**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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**Nos. 17-1300 and 17-1325**

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**INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, et al.,**

**Plaintiffs-Appellees, Cross-Appellants,**

**v.**

**VILLAGE OF LINCOLNSHIRE, et al.,**

**Defendants-Appellants, Cross-Appellees.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**
**No. 1:16-cv-02395**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION ON PREEMPTION

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## STATEMENT OF AMICUS CURIAE

The National Labor Relations Board (NLRB or 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 in the United States, their employees, and the authorized representatives of their employees. Among other things, the NLRA proscribes certain conduct by employers and by labor organizations as unfair labor practices, and empowers the NLRB with exclusive jurisdiction to prevent and remedy the commission of such unfair labor practices.

The Village of Lincolnshire's Ordinance 15-3389-116 (Ordinance) prohibits employee representatives and employers covered by the NLRA from negotiating or entering into so-called "union security" agreements. The Ordinance also regulates hiring halls and dues check-off provisions authorizing employers to deduct union dues from employee wages. The Board agrees with the Appellee Unions that the District Court correctly found the Ordinance's prohibition of union security agreements, as well

as its regulation of hiring halls and dues check-off provisions, is preempted under the NLRA and not saved by the statute's exemption, in Section 14(b), authorizing "State or Territorial laws" to prohibit union security agreements.

The Board has a significant interest in the Court's disposition of the Village's appeal because allowing counties and other local political subdivisions to regulate or prohibit conduct covered by the NLRA contravenes Congress's stated intent and hinders the Board's enforcement authority under the Act. This amicus brief, submitted pursuant to Federal Rule of Appellate Procedure 29(b)(2), is intended to provide the Court with the statutory basis for the Board's view that the Ordinance conflicts with the NLRA and exceeds the limited authority delegated to States and Territories under Section 14(b) of the Act to regulate or prohibit union security agreements.

## ARGUMENT

### I. The Ordinance Conflicts With The NLRA And Is Subject To Preemption Under The Supremacy Clause

The NLRA expressly authorizes employers and unions to enter into union security agreements requiring organized employees to pay union dues as a condition of employment. 29 U.S.C. § 158(a)(3). Because the Village's Ordinance directly conflicts with rights and obligations under the NLRA, it is subject to preemption under the Constitution's Supremacy Clause.

Both the original Wagner Act that created the NLRA and the 1947 Taft-Hartley amendments included a provision stating that: "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C. § 158(a)(3). Taft-Hartley added language clarifying that such membership could only be required post-hiring. The Act accordingly "permits employers as a matter of federal law to enter into agreements with unions to establish union or agency shops." *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.,* 426 U.S. 407, 409-10

(1976). Subsequent case law clarified that even in union shops,[1] employees only may be required to pay dues and fees to the union representing them, but cannot be required to become actual members. *See Communication Workers v. Beck*, 487 U.S. 735, 745 (1988) ("'membership' that may be so required has been 'whittled down to its financial core'") (quoting *NLRB v. General Motors Corp.,* 373 U.S. 734, 742 (1963)). Taken as a whole, Section 8(a)(3) "articulates a national policy that certain union-security agreements are valid as a matter of federal law." *Mobil Oil,* 426 U.S. at 416; *see also Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 296 (1971) (recognizing union security as an area where "federal concern is pervasive and its regulation complex").

Where conduct is protected under the NLRA, state or local law "which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the

[1] "Union" shops refer to work places covered by agreements in which bargaining unit employees are required to join the union within a set time period after they are hired; "agency" shops refer to work places in which the bargaining unit employees are not required to join the union but must, within a set period, pay the union a sum equal to union initiation fees and make periodic payments equal to union dues. *Mobil Oil,* 426 U.S. at 409-10; *General Motors,* 373 U.S. at 742.

Supremacy Clause." *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984). This is so whether the conflict arises because compliance with state or local law would necessitate a violation of the NLRA or when such law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation omitted); *accord Livadas v. Bradshaw*, 512 U.S. 107, 117 n.11 (1994) ("a State's penalty on those who complete the collective bargaining process works an interference with the operation of the Act"); *Hill v. Florida*, 325 U.S. 538, 543 (1945).

The Supreme Court has on at least two occasions explicitly recognized that "with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy"—namely, state laws prohibiting union security agreements—"'(t)here is . . . conflict between state and federal law.'" *Mobil Oil,* 426 U.S. at 417 (quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103 (1963)). But, as the Court went on to explain, in light of Congress's enactment of Section 14(b), "it is a conflict

sanctioned by Congress with directions to give the right of way to state laws." *Id.*[2]

Given the above precedent, the Village's initial contention (Br. 12-20)—that even in the absence of Section 14(b) nothing in the NLRA preempts state or local laws prohibiting union security agreements—is both perplexing and flatly wrong. A simple example suffices. Under the NLRA, collective bargaining parties are permitted to negotiate and enter into union security agreements; indeed, union security is a mandatory bargaining subject if raised by one of the parties. *General Motors,* 373 U.S. at 745. And, if agreement is reached, the NLRA requires "the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(d).

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[2] Both the District Court and the Village focus on the question of field preemption, but that is only one branch of preemption analysis. Where, as here, a statute does not contain express preemption language, preemption may nonetheless be inferred by a showing either that Congress "has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject . . . [or] to the extent that it actually conflicts with federal law." *Brown,* 468 U.S. 501. The Appellee Unions have compellingly explained the reasons supporting the District Court's conclusion that field preemption exists with respect to union security; the Board takes this opportunity to explain why, even in the absence of field preemption, state and local prohibitions on union security are in conflict with the NLRA and thereby preempted unless exempted by Section 14(b).

Any violation of these duties may result in unfair labor practice charges and ultimately a federal court order mandating compliance with these obligations. *See generally NLRB v. Graphic Communications Int'l Union,* 991 F.2d 1302, 1305-06 (7th Cir. 1993). Yet, Section 6 of the Village's Ordinance, by its terms, dictates that any such agreements are "unlawful, null and void, and of no legal effect." Moreover, just the act of negotiating for such an agreement, let alone enforcing or complying with its terms, could result in a criminal conviction under the Ordinance.[3] In short, what the NLRA mandates (negotiation and compliance with contract terms upon agreement), the Ordinance nullifies and prohibits on pain of criminal sanctions—a quintessential "damned if you do, damned if you don't" conflict.

In these circumstances, it does not matter whether the NLRA and federal policy "favors" union security agreements or, as the Village asserts (Br. 14), only reflects "a federal policy of neutrality." The

[3] Section 7 of the Ordinance makes it unlawful "to cause or attempt to cause an employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employees." Section 8 states that anyone who violates the Ordinance would be guilty of a Class A misdemeanor punishable by fine or imprisonment.

Ordinance is subject to preemption because it prohibits agreements and renders unlawful conduct that the NLRA explicitly permits. Nonetheless, we observe that the Supreme Court in *Mobil Oil* explicitly recognized that the NLRA "*favors* permitting such agreements." 426 U.S. at 420 (emphasis added).[4] This follows because the Taft-Hartley amendments to Section 8(3) were enacted explicitly to address not just compulsory unionism but also congressional "concern that, at least as a matter of federal law, 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." *Id.* at 416. Prohibiting union security agreements is contrary to this purpose. Accordingly, unless within the scope of Section 14(b), the Ordinance is subject to preemption for the additional reason that it "stands as an obstacle to the accomplishment and execution of the full purposes and

[4] The Village is incorrect when it suggests that Justice Marshall's *Mobil Oil* opinion only represented a plurality of the Court. (Br. 28.) Seven justices were in the majority; only two dissented. Although Justice Stevens' concurrence took issue with the majority's finding a federal policy favoring union security agreements, none of the other six justices in the majority joined him. Neither Chief Justice Burger nor Justice Powell, who separately concurred, disagreed with the majority opinion's finding in this regard. 426 U.S. at 421-22.

objectives of Congress." *Brown,* 468 U.S. at 501; *accord Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Only if federal law separately grants the Village the authority to enact legislation that conflicts with the NLRA can the Ordinance avoid preemption. As we show below, it does not.

## II. Congress Only Authorized States And Territories, Not Subordinate Political Subdivisions, To Prohibit Union Security Agreements Otherwise Permitted By Federal Law

The Village's Ordinance is preempted under the Constitution's Supremacy Clause unless it falls within the exception in Section 14(b) of the NLRA, 29 U.S.C. § 164(b). This provision is the single exception to Section 8(a)(3)'s explicit authorization of union security agreements. "[I]t is §14(b) (which) gives the States power to outlaw even a union-security agreement that passes muster by federal standards.'" *Mobil Oil,* 426 U.S. at 413 n.7 (quoting *Schermerhorn,* 375 U.S. at 103). The Supreme Court also has instructed that the exception granted by 14(b) is limited by its terms. "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." *Id.* Thus, any regulation of union security

agreements outside the limited parameters of Section 14(b)'s language is preempted by the NLRA. *Schermerhorn*, 375 U.S. at 105.

The District Court's conclusion that only States and Territories, not subordinate political subdivisions or localities like the Village, are authorized to enact laws barring union security clauses is firmly supported by the plain language of the statute, the NLRA's legislative history, and the purposes of the Act.[5]

[5] For the reasons explained in the Appellee Unions' brief, the District Court correctly held that the Ordinance's regulation of hiring halls and dues check-off agreements are preempted because Section 14(b)'s exception applies only to union security agreements, and therefore does not permit even states to regulate hiring halls and check-off agreements. *Int'l Union of Operating Eng'rs, Local 399 v. Village of Lincolnshire,* No. 16-cv-02395, 2017 WL 75742, at *10-11(N.D. Ill. Jan. 7, 2017). Other circuits have reached that same conclusion. *See United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.,* 842 F.3d 407, 422 (6th Cir. 2016) (state and local regulation of "hiring-hall agreements and dues-checkoff requirements are preempted and unenforceable"); *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613, 619–20 (5th Cir. 2016) (the NLRA permits states to regulate only those provisions that amount to "compulsory unionism").

### A. Section 14(b)'s Plain Language Permits Only State and Territorial Laws Prohibiting Union Security, and Canons of Statutory Construction Confirm that Conclusion

Section 14(b) states that nothing in the NLRA "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). Determining the scope of Section 14(b) requires the Court to interpret what Congress meant when it limited 14(b) to "State or Territory" and "State or Territorial law." Various canons of statutory construction are available to guide the Court in this task. But, regardless of which canon is employed, the first step in the process is always the same. "Statutory interpretation begins with the plain language of the statute." *United States v. Berkos,* 543 F.3d 392, 396 (7th Cir. 2008). And, "absent clearly expressed Congressional intent to the contrary, the plain language should be conclusive." *Id*. Furthermore, "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory

language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Beginning with the words of Section 14(b) itself, that provision references only the laws of a "State" or "Territory." There is no mention of localities, municipalities, or other subordinate political subdivisions. That this was intentional and that Congress did not mean for the term "State" to include political subdivisions like the Village is evident from the language and design of the statute as a whole.[6]

Thus, it is critical to a proper understanding of Section 14(b) to recall that in the same 1947 Taft-Hartley amendments Congress also reenacted Section 2(2) of the NLRA, which defines the term "employer" and thereby marks the boundaries of the Board's statutory authority. In particular, in both the original and the reenacted definition of "employer" Congress specifically excluded from the Board's jurisdiction "any State or political subdivision thereof." 29 U.S.C. § 152(2). If Congress understood or intended the term "State" in the Act to encompass political subdivisions, there was no need to make a

[6] The Village does not argue that it is a Territory for purposes of Section 14(b).

redundant reference in Section 2(2) to "State or political subdivision." Indeed, construing the Act's reference to "State" as including "political subdivisions" violates the "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), that Courts should not "adopt a construction making another statutory provision superfluous." *Hohn v. United States*, 524 U.S. 236, 249 (1998); *accord Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995).[7]

The intentional decision of Congress to distinguish states from their political subdivisions both in the original and re-enacted versions of Section 2(2) further demonstrates that Congress well understood the distinction between the two and how to include political subdivisions when that was its intent. Congress purposefully excluded *both* States *and* their subdivisions from the Board's jurisdiction in Section 2(2) but in Section 14(b) authorized *only* States and Territories to exempt

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[7] The definition of "commerce" in Section 2(6) of the Act also uses the term "State" in such a way as to make it apparent that the term as used in the NLRA is not intended to encompass subordinate political subdivisions of a state:

> The term "commerce" means trade, traffic, commerce, transportation or communication among the several States . . . between any foreign country and any State . . . or between points in the same State but through any other State . . . .

29 U.S.C. § 152(6).

themselves from preemption with respect to union security clauses. From this, it is proper to infer that the later limitation was intentional and that Congress did not intend Section 14(b)'s authorization to encompass or exempt actions taken by a State's subordinate subdivisions. "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean,* 135 S. Ct. 913, 919 (2015); *accord Russello v. United States,* 464 U.S. 16, 23 (1983); *Sweeney v. Pence*, 767 F.3d 654, 660 (7th Cir. 2014) (applying this general rule to find that the word "membership" in Section 14(b) has the same meaning as "membership" in Section 8(a)(3)).

This conclusion is reinforced by the fact that Congress not only omitted the term "political subdivisions" from Section 14(b), but also narrowly limited the exemption language to two types of political units—States and Territories—that are generally viewed as having comparable sovereignty. *See People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 260-61 (1937) (finding that powers "exercised by the Territorial legislatures is nearly as extensive as those exercised by any State legislature"); *In re Hooper's Estate*, 359 F.2d 569, 578 (3d Cir. 1966)

(noting the territorial legislation applicable to the Virgin Islands "conferred upon it attributes of autonomy similar to those of a sovereign government or a state"). By contrast, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Sailors v. Bd. of Educ. of Kent Cty.,* 387 U.S. 105, 107-08 (1967) (internal citations omitted). The canon *expressio unius est exclusio alterius* thus supports the inference that the limited reference to "State" and "Territory" in Section 14(b) was meant to exclude dissimilar entities. In short, "the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). For this further reason, Congress's omission of any reference to "political subdivisions" in Section 14(b) is properly understood as expressing an intention to limit Section 14(b)'s

application to decisions made by larger political units, like States and Territories.[8]

Finally, Congress's intent with respect to Section 14(b)'s exemption is ascertainable from its corresponding use of the term "local" in two other provisions of the NLRA. In adjacent subsection Section 14(a), also enacted in 1947, Congress directed that no employer subject to the Act would be compelled to deem supervisors employees "for the purpose of any law, *either national or local*, relating to collective bargaining." 29 U.S.C. § 164(a) (emphasis added). In this context, the term "local" plainly references any political body that is not national, which would include both states and localities or subordinate political subdivisions. If this same Congress had intended Section 14(b) to exempt localities like the Village, it readily could have expressed that intent in the same manner by using the term "local" as employed in Section 14(a). Alternatively, in Section 202(c) of Taft-Hartley, Congress explicitly contrasted the terms "local" and "State" in explaining that the Director

[8] Tellingly, since Taft-Hartley was enacted, union security has been viewed as the exclusive concern of "major policy-making units," such as States, Territories, and the federal government. *New Mexico Fed'n of Labor v. City of Clovis*, 735 F. Supp. 999, 1003 (D.N.M. 1990).

of the newly-created Federal Mediation and Conciliation Service "may establish suitable procedures for cooperation with *State* and *local* mediation agencies." 29 U.S.C. § 172(c) (emphasis added). Again, if this same Congress had intended for Section 14(b) to exempt localities, it presumably would have used the parallel terms "State and local" as it did in Section 202(c).

In sum, the plain language of the statute justifies the conclusion that Congress's limited reference to "State and Territory" in Section 14(b) was clearly intentional and not meant to encompass political subdivisions. If Congress had intended to encompass the latter, concurrent Taft-Hartley amendments manifest that it knew how to demonstrate its intent, either explicitly by using the term "political subdivision" as it did in 2(2), or by using the broader reference to "local" as it did in Sections 14(a) and 202(c). That it "did not adopt this readily available and apparent alternative," *Knight v. C.I.R.*, 552 U.S. 181, 188 (2008), strongly supports rejecting any interpretation that extends 14(b)'s exemption beyond the explicit entities identified in Section 14(b) itself: "any State or Territory." 29 U.S.C. § 164(b).

### B. The NLRA's Legislative History Confirms Congressional Intent to Limit Section 14(b)'s Exception to State and Territorial Laws

Legislative history further confirms what the textual analysis shows: that Congress intended federal law to protect union security clauses, with the only exception being for laws enacted by a State or Territory.

When the Wagner Act was passed in 1935, the NLRA authorized the negotiation of so-called "closed-shop" agreements, which required union membership in order to be hired and as a condition of employment. *See* 29 U.S.C. § 158(3) (1935); *General Motors*, 373 U.S. at 740-41. The expressed concern at that time was that the new legislation might be interpreted either to mandate closed shops or, as had occurred in the predecessor National Industrial Recovery Act (NIRA), to prohibit closed-shop agreements. The Senate Committee Report confirmed that neither result was intended. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board,* 336 U.S. 301, 308 (1949) (citing to Sen. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935)); *General Motors,* 373 U.S. at 739 (noting congressional concern in 1935 that "'nothing in [the NIRA] was intended to deprive labor of its existing rights in many States to contract or strike for a closed or preferential shop * * *. No

reason appears for a contrary view here.'") (citing 1 Leg.Hist. N.L.R.A. 1354-1355).

While authorizing the negotiation of union security agreements under federal law, the Wagner Act Congress understood and accepted that some states had laws prohibiting such agreements, such that both houses of Congress approved making an exception for such state laws. Sen. Rep. No. 573, 74th Cong., 1st Sess. at 11 (closed-shop agreements not "legal in any State where they may be illegal"), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935 at 2311 (1959) (1935 Leg. Hist.); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19-20 (1935) ("The bill does nothing to legalize the closed-shop agreement in the States where they are illegal"), *reprinted in* 1935 Leg. Hist. at 3069.

The 1947 Taft-Hartley amendments prohibited the closed shop, but purposefully reauthorized the federal right of employers and unions to enter into union security arrangements requiring union membership following hiring. Congress authorized the continued use of these union security clauses because otherwise "many employees sharing the benefits of what unions are able to accomplish by collective bargaining

will refuse to pay their share of the cost." S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 412 (1959) (1947 Leg. Hist.).

In reauthorizing union shops, however, Congress attached several requirements, including: a minimum 30-day post-hiring waiting period before implementation; and limiting terminations for lack of union membership only to the failure to pay union dues or fees. 29 U.S.C. §158(a)(3). The net result was that "Congress undertook pervasive regulation of union-security agreements, raising in the minds of many whether it thereby preempted the field . . . and put such agreements beyond state control." *Schermerhorn,* 375 U.S. at 101. To address this potential preemption issue, Congress simultaneously enacted Section 14(b), which was designed to make clear that nothing in the original or amended NLRA "could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy." H.R. Conf. Rep No. 510, 80th Cong., 1st Sess. 60 (1947), *reprinted in* 1947 Leg. Hist. at 564.

What is evident from reviewing the legislative history of both the Wagner and the Taft-Hartley Acts is that, at all times, Congress's focus

and intent was to limit the impact of the union security provisions on *State* rights. *Schermerhorn*, 375 U.S. at 100; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947), *reprinted in* 1947 Leg. Hist. at 564; H.R. No. 245; 80th Cong., 1st Sess. 34, 44 (1947), *reprinted in* 1947 Leg. Hist. at 325, 335 (identifying 12 states that had enacted union security prohibitions, 14 states that were considering such provisions, and 4 states that conditioned such agreements on a super-majority vote by unit employees). Not once in the course of protecting state law from the preemptive scope of Section 8(a)(3), did Congress reference or suggest that localities or subsidiary political subdivisions, like the Village, could lawfully exempt themselves from the federal law authorizing union security agreements. Having expressed its repeated concern for state legislation, the *only* additional entity that Congress chose to exempt in Section 14(b) were Territories.

### C. Interpreting Section 14(b) to Include Political Subdivisions Would Thwart Both the Purposes and the Administration of the Act

A further canon of construction states that statutory language susceptible to more than one meaning is "to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in

particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *Shell,* 302 U.S. at 258; *accord Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.,* 658 F.3d 684, 694 (7th Cir. 2011); *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) (statutory test should be interpreted to "ensure that a text's manifest purpose is furthered, not hindered").

The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Since its enactment, Section 14(b) has been understood to mean that absent contrary state law, Section 8(a)(3) implements a national policy permitting parties to negotiate union security agreements. *Mobil Oil*, 426 U.S. at 416-17; *see also Buckley v. Television & Radio Artists*, 496 F.2d 305, 311 (2d Cir. 1974) (Congress recognized that such agreements further a "substantial public interest" in "minimizing industrial strife").

Congressional interest in minimizing industrial strife, as well as the NLRA's policy of encouraging collective bargaining—including the negotiation of union security provisions—counsels against interpreting Section 14(b) to include political subdivisions. As a practical matter, permitting localities to enact their own union security policies would subject labor contracts to potential legislation by an exponentially larger number of jurisdictions, numbering in the tens of thousands. Moreover, within any one state there may be any number of overlapping political subdivisions having jurisdiction over the same employers.[9] This, in turn, poses an obstacle to industrial peace by destabilizing long

[9] The 2012 official count by the U.S. Census Bureau indicates that, nationwide, there are 90,056 local governments, consisting of 38,910 general purpose governments (counties, municipalities and townships) and 51,146 special purpose governments (school districts and special purpose districts, like airport and civic center authorities, transit districts, port districts, hospital districts, and fire protection districts). U.S. Census Bureau, *Government Organization Summary Report: 2012*, at 1, U.S. Dept. of Commerce, Economics and Statistics Administration, https://www.census.gov/library/publications/2013/econ/g12-cg-org.html. Illinois alone "has 6,963 local governments, the highest number of government units in the nation." *Id.* Of these, 102 are county governments, 2,729 are sub-county general purpose governments like municipalities and townships, and the remainders are school districts and other special purpose districts. U.S. Census Bureau, 2012 Census of Governments, *Individual State Descriptions:2012,* at 80-89, U.S. Government Printing Office, Washington, DC 20013, https://www.census.gov/library/publications/2013/econ/g12-cg-isd.html.

standing expectations, by unduly complicating the collective bargaining process, and by creating a wholly unworkable regulatory patchwork on a scope substantially more complex than anything Congress envisioned or intended. As the District Court below correctly observed:

> Though section [14(b)] permits a narrow exception for authorized state regulation, it is highly unlikely that Congress intended to subject this national policy to the patchwork scheme that would result from city-by-city or county-by-county regulation of such agreements. If the NLRA permitted local governmental entities to enact their own laws regarding union security agreements, "[t]he result would be a crazy-quilt of regulations within the various states."

*Int'l Union of Operating Eng'rs,* 2017 WL 75742, at *8 (quoting *City of Clovis*, 735 F. Supp. at 1002).

Equally problematic is that the scope of jurisdiction and authority of each particular political subdivision is determined by applicable state law. *See Sailors,* 387 U.S. at 108. Hence, the ultimate validity of any political subdivision's union security ordinance would not be

determinable until tested in the state courts or expressly authorized by state legislature.[10]

With respect to the NLRB, this would substantially increase the administrative demands on its regulatory authority. For example, it is an unfair labor practice under the NLRA for an employer or union to refuse to bargain over a lawful union security proposal or to repudiate a lawful union security clause, *General Motors*, 373 U.S. at 744-45, but a complete defense to such a charge is provided by a valid state law under 14(b). *See Plumbers v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982). Conversely, a party that insists to impasse on bargaining for a union security provision that is prohibited by state law also engages in an unfair labor practice. *United Ass'n of Journeymen v. NLRB*, 675 F.2d 1257, 1258 (D.C. Cir. 1982). Accordingly, when confronted with either

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[10] Alternatively, the presumption that "State" encompasses laws of political subdivisions would require those states that do not wish to prohibit union security agreements (including Illinois whose legislature as recently as 2015 rejected a bill to enact such a statewide law) to affirmatively enact legislation either permitting such agreements or explicitly prohibiting their political subdivisions from issuing laws prohibiting union security agreements. Such a result would require a complete reversal of Section 14(b)'s underlying presumption that union security agreements are protected unless affirmatively *prohibited* by state law.

situation in the context of a political subdivision, the Board first would have to undertake the task of determining whether the particular local union security law applies to the given contract or conduct.[11] Next, the Board would have to determine whether the law at issue is "valid"–i.e. whether that particular subdivision was authorized under state law to enact the regulation at issue. Whether the Board undertakes its own evaluation of applicable state law, or holds the charge in abeyance while awaiting a state court determination, the extension of Section 14(b) to political subdivisions will inevitably encumber the Board's administration of the NLRA by hampering the speedy resolution of unfair labor practice cases and by embroiling state law issues into the federal administrative process.

[11] In *Mobil Oil,* the Supreme Court ruled 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." 426 U.S. at 414. The Ordinance, on its face, applies to any employer or employee "covered by the NLRA" with no reference to employee work situs.

### D. Neither *Mortier* nor *Ours Garage* Mandates a Conclusion that Section 14(b) Exempts Political Subdivisions

Neither *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991), nor *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), the two cases on which the Village relies (Br. 22-23), requires a finding that the term State, as used in Section 14(b) of the Act, includes political subdivisions.

First, it is well established that courts are not required to automatically interpret a term as used in one statute exactly the same way in an entirely different statute. "Congress may well have intended the same word to have a different meaning in different statutes," and therefore, looking to a term's definition from a wholly unrelated statute "is a relatively weak aid." *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001). The statutes at issue in *Mortier* and *Ours Garage* involved the regulation of pesticides and highway safety, respectively, in statutes having very different histories and concerns from those in the NLRA, as amended by Taft-Hartley. This is especially true given the particularly unique statutory history of Section 14(b) and Congress's stated intent to preserve the parties' federal right to

negotiate union security agreements. *Cf. United States v. City & Cty. of Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) (refusing to apply *Mortier* and consider "state" synonymous with political subdivisions where doing so "would produce a result so contrary to the overall objectives" and legislative history of the statute under consideration).

Second, in both *Mortier* and *Ours Garage*, the Court made a point of considering the particular statutory framework at issue when arriving at its conclusion that Congress's use of the term "State" in each was not meant to exclude political subdivisions.

In *Mortier*, the Court was tasked with determining whether the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts the regulation of pesticides by local governments. *Mortier*, 501 U.S. at 600. The Court was quick to point out key provisions of that statute which endowed both states and their localities with adjunct responsibilities and specific powers. As the Court held, "FIFRA implies a regulatory partnership between federal, state, *and* local governments," *id*. at 615, and "the statute leaves ample room for States and localities to supplement federal efforts . . . ." *Id*. at 613 (internal citations omitted).

In *Ours Garage,* the Court determined whether the Interstate Commerce Act (ICA) permits municipalities to regulate local tow-truck operations. 536 U.S. at 428. The Court initially observed that the case involved "preemption stemming from Congress' power to regulate commerce, in a field where States have traditionally allowed localities to address local concerns" *and* that State safety power "typically includes the choice to delegate the State's 'safety regulatory authority' to localities." *Id.* at 439. Further, the Court reasoned that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 432-33. The Court concluded in that case that preemption was inappropriate since the statute "does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* at 434.

Unlike the statutes at issue in *Mortier* and *Our Garage*, the NLRA was explicitly designed to obtain uniform application of substantive labor rules through application of an overarching federal law. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) ("It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations.").

States not only are prevented "from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.*

Federal labor law under the NLRA, unlike environmental or safety regulation, also is not an area where it is expected that, to the extent States retain authority over private sector labor relations under the Act, they would typically act through their political subdivisions. This is not surprising since, as explained above, absent 14(b) authority, the States themselves are forbidden to enact legislation in conflict with (or even as a supplement to) the NLRA. Moreover, contrary to both the FIFRA and the ICA statutory provisions at issue in *Mortier* and *Ours Garage*, nothing in the statutory language or legislative history of the NLRA or the Taft-Hartley amendments indicates that Congress ever contemplated adjunct local regulatory action or enforcement of union security matters.

Neither *Mortier* nor *Ours Garage* create a bright line rule that the word "State" in any and all federal statutes must be interpreted to include political subdivisions, unless the statute expressly states

otherwise. As described above, in both opinions, the Court applied traditional rules of construction in thoroughly reviewing the applicable statutes to discern congressional purpose respecting preemption. Only after finding no evidence of congressional intent to preempt local laws in the relevant statutes did the Court conclude that preemption did not preclude local regulation. Here, by contrast, the plain language of Section 14(b), read in the context of the statute as a whole as well as Congress's concurrent use of the terms "political subdivision" and "local" in other sections, clearly manifests that Congress intended to permit only State or Territorial law, and not local laws, to limit the statutory right of covered parties to negotiate union security agreements. As the District Court stated, "[a]lthough the Court ruled in both cases [*Mortier* and *Ours Garage*] that a statutory preemption exception for state regulation extended to local subdivisions as well, the statutes in those cases are distinguishable from the NLRA and therefore do not persuade this Court to find that the same extension applies here." *Int'l Union of Operating Eng'rs,* 2017 WL 75742, at *9.

The Village's heavy reliance on the Sixth Circuit's decision in *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v.*

*Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016), which construed Section 14(b) to allow local subdivisions to prohibit union security agreements, is also misplaced. In that case, despite the instruction that a court "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart*, 486 U.S. at 291, the Sixth Circuit failed to follow the traditional canons of construction. Instead, it started its analysis with the presumption that the first reference to "State" in Section 14(b) includes political subdivisions, because "it plainly must, as political subdivisions are components of the State, with*in* the State, that exercise governmental power of the State." 842 F.3d at 413. From there, the court went on to presume that the second reference to State law "must also be read to include political subdivisions" and that "[i]nsofar as the presumption-of-consistent-usage maxim plays a role in construing § 14(b), it strongly favors the County's position that 'State' includes political subdivisions." *Id.*

In so reasoning, the Sixth Circuit never considered the textual evidence that the same Congress that enacted Section 14(b): (i) employed the same term "State" in Section 2(2) in a manner that manifestly was *not* intended to include political subdivisions; and (ii)

used the term "local" in Section 14(a) when it wished to reference both States and localities. Yet, that same Congress used no comparable language in Section 14(b) to signify any intention that the term "State" was meant to include either political subdivisions or localities; instead, it pointedly limited the exemption only to States and Territories—related terms that exclude lesser governmental units like political subdivisions by implication.

The Sixth Circuit also summarily dismissed legislative history and policy concerns as "dicta" insufficient to show "a clear and manifest purpose rebutting the presumption arising from *Mortier* and *Ours Garage* that 'State' includes political subdivisions of the State," asserting that these "are the very kinds of arguments that the Supreme Court rejected in *Mortier* and *Ours Garage*." *Id.* at 420. [12] As shown above, however, such dismissive reasoning is justified neither by the

[12] Even assuming, for the sake of argument, that the Court in *Mortier* and *Ours Garage* created a judicial presumption in favor of interpreting the word "State" as including political subdivisions, as shown above, there is ample evidence in the statutory language and history to defeat any such presumption with respect to the intent underlying Section 14(b).

plain language of the NLRA nor the Supreme Court's decisions in *Mortier* and *Ours Garage*.

## CONCLUSION

The plain meaning of the statute limits the application of Section 14(b) to "State or Territorial law." Congress's intent, as manifested by traditional canons of construction and legislative history, establishes that subsidiary political subdivisions, like the Village, are not included in the statutory construct of what constitutes a "State" under the NLRA. Nor would the purpose of the NLRA be served by permitting such an expansive reading. Because the Village is neither a State nor a Territory, the Ordinance is not exempted by the limited savings provision of Section 14(b). Accordingly, since the Ordinance conflicts with federal law it is preempted. The District Court's holding should be affirmed by this Court.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 32(g)(1), and 29(b)(4), I hereby certify that this Brief for Amicus Curiae was prepared using a proportional 14-point typeface and contains 6,749 words as calculated by the word processing system used to prepare this brief.

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## CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was filed and served on this day via the CM/ECF system.

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