No. 17-1178

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS
DISTRICT TEN 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

On Appeal From The United States District Court
For The Western District Of Wisconsin, Case No. 16-cv-77
The Honorable William M. Conley, District Judge

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 35(B)(1) STATEMENT AND INTRODUCTION

The State requests rehearing for two reasons: (1) as Judge Manion's dissent explains, the panel majority incorrectly decided the exceptionally important question whether States are preempted from regulating auto-renewing agreements that force workers to pay "agency fees" directly out of their paychecks to unions that they have the undisputed right not to support, and (2) the panel majority created an intracircuit conflict over which kinds of doctrinal developments make a Supreme Court summary disposition no longer binding. *See* Fed. R. App. P. 35(b).

Whether States may give workers the right to cancel otherwise irrevocable, one-year agreements to pay union dues—as several of the Nation's 28 right-to-work jurisdictions, including Indiana, so provide—is an exceedingly significant question. *See, e.g.*, *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1033 (7th Cir. 1987) (en banc), *rev'd,* 486 U.S. 399 (1988). To begin, it is settled that a right-to-work law's ban on agreements "requir[ing]" workers to "[p]ay any dues . . . to a labor organization" is entirely lawful. *E.g.*, Wis. Stat. § 111.04. The Taft-Hartley Act of 1947 permits States to regulate "[a]greements requiring union membership," 29 U.S.C. § 164(b), leaving them "free to legislate in th[e] field" of "union-security agreements," *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 99–102 (1963) (*Retail Clerks II*). That is why, four years ago, this Court upheld Indiana's right-to-work law, describing state authority under § 164(b) as "extensive." *Sweeney v. Pence*, 767 F.3d 654, 660–63 (7th Cir. 2014). And just last year, it also upheld Wisconsin's. *Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017).

The question here is merely whether unions can do indirectly what they cannot do directly. Forbidden from making a deal with an *employer* that would force employees to pay dues, can a union instead "require . . . an individual to . . . [p]ay [ ] dues," Wis. Stat. § 111.04(3)(a), through an irrevocable agreement with the *employee*, giving the union the right to deduct (or "check off") dues directly from her paycheck over her later objection? Federal law leaves this question to States. *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 735–36 & n.3 (1963). And Wisconsin law permits workers to cancel a checkoff at any time so long as they give 30 days' notice. Wis. Stat. § 111.06(1)(i).

By holding that law preempted under an unexplained, now-unsound Supreme Court summary affirmance from 1971, *Sea Pak v. Indus., Tech. & Prof'l Emps., Div. of Nat'l Maritime Union*, 400 U.S. 985 (mem.), the majority opened an intracircuit split on what kinds of "doctrinal developments" render a Supreme Court summary decision no longer controlling, Diss.51–53. Under *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), which struck down Wisconsin's and Indiana's marriage laws, qualifying "doctrinal developments" include even "distinguishable" Supreme Court decisions whose mere "logic" undercuts that of the summary disposition. *Id.* at 660 (citation omitted). According to the panel majority, however, only a "sea-change" in the Court's case law could deprive such a case of precedential force. Op.12. Rehearing is thus also necessary to settle whether *Baskin* "remains the law in [this] circuit." Diss.53 n.9.[1]

[1] Days before this petition was filed, a panel of this Court held that a local right-to-work ordinance is not a "State law" saved from preemption by § 164(b). *Int'l Union of Operating Eng'rs Local 399 v. Vill. of Lincolnshire*, No. 17-1300, 2018 WL 4655487 (7th Cir. Sept. 28, 2018). That decision is no barrier to rehearing here. First, although the *Lincolnshire* panel

STATEMENT

A. Statutory Background

A. Federal law "allows individual States . . . to enact so-called 'right-to-work' laws." *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409 (1976). Right-to-work laws restrict or ban union-security agreements, which "require workers to make certain payments (called 'agency fees') to the union as a condition of getting or keeping a job." *Union security agreement*, Wex Legal Dictionary, Cornell Univ. Law Sch. Legal Info. Inst., https://perma.cc/6F5Y-C6TX. Specifically, although the National Labor Relations Act (NLRA), as a matter of federal policy, permits collective-bargaining agreements (CBAs) to require union "membership" as a "condition of employment," 29 U.S.C. § 158(a) (codifying NLRA § 8(a)), the Taft-Hartley Act makes clear that States may outlaw any "union-security agreement that passes muster by federal standards," *Retail Clerks II*, 375 U.S. at 103, by wielding their statutory power to regulate "[a]greements requiring membership in a labor organization as a condition of employment," 29 U.S.C. § 164(b). Importantly, "'membership'" under § 158(a) "has been whittled down to its financial core," *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (citation omitted), meaning that unions may require only that employees pay "[r]epresentation" or "agency" fees, which cover expenses

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circulated its opinion under Circuit Rule 40(e), it did so only because it created a conflict on an unrelated question, *id.* at *1 n.2, not because it reached conclusions regarding checkoffs that are in conflict with the State's arguments here. Second, upholding Wisconsin's checkoff law would not undermine the judgment in *Lincolnshire*, which rests on the independent ground that § 164(b) does not shield local ordinances. *Id.* at *1. Finally, the *Lincolnshire* opinion does not address how changes in doctrine affect the precedential value of Supreme Court summary dispositions—a question that alone justifies rehearing here.

"germane to collective bargaining, contract administration, and grievance adjustment," *Sweeney*, 767 F.3d at 661, 669. And because § 164(b) "simply mirrors" § 158(a), *Oil, Chem. & Atomic Workers*, 426 U.S. at 417, this Court has held, twice, that § 164(b) "necessarily permits" even those state laws regulating "agreements that require employees to pay" only agency fees, *Schimel*, 863 F.3d at 676; *Sweeney*, 767 F.3d at 661.

This case also implicates 29 U.S.C. § 186(c)(4) (codifying § 302(c)(4) of the Taft-Hartley Act). Section 186 is a labor-related anti-bribery provision, which makes it a crime for an employer to pay "any money or other thing of value" to a "labor organization" that "represents . . . the employees of such employer." 29 U.S.C. § 186(a)(2). This prohibition is "concerned with," among other things, eliminating the "corruption of collective bargaining through bribery of employee representatives by employers." *Arroyo v. United States*, 359 U.S. 419, 425–26 (1959). One of § 186's exceptions states that it "shall not be applicable . . . with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That 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." 29 U.S.C. § 186(c).

B. Like 27 of its sister States and the Territory of Guam, Wisconsin has a right-to-work law. *See* 2015 Wis. Act 1, § 5, *codified at* Wis. Stat. § 111.04(3)(a)3–4; *Right-to-Work Resources*, Nat'l Conference of State Legislatures, https://perma.cc/6N25-

6R2U. Its main provision states that "[n]o person may require, as a condition of obtaining or continuing employment," that a worker "[p]ay any dues, fees, [or] assessments . . . to a labor organization." Wis. Stat. § 111.04(3)(a)3; *Schimel*, 863 F.3d at 676–77 (upholding this provision).

A related provision regulates dues-checkoff authorizations, Wis. Stat. § 111.06(1)(i), which are assignments allowing an employer to deduct an employee's union dues from the employee's paycheck and to pass along those dues to the union. *See Office & Prof. Emps. Int'l Union, Local 95 v. Wood Cty. Tel. Co.*, 408 F.3d 314, 315 (7th Cir. 2005). The provision makes it "an unfair labor practice for an employer" to "deduct labor organization dues or assessments from an employee's earnings," except when "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); *see also, e.g.*, Ind. Code § 22-2-6-2.

B. Factual Background

Plaintiffs ("Union") are a labor organization that represents employees at a John Deere plant in Wisconsin. SA.2. The Union's agreement with John Deere authorizes auto-renewing dues checkoffs that are irrevocable by employees except for during a 15-day period each year. SA.2.

Lisa Aplin (née Koser) is a John Deere employee who signed an auto-renewing dues-checkoff authorization in 2002. SA.2. Aplin signed this form because, before

Act 1, John Deere had a union-security agreement with the Union, requiring all employees to timely "pay[ ] membership dues" to the Union as a condition of employment. *See* Dkt.30-1:7, 9. The form that Aplin signed also asked her formally to become a full-fledged member of the Union, which she opted not to do. SA.6. Nevertheless, by paying "agency fees" via the checkoff, Aplin did become a "member" of the union within the meaning of labor law. *See Beck*, 487 U.S. at 745.

Over ten years later, Wisconsin adopted a right-to-work law, and, in July of 2015, Aplin notified John Deere that she would be revoking her dues-checkoff authorization in 30 days, pursuant to Act 1. *See* SA.3, 14. This notice stated, "I no longer wish to pay Union Dues or any fees as a condition of my employment under 2015 Act 1." SA.14. But the Union refused to honor Aplin's revocation, considering it to be untimely, notwithstanding Wisconsin law. SA.3, 15. Aplin then filed a wage complaint with the Wisconsin Department of Workforce Development, arguing that the Union had violated Act 1. Dkt.30-6. The Department agreed. SA.3.

The Union then sued the Department Secretary and the Chairman of the Wisconsin Employment Relations Commission in federal district court, seeking declaratory and injunctive relief against Wisconsin's checkoff law on the ground that the anti-bribery provision, § 186(c)(4), preempts it under two implied-preemption theories. *E.g.*, Dkt.45:9. For both arguments, the Union relied extensively—if not exclusively—on the opinion of the 1969 federal district court in *Sea Pak*, which the Supreme Court summarily affirmed in 1971. *See* SA.1–2; Dkt.45:10–11, 16. The district court granted the Union summary judgment. SA.2.

A divided panel of this Court affirmed. First, the panel majority held that "*Sea Pak* controls this case." Op.10. It noted that the *Sea Pak* district court, whose analysis the Supreme Court presumably adopted, had rejected the State's arguments here. Op.7. The majority concluded that, even if there were "theoretical room for departing from" *Sea Pak*, "it would take much stronger signals from the Court to do so." Op.11. The majority also suggested that *Sea Pak* is consistent "with the Court's other labor law preemption decisions," specifically "*Garmon* preemption and *Machinists* preemption," which *Sea Pak* did not address. Op.12–13.

Judge Manion dissented. He explained that *Sea Pak*—which "rel[ied] entirely" on "legislative history"—does not "stand up to any scrutiny under modern general preemption doctrine" and is "plainly wrong." Diss.35, 42, 50. In particular, "[t]he Court is now much more sensitive to federalism concerns and far less likely to imply preemption from ambiguous statutes or legislative history." Diss.53. Therefore, this Court is "no longer obliged to follow" *Sea Pak*, especially given this Court's holding in *Baskin* that significant doctrinal developments in methodology can deprive a Supreme Court summary disposition of its precedential force. Diss.35, 51, 52–53 & n.9. Finally, Judge Manion explained that *Sea Pak* cannot be recast as a case about *Garmon* or *Machinists* preemption, which would not apply here anyway. Diss.41–47 & n.6.

ARGUMENT

I. Whether States Can Regulate Irrevocable Dues-Checkoff Agreements, Which Force Workers To Pay Unions, Is An Exceptionally Important Question That The Panel Majority Incorrectly Answered

Whether the Taft-Hartley Act preempts Wis. Stat. § 111.06(1)(i)'s regulation of irrevocable "agency fee" checkoffs is a deeply significant question. Both this Court and the Supreme Court have repeatedly treated issues of labor-law preemption as "exceptional[ly] importan[t]," Fed. R. App. P. 35(a)(2). In *Lingle*, for example, this Court went en banc to decide the "extreme[ly] importan[t]" question whether the Taft-Hartley Act preempted certain state employment-law claims, noting that this Court's decision would affect many "workers covered by collective bargaining agreements." *Lingle*, 823 F.2d at 1033, *rev'd,* 486 U.S. 399 (finding no preemption). Similar cases from the Supreme Court, reviewing "important" labor-law-preemption questions, abound. *E.g.*, *Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994); *see also Chamber of Commerce v. Brown*, 554 U.S. 60, 64–66 (2008).

More than just an ordinary labor-law preemption case, this case pivots on a question that the Supreme Court—especially in recent terms—has shown an increasing interest in, and has taken a dim view toward: the scope of unions' authority to forcibly collect "agency fee" payments from objecting employees. This concern traces back to *Beck*, which considered "the important question" of whether unions may force nonmember-employees to fund union activities to which those employees object. 487 U.S. at 741–42. The Court's skepticism crescendoed in a trilogy of recent challenges to public-sector agency shops, where it noted that exclusive representation is "itself

a significant impingement on associational freedoms that would not be tolerated in other contexts," *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018), and that allowing unions forcibly to collect "agency fees"—which is what irrevocable checkoffs do—is a doctrinal "anomaly," *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012), utterly lacking in justification, at least as a constitutional matter, *see Janus*, 138 S. Ct. at 2465–69; *Harris v. Quinn*, 134 S. Ct. 2618, 2639–40 (2014). Hence, some commentators have suggested that *Janus* casts a shadow on mandatory agency-fee arrangements even in the private sector. *See, e.g.*, Boyd Garriott, *How* Janus *Could Spill into the Private Sector Without Radically Redefining the State Action Doctrine*, On Labor (Apr. 19, 2018), https://perma.cc/BUS9-JVSK.

On several levels, the panel majority decided the important question in this case incorrectly. To address just one: it misapplied settled law on the relationship between two NLRA provisions. Op.28–32 & n.10. While § 158(a)(3) allows, as a matter of federal policy, "agreement[s] . . . requir[ing]" "membership" in a union as a "condition of employment," § 164(b) establishes that "agreements requiring [union] membership" "as a condition of employment" may be "prohibited" by state law. The Supreme Court has explicitly held that the very union-security agreements allowed under § 158(a)(3) "are the same [ ] agreements" that § 164(b) "expressly place[s] within the reach of state law." *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751–52 (1963) (*Retail Clerks I*). Here, no one disputes that mandatory agency-fee arrangements such as irrevocable checkoffs are "agreements requiring

membership" under § 158(a)(3). That is because, after *Beck*, the mere act of paying forced agency fees to a union makes one a "member" within the meaning of § 158(a)(3). 487 U.S. at 745. Thus, because agency-fee mandates are "membership" agreements permitted under § 158(a)(3), it follows that they are also "expressly placed within the reach of state law" under § 164(b). *Retail Clerks I*, 373 U.S. at 751–52.

The panel majority was wrong to resist the conclusion that irrevocable checkoffs are union-security devices, or "agreements requiring membership," 29 U.S.C. § 164(b). *See* Op.28–32. They are plainly "agreements"; they "requir[e]" the payment of union dues for a year, even if the employee wants out on day two; and those payments confer "membership," *Sweeney*, 767 F.3d at 661. This explains why, when Congress passed Taft-Hartley, irrevocable checkoffs were widely understood to be a kind of union-security device. *See, e.g.*, Note, *State Labor Laws in the National Field,* 61 Harv. L. Rev. 840, 847 (1948) ("[T]here seems little doubt as to the validity of state statutes prohibiting the check-off or further regulating its use."); Note, *Checkoff of Union Dues Invalid Under State Wage Assignment and "Weekly Payment" Statutes*, 63 Harv. L. Rev. 902 (1950); E.B. McNatt, *Check-Off,* 4 Lab. L.J. 123, 123 (1953). The legislative history of Taft-Hartley is in accord. *See, e.g.*, 1 *Legislative History of the Labor-Management Relations Act, 1947*, 320 (1948) (calling checkoffs "a form of union security"). Even the Union's own CBA here designates irrevocable checkoffs as a form of union security. Supp.App.3–5 ("Union Security" article includes section titled "Check-Off of Union Membership Dues"). More telling is the irrevocable

checkoff's function: just like a "maintenance-of-membership" agreement, which is certainly subject to state regulation, *Algoma Plywood & Veneer Co. v. Wis. Emp't Relations Bd.*, 336 U.S. 301, 304, 306, 314–15 (1949), an irrevocable checkoff imposes on employees who agree at one time to pay "membership" dues an irrevocable obligation to *remain* paying union "members" for a set period of time, *Horwath v. NLRB*, 539 F.2d 1093, 1095–96 (7th Cir. 1976).

If union security were *not* the purpose of irrevocable checkoffs in right-to-work States, then there would be no reason to make them irrevocable. It is one thing to automatically deduct a worker's union dues in satisfaction of a legally enforceable, CBA-adopted requirement that all employees pay the union for representation. After all, a worker might otherwise forget to pay her dues and consequently face discharge. Supp.App.3. But it is quite another thing to assert, as the Union does, that a worker under no obligation to pay a union in the first place—because she lives in a right-to-work State—*benefits* from an arrangement that irrevocably commits her to *a year* of automatic payments to an organization that, perhaps by the next morning, she no longer wishes to support. Resp.Br.20, 23; *see* Diss.45. Thus, the irrevocable checkoff is recommended as an "obvious[ ]" and "extreme[ly] importan[t]" means of boosting unions' bottom line in right-to-work States. *E.g.*, Richard G. McCracken, *Success Despite Right to Work: Techniques to Increase Union Membership* 4 (2017), https://perma.cc/SJA2-XHGP.

The contrary conclusion of the district court opinion summarily affirmed in *Sea Pak* is no longer binding. In *Hicks v. Miranda*, the Supreme Court held that, when

subsequent "doctrinal developments" undermine a summary disposition, courts should no longer "adhere" to that decision. 422 U.S. 332, 344 (1975). The *Sea Pak* district court concluded that § 186(c)(4), the anti-bribery provision of Taft-Hartley, both conflict- and field-preempts state laws permitting workers to revoke checkoffs, and that irrevocable checkoffs do not constitute "agreements requiring membership" under § 164(b)'s anti-preemption provision. 300 F. Supp. 1197, 1198, 1200–01 (S.D. Ga. 1969). But the Supreme Court's doctrine on both implied preemption and labor-union "membership" have undergone seismic shifts in the intervening 47 years, which make *Sea Pak* no longer binding.[2]

First, while the implied-preemption doctrine of *Sea Pak*'s day allowed preemption based on nothing but scraps of legislative history (which is all that *Sea Pak* cited, Diss.50–51), the Court's modern jurisprudence requires a far stronger, textual showing. "Implied preemption analysis" no longer "justif[ies] a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (plurality op.) (citation omitted). And

[2] The panel majority stated that, to uphold Wisconsin's checkoff law, this Court would have to "split with" the Fourth and Sixth Circuits. Op.12. But the cited statement from the Fourth Circuit's 1977 decision is dictum, since no litigant in that case had "specifically pressed th[e] point" that checkoffs are "subject to State law." *NLRB v. Shen-Mar Food Prod., Inc.*, 557 F.2d 396, 399 (4th Cir. 1977). And while the Sixth Circuit has stood by *Sea Pak*—in a decision that this Court split with in *Lincolnshire*, *supra* pp. 2–3 n.1—it has done so rather unenthusiastically and without the benefit of the State's arguments here, *see* Reply Br. 9 (discussing *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016)). Finally, avoiding intercircuit conflict is not always a sufficient reason to stand by an erroneous panel holding. *Accord Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc) (extending rather than overturning a prior holding on the lopsided end of a three-to-one circuit conflict); *id.* at 1152 (Easterbrook, J., dissenting).

while the implied-preemption inquiry may still look beyond the text to legislative history, *Wyeth v. Levine*, 555 U.S. 555, 573–581 (2009), text is now decidedly preeminent, *see P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Had the *Sea Pak* court applied modern doctrine, it would have had to conclude, as this Court did in *Sweeney*, that *not* "preempt[ing]" the field of union-security regulation was the Taft-Hartley Act's "*clear* and *unambiguous* [ ] purpose," 767 F.3d at 659 (citation omitted; emphases added). *See* Diss.37–51.

Second, *Sea Pak*'s understanding of § 164(b), Taft-Hartley's anti-preemption provision, is outmoded. As *Sweeney* observed, it was not clear until *Beck*—decided 17 years after *Sea Pak*—that even agreements requiring only the payment of agency fees to a union confer union "membership" and thus are subject to state regulation under § 164(b). 767 F.3d at 661 & n.4. So it is not especially surprising that, without the benefit of *Beck*, the *Sea Pak* district court went astray here.

II. The Panel Majority Created An Intracircuit Conflict Over What Kinds Of Doctrinal Developments Render Supreme Court Summary Dispositions No Longer Binding

Rehearing is also "necessary to secure or maintain uniformity of th[is] court's decisions," Fed. R. App. P. 35(a)(1), on what kinds of "subsequent doctrinal developments" render a summary disposition of the Supreme Court no longer controlling, Diss.51–53. Under *Baskin*, qualifying "subsequent doctrinal developments" include even "*distinguishable*" Supreme Court decisions whose "principle[s]" and "logic" undermine the reasoning of the summary disposition. 766 F.3d at 659–60 (emphasis

added; citation omitted). But now, according to the panel majority, only a "sea-change" in the Court's case law suffices. Op.12.

As Judge Manion explained, while the majority's "sea-change" approach might have been open five years ago, *Baskin*—"the law in [this] circuit"—closed it. Diss.52–53 & n.9 (identifying this as the reason that his opinion is a dissent, not a concurrence). In *Baskin*, the States had argued that the Supreme Court's summary decision in *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), foreclosed any Fourteenth Amendment challenge to traditional state marriage laws. 766 F.3d at 659. According to the States, the Court's intervening decisions in cases such as *United States v. Windsor*, 570 U.S. 744 (2013), did not fatally undermine *Baker* because they never "questioned [its] conclusion," Diss.52. Even so, this Court, while admitting that those cases were "distinguishable" from *Baker*, held that their reasoning "ma[d]e clear that *Baker* is no longer authoritative." *Baskin*, 766 F.3d at 660.

Rehearing is necessary to clarify the law of this circuit on this important doctrine. Over the course of its 228-year history, the Supreme Court has created a "vast precedential jurisprudence" of "summary dispositions of appeals, from both state and federal courts." *See* Stephen M. Shapiro et al., *Supreme Court Practice* 312 (10th ed.); *e.g.*, *id.* at 301 n.90 (Court "acted summarily" in 112 appeals in 1985 and 102 in 1986). As disputes over the effect of those dispositions continue to "haunt both lower courts and the bar," *id.* at 312, this circuit will lack a single, definitive standard under which litigants can frame arguments under *Hicks*.

CONCLUSION

This Court should grant this petition for rehearing or rehearing en banc.

Dated: October 4, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This petition for rehearing or rehearing en banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because this petition contains 3,882 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f).

This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this petition has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: October 4, 2018

/s/ Ryan J. Walsh
RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2018, I filed the foregoing petition with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 4, 2018

/s/ Ryan J. Walsh
RYAN J. WALSH