No. 16-5246

IN THE 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 a Final Decision
of the United States District Court
for the Western District of Kentucky

BRIEF FOR APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Appellees United Automobile, Aerospace and Agricultural Implement Workers of America, Local 3047, et al., make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

/s/ James B. Coppess June 13, 2016
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SUMMARY OF ARGUMENT

Hardin County, Kentucky has enacted an ordinance that regulates union security, dues check-off and hiring hall clauses that are included in collective bargaining agreements between employers and unions covered by the National Labor Relations Act. The NLRA regulates all of these matters, and the ordinance is therefore preempted unless it comes within the exception provided by NLRA § 14(b) for "State" laws that prohibit the "execution or application" of "agreements requiring membership in a labor organization as a condition of employment." As the district court correctly held, the Hardin County ordinance is not a "State" law within the meaning of § 14(b) and is, therefore, preempted by the NLRA.

Section 14(b) was included in the NLRA in order to preserve the sort of state right-to-work laws that were brought to Congress's attention while it considered the 1947 amendments to the Act. With the 1947 amendments, the NLRA both affirmatively authorized certain union security agreements and strictly regulated the terms and application of the permitted agreements. These amendments would have preempted the existing state right-to-work laws. It was in order to avoid that result that Congress included § 14(b) preserving state right-to-work law.

The Supreme Court has recognized that § 14(b) authorizes states to adopt their own policies regarding union security agreements that are contrary to the

federal policy authorizing those agreements. But the policy conflict that Congress sanctioned is a conflict only at the federal-state level. Congress did not intend to authorize every county, city, town and village to adopt their own conflicting policies regarding union security agreements. The level of confusion that would introduce into negotiating and applying union security agreements would defeat the federal policy of authorizing such agreements where there is not a contrary state policy.

The Hardin County ordinance is preempted for the additional reason that dues check-off and hiring hall agreements are not subject to even state law prohibition, because they are not agreements requiring membership in a labor organization as a condition of employment.

ARGUMENT

The Hardin County ordinance at issue in this case seeks to regulate several aspects of the relationships among "employee[s]," "employer[s]" and "labor organization[s]" that "are covered by the National Labor Relations Act." Ordinance 300, §§ 3 & 4, RE 5-1, Page ID # 94-98. In particular, the Ordinance seeks to regulate the negotiation and application of collectively bargained contract clauses that: make union membership or the payment of union fees a condition of employment ("union security agreements"); provide for authorized payroll deduction of an employee's union dues or fees ("check-off agreements"); and

provide that an employer will consider job applicants referred by a union without regard to union membership ("hiring hall agreements"). These are all matters that are regulated by the National Labor Relations Act.

"It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986). "[T]he NLRA . . . comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement" because of "Congress' perception that . . . state legislatures and courts were unable to provide an informed and coherent labor policy." *English v. General Electric Co.*, 496 U.S. 72, 86 n. 8 (1990). "[T]he comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA," *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669, 675-76 (1983), has "occupied the field" of labor relations "creat[ing] rights in labor and management both against one another and against the State," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989). *See, e.g., Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008).

The negotiation and enforcement of "union security clause[s]" is, in particular, "a matter as to which . . . federal concern is pervasive and its regulation complex." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 296 (1971).

However, § 14(b) creates "an 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), that "gives the States power to outlaw even a union-security agreement that passes muster by federal standards," *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). *See Retail Clerks v. Schermerhorn*, 373 U.S. 746, 757 (1963) ("§14(b) of the Act subjects [union security agreements] to state substantive law"). Precisely because it is "Section 14(b) [that] allows individual States . . . to enact so-called 'right-to-work' laws," the Supreme Court has held that those "right-to-work laws which are not encompassed under § 14(b) . . . are no[t] permissible" because such laws are preempted by the NLRA. *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409 & 413 n. 7 (1976).

As the district court held, the Hardin County ordinance does not come within "the limited shelter from preemption afforded state right-to-work laws by § 14(b)." *Trowel Trades Employee Health and Welfare Fund v. Edward L. Nezelek, Inc.*, 645 F.2d 322, 326 n. 6 (5th Cir. 1981). *See* Mem. Op. & Order, RE 43, Page ID # 1277-1290. As the district court explained, there are two distinct reasons that the ordinance is "not encompassed under § 14(b)." *Mobil Oil*, 426 U.S. at 413 n. 7. First, and most fundamentally, the ordinance is not a "State . . . law" within the meaning of § 14(b) and thus is not encompassed by the exception at all. Second,

the particular provisions in the ordinance regulating dues check-off and union hiring halls would not come within § 14(b), even if they had been included in a state law, because check-off and hiring hall agreements are not "agreements requiring membership in a labor organization as a condition of employment" within the meaning of § 14(b).

Hardin County begins its challenge to the district court decision by arguing that § 14(b) is largely irrelevant to whether the ordinance is preempted by the NLRA. Appellants Br. 4-9 & 20-34. After first attempting to show that "Section 14(b) is [not] the sole source of authority for right-to-work law," *id*. at 33, the County then attempts to show that "Section 14(b) of the NLRA expressly exempts Ordinance 300 from preemption," *id*. at 34. *See id*. at 34-51. Finally, the County makes a half-hearted attempt to show that "the dues checkoff and hiring hall provisions of Ordinance 300" are permitted by § 14(b) as "ancillary to its core right-to-work language." *Id*. at 51-57. We take up each of Hardin County's arguments in the order they were raised.

I. THE NLRA PREEMPTS RIGHT-TO-WORK LAWS THAT ARE NOT ENCOMPASSED UNDER § 14(b).

In *Mobil Oil*, the Supreme Court squarely held that "right-to-work laws which are not encompassed under § 14(b) . . . are no[t] permissible" because such laws are preempted by the NLRA. 426 U.S. at 413 n. 7. Hardin County dismisses this holding as "dicta," and asserts that, in any event, "it certainly did not mean that

Section 14(b) was the sole authority for right-to-work laws." Appellants Br. 33. The County is wrong on both counts. This statement was not dicta, and it means precisely what it says – that right-to-work laws that are not encompassed by § 14(b) are impermissible.

The issue addressed in *Mobil Oil* was "whether, under § 14(b), Texas' right-to-work laws can void an agency shop agreement covering unlicensed seamen who, while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas." 426 U.S. at 410. The Court began its analysis by noting that "it is § 14(b) [which] gives the States power to outlaw even a union security agreement that passes muster by federal standards," and "that there [are no] applications of right-to-work laws which are not encompassed under § 14(b) but which are nonetheless permissible." *Id*. at 413 n. 7 (quotation marks and citation omitted). Thus, "the central inquiry in th[e] case [wa]s whether § 14(b) permits the application of Texas' right-to-work laws to the agency-shop provision," because "[o]nly if [§14(b)] is to be so read is the agency-shop provision unenforceable." *Id*. at 412-13. The Court "h[e]ld 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." *Id*. at 414. Thus, the Court concluded "that § 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." *Id*. at 418 (emphasis added).

"[T]he holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome." *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582 (7th Cir. 2005). Thus, "a court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis." *Ibid*, quoting Friendly, "In Praise of Erie--and of the New Federal Common Law," 39 N.Y.U.L. Rev. 383, 385-86 (1964). The *Mobil Oil* Court's conclusion that § 14(b) is the exclusive source of state power to apply right-to-work laws was essential to the Court's reasoning and thus is part of the holding of that decision.

Mobil Oil's understanding of § 14(b) rested on three prior Supreme Court decisions – *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963) (*Schermerhorn II*), *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963) (*Schermerhorn I*), and *Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949) – which all treat § 14(b) as the source of state authority to prohibit the union security agreements regulated by the NLRA. The two *Schermerhorn* opinions make particularly clear that it is "§14(b) [that] gives the States power to outlaw even a union-security agreement passes muster by federal standards." *Schermerhorn II*, 375 U.S. at 103. *Id.* at 102-103 ("Yet, even if the union-security agreement clears all federal hurdles, the

States by reason of § 14(b) have the final say and may outlaw it."), at 103 ("a state union-security law authorized by § 14(b)"), at 104-05 ("the problems of state laws barring the execution and application of agreements authorized by § 14(b)"), and at 105 ("As a result of § 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field."); *Schermerhorn I*, 373 U.S. at 747 ("We have concluded that the contract involved here is within the scope of § 14(b) of the National Labor Relations Act and therefore is congressionally made subject to prohibition by Florida law."), at 750 ("The case to a great extent turns upon the scope and effect of § 14(b)"), at 751 ("§ 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security agreements."), and at 757 ("§ 14(b) of the Act subjects this arrangement to state substantive law").

Against all that, Hardin County relies exclusively on the statement in *Algoma Plywood* to the effect that "§ 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement." 336 U.S. at 307. *See* Appellants Br. 19, 23, 31, & 33. But that statement concerned § 8(3) of the National Labor Relations Act of 1935, not the NLRA as amended by the Taft-Hartley Act of 1947. And Hardin County could not be more wrong when it asserts that "[t]he Taft-Hartley Amendments left unchanged the Wagner Act's Section

8(3) language." Appellants Br. 5. To the contrary, as *Algoma Plywood* explains, in the section of the Court's opinion addressed to the Taft-Hartley Act, "§ 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered." 336 U.S. at 314. Such regulation created "the inference that federal policy was to be exclusive," and it was precisely to negate that inference that "§ 14(b) was included" in the NLRA as amended. *Ibid*.[1]

In sum, *Algoma Plywood* confirms that "it 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 II*, 375 U.S. at 103. "There is nothing," therefore, "to suggest that there may be applications of right-to-work laws which are not encompassed under § 14(b) but

[1] The Court elaborated on the preemptive effect of the 1947 amendments and the role of § 14(b) in *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 397-98 (1951). As the Court explained there, "When it amended the Federal Act in 1947, . . . Congress knew full well that its labor legislation '*preempts the field that the act covers* insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to *spell out with particularity those areas in which it desired state regulation to be operative*." *Id.* at 397-98 (1951)(emphasis added; footnotes omitted). The statement to the effect that labor legislation "preempts the field that the act covers," quoted in *Bus Employees*, comes from the portion of H.R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947), explaining the need for a legislative proposal that was eventually enacted as § 14(b). *Id*. at 398 n. 24. And, § 14(b) itself is cited by *Bus Employees* as an example of the 1947 Congress "spell[ing] out with particularity those areas in which it desired state regulation to be operative." *Id*. at 398 n. 25.

which are nonetheless permissible." *Ibid*.

II. THE HARDIN COUNTY ORDINANCE IS NOT A "STATE LAW" WITHIN THE MEANING OF NLRA § 14(b).

A. The Terms and Legislative Context of NLRA § 14(b).

Section 14(b) provides:

> "Nothing in this Act 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).

By providing that the exception applies "in any State or Territory" where "State or Territorial law" prohibits union security agreements, the terms of § 14(b) make clear that the only laws saved from preemption are those that reflect the policy of the State or Territory. If the Taft-Hartley Congress had intended § 14(b) to authorize local right-to-work laws, it would have described the authorized laws as "local" as it did in § 14(a). *See* 29 U.S.C. § 164(a) ("any law, national or local"). And, if it contemplated right-to-work laws having only a local reach, it would have used the phrase "in any State or political subdivision thereof," 29 U.S.C. § 152(2), to describe the area in which the permitted laws could supplant federal policy rather than the phrase "in any State."

The legislative context of § 14(b) reinforces the plain meaning of the statutory terms. Congress added § 14(b) to the NLRA in 1947 in order to

counteract the preemptive effect of the 1947 amendments to § 8(a)(3). "Section 14(b) simply mirrors . . . § 8(a)(3)," and, "[a]s its language reflects, §14(b) was designed to make clear that § 8(a)(3) left the States free to pursue their own more restrictive policies in the matter of union-security agreements." *Mobil Oil*, 426 U.S. at 417 (quotation marks and citation omitted). Since "[t]he connection between the § 8(a)(3) proviso and § 14(b) is clear," any effort to determine "the scope and effect of § 14(b)" must begin with the 1947 amendments to § 8(a)(3). *Schermerhorn I*, 373 U.S. at 750-51.

As a result of the 1947 amendments, "agreement[s] requiring membership in a labor organization as a condition of employment [are] authorized in section 8(a)(3)." 29 U.S.C. § 157. *See* 29 U.S.C. § 159(e)(1) (providing that "such authorization [may] be rescinded" by a majority vote of covered employees). At the same time, the federal law began to closely regulate the wording and the application of the authorized union security agreements. The 1947 amendments to § 8(a)(3)'s first proviso require that union security agreements specify that membership is not required until "the thirtieth day following the beginning of . . . employment." 29 U.S.C. § 158(a)(3). And, the new second proviso added in 1947 regulates how such agreements may be applied.[2]

[2] "Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the

The Supreme Court has explained that "[b]oth the structure and purpose of § 8(a)(3) are best understood in light of the statute's historical origins." *Communications Workers v. Beck*, 487 U.S. 735, 747 (1988). The Court outlined the pertinent history as follows:

> "Prior to the enactment of the Taft-Hartley Act of 1947, § 8(3) of the Wagner Act of 1935 (NLRA) permitted majority unions to negotiate 'closed shop' agreements requiring employers to hire only persons who were already union members. By 1947, such agreements had come under increasing attack, and after extensive hearings Congress determine that the closed shop and the abuses associated with it created too great a barrier to free employment to be longer tolerated. The 1947 Congress was *equally concerned*, however, that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Id*. at 747-48 (emphasis added; quotation marks, brackets and citations omitted).

"The legislative solution embodied in § 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become

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employee on the same terms and conditions generally applicable to other members, or (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 uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3).

members 30 days after being hired as long as such membership is available to all workers on a nondiscriminatory basis, but it prohibits the mandatory discharge of an employee who is expelled from the union for any reason other than his or her failure to pay initiation fees or dues." *Beck*, 487 U.S. at 749. By expressly authorizing union security agreements, while at the same time regulating the terms and applications of such agreements, "the Taft-Hartley Act was intended to accomplish twin purposes":

> "On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." *Id*. at 748-49 (quotation marks and citation omitted).

"Thus, Congress recognized the validity of unions' concerns about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason." *Id*. at 749 (emphasis, quotation marks and citation omitted).

> "Congress' decision to allow union-security agreements at all reflects its

concern that 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." *Beck*, 487 U.S. at 750 (ellipses, quotation marks and citation omitted). "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." *Mobil Oil*, 426 U.S. at 416-17. In other words, "[f]ederal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws." *Id*. at 420. Thus, "with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy '[t]here is . . . conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws.'" *Id*. at 417, quoting *Schermerhorn II*, 375 U.S. at 103.

"By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices . . . ." *Schermerhorn II*, 375 U.S. at 100. "Congress [was] . . . well informed [about these state laws] during the 1947 debates." *Ibid*. Being so informed, Congress sanctioned a "conflict between state and federal law" by enacting "§ 14(b) giv[ing] the States power to outlaw even a union-security

agreement that passes muster by federal standards." *Id*. at 103.[3]

The wording of § 14(b) reflects Congress's intent to allow states to continue to adopt and apply the same sort of state-wide "statutes or constitutional provisions" that had coexisted with collective bargaining under the NLRA from 1935 to 1947. *Schermerhorn II*, 375 U.S. at 100. Given the statutory language and context, only a handful of local governments have attempted to enact local right-to-work laws in the seventy years that § 14(b) has been part of the NLRA. And, as happened in this case, the few local right-to-work laws that have been enacted have been struck down on the grounds that they do not constitute "State or Territorial law" within the meaning of § 14(b). *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. 999, 1004 (D.N.M. 1990); *Kentucky State AFL-CIO*

[3] One serious conflict can occur because, as a matter of federal law, the negotiation of a union security clause that meets the requirements of NLRA § 8(a)(3) is a mandatory subject of bargaining. *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003). This means that an employer or union that refuses to bargain over a lawful union security proposal or that repudiates a lawful union security clause commits an unfair labor practice. *Ibid*. By virtue of § 14(b), a valid state law prohibiting the negotiation or enforcement of an otherwise valid union security clause provides a complete defense to that unfair labor practice. *See United Assoc. of Journeymen and Apprentices v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982) (union security clause prohibited by a state right-to-work law permitted by § 14(b) is not a mandatory subject of bargaining). *See also id*. at 1266 (dissenting opinion) (agreeing as to what would be a mandatory subject of bargaining but disagreeing on the scope of permissible right-to-work laws). However, if the right-to-work law in question – for example, Hardin County Ordinance 300 – is not encompassed by § 14(b), then compliance with the local law will result in a violation of the federal law.

v. Puckett, 391 S.W.2d 360, 362 (1965). *See Mobil Oil Corp.*, 426 U.S. at 413 n. 7 (citing *Puckett* with approval); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1197 (10th Cir. 2002) (relying on *City of Clovis* for the proposition that NLRA § 14(b) "embraces diversity of legal regimes respecting union security agreements" only "at the level of 'major policy-making units'").

B. A Local Ordinance Enacted Pursuant to a General Grant of Home Rule Authority Does Not Express State Policy and Is, Therefore, Not a "State Law" Within the Meaning of § 14(b).

It is very much to the point here that "§ 14(b) *gives the States* power to outlaw even a union-security agreement that passes muster by federal standards," *Schermerhorn II*, 375 U.S. at 103 (emphasis added), so that "any *State* or Territory that wishes to may *exempt itself* from [federal] policy" by "express[ing] a contrary policy via right-to-work laws." *Mobil Oil*, 426 U.S. at 416-17 & 420 (emphasis added). Thus, it is only "*state* policy that [has] overriding authority." *Schermerhorn II*, 375 U.S. at 103 (emphasis added).

Hardin County is a unit of local government and a political subdivision of the Commonwealth of Kentucky. *See* KRS 67.083(1); Ord. 300 § 1. The Fiscal Court of Hardin County has limited authority to enact ordinances that apply within the area of the County. KRS 67.083(7). The County asserts that its right-to-work ordinance was enacted pursuant to its home rule authority and that this makes the ordinance a "State law" within the meaning of NLRA § 14(b). Appellants Br. 9-

14. However, a local government's "action undertaken pursuant to its 'Home Rule' authority is not action contemplated by the state and not an affirmative expression of state policy." *Perry v. City of Fort Wayne*, 542 F.Supp. 268, 273 (N.D. Ind. 1982), citing *Community Communications Co. v. Boulder*, 455 U.S. 40, 55-56 (1982).

"[T]he purpose of Congress is the ultimate touch-stone in every pre-emption case," and "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quotation marks and citations omitted). The language and statutory framework of the NLRA indicate that "Congress was willing to permit varying polices at the state level" but did "not . . . intend[] to allow as many local policies as there are local political subdivisions in the nation." *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d at 362. In other words, NLRA § 14(b) "embraces diversity of legal regimes respecting union security agreements" only "at the level of 'major policy-making units.'" *Pueblo of San Juan*, 276 F.3d at 1197.[4]

[4] Applying "canons of statutory construction peculiar to Indian law," *Pueblo of San Juan* held that an Indian "tribe is not preempted by § 8(a)(3) from enacting a right-to-work law for business conducted in its reservation." 276 F.3d at 1196 & 1197. These canons flow from the basic principle that "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either" but rather "are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *Id.* at 1192 (footnote omitted). Given their

Brushing aside "the statutory framework surrounding" § 14(b), *Medtronic, Inc.*, 518 U.S. at 486, Hardin County asserts that "[w]henever States are free from federal preemption, their political subdivisions are likewise free from federal preemption." Appellants Br. 34-35. The Supreme Court's decisions defining the preemptive effect of the federal antitrust laws completely refute the blanket proposition on which the County relies.

The Supreme Court has concluded that "the [Sherman] Act should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. ___, 133 S.Ct. 1003, 1010 (2013), quoting *Parker v. Brown*, 317 U.S. 341, 352 (1943). State or local "[l]egislation that would otherwise be pre-empted [as conflicting with the federal antitrust laws] may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker v. Brown*. 317 U.S. 341 (1943)." *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986). However, of particular pertinence here, to avoid preemption, "[t]he ultimate source of that immunity can be only the State not its subdivisions." *Ibid*., citing *Community Communications*, 455 U.S. at 50-51, and

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sovereign nature, "Indian tribes . . . have a status higher than that of states" as "subordinate and dependent nations possessed of all powers [except] to the extent that they have been *expressly required to surrender them* by the superior sovereign, the United States." *Id*. at 1192 n. 6 (emphasis added; quotation marks and citation omitted).

Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-13 (1978)(opinion of Brennan, J.). *See First American Title Co. v. Devaugh*, 480 F.3d 438, 445 (6th Cir. 2007)(quotation marks, brackets and citation omitted)(describing a "two-part test for determining whether *Parker* state-action immunity saves a state statute or a county practice from preemption by the Sherman Act").

In applying the "state action" exemption to the antitrust laws, the Supreme Court has held that a municipal "ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . itself in its sovereign capacity or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Community Communications*, 455 U.S. at 52. And, the Court rejected the proposition "that these criteria are met by the direct delegation of powers to municipalities through [a] Home Rule Amendment to the [State] Constitution." *Ibid*. The Court explained, "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id*. at 55. "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws," the Court declined to read the antitrust laws "to exclude anticompetitive municipal action from their reach." *Id*. at 51, quoting *City of Lafayette v. Louisiana Power &*

Light Co., 435 U.S. at 412-413 (Opinion of Brennan, J.). *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) ("Where the actor is a municipality, . . . [t]he only real danger is that it will seek to further purely parochial interests at the expense of more overriding state goals.").

The "serious economic dislocation which could result if [local governments] were free to place their own parochial interests above the Nation's economic goals reflected in the [labor] laws," *Community Communications*, 455 U.S. at 51, strongly indicates that it is "only the State, not its subdivisions," *Fisher*, 475 U.S. at 265, that comes within § 14(b)'s exemption from NLRA preemption. This is especially so, given that the federal labor laws have a much more potent preemptive effect than the federal antitrust laws. *Compare Gould*, 475 U.S at 286 ("in passing the NLRA Congress largely displaced state regulation of industrial relations") *with Parker*, 371 U.S. at 351 ("The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state.").

The two Supreme Court decisions which Hardin County cites for the proposition that "[w]henever States are free from federal preemption, their political subdivisions are likewise free from preemption," Appellants Br. 34-35 – *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991), and *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 434 (2002) – hold nothing of the sort. Rather, both decisions treat "the purpose of Congress," as "discerned

from the language of the . . . statute and the statutory framework surrounding it," as "the ultimate touch-stone" in determining the pre-emptive effect of a statute. *Medtronic, Inc. v. Lohr*, 518 U.S. at 485-86.

Mortier considered whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts the regulation of pesticides by local government. 501 U.S. at 600. The question arose because of a provision stating that "[a] State may regulate the sale or use of any federally registered pesticide or device," so long as it did not authorize any sale or use prohibited by federal law or impose any labeling or packaging requirements different from the federal requirements. 7 U.S.C. § 136v(a). In determining whether this affirmative authorization of state regulation implicitly preempted local regulation, the Court "start[ed] with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 501 U.S. at 605 (quotation marks and citation omitted). The Court then noted that, aside from the affirmative authorization of state regulation, "[t]here was no suggestion that . . . FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States." *Id*. at 607. Rejecting the argument that local regulation was implicitly preempted by a provision that "plainly authorizes the 'States' to regulate pesticides and just as plainly is silent with reference to local government," the

Court explained that "[m]ere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Ibid*. Against that background, the Court concluded that "the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id*. at 608.

Ours Garage also began its preemption analysis "with the assumption 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." 536 U.S. at 432, quoting *Mortier*, 501 U.S. at 605. That case concerned a provision of the Interstate Commerce Act that stated the Act's preemption of state and local regulation "related to a price, route, or service of any motor carrier" would "not restrict the safety regulatory authority of a State with respect to motor vehicles. 49 U.S.C. § 14501(c)(1) & (2)(A). As in *Mortier*, the Court concluded that this express recognition of state authority did not implicitly preempt local regulation:

> "This case . . . deals . . . with preemption stemming from Congress' power to regulate commerce, in a field where States have traditionally allowed localities to address local concerns. Congress' clear purpose in § 14501(c)(2)(A) is to ensure that its preemption of States' economic authority over motor carriers of property, § 14501(c)(1), 'not restrict' the preexisting

> and traditional state police power over safety. That power typically includes the choice to delegate the State's 'safety regulatory authority' to localities. Forcing a State to refrain from doing so would effectively 'restrict' that very authority." *Id*. at 439.

The statutory language and surrounding statutory framework analyzed in *Mortier* and *Ours Garage* are at the furthest remove from the language and statutory framework of § 14(b). Section 14(b) provides that the affirmative federal authorization of union security agreements will not apply "in any State or Territory in which such [agreements are] prohibited by State or Territorial law," 29 U.S.C. § 164(b), and thus sanctions a "conflict between state and federal law." *Schermerhorn II*, 375 U.S. at 103. The statutes at issue in *Mortier* and *Ours Garage* did not involve any conflict between state and federal law. What is more, both cases concern "the regulation of health and safety matters [which] is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985).

By contrast with the statutes at issue in *Mortier* and *Ours Garage*, "the NLRA . . . comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement" because of "Congress' perception that . . . state legislatures and courts were unable to provide an informed and coherent labor policy."

English, 496 U.S. at 86 n. 8. The salient point of difference between this case and *Mortier* and *Ours Garage* is this: because of the NLRA "field pre-emption" in the area of industrial relations, § 14(b) is properly "understood . . . as *authorizing* certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions)," rather than simply assuring that the states' historic authority to act is not disturbed by a federal enactment. *Mortier*, 501 U.S. at 616 (Scalia, J., concurring) (emphasis in original). *See also id*. at 607 & 612-13 (emphasizing the absence of "field pre-emption" under FIFRA).

By stating that the federal authorization of union security agreements will not apply "in any State or Territory" where such agreements are prohibited by "State or Territorial law," 29 U.S.C. § 164(b), the terms of "§ 14(b) reflect[] Congress' decision that any State or Territory that wishes to may exempt itself from [the national] policy," *Mobil Oil*, 426 U.S. at 416-17. However, "the more restrictive policies [regarding union security agreements] that § 14(b) allows the States to enact," *id*. at 417, are state policies and not the policies of the myriad local political subdivisions of a state.

C. Interpreting NLRA § 14(b) to Authorize Local Right-to-Work Laws Would Impede Federal Labor Policy.

The Supreme Court has held NLRA § 14(b) should be interpreted so that "parties entering a collective bargaining agreement will easily be able to determine in virtually all situations whether a union- or agency-shop provision is valid."

Mobil Oil, 426 U.S. at 419. "[T]he diversity that would arise if cities, counties, and other local governmental entities were free to enact their own regulations" is "qualitatively different" from "the diversity that arises from different regulations among various of the 50 states." *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. at 1002-03. Not only would local regulation vastly increase the number of possibly applicable right to work laws, but "[t]he result would be a crazy quilt of [overlapping and possibly inconsistent] regulations" by the various levels of state, county and municipal government. *Id*. at 1002. Those problems are compounded by the difficult issues that arise in determining whether any given piece of local legislation is within a local jurisdiction's home rule authority. "The unpredictability that such a [state of affairs] would inject into the bargaining relationship, as well as the burdens of litigation that would result from it, [should] make [one] unwilling to impute to Congress any intent to adopt such a [system]." *Mobil Oil*, 426 U.S. at 419.

1. Reading NLRA § 14(b) to authorize local right-to-work laws enacted pursuant to general grants of home rule authority would introduce difficult and important questions of state law into any case involving the negotiation or enforcement of a union security agreement that was arguably covered by such a local law. This is so, because the legal meaning of "the home rule concept" is "controversial, uncertain, and highly variable." Briffault, *Home Rule for the*

Twenty-first Century, 36 The Urban Lawyer 253, 256 (2004). As a leading expert has explained:

> "Even within a state, the source and the scope of home rule may vary between cities and counties, or even among cities. In many states, the home rule grant is relatively brief. In others, there is a detailed constitutional and statutory treatment of a broad range of powers and limitations. Moreover, in every state, home rule is shaped by court decisions, with the judicial approach to similar home rule language varying from state to state, and even within a state, depending on the issue presented. * * *
>
> "These cases have forced courts to address anew such questions as the scope of local authority to initiate new laws, the meaning of such open-ended phrases as 'municipal affairs,' [and] 'local affair,' . . .; the power of local governments to make new law in areas subject to state regulation; and the relative roles of states and localities in areas that raise both state and local concerns. These cases and others like them often divide the courts that hear them and lead to different outcomes in different states." *Id*. at 253 & 255-56 (citations omitted).

All of these problems are presented by Kentucky's home rule regime. *See Sheffield v. City of Fort Thomas*, 620 F.3d 596, 609 (6th Cir. 2010) ("While the district court was quite possibly correct in its reading of the Home Rule Statute, we

believe the district court erred by treating the Home Rule Statute as the beginning *and end* of the preemption question, rather than further considering the question in light of the common law of municipal-state relations."). Cities in Kentucky are covered by two different sets of home rule statutes. KRS 82.082, 83.410, 83.420 & 83.520. A city "may exercise any power . . . within its boundaries . . . that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute." KRS 82.082. By contrast, a county "may enact ordinances" only "in performance of [specified] public functions. " KRS 67.083. County ordinances not only must be "consistent with state law or administrative regulation," but they are superseded where "[t]he legislative body of any city within the county has adopted a ordinances pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance." KRS 67.083(6)&(7)(b).

The first question regarding the validity of Hardin County Ordinance 300 as an exercise of home rule authority would be whether a local right-to-work law involves "[p]romotion of economic development of the county," within the meaning of KRS 67.083(3)(x). The examples of such promotion given in that section of the home rule statute – "the provision of access roads, land and building, and promotion of tourism and conventions" – suggest more traditional local government functions. What is more, the specification that county home rule

measures "shall be enforced throughout the entire area of the county," KRS 67.083(7), suggests that legislation likely to have effects beyond the area of the county – such as labor legislation covering employers and unions operating beyond the county's borders – is not contemplated.

Beyond that, there is the requirement that county home rule ordinances be "consistent with state law." KRS 67.083(6). Kentucky law provides that "[e]mployees may . . . associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to *effectively* promote their own rights and general welfare." KRS 336.130 (emphasis added). As the Supreme Court has explained, the view reflected in the 1947 amendments to the NLRA is that the negotiation of union security agreements contributes to "effective" collective bargaining representation. *Communications Workers v. Beck*, 487 U.S. at 747-50. Thus, the enactment of a county ordinance prohibiting such agreements would seem to be contrary to the State law in this regard.

Finally, there is the problem of what would happen if a city within Hardin County exercised its more general home rule authority by enacting a statute *authorizing* the very union security agreements that the County has attempted to prohibit. Would that be "an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county

ordinance," KRS 67.083(7)(b)? Would it be the sort of "State" law permitted by NLRA § 14(b)?

The salient point for present purposes is not whether Hardin County had home rule authority to adopt its own local labor policy. Rather, the point is that Congress could not have possibly intended the legality of union security agreements under the NLRA to turn on resolving such difficult questions of state law. *See* n. 3, p. 15, *supra*.

2. Aside for the difficult questions of local legislative authority that would be presented, allowing a "multiplicity of varying local rules on similar behavior can have a burdensome effect on individuals, businesses, and activities operating in many localities at once," because "[i]t may be difficult to find out about the many local rules and even more costly to comply with multiple different local rules." Briffault, *Home Rule for the Twenty-first Century*, 36 The Urban Lawyer at 261.

The example of local government in Kentucky shows why. There are 120 counties within the Commonwealth of Kentucky. In addition, Kentucky has 425 city governments. What is more, both counties and cities are authorized to "adopt[] [overlapping] ordinance[s] pertaining to the same subject matter." KRS 67.083(7)(b). Thus, reading § 14(b) to allow local laws prohibiting the execution or application of union security agreements would subject such agreements to over five hundred different legal regimes within Kentucky alone.

Applying a patchwork of local right-to-work laws would make it difficult for parties to administer union security agreements. As the example of Kentucky demonstrates, the number of local governmental authorities within a single state can be quite large, and the geographical area within which they each exercise authority will be correspondingly limited. Given the limited geographical reach of many local governmental authorities, many employers will have facilities located within several different political subdivisions of a single state. It is not uncommon for collective bargaining agreements to cover units comprised of a number of facilities and for employees within such units to transfer among the facilities. For example, United Food & Commercial Workers Local 227's collective bargaining agreement with the Kroger Company covers grocery stores located throughout Kentucky, and covered employees have the right to transfer among those stores. In that situation, were local right-to-work laws like Ordinance 300 authorized by § 14(b), the validity of the union security clause contained in the collective bargaining agreement could easily vary as an employee moved from one store to another within Kentucky.

Determining the existence and correct application of local right-to-work laws would be much more difficult than determining the requirements of state laws. In the first place, city and county governments have overlapping jurisdiction, so it would be necessary to determine not only whether a particular local

government has enacted a right-to-work law but whether that law has been preempted or supplemented by the laws of other local governments. In addition, local laws are subject to greater flux than state laws For instance, it was only a matter of weeks between the time Ordinance 300 first came before the Hardin County Fiscal Court and when it was finally enacted into law. And, the ordinance could be just as quickly repealed. The legislative process for enacting state laws is generally much more measured, ensuring a greater stability in state law. Finally, local ordinances are not published in easily available, well indexed forms. Unlike the Kentucky Revised Statutes, which are compiled in one central place, county and city ordinances appear only in whatever form the local jurisdiction determines.

Congress was well aware of the potentially disruptive effect of applying inconsistent right-to-work laws to a single collective bargaining agreement and expressly addressed that problem in the 1950 amendments to the Railway Labor Act authorizing union security agreements under that statute. The Supreme Court has treated the 1950 RLA union security amendments as highly informative with regard to the intent of the 1947 NLRA union security amendments. *Beck*, 487 U.S. at 750-52.

RLA bargaining units are nationwide in scope and typically cover workplaces in a number of states. The 1950 RLA amendments authorizing union security agreements in railroad and airline industries did *not* create an exception

allowing state right-to-work laws, because Congress determined that application of inconsistent state laws to a single bargaining unit would be unduly disruptive. In this regard, the House Report on the 1950 RLA amendments explained that "it would be wholly impracticable and unworkable for the various States to regulate such [union security] agreements," because the "agreements are uniformly negotiated for an entire railroad system and regulate the rates of pay, rules and working conditions of employees in many States." H.Rep. No. 2811, 81st Cong., 2d Sess., p. 5 (1950).[5]

Multi-location and multi-facility bargaining units were not uncommon under the NLRA by 1947. *See, e.g., Sixth Annual Report of the NLRB* 65-66 (1941) ("Multiple-Plant and System Units") *Fifth Annual Report of the NLRB* 66-67 (1940) (same); *Fourth Annual Report of the NLRB* 89-91 (1939)(same). It is inconceivable that Congress would have refused to allow the application of *existing* state right-to-work laws to RLA union security agreements on the grounds that applying multiple laws to a single collective bargaining agreement "would be wholly impracticable," H.Rep. No. 2811 at 5, if three years earlier it had voted to authorize every village, township, city and county in the nation to adopt their own

[5] The authorization for union security agreements in RLA § 2, Eleventh refers to the law of "any State," 42 U.S.C. § 152, Eleventh, for the same reason that NLRA § 14(b) refers to "State law." Both provisions addressed the existing state right-to-works, the RLA to ensure that those laws would *not* apply to RLA-authorized union security agreements and the NLRA to ensure that they would.

myriad local right to work laws. It is equally inconceivable that the Taft-Hartley Congress would have intended to require the States to adopt affirmative measures prohibiting their local governments from enacting their own right-to-work laws if the States wished to avoid the chaos that would inevitably result from the application of overlapping and potentially inconsistent local laws to multi-location collective bargaining agreements.

The only plausible interpretation of § 14(b) is that the provision means what it says and creates an exception to the federal policy of authorizing union security agreements only "in any State or Territory" where the negotiation and application of such agreements "is prohibited by State or Territorial law."

* * *

The Hardin County ordinance is not a "State or Territorial law" within the meaning of § 14(b) and is thus "not encompassed under § 14(b)." *Mobil Oil Corp.*, 426 U.S. at 413 n. 7. The ordinance is, therefore, preempted by the NLRA. *Id*. at 413 & n. 7.

III. CHECK-OFF AND HIRING HALL AGREEMENTS ARE NOT "AGREEMENTS REQUIRING MEMBERSHIP IN A LABOR ORGANIZATION AS A CONDITION OF EMPLOYMENT" WITHIN THE MEANING OF NLRA §14(b).

In the preceding sections, we demonstrated that the Hardin County Ordinance is preempted by the NLRA insofar as it attempts to regulate the negotiation and application of union security, check-off and hiring hall agreements

because the ordinance is not a "State law" within the meaning of NLRA § 14(b). In this section, we show that even if the ordinance were a "State law" under NLRA § 14(b), the provisions regulating dues check-off and union hiring halls are preempted for the additional reason that check-off and hiring hall agreements are not "agreements requiring membership in a labor organization as a condition of employment" within the meaning of NLRA § 14(b). Again, the precedents interpreting § 14(b) are unanimous on these points. And, Hardin County does not seriously contest the district court's ruling on these two provisions. Appellants Br. 52 ("In candor with this Court, the Dues Checkoff and Hiring Hall provisions of Ordinance 300 present closer preemption questions than the Ordinance's core right-to-work provisions, and are severable from them.").

A. Check-off Agreements.

Section 5 of the ordinance makes it "unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges . . . unless the employee has first presented . . . a signed written authorization of such deductions, which authorization *may be revoked by the employee at any time by giving written notice of such revocation to the employer*." Ord. No.15-3389-116, § 5 (emphasis added).

Section 302 of the Labor Management Relations Act makes it unlawful for an employer "to pay, lend or deliver, any money . . . to any labor organization . . .

which represents . . . any of the employees of such employer," but states an exception "with respect to money deducted from the wages of employees in payment of membership dues in a labor organization" where "the employer has received from each employee, on whose account such deductions are made, a written assignment *which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner*." 29 U.S.C. §§ 186(a)(2) & (c)(4).

The Hardin County Ordinance and LMRA § 302(c)(4) not only overlap in their regulation of check-off authorizations, they contradict one another. While the ordinance provides that check-off authorizations may be "revoked by the employee at any time," LMRA § 302(c)(4) provides that check-off authorizations "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." And, while the ordinance specifies that an employee must "giv[e] written notice of such revocation to the employer," LMRA § 302(c)(4) says nothing about how the revocation must be given.

Deduction of union dues or fees from an employee's pay after the employee has revoked his or her authorization at one of the times specified by LMRA § 302(c)(4) is an unfair labor practice subject to the jurisdiction of the NLRB. *See NLRB v. Atlanta Printing Specialties & Paper Product Union 527*, 523 F.2d 783

(5th Cir. 1975). An employer's refusal to deduct union dues or fees in accordance with the terms of its collective bargaining agreement and pursuant to an employee authorization meeting the requirements of LMRA § 302(c)(4) is also unfair labor practice subject to the jurisdiction of the NLRB. *See NLRB v. Shen-Mar Food Products, Inc.*, 557 F.2d 396 (4th Cir. 1977). Finally, an employer's transmission to a labor organization of union dues or fees that have been deducted from an employee's pay without the authorization required by § 302(c)(4) is subject to both criminal and civil enforcement actions in federal court. *See* 29 U.S.C. §§ 186 (d) & (c).

The negotiation and application of check-off agreements is a matter that is carefully regulated by the NLRA and the LMRA. The ordinance's overlapping and inconsistent regulation of check-off agreements is, therefore, clearly preempted unless the ordinance comes within NLRA § 14(b)'s exception from federal preemption. However, "dues checkoff provisions are not union security devices but are intended to be an area of voluntary choice for the employee." *Atlanta Printing Specialties*, 523 F.2d at 787. For that reason, *SeaPAK v. Industrial Technical and Professional Employees*, 300 F.Supp. 1197, 1200-01 (S.D. Ga. 1969), *aff'd* 423 F.2d 1229 (5th Cir. 1970), *aff'd*, 400 U.S. 985 (1971), squarely holds that state laws regulating check-off do not come within NLRA § 14(b). The Supreme Court's affirmance of *SeaPAK* makes that decision a binding

precedent.

Under *SeaPAK*, state laws regulating the voluntary deduction of union dues or fees are not within § 14(b) and are, therefore, preempted. *See, e.g.*, *Local 514, Transport Workers v. Keating*, 212 F.Supp.2d 1319, 1327 (E.D. Okla. 2002) (following *SeaPAK*).

B. Hiring Hall Agreements.

Section 4(E) of the Hardin County Ordinance provides that "[n]o person covered by the National Labor Relations Act shall be required as a condition of employment . . . to be recommended, approved, referred, or cleared by or through a labor organization." It is not uncommon for collective bargaining agreements in the construction industry to contain clauses giving a union the exclusive right to refer applicants for employment. *See* 29 U.S.C. § 158(f)(3) (expressly authorizing such agreements).[6]

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[6] As the Supreme Court has observed:

> "In many industries, unions maintain hiring halls and other job referral systems, particularly where work is typically temporary and performed on separate project sites rather than fixed locations. By maintaining halls, unions attempt to eliminate abuses such as kickbacks, and to insure fairness and regularity in the system of access to employment. In a 1947 Senate Report, Senator Taft explained: 'The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall.' S. Rep. No. 1827, 81st Cong., 2d Sess., 13 (1947), quoted in

The NLRA regulates the negotiation and application of hiring hall agreements to ensure that referrals are made in a fair and nondiscriminatory manner. *See Breininger v. Sheet Metal Workers*, 493 U.S. 67, 73-84 (1989) (describing the federal regulation of hiring halls). Provided that the referrals are made in a manner that does not discriminate on the basis of union membership, "the hiring hall, under the [federal] law as it stands, is a matter of negotiation between the parties." *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 676 (1961). "As a result, courts which have interpreted section 164(b) of the LMRA in this context have held that it does not grant the States the authority to prohibit non-discriminatory exclusive hiring halls." *Local 514, Transport Workers v. Keating*, 212 F.Supp.2d at 1326-27 (citing authority).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Description of Document	Page ID # Range
1	Complaint and All Exhibits filed 1/14/2015	1-47
5 5-1	Answer filed 2/24/15 Ex. A - County of Hardin, Ordinance No. 300	74-93 94-98
15	Amended Complaint filed 4/3/2015	209-219
43	Memorandum Opinion & Order dated 2/3/2016	1277-1290
44	Judgment entered 2/3/2016	1291
45	Notice of Appeal by Defendants filed 2/29/2016	1292-1293

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because this brief contains 9, 358 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Times New Roman font style.

/s/ James B. Coppess
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Date: June 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, the foregoing Brief of the Appellees, United Automobile, Aerospace and Agricultural Implement Workers of America Local 3047, et al., was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system, and was served on counsel for defendants-appellants through the CM/ECF system.

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