UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 399, AFL-CIO, *et al.*, Plaintiffs, v. **VILLAGE OF LINCOLNSHIRE, ILLINOIS**, *et al*. Defendants.	Case No. 16-cv-02395 Judge Matthew F. Kennelly Magistrate Judge Susan E. Cox

[PROPOSED] BRIEF OF THE NATIONAL LABOR RELATIONS BOARD AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATEMENT OF *AMICUS*

The National Labor Relations Board ("NLRB" or "the Board") is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 151 *et seq.*, which regulates labor relations between most private-sector employers, their employees, and the authorized representatives of their employees. The NLRA proscribes certain conduct by employers and by labor organizations, and empowers the Board with exclusive jurisdiction to prevent and remedy violations of the Act. *See Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-65 (1940).

The Village of Lincolnshire's Ordinance 15-3389-116 ("Ordinance") purports to regulate whether employees covered by the NLRA can be compelled to join a union, or refrain from joining a union, as a condition of employment, and further regulates the operation of hiring halls and dues check-off provisions, as explained below. The NLRB has a significant interest in the

Court's disposition of this case because the regulation by municipalities and other local political subdivisions of conduct covered by the NLRA contravenes Congress' stated intent to create a national labor policy and hinder the Board's enforcement authority under the Act. As we explain below, the NLRB fully agrees with the Plaintiffs' position that Sections 4 and 5 of the Ordinance are preempted by the NLRA. This is because, as to union security, Lincolnshire is neither a State nor a Territory, as required by the limited exception in Section 14(b) of the Act (29 U.S.C. § 164(b)), which permits States and Territories to prohibit union security provisions. Moreover, *no* State, Territory, or locality may regulate hiring halls and dues check-off agreements between unions and employers. This *amicus* brief is intended to provide the Court with the NLRB's experience and historical perspective on the scope of the federal preemption doctrine under the NLRA, the practical impact that the Ordinance would have on the NLRB's statutory enforcement responsibilities, and the deliberately constrained authority delegated to States and Territories under Section 14(b).

ARGUMENT

I. STATE AND LOCAL LEGISLATION THAT REGULATES CONDUCT COVERED BY THE NLRA IS PLAINLY SUBJECT TO FEDERAL PREEMPTION

Congress enacted the NLRA to "create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States v. Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir. 1998). To accomplish those goals, Congress established an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns, representation elections, and collective bargaining. Congress also created a centralized administrative agency, the Board, to interpret and administer the NLRA and to resolve labor disputes. *See* 29 U.S.C. §§

153-154, 160; *Garner v. Teamsters, Local Union No. 776*, 346 U.S. 485, 490 (1953); *see also San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959) (in order to obtain uniform application of the Act, Congress "confide[d] primary interpretation and application of its rules" to the NLRB) (quotation omitted).

Accordingly, Congress specified in Section 7 of the NLRA, 29 U.S.C. § 157, that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 further protects the rights of employees "to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." Section 8 of the NLRA, 29 U.S.C. § 158, in turn, prohibits certain conduct that would impede these rights.

In *Garmon*, 359 U.S. at 243, the Supreme Court held that "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." The Seventh Circuit has succinctly explained this preemption doctrine:

> The NLRA "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967). "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Gould*, 475 U.S. at 286, 106 S.Ct. at 1061. The NLRA reflects congressional intent to create a uniform, nationwide body of labor law interpreted and administered by a centralized expert agency-the NLRB. *New York Telephone Co. v. New York Dep't of Labor*, 440 U.S. 519, 527 (1979). The Act vests the NLRB with primary jurisdiction over unfair labor practices. *See* 29 U.S.C. § 158. As such, the NLRA "forecloses

> overlapping state enforcement of the prohibitions in Section 8 of the Act." *New York Telephone,* 440 U.S. at 519.

NLRB v. State of Ill. Dep't of Employment Sec., 988 F.2d 735, 738 (7th Cir. 1993) (parallel citations omitted).[1]

The preemption doctrine serves a very practical purpose in the context of the NLRA. To allow fifty different States – let alone the thousands of individual counties, municipalities, and political subdivisions located in the various States – to enact parallel remedial schemes, individually enforceable in state courts, would necessarily destabilize any hope for a "national" labor policy to be developed by the Board, as Congress contemplated. Thus, as explained in *Garmon*, "to leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law," and "would create potential frustration of national purposes." 359 U.S. at 244. "As it appears to us, nothing could serve more fully to defeat the congressional goals underlying the Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 286-87 (1971).

Preemption of overlapping state and local regulations also ensures that the Board's ability to effectively enforce the NLRA is not unduly hampered. It is the "the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its

[1] A second preemption principle, announced in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976), precludes state or local regulation "concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985). Thus, "[a]lthough the labor-management relationship is structured by the NLRA, certain areas intentionally have been left 'to be controlled by the free play of economic forces.'" *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) (quoting *Machinists*, 427 U.S. at 140).

labor legislation." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960). The *Garmon* preemption doctrine accordingly precludes interference "with the NLRB's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (quoting *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986)). In this regard, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Lockridge*, 403 U.S. at 287.

II. LINCOLNSHIRE'S ORDINANCE REGULATES CONDUCT SUBJECT TO FEDERAL PREEMPTION

A stated purpose of the Ordinance is to ensure that "in the Village of Lincolnshire, no employee covered by the National Labor Relations Act ('NLRA') shall be compelled to join or pay dues to a union, or refrain from joining a union, as a condition of employment." Village of Lincolnshire, Il., Ordinance No. 15-3389-116 (Dec. 14, 2015). The Ordinance prohibits union security agreements (*id*. at § 4(a)(b)) and hiring halls (*id*. at § 4(e)), regulates dues check-off agreements (*id*. at §§ 4(c), 5),[2] declares "null and void" any contracts containing such provisions (*id.* at § 6), and prohibits coercion by unions and employers regarding an individual's choice to become or refrain from becoming a member or to provide financial support to a labor organization, as well as the discharge of employees or refusal to hire based on support or nonsupport of a labor organization (*id*. at § 7). Violations are deemed Class A misdemeanors (*id*. at § 8), which subject violators to both civil (*id*. at § 9) and criminal penalties (*id*. at § 8).

[2] Although not outlawing check-off agreements outright, Section 5 of the Ordinance provides that authorizations of voluntary deductions must be revocable at any time, which directly conflicts with Section 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(4) (permitting voluntary deduction agreements to be irrevocable for up to one year).

A. Union Security, Hiring Hall, and Dues Check-off Provisions of the Ordinance Regulate Conduct that Is Already Regulated by the Labor Act

As discussed throughout Plaintiffs' Brief in Support of Their Motion for Summary Judgment [Doc. 36], the preemption doctrine plainly applies to Ordinance Sections 4 and 5 – which prohibit agreements requiring membership or non-membership in a union as a condition of employment (union security), the referral of an employee by a labor organization as a condition of employment (hiring halls), and the deduction of dues from wages unless the agreement is revocable at any time (dues check-off). This is so because the Ordinance regulates conduct covered by the NLRA. Thus, Section 8(a)(3) of the Act "permits employers as a matter of federal law to enter into agreements with unions to establish union or agency shops" and "articulates a national policy that certain union-security agreements are valid as a matter of federal law." *Mobil Oil Corp.*, 426 U.S. 407, 409, 416. Congress permitted such agreements in furtherance of a "substantial public interest" in "minimizing industrial strife." *Buckley v. Television & Radio Artists*, 496 F.2d 305, 311 (2d Cir. 1974).[3] Indeed, union security is "a matter as to which . . . federal concern is pervasive and its regulation complex." *Lockridge*, 403 U.S. at 276. Under the NLRA, a union security clause is a mandatory subject of bargaining between the parties when proposed in the course of collective bargaining negotiations. *See NLRB v. Bradley Washfountain Co.*, 192 F.2d 144, 154 (7th Cir. 1951).[4] A refusal to so bargain is an unfair labor practice under Section 8(a)(5) of the Act. *Id.* Accordingly, to the extent the Ordinance regulates

[3] The Board does not here repeat the legislative history underpinning this statutory provision, as Plaintiffs' Brief in Support of their Motion for Summary Judgment [Doc. 36, 8-11] thoroughly does so.

[4] Under the NLRA, parties may be required to bargain only over "mandatory" bargaining subjects, that is, those that fall within "wages, hours, and other terms and conditions of employment" under Section 8(d) of the Act, 29 U.S.C. § 158(d). *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958).

union security agreements, it plainly falls within the area of conduct governed by Sections 7 and 8 of the NLRA. *See Lockridge*, 403 U.S. at 292-93 (state court lawsuit against union for causing employee's discharge under union-security provision found preempted because union's conduct arguably violated the NLRA). And, as shown below, Section 14(b) of the Act does not apply to localities like Lincolnshire to exempt it from the provisions of the Act that permit union security agreements.

Likewise, the NLRA permits hiring halls (essentially, employment referral services operated by unions) unless the operation of a particular hall conflicts with the Act's prohibition on union discrimination. *See, e.g., Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 673-75 (1961). Discrimination in hiring hall referrals based on membership or non-membership in a union constitutes unfair labor practices under Sections 8(a)(3), *see Farmer v. United Brotherhood of Carpenters and Joiners, Local 25*, 430 U.S. 290 (1977), 8(b)(1)(A), and 8(b)(2), *NLRB v. Laborers' Int'l Union of N. Am., AFL-CIO, Local Union No. 644*, 810 F.2d 665, 670 (7th Cir. 1987), of the Act. As a practical matter, the determination as to whether a particular hiring hall operates in a non-discriminatory manner is not readily determined. Rather, it requires a careful analysis both of the particular norms and expectations of the industry at issue, as well as the particular facts as to whether the hall operated to encourage union membership in a manner that contravenes the Act. *See, e.g., Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 695 (1963). As the Supreme Court has recognized, "[t]he problems inherent in the operation of union hiring halls are difficult and complex… and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency." *Id.* at 695–96; *accord Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 78-79 (1989) ("We have found state law pre-empted on the ground that 'Board

approval of various hiring hall practices would be meaningless if state courts could declare those procedures violative of the contractual rights implicit between a member and his union.'") (internal citation omitted). Hiring halls are also mandatory subjects of bargaining under the Act. *NLRB v. Houston Chapter, Associated Gen. Contractors of Am., Inc*., 349 F.2d 449, 452 (5th Cir. 1965). *Accord NLRB v. Tom Joyce Floors, Inc*., 353 F.2d 768, 771 (9th Cir. 1965).

Similarly, dues check-off agreements are regulated by Section 302 of the Labor Management Relations Act (LMRA) – a set of amendments to the NLRA enacted by Congress in 1947. *See* 29 U.S.C. § 186. This statutory section explicitly permits check-off agreements, so long as the individual employee authorizations can be revoked after one year. *See Tribune Publishing Co.*, 351 NLRB 196, 197 (2007), *enf'd*. 563 F.3d 1330 (D.C. Cir. 2009). Like the other two subjects regulated by the Ordinance, dues check-off is a mandatory subject of bargaining. *In re WKYC-TV, Inc.*, 359 NLRB No. 30, at *3 (Dec. 12, 2012). Thus, the "area of check-off of union dues has been federally occupied to such an extent under [the LMRA] that no room remains for state regulation in the same field." *SeaPak v. Indus., Tech. & Prof'l Emp., Div. of Nat'l Mar. Union*, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd sub nom. Seapak v. Indus., Tech. & Prof'l Employees*, 423 F.2d 1229 (5th Cir. 1970), *aff'd sub nom. Sea Pak v. Indus. Tech. & Prof'l Employees, Div. of Nat. Mar. Union*, 400 U.S. 985 (1971). Finding federal and state regulations of dues check-off "completely at odds," the court in *SeaPak* invalidated a Georgia state statute that, like the Ordinance at issue here, mandated that dues check-off agreements be revocable at any time. *Id.*[5] In short, because the NLRA regulates the very conduct that Lincolnshire also purports to regulate, the Ordinance is preempted.

[5] The Board acknowledges that Plaintiffs' Complaint does not allege that the Ordinance's prohibitions against coercion and intimidation (§ 7), creation of criminal penalties for violations (§ 8), and establishment of a private right of action (§ 9) are preempted by the Act, but

B. The Ordinance Undermines Federal Labor Policy and the Board's Ability to Effectively Enforce the Act

The impact of permitting local regulation of matters under NLRA jurisdiction can be illustrated by examples drawn from the Board's experience regulating labor relations and enforcing the Act. As noted, the Ordinance's union security and hiring hall prohibitions, as well as its dues check-off regulation, directly conflict with what the NLRA permits. The NLRA, as federal law, has nationwide application; the Ordinance is limited to Lincolnshire, Illinois. Accordingly, the practical result of Lincolnshire's Ordinance is that any employer engaged in work within the Village of Lincolnshire is placed in the untenable position of choosing between complying with federal law and local law. Thus, such an employer must decide whether to agree to union security, hiring hall, and dues check-off provisions proposed by a union in accordance with federal law. Notably, by choosing to comply with federal law, an employer risks incurring criminal or civil liability for violation of the local Ordinance. But if the employer prefers to comply with the local Ordinance, it would necessarily refuse to bargain with a union over union security, hiring hall provisions, and the duration of a dues check-off provision, all of which conduct risks incurring liability under the NLRA. "Such actual conflict between state and federal law exists when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (citations omitted).[6]

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nonetheless notes that those provisions are clearly preempted. *See Gould*, 475 U.S. at 286 ("the *Garmon* rule prevents States . . . from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act").

[6] In Illinois alone, there are 102 counties and 1,299 municipalities, creating the potential for at least 1,401 overlapping regulations if an ordinance like Lincolnshire's is permitted to stand. Businesses with work sites across the State could be subject to varying regulations, with NLRA

To the extent the NLRA and the Ordinance regulate the same conduct, potential state or local criminal prosecution and civil litigation of such conduct may seriously interfere with the Board's administrative processes. *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 73 (2008) (state statute's enforcement mechanisms of private civil actions and penalties constituted "deterrent litigation risks," sufficient to bring "the inherent potential for conflict" between the California statute and the NLRA to fruition) (quotation omitted). For example, witnesses may be reluctant to cooperate fully with Board investigations concerning conduct that may result in civil or criminal liability under the Lincolnshire Ordinance. And to the extent Board witnesses wish to avoid misdemeanor charges, they may invoke their constitutional right not to incriminate themselves by participating in a Board proceeding. Thus, this Ordinance would make the development of an adequate record during the Board's administrative proceedings considerably more difficult.

Procedurally, parallel regulation is likely to hamper the Board's ability to resolve matters within expeditious timeframes.[7] And significantly, parallel proceedings will impede the

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sanctioned union-security, dues check-off, and hiring hall provisions permissible in some locations, and prohibited in others. Such a scheme would make it virtually impossible to administer the type of regional – let alone national – "industry agreements," regularly used in the construction industry to address the transient nature of the work, with explicit Congressional approval. *See Donald Schriver, Inc. v. NLRB,* 635 F.2d 859, 874 (D.C. Cir. 1980). *See generally Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 662 (1982) (explaining that NLRA "confirms that construction industry unions may enter into agreements that would prohibit the subcontracting of jobsite work to nonunion firms"). A scheme of hundreds of potentially conflicting regulations within a particular State would completely undermine the ability to bargain such agreements, thereby effectively denying the benefits of collective bargaining to construction employees.

[7] As the legislative history to the 1947 Taft-Hartley amendments adding injunctive relief provisions to the Act emphasized, "[t]ime is usually of the essence," in resolving unfair labor practice cases. Unnecessary delay in the administrative process prevents "achieving the desired objectives – the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." Senate

negotiation of administrative settlements with parties. "[S]ettlements constitute the 'lifeblood' of the administrative process, especially in labor relations." *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 128 (1987) (quoting Att'y General's Comm. on Admin. Procedure, Admin. Procedure in Gov't Agencies, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess., 35 (1941)).[8] Having exclusive authority to prosecute violations of the NLRA, the Board litigates cases and negotiates settlements in furtherance of the public interest, which is not always aligned with the interests of the private individuals alleging violations of the Act. *See, e.g., Henderson v. Int'l Union of Operating Engineers, Local 701*, 420 F.2d 802, 808 (9th Cir. 1969). If a private right of action and a risk of criminal prosecution arose from the same set of facts as an unfair labor practice charge under the Act, a settlement of the Board's case would be hindered by the potential for liability to parties under the Lincolnshire Ordinance.

Finally, hiring hall and dues check-off matters litigated before the Board are generally particularly complex and resource intensive. For example, when backpay is awarded based on a finding that a hiring hall was operated in a discriminatory manner, it may be quite difficult to determine the precise amounts owed to hundreds of workers across a region with irregular schedules. Adding a parallel remedial scheme in state courts would further complicate the final

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Report No. 105, 80th Cong., 1st Sess., 8 (1947), cited in I Legislative History of the Labor Management Relations Act, 1947, 414 (1948).

Thus, one of the Agency's key performance measures, as described in its annual report to Congress, is the resolution of unfair labor practice cases within 120 days of the filing of the initial charge. NLRB FY 2015 Performance and Accountability Report (PAR), pp. 24-26, accessible at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/14445%20NLRB%20PAR%202015%20v2_508.pdf.

[8] As noted in the PAR: "Over the past few years, more than 90 percent of those cases in which merit is found have been settled without formal litigation. . . . The Agency calculates that every one percent drop in the settlement rate costs the Agency more than $2 million." NLRB FY 2015 Performance and Accountability Report, p. 55.

adjudication. *See NLRB v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 724 (1984) (discussing "serious" delay in computing back pay owing in a union hiring hall discrimination case in which judgment had been entered in 1979). And extended litigation concerning the permissible duration of dues check-off provisions has occurred over the past 15 years, during which the Board ultimately overturned a 50-year-old precedent.[9] All of these examples serve to illustrate the conflict with federal policy presented by Lincolnshire's Ordinance.

III. SECTION 14(b)'S EXCEPTION TO PREEMPTION DOES NOT ENCOMPASS THE PROVISIONS OF THE ORDINANCE

A. The Ordinance Is Not a "State or Territorial Law" and Therefore Falls Outside the Scope of the Section 14(b) Exception

The one key exception to the Act's generally preemptive provisions is Section 14(b), which provides that the Act does not authorize 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). This provision is recognized as a clearly-worded and limited exception to the nationwide application of the NLRA, empowering only States and Territories to prohibit union security. *See Mobil Oil Corp.*, 426 U.S. at 416. Additional exceptions are not articulated by Congress, and they cannot be implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *see also Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989). Thus, the 14(b) exception "should be strictly and narrowly construed because it represents a departure

[9] *See In re WKYC-TV, Inc.*, 359 NLRB No. 30; *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 657 F.3d 865 (9th Cir. 2011); *Hacienda Hotel, Inc. Gaming Corp. (Hacienda III)*, 355 NLRB No. 154 (2010); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008); *Hacienda Hotel (Hacienda II)*, 351 NLRB No. 32 (2007); *Culinary Workers v. NLRB*, 309 F.3d 578 (9th Cir. 2002); *Hacienda Hotel (Hacienda I)*, 331 NLRB 665 (2000).

from the overall spirit and purpose of the Act." *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 363 (Ky. Ct. App. 1965). *See also Mobil Oil*, 426 U.S. at 418 ("There 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.").

As the Plaintiffs explain in their Brief [Doc. 36, 7-9], the language of Section 14(b) is clear and unambiguous, and a narrow construction of Section 14(b) – limited to States and Territories – is consistent with its legislative history. The Village of Lincolnshire cannot contest that it is neither a "State" nor a "Territory," but rather, a political subdivision of a State.[10] Indeed, Congress knew how to specify its intent to exclude local governments from provisions of the Act. Section 2(2), 29 U.S.C. § 152(2), defines "employer" as excluding "any State or political subdivision thereof." (Emphasis added.) Such a distinct difference from the language of Section 14(b) indicates that Congress had no intention to permit governments other than States or Territories to prohibit union security.[11]

Courts are in agreement that political subdivisions are outside the scope of power delegated by Section 14(b) of the Act. *See, e.g., United Auto., Aerospace & Agric. Implement Workers of Am. v. Hardin Cty., Kentucky*, No. 3:15-CV-66-DJH, 2016 WL 427920, *7 (W.D. Ky. Feb. 3, 2016) ("'State' law does not include county or municipal law for purposes of § 14(b)") (appeal pending, No. 16-5246 (6th Cir.)); *Puckett*, 391 S.W.2d at 362 (finding Congress

[10] Of course, the Ordinance does not constitute territorial law. The Supreme Court has generally described territories as lands "acquired by the United States by war with a foreign state." *Binns v. United States*, 194 U.S. 486, 490 (1904).

[11] *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006) ("This Court presumes that, where words differ as they do here, Congress has acted intentionally and purposely."); 2B Sutherland Statutory Construction § 51.2 (7th ed. 2015) ("where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.").

could not "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."). In *New Mexico Federation of Labor v. City of Clovis*, 735 F. Supp. 999, 1002 (D.N.M. 1990), the court invalidated a similar local right-to-work ordinance, observing that "[a] myriad of local regulations would create obstacles to Congress' objectives … and undermine the NLRA's purpose." Finding "nothing in the legislative history of § 14(b) to indicate that Congress intended a broad reading of 'state,'" the court held that a plain language reading of the statute does not permit "State or Territorial law" to encompass legislation enacted by political subdivisions of the State; "when Congress intended to cover subdivisions of the state, it did so directly." *Id.* at 1004.[12] Accordingly, it could hardly be more clear that Section 14(b) has no application here.

B. The Ordinance's Prohibitions of Hiring Halls and Certain Dues Check-off Agreements Are Outside the Scope of NLRA Section 14(b)

Even if Lincolnshire's assertions about the breadth of Section 14(b) were correct [Doc. 28, para. 34, 35], the Ordinance's dues check-off and hiring hall provisions have nothing to do with Section 14(b), which pertains only to union security. The Supreme Court has held that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough Cnty., Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985). As described above, not even States and Territories are permitted to regulate these topics, and accordingly, the Ordinance is preempted under any interpretation of

[12] While the Tenth Circuit Court of Appeals found no preemption of a tribal right-to-work ordinance in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*), its decision was based on principles specific to the interplay between federal and tribal law. *Id.* at 1190 ("The burden falls on the NLRB and the Union as plaintiffs attacking the exercise of sovereign tribal power, to show that it has been modified, conditioned or divested by Congressional action.") (quotation omitted).

Section 14(b). *See Local 514, Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1326 (2002), *aff'd*, 358 F.3d 743 (10th Cir. 2004) (hiring hall regulation not within Section 14(b)) (collecting cases); *SeaPak* 300 F. Supp. at 1201 (dues check-off regulation not within Section 14(b)); *NLRB v. Shen-Mar Food Prods.*, 557 F.2d 396, 399 (4th Cir. 1977) (same).

CONCLUSION

For the reasons stated above, the Village of Lincolnshire does not have the power to promulgate ordinances banning union security, hiring hall, or dues check-off agreements. Additionally, such local bodies of governance may not invade the jurisdiction of the Board by regulating activities covered by Sections 7 and 8 of the NLRA, or impose additional penalties for the activities proscribed by those sections. To find that Illinois municipalities and other local political subdivisions have such power contradicts the plain meaning of Section 14(b) of the Act and Supreme Court precedent. Consequently, the NLRB agrees with Plaintiffs that Sections 4 and 5 of the Ordinance are preempted by the NLRA and should therefore be invalidated.

Respectfully submitted,

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