No. 18-855

In The

Supreme Court of the United States

RAY ALLEN, SECRETARY, WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, ET AL.,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT TEN, ET AL.,

Respondents.

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

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AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF THE PETITIONERS

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Interest of Amicus

Amicus National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center")[1] is a nonprofit, public interest law firm established to provide legal resources to, and to be the voice for, small businesses in the nation's courts. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing its members in Washington, D.C. and all 50 states.

Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership ranges from sole proprietorships to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year.

The NFIB Legal Center frequently files amicus briefs in cases that affect its members. In the present case, *amicus* has an interest in promoting

[1] As required by Supreme Court rule 37.6, Amicus states as follows: No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel, made such a monetary contribution. Counsel of record received timely notice of intent to file this brief under Supreme Court rule 37.2 and consent has been given by all parties for this brief.

public policy that enables small business owners to recruit and retain skilled and motivated employees.

Summary of Argument

2015 Wisconsin Act 1 ("Act 1") protects employees by ending forced unionization. It renders illegal any agreement that conditions employment on "joining or assisting labor organizations", Wis. Stat. § 111.04(2) (2019).[2] It further protects workers who decline to join a union by providing that an employer may not deduct union dues from an employee's wages, unless the employee has signed an individual order instructing the employer to do so that is "terminable by the employee on 30 days written notice." Wis. Stat. § 111.06(1)(i) (2019) (Wisconsin's "dues check-off" law).

Prior to the enactment of Act 1, many employees were required to join a labor union to keep their jobs, even though they had no desire to associate with or support the union. With no choice but to be a union member, many of those employees opted for the administrative convenience of a dues check-off to pay their mandatory union dues. Following the passage of Act 1, employees in Wisconsin are no longer required to maintain union membership, and under the Wisconsin dues check-off law, they are able to terminate automatic dues payments to stop financially supporting a membership they no longer have.

[2] Citations in this brief are to the current version of the Wisconsin Statutes and the U.S. Code, neither state nor federal law has been amended since this case began.

However, as a result of the lower court decisions in this case, businesses, like those represented by *Amicus Curiae*, are being forced to take part of the wages earned by their employees, against the will of the employee, and send those wages as membership dues to a union to which the employee does not belong. The decisions in this case put Wisconsin employers in an impossible situation, and will do significant damage to the relationship between employers and employees, something that the State of Wisconsin had attempted to avoid with its dues check-off law.

Amicus urges this Court to grant the petition for certiorari and hear this case for two reasons. First, contrary to the lower court decisions in this case, Wisconsin's law is not preempted by federal law. Congress did not intend to preempt dues check-off laws like Wisconsin's. In fact, Wisconsin's law fits within and enhances Congress' intent to root out corruption in labor negotiations.

Second, this Court ought to grant the petition in order to clarify the rule for the application of summary affirmances by this Court in cases where the law has markedly changed since the time of this Court's summary affirmance. Here, the lower courts both relied on a summary affirmance by this Court of a 1969 decision from the Southern District of Georgia, *Sea Pak v. Industrial, Technical and Professional Emp., Division of National Maritime Union, AFL-CIO*, 300 F.Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1970), *aff'd* 400 U.S. 985 (1971) (Mem.). In fact, the Seventh

Circuit found *Sea Pak* to be dispositive in this case. But the district court's decision and rationale in *Sea Pak* is no longer good law. This Court should take this opportunity to provide greater clarity to litigants and courts alike as to how to work with summary affirmances and how to properly apply them in light of doctrinal advancements that render them void.

This Court should grant the petition for a writ of certiorari and hear this case.

Argument

I. Wisconsin's dues check-off law is not preempted by federal law

Courts begin a preemption analysis with a presumption that federal statutes do not preempt state law. *Bond v. U.S.*, 572 U.S. 844, 857-858 (2014). "In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress."" *Arizona v. U.S.*, 567 U.S. 387, 400 (2012) (citing *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

Nowhere in the Taft Hartley Act, 29 U.S.C. § 141-197, is there express preemption language. In fact, Taft Hartley expressly *authorizes* states, like Wisconsin, to enact laws allowing workers to refuse to join a union as a condition of employment. 29 U.S.C. § 164(b) (2019). Wisconsin's dues check-off law simply makes sure that once an individual employee exercises their right to terminate

membership in a union, they no longer are required to make payments for that non-existent membership.

With no express preemption contained in the statute, the only way Wisconsin's law could be preempted in this case is under "implied preemption." But under implied preemption, a state law should be sustained unless it conflicts with federal law or would frustrate the federal scheme (so-called "conflict" preemption), or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States (so-called "field" preemption). *520 South Michigan Ave. Associates v. Shannon*, 549 F.3d 1119, 1125 (7th Cir. 2013) (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Moreover, consistent with the presumption that federal laws do not preempt state laws, implicit preemption requires that courts find an unambiguous intent of Congress. "But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BFP v. Resolution Trust Corp*, 511 U.S. 531, 546 (1994).

Neither "field" nor "conflict" preemption applies in this case.

A. Field preemption does not apply

Wisconsin's law is not preempted under a "field preemption" theory. "Field preemption occurs when federal law occupies a "field" of regulation "so comprehensively that it has left no room for

supplementary state legislation.''' *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1480 (2018) (citing *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130 (1986)). This is not such a case. Under Taft-Hartley, supplementary state legislation such as that enacted by Wisconsin is explicitly permitted. 29 U.S.C. § 164(b) (2019).

Nor is Wisconsin's law preempted under the *Machinists* doctrine of "occupy the field" preemption. See *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). "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.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008) (citing *Machinists*, 427 U.S. at 140, n.4). But Wisconsin's law has nothing to do with union organization, collective bargaining or labor disputes.

Machinists preemption covers labor relations and labor negotiations, and bars inconsistent state laws that interfere with the balance struck by Congress in that field, but this case does not involve those subjects. "A dues-checkoff authorization is a contract between an employer and employee for payroll deductions." *International Association of Machinists District Ten and Lodge 873 v. Allen*, 904 F.3d 490, 492 (7th Cir. 2018). The union is not a party to the contract. The contract is for the *employee's* administrative benefit. As the Seventh Circuit noted in this case, a dues check-off is "a

convenient way for employees to pay their union dues." The Union twists that idea so that a dues check-off authorization is for the benefit of the union and to the detriment of the employee. But the Union's interpretation is both wrong and does not speak to *Machinists* preemption. An extremely long period of irrevocability of a dues check-off authorization may be favorable to unions (at the expense of the workers involved) but has little to do with the subjects covered by *Machinists* preemption.

There is no reason, under Taft-Hartley, why the states cannot strike a balance that favors employee freedom, versus union power, as Wisconsin has done. Wisconsin is simply saying that once a worker's membership in a union has been terminated, "dues" are by definition no longer "due." As discussed *infra*, it would be absurd for Congress to have left for states to decide whether employees can be forced to join a union, and then denied those same states the ability to enforce their choice by regulating a dues check-off.

Wisconsin's law is not preempted under a "field preemption" theory, and in fact, has been implicitly authorized by Congress.

B. Conflict preemption also does not apply

Wisconsin's law is also not preempted under a conflict preemption theory. A Court "must not give effect to state laws that conflict with federal laws." *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378, 1383 (2015) (citing *Gibbons v. Ogden,* 22 U.S. 1 (1824)) "Conflict pre-emption exists where

compliance with both state and federal law is impossible, or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1595 (2015) (citing *California v. ARC America Corp*, 490 U.S. 93, 100, 101 (1989)).

The state and federal laws in question here, while different, are *not* in conflict. Wisconsin's law provides that a dues check-off authorization must be terminable with at least thirty days' notice to an employer. Wis. Stat. §111.06(1)(i) (2019). The exemption to the federal anti-bribery statute which allows payments from an employer to a union, says that such agreements "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." 29 U.S.C § 186(c)(4) (2019).

The two laws do not conflict and this is not a situation where compliance with state law and federal law is impossible. In fact, a dues check-off agreement terminable with at least thirty days' notice, as provided for in Wisconsin's dues check-off law, complies with both state and federal law. Such agreements are explicitly allowed by the Wisconsin law, and are not "irrevocable for a period of more than one year" and, thus, also allowed under the federal law.

Where, as here, it is possible to comply with state and federal law, the state law cannot be preempted under a "conflict preemption" theory.

C. Wisconsin's law was authorized by federal law and fits within the federal scheme to enhance employee protections

Not only is Wisconsin's law not preempted by federal law, but it is explicitly authorized by it. Dues check-off agreements have become a workaround for unions to avoid state right to work laws. Wisconsin's law ends the work around. That is consistent with federal law.

1. Federal law authorizes a dues check-off regulation

The expansion of worker freedom through state right to work laws has been paralleled by court cases similarly expanding worker freedom.[3] In resisting the expansion of worker freedom (when it involves freedom from the union), unions see dues check-off authorizations which cannot be revoked for extended periods as one way to subvert right to work laws.[4]

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[3] *See, e.g.: Janus v. American Federation of State, Federal and County Employees*, 138 S.Ct. 2448, 2486 (2018) (Holding that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.")

[4] For an analysis of some of the tactics being used, *See* Washington Policy Center, *How to leave your union – Everything you need to know about the Janus right-to-work court decision.* June 1, 2018. Available at: https://www.washingtonpolicy.org/publications/detail/all-you-need-to-know-about-janus-v-afscme-and-right-to-work ("One tactic government unions are using is convincing workers to sign a document that contains tricky language buried in the

The use of dues check-off authorizations as a "workaround" for unions who disagree with congressionally authorized and state-enacted right to work laws makes those dues check-off authorizations themselves a form of union security agreement. It would be absurd to think Congress intended to authorize state laws that allow employees to refuse to join a union while simultaneously requiring those same employees to continue paying for memberships they just authorized them to terminate.

Wisconsin's law gives employees the ability to stop paying dues when they terminate membership in a union. In so doing, it closes a loophole that unions have attempted to utilize in order to work around state right to work laws. This Court should grant the petition for a writ of certiorari in order to close this loophole and protect the rights of employees.

2. Wisconsin's law enhances employee protections and protects the employer/employee relationship.

Wisconsin law also avoids driving a wedge between employees and employers when an employer is forced to withhold part of the employee's wages against the wishes of the employee.

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fine print that traps workers into paying the union regardless...")

Employers in Wisconsin, like many others around the country, are facing a significant workforce shortage. 76% of Wisconsin employers report having difficulty finding enough employees, with 61.5% saying labor availability is the top public policy issue facing Wisconsin.[5] The state's largest metropolitan area expects to see 100,000 jobs go unfilled over the next decade due to a lack of workers.[6] The same problems are felt in rural Wisconsin as well, where one local news agency reported "[m]any companies in the Northwoods know they could expand, except for one thing. There aren't enough skilled workers to go around."[7]

For employers in Wisconsin who are dealing with this significant workforce shortage, keeping their current staff becomes imperative. For many of those employers, 2015 Wisconsin Act 1 came as a blessing. No longer would they lose employees who did not want to join the union. Forced participation

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[5] Wisconsin Manufacturers & Commerce, *Despite Labor Shortage, Wisconsin Business Leaders Very Optimistic*. June 27, 2018. Available at: https://www.wmc.org/news/press-releases/despite-labor-shortage-wisconsin-business-leaders-very-optimistic/

[6] Dave Daley, "The Worker Shortage Paradox." Wisconsin Interest Magazine, Fall 2015. Page 8. Available at: https://www.badgerinstitute.org/WIInterest/Daleyrevisedfall2015.pdf

[7] News Watch 12, *'Definitely hurting for welders': the Northwoods shortage, and a Rhinelander company's effort to fill the void.* June 11, 2018. Available At: http://www.wjfw.com/storydetails/20180611174143/definitely_hurting_for_welders_the_northwoods_shortage_and_a_rhinelander_companys_effort_to_fill_the_void

in an oppressive dues check-off scheme does not help.

As a result of the lower courts' decisions in this case, employees who wish to exercise their rights under Wisconsin law are faced with only two options: to keep paying union dues (and effectively remain a member of a labor union) or quit their job and take their talents to another employer. This creates significant uncertainty, and essentially renders Act 1 moot for the first year that an employee exercises her rights.

Wisconsin employers are already struggling to recruit and retain employees. Forcing those employers to take duly earned wages from their employees, against their wishes, and transfer those wages to a labor union for membership dues for a membership that no longer exists creates an untenable situation.

A competent and motivated employee who wishes to terminate union membership immediately may simply choose to seek employment elsewhere rather than to be forced to continue to pay dues even after terminating their union membership. This will exacerbate an already existing workforce problem and make it more difficult for employers to retain quality employees.

This Court should grant the petition for a writ of certiorari in order to address this issue and the significant impacts it will have in Wisconsin and elsewhere.

II This case presents an opportunity for this Court to provide additional guidance on the application of summary affirmances

This case was decided by the lower courts based on the conclusion that this Court's summary affirmance in *Sea Pak* was dispositive. But the district court decision in *Sea Pak* that was summarily affirmed by this Court is no longer good law. As explained at length in the brief of the Petitioners, the decision and rationale of the district court has been overcome by doctrinal developments in preemption jurisprudence.

On one hand, this Court has been clear that "summary affirmances have considerably less precedential value than an opinion on the merits." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-181 (1979). On the other hand, this Court has also stated that summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). These two seemingly contradictory statements have led to some significant confusion as to the value to be accorded to the summary affirmance in *Sea Pak*. This is especially true given the doctrinal advancements over the past fifty years, which have called into question the underpinnings of that decision.

This case presents the Court with the opportunity to help further clarify how lower courts are to interpret and apply summary affirmances. Specifically, in cases such as this one (where a

summary affirmance has not yet been formally overturned and yet doctrinal advancements call into question its very underpinnings), this Court should direct lower courts to review the doctrinal advancements and to make a determination as to whether the summary affirmance is still valid law. Where, as here, the summary affirmance does not rest on solid ground, lower courts should be free to follow the more modern case law.

Such a clarification would be consistent with previous statements by this Court regarding summary affirmances. For example, a "summary affirmance is an affirmance of the judgment only," and "the rationale of the affirmance may not be gleaned solely from the opinion below." *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1801 (2015) (citing *Mandel v. Bradley*, 432 U.S. 173, 176 (1975)). Thus, the district court's judgment in *Sea Pak* may have been affirmed but its preemption analysis was not.

Moreover, in discussing summary affirmances Chief Justice Burger pointed out that "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., Concurring). This, of course, is consistent with how this Court considers its own merits decisions.

Indeed, just last year in *Janus v. American Federation of State, County and Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018) this Court

overturned a prior decision (*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)), citing as one of the rationales for overturning the prior decision being "that subsequent developments have eroded its underpinnings." *Janus*, 138 S.Ct. at 2496.

Like the above cases, it is time for *Sea Pak* to be overturned. The Petitioners have explained at length why the preemption analysis in *Sea Pak* is out dated. But the lower courts nevertheless found *Sea Pak* to be dispositive, and have found that based on that case, Wisconsin's law is preempted. Given the host of errors in the district court's decision, this is troubling and presents this Court with an opportunity to revisit the summary affirmance in *Sea Pak*.

Conclusion

For the reasons stated herein, *Amicus Curiae* respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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