IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, AFL-CIO, et al.,	)	
Plaintiffs,	)	Case No. 16-cv-2395
v.	)	Judge Matthew F. Kennelly
VILLAGE OF LINCOLNSHIRE, ILLINOIS, et al.,	)	Magistrate Judge Susan E. Cox
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When Congress passed the National Labor Relations Act ("NLRA"), it determined that the federal government should have the exclusive authority to regulate many facets of the relationship between a labor union and a private-sector employer. But Congress deliberately declined to regulate or prohibit agreements between unions and employers that require workers to join a union as a condition of employment, commonly known as "union security agreements," leaving the states free to do so. Congress's decision to leave this issue to the states was implicit in the original NLRA legislation, the Wagner Act of 1935, and was made explicit in 1947, when the Taft-Hartley Act added NLRA § 14(b), 29 U.S.C. § 164(b), which expressly recognizes states' authority in this area. As a result, 26 states now have laws prohibiting union security agreements, commonly known as "Right-to-Work" laws. *See* State Right to Work Timeline, National Right to Work Committee, http://www.nrtwc.org/facts-issues/state-right-to-work-timeline-2016/.

Illinois has no statewide Right-to-Work law, but its political subdivisions with "home rule" powers have the authority to pass their own Right-to-Work laws that apply within their respective jurisdictions. Article 7, § 6 of the Illinois Constitution authorizes home-rule units to, among other things, "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare," except to the extent prohibited by the Illinois Constitution or Illinois law. Thus, because neither the Illinois Constitution nor the Illinois General Assembly has prohibited home-rule units from enacting Right-to-Work laws applying exclusively to their local jurisdictions, home-rule units may do so.

Accordingly, the Village of Lincolnshire, Illinois (the "Village") exercised its home-rule powers to adopt a Right-to-Work ordinance in December 2015. Village of Lincolnshire Ordinance No. 15-3389-116 (the "Ordinance"). The Ordinance's core Right-to-Work provisions are in § 4(A)-(D), which provides:

> No person covered by the NLRA shall be required as a condition of employment or continuation of employment with a private-sector employer:
>
> (A) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
>
> (B) to become or remain a member of a labor organization;
>
> (C) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
>
> (D) to pay to any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of a labor organization

The Ordinance also contains two ancillary provisions that protect workers from compulsory unionism. Ordinance § 4(E), a ban on "hiring hall" agreements, prohibits a worker covered by the NLRA from being required "to be recommended, approved, referred, or cleared for employment by or through a labor organization." Ordinance § 5 prohibits employers from deducting union fees from the paychecks of workers who have not authorized the deduction in writing, or who have revoked a previous authorization in writing. Specifically, it provides:

> For employers located in the Village, it shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by

giving written notice of such revocation to the employer.

In their complaint against the Village and several of its officials, the Plaintiff labor unions (collectively, the "Unions") allege that federal law preempts these Ordinance provisions. Counts I and II respectively allege that the core Right-to-Work and hiring-hall provisions are preempted by the NLRA, and Count III alleges that the dues-authorization provision is preempted by the Labor-Management Relations Act ("LMRA"). (Doc. 1, Complaint, ¶¶ 32-41.)

The Unions' claims fail as a matter of law – and the Court should therefore grant summary judgment against the Unions and in favor of the Village – for several reasons.

First, the Unions lack standing to bring their claims because they have not shown that they represent any workers who actually are or will be affected by the Ordinance, with the exception of International Union of Operating Engineers, Local 399, AFL-CIO ("Local 399"), which lacks standing only with respect to Count II because it has not shown that it will be affected by the Ordinance's prohibition of hiring hall arrangements.

Second, Count I fails on its merits because the NLRA does not preempt the Ordinance's core Right-to-Work provisions. The Supreme Court has long recognized that Congress has not preempted the field with respect to regulation of union security agreements, and, in any event, NLRA § 14(b) allows local governments, as political subdivisions of a "State," to prohibit union security agreements.

Third, Count II fails on its merits because the NLRA does not forbid state or local governments from prohibiting "hiring hall" agreements, and state or local prohibitions on such agreements would not interfere with federal labor policy.

Fourth, Count III fails on its merits because Ordinance § 5 is a valid "Right-to-Work" provision that protects workers from being compelled to support a union as a condition of their employment.

Fifth, the Unions' claims fail to the extent that the Unions have brought them under 42 U.S.C. § 1983 because the Unions have not alleged or established a violation of a federally protected right.

STATEMENT OF FACTS

Plaintiffs have submitted their material facts separately in accordance with Local Rule 56.1(a).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, a court must view the evidence and draw inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

ARGUMENT

I. With one partial exception, all of the Plaintiffs lack standing.

As an initial matter, the Court must grant summary judgment in the Village's favor with respect to all Plaintiffs on all counts for lack of standing, except for Local 399, whose standing the Village does not challenge with respect to Counts I and III only. To establish their standing, the Unions must show: (1) that they have suffered an injury in fact that is "concrete and particular" and "actual or imminent," not "conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "'likely,' as opposed to

merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). On summary judgment, a plaintiff must establish its standing with "specific facts" set forth in an affidavit or other evidence. *Id.* at 561.

A. No Plaintiff except Local 399 has standing to bring Count I.

To show the actual injury necessary to establish its standing to challenge the Ordinance's core Right-to-Work provisions, a union must show that a worker it represents has been or will be actually affected by these provisions. Otherwise, the union's injury is merely speculative, based on the possibility that the Ordinance might someday affect someone it represents.

The Ordinance could only affect a worker represented by one of the Unions if Lincolnshire is the worker's "predominant job situs" – i.e., the place where the worker spends the majority of his or her working hours. *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 417-20 (1976) (state Right-to-Work law only applies to worker if the state is his "predominant job situs"). Thus, to establish its standing, a union must show that it represents or will represent at least one worker whose predominant job situs is in Lincolnshire. All of the Unions except Local 399 have failed to do this.

1. Local 150 lacks standing to bring Count I.

Plaintiff International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150") has failed to establish its standing to bring Count I because it has not established that it represents any worker who is or will be affected by the Ordinance. Local 150 apparently premises its standing on its agreements with seven employers: Accurate Group; Central Boring, Inc.; C.R. Nelson Landscaping ("C.R. Nelson"); D.C.S. Trucking Co. ("D.C.S."); Dick's Heavy Equipment Repair ("Dick's"); Johler Demolition, Inc. ("Johler"); and Revcon Construction

Corp. ("Revcon"). (Doc. 37, hereinafter "Plfs.' SOF," ¶¶ 18-46.) But it has not shown that any of these companies employs any workers in Lincolnshire who will be affected by the Ordinance.

Local 150 has not shown that it represents a single worker who actually performs work for Accurate Group, C.R. Nelson, or Johler in Lincolnshire – so its agreements with those employers cannot support its standing to challenge the Ordinance. Moreover, the Lincolnshire address Local 150 has provided for C.R. Nelson is a post office box (*Id.* ¶ 28), and Local 150 only alleges that Johler was located in Lincolnshire "through late 2015" (*Id.* ¶ 38), which cannot establish Local 150's standing when the Unions filed their complaint in 2016. *See Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs of Milwaukee*, 708 F.3d 921, 928 (7th Cir. 2013) ("Standing is evaluated at the time the suit is filed.").

To suggest that Local 150 members work at the Lincolnshire facilities of Central Boring, D.C.S., Dick's, and Revcon, Local 150 relies on a declaration of its business representative, Richard Fahy. (Plfs.' SOF ¶¶ 27, 32, 37, 46; Doc. 37-17, hereinafter "Fahy Decl."). Fahy's declaration fails to establish Local 150's standing for several reasons. First, it is based primarily on his observations of the companies when he worked for Revcon 10 to 17 years ago, from 1999 to 2006. (Fahy Decl. ¶¶ 2, 5-8.) Second, Fahy's purported observations of the companies "on occasion" since that time – he does not say how frequent or recent these occasions have been – fail to establish that anyone who currently works for these companies spends the majority of his or her working hours in Lincolnshire. (*Id.* ¶ 9.) Third, Fahy's statement that he sees members at union meetings and "know[s] from them that their work in Lincolnshire is essentially unchanged" (*Id.*) depends on inadmissible hearsay and therefore cannot establish Local 150's standing. *See Smith v. City of Chicago*, 242 F.3d 737, 741 (7th Cir. 2000) (evidence in support of summary judgment must be admissible).

2. Laborers District Council lacks standing to bring Count I.

Plaintiff Construction and General Laborers' District Council of Chicago and Vicinity, Laborers International Unions of North America, AFL-CIO ("Laborers District Council") also has not established that it represents a single worker who is or will be affected by the Ordinance.

Laborers District Council apparently premises its standing on agreements it has entered with four employers: Central Boring; Johler; Revcon; and a business based in Waukegan, Illinois, Stuckey Construction Company ("Stuckey"). (Plfs.' SOF ¶¶ 54-68.) Like Local 150, Laborers District Council has not identified a single employee it represents who actually spends most of his or her working hours in Lincolnshire. The Unions cite a declaration by a Laborers District Council member, Daniel Davis, who states that he is employed by Central Boring but also states that he "usually" works at jobsites "throughout the Chicagoland area," not at Central Boring's Lincolnshire facility. (*Id.* ¶ 57; Doc. 37-19 ¶¶ 3-4.) As for Johler, again, the Unions have only alleged that it was based in Lincolnshire through late 2015, not when the Unions filed their complaint in 2016. (Plfs.' SOF ¶ 38.) As for Revcon, Laborers District Council has not shown that it represents any worker who actually performs work in Lincolnshire.

And as for the Waukegan-based Stuckey, Local 150 has submitted a declaration from its owner stating that its union-member employees have worked on various projects in Lincolnshire over the past 19 years, including one current project, and that he expects that it will employ union members to work on unspecified projects in Lincolnshire in the future. (*Id.* ¶ 68; Doc. 37-20, hereinafter "Stuckey Decl.," ¶¶ 4-7.) But, as Stuckey's owner states, the company's employees are "not tethered to any specific municipality" and commonly work on projects in dozens of municipalities in any given year (Stuckey Decl. ¶ 8), and Stuckey does not identify any

employee who spends, has spent, or will spend the majority of his or her working hours in Lincolnshire.

3. Carpenters Regional Council lacks standing to bring Count I.

Plaintiff Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("Carpenters Regional Council") apparently premises its standing on agreements it has entered with two employers with offices in Lincolnshire, Interior Investments and Build Corps. (SOF ¶¶ 77-78.) But the Unions have not alleged, let alone shown, that any unionized employee of either company has ever performed any work in Lincolnshire. Accordingly, Carpenters Regional Council has failed to establish its standing to bring Count I.

B. No Plaintiff has standing to bring Count II.

None of the Plaintiffs has established its standing to bring Count II, which prohibits requiring workers to be referred to an employer through a union "hiring hall." Plaintiffs Local 399, Laborers District Council, and Carpenters Regional Council lack standing to bring Count II because they have not even alleged that they have entered or will enter into any hiring hall agreements. That leaves only Local 150, which apparently has entered into hiring hall agreements but nonetheless lacks standing because it has not shown that these agreements have required, or will require, anyone whose primary job situs is in Lincolnshire "to be recommended, approved, referred, or cleared for employment by or through a labor organization."

C. No Plaintiff except Local 399 has standing to bring Count III.

The Village does not dispute that collective bargaining agreements the Unions have cited to support their standing contain provisions regarding dues authorizations that would be illegal under Ordinance § 5 if applied to workers whose primary job situs is in Lincolnshire. As discussed above, however, none of the Unions except Local 399 has established that

Lincolnshire is the primary job situs for any worker they represent. Accordingly, none of the Unions except Local 399 has standing to pursue Count III.

II. Federal law does not preempt Right-to-Work ordinances.

Regardless of standing, the Unions' claims also fail on their merits because federal law does not preempt Right-to-Work laws like the Ordinance. "When considering preemption, [federal courts] start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). This assumption is only overcome where there is: (1) express preemption (i.e., a provision of federal law explicitly preempting state or local laws); (2) implied preemption resulting from pervasive regulation; or (3) a conflict between federal law and state or local law. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Federal law does not preempt the Ordinance provisions the Unions challenge in any of these ways.

A. The NLRA does not preempt the Ordinance's "core" Right-to-Work provisions.

Federal law does not preempt the core Right-to-Work provisions of § 4(A)-(D) of the Ordinance because the NLRA has not preempted the field of regulating compulsory unionism.

1. Congress has not expressly preempted local Right-to-Work laws.

First, the NLRA does not expressly preempt local Right-to-Work ordinances. It does not contain a general preemption clause, *Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008); nor does it expressly preempt Right-to-Work laws generally or local Right-to-Work ordinances in particular.

2. Congress has not implicitly preempted local Right-to-Work laws.

Second, federal law does not implicitly preempt state and local regulation of union security agreements. In the context of labor relations, the Supreme Court has held that "Congress

implicitly mandated two types of pre-emption as necessary to implement federal labor policy." *Brown*, 554 U.S. at 65. The first type, *Garmon* preemption, "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA" and thus "forbids states to regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* (internal marks and citations omitted); *see also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (NLRA implicitly preempts state and local laws regarding activities over which the National Labor Relations Board arguably has jurisdiction, including any activity "arguably subject to [Section] 7 or [Section 8] of the [NLRA]"). The second type, *Machinists* preemption, forbids both the National Labor Relations Board ("NLRB") and the state from regulating "conduct that Congress intended to be unregulated . . . [and] controlled by the free play of economic forces." *Brown*, 554 U.S. at 65 (internal marks omitted).

Although federal law does implicitly preempt the field with respect to many aspects of labor relations under *Garmon*, it does not implicitly preempt the field with respect to laws regulating union security agreements. In passing the NLRA, Congress deliberately declined to either prohibit union security agreements or require states to allow them. Immediately after NLRA § 8(a)(3) prohibits employers from engaging in "discrimination . . . to encourage or discourage membership in any labor organization," it states:

> *Provided*, That nothing in this Act, 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 . . . .

29 U.S.C. § 158(a)(3). This proviso simply indicates that union security agreements do not violate federal law, notwithstanding any provisions of federal law that might suggest otherwise,

such as the immediately preceding prohibition on employer discrimination. As the Supreme Court has explained, this language "merely *disclaims a national policy* hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of words 'nothing in this Act or in any other statute of the United States,' and it is confirmed by the legislative history." *Algoma Plywood & Veneer Co. v. Wis. Employment Relations Bd.*, 336 U.S. 301, 307 (1949) (emphasis added).[1] Thus, § 8(a)(3) implies that non-federal Right-to-Work laws are permitted, not preempted.

The Supreme Court explicitly confirmed that the NLRA does not "preempt the field" with respect to union security agreements when it considered the question in *Retail Clerks Int'l Ass'n , Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 100-04 (1963). The Court noted that Congress made its desire not to preempt the field with respect to union-security agreements clear with the Taft-Hartley Act's addition of NLRA § 14(b), which provides:

> Nothing 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 or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b). As the Court stated, § 14(b) reflects Congress's intention "to abandon any search for uniformity in dealing with the problems of state laws [regulating union-security agreements] and . . . to suffer a medley of attitudes and philosophies on the subject." *Id.* at 104-05; *see also Sweeney v. Pence*, 767 F.3d 654, 659-60 (7th Cir. 2014) (noting states' "broad," "extensive" authority to prohibit union security agreements).

[1] *Algoma Plywood* refers to "Section 8(3)" of the NLRA, which became § 8(a)(3) with the Taft-Hartley amendments to the Act. The old § 8(3) permitted "closed shops" (i.e., shops that only hire workers who are already union members); the current § 8(a)(3) prohibits closed shops but allows shops in which a worker must join a union 30 or more days after being hired. *See Sweeney v. Pence*, 767 F.3d 654, 658-59 (7th Cir. 2014); 29 U.S.C. § 158(a)(3).

There is no merit in the Unions' argument that the inclusion of § 14(b) implies that the NLRA actually preempts the field except to the extent that § 14(b) specifically authorizes state and territorial laws regulating union security agreements. (Doc. 36, hereinafter "Plfs.' Mem.," 7-9.) When Congress added § 14(b) to the NLRA with the Taft-Hartley Act in 1947, it sought to make "clear and unambiguous" its purpose "not to preempt the field" with respect to union-security agreements and thus "forestall the inference that federal policy was to be exclusive on the matter of union-security agreements." *Schermerhorn*, 375 U.S. at 101, 104. That is, § 14(b) simply clarified – for those who would argue otherwise – that Congress *never intended* to preempt state regulation of union-security agreements with the NLRA.

The Tenth Circuit reached that conclusion in upholding a Right-to-Work law passed by an Indian tribe against an argument that federal law preempted it. With § 8(a)(3), the court concluded, Congress's purpose was not to "sw[eep] aside state authority to regulate union security measures" or "declare a national policy that they were desirable" but rather "simply to express Congress' judgment that closed shops [or, later, union shops] were not illegal where authorized." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002). Thus, "[w]hen Congress enacted § 14(b), it did not grant new authority to states and territories, but merely recognized and affirmed their existing authority." *Id.* at 1198. In sum:

> What Congress has not taken away by § 8(a)(3) it need not give back (by § 14(b)) in order for the tribe to continue to have authority to pass a Right-to-Work law. Although the Supreme Court has characterized § 8(a)(3) as articulating a national policy that certain union-security agreements are *valid as a matter of federal law*, the Court has also made clear that *§ 8(a)(3) was not intended to be preemptive* . . . [and] left the States free to pursue their own more restrictive policies in the matter of union-security agreements.

Id. at 1197 (citing *Schermerhorn*, 375 U.S. at 101; *Algoma Plywood*, 336 U.S. at 307) (emphasis added, internal marks omitted)).

The Taft-Hartley Act's legislative history supports this conclusion. "Senator Taft in the Senate debates stated that § 14(b) was to *continue the policy of the Wagner Act* and avoid federal interference with state laws in this field." *Schermerhorn*, 375 U.S. at 102 (citing 93 Cong. Rec. 6520, 2 Leg. Hist. of the Labor Management Relations Act, 1947, 1597) (emphasis added). As the Supreme Court noted in *Schermerhorn*, Senator Taft made clear that the NLRA already permitted (i.e., did not preempt) state restrictions on union-security agreements and that § 14(b) therefore did not change the law in that respect but merely clarified it:

> As to the Wagner Act, he stated, 'But that did not in any way prohibit *the enforcement of State laws* which already prohibited closed shops.' (Italics added.) He went on to say, '*That has been the law ever since that time.* It was the law of the Senate bill; and in putting in this express provision from the House bill [§ 14(b)] we in no way change the bill as passed by the Senate of the United States.'"

Id. at 102 (citing 93 Cong. Rec. 6520, 2 Leg. Hist. of the Labor Management Relations Act, 1947, 1597) (second emphasis added).

The House Report on the Taft-Hartley Act also reflected the view that the NLRA had always allowed Right-to-Work laws and that clarification (then in § 13 of the bill, later in § 14(b)) was necessary only to end any disputes over the matter. Because the courts had

> not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee . . . provided expressly in section 13 that laws and constitutional provisions of any State the restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act. *In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not*

> *invalidate any such State law or constitutional provision.* The new section 13 is consistent with this view.

Id. at 101 n.8 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., p.44) (emphasis added).

The House Conference Report made the point even more directly:

> It was *never the intention* of the National Labor Relations Act . . . to preempt the field . . . so as to deprive the States of their powers to prevent compulsory unionism. Neither the 'closed shop' proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to State policy. *To make certain that there should be no question about this*, section 13 was included in the House bill. *The conference agreement, in section 14(b), contains a provision having the same effect.*

Id. at 102 n.9 (quoting H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 60) (first and second emphases added); *see also Sweeney*, 767 F.3d at 682 (Wood, J., dissenting) ("The legislative history of section 14(b) indicates that the drafters understood it as a reaffirmation of the original NLRA . . . .").

Thus, in sum, it was not "the clear and manifest purpose" of Congress to preempt the field with respect to union security agreements with the NLRA. To the contrary, Congress has manifested a purpose *not* to preempt Right-to-Work laws.

3. No conflict exists between federal law and local Right-to-Work laws.

Finally, there is no conflict between the NLRA and the Ordinance's core Right-to-Work provision, so "conflict preemption" does not apply. Conflict preemption exists where either: (1) it is impossible to comply with both federal law and a state or local law; or (2) a state or local law "stand[s] as an obstacle" to achieving the objectives Congress intended when passing a federal law. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

The first conflict-preemption scenario does not exist here because it is possible to comply with both the NLRA and the Ordinance. The NLRA does not mandate compulsory unionism or prohibit Right-to-Work laws.

The second conflict preemption scenario does not exist here because the Ordinance does not stand as an obstacle to the objectives of the NLRA. It was not the NLRA's objective to establish compulsory unionism nationwide; as explained above, its only objective with respect to union security agreements was to tolerate them as a matter of federal law, subject to regulation, including prohibition, in the states.

There is no merit in the Unions' argument that local Right-to-Work ordinances would "impede federal labor policy" because they would require courts to determine the validity of the ordinance under state law in "any case" regarding the negotiation or enforcement of a union security agreement to which an ordinance applies. (Plfs.' Mem. at 12-13.) Presumably the question of whether a given state's law allows its political subdivisions to adopt Right-to-Work ordinances would only have to be answered by that state's highest court once, if at all, not repeatedly. And the Unions have given no reason to think that answering this question would be especially difficult in Illinois or any other state. The Illinois case that the Unions cite to suggest that it would be difficult (Plfs.' Mem. 13-14) has no relevance because it concerned a conflict between state and local policies regarding wages paid in public-works projects. *People ex rel. Bernardi v. Highland Park*, 520 N.E.2d 316, 319-23 (Ill. 1988). Here, the Unions have not alleged a similar conflict between state and local policies on union security agreements. In fact, no Illinois law prohibits the Village from enacting a Right-to-Work Ordinance, and therefore the Village acted within its broad home-rule powers when it did so. *See* Ill. Const. Art. 7 §§ 6(a), (i), (m). Thus, the Unions have no basis for their assertion that "there is a serious question

whether . . . the Village of Lincolnshire had Home Rule authority" to pass the Ordinance. (Plfs.' Mem. 14.)[2]

The Unions' suggestion that Congress "could not possibly have intended the legality of union security" agreements to turn on questions of state law, such as the extent of a municipality's home-rule powers, is also meritless. (*Id.*) Any state or local law, including a statewide Right-to-Work law, could be challenged for violating a state's constitution or laws. The Unions have not cited any authority indicating that this mere possibility suffices to show a "clear and manifest" purpose by Congress to preempt.

The Unions also argue that local Right-to-Work laws could be "burdensome" because "[i]t may be difficult to find out about the many local rules and even more costly to comply with multiple difficult rules." (Plfs.' Mem. at 14-15.) But it is not apparent that a local Right-to-Work ordinance would be significantly more burdensome than the many other local laws that regulate businesses and organizations that operate across multiple jurisdictions. Local Right-to-Work ordinances might require unions to change their strategies and future agreements in some respects, but federal law does not give unions a right to continue operating exactly as they always have. And, in any event, the Unions have not shown that whatever burden the Ordinance would impose would actually impede the achievement of the NLRA's objectives. Instead, the Unions just make a policy argument about the best way for the State of Illinois to exercise its power – an argument appropriately made to Illinois legislators, not a federal court.

Finally, the Unions' argument based on the Railway Labor Act ("RLA") lacks merit. The Unions argue that the RLA's express preemption of Right-to-Work laws for workers covered by

[2] In an opinion on the validity of local Right-to-Work ordinances, Illinois Attorney General Lisa Madigan took the Unions' view on federal preemption but did not suggest that such ordinances would violate Illinois law. Letter from Lisa Madigan, Ill. Att'y Gen., to Sen. Gary Forby & Rep. Jay Hoffman (Mar. 20, 2015), http://illinoisattorneygeneral.gov/opinions/2015/15-001.pdf.

the RLA, 45 U.S.C. § 152(11),[3] shows that Congress was concerned about the "potentially disruptive effect" that Right-to-Work laws could have on collective bargaining agreements covering multiple jurisdictions. (Plfs.' Mem. at 15.) According to the Unions, if Congress could not tolerate the "disruptive effect" of statewide Right-to-Work laws for railway workers in the RLA, it could not have intended to tolerate local Right-to-Work laws, which could also be disruptive to unions with collective bargaining agreements covering multiple local jurisdictions, in the NLRA. (*Id.*) To the contrary, however, the RLA shows that, where Congress intended to preempt Right-to-Work laws, it did so expressly.

B. NLRA § 14(b)'s protection of "State" Right-to-Work laws encompasses local Right-to-Work ordinances like Lincolnshire's.

Even if the NLRA did generally preempt Right-to-Work laws – which it does not – the Ordinance would still be valid because it is expressly permitted under NLRA § 14(b).

Standing alone, a provision of federal law authorizing a "State" to enact a particular type of law does not implicitly prohibit a state's political subdivisions – i.e., local governments – from enacting that same type of law. "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in [the State's] absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal marks and citations omitted). Accordingly, "[t]he exclusion of political subdivisions cannot be inferred from [an] express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Id.* at 608. Thus, Congress's "[m]ere

[3] The RLA authorizes union security agreements "[n]otwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State." 45 U.S.C. § 152(11). Presumably the Unions do not believe that this reference to a "State" implicitly excludes political subdivisions of a State, even though they maintain that the use of "State" in NLRA § 14(b) excludes political subdivisions and argue that the NLRA should be interpreted to match the RLA.

silence" on the question of whether it intended to preempt local laws in authorizing "State" laws is "wholly inadequate to convey an express pre-emptive intent on its own." *Id.* at 607. Rather, a statute authorizing a state to enact a certain type of law implicitly authorizes a state's political subdivisions to do so as well (to the extent that state law permits) unless Congress has set forth a "clear and manifest purpose to preempt local authority." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002).

Applying these principles in *Mortier*, the Supreme Court concluded that a provision of the Federal Insecticide, Fungicide and Rodenticide Act authorizing "States" to "regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act" also allowed local governments, as political subdivisions of a state, to engage in the same type of regulation. 501 U.S. at 606-16. Applying the same principles in *Ours Garage*, the Supreme Court concluded that the Interstate Commerce Act did not preempt local government's regulations on tow trucks where it expressly preempted laws by "a State [or] political subdivision of State . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property" but made an exception for, among other things, laws enacted pursuant to "the safety regulatory authority of a State with respect to motor vehicles." 536 U.S. at 428-42.

Here, nothing in the NLRA or its legislative history shows that Congress had a "clear and manifest" intention to preempt laws of states' political subdivisions when it used the word "State" in § 14(b). Therefore, under *Mortier* and *Ours Garage*, the Court must conclude that the states retain their authority to delegate the exercise of their power to prohibit union security agreements to their subdivisions and that § 14(b) therefore does not preempt the Ordinance.

Contrary to the Unions' argument (Plfs.' Mem. at 7), the NLRA's use of the word "local" in § 14(a) does not imply that the use of "State" in § 14(b) was intended to exclude political

subdivisions. Section 14(a) provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. § 164(a). The word "local" in § 14(a) does not refer specifically to laws enacted by local governments; it just refers to laws other than "national" laws. *See, e.g., Beasley v. Food Fair of N.C., Inc.*, 416 U.S. 653, 658-62 (1974) (striking down state law for violating § 14(a)). Further, because § 14(b) does not distinguish between "national" and "local" laws and pertains to different subject matter than § 14(a), the absence of the word "local" in § 14(b) does not suggest, let alone make "clear and manifest," that Congress intended to exclude political subdivisions when it used the word "State" in § 14(b).

Also, contrary to the Unions' argument (Plfs.' Mem. 7), the NLRA's use of the phrase "any State or political subdivision thereof" in 29 U.S.C. § 152(2) does not imply that the use of the word "State" alone in § 14(b) was intended to exclude a state's political subdivisions. In 29 U.S.C. § 152(2), the NLRA excludes "any State or political subdivision thereof" from its definition of "employer." Separation of states and their subdivisions makes sense in that context because, for employment purposes, a state and its subdivisions are separate corporate entities. That has no relevance, however, to the question of § 14(b)'s recognition of "State" authority was intended to exclude a state's political subdivisions. In that context, as the Court held in *Mortier* and *Ours Garage*, the term "State" implicitly *includes* the state's political subdivision unless Congress has clearly and manifestly shown a contrary intention.

Ours Garage in particular confirms that the use of "political subdivision" elsewhere in the NLRA does not imply that Congress intended to exclude political subdivisions when it used the word "State" alone in § 14(b). Again, that case involved the Interstate Commerce Act, which expressly preempts laws enacted by "a State [or] political subdivision of State . . . related to a

price, route or service of any motor carrier . . . with respect to the transportation of property" but carves out from that preemption several exceptions, two of which are relevant here:

> (2) MATTERS NOT COVERED.
>
> (A) [the preemption clause] shall not restrict the safety regulatory authority of a State with respect to motor vehicles. . . .
>
> . . .
>
> (C) [the preemption clause] does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law . . . relating to the price of for-hire motor vehicle transportation by a tow truck if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

536 U.S. at 429-30 (quoting 49 U.S.C. § 14501(c)). The *Ours Garage* plaintiffs argued that the references to political subdivisions in the statute's preemption clause and exception (C) implied that the use of "State" alone in exception (A) excluded a state's political subdivisions. *Id.* at 433-34. But the Supreme Court held that this difference alone could not "provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* at 434.

If that statute's *express* preemption of laws enacted by political subdivisions – combined with its exception (C), which also specifically referenced political subdivisions – did not clearly imply that exception (A)'s reference to "State" authority alone was intended to exclude political subdivisions, then of course the NLRA's single reference to "political subdivision[s]" does not imply that its use of "State" in § 14(b) was intended to exclude political subdivisions.

Thus, even if the Village's authority to enact a Right-to-Work Ordinance depends on §14(b), the Ordinance's core Right-to-Work provisions are valid because they are part of a law enacted by a political subdivision of the State of Illinois and therefore are the law of a "State" expressly authorized by § 14(b).

III. Federal law does not preempt the Ordinance's hiring hall provision.

Contrary to the Unions' claim in Count II of their complaint, the NLRA does not preempt Ordinance § 4(E), the prohibition on hiring hall arrangements.

First, federal law does not expressly preempt § 4(E). Neither the NLRA nor any other federal law explicitly prohibits state or local bans on "hiring hall" arrangements.

Second, federal law does not implicitly preempt § 4(E). Contrary to the Unions' assertion (Compl. ¶ 23), the NLRA does not "grant[]" a positive federal right to enter into hiring hall agreements. Rather, the NLRA simply does not forbid such agreements; as with union shops, it tolerates them as a matter of federal law. *See Local 357, Teamsters v. NLRB*, 365 U.S. 667, 676 (1961). Whether employers and unions enter into hiring hall agreements is of no concern to the federal government: it is exclusively "a matter of negotiation between the parties," and the NLRB therefore "has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements." *Id.* Because the Supreme Court has specifically held that the inclusion or exclusion of a hiring-hall agreement is outside of the NLRB's jurisdiction, it is not "arguable" that it is a matter that falls within the NLRB's jurisdiction, and state and local laws that prohibit hiring-hall agreements are not preempted under *Garmon*.

Moreover, preemption would not serve the interest that the federal government does have with respect to hiring-hall agreements: ensuring that they do not discriminate against workers who are not union members. *See id.* at 674-77. The NLRB has exclusive jurisdiction over the discrimination issue because "the problems inherent in the operation of union hiring halls are difficult and complex" and thus best adjudicated by "a single expert federal agency." *United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S. 690, 695-96 (1963). The "difficult and complex" issues that warrant exclusive NLRB jurisdiction over discrimination-related claims do

not arise where, as here, a law prohibits hiring halls from operating at all.

Third, there is no conflict preemption. It is possible to comply with the NLRA, which does not mandate the use of hiring halls, and the Ordinance, which prohibits it. And laws prohibiting hiring halls do not impede the achievement of the NLRA's objectives because, again, the NLRA takes no position on whether employers should use hiring halls.

IV. Federal law does not preempt the Ordinance's dues authorization provision.

Contrary to the Unions' claim in Count III, the LMRA does not preempt Ordinance § 5, which (1) prohibits employers from deducting union fees from an employee's paycheck without receiving a written authorization from the employee, and (2) allows an employee to revoke an authorization to deduct union dues at any time by giving written notice.

First, federal law does not expressly preempt § 5. Neither the LMRA nor any other federal law expressly prohibits state or local governments from requiring dues-deduction authorizations to be in writing or from giving employees the right to revoke their dues deduction authorizations at any time.

Second, federal law does not implicitly preempt § 5, which simply protects workers from compulsory union membership and is therefore a permissible Right-to-Work law. Payment of union dues or fees is equivalent to union "membership" as that term is used in NLRA § 8(a)(3) and § 14(b). *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 743 (1963) (payment of union dues is the "practical equivalent" of union membership); *Sweeney*, 767 F.3d at 660-61 (states' authority to prohibit union "membership" as a condition of employment includes authority to prohibit payment of union fees as a condition of employment). Accordingly, a worker who decides that he or she no longer wants to pay union fees, but who cannot immediately revoke his or her dues authorization, is made to accept union membership as a condition of his or her employment for

some period of time. For the reasons discussed in Sections I and II above, local governments have the authority to enact laws to protect workers from compulsory union membership. Accordingly, just as federal law does not preempt the Ordinance's core Right-to-Work provision, it likewise does not preempt the provision regarding dues authorizations.

Third, there is no conflict preemption. LMRA § 302(c)(4) provides that dues authorizations "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner." 29 U.S.C. § 186(c)(4). This sets a maximum – not a minimum – duration that a dues authorization may be irrevocable under federal law. The Ordinance's provision allowing a worker to revoke authorization at any time does not conflict with § 302(c)(4) because it does not allow dues authorizations lasting longer than the one-year federal maximum.

And the Ordinance's dues authorization provision does not "stand[] as an obstacle" to achieving the LMRA's objectives. *Gade*, 505 U.S. at 98. The apparent purpose of § 302(c)(4) is to protect workers from being permanently bound by a dues authorization, not to set one-year dues authorizations as a mandatory nationwide policy. The LMRA contemplates and tolerates dues authorizations that are irrevocable for less than one year. If anything, the Ordinance *furthers* the policy underlying § 302(c) by giving workers additional protection against having dues withheld from their paychecks after they no longer wish to support a union.

Contrary to the Unions' argument (Plfs.' Mem. at 19), this Court is not bound to strike down the Ordinance's dues authorization provision simply because the Supreme Court summarily affirmed a Fifth Circuit decision that summarily adopted and affirmed a 1969 Southern District of Georgia decision that concluded that federal laws preempt state laws regulating dues authorizations, *SeaPAK v. Indus. Tech. & Prof. Employees*, 300 F. Supp. 1197,

1200-01 (S.D. Ga. 1969), *aff'd* 423 F.2d 1229 (5th Cir. 1970), *aff'd* 400 U.S. 985 (1971). The Supreme Court's summary affirmance does not make the district court's decision "binding precedent," as the Unions claim (Plfs.' Mem. at 19), because, when the Supreme Court affirms a lower court decision without an opinion, it affirms the judgment "but not necessarily the reasoning by it was reached." *Mandel v. Bradley*, 428 U.S. 173, 176 (1977).

Because Ordinance § 5 protects workers from compulsory unionism and does not interfere with federal labor policy, this Court should decline to follow *SeaPAK* and should instead grant the Village summary judgment on Count III of the Unions' complaint.

V. The Unions have failed to state a claim under 42 U.S.C. § 1983.

Finally, the Court should grant summary judgment in the Village's favor to the extent that the Unions bring their claims under 42 U.S.C. § 1983 because the Unions have not alleged the deprivation of a right for which § 1983 provides a remedy.

A plaintiff bringing a § 1983 claim "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). For a federal statute to create a "right" protected by § 1983: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the plaintiff must demonstrate that the alleged right "is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) "the statute must unambiguously impose a binding obligation on the States." *Id.* at 340-41.

Here, the Unions fail to state a § 1983 claim because, even if they were correct on the merits of their preemption arguments, they still could not show that the statutes underlying their claims, the NLRA and LMRA, unambiguously impose a binding obligation on the states not to enact a law like the Ordinance. To the contrary, it is undisputable that states *may* prohibit union

security agreements. This case only concerns whether a state must always do so on a large scale, through a law that applies statewide, or whether it may also do so on a smaller scale, through its political subdivisions. Thus, regardless of the merits of the Unions' preemption arguments, they cannot show that the Village violated a federally protect right. *Cf. Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110-13 (1989) (allowing plaintiff to bring *Machinists* preemption claim under § 1983, noting that *Machinists* preemption protects "a guarantee for freedom of private conduct" that no government may abridge (i.e., a right), unlike *Garmon* preemption, which only addresses which level of government may regulate certain conduct). Accordingly, the Court should grant summary judgment against the Unions to the extent that they have brought their claims under § 1983.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that this Court grant Defendants' motion for summary judgment and deny the Unions' motion for summary judgment.

Dated: July 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on July 20, 2016, I served Defendants' Memorandum in Support of Their Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert