Nos. 17-1300 & 17-1325

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 399, AFL-CIO, *et al.*,
Plaintiffs-Appellees/Cross-Appellants,

v.

VILLAGE OF LINCOLNSHIRE, ILLINOIS, *et al.*,
Defendants-Appellants/Cross-Appellees.

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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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ARGUMENT

The question presented by the cross-appeal is whether the National Labor Relations Act creates a right of employers and labor organizations to execute and apply lawful union security, hiring hall and dues check-off agreements free of interference by local governments that is enforceable under 42 U.S.C. § 1983. *See* Pltffs. Br. 2; Def. Resp. Br. 1. The Village acknowledges "that the NLRA gives [employers and labor organizations] the right to negotiate collective bargaining agreements generally" but contends that "federal law does not guarantee . . . a right to negotiate for union security agreements in particular," because "the NLRA expressly condones state and territorial laws prohibiting union security agreements in § 14(b)." Def. Resp. Br. 26. *See also id.* at 1 ("NLRA § 14(b) expressly recognizes states' and territories' authority to prohibit union security agreements."). This argument fails, because the Village right-to-work ordinance is not a "State law" within the meaning of NLRA § 14(b).

A. "[T]he NLRA creates 'rights' in labor and management that are protected against governmental interference." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989). Thus, "[i]n the NLRA, Congress has not just 'occupied the field'" of labor relations, preempting state regulation, it has "create[d] rights in labor and management both against one another and against the State." *Id.* at 109. These "rights [are] enforceable against governmental interference in an action under § 1983." *Ibid.*

"Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (citations and quotation marks omitted). "[S]tate attempts to influence the substantive terms of collective-bargaining agreements," *Machinists v. Wisconsin Employment Rel. Comm'n*, 427 U.S. 132, 153 (1976), "violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract," *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). "[L]ocal government, as well as the [state], lacks the authority" to interfere with "[f]ree collective bargaining." *Golden State Transit*, 475 U.S. at 619 (citations and quotation marks omitted).

Employers and labor organizations are thus "the intended beneficiar[ies] of a statutory scheme that prevents governmental interference with the collective-bargaining process." *Golden State Transit*, 493 U.S. at 109. A claim against a state or local government for interference with "[t]he right . . . to complete the collective-bargaining process and agree to [lawful contract] clause[s]" is "properly brought under § 1983." *Livadas v. Bradshaw*, 512 U.S. 107, 134 (1994).

B. The Village of Lincolnshire has directly "attempt[ed] to influence the substantive terms of collective-bargaining agreements," *Machinists*, 427 U.S. at 153, by forbidding employers and labor organizations covered by the NLRA to negotiate or enforce lawful union security, hiring hall and dues checkoff provisions.

A-29-30. "[T]he NLRA leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process." *Cannon v. Edgar*, 33 F.3d 880, 884-85 (7th Cir. 1994). "*Machinists* preemption prohibits state and municipal regulations of areas that Congress left to the free play of economic forces." *Id.* at 885, citing *Machinists v. Wisconsin Employment Rel. Comm'n*, *supra*. Thus, attempts by state or local government to "intrude[] on the collective bargaining process" by restricting the freedom of "the parties to negotiate as to a specific substantive condition" are "preempted by *Machinists*." *Ibid.*

The Village acknowledges that "the NLRA gives [employees and labor organizations] the right to negotiate collective bargaining agreements generally." Def. Resp. Br. 26. Thus, the Village could not forbid "the parties to negotiate as to a specific substantive condition," such as the contract provision at issue in *Cannon*, 33 F.3d at 885. However, the Village argues that there is an exception to "the right to engage in the collective bargaining process without state interference," *Georgia State AFL-CIO v. Olens*, 194 F.Supp.3d 1322, 1328 (N.D. Ga. 2016), "for union security agreements in particular," because "the NLRA expressly condones state and territorial laws prohibiting union security agreements in § 14(b)." Def. Resp. Br. 26.

The Taft-Hartley amendments to the NLRA specifically "authorize[] employers to enter into certain union security contracts," because "Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who

receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem." *Radio Officers v. NLRB*, 347 U.S. 17, 40-41 (1954). "The amendments were intended . . . to . . .give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." *NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963) (citation and quotation marks omitted). *Accord Communications Workers v. Beck*, 487 U.S. 735, 750 (1988). Thus, the Taft-Hartley amendments leave the decision of whether to include a lawful union security clause in a collective bargaining agreement to the bargaining process.

"While § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy." *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416-17 (1976). But § 14(b) does not create a sweeping exception to the policy of free collective bargaining. For example, "state power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b),*" so that "picketing in order to get an employer to execute an agreement to hire all-union labor in violation of a state union-security statute lies exclusively in the federal domain." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 105 (1963) (emphasis in original). And, even with regard to "the negotiation and execution of th[at] type of agreement," *ibid.*, "§ 14(b) does not allow enforcement of right-to-work laws with

regard to an employment relationship whose principal job situs is outside of a State having such laws," *Mobil Oil*, 426 U.S. at 418. On this reading of § 14(b), *Mobil Oil* rejected the Fifth Circuit's conclusion that "the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant application of the Texas law" to an "agency shop provision" covering employees whose predominate job site was outside the state. *Id.* at 412.

The pertinent § 14(b) limitation here is that only "a[] State or Territory . . . may exempt itself from" the "national policy that certain union-security agreements are valid as a matter of federal law." *Mobil Oil* 426 U.S. at 416-17. The State of Illinois has not exempted itself from that national policy. Thus, the federal law *does* "authoriz[e] the execution [and] application of agreements requiring membership in a labor organization as a condition of employment in [that] State." 29 U.S.C. § 164(b).[1] That being so, interference by the Village of Lincolnshire in the right of employers and labor organizations to execute and apply the authorized agreements is subject to redress under 42 U.S.C. § 1983.

[1] *Compare* Def. Resp. Br. 16-18 (acknowledging that the "in any State" limitation contained in § 14(b) does not apply directly to local right to work ordinances), *with United Automobile Workers v. Hardin County*, 842 F.3d 407, 413 (6th Cir. 2016) (holding that the phrase "in any State" should be read as meaning "in any State or political subdivision thereof"). *See* Pltffs. Br. 10-12 (discussing the significance of this statutory language).

CONCLUSION

The district court's ruling that the Lincolnshire ordinance is preempted by the NLRA should be affirmed. The district court's dismissal of the plaintiff unions' claim under 42 U.S.C. § 1983 should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations and typeface requirements of Rule 32 FRAP and Circuit Rule 32. This brief has been produced with the proportionally spaced Century font 12 point type using Microsoft Word 2016. This brief contains 1,357 words.

/s/ James B. Coppess
James B. Coppess

Date: August 9, 2017

CERTIFICATE OF SERVICE

I certify that on August 9, 2017, the foregoing brief was served on counsel for defendants-appellants through the CM/ECF system.

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