wisconsin. App. 69a. The collective-bargaining

agreement (CBA) that the Union has with John Deere contains a dues-checkoff provision that is irrevocable by employees for one year, so long as the collective-bargaining agreement is valid. App. 69a.

Lisa Aplin (née Koser) is an employee with John Deere who signed a dues-checkoff authorization in 2002, thus allowing John Deere to deduct union dues from her paycheck. App. 69a; Dkt.30-3. This authorization automatically renews each year, and an employee may only revoke it within a fifteen-day window each year. App. 69a; Dkt.30-3. Aplin signed the dues-checkoff authorization because, before Wisconsin adopted right-to-work, John Deere had a union-security agreement with the Union. *See* App. 99a. Authorizing dues-checkoff was a way for employees like Aplin to meet the agreement's payment obligation and maintain their employment—otherwise, they could accidentally miss a payment and be terminated.

In 2015, after Wisconsin passed right-to-work, Aplin sent written notice to John Deere stating that she was revoking her dues-checkoff authorization effective in 30 days. *See* App. 86a–88a. This notice stated, "I no longer wish to pay Union Dues or any fee's [sic] as a condition of my employment under 2015 Act 1." App. 86a. The Union refused to honor Aplin's written revocation. App. 89a–91a.

Aplin filed a complaint with the Wisconsin Department of Workforce Development. Wis. Stat.

§ 109.09; *see also* Dkt.30-6. She alleged that the Union violated Wisconsin's right-to-work law by not honoring her dues-checkoff revocation. *See* App. 70a. The Department agreed. App. 70a.

D. The Union filed this lawsuit against the Secretary of the Department (hereinafter "the State") in 2016, arguing that Section 186(c)(4) preempted Wisconsin's right-to-work law and seeking injunctive relief. App. 67a–68a; Dkt.1:6–8. On summary judgment, the district court concluded that Section 186(c)(4) preempted Wisconsin's right-to-work law, entered judgment in favor of the Union, and issued an injunction. *See* App. 82a.

The State appealed to the Seventh Circuit, and a divided panel affirmed. *See* App. 41a–42a.

The Seventh Circuit's panel majority held that whether Section 186(c)(4) preempted Wisconsin's right-to-work law was "controlled by" *Sea Pak*. App. 5a. In *Sea Pak*, this Court summarily affirmed a two-paragraph Fifth Circuit per curiam decision, which adopted without additional analysis a district-court decision. *See* 423 F.2d 1229 (5th Cir. 1970), *aff'g* 300 F. Supp. 1197 (S.D. Ga. 1969). As the panel majority described, the *Sea Pak* district court concluded that the "Georgia [right-to-work] law" was preempted under both conflict- and field-preemption rationales. *See* App. 12a–13a. Further, according to the panel majority, the *Sea Pak* district court "found that [Georgia's] dues-checkoff regulation was not

saved by § 164(b)," since dues-checkoffs "do not amount to compulsory unionism as to employees who wish to withdraw from membership prior to [the end of the period of irrevocability]." App. 14a (citation omitted). Since this Court ultimately "affirmed . . . summarily, without opinion," both the preemption issues and the Section 164(b) issue were "necessarily decided" by this Court. *See* App. 14a (citation omitted). The panel majority rejected the State's argument that subsequent doctrinal developments rendered *Sea Pak* no longer binding under *Hicks v. Miranda*, 422 U.S. 332 (1975). App. 15a–41a.

Alternatively, the panel majority concluded that *Sea Pak* "is fully consistent with more general federal labor law preemption principles" that *Sea Pak* did not address. App. 5a. As for *Garmon* preemption, the panel majority explained that, while "[a] strong case could be made for [it] here," it would "not . . . explore [it] in [complete] detail." App. 30a, 31a–32a n.7. As for *Machinists* preemption, the majority concluded that it would apply. *See* App. 32a. According to the majority, Section 186(c)(4) "authorize[s]" "employers and labor organizations" "to bargain for arrangements for a checkoff" that are irrevocable for up to one year, App. 33a (citations omitted); since Wisconsin's right-to-work law imposes "a dues-checkoff irrevocability period [that is] much shorter," it "short-circuit[s] the bargaining process" and so would be preempted, App. 32a.

Judge Manion dissented. App. 42a. He explained that the *Sea Pak* district court's preemption analysis "rel[ied] entirely" on bits of "legislative history" and does not "stand up to any scrutiny under modern general preemption doctrine," and so is now "plainly wrong." App. 43a, 60a, 62a. Under that modern doctrine, "[this] Court is now much more sensitive to federalism concerns and far less likely to imply preemption from ambiguous statutes or legislative history." App. 65a. Judge Manion then concluded that, because of the Seventh Circuit's broad "approach to the *Hicks* exception," these subsequent doctrinal shifts in preemption render *Sea Pak* no longer binding. App. 64a–65a & n.9. Judge Manion also noted that if the Seventh Circuit's approach to *Hicks* "were otherwise," then his "dissent would take the form of an opinion concurring in the judgment." App. 64a–65a n.9. Judge Manion also addressed *Garmon* and *Machinists* preemption and concluded that neither applied. *Garmon* preemption does not apply because, among other reasons, "the NLRB has no jurisdiction here; it does not enforce" Section 186(c)(4), App. 58a n.6; rather, the "Department of Justice" does, App. 54a. And *Machinists* preemption does not apply because "this case does not involve the same type of regulation of collective bargaining that has justified *Machinists*." App. 56a.

The State petitioned for rehearing or rehearing en banc, which the Seventh Circuit denied. App. 2a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Overrule Its Summary Affirmance Of The District Court's Antiquated, Erroneous *Sea Pak* Decision

Section 186, a criminal anti-bribery statute, generally prohibits an employer's payment of "money or other thing of value" to a union. 29 U.S.C. § 186(a)(2). Dues-checkoff agreements—where an employer deducts an employee's union dues from the employee's paycheck and then pays those dues directly to the union on the employee's behalf—fall within this prohibition. Only a narrow class of such agreements are exempted from Section 186's criminal scope: agreements allowing "money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year." *Id.* § 186(c)(4).

In *Sea Pak*, a district court held that Section 186(c)(4) preempts state right-to-work laws that limit the irrevocability of dues-checkoff agreements to under one year. The *Sea Pak* district court held that the Georgia statute at issue was preempted under a field-preemption theory, since "[t]he area of checkoff of union dues has been federally occupied to such an extent that under [Section 186(c)(4)] no room remains for state regulation in the same field." 300 F. Supp.

at 1200. And it held that the Georgia statute was preempted under an obstacle-preemption theory—after looking solely to snippets of the legislative history of the Taft-Hartley Act's enactment—since "Congress acted with considered purpose in limiting the period of irrevocability to not more than a year," and Georgia's limitation of that time period was "completely at odds" and "cannot co-exist" with that purpose. *See id.* at 1200–01. The Fifth Circuit affirmed with no additional analysis. *Sea Pak,* 423 F.2d at 1230. When Georgia appealed to this Court, this Court summarily affirmed. *Sea Pak*, 400 U.S. 985 (Justice Harlan was "of the opinion that probable jurisdiction should be noted and case set for oral argument.").

This Court should grant the Petition and overrule *Sea Pak*. *See Edelman v. Jordan*, 415 U.S. 651, 670–71 (1974) (summary affirmances command lesser "precedential value"). As a threshold matter, Section 164(b) explicitly authorizes the States to pass right-to-work laws that regulate irrevocable dues-checkoff agreements, since such agreements require an employee to belong to a union—that is, to pay dues to a union—for the period of irrevocability. Alternatively, *Sea Pak*'s preemption decision, while in error in its own day, is unquestionably wrong under modern preemption doctrine. And neither *Garmon* nor *Machinists* preemption justifies *Sea Pak*'s preemption conclusion.

A. Section 164(b) Grants States The Power To Limit The Irrevocability Of Dues-Checkoff Provisions, Meaning That No Preemption Analysis Is Necessary

The *Sea Pak* summary affirmance, including its preemption analysis, is wrong because it is based upon a misunderstanding of Section 164(b). As this Court has explained, Section 164(b) "allows a State or Territory to ban" or regulate more "restrictive[ly]" union-security agreements, which are "agreements 'requiring membership in a labor organization as a condition of employment.'" *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1976) (quoting *Retail Clerks II*, 375 U.S. at 103). Since irrevocable dues-checkoff agreements—which force employees to pay dues (or "agency fees") to a union for the period of irrevocability, notwithstanding that they may wish to cease supporting the union after signing their checkoff authorization—confer union "membership" and are "another form of union security," U.S. Dep't of Labor, *Growth of Labor Law in the United States* 250 (1962), https://hdl.handle.net/2027/mdp.39015019180952, Section 164(b) empowers a State to ban or regulate them as well, meaning that no preemption analysis is warranted.

1. Section 158 permits an "employer [to] mak[e] an agreement with a labor organization . . . to require as a condition of [continued] employment [an employee's] membership" in the labor organization.

29 U.S.C. § 158(a)(3). Such membership-conferring agreements are termed union-security agreements, since they "protect[ ]" "union status . . . with respect to the union's membership" and its "financial position." Bureau of Labor Standards, U.S. Dep't of Labor, *State Labor Relations Acts* 22 (1961), https://hdl.handle.net/2027/uiug.30112101563648. "The object of union security provisions in labor contracts is to guarantee at a minimum, each employee's financial support of the union." Thomas R. Haggard, *Union Checkoff Arrangements under the National Labor Relations Act*, 39 DePaul L. Rev. 568, 568 (1990). This Court has noted in a related context that allowing unions forcibly to collect these "agency fees"—which is what irrevocable checkoffs and other union-security devices do—is a doctrinal "anomaly," *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012), lacking in justification, at least as a constitutional matter, *see Janus v. Am. Fed'n Of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465–69 (2018); *Harris v. Quinn*, 134 S. Ct. 2618, 2639–40 (2014).

This Court defines union "membership" broadly, solely by refence to an employee's payment of money to fund a union's mandatory bargaining activities. So, by merely *paying* the union, an employee satisfies the union "membership" requirement. *Beck*, 487 U.S. at 745 (noting that the employee may be required to pay for only "union activities . . . germane to collective bargaining, contract administration, and grievance adjustment"); *see also* Haggard, *supra*, at 569–70

("membership" "does not encompass an actual or formal affiliation with the union, in the sense of joining it as a private association"). In other words, "the 'membership' that may be so required has been whittled down to its financial core." *Beck*, 487 U.S. at 745 (citation omitted). Inasmuch as employees pay bargaining-related dues or fees to the union, they are union "members" under Section 158. Therefore, any agreement requiring an employee to pay a union makes that employee a "member" of the union—and thus makes such agreement a union-security agreement.

While Section 158 permits "certain union-security agreements" as a matter of federal policy, Section 164(b) specifically "allows a State [ ] to ban" *any* of those agreements. *Oil, Chem. & Atomic Workers*, 426 U.S. at 416–17. Section 164(b) provides that "[n]othing in [Taft-Hartley] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State [ ] in which such execution or application is prohibited by State [ ] law." 29 U.S.C. § 164(b). Section 164(b) "simply mirrors" Section 158: any agreement permitted under the latter, a State may proscribe under the former. *Oil, Chem. & Atomic Workers*, 426 U.S. at 418; *see also Retail Clerks II*, 375 U.S. at 102–03 ("[Section 164(b)] gives the States power to outlaw even a union-security agreement that passes muster by federal standards."). Congress included Section 164(b) because it "feared" that the

courts would interpret Section 158(a)(3) not simply to *permit* some union-security devices, but also to *preempt* the laws of States "where such arrangements were contrary to the State policy." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963) (*Retail Clerks I*) (citations omitted). So, Section 164(b) makes abundantly clear that the States are "free to legislate in th[e] field" of "execution and enforcement of union-security agreements." *Retail Clerks II*, 375 U.S. at 99–102.

2. By plain statutory meaning, logic, history, and practice, irrevocable dues checkoffs are agreements conferring union "membership" within the meaning of Section 164(b) and are therefore "another form of union security." U.S. Dep't of Labor, *Growth of Labor Law*, *supra*, at 250. Irrevocable checkoffs confer "membership" on employees: they facilitate—and, in the case of objecting employees, *compel*—payments of agency fees to the union, satisfying *Beck*'s "financial core" definition of union "membership." *See* Dkt. 30-3. Irrevocable checkoffs fall within a State's power to regulate or prohibit under Section 164(b).

"Checkoff arrangements fit easily within the union security concept." Haggard, *supra*, at 570. The irrevocable dues checkoff is a mandatory union-dues arrangement: it is a requirement that an employee pay money to a union (thus becoming a member), which is irrevocable for at least some period of time, in order to maintain employment. *See* Commerce Clearing House, *Dictionary of Labor Law Terms* 41

(2d ed. 1953), https://hdl.handle.net/2027/nnc1.cu04236750 ("Under the National Labor Relations Act, a union may request the discharge of a worker in a union shop who fails to pay an initiation fee or dues."). Since, under *Beck*, such arrangements make the employee a "member" under Section 158(a)(3), 487 U.S. at 745, it follows that dues-checkoff agreements are also "expressly placed within the reach of state law" under Section 164(b), *Retail Clerks I*, 373 U.S. at 751–52.

Further, "as a practical matter, an irrevocable checkoff is no different than a form of union security known as 'maintenance of membership,'" Haggard, *supra*, at 570, 631, which is unquestionably within a State's authority to ban under Section 164(b), *see Algoma Plywood & Veneer Co. v. Wis. Emp't Relations Bd.*, 336 U.S. 301, 303–04, 312–15 (1949). Under a maintenance-of-membership agreement, an employee is not forced to join a union to maintain employment, but if she does join, she must remain a paying member for the life of the collective bargaining agreement. *See* Commerce Clearing House, *supra*, at 75. Likewise, under an irrevocable dues checkoff, an employee is not forced to have her dues automatically deducted from her paycheck, *see* App. 58a n.6 (Manion, J., dissenting), but if she agrees to the checkoff, she must remain a paying member for the life of the dues-checkoff agreement. A State should logically have the power to ban or regulate not only maintenance-of-membership agreements—as they have had since 1947, *Algoma*, 336 U.S. at 303–04,

312–15—but also irrevocable checkoffs, their doppelganger.

This functional identity between irrevocable checkoffs and maintenance-of-membership agreements explains why, when Congress passed Taft-Hartley, irrevocable checkoffs were widely understood to be a kind of union-security device. *See, e.g.*, Note, *State Labor Laws in the National Field,* 61 Harv. L. Rev. 840, 847 (1948) ("[T]here seems little doubt as to the validity of state statutes prohibiting the check-off or further regulating its use."); Recent Case, *Checkoff of Union Dues Invalid Under State Wage Assignment and "Weekly Payment" Statutes*, 63 Harv. L. Rev. 902 (1950); E.B. McNatt, *Check-Off,* 4 Lab. L.J. 123, 123 (1953). The U.S. Department of Labor defined "[u]nion security" as "protection of union status . . . with respect to," among other things, "the union's financial position[ ] by means of . . . a checkoff system." U.S. Dep't of Labor, *State Labor Relations Acts*, *supra*, at 22 (under header "Union Security Provisions in State Labor Relations Acts"); *id.* at 39 (same definition); Bureau of Labor Statistics, U.S. Dep't of Labor, *A Guide to Labor-Management Relations in the United States* § 4:01, at 27, Bulletin No. 1225 (1958), https://perma.cc/5NZU-8GBC. "[T]he check-off" is obviously "[a] device to facilitate union financing," which means it, like all union-security agreements, "compels individual employees to join a union or refrain from leaving a union as a condition of obtaining or retaining employment."

Raymond R. Farrell, Note, *Regulation of Union Security Contracts*, 59 Yale L.J. 554, 554 n.2 (1950).

Even more striking, "[b]y the time [Section 164(b)] was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices," *Retail Clerks II*, 375 U.S. at 100, and *a number of those laws—which the Taft-Hartley Congress meant to uphold—regulated or banned irrevocable checkoffs*. Iowa's law, for example, declared any dues checkoff that an employee could not cancel with 30 days' notice "unlawful." State Laws Regulating Union-Security Contracts, 21 L.R.R.M. 66, 67 (citing Iowa's law at 20 L.R.R.M. 3007–08). Colorado's law was substantially identical. *Id.* (citing Colorado's law at 12 L.R.R.M. 2324, 2329). This statutory history is critical because, as the Court observed in *Retail Clerks II*, "Congress seems to have been well informed during the 1947 debates" about "[t]hese laws." 375 U.S. at 100–01 & n.4 (citing "State Laws Regulating Union-Security Contracts, 21 L.R.R.M. 66"); *see generally* U.S. Dep't of Labor, *Growth of Labor Law*, *supra*, at 250 (by 1962, "less than half of the States" had "[s]pecific legal authorization for [dues checkoff] agreements").

Finally, if union security were *not* the purpose of irrevocable checkoffs in right-to-work States, then there would be no reason to make them irrevocable. It is one thing to automatically deduct a worker's union dues in satisfaction of a legally enforceable, CBA-adopted requirement that all employees pay the

union for representation. After all, a worker might otherwise forget to pay her dues and consequently face discharge. But it is quite another thing to assert, as the Union does here, that a worker under no obligation to pay a union in the first place—because she lives in a right-to-work State—*benefits* from an arrangement that irrevocably commits her to *a year* of automatic payments to an organization that, perhaps by the next morning, she no longer wishes to support. R.14:20, 23; *see* App. 56a (Manion, J., dissenting).

3. While the *Sea Pak* district court gave Section 164(b) only summary treatment, the panel majority below sought to expand upon that analysis. The panel majority's conclusion that Section 164(b) does not allow States to regulate dues-checkoff agreements is incorrect. App. 36a–41a.

First, the panel majority concluded that dues-checkoff authorizations are not union-security devices because they "are *optional* payroll deduction contracts." App. 37a (emphasis added). This is wrong in several respects. For one thing, checkoffs are not contracts—they are unbargained-for assignments. 29 U.S.C. § 186(c)(4). The employee gets nothing for signing one. More to the point, whether a union forces an employee to *enter into* an irrevocable dues-payment arrangement is not the *sine qua non* of a union-security device subject to Section 164(b). After all, maintenance-of-membership agreements—which all agree are union-security devices—are entered into

voluntarily. *Algoma*, 336 U.S. at 303–04, 312–15. Rather, the essential feature of an agreement "requiring membership" is compulsion of union support for some duration of time, which irrevocable checkoff, just like maintenance of membership, obviously does. Under both an irrevocable checkoff and a maintenance-of-membership arrangement, an employee who wishes no longer to support the union by day two must wait nearly a year to cease gratuitously paying the union.

Second, the panel majority relied on *Felter v. Southern Pacific Company*, 359 U.S. 326 (1959), App. 37a–38a, where this Court, interpreting the dues-checkoff provision of the Railway Labor Act (RLA), stated in a footnote that the RLA "makes no formal relationship between a union-shop arrangement and a checkoff arrangement" since "parties can negotiate one without the other," 359 U.S. at 333, 337 n.12. This point is true, but irrelevant. The RLA's decoupling of dues-checkoff agreements and union-shop provisions—which are just another type of union-security agreement—does not somehow mean dues-checkoff is not itself a form of union security. The separation of union-shop and dues-checkoff just means employers and unions may agree to one type of union security, say, union-shop, without *also requiring* agreement to another, checkoff.

B. *Sea Pak*'s Preemption Analysis Is Unjustified, Especially Under Modern Preemption Jurisprudence

Even if this Court concludes that Section 164(b) does not fully authorize Wisconsin's right-to-work law, *but see supra* Part I.A, Wisconsin's right-to-work law would still be a valid exercise of the State's police power, and Section 186 does not preempt that law.

1. A federal statute may preempt state law either expressly or impliedly. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–68 (2002); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208–09 (1985) ("[T]he question whether a certain state [labor] action is pre-empted by federal [labor] law is" usually decided under ordinary preemption principles). Express preemption occurs when Congress enacts a statute that plainly states that it preempts state law. *Sprietsma*, 537 U.S. at 63. Implied preemption, on the other hand, occurs "when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively," field preemption, or "when state law is in actual conflict with federal law," conflict preemption. *Id.* at 64–65 (citations omitted). This Court further subcategorizes conflict preemption into impossibility preemption, where "it is impossible for a private party to comply with both state and federal requirements," and obstacle preemption, where state law "stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress." *Id.* at 64 (citations omitted).

2. Section 186(c)(4) does not preempt Wisconsin's right-to-work law, either expressly or impliedly, contrary to the district court's reasoning in *Sea Pak*.

a. Under obstacle preemption, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Sprietsma*, 537 U.S. at 64 (citations omitted). *But see Hillman v. Maretta*, 133 S. Ct. 1943, 1955 (2013) (Thomas, J., concurring in the judgment) (criticizing obstacle preemption). This imposes "a high threshold" before a state law will "be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (plurality op.).

Wisconsin's right-to-work law does not stand as an obstacle to the purposes or objectives of Section 186. The purpose of Section 186—a criminal "antibribery provision," *see Mulhall*, 134 S. Ct. 594 (Breyer, J., dissenting from dismissal of writ as improvidently granted)—is to eliminate the "corruption of collective bargaining through bribery of employee representatives by employers." *Arroyo*, 359 U.S. at 424–26; Haggard, *supra*, at 630. It achieves this by restricting all "pay[ments]" of "any money or other thing of value" from "any employer" to "any labor organization" that represents employees of the employer. 29 U.S.C. § 186(a)(2). In other words, the

law "makes it a felony for an employer to give to a union representative, and for a union representative to receive from an employer, anything of value." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409 (1999). Section 186(c)(4) is simply a narrow exception to Section 186's criminal ban on employer payments to unions, withholding criminal sanction for voluntary, written dues-checkoff provisions that are terminable within at least one year. 29 U.S.C. § 186(c)(4).

Section 186(c)(4) does not grant an affirmative right to any person, thus Wisconsin's right-to-work law's additional limitation on checkoffs does not frustrate any congressional purpose. Other labor-law provisions do grant such rights. Consider Section 158(b)(1), which mirrors the "prohibition-provided" structure of Section 186(c)(4). This Section explicitly grants, as a matter of federal policy, an affirmative right by stating that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce [ ] employees in the exercise of the rights guaranteed in [§ 157]: *Provided*, That this [prohibition] shall not impair *the right* of a labor organization to prescribe its own [membership] rules." *Id.* § 158(b)(1) (second emphasis added). Section 157 is also rights-granting: "[e]mployees shall have *the right* to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." *Id.* § 157.

b. Congress occupies an entire field when it enacts a "framework of regulation so pervasive" or passes laws that further a "federal interest [ ] so dominant" that it "preclude[s] enforcement of state laws on the same subject." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

Section 186(c)(4) does not field preempt Wisconsin's right-to-work law. Haggard, *supra*, at 630. Section 186(c)(4)'s narrow exception to a criminal prohibition does not purport to establish the full range of negotiable terms or conditions for checkoff in collective bargaining. So it is hardly a "framework of regulation so pervasive" as to oust the States from this field. *Arizona*, 567 U.S. at 399. States have long regulated wage assignments of employers and employees, as well as payroll deductions generally. *See Mut. Loan Co. v. Martell*, 222 U.S. 225, 231 (1911). As this Court noted recently, in a challenge to a state right-to-work law's dues-checkoff provision, "the parties agree that the State is not constitutionally obligated to provide payroll deductions at all." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). That agreement recognizes that "wage [checkoff] regulations" "reflect the state's greater interest in the manner in which its citizens are paid," and so "should not [be] supersede[d]" by "federal law." Note, *Checkoff of Union Dues Invalid Under State Wage Assignment and "Weekly Payment" Statutes*, 63 Harv. L. Rev. 902,

902 (1950). *But see Utah v. Montgomery Ward & Co.*, 233 P.2d 685, 688 (Utah 1951).[2]

3. *Sea Pak*'s contrary conclusion was wrong the day it was made, but it is particularly indefensible under modern preemption jurisprudence, as discussed immediately above.

In recent decades, "th[is] Court has grown increasingly sensitive to the fact that its [previous] approach to preemption risks displacing too much state law." Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 288 (2000). In field preemption, for example, "[u]nder [this Court's] more recent cases, Congress must do much more to oust all of state law from a field." *Kurns v. R.R. Friction Prod. Corp.,* 565 U.S. 625, 638 (2012) (Kagan, J., concurring). So, when *Sea Pak* is "[v]iewed through the lens of modern preemption law," it is "an anachronism." *Kurns,* 565 U.S. at 638 (Kagan, J., concurring). Preemption analysis today looks to "the text and structure of the statute at issue" to discern Congress' preemptive

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[2] *Sea Pak* did not rely on the impossibility-preemption type of conflict preemption. 300 F. Supp. at 1200; App. 12a–17a. In any event, under impossibility preemption, this Court requires compliance with both state and federal law to be "physical[ly] impossibl[e]." *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480, 486–87 (2013). Here, it is not impossible for unions and employers to comply with both Section 186's antibribery provision and Wisconsin's right-to-work law. To comply with both provisions, unions and employers must simply negotiate for dues-checkoff provisions that are irrevocable for 30 days or less.

intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see e.g.*, *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988). This emphasis on text for preemption questions mirrors the textualist trend writ large. *See, e.g.*, *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1685 (2012). In other words, the "unenacted approvals, beliefs, and desires [of Congress]" cannot preempt state law "[w]ithout a text that can . . . plausibly be interpreted as *prescribing* federal pre-emption." *Isla Petroleum Corp.*, 485 U.S. at 501.

Contrast this rigorous, text-based preemption analysis with the *Sea Pak* district court opinion. Nowhere did that decision analyze the text of Section 186(c)(4), as required to conduct a preemption analysis. Instead, the *Sea Pak* district court largely divined the allegedly preemptive purpose and objective of Section 186(c)(4) based on (1) "[t]he background of th[e] statute and the Senate debate," which it thought "reveal[ed] deep concern about checkoffs and the period during which they may be irrevocable," and (2) a previous draft of this section. 300 F. Supp. at 1200; *see* App. 61a–62a; Haggard, *supra*, at 631–32 (criticizing *Sea Pak*'s use of legislative history and suggesting the history supports the opposite conclusion). Such "unenacted approvals, beliefs, and desires [of Congress]" to preempt state law, "[w]ithout a text that can . . . plausibly be interpreted as *prescribing* federal pre-emption," are not enough to preempt. *Isla Petroleum*

Corp., 485 U.S. at 501. In all, *Sea Pak*'s "[i]mplied preemption analysis" was an impermissible, "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," without meaningful engagement with the text. *Whiting*, 563 U.S. at 607 (plurality op.) (citation omitted). An analysis of that text demonstrates beyond serious debate that *Sea Pak*'s preemption analysis and bottom line conclusion were wrong.

C. *Machinists* And *Garmon* Preemption Cannot Salvage *Sea Pak*

After the panel majority held that the *Sea Pak* summary affirmance controlled the traditional preemption question, it concluded, in the alternative, that *Machinists* also preempted Wisconsin's right-to-work law, and that *Garmon* preemption might also work. That the panel majority sought to bolster *Sea Pak*'s conclusion with other preemption doctrines—which the *Sea Pak* district court did not address, and which are plainly inapplicable—only highlights how unsustainable *Sea Pak* is.

1. *Machinists* preemption prevents the States from "interfer[ing] with policies implicated by the structure of the [NLRA] itself [ ] by preempting state law . . . concerning conduct that Congress intended to be unregulated." *Metro. Life Ins. v. Massachusetts*, 471 U.S. 724, 749 (1985) (citing *Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976)). In other words, States may not "legislate on top of the

protections of Section 7 of the NLRA," which gives employees the right to unionize and bargain collectively, *see* 29 U.S.C. § 157, "or the prohibitions of Section 8," which identifies and proscribes certain unfair labor practices, *see id.* § 158. App. 53a (Manion, J. dissenting).

The most straightforward reason that *Machinists* does not apply is that Wisconsin's checkoff statute falls within Section 164(b), *see supra* pp. 14–23, and so, like right-to-work laws generally, is exempt from preemption analysis under *Retail Clerks II*, 375 U.S. at 104–05; *see also Oil, Chem. & Atomic Workers*, 426 U.S. at 417. Section 164(b) "'forestall[s] the inference that federal policy [is] to be exclusive' on th[e] matter of union-security agreements." *Retail Clerks II*, 375 U.S. at 104 (quoting *Algoma*, 336 U.S. at 314). As this Court has explained, the Taft-Hartley "Congress . . . chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by [Section 164(b)] and decided to suffer a medley of attitudes and philosophies on the subject." *Id.* at 104–05.

But even with Section 164(b) set aside, *Machinists* is inapposite because Section 186 does not grant either unions or employers the right to bargain for a checkoff agreement that is irrevocable for up to a year. App. 53a–55a (Manion, J., dissenting). Rather, it merely exempts from criminal prohibition a class of checkoff agreements. App. 53a–54a. This Section is, at its core, a protection of *employees*, which

"substantially distinguishes [this case] from the typical *Machinists* case." App. 56a. The Section does not reflect Congress' intent to create subject matter open to union-employer bargaining. *See* App. 53a–55a. Regardless, even if the statute somehow triggered *Machinists*, Wisconsin's law would survive given the State's strong "interest in regulating [this] kind of conduct," an interest that *Machinists* "appreciat[es]." *Metro. Life*, 471 U.S. at 749 n.27. Because States traditionally have closely regulated wage assignments, *Martell*, 222 U.S. at 231, it is unlikely "Congress in fact intended [such] conduct to be unregulated" by the States, *Metro. Life*, 471 U.S. at 749 n.27.

In holding that *Machinists* applied, the panel majority mistakenly interpreted Section 186 to grant unions an affirmative right to bargain for checkoffs that are not illegal under federal law, concluding that Congress' placement of this "right" as an exception to a criminal anti-bribery statute merely reflected "Congress's commitment to [its other anti-bribery] policy choices." App. 35a. But, as Judge Manion explained, "[i]f Congress intended to grant unions an affirmative right . . . it seems highly unlikely it would have placed [it] . . . in a 'provided that' clause of an exception to an anti-bribery statute." App. 54a. The far more "likely" interpretation is that "Congress [ ] intended simply to place a limit, *for the benefit of employees*, on its allowance of checkoff agreements." App. 54a n.5 (emphasis added). The panel majority further relied on *Felter*, which interpreted the RLA's

dues-checkoff provision. *E.g.*, App. 29a. But, as Judge Manion pointed out, *Felter* is entirely inapposite and is "not a preemption case." App. 57a.

2. *Garmon* "protects the primary jurisdiction of the [National Labor Relations Board] to determine in the first instance what kind of conduct is either prohibited or protected by" those two major NLRA provisions. *Metro. Life*, 471 U.S. at 748 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)). Here, of course, the Department of Justice, *not the NLRB*, has jurisdiction to enforce Section 186. App. 58a (Manion, J., dissenting). Without NLRB jurisdiction over this statute in the first instance, a state law allegedly thwarting the statute cannot implicate *Garmon*. *See Metro. Life*, 471 U.S. at 748. And even without this fundamental point, *Garmon* preemption also does not apply because of the force of Section 164(b), as discussed above. *See supra* pp. 14–23.

II. This Case Is An Ideal Vehicle For This Court To Fix The Significant Loophole In Right-To-Work Laws That *Sea Pak* Created

This case provides this Court an ideal opportunity to close a court-created loophole in right-to-work laws, which unions have exploited strategically. *See*, *e.g.*, McCracken, *supra*, at 4. Further percolation would be pointless, as courts have treated *Sea Pak* as controlling for decades. And there are no vehicle problems here.

A. Whether the Taft-Hartley Act preempts state regulation of irrevocable "agency fee" checkoffs is a deeply significant question. Sup. Ct. R. 10(c).

This Court has treated issues of labor-law preemption as worthy of review. *E.g.*, *Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994); *see also Chamber of Commerce v. Brown*, 554 U.S. 60, 64–66 (2008). Indeed, such "issues" have "important bearing . . . upon the distribution of power in our federal system." *Algoma*, 336 U.S. at 304.

All the more here, since this is not an ordinary labor-law preemption case. Rather, this case pivots on a question that this Court—especially in recent terms—has shown an increasing interest in: the scope of unions' authority to forcibly collect "agency fee" payments from objecting employees. This concern traces back to this Court's decision in *Beck*, which considered "the important question" of whether unions may force nonmember-employees to fund union activities to which those employees object. 487 U.S. at 741–42. This Court's skepticism continued in a trilogy of recent challenges to public-sector agency shops, where this Court noted that exclusive representation is "itself a significant impingement on associational freedoms that would not be tolerated in other contexts," *Janus*, 138 S. Ct. at 2478, and that allowing unions forcibly to collect "agency fees"—which is what irrevocable checkoffs do—is a doctrinal "anomaly," *Knox*, 567 U.S. at 311, unjustifiable in principle, *see Janus*, 138 S. Ct. at 2465–69.

Wisconsin is one of many States to have a dues-checkoff law on the books notwithstanding *Sea Pak*. *E.g.*, Ariz. Rev. Stat. § 23-352 (revocable at will); Ga. Code § 34-6-25 ("revoked at any time"); Idaho Code § 44-2004 ("may be revoked by the employee"); Ind. Code § 22-2-6-2 ("revocable at any time"); Iowa Code § 731.5 ("terminable at any time . . . [with] at least thirty days' written notice"); Kan. Stat. § 44-827 (revocable at will for agricultural employees); S.C. Code § 41-7-40 ("absolute right to revoke" after "one year"). So the Court's disposition of this question in Wisconsin's favor will immediately lift the "irreparable harm," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), that *Sea Pak* is inflicting.

Sea Pak undermines the core purpose of right-to-work laws. While federal law "allows individual States . . . to enact so-called 'right-to-work' laws" that ban agreements requiring union membership, *Oil, Chem. & Atomic Workers*, 426 U.S. at 409, unions often circumvent those laws by encouraging employees to authorize irrevocable dues-checkoff authorizations with automatic renewal. Such agreements lock-in employees for many months' worth of membership dues, and often more, since employees may only revoke their authorization during short revocation windows each year. Worse, a union may not be especially forthcoming of when that revocation window opens. Consider the Union's own collective bargaining agreement in this case. App. 92a–99a. It fails to even mention *when* an employee may revoke the dues-checkoff

authorization. App. 95a–98a; *compare* Dkt. 30-2:48 (Union's CBA disclosing how a checkoff for a scholarship fund is revoked). That revocation information came via letter, after Aplin had submitted her revocation notice. *See* App. 90a.

The utility of irrevocable, automatically renewing checkoffs as an end-run around right-to-work explains why "[u]nions have used the checkoff agreement as a substitute for union security, particularly in right-to-work states." 2 Employee and Union Member Guide to Labor Law § 11:15 (2018); Phelps, *supra*, at 28. A Department of Labor study conducted some years after Taft-Hartley showed that while "the checkoff [was] prevalent throughout the United States," "in right-to-work States . . . 85 percent of the workers under major agreements were covered by such provisions, as against 68 percent under agreements in States without [right-to-work] laws." U.S. Dep't of Labor, *Growth of Labor Law*, *supra*, at 250–51; *see* Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Security and Checkoff Provisions in Major Union Contracts 1958–59* at 13, Bulletin No. 1272 (1960) (study), https://perma.cc/65C8-UYSD. In other words, labor unions are resorting to checkoffs *more often* in States where they lack any other means to force the collection of dues payments against the will of objecting employees.

B. Further percolation would be futile. While this Court's doctrine on summary affirmances allows lower courts to disregard such decisions in certain

circumstances, *see Hicks*, 422 U.S. at 344, the lower courts have uniformly treated *Sea Pak* as dispositive, *see United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407, 410, 421–22 (6th Cir. 2016); *N.L.R.B. v. Shen-Mar Food Prods., Inc.*, 557 F.2d 396, 399 (4th Cir. 1977).[3] Given that the lower courts are exceedingly unlikely to split over whether *Sea Pak* is still binding, this Court's typical practice of letting issues percolate will accomplish nothing.

Justices of this Court have noted this perverse effect of summary affirmances. Such decisions often resolve "important issues . . . solely on the basis of a single jurisdictional statement, without the benefit of other court decisions and the helpful commentary that follows significant developments in the law." *Colo. Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 917–18 (1976) (Brennan, J., dissenting from denial of certiorari); *Montana v. Hall*, 481 U.S. 400, 405 (1987) (Marhsall, J., dissenting). Then, given that they bind lower courts, these summary decisions "prevent this Court from obtaining the views of state and lower federal courts on important issues." *Colo. Springs*, 428 U.S. at 918 (Brennan, J., dissenting from denial of certiorari). Whatever the merits of the summary-affirmance procedure to resolve run-of-the-

[3] While Judge Manion dissented here, he explicitly premised his dissent on the Seventh Circuit's over-expansive view of *Hicks* and the circumstances in which this Court's summary affirmances may be set aside. App. 64a n.9.

mill cases arising within this Court's mandatory jurisdiction docket, there is no justification for adhering to the *Sea Pak* summary affirmance, which is plainly incorrect and wrongfully invalidates many States' laws. *Accord Hall*, 481 U.S. at 405 (Marshall, J, dissenting) ("Through summary dispositions, [the Court] deprive[s] the litigants of a fair opportunity to be heard on the merits.").

This Court has recognized the need to grant certiorari—even in the absence of a circuit split—to align one of its prior decisions that implicates fundamental principles of law with subsequent doctrinal development. *See Janus*, 138 S. Ct. 2448; *Harris*, 134 S. Ct. 2618; *Knox*, 567 U.S. 298. As it stands here, "states have been prohibited since 1971 from regulating checkoff agreements" simply because one "district judge held that Taft-Hartley's checkoff provision preempted a state law . . . [a]lthough the state law did not conflict with the federal checkoff provision" and "despite scant textual evidence of congressional intent to pre[empt]." App. 42a (Manion, J., dissenting). This case directly presents this issue.

C. This case is an ideal vehicle for solving this important problem. The parties thoroughly briefed the Question Presented before both the district court and Seventh Circuit, the panel and dissent fully vetted the arguments, and there are no alternative grounds for disposing of this case.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 2018

APPENDIX

APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 21, 2018

Before

DANIEL A. MANION, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 17-1178

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT TEN and LOCAL LODGE 873,	Appeal from the United States District Court for the Western District of Wisconsin No. 16-CV-77
Plaintiffs-Appellees,	**William M. Conley**, *Judge.*
v.	

RAY ALLEN, in his official capacity as Secretary of the Wisconsin Department of Workforce Development, et al.
Defendants-Appellants.

ORDER

On consideration of appellants' petition for rehearing or rehearing en banc, filed on October 4, 2018, all judges on the original panel have voted to deny the petition for panel rehearing. A judge in regular active service called for a vote on the request for rehearing en banc. A majority of judges in active service voted to deny rehearing en banc.

Accordingly, the petition for rehearing or rehearing en banc filed by appellants is DENIED.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 17-1178

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT TEN and LOCAL LODGE 873,

Plaintiff-Appellee,

v.

RAY ALLEN, in his capacity as Secretary of the Wisconsin Department of Workforce Development, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 16-CV-77 — **William M. Conley**, *Judge*.

ARGUED SEPTEMBER 15, 2017 –
DECIDED SEPTEMBER 13, 2018

Before MANION, ROVNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Wisconsin's Act 1 of 2015, codified at Wis. Stat. § 111.01 et seq., changed many provisions of that State's labor laws. This case deals with a narrow provision of Act 1 that attempts to change the rules for payroll deductions that allow employees to pay union dues through dues-checkoff authorizations.

A dues-checkoff authorization is a contract between an employer and employee for payroll deductions. These are "arrangements whereby [employers] would check off from employee wages amounts owed to a labor organization for dues, initiation fees and assessments." *Felter v. Southern Pacific Co.*, 359 U.S. 326, 330–31 (1958). By signing an authorization, the employee directs the employer to deduct union dues or fees routinely from the employee's paycheck and to remit those funds to the applicable union. Many of these authorizations are irrevocable for a specified period—often one year— for reasons of administrative simplicity. See Dkt. 43 at 2 (Elizondo Aff.); see also *N.L.R.B. v. Atlanta Printing Specialties and Paper Prods. Union 527*, 523 F.2d 783, 786 (5th Cir. 1975). The union itself is not a party to the authorization, which is effective if and only if the employee wishes. Federal law has long provided, however, that unions can bargain collectively with employers over the standard terms of dues-checkoff authorizations.

The Taft-Hartley Act imposes three limits on dues-checkoff authorizations: the authorization must be (1) individual for each employee, (2) in writing, and (3) irrevocable for no longer than one year. See 29 U.S.C. § 186(a)(2), (c)(4). Wisconsin's Act 1 attempts to shorten this maximum period to thirty days. See 2015 Wis. Act 1, § 9, codified at Wis. Stat. § 111.06(1)(i).

The district court found that Wisconsin's attempt to impose its own time limit on dues-checkoff authorizations is preempted by federal labor law, and the court issued a permanent injunction barring enforcement of that provision. *International Ass'n of Machinists District 10 v. Allen*, No. 16-cv-77, 2016 WL 7475720, at *7 (W.D. Wis. Dec. 28, 2016). We affirm. This case is controlled by the Supreme Court's summary affirmance in a case finding a nearly identical State law preempted. *Sea Pak v. Indus., Tech. & Prof. Employees, Div. of Nat'l Maritime Union*, 400 U.S. 985 (1971) (mem.). We reject Wisconsin's effort to undermine the precedential force of *Sea Pak*, which is fully consistent with more general federal labor law preemption principles. See, e.g., *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140–42, 153 (1976). Wisconsin's attempt to short-circuit the collective bargaining process and to impose a different dues-checkoff standard is preempted by federal law.

I. *Factual and Procedural History*

A. *Wisconsin Act 1*

Before Act 1 was enacted in 2015, Wisconsin law had allowed so-called union security agreements in which unions and employers would agree that employees would be required either to join the union or pay fair-share fees. That changed with Act 1's "right-to-work" provisions, which prohibit employers from requiring their employees to pay dues or fees to a union. See *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 676–77 (7th Cir. 2017), excerpting 2015 Wis. Act 1, § 5, codified at Wis. Stat. § 111.04(3)(a). Act 1 provides in part: "No person may require, as a condition of obtaining or continuing employment, an individual to … Pay any dues, fees, assessments, or other charges … to a labor organization." § 111.04(3)(a)(3). This also meant that Wisconsin employers and unions could no longer enter into an enforceable mandatory union security agreement—a term in a collective bargaining agreement where an employer promises the union that, as a condition of employment, it will require its employees to maintain membership in the union. We held in *Schimel* that this "right-to-work"/mandatory union security agreement portion of Act 1 is not preempted by federal law. 863 F.3d at 677.[1]

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[1] *Schimel* followed our decision in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), where a divided panel upheld an identical

The section of Act 1 challenged in this lawsuit attempts a less dramatic change in labor law. It requires employers to terminate dues-checkoff authorizations within thirty days of receiving written notice from the employee. 2015 Wis. Act 1, § 9, codified at Wis. Stat. § 111.06(1)(i). This challenged provision reads:

> (1) It shall be an unfair labor practice for an employer individually or in concert with others:
> …
>
> (i) To deduct labor organization dues or assessments from an employee's earnings, unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable by the employee giving to the employer at least 30 days' written notice of the termination. This paragraph applies to the extent permitted under federal law.

B. *The Dispute at the John Deere Plant*

This case stems from a complaint filed with the Wisconsin Department of Workforce Development, the State agency that enforces Wisconsin's wage laws. Lisa Aplin, an assembler at a John Deere plant in Wisconsin, signed a dues-checkoff authorization in

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Indiana law, and rehearing en banc was denied by an equally divided court.

November 2002. Her authorization instructed John Deere to deduct union dues from her paychecks and to remit them to the International Association of Machinists District 10 and Local Lodge 873, the plaintiffs-appellees here, which we refer to as the Machinists or the union. Aplin's authorization said that it was "irrevocable for one (1) year or until the termination of the collective bargaining agreement … whichever occurs sooner." It also provided that it would be automatically renewed for successive one-year periods unless the collective bargaining agreement terminated or Aplin gave notice during a fifteen-day annual period. The authorization also provided that it was "independent of, and not a quid pro quo for, union membership." This arrangement remained in effect until 2015. As the State explains, dues-checkoff authorizations like this are a convenient way for employees to pay their union dues or fair-share fees.

In the wake of Act 1, John Deere and the Machinists updated their collective bargaining agreement, but they left in place a term making dues-checkoff authorizations irrevocable for one year. In July 2015, Aplin sent a letter to John Deere and the union invoking Act 1 and requesting the termination of her dues-checkoff authorization. The union responded that her request was untimely and could not be granted unless she renewed it during the annual cancellation period that November.

Aplin then filed a complaint with the State agency claiming that John Deere was violating State wage laws by not honoring within thirty days her attempt to revoke the dues-checkoff authorization. She sought a refund of $65.60 in union dues deducted from her pay after the cancellation would have taken effect. In November 2015, the agency sided with Aplin, finding that Wis. Stat. § 111.06(1)(i) applied and that John Deere had to honor Aplin's cancellation and refund request, or face enforcement action. The company then reimbursed Aplin for the $65.60 deducted from her paycheck. Around the same time, the agency handled another similar dues-checkoff complaint invoking Wis. Stat. § 111.06(1)(i) and concluded that it "must enforce the statute in its current form" unless and until it was found preempted.

C. *This Federal Lawsuit*

In February 2016, the Machinists filed this action in the Western District of Wisconsin and moved to enjoin the State from enforcing Act 1's dues-checkoff provision. The union contended that the federal Labor-Management Relations Act of 1947, better known as the Taft-Hartley Act, preempted Act 1 on this score. See Pub. L. No. 80–101, § 302(a), (c)(4), 61 Stat. 157, codified at 29 U.S.C. § 186(a), (c)(4).

To protect against corruption in the collective bargaining process, the Taft-Hartley Act, as amended, prohibits "any employer or association of employers" from giving "any money or other thing of

value" to "any labor organization," § 186(a)(2), unless one of a long list of exceptions applies. § 186(c). The exception relevant here provides:

> The [prohibition] provisions of this section shall not be applicable …
> (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner … .

§ 186(c)(4). The union argued that this year-long dues-checkoff exception in federal labor law is incompatible with, and thus preempts, the corresponding thirty-day provision of Wisconsin's Act 1.

The district court granted the union's motion for summary judgment and permanently enjoined enforcement of Wis. Stat. § 111.06(1)(i). 2016 WL 7475720, at *7–8. The district court found that this issue was "relatively straightforward, since its resolution is controlled by the United States Supreme Court's decision" in *Sea Pak*. *Id*. at *3, citing 400 U.S. 985 (1971).

II. *Analysis*

We review the legal conclusions of summary judgment rulings *de novo*, construing all facts and drawing all reasonable inferences in favor of the non-moving parties. See *Wisconsin Central Ltd. v. Shannon*, 539 F.3d 751, 756 (7th Cir. 2008). Here, however, because there are no genuine issues of material fact, we must decide only whether the union is entitled to a judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). The main issue in this appeal is whether Wis. Stat. § 111.06(1)(i) is preempted by Taft-Hartley's § 302(c)(4), codified at 29 U.S.C. § 186(c)(4). We also must address whether Taft-Hartley's § 14(b) exception to preemption for State "right-to-work" laws—codified at 29 U.S.C. § 164(b)—allows Wisconsin to do what it attempted to do here.

We conclude that the Taft-Hartley Act preempts Wisconsin's attempt to set new rules for dues-checkoff authorizations governed by § 186(c)(4). Because the challenged portion of Act 1 regulates an employee's optional dues-checkoff authorization rather than an employee's obligation to pay dues as a condition of employment, it falls outside the scope of the § 164(b) "right-to-work"/union security agreement exception. We explain in Part II-A that we agree with the district court that the Supreme Court's summary affirmance in *Sea Pak* controls this case. In Part II-B, we explain why *Sea Pak* fits comfortably with broader preemption principles of labor law. In Part II-C, we

address and reject further arguments by the State for recognizing an exception from those principles here.

A. *Sea Pak's Continuing Force*

The procedural history of the *Sea Pak* decision was a bit unusual, but the district court correctly found that the Supreme Court's summary affirmance in *Sea Pak* controls here. The Supreme Court has instructed that "the lower [federal] courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not,'" because "votes to affirm summarily … are votes on the merits of a case," just like those accompanied by fully reasoned Court opinions. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (brackets and citation omitted).

To understand the effect of a summary affirmance, it is usually necessary to look closely at the decision that was summarily affirmed. In *Sea Pak*, the Southern District of Georgia found a Georgia law very similar to Act 1 preempted. A Georgia law required employers to treat dues-checkoff authorizations as revocable at will. The district court found that provision was "completely at odds" and "in direct conflict" with 29 U.S.C. § 186(c)(4), which, as noted, permits dues-checkoffs to be irrevocable for up to one year. 300 F. Supp. 1197, 1200 (S.D. Ga. 1969).[2] "A

[2] The district court also noted that the original House-passed version of § 186(c)(4) would have made dues-checkoffs "revocable by the employee at any time upon thirty days written notice to

union is thus permitted to bargain for and receive a checkoff of dues under authorizations which may be irrevocable for as long as one year." *Id.* This Taft-Hartley provision meant "that no room remains for state regulation in the same field." *Id.*[3]

The district court in *Sea Pak* also noted that Judge Noland of the Southern District of Indiana had reached the same conclusion on the same preemption question, holding that § 186(c)(4) preempted an Indiana wage assignment law requiring assignments to be revocable at will. *Id.* at 1198–99, citing *International B'hood of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961, 965 (S.D. Ind. 1968)

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the employer," *Sea Pak*, 300 F. Supp. at 1200—the same policy Wisconsin has attempted to impose here. The final version of § 186(c)(4) allowed the maximum period to be as long as a full year. The district court concluded: "I cannot be persuaded that Federal preemption fails merely because Congress saw fit to adopt a less liberal power of revocation" in setting ground rules for dues-checkoff authorizations. *Id.*

[3] In so holding, the *Sea Pak* district court interpreted § 186(c)(4) the same way the Supreme Court had already read a nearly identical provision in the Railway Labor Act in *Felter*, see 359 U.S. at 330–31, discussed below at 20–23. The *Sea Pak* district court's reasoning also correctly anticipated the Supreme Court's decision seven years later in *Machinists*, 427 U.S. at 153, where the Court found that certain aspects of the "federal regulatory scheme" of labor-management relations "leave the parties free" from "state attempts to influence the substantive terms of collective bargaining agreements" and from such attempts by the National Labor Relations Board.

(§ 186 "specifies the conditions necessary for a valid check-off, and … is sufficiently pervasive and encompassing" to preempt State wage assignment laws).

The *Sea Pak* district court also had to decide whether the Taft-Hartley provision in 29 U.S.C. § 164(b), which permitted States to outlaw "agreements requiring union membership as a condition of employment," also allowed a State to enact check-off provisions contrary to what is provided in § 186(c)(4). 300 F. Supp. at 1199–1200. The court found that the State's dues-checkoff regulation was not saved by § 164(b): "Checkoff authorizations irrevocable for one year after [their authorization] date do not amount to compulsory unionism as to employees who wish to withdraw from membership prior to that time." *Id.* at 1201.

The Fifth Circuit affirmed *per curiam*, adopting the district court's opinion. 423 F.2d 1229, 1230 (5th Cir. 1970). The Supreme Court affirmed that decision summarily, without opinion. 400 U.S. 985 (1971). Both preemption arguments advanced in this case were "presented and necessarily decided" by the Court's summary affirmance in *Sea Pak*; they did not "merely lurk in the record." See *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182–83 (1979) (precedential effect of summary affirmance extends only to "the precise issues presented and necessarily decided," not to questions

that "merely lurk in the record"). *Sea Pak* controls this case.[4]

The State argues, though, that even if *Sea Pak* applies, subsequent developments in the Supreme Court's case law on preemption mean that *Sea Pak* is no longer binding. Language in *Hicks v. Miranda* may offer a small opening for lower courts to depart from summary decisions "when doctrinal developments indicate otherwise." 422 U.S. at 344, quoting *Port*

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[4] The employer-appellant in *Sea Pak* presented the following questions to the Supreme Court, invoking mandatory appellate jurisdiction under 28 U.S.C. § 1254(2) (1970):

> A. Whether the Georgia Statute requiring that dues assignments be revocable at will is in conflict with or preempted by Section 302(c)(4) of the Labor Management Relations Act.
>
> B. Whether the Georgia Statute is a valid exercise of the authority reserved to the Georgia legislature by Section 14(b) of the Labor Management Relations Act, and is, therefore not saved from preemption.

Statement as to Jurisdiction for the Appellant at 5, *Sea Pak*, 400 U.S. 985 (No. 70-463), 1970 WL 136846, at *4. The issues presented here are indistinguishable. The Georgia law made dues-checkoffs "revocable at the will of the employee," *Sea Pak*, 300 F. Supp. 1199, while Wis. Stat. § 111.06(1)(i) grants an at-will cancellation right to employees, to take effect in thirty days. This thirty-day delay is a distinction without a difference. Both statutes operate to shorten considerably the irrevocability period of dues-checkoff agreements otherwise permitted under Taft-Hartley.

Authority Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967) (addressing dismissals for lack of substantial federal questions), and citing *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973) (lower courts should follow summary decisions until Supreme Court says otherwise). We found such an opening in *Baskin v. Bogan*, 766 F.3d 648, 659 (7th Cir. 2014), finding that a 1972 summary dismissal for want of a substantial federal question rejecting a constitutional claim for same-sex marriage was no longer binding in light of a consistent series of more recent Supreme Court decisions recognizing certain sexual orientation rights under the Constitution. To the extent there might be any theoretical room for departing from the summary affirmance in *Sea Pak*, it would take much stronger signals from the Court to do so. As we explain in Part II-B, there has been no comparable sea-change in labor-law preemption or preemption more generally that would justify a lower court in departing from *Sea Pak*.

In addition, to agree with the State and reverse here, we would have to split with two other circuits. See *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin County*, 842 F.3d 407, 410, 421–22 (6th Cir. 2016) (following *Sea Pak* to invalidate county ordinance regulating dues-checkoff authorizations); *N.L.R.B. v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 399 (4th Cir. 1977) (agreeing with NLRB that "the check-off provision was not a Union security device which would be subject to State law

under Section 14(b)" of Taft-Hartley); see also *N.L.R.B. v. Atlanta Printing Specialties and Paper Products Union 527*, 523 F.2d 783, 784, 787–88 (5th Cir. 1975) (enforcing NLRB order to employer and union to honor dues-checkoff cancellations tendered during annual escape period of fifteen days). We agree with the Sixth Circuit that *Sea Pak*'s "authority remains essentially unchallenged" today. *Hardin County*, 842 F.3d at 421.

B. *Labor Law Preemption More Generally*

1. *Machinists and Garmon Preemption*

The State urges us to decide this case under more general field- or conflict-preemption principles. We conclude, however, that *Sea Pak* is consistent with the Court's other labor law preemption decisions, which provide quite clear guidance here. In *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018), the Supreme Court explained that all forms of federal preemption "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." Most relevant for this case, "field preemption" occurs "when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'" *Id.*, quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S.

130, 140 (1986). Federal statutes that preempt a field "reflect[ ] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Murphy*, 138 S. Ct. at 1481, quoting *Arizona v. United States*, 567 U.S. 387, 401 (2012).

Over the decades since enactment of the National Labor Relations Act and the Taft-Hartley Act, the Supreme Court has applied field preemption in a host of cases interpreting those laws. The resulting body of law reflects many individual applications of the general principles of preemption, and labor-law preemption cases specifically provide the most reliable guidance for us in this case, if any were needed beyond the Court's summary affirmance in *Sea Pak*.

Labor law preemption applies, to put it broadly, when a State acts "as regulator of private conduct" with an "interest in setting policy" that is different from the policy of the federal government. *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 229 (1993) (*Boston Harbor*). Most relevant here are two forms of field preemption in labor law, known as *Garmon* preemption and *Machinists* preemption. The Supreme Court has explained:

> The first, known as *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), "is intended to preclude state interference with the National Labor

> Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the [National Labor Relations Act (or NLRA, also known as the Wagner Act)]." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (*Golden State I*). To this end, *Garmon* pre-emption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). The second, known as *Machinists* pre-emption, forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash–Finch Co.*, 404 U.S. 138, 144 (1971)). *Machinists* pre-emption is based on the premise that "'Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.'" 427 U.S., at 140, n. 4 (quoting [Archibald] Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1352 (1972)).

Chamber of Commerce v. Brown, 554 U.S. 60, 65 (2008); see also *520 South Michigan Ave. Assoc. v. Shannon*, 549 F.3d 1119, 1125–26 (7th Cir. 2008)

(summarizing *Garmon* and *Machinists* preemption doctrines).

Both the *Garmon* and *Machinists* doctrines apply broadly to the Wagner (NLRA) and Taft-Hartley Acts: "the object of labor pre-emption analysis," according to the Court, is "giving effect to Congress' intent in enacting" provisions of "the Wagner and Taft-Hartley Acts" as statements of national labor-management policy. *Brown*, 554 U.S. at 73; see also *Belknap, Inc. v. Hale*, 463 U.S. 491, 524–25 (1983) (referring to "the Wagner and Taft-Hartley Acts" as a cohesive whole), citing *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 489 (1960); *Machinists*, 427 U.S. at 141 (same).

Machinists preemption is quite broad. It recognizes that federal labor statutes "specifically conferred on employers and employees" a right to determine certain questions through bargaining and the use of other "permissible economic tactics," and to be free from government fiat in finding solutions. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112–13 (1989) (*Golden State II*) (where *Machinists* applies, it extends a right enforceable under 42 U.S.C. § 1983). Although "the rule of the *Machinists* case is not set forth in the specific text of an enumerated section of the NLRA," that statute's "language and structure" offer "a guarantee of freedom for private conduct that the State may not abridge." *Id.* at 111–12. *Machinists* instructs that both the NLRB and the States "are without authority to attempt to introduce some standard of properly

balanced bargaining power" or to impose "an ideal or balanced state of collective bargaining" because Congress intended to leave such balancing to labor and management. *Machinists*, 427 U.S. at 149–50 (quotations and citations omitted). "[T]he legislative purpose" as determined from the text and structure of the Wagner and Taft-Hartley Acts "may … dictate that certain activity neither protected nor prohibited" by federal labor law may "be deemed privileged against state regulation." See *id.* at 141, quoting *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 187 (1965).

For example, we applied *Machinists* preemption to an Illinois law that required cemeteries and gravediggers to negotiate to establish a pool of workers who would "perform religiously required interments during labor disputes." *Cannon v. Edgar*, 33 F.3d 880, 882, 885–86 (7th Cir. 1994). Despite the State law's benign purpose to respect certain faiths' beliefs concerning timely burial, the law impermissibly "meddle[d] with the collective bargaining process" by "directly interfer[ing] with the ability of" labor and management "to reach an agreement unfettered by the (labor) restrictions of state law." *Id.* at 886; see also *id*. at 885 (finding same statute preempted under *Garmon* as well). Similarly, we applied *Machinists* preemption to an Illinois law that required hotels to give custodial workers specified break periods, rather than leave the issue to collective bargaining. We found that the law was not a minimum labor standard but a specific intrusion

into collective bargaining in a particular industry. *520 S. Michigan Ave.*, 549 F.3d at 1121.

Even State laws with indirect effects on bargaining can be preempted under *Machinists*. Though *Machinists* itself was directed at a union's "refusal to work overtime" and the economic pressure that the refusal placed on the employer, see 427 U.S. at 154, 155, it bars State regulation in any "zone protected and reserved for market freedom" by federal labor law. *Boston Harbor*, 507 U.S. at 226–27 (city governments are "preempted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute"), citing *Golden State I*, 475 U.S. at 618. In such zones, the Court observed in *Brown*, "the States have no more authority than the Board to upset the balance that Congress has struck between labor and management." 554 U.S. at 74 (brackets omitted), quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 751 (1985).

Before turning to more specific discussion of *Garmon* and *Machinists* preemption principles as applied to dues-checkoff authorization, we address the State's broadest argument, which is that the court should apply a much more demanding standard for preemption than was applied in *Sea Pak*, *Garmon*, or *Machinists*. The State cites and quotes Justice Kagan's concurring opinion in *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 638 (2012), which observes that some older preemption cases may

seem anachronisms in terms of newer preemption principles and precedents.

Kurns itself provides the best answer to the argument. Both the *Kurns* majority and Justice Kagan followed the arguably "anachronistic" decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926) (applying field preemption under Locomotive Inspection Act for railroad safety equipment). They did so because *Napier* had established the preemptive force of that statute decades earlier and *Congress had not acted to change that law*. 565 U.S. at 633 (majority); *id*. at 638 (Kagan, J., concurring). As in *Kurns*, the Supreme Court has often observed that principles of *stare decisis* take on "special force" on issues of statutory interpretation. They do so precisely because Congress can legislate to correct an erroneous decision by the Court. E.g., *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 765 (2011) (patent law); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (antitrust law). A case that makes that point with special force, because Congress did respond with new legislation, is *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (civil rights litigation), superseded by Civil Rights Act of 1991, as stated in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 450 (2008).

The State's reliance on more general principles of preemption from other statutory contexts thus fails to engage with the doctrinal heart of this case, which is the decades of decisions deciding the preemptive force

of the Wagner and Taft-Hartley Acts. The issue before us is the preemptive scope of the Taft-Hartley Act, so the most relevant guides are the Supreme Court's decisions under that statute. Moreover, one cannot call *Garmon* and *Machinists* "anachronisms" when the Court has been citing and following them on a regular basis. See, e.g., *Brown*, 554 U.S. at 66 (2008 decision discussing both and applying *Machinists* preemption); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49 (1998) (applying *Garmon* preemption); *Golden State I*, 475 U.S. at 615–16 (1986 decision applying *Machinists* preemption).

2. *Preemption for Dues-Checkoff Rules*

Returning to the text of the relevant Taft-Hartley provision, 29 U.S.C. § 186(c)(4), federal labor law imposes only minimal rules for collective bargaining on dues-checkoff authorization. Federal law leaves other details for resolution by private actors—employers, unions, and employees—through the collective bargaining and dues-checkoff authorization processes.

Section 186 was enacted after Congress had gained some experience with how the Wagner Act worked in practice. The provision was intended "to deal with problems peculiar to collective bargaining" and in particular "was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 424–25 (1959); see also *Unite*

Here Local 355 v. Mulhall, 571 U.S. 83, 84 (2013) (Breyer, J., dissenting from denial of certiorari) (describing how § 186 operates to discourage corruption of bargaining process). The backers of § 186 "were concerned with corruption of collective bargaining through bribery of employee representatives by employers" and with other related financial risks. *Arroyo*, 359 U.S. at 425–26. The Taft-Hartley Act thus made it unlawful for employers to deliver "any money or other thing of value … to any labor organization." § 186(a), (a)(2).

Congress did not intend, however, to outlaw dues-checkoff agreements. They are not a special opportunity for corruption but a convenient way for employees to pay their union dues. So Congress included this exception to the anticorruption provision:

> The provisions of this section shall not be applicable …
> (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

§ 186(c)(4).

This exception sets three, and only three, limits on dues-checkoff agreements, the "written assignment" referred to in the statute. Such agreements must be (1) individual and (2) in writing, and (3) they must allow an employee to revoke it at least once a year or upon expiration of the applicable collective agreement. Apart from those limits, dues-checkoff authorizations are left to collective bargaining. States are not free to mandate additional restrictions for the benefit of unions, employers, or employees.

In addition to the summary affirmance in *Sea Pak*, the Supreme Court reached the same conclusion in a full opinion interpreting a nearly identical provision in the Railway Labor Act, 45 U.S.C. § 152 Eleventh (b), which was modeled on § 186(c)(4). *Felter v. Southern Pacific Co.*, 359 U.S. 326, 332–33 n.10 (1959).[5] The RLA provision permits dues-checkoff agreements in railroad employee unions under the same conditions set forth in § 186(c)(4).[6] In *Felter*, the

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[5] Where RLA and NRLA provisions "are in all material respects identical," the Supreme Court has used RLA cases as a guide to the NLRA and vice versa. See *Communications Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (applying RLA analysis to materially identical NLRA provision), citing *Ellis v. B'hood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 452 n.13 (1984) (applying NLRA analysis to "equivalent provision" of the RLA).

[6] Notwithstanding any other provisions … a labor organization … shall be permitted to make agreements providing for the deduction … from the wages of its or

Supreme Court interpreted those terms to mean what *Sea Pak* held and what we hold today under § 186(c)(4)—Congress left to private actors whether, and if so, how, to formulate a dues-checkoff agreement within the basic parameters set forth in the federal statute. The individual employee must agree to the dues-checkoff, in writing, and it must be revocable at least once every year or at the expiration of the collective bargaining agreement, whichever occurs sooner.

The *Felter* Court explained that when Congress added Section 2 Eleventh (b) to the Railway Labor Act:

> It thus became lawful to bargain collectively for "union-shop" and "checkoff" arrangements; but this power was made subject to limitations. The limitation here pertinent is that, by force of the proviso, the authority to make checkoff arrangements does not include authority to

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their employees … any periodic dues … *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective bargaining agreement, whichever occurs sooner. Pub. L. No. 81–914, ch. 1220, 64 Stat. 1238 (1951), codified at 45 U.S.C. § 152 Eleventh (b).

> bind individual employees to submit to the checkoff. Any agreement was to be ineffective as to an employee who did not furnish the employer with a written assignment in favor of the labor organization, and any assignment made was to be "revocable in writing after the expiration of one year … ." This failure to authorize agreements binding employees to submit to the checkoff was deliberate on the part of Congress. Proposals to that end were expressly rejected. … [The final bill allowed] the individual employee to decide for himself whether to submit to the checkoff, and whether to revoke an authorization after the expiration of one year.

359 U.S. at 331–32.

The Supreme Court then explained how this language placed in only private hands the decisions about additional terms of dues-checkoff authorizations:

> The structure of § 2 Eleventh (b) then is simple: carriers and labor organizations are authorized to bargain for arrangements for a checkoff by the employer on behalf of the organization. Latitude is allowed in the terms of such arrangements, but not past the point such terms impinge upon the freedom expressly reserved to the individual employee to decide whether he will authorize the checkoff in his case. Similarly Congress consciously and

> deliberately chose to deny carriers and labor organizations authority to reach terms which would restrict the employee's complete freedom to revoke an assignment by a writing directed to the employer after one year. Congress was specifically concerned with keeping these areas of individual choice off the bargaining table. It is plainly our duty to effectuate this obvious intention of Congress … .

Id. at 333. In *Felter* itself, the Court found that the employer and the union had violated those statutory ground rules by refusing to honor a timely revocation notice because it had not been submitted on a particular form. *Id.* at 330.

Most relevant to this case, however, *Felter* explained the rules that apply as long as private agreements do not contradict the statutory ground rules:

> Of course, the parties may act to minimize the procedural problems caused by Congress' choice. Carriers and labor organizations may set up procedures through the collective agreement for processing, between themselves, individual assignments and revocations received, and carriers may make reasonable designations, in or out of collective bargaining contracts, or agents to whom revocations may be sent.

Id. at 334–35. In other words, those matters not governed expressly by the statute were left to the collective bargaining process, just as in *Sea Pak* and *Machinists*.

3. *Applying Machinists and Garman Preemption Here*

Here, Wisconsin acted to give employees like Lisa Aplin an additional statutory right under State law: the ability to cancel their duly authorized dues-checkoff agreements midyear on just thirty days' notice. Wis. Stat. § 111.06(1)(i). The problem is that the Taft-Hartley Act leaves it to private actors—and not the State—to decide how long the dues-checkoff authorization should last, as long as the authorization is individual, in writing, and not irrevocable for longer than one year. 29 U.S.C. § 186(c)(4). The State's attempt to add additional regulatory requirements for dues-checkoffs, and thus to change the scope of permissible collective bargaining, is preempted.

A strong case could be made for *Garmon* preemption here because Act 1 can place employers under inconsistent State and federal expectations. After agreeing to a new collective bargaining agreement, employer John Deere was caught here in a federal-state bind. It had agreed, in light of federal law, to a collective bargaining agreement with the Machinists that incorporated by reference dues-checkoff agreements irrevocable for one year. Because this decision was inconsistent with Wisconsin's

thirty-day revocability requirement, John Deere was told that it could be found responsible for committing an unfair labor practice under *State* law. But if, after executing the collective bargaining agreement, John Deere had decided to ignore its requirements and to comply with Act 1 instead, it could have been brought before the National Labor Relations Board by the union for committing a *federal* unfair labor practice. See, e.g., *Metalcraft of Mayville, Inc. and District Lodge No. 10, Int'l Assoc. of Machinists & Aerospace Workers of Am.*, No. 18-CA-178322, 2017 WL 956627 (N.L.R.B. Div. of Judges Mar. 10, 2017) (analyzing complaint brought by same union against different employer in wake of Act 1). *Garmon* preemption is supposed to prevent just this sort of conflict between State law and the NLRB's authority. See *Brown*, 554 U.S. at 65.[7]

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[7] Another argument in favor of *Garmon* preemption is that the precise terms of dues-checkoff agreements might be considered a wage-related term of employment, and thus a mandatory subject of bargaining under the NLRA. 29 U.S.C. § 158(a)(5), (d); *Garmon*, 359 U.S. at 245 ("When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board"). We have equated the two before. See *Office & Prof. Employees Int'l. Union, Local 95 v. Wood Cty. Tel. Co.*, 408 F.3d 314, 317 (7th Cir. 2005) (distinguishing "between dues checkoffs and other terms and conditions of employment," but only with respect to the "express-contractual-authorization requirement" for checkoffs). Since *Sea Pak* and *Machinists* provide such a clear answer to the issue

The State responds that there is a simple solution that would allow an employer to resolve this conflict. In the bargaining process, the State says, the employer could simply refuse to agree to any irrevocability period longer than thirty days. That is true in theory, but this argument shows clearly why the State law is preempted under *Machinists*. Under the Taft-Hartley Act, the State simply is not allowed to impose its own view of how best to balance the interests of labor and management in zones that Congress deliberately left for resolution by collective bargaining. *Machinists*, 427 U.S. at 149–50 (both NLRB and States "are without authority to attempt to introduce some standard of properly balanced bargaining power" in such areas) (quotation marks omitted), quoting *N.L.R.B. v. Insurance Agents*, 361 U.S. 477, 497 (1960). Wisconsin's Act 1 tries to short-circuit the bargaining process by telling John Deere and the union they must use a dues-checkoff irrevocability period much shorter than federal law would otherwise permit.

As explained above, *Machinists* applies a rule of field preemption in areas that "Congress intended [to] be unregulated" by the NLRB or the States. See *Brown*, 554 U.S. at 65 (quotation marks omitted), quoting *Machinists*, 427 U.S. at 140. As *Felter* explained, the text and structure of Taft-Hartley's

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presented in this case, we do not need to explore *Garmon* preemption in any more detail.

dues-checkoff provision do precisely that—employers and labor organizations "are authorized to bargain for arrangements for a checkoff by the employer on behalf of the organization," and it is "expressly reserved to the individual employee to decide whether he will authorize the checkoff in his case." 359 U.S. at 333. That leaves no room for Wisconsin to impose its own regulations in this same field. As in *Felter*, it "is plainly our duty to effectuate this obvious intention of Congress," *id.*, and to keep State law from invading this zone that Congress deliberately left to private actors.

C. *The State's Arguments for an Exception*

The State offers two more arguments to shield Wis. Stat. § 111.06(1)(i) from preemption. It first argues that preemption analysis should not apply to State dues-checkoff laws because 29 U.S.C. § 186(c)(4), is only an exception to a criminal prohibition against bribery and corruption. Second, the State argues that Taft-Hartley's preemption exemption for State "right-to-work"/mandatory union security agreement laws,§ 164(b), applies not only to the kind of agreements mentioned in its text, but also to State laws regulating the terms of dues-checkoff authorizations. Neither argument finds support in the statute or in the Supreme Court's labor law decisions.

1. *Section 186's Preemptive Scope*

First, as recounted above, Taft-Hartley's prohibition on employers and their agents giving "any money or other thing of value" to unions in § 186(a) was designed to fight corruption. The exception in § 186(c)(4) goes further, though. It also sets regulatory terms and conditions for lawful dues-checkoffs: "*Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year[.]" This proviso shows a regulatory intent, not just a narrowing of the scope of § 186(a)'s criminal liability.[8]

Section 186 is not a generic criminal statute applicable across many different potential contexts, comparable to say, mail or wire fraud. Next to Taft-Hartley's other provisions, the scope, exceptions, and location of § 186 show that it seeks primarily to regulate the interaction between employers and

[8] The exception that immediately follows, § 186(c)(5), regarding union trust funds, provides another example of regulatory choices made in this fashion. Its "*Provided*" language lists permissible uses for trust funds, sets forth a process for approving trust fund plans, and even empowers district courts to appoint "an impartial umpire" to settle certain kinds of disputes. This structure is used elsewhere in federal labor law. See, e.g., § 158(a)(3) (union security agreements and unfair labor practices).

employee representatives, including some key terms of dues-checkoff authorizations. The fact that some violations of these policies may be felonies, see § 186(d), reflects the depth of Congress's commitment to these policy choices. It does not show a choice to limit this section's preemptive effect.

In addition, *Machinists* does not suggest that certain parts of Taft-Hartley should be treated differently in terms of preemption. Where Congress deliberately left choices to private actors, neither the State nor the NLRB may intervene. See *Machinists*, 427 U.S. at 140 & n.4. Even public policy and regulatory decisions in other areas of the law can be preempted under *Machinists* if they have an impact on the collective bargaining process. See above at 15–17.

Finally, by attempting to regulate the revocation period of dues-checkoff authorizations, Act 1 is not a "state law[ ] of general application" like minimum-wage laws or minimum labor standards laws, which are generally not preempted. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753, 755 (1985). Here, Wisconsin seeks to modify a specific federal labor policy choice made in 29 U.S.C. § 186(c)(4), not to enact generally applicable health insurance standards, as in *Metropolitan Life*, see 471 U.S. at 727, or to impose "a minimum labor standard which does not interfere with the collective bargaining process," as described in *Shannon*, 549 F.3d at 1129. This public policy decision in Wis. Stat.

§ 111.06(1)(i)—to narrow the scope of bargaining between the employer and the union—is preempted.

2. *The Exception for "Right-to-Work"/Union Security Agreements*

The State also contends that Wis. Stat. § 111.06(1)(i) is permissible because Taft-Hartley's § 14(b) expressly permits States to outlaw mandatory union security agreements in "right-to-work" laws. 29 U.S.C. § 164(b); see also *Sweeney v. Pence*, 767 F.3d 654, 658–59 (7th Cir. 2014) (describing history of § 164(b)). Whether to allow "agreements requiring membership in a labor organization as a condition of employment" is a policy choice that Congress reserved to the States in that provision. § 164(b).[9] Wisconsin contends that the dues-checkoff authorization at issue here is a "maintenance of membership" device best thought of as a union security agreement subject to §164(b)'s preemption exception. Alternatively, the State contends that § 111.06(1)(i)'s thirty-day maximum is one of the "appropriate tools" the State can use in asserting the policy freedom granted by

[9] § 164(b) reads in full:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Taft-Hartley. See *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 600–01 (2011) (plurality opinion).

These arguments depend on the mistaken premise that dues-checkoff authorizations *are* union security agreements, i.e., "*agreements requiring membership* in a labor organization *as a condition of employment*," as set forth in the text of § 164(b) (emphasis added). They are not. Dues-checkoff authorizations are optional payroll deduction contracts between employers and individual employees, similar to health insurance premium payroll deductions or retirement savings arrangements. Checkoffs can be mentioned in a collective bargaining agreement, but they need not be. See *Columbia College Chicago v. N.L.R.B.*, 847 F.3d 547, 552–53 (7th Cir. 2017) (explaining that NLRA requires bargaining but not specific contractual outcomes). Unlike public-sector employees subject to collective bargaining agreements, private sector employees cannot be forced to agree to these payroll deductions. Compare *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 181–82 (2007), citing Wash. Rev. Code § 41.59.100 (2006) ("the employer shall enforce it by deducting from the salary" of employees), with 29 U.S.C. § 186(c)(4) (requiring employer to have "received from each employee … a written assignment").

In both *Sea Pak* and *Felter*, the Supreme Court has illustrated the difference between dues-checkoff authorizations and union security agreements, i.e.,

union-shop or agency-shop provisions. Neither Taft-Hartley nor the Railway Labor Act in *Felter* equates dues-checkoffs with compulsory union membership. In fact, *Felter* observed:

> The Act makes no formal relationship between a union-shop arrangement and a checkoff arrangement; under [the Act] the parties can negotiate either one without the other, if they are so disposed. And of course, a labor organization member who is subject to a union-shop arrangement need not subscribe to the checkoff; he can maintain his standing by paying his dues personally.

359 U.S. at 337 n.12; see also Dkt. 30–1 at 7 (collective bargaining agreement in this case provided that "if no such authorization is in effect, [a member] must pay his membership dues directly to the Union"). By summarily affirming the district court's § 164(b) discussion in *Sea Pak*, the Supreme Court endorsed the conclusion that § 164(b) "reaches no further" than its terms. 300 F. Supp. at 1201. "Checkoff authorizations irrevocable for one year after [their effective] date do not amount to compulsory unionism as to employees who wish to withdraw from membership prior to that time." *Id.*[10]

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[10] On the facts of this case, Aplin's dues-checkoff authorization cannot reasonably be considered a union security device. She would not have faced any consequences from the union or her employer if she had never authorized it. It was also,

To counter these points, the State relies on *Whiting*, a case about federal immigration law and an Arizona business licensing statute, for the idea that it can use "appropriate tools to exercise [the] authority" granted under federal labor law in § 164(b). 563 U.S. at 600–01 (plurality opinion) (discussing 8 U.S.C. § 1324a(h)(2), which permits States to impose "civil or criminal sanctions" on "those who employ … unauthorized aliens" provided this is done "through licensing and similar laws").

Congress did not write § 164(b) nearly as broadly as it wrote the statute in *Whiting*. Courts have rejected reliance on § 164(b) to save State statutes that veered beyond the provision's express scope: agreements between labor and management designed to prevent workers from free-riding on a union's services. See *Idaho Bldg. & Const. Trades Council v. Inland Pacific Chapter of Assoc. Builders &*

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by its express terms, "not a quid pro quo for … union membership." Dkt. 30-3. The dues-checkoff authorization might have become a term of her employment once Aplin signed it, but it was never "a *condition* of employment" as that term is used in § 164(b)—the authorization was a freely adopted optional contractual arrangement with her employer, with its own cancellation terms and conditions that fully complied with federal law. See Dkt. 30-1 at 7; Dkt. 30-3; 29 U.S.C. § 186(c)(4). Aplin enjoyed the convenience of a payroll deduction for thirteen years. Only in the last few months of the arrangement did she seek to change it. *Sea Pak* specifically rejected the notion that this state of affairs amounts to compulsory union membership.

Contractors, 801 F.3d 950, 954, 958 (9th Cir. 2015), citing *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 & nn.1 & 2, 416–17 (1976) (explaining free-rider problem solved by union-shop and agency-shop agreements); see also *Beck*, 487 U.S. at 744, 746, 748–49 (explaining that under Taft-Hartley's nationwide policy, which outlawed closed-shop agreements where union membership was a *pre*-condition for employment, "Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost").

There is no such free-rider concern here. Wisconsin is seeking to modify the terms of voluntary payroll deductions involving an employer and its employee, not mandatory union or agency-shop requirements that the employer and the union agree to impose on all employees. We know this from the terms of Act 1 itself. Its language invoking the power granted by § 164(b) came in the "right-to-work"/union security agreements provision. 2015 Wis. Act 1, § 5, codified at Wis. Stat. § 111.04(3)(a).

In *Sweeney*, we described the States' § 164(b) freedom as "extensive," 767 F.3d at 660, but the Supreme Court has made clear that before that freedom can apply, there must actually be a proper union security agreement in dispute: "state power, recognized by § 14(b), *begins only with actual negotiation and execution of the type of agreement described by § 14(b)*. Absent such an agreement,

conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*." *Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn*, 375 U.S. 96, 105 (1963) (*Retail Clerks II*) (emphasis in original). This § 164(b) authority also applies "only where State and federal power are concurrent." *Algoma Plywood & Veneer Co. v. Wis. Employment Relations Bd.*, 336 U.S. 301, 315 (1949); 29 U.S.C. §§ 158(a)(3), 164(b). That is not the case here with respect to dues-checkoff authorizations. Section 164(b) does not authorize States to regulate other arrangements not covered by its terms, such as dues-checkoff authorizations.

Conclusion

In light of *Sea Pak*, *Machinists*, and the Supreme Court's other labor preemption decisions, 29 U.S.C. § 186(c)(4) preempts Wis. Stat. § 111.06(1)(i). The judgment of the district court reaching that conclusion and enjoining enforcement of the State statute is

AFFIRMED

MANION, *Circuit Judge*, dissenting. Section 302 of the Taft-Hartley Act, an amendment to the National Labor Relations Act, makes it a crime for an employer to give anything of value to a union representing, or seeking to represent, its employees. 29 U.S.C. § 186(a). But the law specifically exempts so-called "checkoff agreements," wherein an employee agrees to set off a portion of each paycheck for union dues, so long as the employee submits a written assignment not irrevocable for more than one year. *Id.* § 186(c)(4). Thus, federal law prohibits checkoff agreements irrevocable for more than one year, but permits those with revocability periods of a year or less.

Nearly 50 years ago, a district judge held that Taft-Hartley's checkoff provision preempted a state law requiring checkoff agreements be revocable at will. Although the state law did not conflict with the federal checkoff provision, the judge concluded that "[t]he area of checkoff of union dues has been federally occupied to such an extent under [Section 302] that no room remains for state regulation in the same field." *SeaPak v. Indus., Tech. & Prof'l Emps.*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969). That decision was summarily affirmed first by the Fifth Circuit and then the Supreme Court, making it the law of the land. 400 U.S. 985 (1971) (mem.). As a result, states have been prohibited since 1971 from regulating checkoff agreements despite scant textual evidence of congressional intent to prevent them from doing so.

Enacted in 2015, Wisconsin's right-to-work law challenges this precedent. In addition to outlawing compulsory unionism, the law requires that checkoff agreements be terminable upon 30 days' notice to the employer. John Deere employee Lisa Aplin tried to take advantage of the new law by revoking her checkoff agreement, but the union, the International Association of Machinists, was not pleased and refused to accept her revocation. Aplin charged that the union committed an unfair labor practice, and the Wisconsin Department of Workforce Development agreed. But with the Supreme Court's summary affirmance in hand, the union obtained an injunction in federal district court.

The court today affirms, relying not only on *SeaPak*, but on the doctrine of *Machinists* preemption, a form of labor-specific preemption that didn't acquire its name until five years after the *SeaPak* decision. *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm.*, 427 U.S. 132 (1976). In my view, the *SeaPak* summary affirmance deserves a fresh look. *SeaPak*'s holding that all state regulation of checkoff agreements is preempted does not fit comfortably within the *Machinists* doctrine. Nor does it stand up to any scrutiny under modern general preemption doctrine, which now requires much stronger textual indications of Congressional intent to displace state regulation. I conclude that developments over the last 47 years have eroded the precedential value of *SeaPak* to such an extent that

we no longer are obliged to follow it. Therefore, I would permit Wisconsin to enforce its limitation on checkoff agreements. I respectfully dissent.

I. Background

Wisconsin's right-to-work law, known as Act 1, went into effect on July 1, 2015. Its main provision abolishes compulsory unionism, declaring that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to … [p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount … to a labor organization" or "any 3rd party." WIS. STAT. § 111.04(3)(a)3 & 4. Further, when an employee chooses to pay dues to a union via a checkoff from the employee's paycheck, such checkoff agreement must be "terminable by the employee giving to the employer at least 30 days' written notice of the termination." *Id.* § 111.06(1)(i). The limitation on checkoff agreements permits employees more flexibility, allowing them to easily stop deductions from their paychecks.

Lisa Aplin worked for John Deere. The International Association of Machinists had a collective bargaining agreement with John Deere to represent the employees at Aplin's plant, but Aplin never agreed to join the union. Nevertheless, she was still obligated before the right-to-work law went into effect to pay dues to the union. She had a checkoff agreement to facilitate that payment. But when her obligation to pay ceased on July 1, 2015, she sought to

revoke the checkoff agreement as of July 31. The union refused to honor her revocation request because, according to the union, the request didn't comply with the collective bargaining agreement. Aplin filed a complaint with the Wisconsin Department of Workforce Development, and that agency agreed that the union had committed an unfair labor practice by refusing to accept a revocation deemed lawful under state law.

The union sought declaratory and injunctive relief in federal court on the ground that Wisconsin's restriction of checkoff agreements is preempted by federal law. The district court agreed, concluding that it was bound by the Supreme Court's summary affirmance in *SeaPak. Int'l Ass'n of Machinists Dist. 10 v. Allen*, No. 16-cv-77-wmc, 2016 WL 7475720 (W.D. Wis. Dec. 28, 2016). Wisconsin appealed.

II. Analysis

Preemption arises from the Constitution's Supremacy Clause, which says federal law "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Since state law may not contradict federal law, sometimes the latter will render the former unenforceable. Preemption "may be either express or implied," *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982), but this case concerns implied preemption because "the [National Labor

Relations Act] contains no express pre-emption provision," *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008); *see also 520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1125 (7th Cir. 2008).

In implied preemption cases, we presume that "a state law should be sustained 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'" *520 S. Mich. Ave.*, 549 F.3d at 1125 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Typically, "[i]mplied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Consistent with that principle, we generally "assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona v. United States*, 567 U.S. 387, 400 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Most importantly, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). In typical preemption cases, courts no

longer attempt to read the tea leaves to determine congressional intent. *See Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 638 (2012) (Kagan, J., concurring).

But this case concerns labor law. Must we throw general preemption principles, meant to preserve the traditional police power of the States, out the window in this context? The court thinks so. To that end, it contends that the *SeaPak* decision was an early application of (or at least consistent with) *Machinists* preemption. *Machinists* preemption is a species of field preemption in labor law that "forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left to be controlled by the free play of economic forces.'" *Brown*, 554 U.S. at 65 (quoting *Machinists*, 427 U.S. at 140) (some internal quotation marks omitted). The rationale is that Congress' choice to protect and prohibit certain labor practices (in Sections 7 and 8 of the NLRA) implies congressional intent that whatever it did *not* protect or prohibit in those sections was meant to be left to bargaining, unregulated by the States. *See 520 S. Mich. Ave.*, 549 F.3d at 1125–26.

Because of this assumption regarding congressional intent, *Machinists* preemption is in some tension with general field preemption principles. As several justices have noted, "recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring

it." *Kurns*, 565 U.S. at 640–41 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting)); *see also id.* at 638 (Kagan, J., concurring) (criticizing a 1920s application of field preemption as an "anachronism," noting that "Congress had 'manifest[ed] the intention to occupy the entire field of regulating locomotive equipment,' based on nothing more than a statute granting regulatory authority over that subject matter to a federal agency.").[1] Commentators, too, have noticed the Court's recent move away from broad application of field preemption. *See* Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 Berkeley J. Emp. & Lab. L. 153, 160 (2012) ("Consistent with the emphasis on states' rights in modern Commerce Clause and Tenth Amendment cases, the Court has tended over the last fifteen years to narrow the availability of field preemption and obstacle preemption, absent clear evidence of Congressional intent." (footnote omitted)).

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[1] The court points out that the Supreme Court in *Kurns* still followed the arguably anachronistic preemption holding. But the Court's commitment to *stare decisis* is far stronger when it has issued an opinion on the merits than when the prior case is only a summary disposition. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180–81 (1979). So while *stare decisis* could have justified the result in *Kurns* (especially in a statutory case), the same might not be true were the Court to reevaluate *SeaPak*.

But *Machinists* preemption necessarily infers congressional intent from silence. As then-Justice Rehnquist put it, "[t]he entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 623 (1986) (Rehnquist, J., dissenting).

Despite this tension, the Court has given no indication that *Machinists* is in danger of being overruled. *See Brown*, 554 U.S. at 68–69. Yet the 2008 *Brown* decision, holding that a California law restricting certain speech about unions was preempted by the NLRA, relied in part on an express provision of the NLRA, Section 8(c), which "expressly precludes regulation of speech about unionization 'so long as the communications do not contain a threat of reprisal or force or promise of benefit.'" *Id.* at 68 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). The Court said the existence of Section 8(c) (codified at 29 U.S.C. § 158(c)) made that case "easier" than the typical NLRA preemption case "because it does not require us 'to decipher the presumed intent of Congress in the face of that body's steadfast silence.'" *Id.* (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 188 n.12 (1978)). And before *Brown*, the Court hadn't found a state law

preempted under *Machinists* since *Golden State* in 1986.[2]

So, while *Machinists* is certainly still good law, I would hesitate to extend it beyond its current boundaries. After all, even in the labor context, the Supreme Court is "reluctant to infer pre-emption." *Building & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993). "Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).

This leaves three main questions. First, can *SeaPak* be recast as a *Machinists* preemption case? If it cannot, can it be justified under modern general preemption doctrine? And if that does not work, must we still follow it simply because it is a merits decision of the Supreme Court and it has not been overruled? I will take these in turn.

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[2] In *Livadas v. Bradshaw*, 512 U.S. 107, 117 n.11 (1994), the Court mentioned *Machinists* preemption in a footnote, saying that in that particular case the difference between typical conflict preemption and *Machinists* was "entirely semantic, depending on whether Livadas's right is characterized as implicit in the structure of the Act (as was the right to self-help upheld in *Machinists*) or as rooted in the text of § 7."

A. *SeaPak* as a *Machinists* Case

The court contends that the *Machinists* preemption doctrine supports the *SeaPak* summary affirmance. It essentially seeks to recast *SeaPak* as a *Machinists* preemption case. Yet I cannot find any cases describing *SeaPak* this way.[3] On the other hand, courts have interpreted *SeaPak* as a general field preemption case (with no mention of *Machinists*). Most recently, the Sixth Circuit characterized *SeaPak* as holding that "[a]llowing dual regulation under federal and state law would undermine Congress's purposes and contravene field preemption." *United Auto., Aerospace, & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407, 421 (6th Cir. 2016). The court held that "[t]he analysis set forth in *SeaPak* is not conclusive, but it bears the Supreme Court's imprimatur and its authority remains essentially unchallenged by any conflicting case law authority." *Id.*; *see also United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167,

[3] The district court in *Georgia State AFL-CIO v. Olens*, 194 F. Supp. 3d 1322, 1330–31 n.5 (N.D. Ga. 2016), noted in a footnote that "[d]espite regulation determining the boundaries of bargaining in this regard, the NLRA left a window between revocable checkoff authorizations and irrevocable authorizations up to a year that would appear susceptible to a challenge under *Machinist* [sic] preemption as well." But the court did not characterize *SeaPak* as a *Machinists* case. Rather, it said that even putting *SeaPak* to one side, *Machinists* preemption might also apply.

1181–82 (D. Ariz. 2013) ("In finding that the Georgia statute was preempted, the trial judge appeared to rely on both conflict and field preemption.").

Further, the *SeaPak* district court failed to mention any cases that the Supreme Court relied on to establish the *Machinists* preemption doctrine seven years later. Instead, it discussed both conflict and field preemption. The court first concluded that the federal and state statutes were "completely at odds" and could not "coexist." *SeaPak*, 300 F. Supp. at 1200. This was plainly wrong, since Georgia's law requiring checkoff authorizations to be revocable at will did not violate federal law; it was possible to comply with both provisions. Second, the court found "[t]he area of checkoff of union dues has been federally occupied to such an extent under [Section 302] that no room remains for state regulation in the same field." *Id.* For support, the court noted that the original version of the legislation in the House would have made it an unfair labor practice for checkoff authorizations to be irrevocable for more than 30 days, but a Senate amendment removed that provision. *Id.* The court rhetorically asked whether, if the legislation had included the original House version of the checkoff restriction, it would "have amounted to a clear Congressional mandate governing deduction of union dues in every state?" *Id.* Of course, it would have, so the court said it couldn't "be persuaded that Federal preemption fails merely because Congress saw fit to adopt a less liberal power of revocation and then incorporated it in a proviso." *Id.* Such an analysis is

not comparable to *Machinists* preemption, but to anachronistic field preemption cases that have fallen out of favor in recent years. I would conclude that *SeaPak* was decided as a general field preemption case.[4]

Even so, leaving *SeaPak* to one side, does *Machinists* require preemption of the Wisconsin regulation here? Admittedly, "congressional intent to shield a zone of activity from regulation is usually found only 'implicit[ly] in the structure of the Act[.]'" *Brown*, 554 U.S. at 68 (quoting *Livadas*, 512 U.S. at 117 n.11). This means that States cannot legislate on top of the protections of Section 7 of the NLRA or the prohibitions of Section 8, on the theory that Congress intended everything else to be left to bargaining. *See Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994); *520 S. Mich. Ave.*, 549 F.3d at 1125–26.

Had Congress included the language of Section 302(c)(4) of Taft-Hartley alongside the prohibitions of Section 8 of the NLRA, I might be persuaded that the rationale of *Machinists* required preemption of state regulations mandating shorter periods of irrevocability for checkoffs. Yet, that is not what happened. Instead, the language appears as an

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[4] Nothing in the question presented or the limited briefing available from the *SeaPak* appeals demonstrates that the Fifth Circuit or the Supreme Court considered *Machinists*-like arguments either.

exception to a criminal law otherwise barring employers from giving anything of value to unions.[5] 29 U.S.C. § 186(a). And as Wisconsin points out, the Department of Justice, not the NLRB, enforces Section 302's criminal prohibition. Section 302(c)(4)'s position as a safe-harbor exception to a criminal law, rather than as a regulation of the collective bargaining process under Sections 7 and 8 of the NLRA, counsels against a finding of preemption. Moreover, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress intended to grant unions an affirmative right to bargain for checkoff agreements irrevocable for a year, it seems highly unlikely it would have placed the language of Section 302(c)(4) in a "provided that" clause of an exception to an anti-bribery statute. *Cf. City of Chicago v. Sessions*, 888 F.3d 272, 285 (7th Cir. 2018) (noting

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[5] The court says that Section 302(c)(4)'s placement as a criminal law, rather than, say, an unfair labor practice prohibited under Section 8 of the NLRA, simply means that Congress was really committed to the issue. Surely, Congress was concerned with the extended irrevocability of checkoff agreements. But Section 302 is primarily a prohibition of employer payments to unions, not a regulation of the collective bargaining process. Checkoffs are only permitted in the first instance as an exception to this general rule, and generally because they are convenient. The structure of the section thus indicates that Congress likely intended simply to place a limit, for the benefit of employees, on its allowance of checkoff agreements. I do not believe we can infer preemption from such a statutory structure.

that "[a] clause in a catch-all provision at the end of a list of explicit powers would be an odd place indeed to put a sweeping power to impose *any* conditions on *any* grants").

Further cutting against *Machinists* preemption is that dues checkoff is "designed as a provision for the administrative convenience in the collection of union dues." *NLRB v. Atlanta Printing Specialties and Paper Prods. Union 527, AFL-CIO*, 523 F.2d 783, 786 (5th Cir. 1975). As the Fifth Circuit explained, "Section 302 generally prohibits payments from employers to unions, in order to prevent corruption, but Subsection (c)(4) makes an exception for dues deductions, provided that the employee gives voluntary written consent. The emphasis is on protection of the employee, not the union." *Id.* The same is true of the one year limit on irrevocability. If Section 302(c)(4) grants rights to anyone (and it does not appear to do so), it is the employee, who is entitled to exercise his or her free choice to revoke checkoff agreements. *See id.* at 786–87; *Felter v. S. Pac. Co.*, 359 U.S. 326, 333 (1959) (limitations on checkoff agreements are a matter of the "employee's freedom of decision"). In light of this, I cannot agree that Section 302(c)(4) grants *unions* the right to bargain for one year of irrevocability. Nor can I conclude that Congress, in permitting limited checkoff agreements for convenience, intended to prevent the States from further preserving an employee's right to freedom of choice.

As this case demonstrates, the revocability of dues checkoff agreements can pit an individual employee, who desires to revoke her checkoff authorization, against the union, which would prefer to receive automatic dues for the remainder of the agreement. That this case is about employee freedom *from* the union substantially distinguishes it from the typical *Machinists* case dealing with "Congress' intentional balance between the power of management and labor to further their respective interests by use of their respective economic weapons." *Cannon*, 33 F.3d at 885. While management and labor may bargain over the existence and terms of checkoff agreements, neither side adequately represents the freedom of employees to revoke their agreements. It is in the union's interest to procure the maximum irrevocability period allowed under the law, not to bargain for the best interests of its members. Simply put, this case does not involve the same type of regulation of collective bargaining that has justified *Machinists* preemption in the past.

Lastly, the court says that the Supreme Court reached the "same conclusion" as *SeaPak* in *Felter*, but I do not see how *Felter* helps the court. That case was about whether, under the Railway Labor Act's checkoff provision, a union could require an employee to submit his revocation on a particular form furnished by the union. The provision at issue stated that no checkoff agreement "shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to

the labor organization … which shall be revocable in writing after the expiration of one year… ." *Id.* at 327. The Supreme Court held that Congress intended employees to be able to freely revoke their agreements after the year was up. It saw "no authority given by the Act to carriers and labor organizations to restrict the employee's individual freedom of decision" in collective bargaining. *Id.* at 333.

Felter was not a preemption case. It simply interpreted the terms of a particular statute that granted a limited authority to labor and management to bargain for checkoff agreements, subject to each employee's ability to revoke his agreement after a year. To be sure, the Supreme Court held that labor and management could not bargain for additional requirements beyond "a written assignment," but it said so because it interpreted the statute as preserving employee freedom. The up-to-one-year provision in Section 302(c)(4) is similar in that it protects employees from certain bargaining decisions. In some ways, that makes these provisions *counter-examples* for *Machinists* preemption. Rather than reserving a zone of freedom for bargaining, the statutes in *Felter* and here reserve a zone of freedom for employee choice. I cannot conclude that *Machinists* precludes States from expanding that zone.

In sum, I conclude that the Wisconsin law is not preempted under *Machinists*.[6] Therefore, I must continue to determine whether the *SeaPak* district court's general preemption conclusions are still binding on us today.

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[6] The court also suggests that the Wisconsin law might be preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In *Garmon*, "the Court held that '[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.'" *NLRB v. State of Ill. Dep't of Emp't Sec.*, 988 F.2d 735, 738 (7th Cir. 1993) (quoting *Garmon*, 359 U.S. at 245). This case does not concern activity even arguably protected by Section 7 or prohibited by Section 8 of the NLRA. Moreover, *Garmon* preemption "seeks to protect the NLRB's primary jurisdiction in cases involving sections 7 and 8 of the NLRA." *520 S. Mich. Ave.*, 549 F.3d at 1125. But the NLRB has no jurisdiction here; it does not enforce Section 302 of the Taft-Hartley Act.

Further, I would not consider a checkoff agreement to be a wage-related term of employment under Section 8(a)(5) of the NLRA. A checkoff is a device of convenience that allows an employee to more easily pay union dues. It has no effect on the employee's wages or work conditions. Even where the union and management bargain for the existence of checkoffs, employees need not take advantage of them. It is hard to see how a voluntary agreement to pay union dues out of one's paycheck would constitute a term of employment at all.

For these reasons, I would conclude that *Garmon* preemption is inapplicable.

B. *SeaPak* under Modern General Preemption Doctrine

Can *SeaPak* withstand scrutiny under modern preemption doctrine? First, a quick review of general implied preemption. It "comes in two types: (1) field preemption, which arises when the federal regulatory scheme is so pervasive or the federal interest so dominant that it may be inferred that Congress intended to occupy the entire legislative field; and (2) conflict preemption, which arises when state law conflicts with federal law to the extent that 'compliance with both federal and state regulations is a physical impossibility,' or the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Planned Parenthood of Ind., Inc., v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 984 (7th Cir. 2012) (quoting *Arizona*, 567 U.S. at 399). So we have three types of preemption: field preemption and two species of conflict preemption known as impossibility and obstacle preemption. Importantly, preemption analysis "begins with a presumption *against* preemption and focuses first on the text of the statute." *Id*.

Impossibility preemption applies only where it is actually "impossible for a private party to comply with both the state and federal law." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013). Although the *SeaPak* district court said that the federal and state statutes in that case were

"completely at odds" and could not "coexist," *SeaPak*, 300 F. Supp. at 1200, it was plainly wrong. Like the revocable-at-will provision at issue in *SeaPak*, the 30-day irrevocability period now mandated by Wisconsin law does not violate federal law. Federal law makes an employer payment to a union under a checkoff agreement a crime only if such agreement is irrevocable for more than one year. The 30-day Wisconsin period falls within the safe-harbor exception granted by Section 302(c)(4) of the Taft-Hartley Act. Since a 30-day irrevocability period complies with both state and federal law, *SeaPak* cannot be justified under impossibility preemption.[7]

Regarding obstacle preemption, the *SeaPak* district court attempted to ascertain the purpose behind Section 302(c)(4), noting that Senate debate revealed "deep concern about checkoffs and the period during which they may be irrevocable." *Id.* The court theorized that "Congress 'was not indifferent to that subject, but on the contrary, was so vitally interested therein, that it established certain conditions precedent which an employer must meet before he may 'check-off' membership dues.'" *Id.* (quoting *State v. Montgomery Ward & Co.*, 233 P.2d 685, 688 (Utah 1951)). That finding was enough for the district court

[7] The text of Section 8 of the NLRA provides no indication that a 30-day period of irrevocability would constitute an unfair labor practice under federal law, so I do not see how the NLRB could possibly sanction any private parties for complying with Wisconsin law.

to hold Georgia's checkoff restriction preempted for creating an obstacle to the enforcement of federal law.

This analysis was questionable in 1969, but it is totally untenable today. As I noted above, today's "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 563 U.S. at 607 (quoting *Gade*, 505 U.S. at 111 ((Kennedy, J., concurring in part and concurring in the judgment)). Looking to the text and structure of the law, and keeping in mind the presumption *against* preemption, I would conclude that obstacle preemption is inapplicable here. That is for much the same reason that I have already concluded *Machinists* is inapplicable, although the finding comes easier in the general preemption context since we need not worry about the inferences drawn from congressional silence that permeate *Machinists* cases. In short, nothing in the text of the NLRA, Taft-Hartley generally, or Section 302(c)(4) specifically indicates any federal objective that would be frustrated by Wisconsin's regulation.

Finally, we have general field preemption. In its most sweeping conclusion, the *SeaPak* district court declared that "[t]he area of checkoff of union dues has been federally occupied to such an extent under [Section 302] that no room remains for state regulation in the same field." *SeaPak*, 300 F. Supp. at

1200. It reached this conclusion relying entirely on legislative history. *See supra* at 9. But, as discussed above, "recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it." *Kurns*, 565 U.S. at 640–41 (Sotomayor, J., concurring in part and dissenting in part) (quoting *Camps Newfound/Owatonna*, 520 U.S. at 617 (Thomas, J., dissenting)). The preemption theory the *SeaPak* district court advanced was entirely atextual, based instead on words Congress *rejected*. *SeaPak*, 300 F. Supp. at 1200. While such cavalier use of legislative history to determine congressional intent was commonplace at the time, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (where the *legislative history* is ambiguous, courts should look to the *statute* to determine legislative intent), it has thankfully fallen out of favor, *see Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 536 (2004) (even though a statute was "awkward" and "ungrammatical," it was not ambiguous and so the Court could not consult legislative history). No court today would find that Congress intended to occupy an entire field based on language that failed to make it into the final bill.

Writing on a clean slate, I would conclude that Wisconsin should be permitted to enforce its limitation on dues checkoff agreements. Nevertheless, I recognize that the Supreme Court's summary disposition in *SeaPak* retains some precedential force. Thus, the final question is whether, even assuming *SeaPak* was wrongly decided, we should still follow it.

C. Is *SeaPak* Still Binding?

Unlike a denial of certiorari, a summary disposition of the Supreme Court is a decision on the merits of a case. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Therefore, "unless and until the Supreme Court should instruct otherwise," inferior courts should treat summary dispositions as binding "except when doctrinal developments indicate otherwise." *Id.* (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)).[8] Not surprisingly, the scope of that "doctrinal developments" exception has been the subject of significant debate.

In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), this court considered the constitutionality of the marriage laws of Indiana and Wisconsin. We confronted the Supreme Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), which had dismissed an appeal from a same-sex couple challenging Minnesota's marriage laws "for want of a substantial federal question." That decision was no longer binding on the lower courts, we said, because

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[8] As I noted above, the Supreme Court has said "that summary affirmances have considerably less precedential value than an opinion on the merits." *Socialist Workers Party*, 440 U.S. at 180–81. However, this appears to apply only to the *Supreme Court's* decisions whether to overrule its own cases. As a lower court, we are bound by summary affirmances unless the *Hicks* doctrinal developments exception applies.

subsequent doctrinal developments in cases like *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), "make clear that *Baker* is no longer authoritative." *Baskin*, 766 F.3d at 660. We so concluded even though none of those cases had questioned *Baker*'s conclusion that no federal constitutional right to same-sex marriage existed. Indeed, on the same day it decided *Windsor*, the Supreme Court also ruled in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), that it lacked jurisdiction to address the marriage question. *See also Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*." (emphasis added)). The Court ultimately addressed that question in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), but we didn't think it necessary to wait for the Court to overrule its summary disposition in *Baker* before we invalidated the Indiana and Wisconsin laws.[9]

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[9] Not everyone shares our willingness to "jump the gun" on "overruling" the Supreme Court's supposedly "outdated" cases. In the same marriage context, the Sixth Circuit insisted that *Baker* was still binding on lower courts. Judge Sutton wrote that circuit courts may only "ignore a Supreme Court decision" in two circumstances: "when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*)." *DeBoer v. Snyder*, 772 F.3d 388, 401

If we were willing to discard *Baker* in light of these cases, the same should apply here. As I have demonstrated, the Supreme Court's preemption jurisprudence has evolved significantly since *SeaPak*. The Court is now much more sensitive to federalism concerns and far less likely to imply preemption from ambiguous statutes or legislative history. The *SeaPak* district court's analysis perhaps made some sense in 1969, but it cannot stand alongside modern preemption doctrine. Therefore, under *Baskin*, I would no longer regard it as binding.

III. Conclusion

Wisconsin has challenged a decades-old Supreme Court summary affirmance preventing it from legislating to provide employees additional freedom to revoke agreements to check off union dues from their paychecks. I conclude that the precedential value of that case, *SeaPak v. Industrial, Technical & Professional Employees*, 400 U.S. 985 (1971) (mem.),

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(6th Cir. 2014), *rev'd on other grounds sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In his view, "[a]ny other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court." *Id.*

I am sympathetic to Judge Sutton's narrower approach to the *Hicks* exception, but *Baskin* remains the law in our circuit. If it were otherwise, this dissent would take the form of an opinion concurring in the judgment.

has been so eroded by changes to preemption doctrine that we should no longer follow it. The court, perhaps sensing that *SeaPak* is on weak ground under general preemption principles, mostly defends it as an early application of labor-specific *Machinists* preemption. But not only was *SeaPak* not a *Machinists* case, *Machinists* is inapplicable to the Wisconsin law as a matter of first impression. Nor can the result be justified under modern preemption doctrine, which grants the States far more latitude to legislate alongside federal law than they once had.

I do not lightly recommend declining to follow Supreme Court precedent. But the *SeaPak* decision cannot stand up to scrutiny under today's preemption doctrines. I am convinced that a court deciding this case today, writing on a clean slate, would find Wisconsin's law not preempted. The changes to preemption doctrine have been so significant that we need no longer follow *SeaPak*. Therefore, Wisconsin should be permitted to enforce its limitation on dues checkoff provisions.

I respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 10 AND LOCAL LODGE 873,

Plaintiffs,

v.

AMENDED
OPINION AND ORDER

16-cv-77-wmc

RAY ALLEN AND JAMES R. SCOTT,

Defendants.

Plaintiffs International Association of Machinists District 10 ("District 10") and its Local Lodge 873 filed this lawsuit under 42 U.S.C. § 1983, challenging a single provision of Wisconsin's "Right to Work" law, Section 9 of 2015 Wisconsin Act 1, that prohibits "dues checkoff authorizations" unless revocable upon 30 days' notice by an employee. Wis. Stat. § 111.06(1)(i). Plaintiffs maintain that this prohibition is preempted by § 302(c)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(4), which permits dues checkoff authorizations that are irrevocable for up to one year. Plaintiffs seek

declaratory and injunctive relief against Ray Allen, Secretary of the Wisconsin Department of Workforce Development ("DWD"), and James Scott, Chairman of the Wisconsin Employment Relations Commission.

Before the court are the parties' cross motions for summary judgment. All of the material facts are undisputed and the parties agree that this case turns on whether Wisconsin's restriction on dues checkoff agreements is preempted by federal law. The outcome of this case is controlled by *SeaPak v. Indus., Tech. & Prof'l Emp., Div. of Nat'l Mar. Union, AFL-CIO*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd sub nom.* 423 F.2d 1229 (5th Cir. 1970), *aff'd sub nom.* 400 U.S. 985 (1971), which held that a very similar Georgia law making checkoff authorizations revocable at will was not compatible with the LMRA's allowance for irrevocable authorizations not to exceed one year. Accordingly, the court will grant plaintiffs' motion for summary judgment, enter an order declaring Wis. Stat. § 111.06(1)(i) to be unconstitutional, and permanently enjoin defendants from enforcing it absent a change in federal law.

UNDISPUTED FACTS[1]

International Association of Machinists District 10 ("District 10") is a labor organization located in

[1] The following undisputed facts are drawn from the parties' proposed statements of fact and responses.

Milwaukee, Wisconsin, and is composed of approximately 30 "Lodges," including Local 873, which represents employees at the John Deere plant in Horicon, Wisconsin. In that capacity, Local 873 is party to a collective bargaining agreement with John Deere, which became effective October 1, 2015, and continues through October 1, 2022.

Among the employees the union represented in negotiating the collective bargaining agreement is Lisa Aplin, who works as an assembler at John Deere. In November 2002, Aplin signed a "dues checkoff authorization" for the deduction of union dues from her wages, which the parties agree continued in effect under the 2015 collective bargaining agreement. In relevant part, the authorization states that it:

> shall be irrevocable for one (1) year or until the termination of the collective bargaining agreement between my Employer and the Union, whichever occurs sooner. I agree that this authorization shall be automatically renewed for successive 1-year periods or until the termination of the collective bargaining agreement, whichever is the lesser, unless I revoke it by giving written notice to me Employer and Union not more than twenty (20) and not less than five (5) days prior to the expiration of the appropriate yearly period or contract term.

(Dkt. #1-8.)

On July 31, 2015, however, Aplin sent a letter to John Deere stating that she no longer wished to pay union dues. Invoking 2015 Wisconsin Act 1, Aplin's letter explained that she was now allowed to terminate her dues checkoff authorization on 30 days' written notice, rather than having to wait until the end of the year of the authorization's life. On or about September 11, 2015, however, District 10 advised Aplin that her request would not be granted because it was not presented during the narrow, 15-day window leading up to the annual contract renewal.

After receiving the union's letter, Aplin filed a complaint with the Labor Standards division of the DWD, alleging that "union dues were taken out after opting out of the union." On November 12, 2015, an investigator from DWD's Labor Standards Division issued a decision finding that the dues taken from Aplin's paycheck after she submitted her withdrawal were "unauthorized and illegal."

> Under Wisconsin Statute 111.06(1)(i) such a deduction is illegal unless you have the employee's signed authorization to make the deduction and the authorization is terminable by the employee giving the employer at least 30 days' written notice of the termination. The changes to Wisconsin Statute 111.06(1)(i) required the 30 day termination notice period were enacted as of March 10, 2015 and were certainly in effect as of July 1, 2015 when the Labor Agreement between the employer and union was modified and extended.

> The Complainant provided the employer with written notice that she no longer wished to pay union dues or any fees on July 31, 2015. In accordance with Wisconsin Statute 111.06(1)(i) any union dues or fees deductions taken after the 30 day notice period, August 30, 2015, are considered unauthorized and illegal deductions from wages earned. Under Wisconsin Statute 109 the wages Ms. Aplin earned are due and payable.

(Dkt. #1-12.) John Deere subsequently reimbursed Aplin for the union dues deducted from her check. District 10 and Local 873 then filed this lawsuit.

After this suit was filed, the DWD received a second labor standards complaint from a member of the United Food and Commercial Workers union, stating that the member wished to revoke his dues checkoff authorization upon 30 days' notice. Like Aplin, the member had signed a checkoff authorization that continued on a year to year basis. In response to the complaint, counsel for the member's employer argued that Wis. Stat. § 111.06(1)(i) was preempted by federal law. In a written decision on July 28, 2016, the DWD stated that the issue of preemption "has not yet been litigated in Wisconsin courts," and that because "[t]he Department cannot determine that the law is preempted, [it] must enforce the statute in its current form." Therefore, the DWD again concluded that Wis.

Stat. § 111.06(1)(i) prohibited any dues checkoff authorization that was not terminable by the employee on 30 days written notice.

OPINION

The sole question before the court is whether Section 9 of Wisconsin Act 1, Wis. Stat. § 111.06(1)(i), which classifies dues checkoff authorizations as an "unfair labor practice" unless they are terminable by the employee on 30 days' written notice, is preempted by the LMRA. The LMRA prohibits employers from paying money to a labor union, 29 U.S.C. § 186(a), with certain express exceptions. Relevant here, § 186(c)(4) expressly permits employers to deduct union membership dues from the wages of an employee pursuant to an employee's written assignment, so long as the deductions are not "irrevocable [by the employee] for a period of more than one year."

A. Preemption Arguments

Plaintiffs argue that Wis. Stat. § 111.06(1)(i) is preempted by 29 U.S.C. § 186 under the doctrines of field and conflict preemption. With respect to field preemption, plaintiffs argue that the NLRA (as amended by the LMRA) occupies the field of labor regulation, with state regulation being largely limited to regulating "union security agreements" under § 14(b) of the NLRA. *See Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 272, 286 (1986)

("It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations."); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits, which includes subjects of mandatory bargaining such as dues checkoff). Because dues checkoff provisions are not "union security agreements," plaintiffs argue, they fall outside the states' authority to regulate. *See NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, AFL–CIO, 523 F.2d 783, 787 (5th Cir. 1985) ("It is clear that the dues checkoff provisions are not union security devices but are intended to be an area of voluntary choice for the employee.") As for conflict preemption, plaintiffs argue that Wis. Stat. § 111.06(1)(i)'s requirement that checkoff authorizations are terminable upon 30-days' notice directly conflicts with 29 U.S.C. § 186(c)(4), because the federal law expressly permits unions to bargain for dues checkoffs that are irrevocable for one year.

For their part, defendants disagree that Wis. Stat. 111.06(1)(i) is preempted under either conflict or field preemption. They argue that federal law does *not* occupy the field of dues checkoff provisions, as such provisions are essentially union security agreements that result in compulsory membership in a union. Defendants further argue that there is no conflict between Wisconsin and federal law, as employers and unions can fully comply with both by only using dues

checkoff agreements that are revocable upon 30 days' notice by an employee.

B. The Supreme Court's Controlling *SeaPak* Decision

Although both sides present well-reasoned arguments, the court concludes that this case is relatively straightforward, since its resolution is controlled by the United States Supreme Court's decision in *SeaPak v. Indus., Tech. & Prof'l Emp., Div. of Nat'l Mar. Union, AFL-CIO*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd sub nom.* 423 F.2d 1229 (5th Cir. 1970), *aff'd sub nom.* 400 U.S. 985 (1971). In *SeaPak*, the district court determined that a similar Georgia state statute regulating duration of dues checkoff agreements was preempted by federal labor law. Specifically, the court held that § 302(c) of the LMRA regulates dues checkoffs and that the Georgia law, which required dues checkoff agreements to be revocable at will, was "completely at odds" with the LMRA's allowing irrevocable authorizations not to exceed one year. *Id.* at 1200. The Fifth Circuit affirmed in a *per curiam* decision, stating that it was adopting "the opinion of the district court." Without discussion, the Supreme Court likewise summarily affirmed. *Id.*

Because *SeaPak* was affirmed by the Supreme Court and has not been overruled by any subsequent Supreme Court decision, this court is bound by it. *See Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir. 1988)

("At the risk of restating the obvious, we note that a lower court must follow a relevant Supreme Court decision," further noting that "only the Supreme Court may overrule one of its own precedents."). This is true even though *SeaPak* was affirmed without discussion in a summary disposition by the Supreme Court. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (explaining that "lower courts are bound by summary decisions" of the Supreme Court and noting that "votes to affirm summarily . . . are votes on the merits of a case"). Indeed, under *Hicks*, this court is bound by *SeaPak* decision with respect to any issues "presented and necessarily decided" by the district court. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (clarifying rule in *Hicks*).[2]

Although defendants concede that *SeaPak* has not been expressly overruled by any subsequent Supreme Court decision, they make several arguments as to why this court is not bound by it. None is persuasive. First, defendants argue that the issues decided in *SeaPak* are distinguishable from those here. Specifically, they argue that the district court's *SeaPak* decision relied solely on the doctrine of "conflict preemption" in deciding that the Georgia statute was preempted by federal law. Thus,

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[2] At the same time, the court is not bound by any discussion of issues that "merely lurk[ed] in the record" of *SeaPak*, but were not necessarily decided by the court. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979).

defendants argue, this court is not bound by any findings or conclusions the district court made regarding *field* preemption.

Defendants are mistaken. The district court's decision in *SeaPak* expressly discusses and relies on *both* conflict and field preemption. With respect to conflict preemption, the court found that, "[t]he two statutory provisions are completely at odds. One or the other must give way. They cannot co-exist." *Id.* at 1200. But the court also applied the doctrine of field preemption. The plaintiff's position in *SeaPak* was that Congress had "preempted the field" of dues checkoff agreements, while the state took the position that § 14(b) of the LMRA allowed the state to regulate dues checkoffs. *SeaPak,* 300 F. Supp. at 1198. The court ultimately agreed with the plaintiff, concluding that the NLRA occupied the field of dues checkoff agreements. In particular, the court held that "[t]he area of checkoff of union dues has been federally occupied to such an extent under 301 that no room remains for state regulation in the same field." *Id.*

The jurisdiction statement filed with the Supreme Court likewise confirms that both field and conflict preemption were at issue in *SeaPak*. Indeed, that statement actually includes the quotations above from the district court regarding conflict and field preemption, and identifies the "Questions Presented" as including elements of both conflict (Question 1) and field (Question 2) preemption. *See SeaPak*, No. 70-463, 1970 WL 136846 (jurisdictional statement); *see*

also Lecates v. Justice of Peace Court No. 4 of State of Del., 637 F.2d 898, 905 (3d Cir. 1980) (explaining that it is appropriate to examine facts and jurisdictional statement of case decided by summary disposition to determine whether it was dispositive of issues in a subsequent case). In short, the summary affirmance of the district court's decision in *SeaPak* was a decision on the merits of the *same* issues raised in this case: whether a state law restricting the duration of dues checkoff authorizations is preempted by federal law under the doctrines of conflict *and* field preemption. Those issues having been presented and decided by the Supreme Court, the *SeaPak* decision controls this case as well.

Defendants' next argument is that this court is not bound by *SeaPak* because "subsequent doctrinal developments" undermine that decision. (*See Dfts.' Br.*, dkt. #38, at 20, 25). While a summary disposition may have reduced precedential value if subsequent cases "make clear that [the summary disposition] is no longer authoritative," *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir. 2014), defendants have pointed to no doctrinal developments that "make clear" *SeaPak* is no longer controlling.

For example, defendants point to no significant doctrinal developments that undermine the *SeaPak*'s conclusion that the NLRA occupies the field of dues checkoff authorizations. Rather, defendants rely on case law and legal principles that existed *prior* to *SeaPak*, citing cases such as *NLRB v. Gen. Motors*

Corp., 373 U.S. 734 (1963) and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746 (1963). Not only did those decisions pre-date *SeaPak,* but both of those cases were cited and distinguished in the *SeaPak* decision as not directly addressing the issue of dues checkoff authorizations. *See SeaPak*, 300 F. Supp. at 1199. The *SeaPak* court instead determined that § 14(b) did not reach the issue of dues checkoffs. Likewise, the more recent cases cited by defendants that analyze § 14(b) do not discuss dues checkoff agreements, much less 29 U.S.C. § 186(c)(4) in particular, and thus, do not "make clear" that *SeaPak*'s discussion of field preemption with regard to dues checkoff agreements is no longer valid.

Defendants also cite no cases that directly undermine *SeaPak*'s analysis of conflict preemption. Defendants argue that subsequent case law has made clear conflict preemption exists only if it would be *impossible* for a party to comply with both state and federal requirements. *See PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013). Defendants argue that under this newer case law, there can be no conflict preemption in the present case because an employer *can* comply with both federal and state law concerning dues checkoff authorizations by simply limiting the irrevocability of dues checkoffs to 30 days or less.

Contrary to defendants' analysis, however, conflict preemption can exist regardless of whether

compliance with state and federal law is impossible, if the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Patriotic Veterans, Inc.*, 736 F.3d at 1049. This type of conflict preemption is also known as "purposes and objectives preemption." *Id.* The district court in *SeaPak* found that the Georgia state law requiring dues checkoffs to be revocable at will was "completely at odds" with § 302(c)(4) of the LMRA *because* that federal provision was enacted to expressly permit unions from bargaining for dues checkoff agreements that were irrevocable for up to one year. *See SeaPak*, 300 F. Supp. at 1200. In other words, a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. Defendants cite to *no* subsequent authority undermining *SeaPak*'s application of this type of conflict preemption.

For all these reasons, *SeaPak* remains controlling authority, absent a change in federal law or reversal by the Supreme Court. No court has overruled *SeaPak* or even concluded that *SeaPak* was wrongly decided, and defendants have pointed to no significant doctrinal developments that undermine the reasoning of *SeaPak*. To the contrary, lower courts have consistently followed *SeaPak* in finding that similar state laws regulating dues checkoff agreements are preempted by § 302 of the LMRA. *See, e.g., United Auto., Aerospace & Agric. Implement Workers of Am.*

Local 3047 v. Hardin Cty., Kentucky, 842 F.3d 407, 421 (6th Cir. 2016); *Georgia State AFL-CIO v. Olens*, No. 1:13- CV-03745, 2016 WL 3774071, at *6 (N.D. Ga. July 7, 2016); *Gen. Cable Indus. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 135*, No. 1:15-CV-81, 2016 WL 3365133, at *3 (N.D. Ind. June 17, 2016); *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167, 1182 (D. Ariz. 2013). Consistent with *SeaPak* and the numerous court decisions that have followed it, Wisconsin's law regulating dues checkoff agreements does not come within the § 14(b) exception to federal preemption, and it is preempted both because it overlaps with, and is in conflict with, federal regulation under the LMRA. Accordingly, this court concludes that Wis. Stat. § 111.06(1)(i) is preempted by § 302 of the LMRA, 29 U.S.C. § 186(c)(4).

C. Appropriate Relief

The only remaining question is the form of relief to which plaintiffs are entitled. Plaintiffs have requested declaratory and injunctive relief. The court concludes plaintiffs are entitled to a declaration that Section 9 of 2015 Wisconsin Act 1, Wis. Stat. § 111.06(1)(i), is unconstitutional under the Supremacy Clause of the United States Constitution as preempted by § 302 of the LMRA. Additionally, because that portion of the Act is unconstitutional, the court will enter an order permanently enjoining its enforcement. *See Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) ("The existence of a

continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.").

Defendants' argue that an injunction against the named defendants may not completely stop enforcement of the Act, but that argument provides no persuasive reason not to enter an injunction against the named defendants in this case. The record in this case shows that the Department of Workforce Development *is* the agency that has already been enforcing, at least indirectly, the preempted law. Additionally, as this court explained previously, the Wisconsin Employment Relations Commission is the agency actually charged with enforcing the law under Wis. Stat. § 111.07(1), and has taken the position that the state law is not preempted by federal law. Finally, although defendants argue that local district attorneys, who are not named defendants, could potentially try to enforce the state law via a criminal complaint, defendants have provided no evidence suggesting that there is even a remote possibility that a local district attorney would file a criminal complaint attempting to enforce a state law that has been declared unconstitutional by a federal court. Accordingly, the court concludes that entry of a permanent injunction is appropriate

ORDER

IT IS ORDERED that:

1. Defendants' motion for summary judgment (dkt. #37) is DENIED.

2. Plaintiffs' motion for summary judgment (dkt. #41) is GRANTED.

3. Section 9 of 2015 Wisconsin Act 1, codified as Wis. Stat. § 111.06(1)(i) is unconstitutional under the Supremacy Clause of the United States Constitution, as preempted by § 302 of the Labor Management Relations Act, codified as 29 U.S.C. § 86(c)(4).

4. Defendants are hereby permanently enjoined from enforcing Wis. Stat.§ 111.06(1)(i).

5. The clerk of court is directed to enter judgment accordingly and close this case.

Entered this 28th day of December, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX D

U.S. Const. art. VI, cl. 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

2015 Wis. Act 1, § 5, codified at *Wis. Stat. § 111.04(3)*

(3)(a) No person may require, as a condition of obtaining or continuing employment, an individual to do any of the following:

. . .

3. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

4. Pay to any 3rd party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

(b) This subsection applies to the extent permitted under federal law. If a provision of a contract violates this subsection, that provision is void.

29 U.S.C. § 164(b)

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 186(a) & (c)

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

. . .

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; . . .

(c) Exceptions

The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner . . . .

APPENDIX E

This is my 30 days' notice that I no longer wish to pay Union Dues or any fee's as a condition of my employment under 2015 Act 1.

Employee Name (Print): LISA APLIN

Employee Clock Number: MX04784

Date Signed: 7-31-15

Employee Signature: Lisa Aplin

2015 WISCONSIN ACT 1

Under the Act, a private sector employer may not enter into an all-union agreement with a labor organization.

In addition, the Act prohibits a person from requiring an individual to do any of the following as a condition of obtaining or continuing employment:

- Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization.
- Become or remain a member of a labor organization.
- Pay any dues, fees, assessment, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization.

- Pay to any third party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

This prohibition applies to the extent permitted under federal law. If a provision of a contract violates this prohibition, that provision is void. Anyone who violates this prohibition is guilty of a Class A misdemeanor. The penalty for a Class A misdemeanor is a fine up to $10,000 or imprisonment up to nine months, or both.

The Act also provides that an employee may terminate an authorization that allows the employer to deduct labor organization dues from the employee's earnings at any time, rather than at the end of any year of the authorization's life, but the employee must provide at least 30 days' written notice of the termination. This provision applies to the extent permitted under federal law. The Act also repeals the requirement that the employer notify the labor organization if the employer receives such a termination notice.

Lastly, the Act repeals the declaration of policy in subch. I of ch. 111, 2013 Stats.

Effective date: March 11, 2015. The act applies to a collective bargaining agreement containing provisions inconsistent with the Act upon the

renewal, modification, or extension of the agreement occurring on or after March 11, 2015. *Prepared by:* Jessica Karls-Ruplinger, Deputy Director, and Margit Kelley, Senior Staff Attorney.

Received by Mail Commission on 10 Aug 15.

APPENDIX F

District No. 10
International Association of Machinists and Aerospace Workers

1650 South 38th Street
Milwaukee, WI 53215-1726
email: iamawd10@sbcglobal.net

414-643-4334
877-235-6653
FAX: 414-643-4715

September 11, 2015

Lisa Aplin
Employee John Deere Horicon
W4417 Hwy. 33
Horicon, WI 53032

Dear Lisa,

We have received your 30 days' notice to resign from the Union and your request to cease dues check-

off. In compliance with your request we will instruct the Secretary-Treasurer of Local Lodge 873 to remove your name from the membership rolls. However, your request to stop dues check-off cannot be granted at this time.

At the time you authorized your dues check-off, you agreed that your authorization would be irrevocable for one (1) year or until the termination of the collective bargaining agreement between your employer and the union, whichever occurs sooner. Your checkoff authorization was signed on November 18, 2002. In compliance with your signed Check-off Authorization, it may be revoked by giving written notice to your employer and union not more than twenty (20) and not less than five (5) days prior to the expiration of the appropriate yearly period or contract term. In other words, you may renew your revocation request no more than twenty (20) days or less than five (5) days prior to November 18, 2015.

We are sorry to see you give up your rights as a union member. Employees sometimes forget that the wages, insurance coverage, vacation, holidays, grievance procedure, seniority rights and other benefits provided to them under the collective bargaining agreement were not offered as an act of generosity by the employer; they were negotiated on your behalf by the Union. Without the legal protection of the collective bargaining agreement, your employer would be free to change or even eliminate these benefits you receive.

All of these benefits are jeopardized without a strong union membership to protect them. By withdrawing from the Union, you are giving up the right to vote on contract proposals or participate in other union activities.

If you have any questions with regard to your decision, please do not hesitate to call me at any time. If you should decide to rejoin the Union in the future, please contact your committee person at any time and we will be happy to assist you.

Fraternally,

Benito Elizondo
Business Representative

BE:lee opelu#9 afl-cio

Copies emailed to: muffs.st@gmail.com; BrathBrianJ@JohnDeere.com

AFFILIATED LOCAL LODGES

Numbers 66, 78, 140, 510, 516, 873, 1061, 1260, 1266, 1367, 1377, 1406, 1516, 1564, 1845, 1855, 1862, 1916, 1947, 2053, 2054, 2073, 2269, 2560

APPENDIX G

AGREEMENT

THIS AGREEMENT made and entered this 1st day of July 2015 by and between the JOHN DEERE HORICON WORKS OF DEERE & COMPANY, Horicon, Wisconsin, hereinafter called the COMPANY and DISTRICT 10 AND ITS AFFILIATE LOCAL LODGE NO. 873 of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO hereinafter referred to as the UNION.

ARTICLE 1
MANAGEMENT

The management of the plant and the general operations thereof, the direction of the Company's working force, the affairs of the Company with reference to the operation of its business including the right to hire, transfer, discharge, and make reasonable shop rules, to suspend, promote or demote employees and the right to relieve employees within the bargaining unit from duty due to lack of work or other legitimate reasons subject to the provisions and conditions of this contract, are vested exclusively in the Company.

ARTICLE 2
RECOGNITION

The Company recognizes the Union as the exclusive collective bargaining representative of all production and maintenance employees employed at the John Deere Horicon Works of Deere & Company, Horicon, Wisconsin, as certified on 10 November 1955 in NLRB Consolidated Cases No. 13-RC-4521 and 4522 (as later modified by voluntary decertification by letter of December 1963 from the International Molders & Foundry Workers Union of North America and also 30UC34) excluding all salaried employees, office clerical employees, shop clerks, watchmen, guards, and supervisors as defined in the National Labor Relations Act.

ARTICLE 3
UNION SECURITY

Section 1. Union Membership

A. Any employee who is a member of the Union in good standing on the effective date of this Agreement shall, as a condition of employment, maintain his membership in the Union to the extent of paying membership dues uniformly levied against all Union members. Such employee may have his membership dues deducted from his earnings by signing an appropriate (as that term is defined by applicable law) form for "Authorization for Check-Off of Dues," or if no

such authorization is in effect, he must pay his membership dues directly to the Union.

B. Any employee who on the effective date of this Agreement is not a member of the Union shall on the 31st day after such date, or on the 31st day after transfer into the bargaining unit, whichever is later, as a condition of employment, become a member of the Union to the extent of paying membership dues uniformly levied against all Union members, and shall maintain his membership as provided in Section 1-A above.

C. Any employee hired on or after the effective date of this Agreement shall become a member of the Union after thirty (30) days, and he shall, as a condition of employment, maintain his membership in the Union to the extent of paying membership dues uniformly levied against all Union members.

D. The Union will furnish the Company within fifteen (15) days from the effective date of this Agreement, the names of all members paying dues direct to the Union.

E. Any dispute arising as to the employees' membership in the Union shall be processed through the grievance procedure and arbitration entering the grievance procedure in Step B of Article 13.

F. "Member of the Union" where used herein means any employee who is a member of the Union and is not more than sixty (60) days in arrears in the payment of Union dues specified herein.

G. Initiation fees for membership in the Union shall not exceed the maximum prescribed by the Constitution of the Union at the time the employee becomes a member.

Section 2. Check-Off of Union Membership Dues

A. During the life of the Agreement, the Company agrees to deduct Union membership dues levied by the Local Union in accordance with the Constitution and Bylaws of the Union from the pay of each employee who executes or has executed the "Authorization for Check-Off of Dues" form.

B. Deductions shall be made only in accordance with the provisions of said "Authorization for Check-Off of Dues," together with the provisions of this Section of the Agreement.

C. A properly executed copy of such Authorization for Check-Off of Dues form for each employee for whom Union membership dues are to be deducted hereunder, shall be delivered to the Company before any payroll deductions are made. Deductions shall be made thereafter, only under authorization for Check-Off of Dues forms which

have been properly executed and are in effect. Any Authorization for Check-Off of Dues which is incomplete or in error will be returned to the Union by the Company.

D. Check-Off deductions under all properly executed Authorization for Check-Off of Dues forms which have been delivered to the Company on or before the effective date of this Agreement, shall begin with the month following.

E. Thereafter on or before the fifteenth (15th) day of each month the Union shall deliver to the Company any executed Authorization for Check-Off of Dues forms under which Union membership dues are to be deducted beginning with the following calendar month. After receipt of the Authorization for Check-Off of Dues form, the Union membership dues for each succeeding calendar month shall be deducted from the employee's check for the first pay period in that month in which the employee has sufficient net earnings to cover the Union membership dues. In the event that membership dues other than those for the calendar month in which the deduction is made and initiation fees have become due end owing by an employee subsequent to the effective date of said employee's Authorization for Check-Off of Dues form, but prior to the first deduction by the Company thereunder, such membership dues and initiation fees will be deducted by the Company at the time it makes the first deduction

for membership dues. The Union will notify the Company in writing, when it makes delivery of Authorization for Check-Off of Dues forms prior to the 15th of each month, of the amount owing by employees who executed these forms.

F. In the case of employees rehired, or returning to work after layoff or leave of absence, or being transferred back into the bargaining unit, who previously have properly executed Authorization for Check-Off of Dues forms, deductions will be made for membership dues as provided herein.

G. In cases where a deduction is made which duplicates a payment already made to the Union by an employee, or where a deduction is not in conformity with the provisions of the Union Constitution and Bylaws, refunds to the employee will be made by the Union.

H. Dues deductions shall be remitted to the designated financial officer of the Local Union once each month within 15 days after the first regular pay day in the month. Any deductions made from subsequent payrolls in that month shall be included with the remittance for the following month. The Company shall furnish the designated financial officer of the Union, monthly, with a list of those for whom deductions have been made and the amount of such deductions.

I. Any temporary employee whose employment is terminated, or any employee who is transferred to a classification not in the bargaining unit, or any employee whose seniority is broken by death, quit, discharge, layoff, or sick leave of absence shall cease to be subject to the check-off deductions beginning with the month immediately following the month in which such termination or transfer occurred or seniority was thus broken. The Company will notify the Union following the end of each month of the names of such employees and will designate the reason each such employee ceased to be subject to the check-off.

J. In any such dispute, the employee involved shall be permitted to continue to work until the matter has been adjudicated.

K. The Company shall not be liable to the Union by reason of the requirements of this Section of the Agreement for the remittance or payment of any sum other than that constituting actual deductions made from employee wages earned.

Section 3. State Law

A. Certain provisions of Article 3 are in conflict with the laws of Wisconsin. These provisions will not be placed into effect until it is legally possible to do so under State and Federal laws. This possibility shall include a determination by responsible State authority that an agency shop is legal under

Wisconsin law. However, the Company will continue as it is now doing to deduct Union dues and initiation fees for employees having authorized such deductions.

B. Such payroll deductions of Union dues and initiation fees from the wages of employees within the bargaining unit shall commence with the first pay period of the first month following the calendar month in which the Company received the written notification and authorization of each employee to make such deductions.

C. All sums deducted, as provided above, shall be remitted to the Local Union Financial Secretary.

D. All new employees will be introduced to a union Officer or Committeemen on the 1st day of orientation, which will take no longer than 30 minutes. Such time will be paid by the company.

E. The company agrees with a stipulation that if State law should change within the period of this contract, the Union Security Clause will be reinstated using the language in Article 3 – Union Security of the current labor agreement (2010-2016)