Nos. 17-1300 & 17-1325

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 399, AFL-CIO*, et al.*,
Plaintiffs-Appellees/Cross-Appellants,

v.

VILLAGE OF LINCOLNSHIRE, ILLINOIS, *et al.*,
Defendants-Appellants/Cross-Appellees.

Appeal from a Final Decision of the United States District Court for
the Northern District of Illinois
Case No. 16-cv-2395
The Honorable Matthew F. Kennelly, Judge Presiding

BRIEF OF APPELLEES/CROSS-APPELLANTS

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1300

Short Caption: International Union of Operating Engineers Local 399, et al. v. Village of Lincolnshire, et al.

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International Union of Operating Engineers, Local 399; International Union of Operating Engineers, Local 150;

Construction and General Laborers' Dist. Council of Chicago and Vicinity; Chicago Reg. Council of Carpenters

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Carmell, Charone, Widmer, Moss & Barr; G&R Public Law and Strategies; Whitfield, McGann & Katterman

Int'l Union of Operating Engineers Local 150 Legal Department; AFL-CIO Legal Department

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1300 & 17-1325

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND STANDARD OF REVIEW 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The District Court Correctly Held that the Lincolnshire Ordinance is Preempted by the National Labor Relations Act. 6

A. The National Labor Relations Act, as Amended in 1947, Preempts State and Local Regulation of Union Security Agreements Except to the Extent State Laws Are Saved by § 14(b). 6

B. The Lincolnshire Ordinance is Not a "State" Law Within the Meaning of § 14(b). 10

C. Hiring Hall and Dues Check-Off Agreements Are Not "Agreements Requiring Membership in a Labor Organization as a Condition of Employment" Within the Meaning of NLRA § 14(b). 24

1. The Prohibition on Union Hiring Halls 24
2. The Regulation of Authorized Payroll Deduction of Union Dues and Fees 26

II. The District Court Erred in Concluding that the National Labor Act Does Not Protect Against Interference by Local Government the Right of Employers and Unions to Freely Negotiate and Enter Lawful Union Security, Hiring Hall and Dues Check-Off Agreements. 27

CONCLUSION 30

CERTIFICATES 31

TABLE OF AUTHORITIES

Cases: Page

Algoma Plywood Co. v. Wisconsin Board, 336 U.S. 301 (1949) 6, 9, 14

Blessing v. Freestone, 520 U.S. 329 (1997) 28

Bus Employees v. Wisconsin Board, 340 U.S. 383 (1951) 7

Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994) 28

City of Columbus v. Ours Garage & Wrecker Service, Inc.,
536 U.S. 424 (2002) 20, 22, 23, 24

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 17

Colson Equipment, Inc., 299 NLRB 871 (1990) 15

Communications Workers v. Beck, 487 U.S. 735 (1988) 16, 29

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) 17

CSX Transportation, Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996) 20

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 15

Employees v. Wisconsin Board, 340 U.S. 383 (1951) 7

Fisher v. City of Berkeley, 475 U.S. 260 (1986) 17

Georgia State AFL-CIO v. Olens, 194 F.Supp.3d 1322 (N.D. Ga. 2016) 28

Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1985) 28

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 6, 27

Gonzaga University v. Doe, 536 U.S. 273 (2002) 29

Grand Trunk Western Railroad Co. v. City of Fenton,
439 Mich. 240, 482 N.W.2d 706 (1992) 21

H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99 (1970) 5, 28, 29

Cases, con't Page

Kentucky State AFL-CIO v. Puckett, 391 S.W.2d 360 (Ky. 1965) .... *passim*

KLB Industries, Inc. v. NLRB, 700 F.3d 551 (D.C. Cir. 2012) 15

Laborers Local 107 v. Kunco, Inc., 472 F.2d 456 (8th Cir. 1973) 4

Livadas v. Bradshaw, 512 U.S. 107 (1994) 27

Local 357, Teamsters v. NLRB, 365 U.S. 667 (1961) 25

Local 514, Transport Workers Union v. Keating, 212 F.Supp.2d 1319 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004) 26

Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983) 4

Machinists v. Wisconsin Employment Rel. Comm'n, 427 U.S. 132 (1976) 28

Michigan Southern Railroad Co. v. City of Kendallville, 251 F.3d 1152 (7th Cir. 2001) 20

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 7

New Mexico Federation of Labor v. City of Clovis, 735 F.Supp. 999 (DNM 1990) 13, 14

NLRB v. General Motors Corp., 373 U.S. 734, 745 (1963) 14, 15, 16, 29

NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) 19

NLRB v. Wooster Div., Borg-Warner Corp., 356 U.S. 342 (1957) 15

Oil, Chemical & Atomic Workers v. Mobil Oil Corp., 426 U.S. 407 (1976) .... *passim*

Radio Officers v. NLRB, 347 U.S. 17 (1954) 16

Retail Clerks v. Schermerhorn, 373 U.S. 746 (1963) 9

Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963) .... *passim*

SeaPAK v Industrial, Technical & Professional Employees, 300 F.Supp. 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1129 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971) 26

Cases, con't Page

Simms v. Local 1752, Int'l Longshoremen Ass'n, 838 F.3d 613 (5th Cir. 2016)........ 25

Sweeney v. Pence, 767 F.3d 654 (7th Cir. 2014).. 10, 25

Teamsters v. Oliver, 358 U.S. 283 (1959) 28

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)... 17

Trowel Trades Employee Health and Welfare Fund v. Edward L. Nezelek, Inc., 645 F.2d 322 (5th Cir. 1981)... 5

United Ass'n of Journeymen and Apprentices v. Borden, 373 U.S. 690 (1963)... 25, 26

United Automobile Workers v. Hardin County, 842 F.3d 407 (6th Cir. 2016) . *passim*

Wisconsin Dep't of Labor & Human Relations v. Gould, 475 U.S. 282 (1986)........... 4

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 19, 20, 21,2 23, 24

Statutes and Constitutional Provisions

7 U.S.C. § 136v(a) 20

28 U.S.C. § 1291... 1

28 U.S.C. § 1331... 1

28 U.S.C. § 1337 1

28 U.S.C. § 1343... 1

29 U.S.C. § 151... 1

29 U.S.C. § 152(2) 10

29 U.S.C. § 157... 6

29 U.S.C. § 158(a)(3)...passim

29 U.S.C. § 159(e)(1) 6

29 U.S.C. § 164(a) 10

29 U.S.C. § 164(b) .... passim

29 U.S.C. § 171 1

29 U.S.C. § 218(a) 10

42 U.S.C. § 1983 .... *passim*

42 U.S.C. § 1988 27

49 U.S.C. § 14501(c)(1) 22

49 U.S.C. § 14501(c)(2)(A) 22

Ill. Const. Art. VII, Sec. 6(a) 13

Ill. Const. Art. VII, Sec. 6(c) 13

Miscellaneous:

H.Rep. No. 2811, 81st Cong., 2d Sess. (1950) 15

Jesse White, Sec. of State, *Illinois Counties and Incorporated Municipalities* (July 2012), ... 13

BRIEF OF APPELLEES/CROSS-APPELLANTS

JURISDICTIONAL STATEMENT

The plaintiff unions – appellees/cross-appellants in this Court – brought this action against the Village of Lincolnshire and several Village officials to challenge Village Ordinance No. 15-2289-116 on the grounds that it is preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and the Labor Management Relations Act, 29 U.S.C. § 171, *et seq.* These claims were asserted under 42 U.S.C. § 1983 and the Supremacy Clause of the United States Constitution. The district court had jurisdiction over these claims under 28 U.S.C. §§ 1331, 1337 & 1343.

The district court entered a final judgment disposing of all claims on January 18, 2017. The defendants filed a timely notice of appeal on February 13, 2017. The plaintiffs filed a timely notice of cross-appeal on February 15, 2017. This Court has jurisdiction over the appeal and the cross-appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES[1]

1. Whether a local government, as an exercise of general home rule authority, may adopt a right to work ordinance prohibiting an employer and a labor organization from executing or applying a union security agreement requiring employees covered by the National Labor Relations Act to become members of the labor organization or pay fees to it as a condition of employment.

2. Whether a local government may enact an ordinance prohibiting an

[1] Issues 1-3 are raised by the appeal and are addressed in point I of the argument. Issue 4 is raised by the cross-appeal and is addressed in point II of the argument.

employer and a labor organization covered by the National Labor Relations Act from executing or applying a hiring hall agreement providing that the labor organization shall be the exclusive source of referral of job applicants.

3. Whether a local government may regulate employer payroll deductions of labor organization dues or fees that have been authorized by employees in the manner required by the National Labor Relations Act and the Labor Management Relations Act.

4. Whether the National Labor Relations Act protects the right of employers and labor organizations to execute and apply union security, hiring hall and check-off agreements free of interference by local governments, making such interference actionable under 42 U.S.C. § 1983.

STATEMENT OF THE CASE AND STANDARD OF REVIEW

The statements of the case and of the standard of review in the Brief of Defendants-Appellants are complete and correct. *See* Def. Br. 3-5 & 10.

SUMMARY OF ARGUMENT

I. The National Labor Relations Act preempts the field of labor relations regulated by that statute. With the 1947 Taft-Hartley amendments, the NLRA began to regulate the terms and application of union security agreements requiring union membership as a condition of employment. However, those amendments left the decision to include a union security clause in an agreement to the collective bargaining process.

Section 14(b) was added to the NLRA as part of the 1947 amendments in

order to preserve from NLRA preemption certain state right to work laws prohibiting union security agreements. The statutory language and legislative history of § 14(b) indicate that the provision was intended to preserve the sort of state statutory and constitutional provisions that had been brought to Congress's attention. The Supreme Court has explained that § 14(b) was intended to allow states to opt out of the federal policy of treating union security as a term of employment subject to free collective bargaining. However, the Court has held that the amended Act preempts any prohibition of union security agreements that is not authorized by § 14(b).

Local right to work ordinances are not "State" laws under § 14(b) and are, therefore, preempted by the NLRA. Such ordinances, adopted pursuant to a general grant of home rule authority, do not constitute a state policy choice. The enactment of local right to work ordinances would interfere with state policy in those states that permit free collective bargaining over union security.

Hiring hall and dues deduction agreements are not agreements requiring union membership within the meaning of NLRA § 14(b). Therefore, state or local laws prohibiting or regulating the execution or application of such agreements are preempted by the NLRA.

II. The NLRA gives employers and unions the right to freely negotiate over whether to include a lawful union security clause in their collective bargaining agreements. A local law prohibiting the inclusion of such a clause violates the NLRA-protected right of employers and unions to engage in collective bargaining

free of government interference with the terms ultimately reached. Violation of that right to negotiate free of government interference is actionable under 42 U.S.C. § 1983.

ARGUMENT

The "core" provisions of the Lincolnshire Ordinance (§ 4(A)-(D)) prohibit employers and labor organizations covered by the National Labor Relations Act from executing or applying union security agreements of the type expressly authorized by the NLRA. Def. Br. 3-4. Other provisions of the Ordinance, which the Village characterizes as "ancillary" to the core provisions, *id.*, at 4-5, prohibit employers and labor organizations from executing or applying hiring hall agreements providing for union job referrals (§ 4(E)) and prohibit employers from honoring dues deduction authorizations that are not revocable at will (§ 5).

The NLRA, as amended in 1947, comprehensively regulates the execution and application of union security, hiring hall and check-off agreements. "[T]he comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA," *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675-76 (1983), has "largely displaced state regulation of industrial relations," *Wisconsin Dep't of Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986). However, NLRA §14(b) creates "an exception to the general rule that the federal government has preempted the field of labor relations regulation," *Laborers Local 107 v. Kunco, Inc.*, 472 F.2d 456, 458 (8th Cir. 1973), that "gives the States power to outlaw even a union-security agreement that passes

muster by federal standards," *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). *See* 29 U.S.C. § 164(b). Because it is only §14(b) that "allows individual States . . . to enact so-called 'right-to-work' laws," the Supreme Court has held that those "right-to-work laws which are not encompassed by § 14(b) . . . are no[t] permissible" because such laws are preempted by the NLRA. *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409 & 413 n. 7 (1976).

In the first point below, we demonstrate that the district court correctly held that the Lincolnshire Ordinance does not come within "the limited shelter from preemption afforded state right-to-work laws by § 14(b)," *Trowel Trades Employee Health & Welfare Fund v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 326 n. 6 (5th Cir. 1981), for two reasons. First, and most fundamentally, the Ordinance is not a "State . . . law" within the meaning of § 14(b) and thus is not encompassed by the exception at all. Second, the particular provisions in the Ordinance prohibiting union hiring hall agreements and regulating dues check-off agreements would not come within § 14(b), even if they had been included in a state law, because hiring hall and check-off agreements are not "agreements requiring membership in a labor organization as a condition of employment" within the meaning of § 14(b).

While the NLRA, as amended, comprehensively regulates the execution and application of union security, hiring hall and dues check-off provisions, the Act leaves the parties free to reach agreement – or not – on any of these terms. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 103-04 (1970). By prohibiting lawful collectively bargained union security and hiring hall provisions and by attempting

to regulate the application of lawful collectively bargained dues check-off provisions, the Lincolnshire Ordinance directly interferes with the rights of employers and labor organizations to "work together to establish mutually satisfactory conditions." *Id.* at 103. As we demonstrate in point II, the district court erroneously failed to recognize that, by authorizing the negotiation of union security, hiring hall and dues check-off provisions, the NLRA provides "a statutory scheme that prevents governmental interference with the collective-bargaining process" regarding these terms of employment and thereby "gives [employers and labor organizations] rights enforceable against governmental interference in an action under § 1983." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989).

I. The District Court Correctly Held that the Lincolnshire Ordinance is Preempted by the National Labor Relations Act.

A. The National Labor Relations Act, as Amended in 1947, Preempts State and Local Regulation of Union Security Agreements Except to the Extent State Laws Are Saved by § 14(b).

The NLRA as enacted in 1935 "merely disclaim[ed] a national policy hostile to the closed shop or other forms of union-security agreement," however, as a result of the 1947 Taft-Hartley amendments, "the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered." *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301, 307 & 314 (1949). As a result of these amendments, "agreement[s] requiring membership in a labor organization as a condition of employment" are expressly "authorized" by the NLRA. 29 U.S.C. § 157. *See* 29 U.S.C. § 159(e)(1) (providing "that such authority [may] be rescinded" by a majority vote of covered employees).

In addition to authorizing the negotiation of union security agreements, the amended Act regulates with great specificity the wording and application of those agreements. The 1947 amendment to § 8(a)(3)'s first proviso requires union security agreements to specify that membership is not required until "the thirtieth day following the beginning of . . . employment." 29 U.S.C. § 158(a)(3). And, the new second proviso added in 1947 regulates how such agreements may be applied.[2] Thus, as a result of the 1947 amendments to the NLRA, the negotiation and enforcement of "union security clause[s]" became "a matter as to which . . . federal concern is pervasive and its regulation complex." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 296 (1971).

"When it amended the Federal Act in 1947, . . . Congress knew full well that its labor legislation *preempts the field that the act covers* . . . and demonstrated its ability to *spell out with particularity those areas in which it desired state regulation to be operative*." *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 397-98 (1951) (emphasis added; quotation marks and footnotes omitted). NLRA § 14(b) is an example of the 1947 Congress "spell[ing] out with particularity [an] area[] in which it desired state regulation to be operative." *Id.* at 398. *See id.* at 398 n. 25.

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[2] "*Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3).

Section 14(b) of the National Labor Relations Act, as amended in 1947, 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).

In *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409 (1976), the Supreme Court squarely held that it is only "Section 14(b) [that] allows individual States to exempt themselves from [the authorization and regulation of certain union security agreements in] § 8(a)(3) and to enact so-called 'right-to-work' laws prohibiting union or agency shops." For precisely that reason, the Court held that "right-to-work laws which are not encompassed under § 14(b) . . . are no[t] permissible." *Id.* at 413 n. 7.

The issue addressed in *Mobil Oil* was "whether, under § 14(b), Texas' right-to-work laws can void an agency shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas." 426 U.S. at 410. The Court began its analysis by noting that "it is § 14(b) [which] gives the States power to outlaw even a union-security agreement that passes muster by federal standards," and "that there [are no] applications of right-to-work laws which are not encompassed under § 14(b) but which are nonetheless permissible." *Id.* at 413 n. 7 (quotation marks and citation omitted). Thus, "the central inquiry in th[e] case

[wa]s whether § 14(b) permits the application of Texas' right-to-work laws to the agency-shop provision," because "[o]nly if [§14(b)] is to be so read is the agency-shop provision unenforceable." *Id.* at 412-13. The Court "h[e]ld that under § 14(b), right-to-work laws cannot void agreements permitted by § 8(a)(3) when the situs at which all the employees covered by the agreement perform most of their work is located outside of a State having such laws." *Id.* at 414. Accordingly, the Court concluded "that § 14(b) *does not allow enforcement* of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a State having such laws." *Id.* at 418 (emphasis added).[3]

In sum, the district court correctly proceeded on the understanding that it is

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[3] *Mobil Oil*'s understanding of § 14(b) rested on three prior Supreme Court decisions – *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963) (*Schermerhorn II*), *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963) (*Schermerhorn I*), and *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949) – which clearly and repeatedly state that it is "§14(b) [that] gives the States power to outlaw even a union-security agreement passes muster by federal standards." *Schermerhorn II,* 375 U.S. at 103. *See also id.* at 102-03 ("Yet, even if the union-security agreement clears all federal hurdles, the States by reason of § 14(b) have the final say and may outlaw it."), at 103 ("a state union-security law authorized by § 14(b)"), at 104-05 ("the problems of state laws barring the execution and application of agreements authorized by § 14(b)"), and at 105 ("As a result of § 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field."); *Schermerhorn I*, 373 U.S. at 747 ("We have concluded that the contract involved here is within the scope of § 14(b) of the National Labor Relations Act and therefore is congressionally made subject to prohibition by Florida law."), at 750 ("The case to a great extent turns upon the scope and effect of § 14(b)"), at 751 ("§ 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security agreements."), and at 757 ("§ 14(b) of the Act subjects this arrangement to state substantive law"); *Algoma Plywood*, 336 U.S. at 314 ("§ 14(b) was included" to negate "the inference that federal policy was to be exclusive" created by the amendments "forbid[ding] the closed shop and strictly regulat[ing] the conditions under which a union-shop agreement may be entered.").

"Section 14(b) [that] protect[s] states' authority to enact laws prohibiting union-security arrangements that are permissible under Section 8(a)(3) and other provisions of the NLRA." *Sweeney v. Pence*, 767 F.3d 654, 659 (7th Cir. 2014). As we show in the next section, a local ordinance of the sort adopted by the Village of Lincolnshire is not an exercise of "state[] authority," *ibid.*, protected by NLRA § 14(b).

B. The Lincolnshire Ordinance is Not a "State" Law Within the Meaning of § 14(b).

1. Section 14(b) provides that the NLRA "authoriz[ation of] the execution or application of agreements requiring membership in a labor organization as a condition of employment" does not apply "in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b). The statutory language makes clear that the only laws that come within the exception are those reflecting the policy of a State or Territory. If the Taft-Hartley Congress had intended § 14(b) to cover laws at both the state and local levels, it would have referred more broadly to "local" law as it did in the immediately preceding § 14(a), 29 U.S.C. § 164(a), rather than "State" law.[4] And, if Congress had contemplated right to work ordinances having only a local reach, it would have used the phrase "[in] any State or political subdivision thereof," 29 U.S.C. § 152(2), to

[4] The Fair Labor Standards Act of 1938, expressly protects local ordinances by providing that nothing in the FLSA "shall excuse noncompliance with any Federal or *State law or municipal ordinance* establishing a minimum wage higher than the minimum wage established under this Chapter." 29 U.S.C. § 218(a) (emphasis added).

describe the area in which the permitted laws could supplant federal policy rather than the phrase "in any State."

In *Mobil Oil*, the Supreme Court held that "§ 14(b) does not allow enforcement of right-to-work laws with regard to an employment relationship whose principal job situs is outside a State having such laws." 426 U.S. at 418. The Court cited "[t]wo practical considerations" in support of this interpretation. *Ibid.* "First, the use of a job situs test will minimize the possibility of patently anomalous extraterritorial application of any given State's right-to-work laws." *Ibid.* Second, "[u]nder a job situs test, parties entering a collective bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid." *Id.* at 419. Both of these important practical goals would be thwarted by interpreting the phrase "State . . . law" to include local ordinances.

In the first place, there is nothing in the language of § 14(b) that would prevent "patently anomalous extraterritorial application of any given [local government's] right-to-work laws," *Mobil Oil*, 426 U.S. at 418, so long as the local ordinance did not apply to job sites in other states.

The Lincolnshire ordinance contemplates precisely such extraterritorial application. The provision barring hiring hall agreements clearly applies to all hiring decisions by Lincolnshire employers without regard to where the employees will ultimately perform their jobs. Sec. 4(E), A-29. And, the provision regulating payroll deduction of dues or fees expressly covers all "employers located in the Village" without regard to the location of the employers' job sites. Sec. 5, A-29-30.

Even the core right to work provisions could be read to prohibit all Lincolnshire employers from conditioning employment on union membership, regardless of job-site location. Sec. 4(A)-(D), A-29. Section 14(b), as interpreted in *Mobil Oil*, would prevent application of the Lincolnshire ordinance to job sites that are not "in [the] State" of Illinois, even *if* the ordinance qualified as a "State" law. But there is nothing in the language of § 14(b) or the Supreme Court's interpretation of that language that would prevent Lincolnshire from applying its ordinance beyond the Village limits to job sites located elsewhere in the State of Illinois.

Recognizing that extraterritorial application of local right to work ordinances would be untenable, the Sixth Circuit attempted to address the problem by reading the phrase "in any State" to mean "in any State or political subdivision thereof." *United Automobile Workers v. Hardin County*, 842 F.3d 407, 413 (6th Cir. 2016), *cert. pending*, U.S. Sup. Ct. No. 16-1451.[5] But the Sixth Circuit's version changes the meaning of the statutory language by establishing two different boundaries on the effective reach of different types of right-to-work laws – the boundaries of the "State" for laws enacted by the State and the boundaries of the "political subdivision" for ordinances enacted by a local government.

"[E]xtraterritorial application[]" is not the only "patently anomalous," *Mobil Oil*, 426 U.S. at 418, situation that would result from reading § 14(b) to authorize

[5] The plaintiff unions in *Hardin County* have filed a petition for certiorari asking the Supreme Court to vacate lower court judgments in that case on the ground that the Kentucky Right to Work Act that became law subsequent to the Sixth Circuit's decision rendered the case moot. *United Automobile Workers, Local 3047 v. Hardin County*, U.S. Sup. Ct. No. 16-1451 (docketed June 6, 2017).

local right to work ordinances. Even without extraterritorial application, "the diversity that would arise if cities, counties, and other local governmental entities were free to enact their own regulations" could easily "subject a single collective bargaining relationship to numerous regulatory schemes. " *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. 999, 1003 (D.N.M. 1990).

Illinois presents a good example of the chaos that would result from allowing local right to work ordinances. Under the Illinois Constitution, every county and every municipality with a population over 25,000 has home rule authority. Ill. Const. Art. VII, Sec. 6(a). In addition, any municipality, no matter how small, may elect to assume home rule authority by referendum. *Ibid.* The Village of Lincolnshire, which has a population of 7,000, voted to assume home rule authority by referendum on April 15, 1975. Jesse White, Sec. of State, *Illinois Counties & Incorporated Municipalities* 15 & 30 (July 2012).[6] There are 102 counties in Illinois and 1,300 municipalities. *Id.* at 2-26. Over two hundred of the municipalities have assumed home rule authority. *Id.* at 29-32. Thus, in Illinois alone, there could be more than 300 right to work ordinances.

Reconciling myriad local right to work ordinances would not be easy. The Illinois constitution provides that municipal ordinances prevail over county ordinances where there is a conflict. Ill. Const. Art. VII, Sec. 6(c). But § 14(b) does not limit right to work laws to a simple prohibition of union security agreements.

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[6] Available at: https://www.cyberdriveillinois.com/publications/pdf_publications/ipub11.pdf.

Right to work laws may prohibit some lawful forms of union security agreement while permitting others, *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963), or attach conditions to the execution of union security agreements, such as an employee authorization vote by a specified margin, *Algoma Plywood*, 336 U.S. at 304. Thus, it may be unclear whether there is an actual conflict between a municipal right to work ordinance and a county ordinance where they specify inconsistent – but not contradictory – limitations on union security agreements. Beyond that, numerous municipal ordinances, each specifying different and possibly contradictory limitations, could apply to a single collective bargaining agreement. For example, an agreement could cover multiple facilities of an employer located in different cities or villages. Or, an agreement could cover multiple job sites, such as construction sites, that are located in different cities and villages.

If local right to work ordinances were allowed by § 14(b), "[t]he result would be a crazy-quilt of [overlapping and possibly inconsistent] regulations." *City of Clovis*, 735 F.Supp. at 1002. And, the "bargaining parties would often be left in a state of considerable uncertainty if they were forced to identify and evaluate all the relevant [local ordinances] in order to determine the potential validity of a proposed union-security provision." *Mobil Oil*, 426 U.S. at 419. "The unpredictability that [this] would inject into the bargaining relationship, as well as the burdens of litigation that would result from it," are not something that Congress intended. *Ibid.*[7]

[7] Congress addressed the potentially disruptive effect of applying inconsistent

It bears emphasis that uncertainty about what might be required by local right to work ordinances would have adverse effects on the overall bargaining process. "[U]nion security is . . . a mandatory subject of bargaining in other than right-to-work states." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) (quotation mark and citation omitted). An "employer and the representative of its employees [are required] to bargain with each other in good faith with respect to [such] terms and conditions of employment." *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (citation and quotation marks omitted). An employer that refuses to bargain over a proposal for a lawful union security clause, even in the good faith belief that the clause is unlawful, would be guilty of an unfair labor practice. *General Motors*, 373 U.S. at 745. *See Colson Equipment, Inc.*, 299 NLRB 871, 873-74 (1990) (suggesting that an employer would have committed an unfair labor practice by refusing to bargain over a union security proposal that violated a preempted local right to work ordinance). And, if the employer locked out its

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right-to-work laws to a single collective bargaining agreement in the 1950 amendments authorizing union security agreements under the Railway Labor Act. RLA bargaining units are nationwide in scope and typically cover workplaces in a number of states. The 1950 RLA amendments authorizing union security agreements in railroad and airline industries did *not* create an exception allowing state right-to-work laws, because Congress determined that application of inconsistent state laws to a single bargaining unit would be unduly disruptive. In this regard, the House Report on the 1950 RLA amendments explained that "it would be wholly impracticable and unworkable for the various States to regulate such [union security] agreements," because the "agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules of working conditions of employees in many States." H.Rep. No. 2811, 81st Cong., 2d Sess., p. 5 (1950). Allowing local right to work ordinances covering NLRA bargaining units would be equally "impractical and unworkable." *Ibid.*

employees in support of that unlawful bargaining position, it would incur substantial backpay liability. *KLB Industries, Inc. v. NLRB*, 700 F.3d 551, 559-60 (D.C. Cir. 2012).

The "uncertainty" resulting from reading § 14(b) to authorize myriad local right to work ordinances would thwart the "[f]ederal policy [that] favors permitting [union security] agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws." *Mobil Oil*, 426 U.S. at 419-20. The Taft-Hartley amendments "authorize[] employers to enter into certain union security contracts," because "Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem." *Radio Officers v. NLRB*, 347 U.S. 17, 40-41 (1954). In other words, "[t]he amendments were intended . . . to . . .give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." *General Motors*, 373 U.S. at 741 (citation and quotation marks omitted). *Accord Communications Workers v. Beck*, 487 U.S. 735, 750 (1988).

"While § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy." *Mobil Oil*, 426 U.S. at 416-17. "By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop

and related devices," a fact "about which Congress seems to have been well informed during the 1947 debates." *Schermerhorn II*, 375 U.S. at 100. At the same time, Congress would have been aware that the other thirty-six states had declined to enact such laws, thereby leaving union security to the collective bargaining process. While Congress obviously intended to preserve the policy choice made by the twelve states that had enacted right to work laws, there is no indication that it intended to allow local governments to thwart the policy choice of the other thirty-six states that permitted collective bargaining over union security.

In the analogous context of defining the "state action" exemption to the federal antitrust laws, the Supreme Court has recognized that there is a crucial distinction between a "clearly articulated and affirmatively expressed state policy" and simply "allow[ing] . . . municipalities to do as they please." *Community Communications Co. v. Boulder*, 455 U.S. 40, 52 & 55 (1982). "Where the actor is a municipality," rather than a state, there is a "real danger . . . that it will seek to further purely parochial interests at the expense of more overriding state goals." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). The "serious economic dislocation which could result if [local governments] were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 (1978) (Opinion of Brennan, J.)., led the Court to conclude that "only the State, not its subdivisions," *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986), comes within the state action exemption. The statutory language, legislative history and

authoritative interpretation of § 14(b) all indicate that Congress intended to draw the same distinction between state and local policy with respect to the limited exemption from NLRA preemption stated there.

2. In the seventy years since § 14(b) was enacted there have been only two appellate court decisions addressing whether local ordinances are protected by that provision. *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. 1965), and *United Automobile Workers v. Hardin County*, 842 F.3d 407 (6th Cir. 2016). There are thousands of local governments spread throughout the United States, and the fact that virtually none of them have even attempted to enact right to work ordinances demonstrates the common understanding that § 14(b) does not protect such local laws. Comparison of the reasoning in *Puckett* and in *Hardin County* confirms the common sense view that local right to work ordinances are not authorized by § 14(b). *See Mobil Oil*, 426 U.S. at 413 n. 7 (citing *Puckett*'s construction of NLRA § 14(b) with approval).

a) *Puckett* held that § 14(b) does not allow "local subdivisions" to enact right to work laws, because that provision only "permit[s] varying policies [regarding the legality of union security agreements] at the state level" and was "not . . . intended to allow as many local policies as there are local political subdivisions in the nation." 391 S.W.2d at 362. *Puckett* began from the proposition that the meaning of § 14(b) depends on whether, "by Section 8(a)(3) of the National Labor Management Relations Act, as amended, 29 U.S.C. § 158(a)(3), Congress . . . intend[ed] to pre-empt . . . the field of union-security agreements." *Ibid.* The Kentucky court reasoned

that, if "by Section 8(a)(3), Congress did intend to pre-empt the field of union security agreements then Section 14(b) would seem to serve the function of making a special exception out of the pre-emption," and "the words 'State or Territory' very well could be meant to so limit the exception as to exclude local subdivisions." *Ibid.*

On the understanding that "Section 14(b) makes an exception out of the otherwise full preemption by the Act" that "should be strictly and narrowly construed because it represents a departure from the overall spirit and purpose of the Act," *Puckett* concluded:

> "[I]t is not reasonable to believe that Congress could have intended to waive other than to major policy-making units such as states and territories, the determination of policy in such a controversial area as that of union-security agreements. We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation." *Ibid.*[8]

b) By contrast with *Puckett*, the Sixth Circuit's *Hardin County* opinion pays little attention to § 14(b)'s place in the overall purpose and structure of the NLRA. Rather, the Sixth Circuit concluded that the proper interpretation of § 14(b) was controlled by "the presumption arising from *Mortier* and *Ours Garage* that 'State'

[8] In addressing whether Indian tribes may enact right to work laws, the Tenth Circuit similarly concluded that NLRA § 14(b) "embraces diversity of legal regimes respecting union security agreements at the level of major policy-making units." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002) (citation and quotation marks omitted). The Tenth Circuit's conclusion that Indian tribes could enact such laws, however, turned on "canons of statutory construction peculiar to Indian law." *Id.* at 1196.

includes political subdivisions of the State." 842 F.3d at 420 (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002)).[9] Contrary to the Sixth Circuit, *Mortier* and *Ours Garage* both support *Puckett*'s approach to interpreting § 14(b).

i) *Mortier* considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) precludes the regulation of pesticides by local government. 501 U.S. at 600. The question arose because FIFRA § 136v(a) provides that, notwithstanding FIFRA's labeling or packaging requirements, "[a] State may regulate the sale or use of any federally registered pesticide or device." 7 U.S.C. § 136v(a).

In determining whether § 136v(a)'s permission to regulate pesticides extended to local governments, the *Mortier* Court paid particular attention to whether "FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States" and concluded that "field pre-emption cannot be inferred." 501 U.S. at 607, 612. It followed that "[t]he specific grant of authority in § 136v(a) *consequently* does not serve to hand back to the States powers that the statute impliedly usurped." *Id.* at 614 (emphasis added).

[9] The Sixth Circuit overruled *CSX Transportation, Inc. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996), to the extent that it did not apply this presumption. 842 F.3d at 416. *CSX Transportation* is a precedent that this Court has cited with approval regarding the meaning of the term "State" in the Federal Railway Safety Act's preemption exception. *Michigan Southern Railroad Co. v. City of Kendallville*, 251 F.3d 1152, 1154 (7th Cir. 2001).

The Court's opinion in *Mortier* proceeded on the assumption that, if FIFRA were "a comprehensive statute that occupied the field of pesticide regulation," it would make sense to read "certain provisions," such as § 136v(a), as "open[ing] specific portions of the field to state regulation and much smaller portions to local regulation." *Id.* at 611. Justice Scalia's concurring opinion elaborated this point:

> "If there *were* field preemption, 7 U.S.C. § 136v(a) would be understood not as restricting certain types of state regulation (for which purpose it makes little sense to restrict States but not their subdivisions) but as *authorizing* certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions)." *Id.* at 616 (emphasis in original).

The Village maintains that only Justice Scalia attached importance to the question of field preemption. Def. Br. 26. But the majority opinion in *Mortier* expressly found it "important[]" that "field pre-emption cannot be inferred." 501 U.S. at 612. *See Grand Trunk Western Railroad Co. v. City of Fenton*, 439 Mich. 240, 249, 482 N.W.2d 706 (1992) (the absence of field preemption was "crucial" in *Mortier*).

What *Mortier* says about construing an exception to field preemption is virtually identical to *Puckett*'s statement that "if it be considered that by Section (8)(a)(3), Congress did intend to pre-empt the field of union security agreements then Section 14(b) would seem to serve the function of making a special exception out of the pre-emption," so that "the words 'State or Territory' very well could be

meant to so limit the exception as to exclude local subdivisions." 391 S.W.2d at 362.

ii) *Ours Garage* concerned a provision of the Interstate Commerce Act stating that the Act's preemption of state and local regulation "related to a price, route, or service of any motor carrier" would "not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(1) & (2)(A). The Court concluded that the "safety regulatory authority" retained by the state included the authority to delegate police powers over safety matters to local government:

> "This case . . . deals . . . with preemption stemming from Congress' power to regulate commerce, in *a field where States have traditionally allowed localities to address local concerns*. Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' *the preexisting and traditional state police power over safety*. That power *typically includes the choice to delegate the State's 'safety regulatory authority' to localities*. Forcing a State to refrain from doing so would effectively 'restrict' that very authority." *Ours Garage*, 536 U.S. at 439 (emphasis added).

The *Ours Garage* opinion observed that "[a] congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal [would seem to] call for the narrowest possible construction of the exception." 536 U.S. at 440. But the Court concluded that "[s]uch a construction is surely resistible here, for § 14501(c)(1)'s preemption rule and § 14501(c)(2)(A)'s safety exception to it do not necessarily conflict," because "[t]he

problem [addressed by the preemption rule] was 'state *economic* regulation,' [while] the exemption in question is for state *safety* regulation." *Id.* at 440-41 (emphasis in original).

Ours Garage thus expressly recognized that where "a specific exception" "tend[s] against" the "general policy" of a statute, that circumstance usually "call[s] for the narrowest possible construction of the exception." 536 U.S. at 440. *Puckett* applied that principle, observing that § 14(b) "should be strictly and narrowly construed because it represents a departure from the overall spirit and purpose of the Act." 391 S.W.2d at 362. A narrow construction was not called for in *Ours Garage*, because the "preemption rule and [the] safety exception to it d[id] not necessarily conflict" in that the preemption rule addressed "'[s]tate *economic* regulation' [while] the exception in question is for state *safety* regulation." 536 U.S. at 440-41 (emphasis in original). But as *Puckett* explains, § 8(a)(3)'s authorization of union security agreements and the § 14(b) exception allowing States to prohibit such agreements *do* conflict with regard to precisely the same policy issue. *See Mobil Oil*, 426 U.S. at 417 (§ 14(b) permits a "conflict between state and federal law").

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In sum, *Mortier* and *Ours Garage* support *Puckett*'s conclusion that § 14(b) does not allow "local subdivisions" to enact right to work laws, because that provision only "permit[s] varying policies [regarding the legality of union security

agreements] at the state level" and was "not . . . intended to allow as many local polices as there are local political subdivisions in the nation." 391 S.W.2d at 362. "Federal policy *favors* permitting [union security] agreements," *Mobil Oil*, 426 U.S. at 420 (emphasis added), but "§ 14(b) reflects Congress' decision that any State or Territory that wishes to may *exempt itself from that policy*," *id.* at 416-17 (emphasis added). Thus, "with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy '[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws.'" *Id.* at 417, quoting *Schermerhorn II*, 375 U.S. at 103. The fact that the § 14(b) exception authorizes States to adopt a policy regarding the legality of union security agreements that "necessarily conflict[s]" with the "general policy" of the NLRA regarding union security agreements "call[s] for the narrowest possible construction of the exception." *Ours Garage*, 536 U.S. at 440. "The specific grant of authority in [NLRA § 14(b)] hand[s] back to the States powers that the statute had impliedly usurped" by "*authorizing* certain types of state regulation," and it thus "makes eminent sense to [read § 14(b)] to authorize States but not their subdivisions." *Mortier*, 501 U.S. at 614 & 616 (Scalia, J., concurring) (emphasis in original).

C. Hiring Hall and Dues Check-Off Agreements Are Not "Agreements Requiring Membership in a Labor Organization as a Condition of Employment" Within the Meaning of NLRA § 14(b).

1. The Prohibition of Union Hiring Halls.

Section 4(E) of the Village Ordinance provides that "[n]o person covered by

the NLRA shall be required as a condition of employment . . . to be recommended, approved, referred, or cleared for employment by or through a labor organization." (A-29.) In short, this is a "prohibition on union hiring halls." Def. Br. 34.

As this Court has observed, "§14(b) does not authorize states to prohibit the use of exclusive hiring halls that do not discriminate between union members and nonmembers." *Sweeney*, 767 F.3d at 663 n. 8 (citing authority). *Accord Hardin County*, 842 F.3d at 421-22; *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613, 619-20 (5th Cir. 2016). Section 14(b) does not authorize such state laws, "because hiring halls do not require prospective employees to do anything more than temporarily visit union facilities during the hiring process," and "[s]uch temporary affiliation does not amount to 'membership' as that term has been interpreted by the Supreme Court." *Sweeney*, 767 F.3d at 663 n. 8.

The Village does not attempt to explain how the use of a nondiscriminatory hiring hall could constitute "membership in a labor organization." 29 U.S.C. § 164(b). Nor does the Village cite a single case in counterposition to the myriad circuit court decisions holding that § 14(b) does not cover nondiscriminatory union hiring halls. To the contrary, the Village correctly notes that the Supreme Court has held that the NLRA leaves whether "the hiring hall be included or excluded in collective agreements" as "a matter of negotiation between the parties," and that the "difficult and complex" problem of regulating hiring halls has been left to "a single expert federal agency." Def. Br. 35, quoting *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 676 (1961), and *United Ass'n of Journeymen & Apprentices v. Borden*, 373 U.S.

690, 695-96 (1963). In sum, the Village tacitly accepts that Section 4(E) of the ordinance is preempted by the NLRA.

2. The Regulation of Authorized Payroll Deduction of Union Dues and Fees.

Section 5 of the Lincolnshire ordinance makes it unlawful for "employers located in the Village" to deduct union dues or fees from an employee's pay unless "the employer has received[] a signed written authorization of such deductions, which . . . may be revoked by the employee at any time by giving written notice of such revocation to the employer." A-29-30. As the Village acknowledges, "LMRA § 302(c)(4) requires that union dues authorizations 'not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement, which ever occurs sooner.' 29 U.S.C. § 186(c)(4)." Def. Br. 38.

The Supreme Court summarily affirmed a lower court decision that "held that a state law regulating such a dues-payment arrangement did not come within the § 14(b) exception and was preempted because it overlapped with, and was in conflict with, federal regulation under the Labor Management Relations Act ('LMRA'), 29 U.S.C. § 186(c)(4)." *Hardin County*, 842 F.3d at 421, citing *SeaPAK v Industrial, Technical & Professional Employees*, 300 F.Supp. 1197 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971). The *SeaPAK* decision "bears the Supreme Court's imprimatur and its authority remains essentially unchallenged by any conflicting case law authority." *Hardin County*, 842 F.3d at 421. *Accord Local 514, Transport Workers Union v. Keating*, 212 F.Supp.2d 1319, 1327 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004).

Again, the Village neither cites any countervailing authority nor offers any reason to question the unanimous line of cases – including a decision by the Supreme Court – holding that identical state attempts to regulate check-off authorizations are preempted by federal law. Thus, the Village tacitly accepts that Section 5 is preempted.

II. The District Court Erred in Concluding that the National Labor Act Does Not Protect Against Interference by Local Government with the Right of Employers and Unions to Freely Negotiate and Enter Lawful Union Security, Hiring Hall and Dues Check-Off Agreements.

The district court's conclusion that the plaintiff unions failed to state a claim under 42 U.S.C. § 1983 is contrary to the Supreme Court's decisions in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989), and *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994), which hold that preemption claims under the National Labor Relations Act are cognizable under § 1983. This error is of practical consequence because 42 U.S.C. § 1988 authorizes the award of attorneys fees to the prevailing party in an action brought under § 1983.

In *Golden State Transit*, the Supreme Court squarely held that "the NLRA creates 'rights' in labor and management that are protected against governmental interference," 493 U.S. 108, and "that the NLRA gives [labor and management] rights enforceable against governmental interference in an action under § 1983," *id.* at 109. The Court explained that, "[i]n the NLRA, Congress has not just 'occupied the field'" of labor relations, it has "create[d] rights in labor and management both against one another and against the State." *Ibid.* Among the rights created by the NLRA "against the State" is the right to be free of "governmental interference with

the collective-bargaining process." *Ibid.* In *Livadas*, the Court held that the NLRA grants "[t]he right . . . to complete the collective-bargaining process and agree to [lawful contract] clause[s]" free of state or local government interference and that a claim for violation of this right by a state or local government is "properly brought under § 1983." 512 U.S. at 134. *See Blessing v. Freestone*, 520 U.S. 329, 343 (1997) ("the National Labor Relations Act [protects] the very specific right of employees 'to complete the collective bargaining process and agree to [lawful] clause[s]'").

"[T]he fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co.*, 397 U.S. at 108. Thus, "the right to engage in the collective bargaining process without state interference . . . is sufficiently definite to permit a § 1983 claim." *Georgia State AFL-CIO v. Olens*, 194 F.Supp.3d 1322, 1328 (N.D. Ga. 2016). "Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 153 (1976), quoting *Teamsters v. Oliver*, 358 U.S. 283, 296 (1959). *See Cannon v. Edgar*, 33 F.3d 880, 884-86 (7th Cir. 1994). And, a "local government, as well as the [state], lacks the authority" to interfere with "[f]ree collective bargaining." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (citations and quotation marks omitted).

The 1947 amendments to the NLRA ensure that "the parties to a collective

bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them," *Beck*, 487 U.S. at 750, by "permitting such agreements," *Mobil Oil*, 426 U.S. at 420. "The amendments were intended . . . to . . .give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." *General Motors*, 373 U.S. at 741 (citation and quotation marks omitted). "[F]reedom of contract" is "[o]ne of the[] fundamental policies" of the National Labor Relations Act. *H.K. Porter Co.*, 397 U.S. at 108. And, a central purpose of the 1947 Taft-Hartley amendments was to ensure that, as a matter of federal law, the freedom of contract extended to union security agreements.

The district court focused only on the NLRA's regulation of union security agreements and ignored its protection of the right to freely negotiate such agreements. A-12-13. It was this error that led the court to conclude that the plaintiffs' challenge to the Lincolnshire "do[es] not fall within the reach of section 1983 as established by *Golden State*." A-13.

The Lincolnshire Ordinance interferes with the plaintiffs' NLRA-protected rights to negotiate and enforce lawful union security, hiring hall and check-off agreements free of state or local government interference. "Once a plaintiff demonstrates that a statute confers an individual right [against state or local government interference], the right is presumptively enforceable by § 1983." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002).

CONCLUSION

The district court's ruling that the Lincolnshire ordinance is preempted by the NLRA should be affirmed. The district court's dismissal of the plaintiff unions' claim under 42 U.S.C. § 1983 should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations and typeface requirements of Rule 32 FRAP and Circuit Rule 32. This brief has been produced with the proportionally spaced Century font in 12 point type using Microsoft Word 2016. This brief contains 8,128 words.

/s/ James B. Coppess
James B. Coppess

Date: June 29, 2017

CERTIFICATE OF SERVICE

I certify that on June 29, 2017, the foregoing brief was served on counsel for defendants-appellants through the CM/ECF system.

/s/ James B. Coppess
James B. Coppess

CIRCUIT RULE 30(d) STATEMENT

I certify that the short appendix contained in the Brief of Defendants-Appellants contains all materials required by parts (a) and (b) of Circuit Rule 30.

/s/ James B. Coppess
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Date: June 29, 2017