No. 18-855

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

ARGUMENT

The Wisconsin Employment Peace Act regulates the payroll deduction of union dues by making it "an unfair labor practice for an employer . . . [t]o 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." Wis. Stat. § 111.06(1)(i). The Wisconsin Act applies to private sector employers who are covered by federal labor relations statutes that regulate the same conduct. *See* Wis. Stat. § 111.02(7).

Section 302(c)(4) of the Labor Management Relations Act permits "money [to be] deducted from the wages of employees in payment of membership dues in a labor organization" only when "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." 29 U.S.C. § 186(c)(4). "[T]he [National Labor Relations] Board has long held that employers and unions engage in unfair labor practices under Sections 8(a)(1)-(3) and 8(b)(1)(A) of the National Labor Relations Act if they check off union dues without an employee's valid authorization. And in examining whether employers and unions have committed unfair labor practices in that connection, the Board has interpret-

ed Section 302(c)(4)'s directive[s]." *Stewart v. NLRB*, 851 F.3d 21, 23 (D.C. Cir. 2017) (citation omitted).[1]

In an unbroken string of decisions stretching from *State v. Montgomery Ward & Co.*, 120 Utah 294, 233 P.2d 685 (1951), to the decision of the Seventh Circuit in this case, every court to have considered the question has concluded that the LMRA/NLRA regulation of the payroll deduction of union dues preempts state regulation. The basis for this conclusion was succinctly stated in an early decision:

> "Check-offs are regulated primarily by § 302 of the LMRA, which specifies the conditions necessary for a valid check-off, and provides for both injunctive and criminal penalties. Additionally, the National Labor Relations Board has authority to regulate check-offs under Section 8 of the [NLRA]. It thus appears that Congressional regulation of the area of check-offs is sufficiently pervasive and encompassing to pre-empt the force of [state law]." *Int'l Broth. of Operative Potters v. Tell City Chair Co.*, 295 F. Supp. 961, 965 (S.D. Ind. 1968) (citations omitted).

SeaPAK v. Industrial, Technical and Professional Employees, 300 F.Supp. 1197 (S.D. Ga. 1969)—which followed the holdings in *Montgomery Ward* and *Operative Potters*, *see id.* at 1198-1200—was summarily affirmed by this Court. *See* 400 U.S. 985 (1971).

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[1] Subchapter II of the Labor Management Relations Act, which comprises 29 U.S.C. §§ 151-169, is referred to as the "National Labor Relations Act." Section 8 of the National Labor Relations Act is codified at 29 U.S.C. § 158, and Section 14(b) of the Act is codified at 29 U.S.C. § 164(b). Section 302(c)(4), which is contained in subchapter IV of the Labor Management Relations Act, is codified at 29 U.S.C. § 186(c)(4). The entire Labor Management Relations Act of 1947 is often referred to as the Taft-Hartley Act.

The Petition for Certiorari half-heartedly challenges the premise that "the National Labor Relations Board has authority to regulate check-offs under [NLRA] Section 8," *Operative Potters*, 295 F.Supp. at 965, by asserting that "the Department of Justice, *not the NLRB*, has jurisdiction to enforce [LMRA] Section [302]." Pet. 32. It is true that the Department of Justice has sole authority to directly enforce Section 302, which is a criminal provision. But the NLRB has long held that it is an unfair labor practice under Section 8 for an employer "to deduct [union] dues from [employees'] pay" where "the employees did not furnish [the employer] with voluntary written authorizations for the checkoff." *Federal Stores*, 91 NLRB 647, 648-49 (1950). And, the Board treats Section 302(c)(4) as defining the nature of the required authorization and the right of employees to withdraw such authorization. *See, e.g., Atlanta Printing Specialties*, 215 NLRB 237, 237-38 & n.4 (1974), *enf'd*, 523 F.2d 783 (5th Cir. 1975). In fact, the NLRB is the forum most commonly charged with applying the requirements of Section 302(c)(4). *See Ohlendorf v. Local 876, Food & Commercial Workers*, 883 F.3d 636, 643 (6th Cir. 2018) (citing numerous cases in which employees have "file[d] a complaint with the National Labor Relations Board on the ground that a violation of § 302 . . . amounts to an unfair labor practice under the National Labor Relations Act").

Tacitly accepting the general proposition "that Congressional regulation of the area of check-offs is sufficiently pervasive and encompassing to pre-empt the force of [state law]," *Operative Potters*, 295 F. Supp. at 965, the Petition's principal argument is that "preemption . . . does not apply because of the force of Section [1]4(b)." Pet. 32, citing *id.* at 14-23. This argument founders on the text and the authoritative interpretation of Section 14(b).

Section 14(b) of the NLRA provides:

> "Nothing in this 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).

"[T]he agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [to § 8(a)(3)] are the same 'membership' agreements expressly placed within the reach of state law by § 14(b)." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963). As the Petition puts it, "Section [1]4(b) 'simply mirrors' Section []8" in this regard. Pet. 16, quoting *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 418 (1976).

The proviso to § 8(a)(3) of the NLRA allows "an employer [to] mak[e] an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C. § 158(a)(3). But a checkoff authorization to deduct union dues is something that "the employer has received from each employee, on whose account such deductions are made," 29 U.S.C. § 186(c)(4), and is *not* "an agreement" that "an employer . . . mak[es] with a labor organization," 29 U.S.C. § 158(a)(3). Nor may an employee be required to provide a checkoff authorization as a "condition of employment." *Ibid.*

In the first place, "a checkoff authorization is a contract between employer and employee." *Cameron Iron Works*, 235 NLRB 287, 289 (1978). Far from being "an [employer] agreement with a labor organization," 29 U.S.C. § 158(a)(3), the NLRB has held that it is an unfair labor practice for "an employer and union . . . by their subsequent agreement [to] change the terms

of this statutorily authorized contract without obtaining the employee's signature on a new authorization card reflecting the parties' agreement." *Cameron Iron Works*, 235 NLRB at 289.

Moreover, an employee cannot be required to sign a checkoff agreement as a "condition of employment." 29 U.S.C. § 158(a)(3). "[T]he fundamental basis for the checkoff is the voluntary consent of an employee." *NLRB v. Bhd. of Ry. Clerks*, 498 F.2d 1105, 1109 (5th Cir. 1974). Thus, "dues checkoff provisions are not union security devices but are intended to be an area of voluntary choice for the employee." *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 787 (5th Cir. 1975). *Accord Anheuser-Busch, Inc. v. Teamsters Local 822*, 584 F.2d 41, 43 (4th Cir. 1978). Precisely because "dues checkoff . . . does not, in and of itself, impose union membership or support as a condition required for continued employment, . . . matters concerning dues-checkoff authorization and labor agreements implementing such authorizations are exclusively within the domain of Federal law, having been preempted by the National Labor Relations Act and removed from the provision of Section 14(b) by the operation of Section 302." *Shen-Mar Food Prods., Inc.*, 221 NLRB 1329, 1330 (1976), *enf'd*, 557 F.2d 396 (4th Cir. 1977).

"[S]tate power, recognized by § 14(b), begins *only with the actual negotiation and execution of the type of agreement described by § 14(b)*." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 105 (1963). The voluntary "written assignment" that "the employer [must] receive[] from each employee, on whose account [dues] deductions are made," 29 U.S.C. § 186(c)(4), is clearly not "the type of agreement described by § 14(b)," *Schermerhorn*, 375 U.S. at 105 (emphasis omitted). "Absent such an agreement, conduct arguably an un-

fair labor practice would be a matter for the National Labor Relations Board," and beyond the "state power[] recognized by § 14(b)," *ibid.*, as the court below—and every other court to have addressed the matter—correctly held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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