No. 13-1384

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

JAMES M. SWEENEY, DAVID A. FAGAN,
CHARLES SEVERS, JAMES C. OLIVER,
BRYAN SCOFIELD, *et al.*,

Plaintiffs-Appellants,

v.

MICHAEL PENCE, GOVERNOR
OF THE STATE OF INDIANA, GREGORY ZOELLER,
ATTORNEY GENERAL OF THE STATE OF INDIANA, *et al*.,

Defendants-Appellees.

Appeal from The United States District Court
For The Northern District of Indiana Hammond Division
Case No. 12 cv 00081
Honorable Phillip P. Simon

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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RULE 26.1 DISCLOSURE STATEMENT

No law firm has appeared for the amici curiae in this case.

STATEMENT OF AMICI CURIAE

The amici curiae are chaired professors of law at the University of California, Irvine School of Law and Harvard Law School. They are the authors of a law review article shortly to be published that addresses the precise issue in this case. Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work Laws*, 4 U.C. Irvine L. Rev. 859 (2014). Available at SSRN: http://ssrn.com/abstract=2325158. They respectfully submit the following brief to draw the Court's attention to the analysis in that article.

The amici curiae state that no party nor any party's counsel authored this brief in whole or in part, and no party, nor any party's counsel, nor any other person provided any money to either amicus to fund preparing or submitting this brief.

ARGUMENT

I. SUMMARY

In February 2012, Indiana enacted so-called right-to-work legislation invalidating any employer requirement that union-represented employees "pay dues, fees, or other charges of any kind or amount to a labor organization … or to a charity or third party." Indiana Code § 22-6-6-8. A three-judge panel of this Court, in an opinion by Judge Tinder joined by Judge Manion, over a dissent by Judge Wood, rejected the petitioner/appellants' argument that the National Labor Relations Act preempts the Indiana law. For reasons explain below, the majority erred.

In a forthcoming article, we conclude that right-to-work laws like Indiana's are preempted by federal law to the extent they prohibit collective bargaining agreements that require nonmembers to pay less than union dues and fees. *See* Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work Laws*, 4 U.C. Irvine L. Rev. 859, 862-68 (2014). The National Labor Relations Act broadly preempts state laws regulating union-management relations and provides the exclusive source of law governing the interpretation and validity of collective bargaining agreements. *See Teamsters Local 174 v. Lucas Flour,* 369 U.S. 95 (1962); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959). With the limited exception to preemption of section 14(b), 29 U.S.C. § 164(b), the validity of fair share fee provisions of collective bargaining agreements is governed exclusively by federal law. Section 14(b) saves from preemption only state laws invalidating agreements requiring nonmembers to pay the *same as* is required of members. To the extent that Indiana Code § 22-6-6-8 invalidates collective agreements requiring nonmembers to pay *less* than is required of members, it is not within the section 14(b) savings provision. Accordingly, this Court should grant the petition for rehearing en banc and hold that federal labor law preempts the Indiana right-to-work law.

II. THIS COURT ERRED IN HOLDING THAT FEDERAL LABOR LAW DOES NOT PREEMPT THE INDIANA RIGHT-TO-WORK LAW.

Under United States labor law, when a majority of employees in a bargaining unit choose union representation, the union becomes the exclusive representative of all the employees for collective bargaining. 29 U.S. C. § 159(a); *Emporium Capwell Co. v. W. Addition Cmty. Org*., 420 U.S. 50, 64 (1975). Although the union represents all of the workers in a bargaining unit, no worker need actually become a union member. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 743–45 (1963). This is true in states like Indiana that have enacted right-to-work laws and in states that have not. Everywhere in the United States, unions operate under a regime of exclusive representation, and with exclusive representation, moreover, comes a judicially crafted duty of fair representation which requires the union to represent all workers in the bargaining unit equally, regardless of union membership. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944). The duty extends not just to collective bargaining—in which the union cannot bargain terms that favor members over nonmembers—but to disciplinary matters as well. *See Vaca v. Sipes*, 386 U.S. 171, 186 (1967). The union must grieve and arbitrate on behalf of nonmembers just as zealously (and as expensively) as it does on behalf of members.

Federal law enables unions to require that nonmembers pay for the services they receive. Under section 8(a)(3) of the National Labor Relations Act (NLRA), unions and employers can agree to collective bargaining agreements that require all employees in a bargaining unit, as a condition of employment, to pay to the union dues and fees that are the equivalent of what members pay to support the union's collective bargaining and contract administration functions. 29 U.S.C. § 158(a)(3). In non-right-to-work states, the union has a duty to represent nonmembers, but the nonmembers can be required to pay for that representation. The Indiana law at issue in this case aims to prevent nonmembers from being required to pay for representation, Ind. Code. § 22-6-6-8, but the state law does not change the federally-imposed duty of fair representation. Consequently, the Indiana law grants union-represented employees the right to refuse to pay the union for the services the union is legally obligated to provide.

When a union bargains a collective agreement with an employer, the benefits of the agreement—including, for example, wage and benefit gains, enhanced job security, and

improved mechanisms for voice at work—extend to all of the employees covered by the agreement. This presents a classic threat of free riding: the risk is that workers in the unit will seek to receive the benefits of the union's collective actions without contributing resources necessary to secure those benefits. Indeed, Mancur Olson used the union context to describe what he saw as the quintessential collective action problem. *See* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 66–97 (1965 & 1971).

Unions have attempted to respond to this free rider problem through a variety of mechanisms that require employees who benefit from a collective agreement to share in the costs of securing those benefits. Prior to 1947, unions and employers often required employees to be members of the union at the time of hiring. The Taft-Hartley Act of 1947 prohibited these "closed shop" agreements, but continued to allow other so-called union security agreements that require employees to become union members after hiring. As amended by Taft-Hartley, section 8(a)(3) expressly allows employers and unions to agree "to require as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3).

When Congress banned the closed shop, however, it also added section 14(b) to the statute, giving states some latitude to legislate in the union security area. Thus, although the federal statute permits unions and employers to bargain contract clauses that require employees to pay dues and fees to the union, section 14(b) of the statute allows states to proscribe "requiring membership in a labor organization as a condition of employment." 29 U.S.C. § 164(b).

The plain language of section 14(b)'s use of the term "membership" allows states to forbid collective bargaining clauses requiring that a worker actually become a *member* of a union. On this reading, state right-to-work laws that prohibited compulsory payment of dues and fees would

be preempted by the NLRA. After all, section 14(b) only allows states to prohibit "membership"; it does not save from preemption state laws prohibiting payment of fees for services that federal law compels unions to provide.

But the Supreme Court has held that section 14(b)'s definition of "membership" is broader than its literal construction. In *NLRB v. General Motors Corp.*, 373 U.S. 734, 735 (1963), the Court considered whether section 8(a)(3) of the statute allowed unions adopt a collective bargaining agreement provision that required nonmember employees to pay the union a fee for the union's services (an "agency fee" provision). The employer insisted that the only form of union security device that the NLRA authorized was a union shop provision that requires employees actually to become union members after the date of hire. *Id.* at 741–43. The Court rejected the employer's argument and held that the 1947 Taft-Hartley amendments changed the "meaning of 'membership' for the purposes of union-security contracts." *Id.* at 742. Unions and employers, the Court reasoned, could agree to union security devices that require employees to do *less* than is required by a union shop. *Id.* at 741–42. In particular, the Court held that "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues." *Id.* at 742. This, the Court explained, "serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent." *Id.* at 744.

Then, in *Retail Clerks International Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 756–57 (1963), the Court extended the *General Motors* section 8(a)(3) analysis to section 14(b). *Schermerhorn* held that an agency shop agreement requiring all employees in the bargaining unit to pay the equivalent of the dues and fees paid by members—"is the 'practical equivalent' of an

'agreement requiring membership in a labor organization.'" *Id.* Reasoning that section 8(a)(3) and section 14(b) "overlap to some extent," the Court concluded that such agreements also require membership within the meaning of section 14(b). *Id.* at 751-52. Thus, *Schermerhorn* allows states to prohibit collective bargaining provisions that require all employees to pay the same dues and fees as members pay.

But the *Schermerhorn* Court expressed an important caveat. Although agency fee agreements that required the same payments from nonmembers and members could be prohibited by section 14(b), that did *not* imply that "less stringent union-security arrangements" could also be prohibited. *See id.* at 752. Indeed, the union in *Schermerhorn* argued that its agreement was distinguishable from the agency shop clause at issue in *General Motors* because it "confine[d] the use of nonmember payments to collective bargaining purposes alone and forb[ade] their use by the union for institutional purposes unrelated to its exclusive agency functions." *Id.* In *General Motors*, by contrast, nonmembers were required to pay the same dues and initiation fees required of union members *and* to share with members the cost of "strike benefits, educational and retired member benefits, and union publications and promotional activities." 373 U.S. at 737.

The *Schermerhorn* Court rejected the union's argument, but for reasons that affirm our key contention. *Schermerhorn*, 373 U.S. at 752–54. First, there was no support in the record for the union's argument that its clause was distinct from a full agency shop agreement. *See id.* at 752–53. This mattered because if the union could use nonmember fees for purposes other than funding the costs of representing the nonmembers the fee requirement would look more like a *membership* requirement than a fee-for-service arrangement. *See id.* at 752-53. Second, even had the agreement restricted the use of nonmember payments to "bargaining costs," the fact that

nonmembers paid the same amount as members would render this fact "of bookkeeping significance only rather than a matter of real substance." *Id.* at 753. Because money is fungible, if members and nonmembers pay the same amount, but nonmember money may only go to collective bargaining expenses, the union can simply reallocate some portion of member dues to non-collective bargaining expenses, and not see any change in its actual budget. *See id.* at 754.

None of this analysis would matter unless there were, in fact, some types of mandatory dues arrangements that are not saved from preemption by section 14(b). If states could ban *all* mandatory payments, it would have been simple enough to say so. That the Court went through this analysis indicates clearly that this was not its position. *Schermerhorn* makes clear that states can ban agreements that require nonmembers to pay what members pay. But, by the same token, *Schermerhorn* did not hold or suggest that states can ban agreements that require nonmembers to pay *less* than what members pay.

One final Supreme Court opinion requires attention. In *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988), the Supreme Court held that section 8(a)(3) permits a collective bargaining agreement to require nonmembers to pay mandatory dues or fees to support only the union's collective bargaining and contract administration functions; an agreement may not require nonmembers to fund the union's political operations. That is, the "membership" that can be required under section 8(a)(3) is whittled down to a requirement that the nonmember pay to the union whatever share of membership dues and fees are used for collective bargaining and contract administration functions, and for those functions alone.

In sum, "membership" under both sections 8(a)(3) and 14(b) is the financial requirement of paying dues and fees equivalent to the share of member dues and fees that fund the union's collective bargaining and contract administration functions. The definition of membership the

Supreme Court has given to sections 8(a)(3) and 14(b) is broader than the literal "membership" to which section 14(b) refers, but not so broad as to cover all forms of mandatory payments from employees to unions. Indeed, the Court's opinions suggest that a provision in a collective bargaining agreement requiring all employees in a bargaining unit to pay the proportion of membership dues that cover members' representation in disciplinary matters—but nothing more—would not "require membership" within the meaning of section 14(b). *See id.* at 762–63; *Schermerhorn*, 373 U.S. at 752; *Gen. Motors Corp*., 373 U.S. 734, 743–44 (1963). So long as the required payments are less than what members pay to support collective bargaining and contract administration functions, they do not constitute the equivalent of membership and states cannot prohibit them.

It might be argued that, because section 8(a)(3) allows unions and employers to enforce a union security agreement that required payment of less than full membership dues, it must be wrong to conclude that states cannot ban such clauses. This argument fails for an important reason. Membership means the same thing under section 14(b) and section 8(a)(3): the financial requirement of paying the equivalent of the dues and fees necessary to fund the union's collective bargaining and contract administration functions. *See Beck*, 487 U.S. at 758–69. But section 8(a)(3) allows unions and employers to enforce union security clauses that are less exacting of nonmembers than full compliance with the financial requirements of membership, while at the same time section 14(b) prohibits states from banning anything less exacting than the full financial requirements of membership. Section 8(a)(3) of the NLRA determines the outer bounds of what collective bargaining agreements may require of nonmembers. A provision in a collective bargaining agreement requiring all employees in a unit to pay the proportion of membership dues that cover members' representation in disciplinary matters—but nothing

more—would be permissible under section 8(a)(3) because it is less exacting than what section 8(a)(3) permits. Likewise, section 14(b) determines the outer bounds of the authority it grants—but rather than limiting the authority of unions and employers to enter agreements, it sets the outer bounds of what states may prohibit consistent with the NLRA. 29 U.S.C. § 164(b). Thus, state right-to-work laws can ban collective bargaining agreements that "require membership" in a union—including the financial equivalent of membership as the Court has defined it—but they cannot ban *more* than that without exceeding the authority granted to them by federal law. Because a provision in a collective bargaining agreement requiring employees to pay the proportion of membership dues that cover members' representation in disciplinary matters would not "require membership," *see Beck*, 487 U.S. at 762–63, a state does not have authority to ban it, even though such a provision is permissible under section 8(a)(3).

In sum, while states can ban compulsory union membership and union security clauses that require nonmembers to pay the same amount that union members pay in dues for collective bargaining and contract administration functions, states cannot prohibit agreements under which nonmembers are compelled to pay less than that. On this analysis, the Indiana right-to-work law is preempted. The panel opinion of this Court therefore erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing en banc.

Respectfully submitted,

October 10, 2014

_/s/ Catherine L. Fisk_____

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. (40)(b) because this brief does not exceed 8 pages, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 12 point.

Dated: October 8, 2014

By: /s/ Catherine L. Fisk
Attorney for Amici Curiae