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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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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?

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## INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the First Amendment rights of workers. PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989). PLF has participated as amicus curiae in all of the most important cases involving the application of the First Amendment freedoms of speech and association to instances of government compulsion, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012), *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016), and *Janus v. Am. Fed'n State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

The Seventh Circuit panel majority concluded in this case that a portion of Wisconsin's 2015 right-to-work law, which imposes a time limit on dues check-off authorizations, is preempted by federal law under *Sea Pak v. Indus., Tech., & Prof'l Emps.*, 400 U.S. 985 (1971) (mem.), which was a summary affirmation of a Georgia district court opinion of dubious continued vitality. Pet. App. 41a; *id.* at 43a-44a (Manion, J., dissenting). In addition to the reasons stated in the petition for writ of certiorari, this Court should grant review to consider whether the line of cases culminating in *Janus* further calls into doubt *Sea Pak*'s reasoning and result. These cases vindicated the individual right of each public employee not to subsidize union speech. Here, they counsel against an expansive preemption doctrine that prohibits states from protecting employees' freedom of choice. PLF urges this Court to grant the petition so that it can consider the effect of its decision in *Janus* on the law challenged here.

## REASONS TO GRANT THE PETITION

### I

### THIS COURT SHOULD RECONSIDER *SEA PAK* IN LIGHT OF CHANGES IN FIRST AMENDMENT EFFECTS ON LABOR LAW

Although the panel majority below observed no "sea-change in labor-law preemption or preemption more generally" that would justify a departure from this Court's 1971 affirmance in *Sea Pak*, Pet. App. 16a, there *has* been such a sea-change in First Amendment doctrine as it relates to labor law. In

*Janus*, this Court recently reaffirmed that the First Amendment places significant restrictions on the ability of federal and state governments to mandate the speech of their employees. *Janus*, 138 S. Ct. at 2460. The Court's emphasis on the freedom of the individual employees vis-à-vis the union calls into question a union's ability to rely on preemption to support an effort to restrict employee choice.

The First Amendment limits the reach of federal labor law. *BE & K Constr. Co. v. N.L.R.B*, 536 U.S. 516, 536 (2002) (holding that the National Labor Relations Board violated the First Amendment's Petition Clause by deciding that a company violated federal labor law by prosecuting an unsuccessful suit with a retaliatory motive); *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam). While First Amendment challenges are distinct from preemption claims, federal labor statutes, and their preemptive effect, must be construed with the First Amendment in mind. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *id.* at 753 (Brennan, J., concurring) (The Court finds it "inappropriate to infer" that Congress did not intend the National Labor Relations Act to infringe upon First Amendment rights.). To avoid First Amendment problems, this Court has, when necessary, adopted a limiting construction of the National Labor Relations Act to ensure that the Act does not infringe upon protected speech, association, and petition rights. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding that 29 U.S.C. § 158(b)(4) did not extend to hand billing, which is protected by the First Amendment); *Int'l Ass'n of Machinists v. Street*, 367 U.S 740, 749 (1961)

(emphasizing that the Court "pass[ed] narrowly" on the relevant section of the Railway Labor Act to avoid violation of the First Amendment).[2]

In the context of compelled public employee union dues, the critical First Amendment rights belong to the employees, not the unions. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007) ("[U]nions have no constitutional entitlement to the fees of nonmember-employees."); *Knox*, 567 U.S. at 321 (In the context of agency fees, the union is "the side whose constitutional rights are *not* at stake.") (emphasis added). Building on these cases, *Janus* recognized that "a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union." 138 S. Ct. at 2464 (internal quotes and citation omitted). Hopes for "labor peace" do not justify compelled union support, nor does the risk of "free riders." *Id*. at 2466-67. ("[T]he First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interest of the person who does not want to pay."). The individual employee's right not to subsidize the union trumps both of these concerns.

Though this case does not concern *public* employee unions, the principles underlying the Court's analysis in *Janus* are nonetheless applicable to private sector unions. Section 302(c)(4) of the Taft-

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[2] *See also Int'l Ass'n of Machinists and Aerospace Workers v. Haley*, 832 F. Supp. 2d 612, 634 (D.S.C. 2011), *aff'd*, 482 Fed. App'x 759 (4th Cir. 2012) (interpreting National Labor Relations Act to avoid the need to address whether it is "compatible with the First Amendment").

Hartley Act permits check-off agreements so long as they are irrevocable for no longer than one year. 29 U.S.C. § 186(c)(4). Congress' limitation on irrevocability was meant to protect the employee's freedom of choice, not to grant the union a statutory right to one year of check-off irrevocability. *See N.L.R.B. v. Atlanta Printing Specialists and Paper Prods. Union 527, AFL-CIO*, 523 F.2d 783, 786 (5th Cir. 1975) (making the same point regarding Section 302's voluntary written consent requirement). As the Court said long ago, statutory restrictions on dues check-off agreements exist to protect "the employee's individual freedom of decision" to revoke his authorization. *Felter v. S. Pac. Co.*, 359 U.S. 326, 333-34 (1959).

Like the *Janus* line of cases, the battle over dues check-off agreements pits employee freedom against union security. *Janus* counsels that courts should privilege the former over the latter. Courts need not read the National Labor Relations Act so broadly that it preempts state and local attempts to bolster Section 302(c)(4) and further enhance employee choice. Such attempts are consistent with the spirit of the First Amendment, which makes clear that individuals cannot be compelled to subsidize the private speech of private organizations. These provisions do not violate federal law.

Just like *Abood*, 431 U.S. at 226, this Court's summary affirmance in *Sea Pak* is an anomaly, incompatible with the First Amendment's protection of individual speech rights. And just as *Janus* ended "the oddity of privileging compelled union support[,]" 138 S. Ct. at 2484, this Court should grant the petition in this case to hold that *Sea Pak*'s regime restricting

employee freedom to revoke check-off agreements no longer remains viable after *Janus*.

## II

## STARE DECISIS IS NO BAR TO RECONSIDERING *SEA PAK*

Stare decisis should not deter this Court from reconsidering *Sea Pak*. An exceptionally important constitutional issue is presented in this case: whether restricting employee freedom to revoke dues check-off agreements violates the First Amendment rights of workers. Stare decisis is a high bar to overcome, but it is "not an inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The doctrine applies "with perhaps the least force of all to decisions that wrongly denied First Amendment rights: 'This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one.).'" *Janus*, 138 S. Ct. at 2478 (quoting *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)). It is particularly appropriate to overrule previous decisions when intervening changes have "removed or weakened the conceptual underpinnings from the prior decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

In this case, the *Janus* line of cases has significantly weakened the already precarious *Sea Pak* summary affirmance. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (summary affirmances command lesser "precedential value"). This Court's *Sea Pak* decision itself is a summary affirmance of Fifth Circuit affirmance issued with no additional

analysis. *Sea Pak v. Industrial, Technical, and Professional Employees, Division of National Maritime Union*, 423 F.2d 1229, 1230 (5th Cir. 1970). The sole opinion in the case was rendered by a district court without the benefit of the significant body of First Amendment law in the labor context that later developed.

*Sea Pak* is a relic and should no longer be sufficient support for a plan which severely restricts worker choice. When this Court summarily affirmed *Sea Pak* in 1971, the Court had not yet begun to regularly consider—much less uphold—the First Amendment rights of employees in the union context. Since then, due in part to concerns about worker rights and freedom, this Court has prohibited:

- using nonmember and dissenters' funds, even temporarily, for political purposes, *Abood*, 431 U.S. at 235; *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 444 (1984);
- taking compulsory fees from public and private sector nonmembers without having procedural safeguards in place, *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302-3 (1986); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745-47 (1988);
- forcing nonmembers to contribute to any union activities, like supporting political speech or causes, not germane to collective bargaining, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Beck*, 487 U.S. at 745 (extending *Hudson* protections to private sector workers); and

- imposing a special assessment or dues increase without notice and affirmative consent from nonmembers, *Knox*, 567 U.S. at 322.

This Court recognized that *Abood* was on its last legs in *Harris v. Quinn*, refusing to extend *Abood* to nonunion Medicaid-funded home healthcare workers because the scheme prohibited workers from choosing not to subsidize the union they did not support. 134 S. Ct. at 2638. Last year, *Janus* overruled *Abood* in the most recent example of this Court's gradual shift towards the understanding that the First Amendment places significant restrictions on the ability of federal and state governments to limit employees' speech and associational choices. *Janus*, 138 S. Ct. at 2460.

In dismantling a longstanding case like *Abood*, this Court showed its willingness to overturn precedent which conflicts with the First Amendment rights of workers in relation to labor unions. There is little difference between forcing nonmembers to subsidize a union through an agency fee and forcing nonmembers to subsidize a union through a dues check-off authorization. Both instances severely limit worker choices regarding their protected speech and association rights. However, while the former is unconstitutional under *Janus*, the latter is currently being propped up by now-discredited *Sea Pak* summary affirmance.

The Court's emphasis on protecting the First Amendment freedom of individual employees over the extraordinary statutory powers granted to unions calls into question any union's ability to rely on preemption doctrine as a means to restrict employee choice. To the extent that *Sea Pak* supports

restrictions on the rights of workers to revoke dues check-off agreements, which unconstitutionally funnel employee funds to unions they no longer endorse, it should be overruled. This Court should seize this opportunity to address this important and timely issue.

## CONCLUSION

The briefing and argument in this case before the Seventh Circuit concluded almost a year before *Janus* was decided, and therefore the lower court did not cite it. Post-*Janus*, the Seventh Circuit rejected a request for rehearing in light of that substantial change in the law surrounding the intersection between labor law and the First Amendment rights of employees. Although this is not a First Amendment case, the principles espoused in *Janus* counsel against utilizing broad preemption doctrines to stifle state and local attempts to secure employee choice in this area. The Court should grant the petition for writ of certiorari to reexamine how *Janus* affects the required preemption analysis and decide whether *Sea Pak* is still good law.

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