No. 17-1178

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

International Association of Machinists
District 10 and Local Lodge 873,
Plaintiff-Appellee,

v.

Ray Allen, in his Capacity as Secretary of the Wisconsin Department of Workforce Development, and James Daley, in his Capacity as Chairman of the Wisconsin Employment Relations Commission,
Defendants-Appellants.

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

AMICUS CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING OR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1178

Short Caption: Int'l Assoc. of Machinists Dist. 10 and Local Lodge 873 v. Ray Allen, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Federation of Independent Business Small Business Legal Center (NFIB Legal Center)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Wisconsin Institute for Law & Liberty

(3) If the party or amicus is a corporation:

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ Richard M. Esenberg Date: October 11, 2018

Attorney's Printed Name: Richard M. Esenberg

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Attorney's Signature: s/ Brian McGrath Date: October 11, 2018

Attorney's Printed Name: Brian McGrath

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Attorney's Signature: s/ Lucas Vebber Date: October 11, 2018

Attorney's Printed Name: Lucas Vebber

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") 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. The NFIB Legal Center frequently files amicus briefs in cases that affect it members. In the present case, *amici* have an interest in promoting public policy that enables small business owners to recruit and retain skilled and motivated employees.

FED. R. APP. P. 29(A)(4)(E) STATEMENT

No counsel for any party authored this *amicus* brief, nor did a party or party's counsel contribute money intended to prepare or submit this brief. No person other than the *amicus curiae* contributed money intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

En banc review is "reserved for the truly exceptional cases." *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008).[1] This case is of exceptional importance because of its impact on worker freedom and the employee-employer relationship.

This is not a case about collective bargaining or about the relationship between unions and management. It is a case about workers being free to stop paying union dues when they quit a union. This is not a case covered by the provisions of the Taft-Hartley Act that govern workers' right to act collectively or that deals with unfair labor practices. Instead, it is focused on 29 U.S.C. §186 – a criminal anti-bribery statute.[2] The issue is whether that criminal statute preempts the State of Wisconsin from enacting a state statute that protects workers from being forced to pay union dues long after they have exercised their right to quit the union. There is no reason to apply preemption here.

ARGUMENT

The Taft Hartley Act expressly authorizes states to enact laws allowing workers to refuse to join a union as a condition of employment. 29 U.S.C. §

[1] Fed. R. App. P. 35(a)(2)

[2] *See, for example*, Thomas R. Haggard, *Union Checkoff Arrangements under the National Labor Relations Act.* 39 DePaul L. Rev. 567, 630 (1990). ("The purpose of section 302(c) was to address the problems of extortion and racketeering … Congress' primary intent, however, was not to regulate the checkoff, either comprehensively or preclusively.")

164(b). A majority of states have passed such "right to work" laws. In 2015, the State of Wisconsin did the same. *See*, 2015 Wisconsin Act 1.

Wisconsin's law not only provides that employees have the right to refrain from "joining or assisting labor organizations,"[3] but also protects workers who exercise that right by providing that an employer may deduct union dues from an employee's wages, only if the employee has signed an individual order therefor that is "terminable by the employee on 30 days written notice."[4] This protection means that once an employee exercises her right to quit the union, even if she signed a dues check-off authorization provided to her by the union which says that it is irrevocable for one year, she will not have to continue to pay membership dues for longer than 30 days. Wisconsin has decided that an irrevocable dues checkoff that lasts longer than 30 days is an unfair and unnecessary restriction on worker freedom. The Plaintiff-Appellee says that Wisconsin's policy decision is preempted by federal law.

The Plaintiff-Appellee bases its argument on a criminal statute that ***prohibits bribery***. That section makes it a felony for any employer to make payments to labor unions. 29 U.S.C. 186(a)(2). Exempted are payments made from an employer to a labor union from "money deducted from the wages of employees in payment of membership dues in a labor organization" so long as the

[3] Wis. Stat. § 111.04(2)
[4] Wis. Stat. § 111.06(1)(i)

employer has a written authorization that is not irrevocable "for a period of more than one year." 29 U.S.C. 186(c)(4). The Plaintiff-Appellee argues that this exception in an anti-bribery law preempts Wisconsin's law. The district court agreed. And in a divided panel opinion, this Court upheld that decision.

This decision gives unions a back door that allows them to collect dues from workers who have exercised their freedom under Wisconsin law and negatively affects employers who are already struggling to find and maintain necessary employees. Union employers will find it much more difficult to keep employees who do not want to make another year of dues payments. Such an employee could simply decide to quit and go work elsewhere. This creates an untenable situation, especially in Wisconsin's currently booming economic climate and tight labor market.

I. WISCONSIN'S "DUES CHECKOFF" LAW IS NOT PREEMPTED BY A CARVE OUT TO A FEDERAL ANTI-BRIBERY STATUTE.

The businesses represented by *amici* in this case are being asked to take part of the wages of their own employees against the will of the employee and send those wages as "membership dues" to a union to which the employee does not want to belong. The decision puts these employers in an impossible situation, and will likely do significant damage to the relationship between employers and employees, something that the State of Wisconsin is actually trying to avoid. Federal law does not prevent Wisconsin from acting.

Nowhere in the Taft Hartley Act is there express preemption language. In fact, Taft Hartley expressly *authorizes* states to enact laws allowing workers to refuse to join a union as a condition of employment. 29 U.S.C. § 164(b). Wisconsin's law simply makes sure that the union cannot infringe the worker's right by continuing to collect dues for more than 30 days after an individual worker exercises her right.

Where a law "contains no express preemption language, only implied preemption is even conceivably at issue." *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. Health*, 699 F.3d 962, 984 (7th Cir. 2012). "Implied preemption 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.'" *Id*. (internal citations omitted). Neither field preemption nor conflict preemption apply here.

A. *Sea Pak* is not dispositive of this case.

The three judge panel in this case found Wisconsin's law to be preempted based upon a summary affirmance opinion from 1971. *Sea Pak v. Industrial,*

Technical and Professional Emp., Division of National Maritime Union, AFL-CIO, 400 U.S. 985 (1971). Both the Defendants-Appellants and Judge Manion in his dissenting opinion in this case have explained why *Sea Pak* is not dispositive. As they note, a summary affirmation does not carry the same precedential weight as other opinions. "When we summarily affirm, without opinion … we affirm the judgment but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176, citing *Fusari v. Steinberg*, 419 U.S. 379, 391-392, (1975) (Footnote omitted) (Burger, C. J., concurring).

Amici agrees with, and will not repeat, the detailed points made by Defendants-Appellants that show that *Sea Pak* is no longer good law. We will make one additional point. It **is** appropriate to disregard (and indeed, this Court has disregarded) an otherwise precedential case where subsequent developments in the law rendered it moot. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (Court disregarded a summary disposition case because of subsequent doctrinal developments). The Defendants-Appellants have pointed out the doctrinal changes in preemption jurisprudence. But there have also been changes in the law as it pertains to right to work. Such laws were once few and far between but now exist in more than half the states.[5]

[5] Currently 28 states. *See* National Conference of State Legislatures, *Right-to-Work Resources*. Available at: http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx

The expansion of worker freedom through state right to work laws has been paralleled by court cases similarly expanding worker freedom.[6] In fighting back, unions see dues check off authorizations which cannot be revoked for extended periods as one way to work around right to work laws.[7] These recent developments – rapid expansion of right to work laws, cases expanding worker freedom like the Supreme Court's decision in *Janus*, and the use of excessive dues check off authorizations to resist worker freedom – would not have been apparent to the *Sea Pak* Court 47 years ago. Given modern preemption doctrine, together with these developments, a court today would not get to the same conclusion as the district court did in *Sea Pak*.

B. No theory of implied preemption is applicable.

Courts "…begin with the assumption that a state's police powers cannot be preempted by a federal act unless the preemption was the clear intent of Congress, [meaning that] the burden is on [the plaintiff] to present a showing of implied

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[6] *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.") (internal citations omitted)

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

preemption that is strong enough to overcome the presumption that state and local regulations can coexist with federal regulation." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir., 2013) citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc*., 471 U.S. 707, 715–716 (1985). Moreover, "[w]ith implied preemption, 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 South Michigan Ave. Associates v. Shannon*, 549 F.3d 1119, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

"A dues-checkoff authorization is a contract between an employer and employee for payroll deductions." *International Association of Machinists v. Allen*, 2018 WL 4355864 (7th Cir. 2018). They are for the *employee's* administrative benefit. The Plaintiff-Appellee twists that idea so that a dues check off authorization is for the benefit of the union and to the detriment of the employee. There is no obvious reason why the states cannot strike a balance here that favors employee freedom, as Wisconsin has done.

If Congress wanted to preempt state regulation here, it could easily have done so expressly. As Judge Manion noted "[i]f 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."

International Association of Machinists, 2018 WL 4355864 (Manion, J., Dissenting).

Nor is Wisconsin's law preempted under the *Machinists* doctrine of "occupy the field" pre-emption.[8] "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*, 544 U.S. 60, 65 (2008) (internal citation omitted). But *Machinists* speaks to labor negotiations and regulates the playing field as between unions and employers. This case does not involve such negotiations but instead involves employees' rights, and a Wisconsin law that protects them.

Finally, Wisconsin's law is not preempted under a conflict preemption theory. "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 (internal citations omitted).

The state and federal laws in question here are clearly not in conflict. Wisconsin's law provides that a dues checkoff authorization must be terminable with at least thirty days' notice to an employer. Wis. Stat. §111.06(1)(i). The

[8] *International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)

federal anti-bribery statute says that such agreements may not be irrevocable for *more than a year*. Agreements terminable with at least thirty days' notice comply with both state and federal law.

C. Wisconsin's law is much more manageable for employers.

Wisconsin law makes it simple for employers; one rule – 30 days. 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. 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.[9] The state's largest metropolitan area expects to see 100,000 jobs go unfilled over the next decade due to a lack of workers.[10] The same problems are felt in rural Wisconsin as well, where one local news agency reported "[m]any companies in the Northwoods

[9] 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/

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

know they could expand, except for one thing. There aren't enough skilled workers to go around."[11]

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 in an oppressive dues check off scheme does not help.

As a result of the three-judge panel's decision 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. This creates significant uncertainty, and essentially renders Act 1 moot for the first year that an employee exercises her rights.

[11] 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

CONCLUSION

This Court should grant the petition for rehearing or rehearing *en banc* in order to review the decision of the three-judge panel.

Dated this 11th day of October, 2018.

Respectfully submitted,

/S/ RICHARD M. ESENBERG

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Dated this 11th day of October, 2018.

/S/ RICHARD M. ESENBERG

Richard M. Esenberg

☑

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Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ RICHARD M. ESENBERG

☐

CERTIFICATE OF SERVICE

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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