**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 Appeal from the United States District Court**
**For The Western District of Kentucky, Louisville Division**
**Civil Action No. 3:15-cv-00066-DJH**

## BRIEF OF THE NATIONAL LABOR RELATIONS BOARD AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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## STATEMENT OF *AMICUS*

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. *See Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-65 (1940).

Hardin County's Ordinance 300 (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 allowing counties and other local political subdivisions to prohibit conduct covered by the NLRA contravenes Congress's stated intent to create a national labor policy and hinders the Board's enforcement authority under the Act. 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 limited authority delegated to States and Territories under Section 14(b) of the Act (29 U.S.C. § 164(b)), and the practical impact that the Ordinance would have on employers and unions attempting to form valid contracts under the Act.

## INTRODUCTION

Hardin County, Kentucky enacted Ordinance 300 with the stated purpose of ensuring that "no employee within Hardin County covered by the National Labor Relations Act need join or pay dues to a union, or refrain from joining a union, as a condition of employment." County of Hardin, Ky., Ordinance No. 300, Series 2014 (Jan. 13, 2015). In furtherance of that goal, the Ordinance, among other things, outlaws union security clauses (*id*. at §§ 4, 6) and hiring halls (*id*. at §§ 4, 6), and regulates the permissible scope of union dues check-off agreements (*id*. at §§ 4, 5, 6). Section 6 of the Ordinance declares any contrary agreements to be "unlawful, null and void, and of no legal effect." And Section 8 prescribes that, "[a] violation of any other section of this Ordinance [excluding Section 7 which prohibits coercion and intimidation] shall be classified as a class B misdemeanor." For the reasons set forth below, the District Court correctly determined that Sections 4, 5, and 6 of the Ordinance are preempted by the NLRA. This is because, as to union security, Hardin County is neither a State nor a Territory, as required by the limited exception in Section 14(b), which permits States and Territories to prohibit union

security provisions. Moreover, *no* State, Territory, or locality may regulate dues check-off and hiring hall agreements between unions and employers.

## ARGUMENT

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

By enacting the NLRA, Congress sought to create a national, uniform body of labor law and policy. "The purpose of the Act was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953)). To accomplish these 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*, 346 U.S. at 490; *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.

As the District Court below accurately observed, "*Garmon* preemption forbids state and local regulation of 'activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" Mem. Op. & Order, RE 43, page ID#1286. This result follows from the Supreme Court's recognition that "in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986). Thus, as the Supreme Court had previously recognized, "[w]hen an activity is arguably subject to § 7 [29 U.S.C. § 157] or § 8 [29 U.S.C. § 158] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National

Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245.

The preemption doctrine serves a 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 national labor policy developed by the Board, as Congress intended. 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." *Id.* 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 further 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 labor legislation." *NLRB v. Ins.*

*Agents' Int'l Union*, 361 U.S. 477, 499 (1960). *Garmon* preemption 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 *Gould*, 475 U.S. at 289). 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. The primacy of federal labor law has also been recognized by the Supreme Court of Kentucky. *See Methodist Hosp. of Ky., Inc., v. Gilliam*, 283 S.W.3d 654, 655-56 (Ky. 2009) (finding wrongful discharge claim under state law preempted under *Garmon*).[1]

## II. HARDIN COUNTY'S ORDINANCE REGULATES CONDUCT COVERED BY THE ACT

The preemption doctrine applies to Ordinance Sections 4, 5, and 6, which, as explained above, prohibit agreements requiring membership or non-membership in a union as a condition of employment (union security), the deduction of dues from wages unless the agreement is revocable at any time (dues check-off), and the

[1] The preemptive impact of the NLRA stands in contrast to the federal statutes raised by the County (Appellants' Br. 39), the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(a), and the Interstate Commerce Act, 49 U.S.C. § 14501(c). Neither statute expresses the requisite intent to preempt concurrent state and local regulation. Rather, unlike the NLRA, those statutes are non-preemptive because they regulate areas that traditionally fall within states' police powers to regulate health and safety. *See* Appellees' Br. 20-23; Commonwealth of Kentucky Amicus Br. 9-11.

referral of an employee by a labor organization as a condition of employment (hiring halls). This is so because the Ordinance regulates conduct covered by the NLRA.

First, in the Act's 1947 Taft-Hartley amendments, Congress included specific provisions in the Act to permit employers and unions to negotiate union-security agreements requiring employees to maintain membership in or pay dues to a union. As the Supreme Court explained, Section 8(a)(3) "articulates a national policy that certain union-security agreements are valid as a matter of federal law." *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409, 416 (1976). Congress permitted such agreements in furtherance of a "substantial public interest" in "minimizing [the] industrial strife" that led to the creation of the Act in 1935. *Buckley v. Television & Radio Artists*, 496 F.2d 305, 311 (2d Cir. 1974); *see also* Section 1 of the Act, 29 U.S.C. §151. As explained in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954), "[l]engthy legislative debate preceded the 1947 amendment to the Act," which explicitly authorized union-security agreements and strictly regulated the terms and application of those agreements. *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 100-02 (1963). This legislative history makes clear that Congress recognized the validity of unions' concerns about "free riders," that is, "employees who receive the benefits of union representation but are unwilling to contribute their share of

financial support to such union." *Radio Officers' Union*, 347 U.S. at 41. For this reason, Congress "intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.*

Thus, although Section 8(a)(3) of the NLRA deems it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," that same section provides that "nothing in this Act [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 on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." Section 8(a)(3) goes on to state that "no employer shall justify discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees required as a condition of acquiring or retaining membership."

In other words, union "membership," for purposes of union-security clauses, bears the specific meaning of paying minimum dues and initiation fees. As the Supreme Court explained, "[i]f an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees . . . the

condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member." *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). In short, "'[m]embership' as a condition of employment is whittled down to its financial core." *Id.* at 742.

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, union security is a mandatory subject of bargaining between the parties when proposed in the course of collective bargaining negotiations. *See Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003).[2] A refusal to so bargain is an unfair labor practice under Section 8(a)(5) of the Act. *Id.* And, as set forth above, Section 8(a)(3) prohibits employers from discharging an employee for non-membership in a labor organization if membership was denied or terminated for reasons other than the failure to pay dues or initiation fees. That provision further forbids discharge if "membership was not available to the employee on the same terms and conditions generally applicable to other members." 29 U.S.C. § 158(a)(3). Section 8(b)(2) similarly prohibits unions from

[2] 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).

causing an employer to discharge an employee for non-membership if membership "has been denied or terminated on some ground other than his failure to tender the periodic dues." 29 U.S.C. § 158(b)(2). Accordingly, to the extent the Ordinance regulates 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).

Like union security, dues check-off agreements are regulated by the Act's Taft-Hartley amendments, specifically, Section 302(c)(4) of the Labor Management Relations Act (LMRA). *See* 29 U.S.C. § 186(c)(4). 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). And like union security, dues check-off is a mandatory subject of bargaining. *Lincoln Lutheran of Racine*, 362 NLRB No. 188, at *2 (Aug. 27, 2015).

Similarly, 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 an unfair labor practice under NLRA Sections 8(a)(3). *See Farmer v. United Brotherhood of Carpenters and Joiners, Local 25*, 430 U.S. 290 (1977). Such discrimination by a union is prohibited by Section 8(b)(1)(A) and 8(b)(2), 29 U.S.C. § 158(b)(1)(A), (b)(2). *See National Cash Register Co. v. NLRB*, 466 F.2d 945, 956-57 (6th Cir. 1972).[3]

Thus, because the NLRA regulates the very conduct that Hardin County also purports to regulate, Sections 4, 5, and 6 of the Ordinance are subject to federal preemption.[4]

[3] Like union security provisions, hiring halls are 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); *see also NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 771 (9th Cir. 1965).

[4] The Board acknowledges that Plaintiffs-Appellees have not alleged preemption of 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), but 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").

## III. SECTION 14(b)'S EXCEPTION TO PREEMPTION DOES NOT ENCOMPASS ORDINANCE 300

### A. Hardin County's 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 general rule that the federal government has preempted the field of labor relations regulation." *Laborers Local 107 v. Kunco, Inc*. 472 F.2d 456, 458 (8th Cir. 1973). Section 14(b) empowers *only* States and Territories to prohibit "a union-security agreement that passes muster by federal standards." *Schermerhorn*, 375 U.S. at 103; *see also Mobil Oil Corp.*, 426 U.S. at 416. Additional exceptions are not articulated by Congress, and they cannot be "implied[] in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *see also In re Robinson*, 764 F.3d 554, 562 (6th Cir. 2014). Thus, the 14(b) exception "should be strictly and narrowly construed because it represents a departure 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.").

It is a black letter principle of statutory interpretation that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning," *Perrin v. United States*, 444 U.S. 37, 42 (1979). 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.

Before Section 14(b) was enacted as part of the 1947 Taft-Hartley amendments to the NLRA, Section 8(3) of the Wagner Act (the original NLRA) permitted "closed shops," *i.e.*, a place of work where membership in a union is a condition for being hired and for continued employment. *See General Motors*, 373 U.S. at 738-39. But even during that era, twelve States maintained legislation prohibiting closed shops and related devices. *Schermerhorn*, 375 U.S. at 100. Thus, even prior to the 1947 Taft-Hartley amendments, a patchwork existed, whereby some States banned closed shops, and in the remainder of the country the NLRA permitted such shops.

Section 14(b) was drafted to maintain this patchwork status quo, while at the same time banning closed shops. Thus, Section 8(a)(3) permits "union shops," by explicitly authorizing union-security agreements and strictly regulating the terms

and application of those agreements. *See* H.R. No. 245, 80th Cong., 1st Sess. at 34, 44 (1947). Under this provision, employees may not be required to actually join a union, but may be compelled to pay dues, *General Motors*, 373 U.S. at 742, *after* hiring. In order to avoid preempting the laws of the twelve States that prohibited all forms of union security, Section 14(b) explicitly permits States, as well as Territories, to continue to ban union security.

Of course, "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Schermerhorn*, 375 U.S. at 103). When Section 14(b) was enacted, no State or Territory had delegated authority to prohibit union-security clauses to their political subdivisions. And here, the County has pointed no legislative history of Section 14(b) indicating that Congress intended the term "State" to be read so extensively that it *must* include localities. Nor has the County pointed to any proposal during the Taft-Hartley debates that regulatory power over union security should be localized to such a degree. "Even the opponents of the Taft-Hartley Act, who could have been expected to propound all possible arguments, did not contend that one of the evils of the Act was that it left labor to the mercy of city councils and such." Ted Finman, *Local "Right to Work" Ordinances: A Reply*, 10 Stan. L. Rev. 53, 70 (1957). Thus, "[w]hen Congress enacted § 14(b), it did not grant new authority to states and territories, but merely recognized and affirmed their existing

authority." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198 (10th Cir. 2002) (*en banc*).

Hardin County cannot contest that it is neither a "State" nor a "Territory," but rather, a political subdivision of a State.[5] Indeed, Congress knew how to specify its intent to exclude local governments from provisions of the Act. Section 2(2) of the Act defines "employer" as excluding "any State *or political subdivision thereof*." 29 U.S.C. § 152(2) (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. "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).[6]

[5] 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).

[6] The County's analogy to the union-security provisions of the Railway Labor Act (RLA), 42 U.S.C. § 152, Eleventh, provides no support for its expansive definition of "State." *See* Appellants' Br. 47-49. As the Appellees explain in their brief (Appellees' Br. 31-32 and n.5), Congress amended the RLA in 1951 in order to provide for union security. However, knowing that a number of States prohibited union security at that time, Congress chose to make the *opposite* choice that it had made in 1947 with respect to NLRA employers, because the RLA's nationwide bargaining units made any other choice untenable. Accordingly, Congress chose in the RLA to preempt State law entirely. In neither case did Congress contemplate that the myriad of local governments be permitted to enact their own union-security policies.

Courts agree that political subdivisions are outside the scope of power delegated by Section 14(b) of the Act. *See Puckett*, 391 S.W.2d at 362 (finding Congress 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."); *Mobil Oil Corp*., 426 U.S. at 413 n.7 (citing *Puckett* with approval). And in *New Mexico Federation of Labor v. City of Clovis*, 735 F. Supp. 999, 1002 (D.N.M. 1990), a district court invalidated a local right-to-work ordinance similar to Ordinance 300, finding that permitting such a local ordinance would result in "a crazy-quilt of regulations within the various states," and "undermine the NLRA's purpose." *Id*. at 1002. Because there is "nothing in the legislative history of § 14(b) to indicate that Congress intended a broad reading of 'state,'" the district 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. "[W]hen Congress intended to cover subdivisions of the state, it did so directly." *Id.* at 1004.

The County relies heavily upon the Tenth Circuit's decision in *Pueblo of San Juan*, but that case is wholly inapposite. Appellants' Br. 30-31, 34, 50. It turned on principles unique to the interplay between federal and tribal law: "whether the Pueblo continues to exercise the same authority to enact right-to-work laws as do states and territories, or whether Congress in enacting §§ 8(a)(3)

and 14(b) of the NLRA, 29 U.S.C. §§ 158(a)(3) and 164(b), intended to strip Indian tribal governments of this authority as a sovereign." 276 F.3d at 1191. In stark contrast to tribes, "[p]olitical subdivisions of States–counties, cities, or whatever–never were and never have been considered as sovereign entities." *Sailors v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 107 (1967). Counties, cities, and towns "have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such are expressly or impliedly derived from their charters or other statutes of the State." *Town of Mt. Pleasant v. Beckwith*, 100 U.S. 514, 524 (1879). Accordingly, *Pueblo of San Juan* lends no support to the County's position, and its attempt to invoke the limited exception of Section 14(b) must fail.

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

Even if Hardin County's assertions about the breadth of Section 14(b) were correct, the Ordinance's dues check-off and hiring hall provisions fall outside the ambit of Section 14(b). As the Court described in *Schermerhorn*, "state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by 14(b).* Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under *Garmon*." 375 U.S. at 105. As explained below, because not even States may properly regulate these topics, neither may Hardin County.

Dues check-off agreements are voluntary authorizations and regular deductions from employee wages by an employer to pay for union dues. They do not regulate *whether* dues are paid, but rather, *how* dues are paid. Accordingly, the Fifth Circuit in *SeaPAK v. Industrial, Technical and Professional Employees*, 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971), adopted the opinion of the district court holding that Section 14(b) does not encompass state laws regulating check-off. *See* 300 F. Supp. 1197, 1200 (S.D. Ga. 1969). 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." Finding federal and state regulations of dues check-off "completely at odds," the district court therefore invalidated a state statute that, like Section 5 of the Ordinance at issue here, mandated that dues check-off agreements be revocable at any time. *Id. at* 1200; *see also NLRB v. Shen-Mar Food Prods.*, 557 F.2d 396, 399 (4th Cir. 1977) (same).

The regulation of hiring halls by states and localities is similarly outside Section 14(b)'s scope. This is because Section 14(b) only permits States to prohibit agreements requiring membership. Accordingly, because a non-discriminatory hiring hall does not require membership, "*a fortiori*, it is not within the ambit of § 14(b)," *Laborers' Int'l Union, Local 107 v. Kunco, Inc.*, 472 F.2d 456, 459 (8th Cir. 1973); *see also Local 514, Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1326 (E.D. Okla. 2002), *aff'd*, 358 F.3d 743 (10th

Cir. 2004) (same). Thus, neither the Ordinance's regulation of hiring halls, nor dues check-off, is saved by Section 14(b).

## IV. ORDINANCE 300 UNDERMINES FEDERAL LABOR POLICY AND THE BOARD'S ABILITY TO EFFECTIVELY ENFORCE THE ACT, AND CREATES PRACTICAL EFFECTS CONTRARY TO CONGRESSIONAL POLICY

The Ordinance's local regulation of matters subject to NLRA jurisdiction is directly contrary to Congress's purpose "to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Nash-Finch*, 404 U.S. at 144 (quotation omitted). This is confirmed by the Board's experience regulating labor relations since the enactment of the NLRA.

First, permitting political subdivisions to regulate union security would render collective bargaining considerably more difficult, contrary to one of the Act's central goals. 29 U.S.C. § 151 ("It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."). Within the United States, many unions contract with employers who operate multiple facilities across county and municipal lines. *See, e.g., Hazard Express, Inc.*, 324 NLRB 989, 989 (1997) (approving a multi-facility bargaining unit consisting of a Kentucky employer's workforce in Hazard County, Lexington, and Louisville). In order to facilitate the free flow of labor between such facilities

and eliminate the inefficiencies associated with bargaining separate agreements, a union and an employer will often attempt to create a single contract to cover all facilities operated by the employer. But if a local jurisdiction in which a facility is located prohibits union security agreements, then, in order to treat all the employer's facilities alike, no union-security provisions could be permitted in any of the facilities, even for those where there is *no* governing prohibition on union security. Alternatively, the union and the employer could try to negotiate separate contracts for each facility and carefully monitor employee interchange. But in either situation, allowing counties and municipalities to prohibit union security agreements imposes on the parties significant costs that Congress neither envisioned nor approved.

Second, the Ordinance's dues check-off regulation and hiring hall prohibition are even more problematic because they directly conflict with what the NLRA permits. Thus, the Ordinance requires that dues check-off authorizations be revocable at any time, but the Act permits that such authorizations be irrevocable for a period of up to one year. 29 U.S.C. § 186(c)(4); *see also* Appellees' Br. 34-35. And the Ordinance bans the use of all hiring halls, while the Act permits the operation of hiring halls that do not discriminate based on union membership. "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).

Accordingly, the practical result of Hardin County's Ordinance is that any employer engaged in work within Hardin County is placed in the untenable position of choosing between complying with federal law and complying with local law. Thus, such an employer must decide whether to bargain about and agree to dues check-off and hiring hall provisions proposed by a union in accordance with federal law. Notably, by choosing to comply with federal law, an employer risks incurring criminal and 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 hiring hall provisions and the duration of a dues check-off provision, conduct which risks incurring liability under the NLRA.[7]

[7] In Kentucky alone, there are 120 counties and 425 municipalities, creating the potential for at least 545 overlapping regulations. Businesses with work sites across the State could be subject to varying regulations, with NLRA-sanctioned 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 contrary scheme of hundreds of potentially conflicting regulations within a particular State would

Because 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 for activity regulated by the NLRA constituted "deterrent litigation risks," sufficient to realize "the inherent potential for conflict" between the California statute and the Act) (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 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. Consequently, the 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.[8] For example, parallel proceedings

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completely undermine the ability to bargain such agreements, thereby effectively denying the benefits of collective bargaining to construction employees.

[8] 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

will impede the 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)).[9] 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 Eng'rs, Local 701*, 420 F.2d 802, 808 (9th Cir. 1969). Thus, if a private

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obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." Senate 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.

[9] 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.

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, settlement of the Board's case would be hindered.

In addition to the general problems created by conflicting regulation of the same subject matter, Ordinance 300 also exacerbates enforcement problems specific to dues check-off and hiring halls. Under the scheme created by Congress, the difficult issues of national labor policy raised by such matters are decided by the Board in the first instance, subject to review in the courts of appeals and the Supreme Court. *See Garner*, 346 U.S. at 490-91; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-49 (1938). As explained below, adding in the possibility of conflicting state court decisions on these matters can only serve to increase the complexity and delay in these cases.

The litigation of dues check-off and hiring hall matters is often particularly difficult. *See, e.g.*, *Hacienda Hotel, Inc. Gaming Corp.*, 363 NLRB No. 7 (2015) (enforcement litigation over the duration of dues check-off provisions extending over fifteen years).[10] Similarly, the determination as to whether a particular hiring hall operates in a non-discriminatory manner is not readily determined. Rather, it

[10] *Local Joint Executive Bd. of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011); *Hacienda Hotel, Inc. Gaming Corp.*, 355 NLRB No. 154 (2010); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008); *Hacienda Hotel*, 351 NLRB No. 32 (2007); *Culinary Workers v. NLRB*, 309 F.3d 578 (9th Cir. 2002); *Hacienda Hotel*, 331 NLRB 665 (2000).

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 Ass'n 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 hall cases also involve complex backpay disputes involving large numbers of workers--disputes which by their very nature are already subject to delay. *See, e.g., 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). In short, permitting local regulation of these matters creates significant hurdles to the Board's effective enforcement of the Act in the manner intended by Congress.

## CONCLUSION

For the reasons stated above, Hardin County does not have authority to promulgate an ordinance banning union security and hiring halls, and regulating dues check-off. This is because a local body of government 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 Kentucky counties 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 urges affirmance of the District Court's ruling that Sections 4, 5, and 6 of the Ordinance are preempted by the NLRA and should therefore be invalidated.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed the foregoing Brief of Amicus Curiae in Support of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies, consistent with Federal Rule of Appellate Procedure 29(d), 32(a)(5)(A), and 32(a)(7)(B)(i), that its brief contains 6,418 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

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