No. 16-5246

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 3047, *et al*.,

Plaintiffs-Appellees,

v.

HARDIN COUNTY, KENTUCKY, *et al*.,

Defendants-Appellants.

On Petition for Rehearing En Banc on Appeal from a Final Decision of the United States District Court for the Western District of Kentucky
No. 3:15-cv-00066-DJH

BRIEF OF AMICUS CURIAE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF PETITION FOR REHEARING EN BANC

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
BARBARA A. O'NEILL
Associate General Counsel
NANCY E. KESSLER PLATT
Deputy Associate General Counsel

WILLIAM G. MASCIOLI
Assistant General Counsel
DAWN L. GOLDSTEIN
Deputy Assistant General Counsel
DIANA ORANTES EMBREE
Supervisory Attorney
KEVIN J. HOBSON
Trial Attorney
AARON SAMSEL
Trial Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2930

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Legislative Material

STATEMENT OF IDENTITY OF AMICUS CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

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 employees' authorized representatives. The Board believes that the panel's decision incorrectly interprets the NLRA, and creates an obstacle to administering congressional policy expressed in Sections 2(2), 8(a)(3), and 14(b) of the Act. The Board submits this brief pursuant to Federal Rule of Appellate Procedure 29(b)(2).

STATEMENT OF AMICUS IN SUPPORT OF EN BANC REVIEW

For the first time since its enactment in 1947, a federal court has held that Section 14(b) of the NLRA, 29 U.S.C. § 164(b), permits a political subdivision to enact an ordinance prohibiting the execution or application of union-security agreements between unions and private employers covered by the NLRA.[1] The panel's decision to overturn a legal framework that has prevailed for seven decades

[1] Section 14(b) states: "Nothing in this subchapter 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."

derives from its erroneous conclusion that this result is compelled by two Supreme Court cases – *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (*Mortier*), and *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002) (*Ours Garage*).

In agreement with the Appellees and Amicus, the Commonwealth of Kentucky (Kentucky), the Board respectfully submits that the panel decision is fundamentally flawed and should be reheard en banc. The petitions for rehearing submitted by the Appellees and Kentucky demonstrate why the panel's reading of *Mortier* and *Ours Garage* fails on its own terms. Rather than repeating those arguments, we focus on the panel's failure to affirm the district court based on the statutory analysis advanced by the Board below. Unlike the district court and the panel, which considered Section 14(b) standing alone, the Board submits that an appropriate analysis of Section 14(b) must take into account the text of Section 2(2) of the NLRA, which distinctively exempts from the definition of employers subject to the NLRA "any State or political subdivision thereof." 29 U.S.C. § 152(2). By contrast, Section 14(b) permits only a "State or Territory," to prohibit union security, plainly manifesting Congress' intent to limit Section 14(b)'s exemption to major policymaking units. Moreover, legislative history confirms that Congress intended to exempt from preemption only States and Territories. Finally,

the panel's contrary conclusion frustrates Congress' objective of balancing the authority of the Federal government with the interests of the States, and creates obstacles to the Board's administration of the Act.

ARGUMENT

The Panel's Conclusion that Section 14(b) Exempts Political Subdivisions Contravenes Congressional Intent

Discerning Congressional intent is central to the evaluation of any federal statute. This is particularly so in the area of preemption analysis, where "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose.*'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Congress' intent "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.*

The panel recognized "that the preemptive effect of each federal regulatory scheme (and exception thereto) is defined by its own body of case law, as Congress's intent is divined with reference to the subject statutory language, rules of construction, and legislative history." (Op. 11.) But the panel disregarded that sound principle and failed to give effect to statutory language that, if properly construed, persuasively establishes that "State or Territorial law" is the only basis that Congress authorized for prohibiting union-security agreements otherwise protected by federal law.

A. The Panel Failed to Give Effect to the Plain Language of the Statute

When interpreting a statute, "a court should always turn first to one, cardinal canon before all others… courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal citations omitted). Furthermore, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citations omitted).

Critical to properly understanding "State" in Section 14(b) is that at the same time Congress enacted that section in 1947 as part of the Taft-Hartley amendments, it also re-enacted the definition of "employer" in Section 2(2) of the Wagner Act, which created the NLRA in 1935. That definition of employer, which marked the boundaries of the Board's jurisdiction, expressly excluded "any State or political subdivision thereof." 29 U.S.C. § 152(2). Section 2(2) thus demonstrates that, in enacting the Wagner Act and then amending it in 1947 to include, among other provisions, new Section 14(b), Congress well understood and plainly expressed the distinction between States and their political subdivisions.

In this statutory context, principles of statutory construction required the panel to attach significance to the omission of any reference to political subdivisions in Section 14(b). That section, like Section 2(2), delineates the Board's jurisdiction—in this instance by providing that union-security agreements authorized expressly in Section 8(a)(3), 29 U.S.C. § 158(a)(3), are not authorized if "prohibited by State or Territorial law." 29 U.S.C. § 164(b). "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*, 464 U.S. at 23. Congress' including "political subdivision" in Section 2(2)'s exclusionary provision, but omitting that term from Section 14(b)'s exclusionary provision, shows that Congress did not intend political subdivisions to have the rights 14(b) recognizes.[2]

That conclusion is reinforced because Congress not only omitted political subdivisions from Section 14(b), but limited that exemption to States and

[2] In *Ours Garage*, the Court did not find the *Russello* canon controlling; there, the statute's provisions did not clearly manifest congressional intent to exclude municipalities from regulating motor vehicle safety, traditionally an area of local concern. *See* submissions of Appellees (Doc. 49 at 7-9) and Kentucky (Doc. 53 at 6). Here, as we explain, nothing in the NLRA stands in the way of applying *Russello*. Further, union security has for over 70 years been 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).

Territories. This further supports the inference that 14(b)'s omission was deliberate and that Congress intended for 14(b) only to encompass States and comparable political units of like size and sovereignty, namely, Territories. *Cf. Barnhart v. Peabody Coal Co*., 537 U.S. 149, 168 (2003) (when included and omitted terms in a statute are all members of an associated group, it is appropriate to infer the omitted term was deliberately excluded).

For the foregoing reasons, the panel erred in failing to recognize that the NLRA's plain language, when considered in light of canons of construction, supports only one conclusion – that Congress' reference solely to "State or Territorial law" in Section 14(b) was intentional and Congress had no intent to include "political subdivisions" within 14(b). Where Congress' intent to exclude political subdivisions from 14(b) is apparent, the duty of courts is to give effect to that manifest intent. The panel may have been justified in faulting the district court to the extent that, contrary to *Mortier* and *Ours Garage*, it relied on legislative silence or a general claim that the term "State" does not include political subdivisions. But the statutory argument the Board has advanced is not vulnerable to that claim. The Board's argument gives effect to the intent that Congress manifested in enacting an exemption for States and political subdivisions in one

section, Section 2(2), and an exemption only for state or territorial law in another, Section 14(b).

B. The Panel's Construction Is Contrary to the Legislative History of the Wagner Act and the Taft-Hartley Amendments

From the time Congress enacted the NLRA and began regulating union security, it recognized the continuing validity of state laws prohibiting union security. The Act's legislative history confirms what the text shows: Congress contemplated that federal law would protect union-security clauses, except where prohibited by state laws.

When the Wagner Act was passed in 1935, the NLRA authorized the negotiation of so-called "closed-shop" agreements requiring union membership as a condition of employment. *See* 29 U.S.C. § 158(3) (1935); *NLRB v. General Motors Corp*., 373 U.S. 734, 740-41 (1963). Nevertheless, Congress acknowledged that these new protections did "nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. Rep. No. 573, 74th Cong., 1st Sess. 11 (1935), *reprinted in* 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2311 (1959) (1935 Leg. Hist.); *see also* H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19-20 (1935), *reprinted in* 1935 Leg. Hist. 3069.

In the 1947 Taft-Hartley amendments, Congress re-authorized employers and unions to enter into union-security arrangements, while prohibiting closed shops, 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.). Simultaneously, Congress enacted Section 14(b) to clarify 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. 564. [3]

In saving state law from the preemptive scope of Section 8(a)(3), Congress never suggested that political subdivisions could enact ordinances prohibiting union security. To the contrary, the only addition to state regulation of union security that Congress recognized in 14(b) was the right of *Territories* to also prohibit these agreements. Critically, political subdivisions are of a different order

[3] *See* H.R. No. 245, 80th Cong., 1st Sess. 34, 44 (1947), *reprinted in* 1947 Leg. Hist. 325, 335 (identifying the States that had enacted or were considering union security legislation and acknowledging that "[t]he demand for legislation of this kind is widespread and pressing."); H.R. Conf. No. 510 at 60, *reprinted in* 1947 Leg. Hist. 564 ("Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal.").

of magnitude than States or Territories. In neither 1935 nor 1947 did Congress express any intent that political subdivisions could exempt themselves from federal law authorizing union-security agreements.

C. The Panel Decision Frustrates the Purpose of the Act

The Supreme Court has consistently held that a state or local law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Although the panel recognized this type of conflict preemption (Op. 14), it erred in narrowing conflict to include only circumstances where an employer's compliance with an ordinance "would result in the violation of a federal regulation." *Id*. It failed to consider the obstacles created by local regulation of union security.

The stated purpose of Section 14(b) was to strike a balance between federal authority to create national law and state concerns about compulsory unionism. *See Retail Clerks, Local 1625 v. Schermerhorn*, 375 U.S. 96, 101-02 (1963); H.R. Conf. Rep. No. 510 at 60, *reprinted in* 1947 Leg. Hist. 564. Since 14(b)'s enactment, that balance has been understood to mean that absent contrary state law, Section 8(a)(3) "articulates a national policy that certain union-security

agreements are valid as a matter of federal law." *Oil Workers v. Mobil Oil*, 426 U.S. 407, 416-17 (1976). That policy is impaired by the panel decision, which frustrates the purposes of the NLRA in general and Section 14(b) in particular.

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). Settling controversial union-security issues on a state-wide basis is fully consistent with Congress' goal of securing industrial peace. Conversely, if the panel decision stands, labor agreements will be subject not just to potential legislation enacted by fifty States or a handful of Territories, but to an exponential number of localities nationwide. Such an expansion poses an obstacle to industrial peace, unduly complicates the process of collective bargaining, and creates a wholly unworkable regulatory patchwork. This result is immensely more complex than anything Congress envisioned or intended.[4]

[4] In Kentucky alone, there are 120 county and 418 municipal governments. *See* Legislative Research Commission, County Government in Kentucky (2003), available at https://kydlgweb.ky.gov/Documents/Counties/IB%20115.pdf; Kentucky League of Cities, The Basics of Kentucky Cities (Sept. 2012), available at http://www.klc.org/UserFiles/TheBasics2012-2.pdf. *See also NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971) ("political subdivision" in the NLRA includes all entities that are "created directly by the state" or "administered by individuals who are responsible to public officials or to the general electorate"); *Moir v. Greater Cleveland Regional Trans. Auth.*, 895

The panel's decision also would substantially increase the administrative burdens of the NLRB. This is because the NLRA right of employees to negotiate and enforce union-security agreements turns on the contours of state law. Although it is an unfair labor practice under the Act for an employer or union to refuse to bargain over a lawful union-security proposal or to repudiate a lawful union-security clause, *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003), a complete defense to such a charge is provided by a valid state law prohibiting the negotiation or enforcement of a union-security clause. *See Plumbers v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982). Thus, when confronted with such a charge in the context of a political subdivision, the Board would face the difficulty of determining whether local union-security laws apply to a given contract, and whether the particular subdivision was authorized under state law to enact the regulation.

In short, given the Board's regulatory authority over activity that "the NLRA protects, prohibits, or arguably protects or prohibits," *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986), the panel's holding creates a vastly more complicated administration of the Act. Whether the Board undertakes its own evaluation of applicable state law or holds the charge in

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F.2d 266, 270-72 (6th Cir. 1990) (finding transit authority to be a "political subdivision" under the NLRA).

abeyance while awaiting a state court determination, the extension of Section 14(b) to localities creates unacceptable obstacles to administering the NLRA and stabilizing industrial relations through the speedy resolution of unfair labor practices. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 428 (1960).

CONCLUSION

The NLRB submits that Congress' manifest intent limits 14(b) to "State or Territorial law." Local union-security regulations are preempted because they are not encompassed by 14(b) and interfere with the NLRA-protected right to negotiate and enforce union-security clauses. En banc reconsideration is warranted here.

Respectfully submitted,

NANCY E. KESSLER PLATT
Deputy Associate General Counsel
Division of Legal Counsel
National Labor Relations Board
1015 Half St., SE 4th floor
Washington, D.C. 20570
Fax: (202) 273-4244

WILLIAM G. MASCIOLI
Assistant General Counsel
Contempt, Compliance, and
Special Litigation Branch

DAWN L. GOLDSTEIN
Deputy Assistant General Counsel

DIANA ORANTES EMBREE
Supervisory Attorney

AARON D. SAMSEL
Trial Attorney

s/ Kevin J. Hobson
KEVIN J. HOBSON
Trial Attorney
National Labor Relations Board
1015 Half St., SE 4th floor
Washington, D.C. 20570
kevin.hobson@nlrb.gov
(202) 273-0102

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 2,596 words (excluding the parts of the brief exempted by Rule 32(f)) as calculated by the word processing system used to prepare this brief.

s/ Kevin J. Hobson
KEVIN J. HOBSON
Trial Attorney
National Labor Relations Board
1015 Half St., SE 4th floor
Washington, D.C. 20570
kevin.hobson@nlrb.gov
(202) 273-0102

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing was filed on this the 27th day of December, 2016 via the CM/ECF system.

s/ Kevin J. Hobson
KEVIN J. HOBSON
Trial Attorney
National Labor Relations Board
1015 Half St., SE 4th floor
Washington, D.C. 20570
kevin.hobson@nlrb.gov
(202) 273-0102