No. _____

IN THE

Supreme Court of the United States

VILLAGE OF LINCOLNSHIRE, ET AL.,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 399, ET AL.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle St.
Chicago, IL 60603

David S. Birnbaum
JONES DAY
77 West Wacker Dr.
Suite 3500
Chicago, IL 60601

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Vivek Suri
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

QUESTION PRESENTED

Section 14(b) of the National Labor Relations Act states that nothing in the 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). Does a law enacted by a political subdivision of a state constitute "State … law" under section 14(b)?

PARTIES TO PROCEEDINGS BELOW

The defendants-appellees and cross-appellants below were petitioner Village of Lincolnshire, petitioner Elizabeth Brandt in her official capacity as Mayor of Lincolnshire, petitioner Barbara Mastandrea in her official capacity as Village Clerk of Lincolnshire, and Peter Kinsey in his official capacity as Chief of Police of Lincolnshire. Mr. Kinsey has since been succeeded as Chief of Police by petitioner Joseph Leonis. The plaintiffs-appellants and cross-appellees below were respondents International Union of Operating Engineers, Local 399, AFL-CIO; International Union of Operating Engineers, Local 150, AFL-CIO, Construction and General Laborers' District Council of Chicago and Vicinity, Laborers International Union of North America, AFL-CIO; and Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

"For many decades, Americans have debated the pros and cons of right-to-work laws"—laws that preclude employers and unions from compelling employees to associate with or fund unions. *Harris v. Quinn*, 134 S. Ct. 2618, 2658 (2014) (Kagan, J., dissenting). Proponents of right-to-work laws argue that compelling someone to associate with a union violates the freedom of conscience. Opponents of right-to-work laws contend that they impair the strength of labor unions and the stability of labor relations. This "policy debate" is "healthy," "energetic," and "democratic." *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018).

In the National Labor Relations Act, Congress decided to leave this controversial issue to the states, and not to legislate a one-size-fits-all resolution of the debate for the whole nation. In section 14(b) of the NLRA, Congress declared that nothing in the Act preempts any "State or Territorial" right-to-work law. 29 U.S.C. § 164(b).

The question presented here is whether the NLRA allows local governments to pass their own right-to-work laws—that is, whether a right-to-work law passed by a political subdivision is a "state" law under section 14(b). This Court has held in two cases—*Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *Columbus v. Ours Garage & Wrecker Servs., Inc.*, 536 U.S. 424, 434 (2002)—that a federal law that authorizes action by a "state" presumptively authorizes action by a state's political subdivisions, unless the statute contains a clear statement supplanting local authority. These cases reflect the ordinary meaning of the term "state" in federal law. They also respect state sovereignty: Unless the statute

clearly says otherwise, a court should presume that Congress has left it up to the state to decide which decisions to take statewide and which to leave to the local level.

Despite this clear-statement rule, the Seventh Circuit ruled, in the decision below, that the NLRA does preempt local right-to-work laws. In the Seventh Circuit's view, a local law is not a "State" law under section 14(b). As a result, a state may not make the same decision about right-to-work legislation that Congress has made—namely, the decision to leave this controversial issue to a smaller unit of government.

The question whether section 14(b) protects local legislation deserves this Court's review. To start, it is the subject of a circuit split—the Sixth Circuit upheld a local right-to-work law as "State" law under this provision, but the Seventh Circuit and the Kentucky Supreme Court struck down local laws as not covered. *See United Automobile Workers v. Hardin County*, 842 F.3d 407 (6th Cir. 2016); *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. 1965). The Seventh Circuit's crabbed interpretation of "State" also conflicts with *Mortier* and *Ours Garage*. Finally, the question presented is important. Numerous local governments have enacted right-to-work laws, and this Court should clarify whether those enactments are lawful.

OPINIONS BELOW

The opinion of the court of appeals is reported at 905 F.3d 995 and reproduced at App. 1a–27a. The opinion of the district court is reported at 228 F. Supp. 3d 824 and reproduced at App. 28a–55a.

JURISDICTION

On September 28, 2018, the court of appeals affirmed the district court's judgment. App. 1a. On December 12, 2018, Justice Kavanaugh extended the time to file the petition for certiorari until February 25, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reproduced at App. 56a–59a.

STATEMENT OF THE CASE

A. The National Labor Relations Act

Congress enacted the National Labor Relations Act in 1935, and amended it in the Taft-Hartley Act in 1947. The NLRA, as in effect today, sets up the National Labor Relations Board, grants employees the right to join unions and bargain collectively, defines and prohibits unfair labor practices, and regulates union elections.

The NLRA includes provisions addressing union-security agreements (agreements requiring workers, as a condition of employment, to associate with labor unions). Section 8(a)(3) prohibits "closed shop" agreements, which provide that "the employer will hire no one who is not a member of the union at the time of the hiring." *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1 (1976). But section 8(a)(3) explicitly clarifies that the NLRA does not prohibit "union shop" contracts, which provide that "no one will be employed who does not join the union within a short time after being hired." *Id.* It also clarifies that the NLRA does not prohibit "agency shop" contracts, which provide that "while employees do not have to join the union, they are required … to make periodic payments to the union equal to the union dues." *Id.* This Court has interpreted section 8(a)(3) as "articulat[ing] a national policy that certain union-security arrangements"—namely, the union shop and the agency shop—"are valid as a matter of federal law." *Id.* at 416.

At the same time, Congress recognized that other governments might reasonably disagree with it about the wisdom of these controversial agreements.

Section 14(b) of the NLRA states that nothing in the Act "shall be construed as authorizing" a union-shop or agency-shop contract that is "prohibited by State or Territorial law." 29 U.S.C. § 164(b). This provision "allows individual States and Territories to exempt themselves from [section] 8(a)(3) and to enact so-called 'right-to-work' laws prohibiting union or agency shops." 426 U.S. at 409. States thus "have the final say" on the right-to-work issue: Thanks to section 14(b), they may "outlaw even a union security agreement that passes muster by federal standards." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

B. The Village of Lincolnshire Ordinance

The Village of Lincolnshire is located to the north of Chicago. Lincolnshire is a home-rule unit under the Illinois Constitution, which means that it "may exercise any power and perform any function pertaining to its government and affairs." Ill. Const. art. VII, § 6(a); *see* App. 9a.

The Illinois General Assembly has not enacted a statewide right-to-work law. In 2015, however, the Village of Lincolnshire adopted a village-level right-to-work law by enacting Ordinance No. 15-3389-116. The Ordinance prohibits private-sector employers from requiring employees to associate or to refrain from associating with labor unions. The provisions at issue here, section 4(B)–(D), prohibit union-shop and agency-shop contracts. They state:

> No person covered by the NLRA shall be required as a condition of employment or continuation of employment with a private-sector employer: …

> (B) to become or remain a member of a labor organization;
>
> (C) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization;
>
> (D) to pay any charity or other third party, in lieu of such payments, any amount equivalent to or a pro-rata portion of dues, fees, assessments, or other charges regularly required of members of labor organization.

App. 58a–59a.

C. Proceedings Below

In 2016, respondents (four unions that operate in Lincolnshire) sued petitioners (the Village, the Mayor, the Village Clerk, and the Police Chief) in federal district court. They claimed that the NLRA preempted Lincolnshire's right-to-work law. (They also challenged other provisions of the ordinance, but those provisions are not relevant here, and we do not discuss them further.)

The district court granted the unions summary judgment. It concluded, on the basis of the NLRA's "language" and "legislative history," that "Congress intended to preempt the field of union security agreements." App. 45a. The court acknowledged that section 14(b) of the Act saved from preemption "State or Territorial law" that prohibited union-security agreements. *Id.* The court ruled, however, that section 14(b) must be "read narrowly to extend to states and no further." App. 51a.

The Seventh Circuit affirmed. It began by explaining that, under this Court's cases, the NLRA "occupies the field for any activities that … fall within [its] ambit." App. 6a (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)). The Seventh Circuit continued that, again under this Court's cases, "union-security clauses … are such activities." App. 6a (citing *Street Employees v. Lockridge*, 403 U.S. 274, 284 (1971)). As a result, "laws banning union-security agreements clash with [the NLRA] and thus can be saved only if they fall within the scope of section 14(b)." App. 7a.

The Seventh Circuit turned, accordingly, to section 14(b), which saves from preemption "State" right-to-work laws. The court stated that "[a] devotee of the 'plain language' approach to statutory interpretation might think" that section 14(b) does not cover local right-to-work laws, because "municipalities are not states." App. 14a–15a. The court also noted that the NLRA "call[ed] out political subdivisions by name" in some other provisions, but not in section 14(b). App. 15a.

The court, however, "prefer[red] … not to rely on the literal terms of the statute." App. 15a. Instead, it rested its decision principally on the "goal" of the NLRA. App. 19a. In the court's view, "Congress enacted the NLRA to create national uniformity in labor law." App. 19a. The court believed that "[p]ermitting local legislation under section 14(b)" undermines that uniformity by "threaten[ing] a crazy-quilt of regulations." App. 18a. The court acknowledged that section 14(b) itself constitutes an exception to the NLRA's policy of uniformity, but insisted that (in light of the NLRA's overall goals) the excep-

tion must be interpreted to allow only "variation at the state … level," not variation "within states." App. 19a.

The Seventh Circuit likewise consulted "legislative history." App. 19a. The court considered it significant that "the congressional debates' repeated references to safeguarding state authority contain no mention of local autonomy." App. 19a–20a.

Finally, the court highlighted what it believed were the "consequences" of allowing local right-to-work legislation. In the court's view, interpreting section 14(b) to authorize local right-to-work legislation would lead to "administrative nightmares." App. 16a. The court considered it "impossible as a practical matter" for employers and unions to comply with the separate laws of thousands of localities across the United States. App. 18a. The court thus reached what it described as the "sensible conclusion": "section 14(b) operates only at the state level." App. 17a.

The Seventh Circuit acknowledged that this Court had previously ruled, in *Mortier* and *Ours Garage*, that a preemption exception's reference to "State" law encompasses local law, in the absence of a "clear and manifest indication that Congress sought to supplant local authority." App. 24a. The court did not suggest that there is any such "clear and manifest indication" here. Instead, the court declared that *Mortier* and *Ours Garage* were "distinguishable." App. 22a. They involved exceptions to "an express preemption provision," whereas this case involves an exception to "field" preemption. *Id.* And they involved the "ability to regulate noxious substances" and "local safety regulation," while this case involves "anti-labor laws." App. 24a.

REASONS FOR GRANTING THE PETITION

I. LOWER COURTS DISAGREE ABOUT THE VALIDITY OF LOCAL RIGHT-TO-WORK LEGISLATION

A. Appellate courts have split over the question presented—whether section 14(b) saves local right-to-work laws from preemption. The Sixth Circuit has ruled that section 14(b) does cover local right-to-work laws. In contrast, the Seventh Circuit and the highest court of Kentucky have held that it does not.

Sixth Circuit. The Sixth Circuit has ruled in *United Automobile Workers v. Hardin County* that a political subdivision (there, Hardin County, Kentucky) may pass a local ordinance prohibiting union shops and agency shops. 842 F.3d 407 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 130 (2017) (mem.).

The Sixth Circuit's analysis rested on two of this Court's cases, *Mortier* and *Ours Garage*. In *Mortier*, this Court addressed a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that said: "A State may regulate the sale or use of any federally registered pesticide or device in the State." 7 U.S.C. § 136v. The Court held that the statute did not preempt local regulation of pesticides. The Court's analysis stemmed from the premise that a statute distinguishes between state and local regulation only if it provides a "clear and manifest indication that Congress sought to supplant local authority." 501 U.S. at 611. The Court ruled that, far from providing a "clear and manifest indication," the use of the term "State" in the saving clause "tilt[ed] *in favor* of local regulation," because "political subdivisions are components of the very entity the statute empowers." *Id.* at 607–08 (emphasis added). The Court acknowl-

edged that some other provisions of the Act referred separately to political subdivisions, but said that "scattered mention of political subdivisions elsewhere in [the statute] does not require their exclusion here." *Id.* at 612. The Court also acknowledged concerns about "uniformity" and "regulatory coordination" across thousands of municipalities, but concluded that such "policy speculations" cannot suffice to require preemption of state laws. *Id.*

Similarly, in *Ours Garage*, this Court considered a provision of the Federal Aviation Administration Authorization Act that saved "State" motor-vehicle safety regulation from preemption. The Court held that this saving provision saved local regulation as well. The Court began with a premise that is "beyond genuine debate": A preemption provision's exception for "exercises of the … regulatory authority of a State" presumptively "embrace[s] both state and local regulation." 536 U.S. at 432. The Court said that *Mortier* was "definitive" on this point. *Id.* Only a "clear and manifest indication that Congress sought to supplant local authority" can overcome this presumption. *Id.* at 434. The Court ruled that the statute at issue "did not provide the requisite 'clear and manifest indication.'" *Id.* The Court acknowledged that the saving provision saved the power of a "State" to enact motor-vehicle safety regulation, the power of a "State or a political subdivision" to regulate tow-truck prices, and the power of a "State [or] political subdivision" to enact cargo-liability rules. *Id.* at 429–30. The Court ruled, however, that even this stark pattern—using "State" in some parts of the saving clause and "State or political subdivision" in others—did not suffice. The implications of the dis-

parate inclusion or exclusion of the word "political subdivision" did not amount to a "clear and manifest indication." *Id.* at 434.

Against the backdrop of *Mortier* and *Ours Garage*, the Sixth Circuit held that "§14(b)'s use of 'State' includes political subdivisions." 842 F.3d at 417. The Sixth Circuit emphasized the presumption that Congress's use of the term "State" encompasses political subdivisions in the absence of a "clear and manifest indication that Congress sought to supplant local authority." *Id.* at 414 (quoting *Mortier*, 501 U.S. at 611). The court ruled that "no showing of such a clear and manifest purpose ha[d] been made." *Id.*

The Sixth Circuit acknowledged that "[section 14(b)'s] recognition of state authority is silent as to political subdivisions of the State." *Id.* at 415. The court ruled, however, that, "[p]er *Ours Garage*, this silence is to be construed as preserving state authority to delegate its governmental powers to its political subdivisions as it sees fit." *Id.* The Sixth Circuit also acknowledged that the union had raised "policy concerns" about local right-to-work legislation. *Id.* at 420. In its view, however, *Mortier* established that "unconvincing 'policy speculations'" do not amount to a "'clear and manifest indication that Congress sought to supplant local authority.'" *Id.* at 414 (quoting *Mortier*, 501 U.S. at 611). The court therefore summed up: "Because Hardin County's right-to-work ordinance is 'State law,' it is not preempted."

Seventh Circuit. In contrast, the Seventh Circuit ruled in this case that a political subdivision may *not* pass a local ordinance prohibiting union shops and agency shops. The wording of the law in this case is identical to that in *United Automobile*

Workers: Both provide that an employer may not require an employee "as a condition of employment or continuation of employment" "(B) to become or remain a member of a labor organization," "(C) to pay any dues …," or "(D) to pay any … third party … in lieu of such payments." App. 58a–59a; *United Automobile Workers*, 842 F.3d at 410. Yet the Seventh Circuit struck down the law, because "section 14(b) does not extend to the political subdivisions of states." App. 3a.

The Seventh Circuit acknowledged that the Sixth Circuit had reached the opposite conclusion. App. 2a. The Seventh Circuit, however, disagreed with its reasoning, especially its emphasis on *Mortier* and *Ours Garage*. App. 20a. In the Seventh Circuit's view, these cases were "distinguishable." App. 22a. The court pointed out that "sometimes Congress allows redelegation, as in *Mortier* [and] *Ours Garage*, … and sometimes it does not." App. 25a. "The aspect of labor law governed by section 14(b) of the NLRA," the court concluded, "falls in the latter category." *Id.*

Kentucky Court of Appeals. Kentucky's highest court has reached the same conclusion as the Seventh Circuit. In *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. 1965), it struck down a local right-to-work ordinance. It reasoned: "We think it is not reasonable to believe that Congress could 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." *Id.* at 362.

B. The lower courts have acknowledged this circuit split. The Sixth Circuit, for its part, recognized that Kentucky's highest court had "held that [sec-

tion] 14(b) does not encompass laws of political subdivisions," but ruled that this decision had "no persuasive weight." *United Automobile Workers*, 842 F.3d at 417. The Seventh Circuit, likewise, acknowledged that the Sixth Circuit and the Kentucky Supreme Court were already divided on the question presented even before this case: "Whether a local law, rather than a statewide law, falls within the scope of section 14(b) is a subject that has divided other courts. The Sixth Circuit, in [*United Automobile Workers*], agreed with the Village that it does … On the other side of the fence, Kentucky's highest court has held that section 14(b) does not permit local legislation on the topic." App. 2a. The court added that, by siding with Kentucky's highest court, it had "create[d] a [circuit] conflict with the Sixth Circuit." App. 3a n.2.

This circuit split will not resolve itself without this Court's intervention. The Seventh Circuit expressly said so. "[B]ecause [the panel's decision] … create[d] a conflict with the Sixth Circuit," the panel "circulat[ed] it to all members of the court in regular active service," but none "wished to hear this case en banc." App. 3a n.2. The Sixth Circuit, for its part, rejected the reasoning underlying the Seventh Circuit's decision. While the Seventh Circuit emphasized statutory purpose, legislative history, and policy consequences, the Sixth Circuit considered arguments about "purpose," "legislative history," and "policy concerns" insufficient to "rebu[t] the presumption arising from *Mortier* and *Ours Garage* that 'State' includes political subdivisions of the State." 842 F.3d at 420. And while the Seventh Circuit found *Mortier* and *Ours Garage* to be "distinguishable," App. 22a,

the Sixth Circuit found them controlling, *see* 842 F.3d at 413–16. This Court should intervene to resolve this disagreement.

II. THE SEVENTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S PRECEDENTS

A. As already discussed, this Court has decided two cases—*Mortier* and *Ours Garage*—about the meaning of the term "State" in a federal provision that saves "State" law from preemption. Each time, the Court ruled that "State" law includes local law—and that, if Congress wishes to use the word "State" differently, it must say so clearly. In this Court's words, a statute distinguishes between state and local regulation only if it provides a "clear and manifest indication that Congress sought to supplant local authority." *Mortier*, 501 U.S. at 611.

This clear-statement rule reflects the legal status of political subdivisions. *See Mortier*, 501 U.S. 597. "Political subdivisions" are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). They are not sovereign entities, and they do not exercise their own sovereign powers. Instead, they "exercis[e] such of the governmental powers *of the State* as may be entrusted to them." *Id.* (emphasis added). Since a political subdivision exercises the powers of the state, a law of a political subdivision *is* a law of the state in the eyes of the Federal Government. As a result, a statutory reference to "states" "tilts *in favor* of local regulation," since "political subdivisions are components of the very entity the statute empowers." *Mortier*, 501 U.S. at 607–08. Put another way, "the

more plausible reading of [a federal statute'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 … in the hands of local authorities." *Id.* at 608.

Mortier and *Ours Garage* also reflect "basic tenets of our federal system." *Ours Garage*, 536 U.S. at 434. In that federal system, each state has broad power to define "the structure of its government, and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In particular, states have "wide leeway" to create "political subdivisions," and "extraordinarily wide latitude" to determine the "number, nature and duration of the powers conferred" upon them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). "If Congress intends to alter the usual constitutional balance between the States and the Federal Government"—here, by prohibiting a state from delegating its authority to political subdivisions—Congress must "make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460.

Under *Mortier*, *Ours Garage*, and the principles of federalism on which they rest, the proper resolution of this case is straightforward. To establish that the NLRA saves statewide but not local right-to-work laws—*i.e.*, to establish that the NLRA deprives Illinois of the power to redelegate its authority over right-to-work laws to subdivisions—one must show that section 14(b) contains a "clear and manifest indication that Congress sought to supplant local authority." *Ours Garage*, 536 U.S. at 434. "[N]o show-

ing of such a clear and manifest purpose has been made." *United Automobile Workers*, 842 F.3d at 420. And no such showing is possible, because section 14(b) says nothing at all about a distinction between state and local law. "Mere silence" "with reference to local governments" "cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *Ours Garage*, 536 U.S. at 432.

B. The Seventh Circuit offered a handful of reasons to justify its contrary conclusion. Each underscores the conflict between the Seventh Circuit's decision and this Court's decisions.

First, although the Seventh Circuit disclaimed reliance on "the literal terms of the statute," it said that a "devotee of the 'plain language' approach" should agree with its decision, because "municipalities are not states." App. 14a–15a. This reasoning directly contradicts *Mortier*, which says that "the statutory language" of an "express authorization to the 'States'" "tilts *in favor* of local regulation." 501 U.S. at 607–08 (emphasis added). This reasoning also directly contradicts *Ours Garage*, which says that it is "beyond genuine debate" that a statutory reference to "state" regulation presumptively "embrace[s] both state and local regulation." 536 U.S. at 432.

Second, the Seventh Circuit said in passing that "Congress sometimes calls out political subdivisions by name" "elsewhere" in the Act—for example, in a provision dealing with "cooperation with State and local mediation agencies." App. 15a (quoting 29 U.S.C. § 172(c)). This rationale, too, directly contradicts this Court's decisions. *Mortier* held that the "scattered mention of political subdivisions elsewhere in [the act] does not require their exclusion

here." 501 U.S. at 612. And *Ours Garage* held that the mention of political subdivisions elsewhere *in the preemption and savings provisions themselves* "does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'" 536 U.S. at 434.

Third, the Seventh Circuit said that local right-to-work regulation would undermine the NLRA's "goal" of "national uniformity." App. 19a. Yet again, contrary to this Court's decisions. For one, the Court has rejected efforts to satisfy its clear-statement rule by reference to statutory purposes rather than statutory language. In *Mortier*, it rejected the argument that local regulation is preempted because it would undermine a congressional "goal of regulatory coordination." 501 U.S. at 615. And in *Ours Garage*, it rejected an argument that local regulation is preempted because it would undermine "the statute's deregulatory purpose." 536 U.S. at 440.

For another, as this Court explained in *Ours Garage*, a court errs by giving "a specific exception" a "narro[w] … construction" in order to advance the "general policy" of the statute as a whole. *Id.* The ordinary rule in statutory interpretation is that the specific governs the general, not the other way around. And, in any event, "the limitations on a statute's scope are as much part of the statute's 'purpose' as the scope itself." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 63 (2013). The Seventh Circuit violated these principles by invoking the NLRA's general goal of uniformity to narrow the scope of section 14(b), which is a specific exception to that policy of uniformity.

Fourth, the Seventh Circuit relied on "legislative history," stressing that "the congressional debates' repeated references to safeguarding state authority contain no mention of local autonomy." App. 19a–20a. Once more, it contradicted this Court's decisions; if "snippets of legislative history" cannot satisfy the clear-statement rule of *Mortier* and *Ours Garage*, then the *absence* of such snippets certainly is not enough. *Mortier*, 501 U.S. at 615. Indeed, "legislative history" is ordinarily "irrelevant" to the application of a clear-statement rule; if "Congress' intention is not unmistakably clear" in "the language of the statute," "recourse to legislative history will be futile, because by definition the [clear-statement] rule … will not be met." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

Fifth, the Seventh Circuit declared that allowing local right-to-work laws would lead to "catastrophic" "consequences" and "administrative nightmares." App. 16a, 19a. This rationale, as well, contradicts this Court's cases, which held that "policy speculations" cannot justify interpreting a statute to preempt local authority and to deny a state the power to delegate authority to local governments. *Mortier*, 501 U.S. at 615.

In any event, the Seventh Circuit's Cassandra-like gloom is unwarranted. In *Oil Workers*, this Court adopted a federal choice-of-law rule for right-to-work laws adopted in accordance with section 14(b). 426 U.S. 407. Under that federal choice-of-law rule, an employer's relationship with a given employee is governed by the right-to-work laws of the employee's "predominant job situs"—that is, the place where the employee "perform[s] most of [his]

work." *Id.* at 414. "Under a job situs test, 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." *Id.* at 419. Employees whose predominant job situs is in Lincolnshire are covered by the Lincolnshire ordinance; employees whose predominant job situs is elsewhere are not. There is no reason to fear "administrative nightmares" or "catastrophic" consequences. App. 16a, 19a.

Finally, the Seventh Circuit tried to distinguish *Mortier* and *Ours Garage*. The Seventh Circuit first emphasized that those decisions involved the scope of an exception from "an express preemption provision," while this case involves the scope of an "exception to the general preemption established in the Act for the field of labor relations." App. 24a. That difference, however, makes this an *a fortiori* case. An express preemption clause (which Congress included in the statutory text) surely deserves more weight, not less, than implied field preemption principles (which courts have inferred from the statutory text). As a result, if it is improper to narrowly interpret the word "state" in an exception to an express preemption clause, it is even more improper to narrowly interpret the word "state" in an exception to implied field preemption.

The Seventh Circuit also declared that *Mortier* and *Ours Garage* involved the "historic police powers of the States" over "noxious substances" and "safety regulation"; it believed that no such "historic police power" is at stake here, because "for nearly a century the regulation of unions has rested with the federal, rather than state, government." App. 22a, 24a. As an

initial matter, the Seventh Circuit framed its analysis at the wrong level of generality. This case is not about "the regulation of unions" in general; it is about right-to-work laws in particular. And the power to pass right-to-work laws *is* among the historic police powers of the states: Even when federalizing much of the field of labor relations in the NLRA, Congress expressly reserved the power over the right-to-work enclave to the states. In any event, there is an even more fundamental state power at stake here, quite apart from the power to pass right to work laws. That is the power of a state "to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 752 (1999). The Seventh Circuit's decision undermines *that* power by prohibiting states from delegating the right-to-work issue to their subdivisions.

In sum, the Seventh Circuit's arguments "are the very kinds of arguments that the Supreme Court rejected in *Mortier* and *Ours Garage*." *United Automobile Workers*, 842 F.3d at 420. The direct conflict with this Court's decisions underscores the need for this Court's review.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION

A. The question presented is exceptionally important. As members of this Court have recognized, public debate about right-to-work laws "is currently intense." *Knox v. Service Employees*, 567 U.S. 298, 341 (2012) (Breyer, J., dissenting). In the course of that debate, many local governments have, in recent years, enacted their own local right-to-work laws. *See, e.g.*, Brenna Goth, *Local Right-to-Work Rules*

Sweep New Mexico Counties, Bloomberg News, Sept. 20, 2018; Kevin Mooney, *Amid Union Opposition, Right to Work Advances in Delaware County*, The Daily Signal, Oct. 24, 2017; Patrick Gleason, *How Right To Work Laws Are Making Inroads Even In Blue States*, Forbes, Nov. 6, 2017; Greg Kocher, *Several Kentucky counties passing or considering 'right to work' laws*, Lexington Herald-Leader, Jan. 17, 2015. The validity of local right-to-work laws is thus a recurring issue.

This issue matters to all the relevant participants. To start, the issue matters to states. Any federal law or judicial decision that tells a state that it must exercise certain powers at the statewide level, and that it may not delegate those powers to its subdivisions, strikes at "the independence of the States" by undermining its power to determine "the structure of its government … free from external interference." *Gregory*, 501 U.S. at 460. This Court recognized the significance of this intrusion upon "the basic tenets of our federal system" when it granted certiorari in *Mortier* and *Ours Garage*. *Ours Garage*, 536 U.S. at 434. The intrusion remains just as significant today, particularly in the politically charged context of right-to-work legislation.

The issue also matters to local governments, who need certainty about whether they can pass their own right-to-work laws. The typical American town or county does not have a large litigation budget or a large legal staff. A political subdivision may wish to pass a right-to-work law, yet avoid doing so just because it does not wish to get dragged into a long and bitter legal fight with labor unions. Taking up this

case and reversing the Seventh Circuit's judgment would lift that fog of legal uncertainty.

The question presented similarly matters to individual employees who do not wish to associate with private-sector unions. This Court has explained that "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus* 138 S. Ct. at 2464. It has also explained—quoting Thomas Jefferson—that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." *Id.* And the Court has emphasized that unions "can also speak out in collective bargaining on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Id.* at 2476. The Court made these points in the context of public-sector unions, but they remain true even for private-sector unions. Compulsory speech is still demeaning even if the source of the compulsion is a private employer's agreement with a union, rather than a governmental enactment. It thus matters a great deal to individual employees whether their local governments can shield them from compulsion to violate their consciences.

The question presented, similarly, matters to unions. Right-to-work laws can affect a union's ability to fill its coffers. And "union revenues" are "a matter of considerable importance to the union." *Knox*, 567 U.S. at 341 (Breyer, J., dissenting).

Finally, the question presented matters to businesses. They have an interest in knowing what terms they may and may not include in their collective-bargaining agreements with unions. They also have

an interest in knowing what local laws they must comply with, and what local laws are preempted by the NLRA. Resolving the question presented is essential to giving businesses definite answers to these questions.

B. This case is an ideal vehicle to decide the question presented. The Seventh Circuit's decision turned entirely on its interpretation of section 14(b). And nothing would hinder the Court in reviewing that interpretation. The parties agree that at least one of the unions has standing to bring the claim at issue, and the district court and the Seventh Circuit ruled that all four of the unions do. App. 4a–5a; 34a–40a; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint").

Similarly, there are no jurisdictional disputes, procedural complications, alternative holdings, or other obstacles to this Court's review. In this way, this case presents a far better candidate for certiorari than the Sixth Circuit's decision in *United Automobile Workers* did. After the Sixth Circuit upheld the county ordinance at issue there, the state passed a right-to-work law, mooting the case. *See* Petition for Certiorari, *United Automobile Workers*, 138 S. Ct. 130 (No. 16-1451), 2017 WL 2459685, at *i (raising, as the first question presented, whether the Sixth Circuit should have "vacate[d]" because "further review [wa]s precluded by mootness").

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle St.
Chicago, IL 60603

David S. Birnbaum
JONES DAY
77 West Wacker Dr.
Suite 3500
Chicago, IL 60601

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Vivek Suri
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

FEBRUARY 14, 2019