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

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether this Court should overrule its summary affirmance in *Sea Pak v. Industrial, Technical, & 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 revoke dues-checkoff authorizations.

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading litigation advocate against compulsory unionism since 1968. In furtherance of this mission, Foundation staff attorneys have represented individual employees in almost all of the compulsory union fee cases that have come before this Court. *E.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case involves a fundamental question of constitutional and statutory law: which sovereign in our federalist system has the power to decide what compelled unionism forms are legal?

Until the 1930s, that was an easy question to answer, as several States exercised their traditional police powers to regulate labor relations—including compelled unionism—without interference from Congress. In 1935, however, Congress passed the National Labor Relations Act ("NLRA"), thereby tak-

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[1] Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing.

Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

ing a larger role in the labor relations field, including by regulating compelled unionism and enacting a national policy making so-called "union security" provisions in collective bargaining agreements permissible under federal law.

These "union security" provisions compelled unionism in two ways. They permitted (1) the "closed shop," in which employers and labor organizations entered into contracts compelling workers to join a union as an employment condition; and (2) the "agency shop," in which employers and labor organizations entered into contracts compelling workers to pay an "agency fee" as an employment condition, instead of requiring full-fledged membership. But, employers and labor organizations also utilized a third related "union security" form that Congress did not address in the NLRA: the dues-checkoff authorization, which is a wage assignment that permits an employer to deduct a worker's union dues or fees directly from his or her paycheck and remit them to a union. *See* Pet. Br. 4–5.

Congress reversed course in 1947, however, when it amended the NLRA through the Taft-Hartley Act. In Taft-Hartley, Congress, among other things, outlawed the closed shop, retained the agency shop, and added a provision establishing a maximum one-year irrevocability period for dues-checkoff authorizations. *See* 29 U.S.C. § 186(c)(4). Congress notably left the final decision whether to permit, outlaw, or limit compelled unionism forms to the States in Section 14(b), 29 U.S.C. § 164(b). This statutory provision

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." *Id*. This left a statutory scheme with a federal-state balance: the federal government would determine what compelled unionism forms were permitted under federal law, but the States, under Section 14(b), could prohibit what federal law allowed.

In 2015, the State of Wisconsin utilized Section 14(b) to pass Wisconsin Act 1 ("Act 1"), which protects workers' freedom by outlawing or limiting numerous compelled unionism forms. *First*, Act 1 outlawed the agency shop: "[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." 2015 Wis. Act 1, § 5, *codified* at WIS. STAT. §§ 111.04(3)(a)3 & (3)(a)4; Pet. Br. 4. *Second*, Act 1 limited dues-checkoff authorizations' procedures and durations by making it an unfair labor practice for an employer 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." WIS. STAT. § 111.06(1)(i); Pet. Br. 5.

However, relying on this Court's summary affirmance in *Sea Pak*, 400 U.S. 985, the district court below held Wisconsin's thirty-day notice dues-checkoff law provision unconstitutional because Taft-Hartley Section 186(c)(4) preempted it. Pet. App. at 67a–82a. The Seventh Circuit agreed. Pet. App. at 3a–66a.

The Court should take this case and overrule *Sea Pak*. *First*, *Sea Pak*'s Section 186(c)(4) and Section 14(b)'s intersection analysis raises serious federalism concerns. When Congress passed Section 14(b), it clearly intended the States to continue to have the final say in what compelled unionism forms—including devices such as dues-checkoff authorizations—are legal. Moreover, when reviewing the NLRA and Taft-Hartley statutory scheme here, the district court in *Sea Pak* failed to apply the presumption that a federal statute should not displace a State's power absent a clear statement from Congress. *Second*, by ignoring the state preeminence that Congress recognized in Taft-Hartley Section 14(b), *Sea Pak* has had serious consequences nationwide for employees' individual liberty.

REASONS FOR GRANTING THE WRIT

I. *Sea Pak*'s Holding Raises Serious Federalism Concerns Warranting This Court's Review.

A. This Court consistently has held Congress intended Section 14(b) to preserve state preeminence in compulsory unionism matters.

Starting in 1949 with *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, this Court has recognized that Congress' intent through Section 14(b) was to leave the States free to continue to regulate "union security" provisions. 336 U.S. 301 (1949).

As here, *Algoma Plywood* involved a challenge to a Wisconsin statute that outlawed "maintenance-of-membership" agreements unless certain preconditions were met. *Id.* at 303–04.[2] The challengers argued the Wisconsin statute was preempted by the precursor to NLRA Section 8(a)(3), 29 U.S.C. § 158(a)(3), Section 8(3), Nat'l Labor Relations Act, ch. 372, § 8(3), 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1976)), which had authorized compulsory unionism agreements. *Algoma Plywood*, 336 U.S. at 304.

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[2] The maintenance-of-membership agreement in *Algoma Plywood* involved a closed shop provision that was agreed to prior to Taft-Hartley's passage. 336 U.S. at 304–05.

The Court first recognized that, when "the National Labor Relations Act was adopted, the courts of many States, at least under some circumstances, denied validity to union-security agreements." *Id.* at 306. The Court then held that the Wisconsin law was not preempted by Section 8(3)'s authorization of the closed shop because Congress, in enacting that section, had "not manifested an unambiguous purpose that [state power to regulate compulsory unionism] should be supplanted." *Id.* at 312. Rather, Section "8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreement." *Id.* at 307.

The Court then turned to the Taft-Hartley Act amendments and held those provisions "make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements." *Id.* at 313–14. Indeed, the Court said, Section "14(b) was included to forestall the inference that federal policy was to be exclusive." *Id.* at 314.

This Court consistently has reaffirmed the *Algoma Plywood* holdings that Sections 8(a)(3) and 14(b) leave the States free to regulate fully compulsory unionism provisions. In *Retail Clerks International Ass'n, Local 1625 v. Schermerhorn*, the Court noted that Senator Taft, in the Senate debates on Taft Hartley, "stated that [Section] 14(b) was to continue the policy of the Wagner Act and avoid federal interference with state laws in this field." 375 U.S. 96, 102 (1963). "In light of the wording of [Section 14(b)

and this legislative history," the Court concluded "that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. . . . [I]t is plain that Congress left the States free to legislate in that field." *Id.*

Other cases make the same point. *See Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 417 (1976) ("[Section] 14(b) simply mirrors that part of [Section] 8(a)(3) which focuses on Post-hiring conditions of employment. As its language reflects, [Section] 14(b) was designed to make clear that [Section] 8(a)(3) left the States free to pursue their own more restrictive policies in the matter of union-security agreements." (citation and quotation marks omitted)); *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963) (*Schermerhorn I*) (holding Section "14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements").

In short, with Section 14(b), Congress preserved the pre-existing federal-state balance whereby States are free to determine which compulsory unionism agreements are legal and which are not.

B. States have the authority to regulate or outlaw dues-checkoff authorizations because they are agreements that compel financial support of unions.

1. Here, the Employer and Union have provided in a collective bargaining agreement that employees who agreed to union dues deductions in the past must continue to pay dues for a certain period of time, namely one year. Pet. App. at 92a–99a. That agreement is indistinguishable from "maintenance-of-membership agreements"—the agreement type at issue in *Algoma Plywood*, 336 U.S. at 310–11—which require employees who agreed to union membership in the past to continue to pay union dues for a certain amount of time, usually the contract's duration. *See McCahon v. Pa. Turnpike Comm'n*, 491 F. Supp. 2d 522, 525–26 (M.D. Pa. 2007).

A maintenance-of-membership requirement is, in turn, indistinguishable from an agency shop requirement with a limited duration. Just as States can prohibit agency shop agreements under Section 14(b), *Schermerhorn I*, 373 U.S. at 750–54, so too can they prohibit maintenance-of-membership agreements. Accordingly, Section 14(b) permits States to prohibit agreements mandating that union dues deductions must continue for certain time periods.

An example illustrates the point. Consider the following three employer-union agreements:

- Agency Shop Agreement: Employees are required to pay union dues or fees.

- Maintenance-of-Membership Agreement: Employees who agreed to be union members in the past are required to pay union dues for the contract's duration.
- Checkoff Restriction Agreement: Employees who agreed to be union members in the past are required to pay union dues for a one-year period.

As this comparison makes plain, maintenance-of-membership and checkoff restriction agreements are the same thing but with different durations. Each is a type of agency shop provision that requires employees to continue to pay union dues. Each is a compulsory unionism form that States can ban under Section 14(b).

2. Section 186(c)(4) does not preempt Section 14(b). As noted, *supra* p. 2, Section 186(c)(4) merely sets a maximum one-year irrevocability period for dues-checkoff authorizations—a national ceiling. *See* 29 U.S.C. § 186(c)(4).

This is identical to the situation this Court analyzed in *Algoma Plywood*. There, the employer and union had argued "that a State cannot forbid what § 8(3) affirmatively permits." 336 U.S. at 307. However, the Court held Section 8(3) only established what compulsory unionism agreement forms were allowed under federal law and did not preempt State laws prohibiting or regulating those agreements. *Id.* at 307–12. So too with Section 186(c)(4). That provision merely sets a national ceiling for the permissible duration of that type of forced union financial support

to prevent an employer's transfer of money to a union from being considered a bribe. It does not speak to the States' authority to regulate that compulsory unionism form.

Therefore, as with Section 8(a)(3), the States have the pre-existing power preserved by Section 14(b) to lower the ceiling Section 186(c)(4) sets for the checkoff agreements duration.

C. Federal statutes are not presumed to preempt state law.

As explained, this Court's precedent establishes that Congress intended to preserve the federal-state balance in compulsory unionism matters through enactment of Section 14(b). Nevertheless, to the extent there is any ambiguity, this Court should grant the Writ and apply the fundamental principle that federal statutes are not presumed to preempt state laws.

It is this Court's fundamental principle of statutory construction that "[p]art of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014) (*Bond II*) (citation and internal quotation marks omitted). This includes the "long settled" presumption that "federal statutes do not abrogate state sovereign immunity, . . . impose obligations on the States pursuant to section 5 of the Fourteenth Amendment, . . . *or preempt state law*[.]" *Id.* at 858 (citations omitted) (emphasis added).

In "all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations and quotation marks omitted).

It is a "well-established principle that 'it is incumbent upon federal courts to be certain of Congress' intent before finding that the federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond II*, 572 U.S. at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). And, in finding this congressional intent when "legislation affect[s] the federal balance, the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

This well-established principle is as applicable to labor law as to any other area of the law. *See 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); Pet. Br. 23. Indeed, *Algoma Plywood* recognized this principle: "in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted." 336 U.S. at 312.

Yet, nowhere in its opinion did the district court in *Sea Pak* address these presumptions or federalism principles. *SeaPak v. Indus., Tech. & Prof'l Emps.*, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971). It is therefore important for the Court to take this case and reaffirm that federal laws are not presumed to preempt state laws.

II. This Court Should Grant the Writ to Address the Nationally Important Question It Presents: Whether *Sea Pak*, Which Impacts Individual Employees' Freedom, Should Be Overruled.

Sea Pak's faulty decision ignoring the federal-state balance Congress devised in the NLRA and Taft-Hartley provides a prime example of why federalism is so important to individual liberty.

As this Court has noted, "freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S. 706, 758 (1999). Since this country's founding, it has been a fundamental precept of our governmental structure that the "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011) (*Bond I*). Moreover, "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The

federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.*

These values serve to protect individual liberty, not just a state's autonomy. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (citations and quotation marks omitted).

These principles also allow for state experimentation to devise policies that are best for the people of a State. In this way, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Id.* (quoting *Gregory*, 501 U.S. at 458); *see also*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (noting "[t]he first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes").

Sea Pak's total disregard for these principles—enshrined in the NLRA's and Taft-Hartley's structure—has caused great injury to employees. If left to their own whims, unions and unionized employers

have shown they will utilize any type of restriction or tactic they can to delay the applicability of a law like Wisconsin's, and to vitiate employees' ability to exercise their rights under that law whenever a union and employer see fit. *See, e.g.*, *Local 58, Int'l Bhd. of Elec. Workers v. NLRB*, 888 F.3d 1313, 1315, 1318–19 (D.C. Cir. 2018) (striking down a union's requirement, established to circumvent Michigan's newly enacted Right to Work law, that employees must show up at the union hall with photo identification and a written resignation and checkoff authorization revocation); *see also infra.* pp. 14–15 (examples below).

These all-too-common restrictions and tactics make it exceedingly difficult for employees to cease supporting financially an often unwanted exclusive bargaining representative where compulsory fees cannot be required under state law. Such restrictions and tactics also frustrate a State's ability to enforce its law. As Judge Manion succinctly stated in dissent, "neither [management nor labor] adequately represents the freedom of employees to revoke their agreements." Pet. App. at 56a.

For years, unions and employers have restricted employees' ability to stop dues deductions to short annual window periods that often differ for each employee. *See, e.g., NLRB v. U.S. Postal Serv.*, 833 F.2d 1195, 1197 (6th Cir. 1987), *decision supplemented*, 837 F.2d 476 (6th Cir. 1988) (10 day revocation window); *Newspaper Guild/CWA v. Hearst Corp.*, 645 F.3d 527, 528–29 (2d Cir. 2011) (15 day revocation

window); *Williams v. NLRB*, 105 F.3d 787, 789 (2d Cir. 1996) (10 day revocation window); *Anheuser-Bush, Inc. v. Int'l Bhd. of Teamsters, Local 822*, 584 F.2d 41, 42 (4th Cir. 1978) (allowing employees to stop union dues deductions only if they "give written notice to the Company and the Union at least 60, and not more than 75 days before any periodic renewal date of this authorization and assignment of my desire to revoke the same"); *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 784 (5th Cir. 1975) (two 15 day revocation windows).

Unions also have required employees to appear in person at a union hall to revoke their checkoff authorizations, *Newport News Shipbuilding & Dry Dock Co.*, 253 N.L.R.B. 721, 731–32 (1980), *enforced sub nom. Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488 (4th Cir. 1981); to appear in person at a union hall with a photo identification and written revocation, *Local 58*, 888 F.3d at 1318–19; or to notify unions of their dues collection wishes only by certified mail, *see Kidwell v. Transportation Communications International Union*, 731 F. Supp. 192, 205 (D. Md. 1990), *aff'd in part, rev'd in part*, 946 F.2d 283 (4th Cir. 1991) (requiring certified mail for objections to an agency fee); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1499–1500 (N.D. Cal. 1992) (requiring certified mail for objections to the union's reduced agency fee calculation); *see also California Saw & Knife Works*, 320 N.L.R.B. 224, 236–37 (1995) (requiring certified mail for employees to communicate objections).

It is thus imperative that States like Wisconsin be permitted to exercise their sovereign authority to protect employees' freedom to choose whether to subsidize a union and its speech. Otherwise, employee rights will be subject to the self-interested machinations of unions and unionized employers, and state law protecting those rights will be "practically meaningless if so easily avoided." *Algoma Plywood*, 336 U.S. at 315.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioners, the Court should grant the Petition.

Respectfully submitted,

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