No. 16-3736, 16-3834

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139;
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 420,
PLAINTIFFS-APPELLANTS, CROSS-APPELLEES,

v.

BRAD SCHIMEL; JAMES R. SCOTT,
DEFENDANTS-APPELLEES, CROSS-APPELLANTS

On Appeal From The United States District Court
For The Eastern District of Wisconsin
Case No. 16-cv-0590
The Honorable J.P. Stadtmueller, Judge

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

For the fourth time in three years, a group of labor unions is asking this Court to create a circuit conflict by overruling *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), which held that right-to-work statutes—on the books in 28 States[1]—are lawful under the National Labor Relations Act and the Fifth Amendment's Takings Clause. The *Sweeney* plaintiffs were the first to make this request, when they urged the en banc Court to set aside the panel's decision. The Court declined. *See* Case No. 13-1264, Dkt. 45. More than two years later, Plaintiffs International Union of Operating Engineers Locals 139 and 420 ("the Unions") petitioned for an initial hearing en banc in this related appeal, pressing the Court to "consider afresh" whether "*Sweeney* was wrongly decided." Case No. 16-3736, Dkt. 27:2. Once again, the Court said no. Dkt. 39. The Unions next tried their luck with the panel. Again, for the third time, this Court refused to "revisit *Sweeney*." Opinion 5, No. 16-3736, Dkt. 51 ("Op."). Undeterred, the Unions now retread their arguments in a petition for rehearing en banc.

All the while, the precedential force of *Sweeney*, which aligns this Court with other circuits, has only grown. No federal case conflicts with *Sweeney*. No later factual, statutory, or doctrinal developments—in this circuit, the Supreme Court, or elsewhere—have cast doubt on its soundness. It is recent. And it is easy to apply, as shown by the workmanlike panel opinion in this case. *See* Op. 4–5.

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[1] *Right-to-Work Resources*, National Conference of State Legislatures, *available at* https://goo.gl/CH8TBY.

Here, as before the panel, the Unions have no answers for these points. They do not even attempt to carry their burden of showing a "compelling reason" to overrule *Sweeney*. *United States v. Kendrick*, 647 F.3d 732, 734 (7th Cir. 2011); *see Buchmeier v. United States*, 581 F.3d 561, 565–66 (7th Cir. 2009) (en banc) (*stare decisis* applies in en banc proceedings). Rather, the Unions are content simply to assert that *Sweeney* erred and to note that the vote over whether to rehear the case en banc was close. But both points are categorically insufficient reasons to revisit a decision, *see* Op. 5; *Santos v. United States*, 461 F.3d 886, 894 (7th Cir. 2006); *Mitchell v. JCG Indus., Inc.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring in the denial of rehearing en banc), much less to create a circuit conflict, *see Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005). The Unions also point out that several States, including Wisconsin, have enacted right-to-work laws after *Sweeney*, but they get *stare decisis* backwards when they suggest that this development makes overruling *Sweeney* "even more important." Pet. 1. To the contrary, it has made it even more important that *Sweeney* remain stable. *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206–07 (1991) (*stare decisis* applies in force to a "statutory construction implicating important reliance interests").

The Court should decline this invitation to reexamine the validity of state right-to-work laws—just as it did the first three times.

STATEMENT

I. Legal Background

Under the National Labor Relations Act (NLRA), employees may choose a representative for the purposes of "collective bargaining" with their employer. *See* 29 U.S.C. § 157. The chosen candidate, usually a labor union, becomes the "exclusive representative" of all the employees in the bargaining unit. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). A union's election to the position of exclusive representative gives it an extraordinary "set of powers and benefits." *Sweeney*, 767 F.3d at 666. It becomes "the agent of all the employees" in the bargaining unit, including those who do not consent. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944).

The same Act that grants these valuable benefits to unions also imposes an attendant obligation not to discriminate against any employees in the bargaining unit, which is called the duty of fair representation. *Sweeney*, 767 F.3d at 666. If the law conferred the exclusive-representative authority "without any commensurate statutory duty" toward all employees, permitting discrimination against nonmembers, "constitutional questions [would] arise." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198 (1944). Thus a union is "subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it [represents]." *Id.*

Although federal law generally controls the field of labor relations, the NLRA, as amended by the Taft-Hartley Act of 1947, permits States to ban union-security agreements. Two provisions of the Act are relevant. Under 29 U.S.C. § 158(a)(3) (or

§ 8(a)(3) of the Taft-Hartley Act), it is an "unfair labor practice" to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." But the provision adds that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later," if certain conditions are met. *Id.* A separate but closely related section, 29 U.S.C. § 164(b) (or § 14(b) of the Taft-Hartley Act), provides that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

This Court construed those provisions in *Sweeney*, 767 F.3d 654, in which unions challenged Indiana's right-to-work law as preempted under the NLRA. Reading federal law "against th[e] backdrop of states' extensive authority" in "the field of union-security agreements," the *Sweeney* Court explained that the States' statutorily protected option to forbid "agreements requiring membership in a labor organization" includes the power to ban agreements requiring forced payments to labor organizations. *Id.* at 658–64 (emphasis removed). The Court explained that this reading (among its other virtues) accords with Supreme Court precedent, *id.* at 660–61, which makes clear that those union-security agreements made permissible by § 158(a)(3)'s

proviso "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*). *Sweeney*'s interpretation also made the meaning of the term "membership" consistent throughout the Act, and it did not render any provision of the Act superfluous. 767 F.3d at 658–64. Further, it put this Court in agreement with the D.C. Circuit, and no case from any other federal court of appeals was to the contrary. *Id.* at 663–64.

Responding to Chief Judge Wood's dissent, the *Sweeney* Court rejected the argument that Indiana's law, if not preempted, committed an unconstitutional taking. To begin, the Court explained that "it is *federal* law that provides a duty of fair representation"; right-to-work laws do "not 'take' property from the Union"—they "merely preclude[ ]" unions from forcing nonmembers to pay. *Id.* at 666. Anyway, a properly targeted takings claim would also have failed, the Court explained, since a union "is justly compensated" for any representational burden "by federal law's grant to the Union the right to bargain exclusively with the employer." *Id.* Put differently, the fair-representation duty is not a taking because unions freely accept it "in exchange for the powers granted to the Union as an exclusive representative," which comes with a valuable "set of . . . benefits." *Id.*

Plaintiffs in *Sweeney* petitioned this Court to rehear the case en banc. The Court denied the petition. *See* Case No. 13-1264, Dkt. 45.

After the mandate issued in *Sweeney*, Case No. 13-1264, Dkt. 46, Wisconsin exercised its federally guaranteed option to adopt a right-to-work law by passing 2015

Wisconsin Act 1. Act 1 provides that "[n]o person may require, as a condition of obtaining or continuing employment, an individual to . . . [p]ay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization" or "any 3rd party." *See* 2015 Wis. Act 1, § 5, *codified at* Wis. Stat. § 111.04(3)(a)3 & (3)(a)4. The law applies only to collective-bargaining agreements made after its enactment. *See* 2015 Wis. Act 1, § 13.

II. Procedural History

In this suit against Wisconsin officials, the Unions claim that Act 1 is preempted by the NLRA and that Act 1 violates the federal Takings Clause "[t]o the extent that [it] prohibits a union from obtaining reimbursement for the cost of collective bargaining representation that the union is obligated to provide to non-members by federal law." App. 7–8, 16.[2]

The district court entered judgment for the State on the pleadings. SA.24. On preemption, the court held that *Sweeney* controlled. SA.15. Regarding the takings question, the court rejected the State's argument that this claim was unripe, SA.20–22, but it agreed with the State that the claim failed on the merits in light of *Sweeney*. SA.15.[3]

[2] The Appendix filed with the Unions' Opening Brief is cited as "App.," and the Short Appendix as "SA."

[3] The State challenged the district court's ripeness holding in a cross-appeal (Case No. 16-3834), which this Court consolidated with the main appeal filed by the Unions (Case No. 16-3736). As to the State's cross-appeal, the panel affirmed the district court's holding that the Unions' takings claim is ripe. Op. 5–9. Because the ripeness question is irrelevant to consideration of the Unions' petition here, the State will not discuss it further.

The Unions appealed. App. 75. They filed a petition for initial hearing en banc, raising the same arguments that appear in the present petition. *See* Case No. 16-3736, Dkt. 27. Without calling for a response, this Court denied it. Dkt. 39.

The three-judge panel affirmed, rejecting the Unions' argument that "*Sweeney* was wrongly decided and should be overturned." Op. 4–5. The Court reiterated that it "do[es] not take lightly suggestions to overrule circuit precedent, and therefore require[s] a 'compelling reason' to do so." Op. 4–5 (citations omitted). Yet, "[b]eyond re-arguing the merits of the *Sweeney* decision," all that the Unions offered were observations "that Chief Judge Wood published a strong dissent in that case" and "that this Court's vote to rehear *Sweeney* en banc was close." Op. 5 (citations omitted). But neither is a "compelling reason[ ] to overturn a recent decision." Op. 5 (citation omitted). Moreover, the Unions identified "no intervening developments in statutory, Supreme Court, or even intermediate-appellate-court law between *Sweeney* and today that undermine *Sweeney*'s validity." Op. 5.

ARGUMENT

"[A]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a); *see Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* 177 (2017) ("*Handbook*"). A request for mere error correction will not do. *See HM Holdings, Inc. v. Rankin*, 72 F.3d 562,

563 (7th Cir. 1995) (per curiam). Hence "[i]t should go without saying that mere disagreement with a decision by a panel of the court is not a sufficient ground for rehearing en banc." *Mitchell*, 753 F.3d at 699 (Posner, J., concurring in the denial of rehearing en banc).

The Unions do not come close to satisfying Rule 35(a). Far from seeking uniformity, the Unions ask this Court to go en banc precisely to open up a circuit conflict. And they fail to overcome this Court's conclusion in 2015 that taking such an extraordinary step to reconsider *Sweeney* is not warranted. Indeed, the case for reconsidering *Sweeney* is far weaker today than it was then. In any event, *Sweeney* is correct.

I. Overruling *Sweeney* Would Not Resolve A Circuit Conflict—It Would Create One

Typically a petitioner will try to show that en banc rehearing is necessary to end an "intercircuit conflict." *Mitchell*, 753 F.3d at 699 (Posner, J., concurring in the denial of rehearing en banc). In that circumstance, "reconsideration is more appropriate" because, where this Court can "eliminate [a] conflict by overruling a decision that lacks support elsewhere," *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (emphasis added), it promotes the uniformity of federal law and "spare[s] the Supreme Court extra work." *Russ*, 414 F.3d at 788 (citation omitted).

It is obvious why the Unions make no attempt to meet this standard. "Far from there being either an intracircuit or an intercircuit conflict" here, "a reversal of the panel decision"—and, by extension, *Sweeney*—"would create a circuit split." *Mitchell*, 753 F.3d at 699 (Posner, J., concurring in the denial of rehearing en banc). As the Unions concede (Pls. Opening Br. 39 n.3), *Sweeney* aligned this Court with the D.C.

Circuit, which long has held that state right-to-work statutes forbidding unions from forcing employees to pay fees are lawful. *Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982); *see Sweeney*, 767 F.3d at 663–64. Following *Sweeney*, the Sixth Circuit adopted the same view, recently holding that a county's ban on forced payments to unions constitutes "State law" within the meaning of § 164(b) and so "is included in [§ 164(b)'s] exception from preemption." *United Auto., Aerospace & Agric. Implement Workers of Am. v. Hardin Cnty.*, 842 F.3d 407, 417 (6th Cir. 2016). Other circuits also appear allied with the *Sweeney* coalition. *See, e.g.*, *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613, 620 (5th Cir. 2016) (§ 164(b) lets States ban mandatory "fees" that "constitute union 'membership'" as defined by the Supreme Court); *Local Joint Exec. Bd. v. NLRB*, 540 F.3d 1072, 1076 (9th Cir. 2008) (similar); *Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 747 (10th Cir. 2004) ("§ 164(b) . . . giv[es] states the right to enact right-to-work laws"). And no circuit has diverged from it. So, among the federal courts of appeals to have considered the matter, there is consensus. Upsetting that unanimity is not a reason to revisit *Sweeney* but to stand by it. On this basis alone, the Court should deny the Unions' petition.

II. Revisiting *Sweeney* Was Not "Exceptionally Important" In 2015, As This Court Concluded Then, And It Is Even Less So Today

"[W]here the petition points to no contrary case law, nor any other authority that disagrees with the panel's decision," it becomes "particularly" necessary for the

petitioner to demonstrate specifically why rehearing the case is otherwise "exceptional[ly] important." *HM Holdings*, 72 F.3d at 563. Here, the Unions assert that reexamining *Sweeney* is important because (1) after *Sweeney*, four more States passed right-to-work laws, including Wisconsin, and (2) some law professors, who are *amici* here, have criticized *Sweeney*. Pet. 1–2. Neither point comes close to demonstrating "exceptional importance," Fed. R. App. P. 35(a)—and certainly not a degree of importance *more* exceptional than that presented by the en banc request in *Sweeney*, which this Court denied.

That more States have exercised their option under § 164(b) to adopt right to work cuts in *favor* of *Sweeney*, not against it. "[T]hose who wish . . . to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden." *Arizona v. Gant*, 556 U.S. 332, 355 (2009) (Breyer, J., dissenting). The point of precedents, after all, is to "foster[ ] reliance on judicial decisions," not only by private parties but by state governments. *Randall v. Sorrell*, 548 U.S. 230, 243–44 (2006) (citation omitted) (upholding a precedent in large part because "state legislatures" had "used [the precedent] when drafting campaign finance laws"). It is fair to assume that, as West Virginia, Kentucky, and Missouri recently passed their right-to-work statutes, they took comfort in the stability of *Sweeney*. But in Wisconsin in particular—where this Court's precedents are binding—*Sweeney* generated even more "considerable reliance," by both the State and its people. *Randall*, 548 U.S. at 244. By the State, because had the en banc Court vacated *Sweeney* in 2015, the Legislature likely would not have bothered

even to consider Act 1. By its people, because for as long as right to work has been the law of Wisconsin, workers and businesses undoubtedly have relied upon it when entering into contracts. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2404 (2015) (where "property" and "contract" rights are "implicate[d]," "considerations favoring *stare decisis* are at their acme" (citation omitted)).

The Unions' argument that certain scholarly criticism of *Sweeney*'s preemption holding makes a rehearing in this case "exceptionally important" also falls flat. For one thing, this Court already has considered and rejected the cited criticism, which is not new. The Unions' evidence of academic resistance to *Sweeney* is an *amici* brief filed in this case by a few law professors led by Professor Catherine Fisk. *See* Pet. 2 (citing Dkt. 21). In *Sweeney*, a materially identical brief also asked for en banc reconsideration in light of then-recent academic commentary. That brief also was led by Professor Fisk, and it drew heavily upon the same article featured in *amici*'s brief here. *Compare* Case No. 13-1264, Dkt. 39, *with* Case No. 16-3736, Dkt. 21.[4] Anyway, to the extent the Unions are suggesting a scholarly consensus against *Sweeney*, they are incorrect. In fact, as several professors (including two of the *amici*) have recognized, the weight of opinion appears to favor the decision. *See, e.g.*, Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2, 95 (2016) ("Twenty-six states . . . have enacted laws granting such union-represented employees the right to refuse to pay the union; [§ 164(b)] gives states the authority to do so." (footnote omitted)); Cynthia Estlund,

[4] The *amici* brief in *Sweeney* was co-led by Professor Benjamin Sachs, who is co-counsel for the Unions in this case. The relevant article is Catherine Fisk & Benjamin Sachs, *Restoring Equity in Right to Work Laws*, 4 U.C. Irvine L. Rev. 857 (2014).

The "Constitution of Opportunity" in Politics and in the Courts, 94 Tex. L. Rev. 1447, 1465 (2016) (Section 164(b) "is generally understood" to "allow states to prohibit mandatory union fees of all kinds"); Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. Rev. 144, 165 n.91 (2016) (noting that right-to-work states have "exempt[ed] themselves from the [federal] union shop system"); Heather M. Whitney, Friedrichs*: An Unexpected Tool for Labor*, 10 N.Y.U. J.L. & Liberty 191, 196–98 (2016) (arguing that Supreme Court precedent forecloses the *Sweeney* dissent's takings argument); William B. Gould IV, *Organized Labor, the Supreme Court, and* Harris v. Quinn: *Déjà Vu All Over Again?*, 2014 Sup. Ct. Rev. 133, 168 (2014) (the *Sweeney* dissent "seems tenuous"). Finally, even if there were a scholarly critique of *Sweeney* that this Court had not yet considered, that alone would not be reason for rehearing. En banc proceedings are "very rare." *Handbook* at 177. Academic objections to court opinions are not.

More to the point, although the vote over rehearing *Sweeney* was close, whatever cause there might have been to reexamine that decision three years ago has since evaporated. After its mandate issues, "[t]he mere existence of [a precedent] becomes a reason for adhering to its holding in subsequent cases." *United States v. Sykes*, 598 F.3d 334, 338 (7th Cir. 2010) (citation omitted), *aff'd,* 564 U.S. 1 (2011). That is why the question in this case is not whether the *Sweeney* panel erred but whether there is a "compelling reason" to discard that established precedent. Op. 4–5. As the panel here explained, there is not. Op 4–5. *Sweeney* has not been "overruled or undermined by the decisions of a higher court, or other supervening developments." *Santos*, 461

F.3d at 891 (citation omitted) (so it is "entitled to considerable weight"). It harmonizes with out-of-circuit authority. *Supra* Part I. It "is simplicity itself to apply." *Kimble*, 135 S. Ct. at 2411. It interprets a statute. *Id.* at 2409 (so it has "enhanced force"). It is a recent decision. *United States v. Hill*, 48 F.3d 228, 230 (7th Cir. 1995) (making it "more authoritative"). And the full Court already has declined an opportunity to re-visit it. *See Parish v. City of Chicago*, 594 F.3d 551, 553 (7th Cir. 2009) (declining request to revisit precedent when the Court "recently rejected" the same request in a previous case).

III. At Any Rate, *Sweeney* Was Correctly Decided

Even if a petition for rehearing in this case were a proper vehicle to relitigate *Sweeney*, the Unions would lose. *Sweeney* got the relationship between the two key NLRA provisions exactly right. A proviso to 29 U.S.C. § 158(a)(3) allows as a matter of federal policy "agreement[s] . . . requir[ing]" post-hire "membership" in a union as a "condition of employment." At the same time, 29 U.S.C. § 164(b) establishes that the very same category of agreements—those "requiring [union] membership . . . as a condition of employment"—may be "prohibited" by state law. In other words, the union-security agreements made permissible by the proviso "are the same [ ] agreements" that § 164(b) "expressly place[s] within the reach of state law." *Retail Clerks I*, 373 U.S. at 751–52. Here, because it is undisputed that the union-security agreements at issue satisfy the Act's proviso—forced payments to a union make one a "member" within the meaning of § 158(a)(3), *see Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988)—they are subject to state prohibition. So § 164(b) "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). Under the Unions' contrary position, either § 164(b) is a nullity after *Beck* (because it permits States to ban only those union-security arrangements that federal law already forbids), or *Beck* must be overruled. Faced with this choice, the Unions target *Beck*, devoting more than four pages of their opening brief to an attack on its reasoning, *see* Pls. Opening Br. 29–33, and repeating here their charge that *Beck*'s analysis is "strained," Pet. 8. That objection belongs in a petition for a writ of certiorari, not a petition for rehearing en banc.

Sweeney also correctly held that right-to-work laws do not unconstitutionally "take" unions' "services" by forbidding them from exacting fees from objecting employees. 767 F.3d at 665–66. Act 1, the only law challenged here, does not force the Unions to offer *any* "services." The Unions' real grievance is with the duty of fair representation, which has an entirely different source. Yet the Unions have voluntarily assumed that duty in exchange for the special privilege of exclusive representation, against the backdrop of a statute that permits state enactment of right to work. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–07 (1984). And while the Unions fear financial doom, the fact is that "unions continue to thrive" under right-to-work laws. *Sweeney*, 767 F.3d at 664.

CONCLUSION

The petition for rehearing en banc should be denied.

Dated, August 21, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2017, I filed the foregoing Response 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: August 21, 2017

/s/ Ryan J. Walsh
RYAN J. WALSH