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 INDIANA, GEORGIA, LOUISIANA, OKLAHOMA, SOUTH CAROLINA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


Office of the
Attorney General
302 W. Washington St.
Indianapolis, Indiana
46204
(317) 232-6255
Tom.Fisher@atg.in.gov
**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
of Indiana
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General

*Counsel for* Amici *States*
*Additional counsel listed with signature block*

## 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.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**CASES [CONT'D]**

**CASES [CONT'D]**

**CASES [CONT'D]**



**STATUTES**

**STATUTES [CONT'D]**



**OTHER AUTHORITIES**

**OTHER AUTHORITIES [CONT'D]**

## INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Georgia, Louisiana, Oklahoma, South Carolina, and Texas respectfully submit this brief as *amici curiae* in support of the petitioners.

In its decision below the Seventh Circuit held that federal law preempts States from regulating dues-checkoff authorizations, forms by which employees authorize employers to deduct union dues from their wages. The Seventh Circuit, like every other court to consider the question, concluded that this result was required by a summary affirmance this Court issued nearly fifty years ago. *See Sea Pak v. Indus., Tech. & Prof'l Emps., Div. of Nat'l Mar. Union*, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1970), *aff'd mem.*, 400 U.S. 985 (1971).

*Amici* States have an interest in maintaining their authority to protect workers from being compelled to pay union dues, including by regulating dues-checkoff authorizations. They submit this brief to explain why the Court should grant the petition and hold that federal law permits States to regulate dues-checkoff authorizations.

---

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least 10 days prior to the due date of this brief.

## REASONS FOR GRANTING THE PETITION

Both Congress and the Court have consistently recognized States' authority to protect workers by passing right-to-work legislation that prevents employers and labor organizations from coercing workers into joining unions. But a district court decision the Court summarily affirmed nearly fifty years ago has created an anomalous gap in States' ability to enforce their right-to-work laws: This decision, *SeaPak v. Industrial, Technical & Professional Employees*, held that a statutory exception to a federal anti-bribery law preempts state regulation of dues-checkoff authorizations—forms executed by employees that authorize employers to deduct union dues from employees' paychecks. 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd* 400 U.S. 985 (1971) (mem.). Even as the Court has become less amenable to implied preemption over the last five decades, other doctrinal developments have exacerbated problems with *SeaPak*'s implied preemption of state regulation of dues-checkoff authorizations. Nevertheless, lower courts continue to consider themselves bound by *SeaPak*.[2] The time has come for the Court to revisit it.

---

[2] *See, e.g., United Auto., Aerospace & Agric. Implement Workers of Am. v. Hardin Cty., Ky.*, 842 F.3d 407, 421 (6th Cir. 2016); *NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396, 399 (4th Cir. 1977); *Gen. Cable Indus. v. Chauffeurs, Teamsters, Warehousemen & Helpers Local Union*, No. 1:15-CV-81, 2016 WL 3365133, at *3 (N.D. Ind. June 17, 2016); *Georgia State AFL-CIO v. Olens*, No. 1:13-CV-03745-WCO, 2015 WL 13260393, at *13 (N.D. Ga. July 20, 2015); *Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1327 (E.D. Okla. 2002), *aff'd*, 358 F.3d

## I. Practically Irrevocable Dues-Checkoff Authorizations Undermine State Right-to-Work Protections

1. Just over seventy years ago, the Court held that the U.S. Constitution permits States to protect workers' rights by adopting laws that "forbid employers acting alone or in concert with labor organizations deliberately to restrict employment to none but union members," such as by entering into "union security agreements" that "obligate an employer to employ" only union members. *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 528–30 & n.2 (1949). Justice Frankfurter's concurring opinion explained that when it comes to the rights of employees, employers, and labor organizations, "a compromise must be struck" and where that compromise "should fall . . . is plainly a question within the special province of the legislature." *Am. Fed'n of Labor v. Am. Sash & Door Co*, 335 U.S. 538, 546 & n.2 (1949) (Frankfurter, J., concurring). He observed that the Court had "given effect to such a compromise in sustaining a legislative purpose to protect individual employees against the exclusionary practices of unions," and that States' "legislation prohibiting union-security agreements is founded on a similar resolution of conflicting interests." *Id.* at 546 & n.2 (collecting authorities).

---

743 (10th Cir. 2004); *United Elec. Radio & Mach. Workers of Am. v. Westinghouse Elec. Corp.*, 345 F. Supp. 274, 276 (W.D. Pa. 1972), *aff'd*, 478 F.2d 1399 (3d Cir. 1973); *Warner v. Chauffeurs, Teamsters, & Helpers Local Union*, 73 N.E.3d 190, 197 (Ind. Ct. App. 2017).

Similarly, Congress has consistently and expressly endorsed States' authority to adopt right-to-work laws prohibiting union-security agreements. "Prior to enactment of the Wagner Act in 1935, the States had unquestioned power to regulate or prohibit the closed shop and other forms of union-security agreements." *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 100 n.2 (1963). "At the time when the [Wagner Act] was adopted, the courts of many States, at least under some circumstances, denied validity to union-security agreements." *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 306 (1949).

Section 8(3) of the Wagner Act "forbade employers to discriminate against employees to compel them to join a union." *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 738 (1963). To prevent this provision from being construed to "outlaw union-security arrangements such as the closed shop," Congress added a proviso "expressly declaring . . . 'That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a).'" *Id.* at 738–39 (last ellipsis in original) (quoting 49 Stat. 452 § 8(3)). This proviso "disclaim[ed] a *national* policy hostile to the closed shop or other forms of union-security agreement," *Algoma Plywood*, 336 U.S. 307 (emphasis added), but did "nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal," *id.* at 308 (quoting S. Rep. No. 573, 74th Cong., 1st Sess. 11–12). The Wagner Act

thus left in place state right-to-work laws, including laws regulating contracts requiring workers to maintain union membership as a condition of employment. *Id.* at 305.

By the time Congress enacted the Taft-Hartley Act (the statute at issue in this case) in 1947, "twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices"—state laws "about which Congress seems to have been well informed during the 1947 debates." *Id.* Three provisions of Taft-Hartley are of particular relevance here.

Section 8(a)(3) of the Act (codified at 29 U.S.C. § 158(a)(3)) changed the text of Section 8(3) of the Wagner Act to "forbid[] the closed shop and strictly regulate[] the conditions under which a union-shop agreement may be entered." *Id.* at 314. Section 8(a)(3), for example, "require[s] that there be a 30-day waiting period before any employee is forced into a union . . . and that an employer not discriminate against an employee if he has reasonable grounds for believing that membership in the union was not available to the employee on a nondiscriminatory basis." *Retail Clerks*, 375 U.S. at 100. Notably, while Section 8(a)(3) permits union-security agreements, "it prohibits the mandatory discharge of an employee who is expelled from the union for any reason other than . . . failure to pay . . . dues." *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 749 (1988). Under Taft-Hartley, the "membership" that a collective bargaining agreement may require has thus "been 'whittled down to its financial core'" to include only payment of dues that

support the union's "collective bargaining, contract administration, and grievance adjustment" activities. *Id.* at 745 (quoting *Gen. Motors Corp.*, 373 U.S. at 742).

Much later in the Act, Section 302 (codified at 29 U.S.C. § 186) makes it generally unlawful for employers to give anything of value to union representatives, excepting "money deducted from the wages of employees in payment of membership dues in a labor organization" if that money is deducted pursuant to "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." Section 302 is essentially an anti-bribery provision, and it was meant to: "(1) protect welfare funds . . . (2) prevent corruption in the collective bargaining process . . . [and] (3) protect against the possible abuse by union officers of the power they might wield if welfare funds were left to their sole control." *Schwartz v. Associated Musicians of Greater New York*, 340 F.2d 228, 233–34 (2d Cir. 1964) (collecting cases); *see also United Steelworkers v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974) (noting that Section 302's purpose was "to protect employers from extortion and to insure honest, uninfluenced representation of employees"). It provides for enforcement via criminal penalties—chargeable as a felony if the violation is intentional and the amount at issue exceeds $1,000. *See* 29 U.S.C. § 186(d).

Finally, "to forestall the inference that federal policy [allowing union-shop agreements] was to be exclusive," *Algoma Plywood*, 336 U.S. 314, Taft-Hartley included Section 14(b) (codified at 29 U.S.C. § 164(b)), which provides that "[n]othing 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 . . . in which such execution or application is prohibited by State . . . law." Section 14(b) "ma[de] clear and unambiguous the purpose of Congress not to preempt the field." *Retail Clerks*, 375 U.S. at 101–02. In this respect, the Taft-Hartley Act "continue[d] the policy of the Wagner Act and avoid[ed] federal interference with state laws in this field." *Id.*

2. Thus, from the time the federal involvement began regulating labor relations to today, States have had unquestioned authority to pass right-to-work laws protecting workers from being forced into union membership. Several States have adopted such right-to-work laws recently, including three in the last four years. *See* 2015 Wis. Act 1; 2016 W. Va. Acts, c. 142; 2017 Ky. Acts ch. 1. In all, 27 States, including *Amici Curiae,* have adopted right-to-work laws. *See, e.g.,* Ind. Code § 22-6-6-1 *et seq.*; Ga. Code § 34-6-21 *et seq.*; La. Rev. Stat. Ann. § 23:981 *et seq.*; Okla. Const. art. XXIII, § 1A; S.C. Code Ann. § 41-7-10 *et seq.*; Tex. Lab. Code Ann. § 101.051 *et seq*. *See generally* National Conference of State Legislatures, Right-To-Work Resources, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx. These laws generally proscribe any requirement that an em-

ployee, as a condition of employment, become or remain a union member or pay dues or equivalent charges to a union or third party. *See, e.g.,* Ind. Code § 22-6-6-8. Their purpose is to ensure employees may join and leave unions without coercion by unions or employers. *See, e.g.*, La. Rev. Stat. Ann. § 23:981.

Because they prevent employers and unions from agreeing to compel employees to pay union dues as a condition of employment, right-to-work laws are often understood to "make[] unionization more difficult" by restricting the tools unions may use to convince employees to become members and pay dues. Matthew Dimick, *Productive Unionism*, 4 UC Irvine L. Rev. 679, 705 n.147 (2014). After all, "[a]s is true of any organization, money is the life blood of a labor union." Thomas R. Haggard, *Union Checkoff Arrangements under the National Labor Relations Act*, 39 DePaul L. Rev. 568, 574 (1990). Right-to-work laws, do not, however, eliminate union activity. "[U]nions continue to thrive and assert significant influence in several right-to-work states, including Iowa, where [right-to-work] provisions . . . have been in effect for more than sixty-five years." *Sweeney v. Pence*, 767 F.3d 654, 664–65 (7th Cir. 2014). Today, union membership rates in right-to-work States range from 2.7% in North Carolina and South Carolina to 14.5% in Michigan. *See* Appendix. And "[e]ven unionized workplaces in right-to-work states have impressive *firm-level* union density." Dimick, *supra,* at 705.

3. Nevertheless, "[u]nions defend union security with great intensity," *id.* at 705 n.147. And one way they do so is through the "dues-checkoff." The dues-

checkoff typically involves two discrete arrangements: First, a union employee executes a written authorization for the employer "to deduct from wages due . . . the amounts that may be due from month to month from such employee to the union." Note, *The Check-Off in Collective Agreements*, 30 Monthly Lab. Rev. 1, 1 (1930). Second, the "employer agrees with [the] union to deduct from his employees' wages union dues and other financial obligations and turn this sum over to appropriate union officials at regular intervals." E.B. McNatt, *Check-Off*, 4 Lab. L.J. 123, 123 (1953); *see also* Note, *Check-off of Union Dues under the NLRA – A Federally Protected Bargaining Issue*, 26 Ind. L. J. 443, 443–44 & n.2 (1951) (observing that dues-checkoff authorizations have long been a "frequent[]" subject of collective bargaining agreements).

Because "the continued existence of the union as an organization is dependent upon a steady flow of income from its members, it is obvious that the checkoff is more important to the union as an entity than it is to the employer or even to the individual union member." McNatt, *supra* at 123. The dues-checkoff has obvious advantages for the union: It ensures a steady stream of revenue, and when—as is usually the case—the revocability of the dues-checkoff authorization is limited, it can keep employees paying dues when they otherwise would not do so. It is thus "simply another form of union security provision and is therefore closely related to various union shop provisions in collective bargaining contracts." *Id.*

Indeed, today labor organizers themselves see dues-checkoff authorizations as "[b]y far the most important provision" for evading the reach of state right-to-work laws that prohibit union security agreements. Richard G. McCracken, *Techniques to Increase Union Membership* (2017 Oregon Labor Law Conference) at 4, http://laborlawconference.com/wp-content/uploads/2017/01/OLLC-Right-to-Work-2017.pdf. Abuse of dues-checkoff authorizations is nothing new: Seventy years ago the Columbia Law Review remarked that "where judicial resistance to the closed shop itself is strong, unions have written in checkoff provisions, thus securing at least universal financial support." Note, *Employer's Liability under Checkoff Contract for Non-Union Employee's Dues*, 47 Colum. L. Rev. 143, 145 (1947).

In short, while right-to-work laws prohibit compulsory union fees and dues, long-term dues-checkoff authorizations inhibit dissatisfied union members' freedom to reject union membership (or to otherwise cease supporting the union).

4. Aggravating the problem, judicial and administrative interpretations have weakened Taft-Hartley's restraints on checkoffs, permitting unions to apply them to a broader range of fees and to impose narrower and more obscure revocation periods. That dynamic has increased the need for state regulation and, correspondingly, the need for reexamination of *SeaPak*.

Section 302 of the Taft-Hartley Act allows employers to deduct money "from the wages of employees *in*

*payment of membership dues in a labor organization*," *only* if such deductions are made pursuant to "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) (emphasis added). Thus, as a matter of federal law, any dues-checkoff authorization must satisfy two requirements: The money must be "in payment of membership dues in a labor organization," and the authorization must at least meet Taft-Hartley's revocability requirements. Federal courts and the National Labor Relations Board, however, have progressively weakened these requirements, exposing workers to greater union overreach, notwithstanding state right-to-work laws.

First, "the courts have tended to construe the checkoff exception of subsection (c) rather broadly" to encompass more than just the "membership dues" to which Section 302 refers. Haggard, *supra* at 576 & n.37 (citing *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3, 11–12 (3d Cir. 1962)). "[T]he courts have allowed the checkoff of strike assessments, supplemental dues, 'emergency dues,' percentage levies, a performance tax, and agency shop fees." *Id.* at 577 & n.39–44 (collecting cases). Accordingly, a single dues-checkoff authorization can permit a union to collect a wide variety of union exactions from an employee's paycheck, all without obtaining any additional consent from the employee.

Second, federal courts have accepted NLRB's extremely limited interpretation of Section 302's revocability requirements. NLRB claims that Section 302 allows dues-checkoff authorizations to renew automatically without additional employee consent, and it thus "understands Section 302(c)(4) to establish a statutory right to two opportunities to revoke a checkoff authorization: the first tied to the annual anniversary of the authorization, and the second tied to the expiration of the operative collective bargaining agreement." *Stewart v. NLRB*, 851 F.3d 21, 24 (D.C. Cir. 2017). NLRB maintains that, "[w]ith respect to each of those two opportunities," the ability to revoke the authorization can be confined "to a reasonable escape period preceding the anniversary and expiration dates, respectively." *Id.*

Third, and most alarmingly, in a landmark 1991 decision, NLRB held that Section 302 permits a dues-checkoff authorization to continue to operate *even after the employee has resigned membership in the union*, so long as the authorization "clearly and explicitly provide[s] for postresignation dues obligations." *Int'l Bd. of Elec. Workers (Lockheed)*, 302 NLRB 322, 331 (1991). This "continuation" doctrine stands in tension with Section 302's requirement that the deduction of wages be "in payment of membership dues in a labor organization": In a right-to-work State, when the employee resigns from the union, the employee no longer owes dues, which means any amounts deducted from the employee's wages cannot be "in payment of membership dues." Nevertheless, both NLRB and the federal courts have continued to reaffirm the continua-

tion doctrine. *See, e.g., Stewart*, 851 F.3d at 31; *Williams v. NLRB*, 105 F.3d 787, 791 (2d Cir. 1996); *Smith's Food & Drug Centers, Inc.*, 366 NLRB No. 138 (July 24, 2018); *Int'l Bhd. of Teamsters Local 385*, 366 NLRB No. 96 (June 20, 2018).[3]

The upshot of the automatic renewal and continuation doctrines is that dues-checkoff authorizations now generally impose irrevocability for the full one-year period permitted by federal law *and* automatic renewal every year, *even if the employee has resigned his union membership*. The result is that employees have only a narrow ten- to twenty-day window to revoke their authorization, and if they fail to do so the authorization automatically renews for yet another year. *See* Brian A. Powers & Andrew Kelser, *Dues-Checkoff Dreams Do Come True, They Do, They Do*, 29 ABA J. Lab. & Emp. L. 299, 303 & n.32 (2014) ("[A]uthorization is revocable during an 'escape period,' which is usually a ten- to twenty-day window immediately after the irrevocability period expires."); *see also e.g.*, *Ohlendorf v. United Food & Commercial Workers Int'l Union*, 883 F.3d 636, 639 (6th Cir. 2018) (15-day window); *Stewart v. N.L.R.B.*, 851 F.3d 21, 25

---

[3] Notably, NLRB's conclusion in *Lockheed* that wages deducted pursuant to the dues-checkoff authorization of a resigned union member are deducted "in payment of *membership*," *Int'l Bd. of Elec. Workers (Lockheed)*, 302 NLRB 322, 325 (1991) (emphasis in original), contradicts *SeaPak*'s conclusion that dues-checkoff authorizations are not encompassed by Taft-Hartley's authorization of States to regulate "agreements requiring *membership* in a labor organization as a condition of employment." 29 U.S.C. § 164(b). Either the dues-checkoff authorizations of resigned members relate to union membership or they do not: Unions cannot have it both ways.

(D.C. Cir. 2017) (same); *Williams v. N.L.R.B.*, 105 F.3d 787, 789 (2d Cir. 1996) (10-day window); *Amalgamated Meat Cutters & Allied Workers of N. Am. v. Shen-Mar Food Prod., Inc.*, 405 F. Supp. 1122, 1125 (W.D. Va. 1975) (same).

The automatic renewal and continuation doctrines leave employees with few opportunities to revoke dues-checkoff authorizations, opportunities likely to pass them by when—as is the norm—they do not have an attorney providing revocation advice. Limited and obscure revocation periods thereby frustrate the purpose of right-to-work laws since they, in effect, force employees to continue paying union dues long after they decide to quit the union.

Take the employee here: She signed a dues-checkoff authorization when Wisconsin law still permitted compulsory union dues. She attempted to revoke the authorization shortly after Wisconsin prohibited compulsory dues, but under the continuation doctrine, because she did not revoke the authorization during its slim 15-day window, she must continue paying dues to a union she does not support. *See* Pet'r. App. 70a.

5. For precisely these reasons, many States regulate dues-checkoff authorizations, such as by requiring a majority vote of employees, *see* 43 Pa. Cons. Stat. Ann. § 211.6; 28 R.I. Gen. Laws § 28-14-3, by further limiting the period in which authorization is irrevocable, *see* Iowa Code § 731.5; N.C. Gen. Stat. § 95-25.8(a), or by requiring revocability at will, *see* Ind. Code § 22-2-6-2; Ga. Code § 34-6-25(a); Ariz. Rev.

Stat. § 23-361.02(F); *Local 514, Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1327 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004).

As demonstrated by the decision below, the Court's nearly half-century-old summary affirmance in *SeaPak* interferes with such worker protections and undermines States' right-to-work laws more broadly. Only the Court can remove *SeaPak* as an obstacle to States' effective exercise of their undisputed authority to adopt right-to-work legislation. Because of the stakes this issue presents for States and workers across the country, the Court should do so.

## II. States Have Long Regulated Wage Assignments, Including Dues-Checkoff Authorizations

In addition to undermining States' unquestionably legitimate authority to adopt right-to-work laws, *SeaPak* also disrupts the long historical practice of state regulation of dues-checkoff authorizations specifically and of wage assignments more generally.

Dues-checkoff authorizations have been a feature of American labor relations for many years. "Provision for the check-off system of collecting union dues appeared in the earliest agreements between the bituminous coal operators and the miners' union," and by 1930 "the collective agreements received by the Bureau of Labor Statistics show[ed] that provision for the check-off is made in many other trades." Note, *The Check-Off in Collective Agreements*, 30 Monthly Lab. Rev. 1 (1930). And, due to their potential for abuse,

dues checkoffs have long been a "subject of a considerable measure of state regulation." Note, *Check-off of Union Dues under the NLRA – A Federally Protected Bargaining Issue*, 26 Ind. L. J. 443, 443–44 & n.2 (1951).

By 1948, for example, eight States had outlawed the dues-checkoff in the absence of a signed, written order. Millis and Katz, *A Decade of State Labor Legislation, 1937–1947*, 15 U. Chi. L. Rev. 282, 294–95 & n.83–90 (1948). In addition, Iowa required dues-checkoffs to be "countersigned by the spouse . . . [and] revocable on thirty days' notice," while Georgia required dues-checkoffs to be revocable at will. *Id.* at 295 & n.91–92. Pennsylvania permitted the dues-checkoff only if the employees in the bargaining unit voted to approve it by majority vote. *Id.* at 295 & n.93.

Dues-checkoff authorizations have also historically been subject to broader state regulations governing wage assignments in general. Because no consideration passes between the employee and employer, dues-checkoff authorizations are *assignments*, not contracts. *See Gasaway v. Borderland Coal Corp.*, 278 F. 56, 65 (7th Cir. 1921) ("[T]he check-off is the voluntary assignment by the employee of so much of his wages as may be necessary to meet his union dues, and his direction to his employer to pay the amount to the treasurer of his union."); Note, *Labor – Statutes and Interpretation – Checkoff of Union Dues Invalid Under State Wage Assignment and "Weekly Payment" Statutes*, 63 Harv. L. Rev. 902, 902 (1950); E.B. McNatt, *Check-Off*, 4 Lab. L.J. 123, 123 (1953); Thomas R. Haggard, *Union Checkoff Arrangements*

*under the National Labor Relations Act*, 39 DePaul L. Rev. 568, 573 (1990) (collecting authorities).

Accordingly, state laws governing wage assignments traditionally applied to dues-checkoff authorizations unless state law specifically excluded them. In 1949, for example, the Rhode Island Supreme Court held that dues-checkoff authorizations were invalid under the State's wage-assignment law. *Shine v. John Hancock Mut. Life Ins. Co.*, 68 A.2d 379, 381 (R.I. 1949).

States have regulated wage assignments for a very long time, including since well before Congress passed the Taft-Hartley Act and even the Wagner Act. In 1932 the Harvard Law Review reported that thirty-nine states had regulations concerning voluntary assignments. *See* Note, *Efforts to Eliminate Some Evils of Unrestricted Credit for Wage Earners*, 45 Harv. L. Rev. 1102, 1104 (1932). These regulations imposed a variety of requirements, including that they be in writing, indicate the consent of the assignor's spouse, and limit the length of time of the assignment. *See id.* at 1105 & n.32–38. Regulation of wage assignments is thus undoubtedly a sphere "traditionally occupied" by states, and therefore an area of law where the presumption against preemption is at its zenith. *See Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009).

Under current preemption doctrine, such historical state regulation of checkoffs as wage assignments would be entitled to great weight via the presumption against preemption. Nowadays, to preempt "the historic police powers of the States," the Court requires

statutory language evincing "the clear and manifest purpose of Congress" to do so—not merely the possibility that longstanding state statutes might impede some broad federal policy. *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Yet the district court decision in *SeaPak* summarily affirmed by this Court proceeded from a very different understanding of preemption doctrine. Illustrating just how much the Court's preemption doctrine has changed in the last five decades, the *SeaPak* district court did not so much as *mention* the presumption against preemption—a principle the Court recently characterized as a "cornerstone[] of [its] preemption jurisprudence." *Id.* (internal quotation marks and citations omitted). Indeed, not until 2009 did the Court declare in *Wyeth* that the presumption against preemption applies even in areas with a history of federal regulation and even in conflict preemption cases. *Id.* at 565 n.3 (rejecting petitioner's and dissent's arguments that the presumption is inapplicable in these contexts).

*Wyeth* was "a sea change in the way courts are to consider issues of federal preemption." *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 389 (7th Cir. 2010). As the dissent below observed, the Court "is now much more sensitive to federalism concerns and far less likely to imply preemption from ambiguous statutes or legislative history." Pet'r. App. 65a. The *SeaPak* "district court's analysis perhaps made some sense in 1969, but it cannot stand alongside modern preemption doctrine." *Id.*

In short, *Wyeth*'s "sea change" means it is now time to review *SeaPak*. The Court should grant the petition, correct the preemption anomaly *SeaPak* represents, and restore States' long-recognized authority over union-security agreements and wage assignments.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Office of the
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov
**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General of
Indiana
THOMAS M. FISHER*
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General

*Counsel for* Amici *States*

Dated: February 4, 2018

ADDITIONAL COUNSEL

*Counsel for* Amici *States*

CHRISTOPHER M. CARR
Attorney General of
Georgia
40 Capitol Square, SW
Atlanta, GA 30334

JEFF LANDRY
Attorney General of
Louisiana
1885 N. Third Street
Baton Rouge, LA 70802

MIKE HUNTER
Attorney General of
Oklahoma
313 N.E. 21 Street
Oklahoma City, OK 73105

ALAN WILSON
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29211

KEN PAXTON
Attorney General of
Texas
P.O. Box 12548 (MC 059)
Austin, TX 78711

# APPENDIX

**Appendix**
**Percentage of Total Employed Workers**
**Who Are Union Members, Right-to-Work States**

| State | Percentage of total employed workers who are union members |
|---|---|
| Alabama | 9.2 |
| Arizona | 5.3 |
| Arkansas | 4.8 |
| Florida | 5.6 |
| Georgia | 4.5 |
| Idaho | 4.7 |
| Indiana | 8.8 |
| Iowa | 7.7 |
| Kansas | 7 |
| Kentucky | 8.9 |
| Louisiana | 5 |
| Michigan | 14.5 |
| Mississippi | 5.1 |
| Nebraska | 6.6 |
| Nevada | 13.9 |
| North Carolina | 2.7 |
| North Dakota | 5.2 |
| Oklahoma | 5.7 |
| South Carolina | 2.7 |
| South Dakota | 5.6 |
| Tennessee | 5.5 |
| Texas | 4.3 |
| Utah | 4.1 |

| State | Percentage of total employed workers who are union members |
|---|---|
| Virginia | 4.3 |
| West Virginia | 10 |
| Wisconsin | 8.1 |
| Wyoming | 6.5 |
| | |
| Source: Bureau of Labor Statistics, https://www.bls.gov/news.release/union2.t05.htm | |