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; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO; CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; and CHICAGO REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Plaintiffs-Appellees, Cross-Appellants,

v.

VILLAGE OF LINCOLNSHIRE, ILLINOIS; PETER KINSEY, Chief of Police; ELIZABETH BRANDT, Mayor; and BARBARA MASTANDREA, Village Clerk,

Defendants-Appellants, Cross-Appellees.

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

REPLY AND RESPONSE BRIEF OF DEFENDANTS-APPELLANTS / CROSS-APPELLEES

Jacob H. Huebert
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668

Attorneys for Defendants-Appellants and Cross-Appellees

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STATEMENT OF THE ISSUE ON CROSS-APPEAL

Does the National Labor Relations Act guarantee a federal right to negotiate for union security agreements in collective bargaining agreements, the violation of which gives rise to a cause of action under 42 U.S.C. § 1983, even though NLRA § 14(b) expressly recognizes states' and territories' authority to prohibit union security agreements?

SUMMARY OF THE ARGUMENT

Congress has never intended to preempt the field of "Right-to-Work" laws – *i.e.*, laws prohibiting "union security agreements" between unions and private-sector employers that would require workers to join a union as a condition of their employment. When it amended the National Labor Relations Act with the Taft-Hartley Act, it added NLRA § 14(b), which acknowledges the validity of Right-to-Work laws enacted by "State[s]" and "Territor[ies]," only to make this clear.

The Supreme Court did not hold otherwise in a case the Plaintiff Unions rely on, *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), which did not even concern whether Congress preempted the field. The Unions argue that a footnote in the decision indicates that § 14(b) is the sole source of authority for Right-to-Work laws. But the case's main text correctly indicates, in accordance with precedent and the legislative history, that § 14(b) is not a grant of authority but merely tells courts how to construe the rest of the NLRA.

And even if the NLRA did generally preempt Right-to-Work laws, it would not preempt the Village of Lincolnshire's Right-to-Work ordinance that the Unions

challenge here (the "Ordinance") because, as a law of a political subdivision of the State of Illinois, the Ordinance is a "State" law expressly approved in NLRA § 14(b). In two key cases, the Supreme Court has held that a federal law authorizing "State" laws implicitly authorizes laws enacted by states' political subdivisions unless Congress has shown a clear and manifest intention to preempt local laws. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991). Here, there is no basis for concluding that Congress clearly and manifestly intended to preempt local laws when it approved "State" laws in NLRA § 14(b), and therefore there is no basis for concluding that the NLRA preempts local Right-to-Work laws.

Contrary to the Unions' argument, *Mortier* did not hold, or even suggest, that a statute authorizing "State" laws should be read to exclude local laws when the authorization creates an exception to a general rule of preemption, as the Unions say § 14(b) does. Indeed, *Mortier* explicitly rejected that view. And, contrary to the Unions' argument, *Ours Garage* did not hold, or even suggest, that a statute authorizing "State" laws should be read to exclude local laws when the authorization creates an exception to a general policy that would tend to undermine the general policy's goals. And, in any event, NLRA § 14(b) does *not* tend against any goal of the NLRA because the NLRA has no goals regarding the use or non-use of union security agreements.

References to local governments and local laws in several other provisions of federal law cannot establish, as the Unions argue, that Congress intended to

exclude local laws when it only referred to "State" laws in § 14(b). *Mortier* and especially *Ours Garage* make clear that more is necessary to establish that Congress had the required clear and manifest intention to preempt local laws.

The policy arguments the Unions cite to argue for preemption are not well-founded and, in any event, cannot establish that Congress clearly and manifestly intended to preempt local laws. *First*, there is no merit in the Unions' concern that local Right-to-Work laws might apply to conduct outside a local jurisdiction's borders because states can and do prevent local governments from overreaching in this way. *Second*, there is no merit in the Unions' argument based on the supposed difficulty unions and businesses would have complying with multiple local jurisdictions' Right-to-Work laws. The Unions have not substantiated that this would actually create extraordinary difficulty, much less shown that Congress was so concerned about any such difficulty that it intended to preempt local laws. *Third*, there is no merit in the Unions' argument that local Right-to-Work laws would be contrary to a federal policy favoring union security agreements because there is no such federal policy. *Fourth*, there is no merit in the Unions' argument that Congress could not have intended to allow local governments to "thwart" their respective state governments' policy decisions on Right-to-Work because the exercise of home-rule powers is consistent with state policy; it is preemption of home-rule units' Right-to-Work laws, not tolerance of such laws, that would thwart state policy decisions.

Further, the Unions receive no help from antitrust cases limiting "state action" immunity to local governments that act pursuant to a state policy, which have no relevance to the analysis courts perform when determining whether Congress intended to preempt local laws.

Also, the Unions have not refuted the Village's argument showing that the Ordinance's ban on mandatory union hiring halls is a valid Right-to-Work provision because, in practical effect, it protects workers from compulsory unionism.

The Unions have also failed to refute the Village's argument showing that the Ordinance's provision restricting the deduction of union dues from workers' paychecks is a valid Right-to-Work provision. This Court should decline to follow the non-binding district court case the Unions cite to argue that such provisions are preempted because that case failed to recognize that the continued deduction of dues from a worker's paycheck, after the worker no longer wishes to pay them, forces a worker to accept union membership as a condition of employment – and is therefore exactly what NLRA § 14(b) allows states (and their subdivisions) to protect workers from.

Finally, the Court should reject the Unions' challenge, in their cross-appeal, to the district court's conclusion that they failed to state a claim under 42 U.S.C. § 1983. A cause of action under § 1983 only arises where a state or local government violates a federal *right*. The mere enactment of a statute or ordinance preempted by federal law is not, in itself, enough. And here, the Unions have not alleged the violation of a federal right because the NLRA does not guarantee a right to enter

into union security agreements. To the contrary, it expressly tolerates state and territorial laws banning union security agreements. The Supreme Court has recognized that a claim of NLRA preemption, even if valid, may not give rise to a cause of action under § 1983 under just this circumstance: where the dispute does not concern whether *any* governmental body may violate the alleged right but only *which* governmental body has the authority to do so.

ARGUMENT

1. The NLRA does not preempt the field of Right-to-Work laws.

The National Labor Relations Act has never preempted the field of "Right-to-Work" laws – *i.e.*, laws prohibiting "union security agreements" between unions and private-sector employers that would require workers to join a union as a condition of their employment. (*See* Village Br. 12-21.) The Supreme Court has recognized that the NLRA did not do so under the original Wagner Act and that it has not done so since Congress amended it with the Taft-Hartley Act in 1947. *See Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 100-04 (1963); *Algoma Plywood & Veneer Co. v. Wis. Employment Relations Bd.*, 336 U.S. 301, 305, 307 (1949).

In their response brief, the Plaintiff Unions do not dispute that the Wagner Act did not preempt the field but argue that, with the Taft-Hartley amendments, the NLRA's regulation of union security agreements became "pervasive" and "complex" enough to preempt the field. (*See* Unions Br. 6-7.) The statute's text, the legislative history, and the case law all refute the Unions' argument.

In concluding that the Wagner Act did not preempt the field of Right-to-Work laws in *Algoma Plywood*, the Supreme Court considered the language of § 8(3) of the Act, which prohibited employers from encouraging or discouraging employees from joining a union, except that the employer could require employees to be union members if the terms of a union security agreement required it. 336 U.S. at 307. Specifically, Wagner Act § 8(3) stated that it was an unfair labor practice for an employer

> By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* that nothing in this Act . . . or 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, if such organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

Id. (quoting Wagner Act § 8(3)).

The Court concluded that § 8(3) did not preempt the field of Right-to-Work laws because it "merely disclaim[ed] a national policy hostile to the closed shop or other forms of union security agreement." *Id.* That was "the obvious inference to be drawn from the choice of the words 'nothing in this Act . . . or in any other statute of the United States'" and was "confirmed by the legislative history." *Id.*

The language that the Court found dispositive in *Algoma Plywood* remains in the statute today. The current NLRA § 8(a)(3), like Wagner Act § 8(3), contains a prohibition on employers encouraging or discouraging union membership, followed

by a proviso allowing employers to enter collective bargaining agreements requiring employees to be union members:

> *Provided*, That *nothing in the 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 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) (second emphasis added). As with Wagner Act § 8(3), the "obvious inference" to be drawn from Congress's use of the words "nothing in this Act, or in any other statute of the United States" is that Congress intended to "disclaim[] a national policy hostile to . . . union security agreement[s]." *Algoma Plywood*, 336 U.S. at 307.

Contrary to the Unions' arguments (Unions Br. 7), the differences between Wagner Act § 8(3) and the current NLRA § 8(a)(3) are immaterial to the question of preemption. The Supreme Court's conclusion in *Algoma Plywood* turned on the proviso's disclaimer language, which did not change with the Taft-Hartley amendments. *See Algoma Plywood*, 336 U.S. at 307.

And contrary to the Unions' arguments (Unions Br. 8-10), Congress did not add NLRA § 14(b) with the Taft-Hartley Act because the amended statute otherwise would have preempted all Right-to-Work laws due to its new restrictions on union-shop agreements. NLRA § 14(b) simply exists to explain how the NLRA "shall be construed" – hence the title of § 14, "Construction of provisions." Specifically, § 14(b) exists to clarify that the NLRA should not be construed as preempting Right-to-

Work laws. This clarification was necessary, in part because, when Congress was considering the Taft-Hartley amendments, the courts had not yet resolved the question of whether the Wagner Act preempted Right-to-Work laws; the *Algoma Plywood* case, which would answer that question, was still pending. *See Algoma Plywood*, 336 U.S. at 307-14. Congress therefore added § 14(b) to *put an end* to arguments – which had already been made with respect to the Wagner Act, and which the Taft-Hartley amendments might have further encouraged – that the NLRA preempted Right-to-Work laws. *See id.* As the Village has shown in detail in its primary brief, the legislative history confirms that Congress's intention with § 14(b) was to ensure that courts would respect Congress's original intention that the NLRA would not preempt the field of Right-to-Work laws. (Village Br. 17-19.)

The Unions' position receives no help from the primary decision the Unions rely on, *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976), a case that case had nothing to do with the validity of local Right-to-Work laws or whether Congress preempted the field with respect to union security agreements. Rather, that case only concerned whether Texas's Right-to-Work statute could apply to seamen who performed "the vast majority" of their work on the high seas, not in Texas. 426 U.S. at 409-10. In other words, the case was about how to determine which jurisdiction's law regarding union security agreements should govern a given employment relationship; it was not about the scope of federal preemption under the NLRA. The Supreme Court concluded that the Texas law did not apply to the

seamen because "the employees' predominant job situs should determine the applicability of the State's right-to-work laws." *Mobil Oil*, 426 U.S. at 418.

The Unions' argument depends on a footnote in *Mobil Oil*, which states that "[t]here is nothing in either § 14(b)'s language or legislative history to suggest that there may be applications of right-to-work laws which are not encompassed under § 14(b) but which are nonetheless permissible." 426 U.S. at 413 n.7. The Unions argue that this statement implies that the NLRA preempts the field with respect to union security agreements except to the extent § 14(b) specifically authorizes them. (Unions Br. 8-9.) But the footnote, like the case generally, was concerned with "*applications* of right-to-work laws" – *i.e.*, with the question of which employment relationships a given jurisdiction's Right-to-Work laws should govern. The footnote did not say (let alone "squarely h[o]ld," as the Unions put it) that § 14(b) is the exclusive source of any authority to enact Right-to-Work laws, and the footnote cannot reasonably be interpreted as incidentally resolving a controversial question regarding preemption that the parties did not brief or argue and that was not necessary to decide the case.

And even if the footnote, standing alone, might arguably appear to support the inference that the Unions draw from it, *Mobil Oil*'s main text contradicts that inference by stating that "§ 14(b) was designed to make clear that *§ 8(a)(3) left the States free* to pursue 'their own more restrictive policies in the matters of union security agreements.'" 426 U.S. at 417 (quoting *Algoma Plywood*, 336 U.S. at 314) (emphasis added). If the Court had adopted the position that the Unions urge here,

it would have said that *§ 14(b)* left the states free to pursue Right-to-Work laws – but it did not say that. Thus, the Court implicitly recognized that § 14(b) was merely an interpretive tool clarifying that Congress did not intend to preempt Right-to-Work laws with the NLRA. *See also NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002) (concluding that § 14(b) "did not grant new authority to states and territories, but merely recognized and affirmed their existing authority"). The Unions' interpretation of the *Mobil Oil* footnote is also contradicted by the legislative history and the Court's detailed discussion of it in *Algoma Plywood* and *Schermerhorn* – cases that, unlike *Mobil Oil*, actually involved questions regarding federal preemption of the field of Right-to-Work laws, and which the Supreme Court did not overrule or even question in *Mobil Oil*. (*See* Village Br. 17-19.)

2. The Village's Ordinance is a "State" law authorized by NLRA § 14(b).

Courts must conclude that a federal statute authorizing "State" laws implicitly authorizes laws enacted by states' political subdivisions unless Congress has shown a clear and manifest intention to preempt local laws. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002). The Supreme Court has adopted this rule for two reasons. First, the word "State," by definition, encompasses the political subdivisions of a state. *Id.* at 432-33. Second, respect for federalism requires courts to assume that Congress did not intend to interfere with States' inherent authority to decide for themselves how to divide and exercise their power – "a question central to state self-government" – unless Congress clearly indicated otherwise. *Id.* at 437; *see also Nixon v. Mo. Mun. League*, 541 U.S. 125,

140 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of [a] plain statement [that Congress intended to preempt local laws].").

In their response brief, the Unions have presented nothing to establish that Congress had a clear and manifest intention to exclude local laws from the "State" Right-to-Work laws it expressly approved in NLRA § 14(b). Therefore, the Unions have presented no basis for the Court to conclude that the NLRA preempts local Right-to-Work laws such as the Village of Lincolnshire's Right-to-Work ordinance.

A. Under *Mortier* and *Ours Garage*, the "State" laws authorized in NLRA § 14(b) include laws of states' political subdivisions.

The Supreme Court established the rule that a federal statute authorizing "State" laws presumptively authorizes local laws of the same type in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) and *Ours Garage*, 536 U.S. 424. (*See* Village Br. 21-23.) In upholding the core provisions of a local Right-to-Work ordinance substantially identical to the one at issue here, the Sixth Circuit found *Mortier* and *Ours Garage* to be conclusive: as in those cases, there was no basis for concluding that Congress had a clear and manifest intention to preempt local laws when it expressly approved "State" laws, so the Court had to conclude that the "State" laws Congress has approved include laws of states' political subdivisions. *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407, 413-17 (6th Cir. 2016).

The Unions fail in their effort to avoid the conclusion to which *Mortier* and *Ours Garage* lead.

The Unions attempt to overcome *Mortier* by asserting that it established a rule that a federal law authorizing "State" laws should be read narrowly to allow only laws enacted by a State's central government if the authorization creates an exception to a general rule of preemption, as the Unions argue § 14(b) does. (Unions Br. 21.) According to the Unions, *Mortier* "expressly found it 'important[]' that 'field preemption [could not] be inferred'" from the statute at issue in that case. (Unions Br. 21, quoting *Mortier*, 501 U.S. at 612.) But the Unions' selective quotation of *Mortier* distorts what the Court actually said. First, the Court said that, *even if* Congress preempted the field, "it would still have to be shown under ordinary canons of construction that [the statute's] delegation to 'States' would not . . . allow the State in turn to redelegate some of this authority to their political subdivisions." *Mortier*, 501 U.S. at 612. That is because the term "'State' is not self-limiting since political subdivisions are merely subordinate components of the whole." *Id.* Thus *Mortier* indicated – contrary to a concurring opinion by Justice Scalia, *id.* at 616 – that, even where Congress has preempted the field, a provision authorizing "State" laws presumptively includes local laws, based on the definition of the word "State," in the absence of a clear and manifest reason to believe that Congress intended a more limited definition of "State."

After making that point, *Mortier* next stated: "More importantly, field pre-emption cannot be inferred [from the text of the statute at issue, the Federal

Insecticide, Fungicide, and Rodenticide Act ("FIFRA")]." *Id.* This does not mean that a lack of field preemption was essential to the Court's decision, as the Unions would have it. Rather, it just means that the *Mortier* plaintiffs' argument based on field preemption failed at the first step, making it unnecessary for the Court to consider further whether field preemption should alter its understanding of the statute's authorization of "State" laws.

The Unions receive no help from a Michigan Supreme Court decision they cite for the proposition that "the absence of field preemption was 'crucial' in *Mortier*," *Grand Trunk W. R.R. Co. v. City of Fenton*, 482 N.W.2d 706, 709 (Mich. 1992). (Unions Br. 21.) That case distinguished *Mortier* by noting that, "in *Mortier*, there was no claim that the FIFRA *either* expressly preempted local regulation . . . *or* evinced a Congressional intent . . . to otherwise occupy that field." *Grand Trunk*, 482 N.W.2d at 709 (emphasis added). That language would seem to support the Unions' position – except that, after the Michigan court decided the *Grand Trunk* case, the U.S. Supreme Court rejected that view in *Ours Garage*, concluding that the word "State" presumptively includes a State's political subdivisions even when it appears in a provision creating an exception to an express rule of preemption. 536 U.S. at 432-40. (*See* Village Br. 26-27.)

To try to overcome *Ours Garage*, the Unions distort what the case says, quoting it as stating 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."

(Unions Br. 22, quoting *Ours Garage*, 536 U.S. at 440 (brackets in Unions' brief)). By replacing select words with their own bracketed words, the Unions have changed the sentence to say nearly the opposite of what the Court actually said: "A Congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal *does not invariably* call for the narrowest possible construction of the exception." *Ours Garage*, 536 U.S. at 440 (emphasis added). The Unions then go even further with their distorted presentation of the case, asserting that "*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.'" (Unions Br. 23, quoting *Ours Garage*, 536 U.S. at 440.) In fact, the case said no such thing.

In any event, NLRA § 14(b)'s approval of "State" laws does *not* tend against any goal of the NLRA. The NLRA *has no goals* with respect to the validity of union security agreements; it neither favors nor disfavors them. *Schermerhorn*, 375 U.S. at 104-05. And even if federal policy did favor union security agreements, it is not obvious that allowing local Right-to-Work laws would undermine that policy because the existence of local Right-to-Work laws could reduce pressure to enact a statewide Right-to-Work law that might otherwise exist. (*See* Village Br. 29.)

B. References to local governments or local laws in other provisions of federal law do not establish that Congress intended to exclude local laws from the "State" laws referenced in NLRA § 14(b).

There is no merit in the Unions' argument that references to local governments or local laws in several other statutory provisions imply that Congress intended its reference to "State" laws in § 14(b) to exclude local laws. (*See* Unions Br. 10-11.)

The Village has already addressed the Unions' arguments based on a reference to "local" laws in NLRA § 14(a) and a reference to municipal ordinances in an unrelated provision of the Fair Labor Standards Act, 29 U.S.C. § 218(a), and will not do so again here. (*See* Village Br. 33-34.)

That leaves the Unions' argument that, if Congress had intended to authorize laws of political subdivisions in § 14(b), it would have specifically referenced "political subdivisions" as it did when it excluded "any State or political subdivision thereof" from the NLRA's definition of "employer" in 29 U.S.C. § 152(2). (Unions Br. 10-11.) But in that definition, it made sense for the NLRA to separately reference states and their subdivisions because, for employment purposes, a state and its subdivisions are separate corporate entities. But that has no relevance to the question whether NLRA § 14(b)'s recognition of "State" authority was intended to exclude a state's political subdivisions. In that context, under *Mortier* and *Ours Garage*, the term "State" implicitly includes a state's political subdivisions unless Congress has clearly and manifestly shown a contrary intention. As the Village discussed in its primary brief (Village Br. 26-27, 31-33), *Ours Garage* in particular confirms that statutory provisions specifically referencing both states and political

subdivisions (or their respective laws) do not suffice to establish that Congress intended to exclude local laws when it referred to "State" laws alone in another provision of the same statute. *See Ours Garage*, 536 U.S. at 432-40.

C. The Unions' policy arguments are not well-founded and do not show that Congress intended to exclude local laws from the "State" laws referenced in § 14(b).

Many of the Unions' arguments as to why the word "State" in § 14(b) should be read to exclude local laws are essentially policy arguments about why, in the Unions' view, Right-to-Work laws should be enacted (if at all) at the state level rather than the local level. These arguments are not well-founded and, in any event, do not establish that Congress intended to preempt local laws.

First, there is no merit in the Unions' concern that a local Right-to Work law might apply to conduct occurring outside the local jurisdiction's borders and therefore make it difficult for employers and unions to determine which jurisdiction's law applies to a given employment relationship. (Unions Br. 11-12.) The Unions acknowledge that a local Right-to-Work law could not control employment relationships for work done in other states, under the Supreme Court's decision in *Mobil Oil*. (Unions Br. 12.) And the potential for local jurisdictions to control activity outside their borders, but within the same state, presents no cause for concern. State law already establishes, and state courts already enforce, limits on local jurisdictions' authority to ensure that individuals and businesses can understand which laws apply to their conduct and that particular activities are not subject to conflicting local laws. *See, e.g., Carbondale v. Van Natta*, 338 N.E.2d 19,

21 (Ill. 1975) (home-rule authority does not allow local governments to exercise extraterritorial powers); *Evanston v. County of Cook*, 291 N.E.2d 823, 826 (Ill. 1972) (Illinois Constitution "establishes a means of resolving conflicts and inconsistencies existing between a municipal ordinance and a home-rule county ordinance when both ordinances are in effect in the same territory"); *Siegles, Inc. v. City of St. Charles*, 849 N.E.2d 456, 458 (Ill. App. Ct. 2006) ("[H]ome rule units . . . have no jurisdiction beyond their corporate limits except what is expressly granted by the legislature," which means that, to determine whether an ordinance is valid, a court must determine whether it "has an extraterritorial effect and, if so, whether that extraterritorial influence is expressly authorized by the legislature."). Therefore it is safe to assume that, if local jurisdictions overreach with their local Right-to-Work laws, state courts will rein them in. And if parties are uncertain about which employment relationships are governed by a given municipality's Right-to-Work law, state courts can answer that question, just as the Supreme Court answered it at the federal level in *Mobil Oil*.[1]

Second, there is no merit in the Unions' argument that allowing local Right-to-Work laws would lead to "chaos" because of the number of ordinances that unions and businesses that operate across multiple local jurisdictions might have to take into consideration when entering into collective bargaining agreements. (Unions Br.

[1] The potential need for state courts to clarify local laws is no reason to conclude that local laws must be preempted. State courts have long construed statewide Right-to-Work laws. *See, e.g., Master Builders of Iowa v. Polk County*, 653 N.W.2d 382, 391 (Iowa 2002) (ruling on scope of Right-to-Work law); *Ficek v. Int'l Bhd. of Boilermakers*, 219 N.W.2d 860 (N.D. 1974) (holding agency-shop and dues-checkoff provisions illegal under Right-to-Work law); *Moving Picture Mach. Operators v. Cayson*, 205 So. 2d 222, 231 (Ala. 1967) (holding that contract, as construed and applied by employer and union, violated Right-to-Work law).

13-14.) Businesses and other organizations that operate across multiple local jurisdictions already comply with varying local laws on a wide variety of matters, including matters related to employment, such as minimum wages. And if citizens and organizations were to have difficulty complying with differing local laws addressing union security agreements (or any other subject matter), a state legislature could always solve the problem by preempting local laws with state legislation. In any event, this is a matter of state law and policy; it is no concern of the federal government in general, and there is no reason to believe that Congress was concerned about it at all – let alone so concerned that it intended to interfere with states' authority to determine for themselves whether to exercise their power centrally or through their subdivisions – when it passed the Taft-Hartley Act.

The Unions attempt to bolster their argument by citing the Railway Labor Act's explicit preemption of state Right-to-Work laws with respect to railroad workers, 45 U.S.C. § 152(11), but, if anything, that provision harms the Unions' case. The Unions argue that, with the RLA's preemption of state Right-to-Work laws, Congress recognized the disruptive potential such laws could have in an industry where businesses operate across multiple jurisdictions. (Unions Br. 14-15.) But the RLA actually shows that, where Congress believed that it was appropriate to preempt a particular type of Right-to-Work law, it did so expressly. Many businesses operate across multiple states, but Congress chose *not* to preempt state Right-to-Work laws for any of them except railroads. Therefore, it appears Congress was *not* concerned about the potential disruption to national (or regional) industries

that Right-to-Work laws could cause, except in the special case of the railroad industry. Therefore, the RLA provides no basis for inferring that Congress must have intended to prohibit local Right-to-Work laws that could affect businesses operating across multiple jurisdictions.

Also, the Unions' narrow reading of "State" in § 14(b) would not necessarily even protect employers and unions from having to comply with differing rules regarding union security agreements within the same state. Even if § 14(b) only authorized laws enacted by a state's central government, a state legislature could still pass a law mandating Right-to-Work in some counties or regions of the state but not others. *See Ours Garage*, 536 U.S. at 441 (noting that the plaintiffs' narrow reading of "State" would still allow a state legislature to impose different rules on different municipalities); *cf. Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 774-75 (7th Cir. 1999) (noting that "Illinois statute books are riddled with laws" that treat some communities differently from others and concluding that the state can have a rational basis for imposing different rules in different parts of the state).

Third, there is no merit in the Unions' argument that local Right-to-Work laws would be contrary to a federal policy favoring union security agreements. Again, there is no federal policy favoring union security agreements. (*See* Village Br. 28-29.)[2]

[2] As the Village explained in its primary brief (Village Br. 29), *Mobil Oil* did not establish that federal policy favors union security agreements because only four justices joined Justice Marshall's majority opinion, and one of them, Justice Stevens, wrote separately to state that he did not endorse the "suggestion that federal policy favors permitting union-shop and agency-shop agreements." 426 U.S. at 421 (Stevens. J., concurring). In its amicus brief, the NLRB suggests that two additional justices agreed with Justice Marshall. (NLRB

Fourth, there is no merit in the Unions' argument that Congress could not have intended to allow local governments to "thwart" their respective state governments' policy decisions by enacting Right-to-Work laws when the state legislature had not enacted a state Right-to-Work law. (Unions Br. 17.) If a state gives its political subdivisions the authority to enact their own Right-to-Work laws, then those laws do not violate state policy, but rather reflect it, because a state's decision to give its municipalities home-rule powers is itself a policy decision. For example, with its 1970 Constitution, Illinois made the policy decision to give its home-rule units open-ended legislative powers and allow them to legislate even with respect to matters the General Assembly had not anticipated. *See* Ill. Const. Art. VII, § 6; *Kanellos v. Cty. of Cook*, 53 Ill. 2d 161, 166 (1972) (Illinois Constitution's home-rule provisions were intended to "drastically alter the relationship which previously existed between local and State government" by giving home-rule units "greater autonomy" with "substantial powers . . . subject only to those restrictions imposed or authorized therein"). Therefore, it is federal preemption of local Right-to-Work laws, not federal tolerance of such laws, that would thwart state policy decisions by interfering with states' "absolute discretion" to entrust the exercise of their powers to the agencies of their choosing. *Mortier*, 501 U.S. at 608.

Br. 8 n.4.) But, in fact, those two justices did not endorse Justice Marshall's opinion at all. Chief Justice Burger only concurred in the judgment, without opinion, and Justice Powell concurred in the judgment based on reasoning entirely different from Justice Marshall's. *Mobil Oil*, 426 U.S. at 421 (Burger, C.J., concurring in judgment); *id.* at 421-22 (Powell, J., concurring in judgment).

D. Antitrust cases are irrelevant to the meaning of "State" in § 14(b).

The cases applying the Sherman Act that the Unions cite to argue for its narrow reading of "State" in § 14(b) are not relevant to the federal preemption analysis the Court must undertake in this case. (*See* Unions Br. 17.)

In the first antitrust case the Unions cite, the Supreme Court extended the existing immunity from Sherman Act liability for "state action" to cover actions taken by a local government, but only where a local government acts "pursuant to [a] state policy to displace competition with regulation or monopoly public service." *Cmty. Comms. Co. v. City of Boulder*, 455 U.S. 40, 51 (1982). The Supreme Court determined that it was appropriate to limit local governments' immunity in this way to prevent local governments from "plac[ing] their own parochial interests about the Nation's economic goals reflected in the antitrust laws." *Id.* (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412-13 (1978) (plurality opinion)). (Unions Br. 17.) And the Unions suggest that Congress must have intended to limit local governments' authority to enact Right-to-Work laws for the same reason. (Unions Br. 17-18.)

But the antitrust cases the Unions cite have no relevance to this case because they concern immunity from liability under the Sherman Act, not federal preemption of local laws in a particular field. Presumably that is why the seminal Supreme Court cases that *do* address federal preemption of local laws, *Mortier* and *Ours Garage*, make no reference to antitrust cases and instead apply a different analysis that focuses on Congressional intent.

And while the Supreme Court's antitrust cases reflect concern about local governments interfering with "the Nation's economic goals reflected in the antitrust laws," its labor cases express no concern for interference with "the Nation's economic goals" with respect to union security agreements. That is because the nation *has no* "economic goals" with respect to union security agreements but rather has chosen "to abandon any search for uniformity" and "to suffer a medley of attitudes and philosophies on the subject." *Schermerhorn*, 375 U.S. at 104-05.

3. The Ordinance's ban on mandatory union hiring halls and restrictions on deductions of union fees from workers' paychecks are valid Right-to-Work provisions.

The Unions have not refuted the Village's arguments showing that the Ordinance's ban on mandatory union hiring halls and restrictions on deductions of union fees from workers' paychecks are valid Right-to-Work provisions.

A. States may prohibit union hiring halls to protect workers from compulsory union membership.

The Unions support their attack on the Ordinance's prohibition on mandatory union hiring halls by citing this Court's statement that an employer's use of a union hiring hall does not constitute mandatory union "membership" under NLRA § 14(b) in *Sweeney v. Pence*, 767 F.3d 654, 663 n.8 (7th Cir. 2014). But that statement is dicta – the case in which it appeared did not concern the validity of bans on union hiring halls – and therefore is not binding on the Court. *See Alliant Energy Corp. v. Bie*, 336 F.3d 545, 548 (7th Cir. 2003) (dicta from past decision of this Court "not controlling"); *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir.

1993) (district court not bound to follow this Court's dicta, even under law-of-the-case doctrine).

The Court should decline to follow *Sweeney's* dicta on hiring halls. As the Village has explained in its primary brief, federal law is indifferent to whether employers use hiring halls and is only concerned that hiring halls do not discriminate against workers who are not union members – a concern that the Ordinance's total ban on hiring halls does not implicate. (*See* Village Br. 35-36.) And although being required to report to a union hall might not, in itself, be the equivalent of mandatory union membership, a ban on hiring halls is nonetheless a reasonable means of protecting workers against coerced union membership because, in practice, union referrals are a means of pressuring workers to become union members. (*See* Village Br. 36.)

B. States may restrict deductions of union fees from workers' paychecks to protect workers from compulsory union membership.

In their primary brief, the Village has shown that Ordinance § 5 – which prohibits employers from deducting union dues from an employee's paycheck without written authorization and allows an employee to revoke such an authorization at will – is a valid Right-to-Work provision because it simply protects workers from compulsory unionism. (Village Br. 37-38.) To briefly review, NLRA § 14(b) recognizes the authority of states (including their subdivisions, as discussed above) to prohibit employers from "requiring membership in a labor organization as a condition of employment." This Court, following the Supreme Court, has held that "membership" under § 14(b) is "synonymous" with the payment of union dues (specifically, "the portion of dues germane to the union's collective bargaining").

Sweeney, 767 F.3d at 661 (citing *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963)). So when Ordinance § 5 authorizes workers to revoke their dues authorizations at will, it is protecting workers who no longer wish to be union members from being forced to accept "membership in a labor organization as a condition of employment" – *i.e.*, it is doing exactly what § 14(b) contemplates that permissible Right-to-Work laws will do.

The Unions' response brief does not address this argument, much less refute it. Instead, the Unions just point to the Sixth Circuit's invalidation of a substantially identical provision in *Hardin County*, 842 F.3d at 421, which, in turn, relied on a 1969 decision from the Southern District of Georgia, which the Fifth Circuit summarily adopted and affirmed and the Supreme Court then summarily affirmed, *SeaPAK v. Indus. Tech. & Prof. 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). (Unions Br. 26.) But *SeaPAK* does not control because, when the Supreme Court affirms a lower court without an opinion, it affirms the judgment "but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

This Court should decline to follow *SeaPAK* because the district court's decision in that case failed to recognize that the collection of union dues from a worker who no longer wishes to pay them is equivalent to requiring union membership as a condition of (continued) employment – a conclusion that is inescapable in light of this Court's holding on the definition of union "membership" in *Sweeney*, 767 F.3d at 660-61. Indeed, in *Sweeney*, this Court noted that Congress included § 14(b) in

the Taft-Hartley Act to preserve then-existing Right-to-Work laws, including Georgia's, which, at the time of Taft-Hartley's enactment, included the provision struck down in *SeaPAK*. *Id.* at 662-63; *see also SeaPAK*, 300 F. Supp. at 1199 (noting that the Georgia's dues-authorization restriction was part of the state's Right-to-Work law and "was in effect before the Taft-Hartley Act was enacted"). *Sweeney* also recognized that states' authority to enact Right-to-Work laws is "broad" and "extensive" and allows them "to place restrictions *of their choosing* on union-security agreements, including restrictions on whether employees could be compelled to pay dues or fees of any kind to a union," 767 F.3d at 660, 663 (emphasis added), providing another reason to reject *SeaPAK*'s narrow notion of states' authority in this field.

4. The Unions failed to state a claim under 42 U.S.C. § 1983 because the NLRA does not guarantee a right to enter into union security agreements.

Turning to the Unions' cross-appeal, the Court should affirm the district court's conclusion that the Unions failed to state a claim under 42 U.S.C. § 1983 because the NLRA does not guarantee a right to enter into union security agreements.

A right of action under § 1983 does not arise whenever federal law preempts a state or local law. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107-08 (1989). Rather, a cause of action under § 1983 only exists if the allegedly preemptive federal statute creates a federal *right* that the state law violates. *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 failed to state a § 1983 claim, regardless of the merits of their preemption arguments, because they cannot satisfy the third criterion for the recognition of a federal statutory right. The statutes underlying their claims, the NLRA and the Labor-Management Relations Act, do not unambiguously impose a binding obligation on the states not to enact a Right-to-Work law like the Ordinance. To the contrary, the NLRA expressly condones state and territorial laws prohibiting union security agreements in § 14(b). *See Sweeney*, 767 F.3d at 654-71. The Unions emphasize that the NLRA gives them the right to negotiate collective bargaining agreements generally (Unions Br. 27-29), but federal law does not guarantee unions a right to negotiate for union security agreements in particular. Therefore, even if the Village's preemption arguments were correct, that still would not establish a violation a federally guaranteed right that could support a cause of action under § 1983.

The Supreme Court has recognized that a claim of NLRA preemption, even if valid, may not give rise to a cause of action under § 1983 under just this circumstance. The Court has held that, where "*Machinists* preemption" applies – *i.e.*, where the NLRA guarantees "freedom for private conduct" that neither the federal government nor the states can abridge – the NLRA creates a federal right,

the violation of which gives rise to a cause of action under § 1983. *Golden State*, 493 U.S. at 111-13. But the Court has noted that a claim of "*Garmon* preemption" – under which states are forbidden from interfering with certain conduct, but the NLRB is not – is "fundamentally different": it does not concern whether *anyone* may interfere with particular private conduct but only *who* – the NLRB or the states – has the authority interfere with that conduct. *Id.* at 110-12; *Livadas v. Bradshaw*, 512 U.S. 107, 133 n. 27 (1994) (difference between *Machinists* and *Garmon* preemption "might prove relevant to cognizability under § 1983").

The district court therefore rightly recognized that, because the Unions only argue that the Village "has attempted to regulate an area otherwise reserved to the federal government through the NLRA" and "do not argue that [the Village] has abridged a right or course of conduct that Congress intended to leave to the control of the free market" – *i.e.*, the Unions allege *Garmon* preemption, not *Machinists* preemption – the Unions have not alleged the violation of a federal right, and their claims "do not fall within the reach of section 1983." A-13. This Court should affirm that conclusion.

CONCLUSION

The district court's partial denial of Defendants' motion for summary judgment and partial grant of Plaintiffs' motion for summary judgment should be reversed; the district court's partial grant of Defendant's motion for summary judgment and partial denial of Plaintiffs' motion for summary judgment should be affirmed.

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Respectfully submitted,

/s/ Jacob H. Huebert
Jacob H. Huebert
Jeffrey M. Schwab
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

Attorneys for Defendants-Appellants and Cross Appellees Village of Lincolnshire, Peter Kinsey, Elizabeth Brandt, and Barbara Mastandrea

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I served the foregoing brief upon all counsel of record by electronically filing it with the appellate CM/ECF system.

/s/ Jacob H. Huebert
Jacob H. Huebert