APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

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

v.

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

Nos. 17-1300, 17-1325

ARGUED MARCH 27, 2018
DECIDED SEPTEMBER 28, 2018

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 16 C 2395—Matthew F. Kennelly, *Judge*.

Before WOOD, Chief Judge, and BAUER and KANNE, Circuit Judges.

WOOD, Chief Judge.

The National Labor Relations Act and its amendments establish a national system of industrial-

labor relations. The question before us in this case is whether a municipality—specifically, the Village of Lincolnshire, Illinois—can add to or change that system through a local ordinance. Lincolnshire passed an ordinance that purports to do three things: (1) forbid the inclusion of union-security or hiring-hall provisions in collective bargaining agreements, (2) forbid the mandatory use of hiring halls, and (3) forbid dues checkoff arrangements. The Village asserted that it had the right to do so under section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), which permits *states* to bar compulsory union membership as a condition of employment. Lincolnshire contends that, as a political subdivision of Illinois, it is entitled to exercise the state's power in this respect.

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, Aerospace & Agricultural Implement Workers of America Local 3047 v. Hardin County, Kentucky*, 842 F.3d 407 (6th Cir. 2016), agreed with the Village that it does, but only for union-security clauses. The Sixth Circuit found hiring-hall and dues-checkoff provisions comparable to those in the Lincolnshire ordinance to be outside the scope of section 14(b) and thus preempted by the NLRA. 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 of either union-security or mandatory use of hiring-halls or dues-checkoffs. See *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360

(Ky. Ct. App. 1965).[1] With all due respect to our sister circuit, on the union-security clause issue we find ourselves persuaded by the position that Kentucky took, although our reasons differ somewhat.[2] We agree with both courts that localities may not address the subjects of hiring halls or dues checkoffs. We thus conclude that the authority conferred in section 14(b) does not extend to the political subdivisions of states and affirm the judgment of the district court holding Lincolnshire's ordinance preempted and without force.

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[1] Until 1976, the highest court of Kentucky was the Court of Appeals of Kentucky. Pursuant to the Amendment of May 29, 1975, effective at the beginning of 1976, Kentucky restructured its courts, and so the highest court now is the Supreme Court of Kentucky.

[2] This case reveals an interesting gap in Circuit Rule 40(e), which requires circulation to the full court when a panel decision would create a conflict with another circuit. The rule says nothing about the creation of a conflict with the highest court of a state, notwithstanding the fact that Supreme Court Rule 10(a) includes cases in which a United States court of appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." One goal of Circuit Rule 40(e) is to ensure that this court does not lightly create the type of conflict that can be resolved only through intervention by the Supreme Court. A conflict in the circuits is certainly one such situation, see S. Ct. Rule 10(a) clause 1, but as just noted, so is a conflict between a court of appeals and a state court of last resort, see S. Ct. Rule 10(a) clause 2. Given the current language of Circuit Rule 40(e), however, because this opinion would create a conflict with the Sixth Circuit, we are circulating it to all members of the court in regular active service, even though it does not create the kind of conflict described in Supreme Court Rule 10(a). No judge in regular active service wished to hear this case *en banc*. Judge Flaum did not participate in consideration of this hearing *en banc*.

I

In 2015 Lincolnshire adopted Ordinance Number 15-3389-116 ("the Ordinance"). Section 4 of the Ordinance bans union-security agreements within the Village by forbidding any requirement that workers join a union, compensate a union financially, or make payments to third parties in lieu of such contributions. Section 4(B)–(D). Section 4 also bars any requirement that employees "be recommended, approved, referred, or cleared for employment by or through a labor organization." Section 4(E). Finally, section 5 prohibits employers from making any payments to unions on a worker's behalf except pursuant to a "signed written authorization" that "may be revoked by the employee at any time by giving written notice." Section 5. The Ordinance provides both civil remedies and criminal penalties for its violation.

A collection of unions sued Lincolnshire, asserting that the National Labor Relations Act of 1935 ("Wagner Act"), as amended by the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), preempts the Ordinance. (The references in this opinion to the NLRA mean the Act as amended.) Their complaint asserts that sections 4(B)–(D), 4(E), and 5 of the Ordinance violate the Supremacy Clause and 42 U.S.C. § 1983.

The district court resolved the case on motions for summary judgment. It first found that all of the unions had standing to challenge the membership and fee provisions of section 4(A)–(D) and the checkoff regulation of section 5, but that only one of the unions could challenge the prohibition of hiring halls in

section 4(E). We find the court's analysis in this respect to be sound, and there is no need to say more, since neither side has appealed from these rulings. The district court then held all three provisions to be preempted by the NLRA. In No. 17-1300, Lincolnshire has appealed from this determination. The district court also ruled that the unions failed to state a claim under section 1983, because it understood them to be asserting *Garmon*, rather than *Machinists*, preemption claims. See *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 110–13, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). Relying on that ruling, it prevented the unions from claiming attorney's fees under 42 U.S.C. § 1988. In No. 17-1325, the unions have cross-appealed the latter decision.

II

A

Before turning to the heart of the case, we note that the unions' invocation of the Supremacy Clause was proper in this instance. Although the Supremacy Clause does not create a freestanding private right of action, *Armstrong v. Exceptional Child Ctr., Inc.*, —— U.S. ——, 135 S.Ct. 1378, 1384, 191 L.Ed.2d 471 (2015), a plaintiff may "sue to enjoin unconstitutional actions by state and federal officers" in violation of supreme federal law by invoking courts' equitable powers or through the comparable mechanisms provided by the Declaratory Judgment Act. *Restoration Risk Retention Grp., Inc. v. Gutierrez*, 880 F.3d 339, 346 (7th Cir. 2018) (quoting *Armstrong*, 135 S.Ct. at 1384). That is what the unions have done here.

B

If it were not for section 14(b), the NLRA would preempt all three aspects of Lincolnshire's Ordinance. State law must give way to federal law, the Supreme Court has explained, in a number of instances: when Congress has enacted a statute expressly preempting state law; when there is "a framework of regulation so pervasive … that Congress left no room for the States to supplement it or where there is a federal interest … so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; and when state laws conflict with federal law, either because compliance with both is a physical impossibility, or because "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012) (internal quotation marks and citations omitted); see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

The first of these possibilities is usually called field preemption, and we begin there. The Supreme Court has confirmed that section 8 of the NLRA occupies the field for any activities that it "may fairly be assumed" fall within the ambit of the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The negotiation and adoption of the types of provisions at issue here—union-security clauses, hiring-hall rules, and dues checkoffs—are such activities. *E.g.*, *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 284, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); see also *id.* at 296, 91 S.Ct. 1909

(noting that, with respect to union-security clauses, "federal concern is pervasive and its regulation complex"); *Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 409, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976).

Section 8(a)(3) of the NLRA bars, as an unfair labor practice, any "discrimination in regard to … employment or any term or condition of employment to encourage or discourage membership in any labor organization." It also provides that nothing in the NLRA "or in any other statute of the United States, shall preclude" requiring new hires to join a union within 30 days, unless specified exceptions apply. 29 U.S.C. § 158(a)(3). That is enough to conclude—again, putting section 14(b) to the side for a moment—that the union-security provisions of the Ordinance impermissibly encroach on a field that has been occupied by section 8 of the NLRA. See *Sweeney v. Pence*, 767 F.3d 654, 661 (7th Cir. 2014) (finding analogous provisions in an Indiana statute governed union membership within the meaning of section 8). The same is true of the hiring-hall and dues-checkoff provisions, although our emphasis below will be on union-security clauses, as that is the only point of disagreement between the Sixth Circuit and us.

The Supreme Court has recognized that laws banning union-security agreements clash with section 8(a)(3) and thus can be saved only if they fall within the scope of section 14(b):

> While § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law … [s]ection 14(b) allows a State or Territory to ban agreements "requiring

> membership in a labor organization as a condition of employment." We have recognized that 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 … ."

Mobil Oil Corp., 426 U.S. at 416–17, 96 S.Ct. 2140 (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)) (alteration in original). The question before the Court in *Mobil Oil* was whether Texas's right-to-work laws could override an agency-shop requirement covering unlicensed seamen who were hired in Texas, but who spent "the vast majority of their working hours on the high seas." 426 U.S. at 410, 96 S.Ct. 2140. The Court concluded that Texas law did not reach this far and that "predominant job situs is the controlling factor in determining whether, under § 14(b), a State can apply its right-to-work laws to a given employment relationship." *Id.* at 420, 96 S.Ct. 2140. Most (though not all) of the seamen's work was done on the high seas, "outside the territorial bounds of the State of Texas." *Id.* This was enough to conclude that the exception to national labor policy recognized in section 14(b) was not triggered.

In the absence of applicable legislation under section 14(b), the question whether to have a union-security agreement constitutes a mandatory subject of bargaining under the NLRA, and refusal to bargain may amount to an unfair labor practice. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744–45, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Atlas Metal Parts Co., Inc. v.*

NLRB, 660 F.2d 304, 308 (7th Cir. 1981); see also *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 759 (6th Cir. 2003); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). In states that have adopted right-to-work laws, however, the tables are turned: not only is there no duty to bargain over these clauses; the clauses themselves are forbidden as a matter of state law. See, *e.g.*, *Sweeney*, 767 F.3d at 671.

Illinois does not have a state-wide right-to-work law. Perhaps that is why Lincolnshire passed the Ordinance. But it is not such a simple matter to say that the state's power to pass such a law has been, or may be, delegated to its subdivisions. Sometimes that is true, and sometimes it is not. Lincolnshire is a home-rule city, and so we assume for present purposes that it has broad regulatory powers. Lincolnshire concedes, however, that if Illinois were to pass a specific statute *forbidding* the state's political subdivisions to legislate in this area, then it would be out of luck. We put that state-law issue to one side, however, since the broader question is whether as a matter of federal law section 14(b) authorizes political subdivisions to act in this area.

A local union-security provision would seriously undermine the objectives of the NLRA in any state that has not taken advantage of section 14(b) to forbid agency shops. The NLRA "favors permitting [union-security] agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws." *Mobil Oil Corp.*, 426 U.S. at 420, 96 S.Ct. 2140. It does this in part to avoid free-riding. *Id.* at 416, 96 S.Ct. 2140. Recognition of this aim has motivated the Supreme

Court to monitor carefully the scope of states' authority to override that policy. See *id*. at 420, 96 S. S.Ct. 2140 (holding that even though Texas may have had more contacts than any other state with the employment relationship at issue, its right-to-work law did not apply because the predominant situs of the employment was not in Texas). Lincolnshire's Ordinance undermines that congressional goal by banning any collective bargaining agreement designed to ensure that workers shoulder their portion of the costs of representation. If the State of Illinois had passed a right-to-work law, as 28 other states have done, a different congressional goal would be implicated: the one expressed in section 14(b) requiring deference to the state's choice. But as we have said, Illinois has done no such thing.

The hiring hall aspect of Lincolnshire's ordinance also runs into problems with preemption. Like the union-security part, it falls within the purview of section 8. *Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 303 n.11, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) ("Discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA."); see also *Local 357, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 365 U.S. 667, 675, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961) (noting that section 8 permits hiring halls *other than* those which are discriminatory). State regulation of hiring halls is therefore blocked by field preemption. *E.g.*, *United Auto.*, 842 F.3d at 421–22; *Laborers' Int'l Union of N. Am., Local No. 107 v. Kunco, Inc.*, 472 F.2d 456, 458 (8th Cir. 1973); *NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 770–71 (9th Cir. 1965). The use of hiring-

halls routinely has been treated as a mandatory subject of bargaining and thus hiring-hall provisions are affirmatively permitted by the NLRA. *E.g.*, *Clarett v. Nat'l Football League*, 369 F.3d 124, 140–41 (2d Cir. 2004); *Sw. Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986); *NLRB v. Sw. Sec. Equip. Corp.*, 736 F.2d 1332, 1338 (9th Cir. 1984); *NLRB v. Houston Chapter, Associated Gen. Contractors of Am., Inc.*, 349 F.2d 449, 452 (5th Cir. 1965); *Houston Chapter, Associated Gen. Contractors of Am., Inc.*, 143 N.L.R.B. 409, 415 (1963). Lincolnshire's attempt to prohibit them requires unions and employers to choose between complying with national or municipal law and thus creates an actual conflict.

Finally, Lincolnshire's dues-check-off regulation is preempted. Dues checkoff provisions are mandatory subjects of bargaining. *E.g.*, *Tribune Publ'g Co. v. NLRB*, 564 F.3d 1330, 1333 (D.C. Cir. 2009); *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1165 (5th Cir. 1976); *United Steel Workers of Am. v. NLRB*, 390 F.2d 846, 849 (D.C. Cir. 1967). Their negotiation is thus subject to section 8, and federal law requires state law to yield. *Garmon*, 359 U.S. at 244, 79 S.Ct. 773. In this respect too the Lincolnshire Ordinance threatens an actual conflict with federal law: it permits employers to remit dues only pursuant to *fully revocable* checkoffs, while federal law requires employers to bargain in good faith over checkoff proposals that bind both parties for up to *one year*.

Section 302 of the Taft-Hartley Act comprehensively regulates the payment of fees by employers, including payments to unions. 29 U.S.C. § 186. This includes a provision allowing for checkoffs to pay union fees under certain circumstances. *Id.*

§ 186(c)(4). The statutory scheme represents a careful balancing of interests and leaves no room for regulation—complementary or otherwise—by subnational units of government. See *United Auto.*, 842 F.3d at 421 ("While Hardin County maintains that its ordinance regulation of dues checkoff provisions does not actually conflict with that of the LMRA [Labor Management Relations Act], the fact remains that the activity is subject to regulation under the LMRA. Allowing dual regulation under federal and state law would undermine Congress's purposes and contravene field preemption."); *SeaPAK v. Indus., Technical & Prof'l Emps., Div. of Nat'l Mar. Union*, 300 F.Supp. 1197, 1200 (S.D. Ga. 1969), *summarily aff'd* 423 F.2d 1229 (5th Cir. 1970).

We conclude, therefore, that the Ordinance's provisions invade territory occupied by federal law. Lincolnshire can prevail only if we accept the argument that section 14(b) authorizes not just states, but also any of a state's political subdivisions, to override the background federal rules in any of the three ways set forth in the Ordinance.

III

Our starting point is the language of the statute. The Taft-Hartley Act added section 14(b) to the NLRA in 1947. See Pub.L. No. 86-257, Title VII, § 701(a). That provision reads as follows:

> **(b) Agreements requiring union membership in violation of State law**
>
> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any

> State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b). Section 14(b) is the exclusive source of states' authority to pass right-to-work laws. *Mobil Oil Corp.*, 426 U.S. at 413 n.7, 96 S.Ct. 2140. Thus, this case does not turn on whether states—as a domestic matter—may delegate some or all of their own powers to localities. Rather, it depends on whether, as a matter of statutory interpretation, Congress meant to include local laws when it referred to "State or Territorial law."

The only serious issue before us relates to the agency-shop aspect of the Ordinance. As the Sixth Circuit recognized, section 14(b) does not authorize any government—state or local—to restrict the use of hiring halls or checkoffs. *United Auto.*, 842 F.3d at 421–22. We noted the same thing in *Sweeney* when we observed that section 14(b) "applies to post-hiring union security arrangements," not to "pre-hiring practices" such as the use of hiring halls. 767 F.3d at 663 n.8. As we explained in *Sweeney*, using a hiring hall does "not require prospective employees to do anything more than temporarily visit union facilities during the hiring process." *Id.* The applicant need not make any continuing commitment to the union if and when he secures employment. Other circuits to consider the issue have come to the same conclusion. *Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613, 618–20 (5th Cir. 2016); *Kunco, Inc.*, 472 F.2d at 458–59; *United Auto.*, 842 F.3d at 421–22; *Tom Joyce Floors, Inc.*, 353 F.2d at 771.

Checkoff provisions, though they govern relationships with the union after hiring, are also different from "membership" within the meaning of section 14(b). They do not, in and of themselves, require employees either to join unions or to make any payments to them. Rather, they facilitate payments once employees have themselves made the decision to contribute to a union or to accept a job requiring that contribution. To state the matter differently, filling out a checkoff form does not determine union membership either way: "The dues checkoff section of the [Taft-Hartley] Act … far from being a union security provision, seems designed as a provision for administrative convenience in the collection of union dues. An employee could revoke the dues deduction authorization, and yet continue to pay dues personally." *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 786 (5th Cir. 1975). In short, checkoff provisions do not compel workers to pay anything. They thus do not constitute "agreements requiring membership in a labor organization" as understood by this court in *Sweeney*. 767 F.3d at 660–61. Here, too, the circuits are in agreement. *NLRB v. Shen-Mar Food Prods., Inc.*, 557 F.2d 396, 399 (4th Cir. 1977); see also *United Auto.*, 842 F.3d at 421–22; *Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d at 786.

This takes us to the central question on appeal: does section 14(b) permit a state to delegate to some or all of its subdivisions the power to ban agency shops at the local level? A devotee of the "plain language" approach to statutory interpretation might think that the answer to this question must be "no," because nothing in the language of section 14(b) refers to local

legislation: it speaks exclusively of "State or Territorial law." To state the obvious, municipalities are not states, and municipal law applies only within the regulating municipality, varying from place to place. And indeed, Congress sometimes calls out political subdivisions by name. For example, the NLRA defines "employer" to exclude "any State or political subdivision thereof." 29 U.S.C. § 152(2). Elsewhere, the Act authorizes the director of the NLRB to "establish suitable procedures for cooperation with State and local mediation agencies." 29 U.S.C. § 172(c). See *Dep't of Homeland Sec. v. MacLean*, —— U.S. ——, 135 S.Ct. 913, 919, 190 L.Ed.2d 771 (2015) (word "law" did not include regulations in statutory section that did not mention "rules" or "regulations," unlike other parts of the same law).

But Congress sometimes allows states to entrust matters arising under federal laws to lower levels of government without saying anything on the subject. In the field of anti-trust, for instance, the Supreme Court has concluded that the Sherman Act does not displace clearly established and actively supervised state regulations of economic activity. See *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). But *Parker* does not insist that qualifying legislation comes exclusively at the state level. To the contrary, as cases such as *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), demonstrate, certain municipal legislation also qualifies (with a few tweaks not pertinent here).

We prefer, therefore, not to rely on the literal terms of the statute here. Labor law is one of the rare areas in which Congress has preempted the field, and so

states have no power in the area except with respect to their own employees. True, section 14(b) cedes some power back to the states, but it makes no sense to say that states can re-delegate that power. As we explain in more detail below, no one would be able to figure out what is legal and what is not. The situation with Medicaid is similar: states have the power to choose whether to opt into Medicaid, but that power must be exercised by the state as a whole and cannot be redelegated. See 42 U.S.C. § 1396a(a)(1) (state plan for medical assistance must be in effect in all political sub-divisions of the state and be mandatory in them).

Construed the way the Village would have it, the Ordinance would put employers in and around the Village in an impossible position. An employer with offices within the Village whose workers' predominant job situs is outside the Village in a jurisdiction without a comparable law would risk committing an unfair labor practice if it *refused* to bargain over an agency-shop provision. The same employer would risk civil or criminal penalties if it misjudged "predominant" job situs and *did* bargain over an agency-shop rule, if most of its work was done within the Village. Over what period should the employer make this assessment: a week? a month? a year? The employer's duty to bargain or prohibition on bargaining might shift from day to day, or month to month, or job to job.

Construing section 14(b) to permit re-delegation would create other administrative nightmares as well. There were 38,910 general purpose governments in the United States in 2012, and more than 90,000 general and special-purpose governments combined. *Carma Hogue, Government Organization Summary Report: 2012*, U.S. CENSUS BUREAU 1 (2013),

https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf, as compared to just 50 states and a handful of territories. Illinois alone has almost 7,000 local governments. *Id*. Not only are these jurisdictions more numerous than the states by several orders of magnitude, but they are also smaller. In many trades or industries, the job sites of workers might bring them to numerous municipalities every week. Even a single plant might cross municipal lines. Lincolnshire, as of the 2010 Census, had a population of 7,275 people, and covered an area of 4.68 square miles in Lake County, Illinois. The idea that businesses operate exclusively within its borders strikes us as fanciful. Is an employee subject to an agency agreement one day, when his job takes him to nearby Chicago, and not the next day, when he happens to be working on-site in Lincolnshire? What if neighboring Buffalo Grove has the opposite law? The sensible conclusion is that section 14(b) operates only at the state level.

This reveals another problem with the Ordinance. It does not limit its effect to employees whose primary work situs is in the Village, as required by *Mobil Oil*. That case, as we noted earlier, held 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." 426 U.S. at 414, 96 S.Ct. 2140. There is no reason why this principle would not apply to political subdivisions.

Lincolnshire responds that employers already must comply with separate state laws, so why assume that

they could not do the same with municipal laws? The answer is simple: at some point a difference in degree becomes a difference in kind. Complying with 7,000 different laws in Illinois alone is quite different from making border adjustments between Illinois and Indiana, two states with different policies governing agency shops. It would be impossible as a practical matter for a collective bargaining agreement to account for each jurisdiction's ordinances. Could an employer be held liable for committing an unfair labor practice for refusing to engage in a separate round of horse-trading with workers in each locale? Has a Lincolnshire employer who just landed a lucrative contract in Chicago committed a criminal violation in Lincolnshire because it has agreed to join a multi-employer bargaining unit with an agency-shop rule that is legal at the work situs? As a practical matter, would bargaining units be limited to individual municipalities? What happens to employees who move regularly between job sites? Is a manufacturer precluded from shifting its employees between assembly lines if they would cross into a different municipality's right-to-work regime?

Permitting local legislation under section 14(b) threatens "a crazy-quilt of regulations." The "consequence of such diversity for both employers and unions would be to subject a single collective bargaining relationship to numerous regulatory schemes thereby creating an administrative burden and an incentive to abandon union security agreements." *New Mexico Fed'n of Labor, United Food & Commercial Workers Union Local 1564 v. City of Clovis*, 735 F.Supp. 999, 1002–03 (D.N.M. 1990).

Interpreting the words "State or Territory" in section 14(b) to permit delegation to local units of government would thus do violence to the broad structure of labor law—a law that places great weight on uniformity. Construing the words "State or Territory" to preclude delegation assures that only a limited number of these conflicts exists. It avoids adding an onerous and ever-shifting new factual layer to the inquiry. Similarly, it avoids introducing a new legal inquiry into the mix: did the locality have the authority to pass the ordinance in question as a matter of state law? Some units of local government have home-rule authority, others do not; some are special-purpose, others are general-purpose. The variations both within states and from state to state are endless.

The consequences for the uniformity of national labor law would be catastrophic. The Supreme Court has said that Congress enacted the NLRA to create national uniformity in labor law, *NLRB v. Nash–Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) (quoting *Garner v. Teamsters, Chauffeurs & Helpers Local Union*, 346 U.S. 485, 490, 74 S.Ct. 161, 98 L.Ed. 228 (1953)); see also *Cannon v. Edgar*, 33 F.3d 880, 883 (7th Cir. 1994), and to minimize industrial strife, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41, 45, 57 S.Ct. 615, 81 L.Ed. 893 (1937). While section 14(b) represents a decision that some variation at the state and territorial level is acceptable, that does not mean that national uniformity itself has been abandoned as a goal. Notably, while the parties cite extensively to the legislative history of the Wagner and Taft-Hartley Acts, the congressional debates' repeated references to

safeguarding state authority contain no mention of local autonomy.

Against these concerns, the Sixth Circuit, in *United Auto*., and Lincolnshire offer in support of the possibility of delegation under section 14(b) two decisions from the Supreme Court in other areas of law, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), and *City of Columbus v. Ours Garage & Wrecker Service, Inc*., 536 U.S. 424, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Neither *Mortier* nor *Ours Garage*, however, abandoned the principle that the meaning of words in a statute "depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973) (holding that same phrase, "State or Territory," encompasses the District of Columbia when used in 42 U.S.C. § 1982 but excludes the District when used in the context of a prior version of 42 U.S.C. § 1983, *id*. at 421–32, 93 S.Ct. 602).

Mortier concerned the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq*. At that time, FIFRA stated that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v. It expressly defined "State" to include states, the District of Columbia, and various U.S. territories, without any mention of subdivisions. *Id*. at § 136(aa). The Court noted, however, that nothing in either the statute or its legislative history suggested preemption of local regulation. *Mortier*, 501 U.S. at 607–08, 611–12, 614–16, 111 S.Ct. 2476. Indeed, it found clues in the

statutory language indicating that the exclusion of local authorities would have created tensions within the Act:

> [For example,] § 136f(b) requires manufacturers to produce records … upon the request of any employee of the EPA "or of any State or *political subdivision*, duly designated by the Administrator." Section 136u(a)(1), however, authorizes the Administrator to "delegate to any State … the authority to cooperate in the enforcement of this [Act] through the use of its personnel." If the use of "State" in FIFRA impliedly excludes subdivisions, it is unclear why the one provision would allow the designation of local officials for enforcement purposes while the other would prohibit local enforcement authority altogether.

Mortier, 501 U.S. at 608–09, 111 S.Ct. 2476 (emphasis added).

Mortier concluded that for FIFRA, the failure to mention political subdivisions was not enough to support an inference that Congress had forbidden all local regulation. This, as we already have noted, contrasts sharply with the scope of the NLRA and the Court's consistent interpretation of it. Moreover, *Mortier* asked not whether the mention of "State" in section 136v authorized localities to regulate matters otherwise beyond their remit, but rather whether that word alone forbade them from exercising such power. *Id*. at 614, 111 S.Ct. 2476. In other words, the first question in *Mortier* was whether FIFRA had any preemptive effect at all. Federal statutes do not supersede a state's "historic police powers … unless

that was the clear and manifest purpose of Congress," *id*. at 605, 111 S.Ct. 2476 (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. 1146), and, as a baseline assumption, political subdivisions are understood as "components" of the state for purposes of the police power. *Id*. at 608, 111 S.Ct. 2476; see also *id*. at 607–08, 111 S.Ct. 2476 (citing, *inter alia*, *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 52 L.Ed. 151 (1907)). That is why the mere reference to states in section 136v gave no reason to suspect that Congress implicitly intended to supplant local regulation—let alone that this silence was a clear and manifest statement of such a purpose.

Mortier did suggest that the Supreme Court would still have concluded that section 136v affirmatively authorized the delegation to local governments of the authority to implement FIFRA (an environmental law regulating pesticide use). The ability to regulate noxious substances has been part of the police power since time out of mind. The Supreme Court assumes that "the historic police powers of the States" are not to be superseded by federal law unless that was "the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008). The Court found no such purpose in *Mortier*. The federal labor laws, as we already have explained, are a different matter altogether. As the Kentucky Court of Appeals indicated, 391 S.W.2d at 362, we should construe exceptions to the NLRA carefully, with an eye both to the scope of the exception and to its effect on the remainder of the law.

Ours Garage is also distinguishable. There an express preemption provision in the Interstate Commerce Act generally forbade "a State, political subdivision of a State, or political authority of 2 or

more States" to adopt regulations "related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The law said, however, that it would not "restrict the safety regulatory authority of a State with respect to motor vehicles." *Id*. at § 14501(c)(2)(A). Despite the omission of any reference to political subdivisions in the latter clause, the Supreme Court held that states could delegate their preserved authority to localities. *Ours Garage*, 536 U.S. at 428–29, 122 S.Ct. 2226. As the Court wrote, "[a]bsent a clear statement to the contrary, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." *Id*. at 429, 122 S.Ct. 2226.

Ours Garage acknowledged that it presented a "closer call" than was the case in *Mortier*. *Id*. at 433, 122 S.Ct. 2226. The general preemption provision (49 U.S.C. § 14501(c)(1)) "explicitly preempt[ed] regulation both by a State and by a political subdivision of a State." *Id*. Yet there were other parts of the statute that said nothing about political subdivisions. The Court concluded as follows:

> We acknowledge that § 14501(c)'s disparate inclusion [and] exclusion of the words "political subdivisions" support an argument of some force, one that could not have been made in *Mortier*. Nevertheless, reading § 14501(c)'s set of exceptions in combination, and with a view to the basic tenets of our federal system pivotal in *Mortier*, we conclude that the statute does not provide the requisite clear and manifest

> indication that Congress sought to supplant local authority.

536 U.S. at 434, 122 S.Ct. 2226 (internal quotation marks omitted).

Ours Garage, like *Mortier*, concerned the scope of an express preemption provision and therefore (as the excerpt above shows) was governed by the rule that the Court requires a "clear and manifest indication that Congress sought to supplant local authority." *Id.* Section 14(b) plays a different function. It is not the source of NLRA preemption; rather, it is an exception to the general preemption established in the Act for the field of labor relations. The question is only how much subnational authority does section 14(b) *restore*.

Ours Garage depended heavily on an extensive contextual analysis that looked to other parts of section 14501(c)—provisions that have no corollary in the NLRA. *E.g.*, *Ours Garage*, 536 U.S. at 434–36, 122 S.Ct. 2226. It is also significant that *Ours Garage* concerned a local safety regulation, which is the type of law that raises concerns about undue interference with the states' police power. *Id.* at 437, 438, 122 S.Ct. 2226. Although states once used their police powers to enact sweeping anti-labor laws, for nearly a century the regulation of unions has rested with the federal, rather than state, government. Finally, the Court emphasized that the Interstate Commerce Act primarily concerned itself with economic regulation, while the local ordinance addressed traditional safety concerns. *Id.* at 440–42, 122 S.Ct. 2226. Municipalities could legislate on the latter topic without directly offending the statute's central goals. In contrast, Lincolnshire's regulation addresses

collective bargaining head-on—the central concern of the NLRA.

Lincolnshire finally argues that, because local governments are creatures of the state, they can *always* exercise under federal law any powers Congress has given to the state, if the state in turn has delegated those powers to its subdivisions. *Hunter*, 207 U.S. at 178, 28 S.Ct. 40. As we already have pointed out, however, the rule is more nuanced: sometimes Congress allows redelegation, as in *Mortier*, *Ours Garage*, and *Parker*, and sometimes it does not, as in the Medicaid example we gave. The aspect of labor law governed by section 14(b) of the NLRA, we conclude, falls in the latter category.

IV

We thus agree with the unions that the district court correctly found preemption of the Ordinance with respect to all three of the aspects at issue: the agency shop, the hiring hall, and the dues checkoff. This disposes of Appeal No. 17-1300. As we noted briefly at the outset, the unions filed a cross-appeal, No. 17-1325, in which they sought damages under 42 U.S.C. § 1983 for Lincolnshire's violation of their rights. Such a claim is possible only if the unions were able to show preemption under the Supreme Court's *Machinists* decision, which recognizes that some state legislation is preempted because it interferes with Congress's intention that the conduct involved be left to the "free play of economic forces." *Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 140–41, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (internal quotation marks omitted). *Garmon* preemption, in contrast, addresses

the problem of state regulation that would interfere with the primary jurisdiction of the National Labor Relations Board. *Id*. at 138, 96 S.Ct. 2548. It does not involve the kind of personal right that would support a claim under section 1983.

We conclude that the union's attempt to bring a *Machinists* claim comes too late. In the district court, the unions' brief in support of their own motion for summary judgment made no mention of section 1983. While a page of their brief in opposition to Lincolnshire's competing motion did touch on the subject, it mentioned neither *Garmon* nor *Machinists* preemption and thus made no evident effort to situate the claim in the latter camp. "[A] party [that] fails to adequately present an issue to the district court has waived the issue for purposes of appeal … even though the issue may have been before the district court in more general terms." *Fed-nav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010). We cannot say that the unions fairly presented their position to the district court. Nor can we fault the district court for failing to anticipate the unions' arguments for why *Machinists* preemption applies. We thus see no reason to disturb the district court's judgment in this respect either on the merits or with regard to attorneys' fees.

V

Section 14(b) of the NLRA does not permit local governments on their own authority to ban agency-shop, hiring hall, or checkoff agreements. In the absence of an applicable state law with respect to the agency-shop, as here, all three measures are preempted by federal law. Finally, the unions failed to properly preserve their claim under section 1983,

and so the district court did not err by dismissing it. We therefore AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

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,
Plaintiffs,

v.

VILLAGE OF LINCOLNSHIRE, ILLINOIS; Peter Kinsey, Chief of Police; Elizabeth Brandt, Mayor; and Barbara Mastandrea, Village Clerk,
Defendants.

Case No. 16 C 2395
Signed 01/07/2017

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In December 2015, the Village of Lincolnshire adopted an ordinance that imposed new restrictions on

labor relations between labor unions, employers, and employees. The plaintiffs, four unions that operate in Lincolnshire (the Unions), challenge the ordinance, alleging that it is invalid under the Supremacy Clause and deprives the Unions of their rights in violation of 42 U.S.C. § 1983. The Unions have moved for summary judgment. The defendants have filed a cross-motion for summary judgment, contending that each of the Unions lacks standing to bring at least one of the claims and that the Unions' claims lack merit.

For the reasons stated below, the Court concludes that three of the four unions lack standing to challenge a particular part of the Lincolnshire ordinance and that none of the unions may bring claims under section 1983 but otherwise denies defendants' motion for summary judgment. The Court concludes that all four unions have standing to challenge the remaining parts of the ordinance. The Court therefore grants summary judgment on the preemption claims in favor of all four unions, finding that federal law preempts the challenged provisions of the Lincolnshire ordinance.

Background

The plaintiffs are four labor organizations that operate within Lincolnshire. International Union of Operating Engineers, Local 399, AFL–CIO (Local 399) is the collective bargaining representative for a bargaining unit composed of workers at Colliers International Asset and Property Management, LLC in Lincolnshire. Compl. ¶ 5. International Union of Operating Engineers, Local 150, AFL–CIO (Local 150) is the collective bargaining representative for seven separate bargaining units with various businesses in Lincolnshire, including Central Boring, Inc.; Dick's

Heavy Equipment Repair; C.R. Nelson Landscaping; Accurate Group, Inc.; D.C.S. Trucking Co.; Johler Demolition Inc.; and Revcon Construction Corp. *Id.* ¶ 6. Local 150 also alleges that it is the representative for numerous other units of employees who are likely to perform work in Lincolnshire in the future. *Id.* ¶ 8.

Construction and General Laborers' District Council of Chicago and Vicinity, Laborers International Union of North America, AFL–CIO (LDC) is party to three collective bargaining agreements that cover employees of employers located in Lincolnshire, including Central Boring, Inc.; Johler Demolition, Inc.; and Revcon Construction Corp. *Id.* ¶ 9. LDC also alleges that it is the representative for numerous other units of employees who are likely to perform work in Lincolnshire in the future. *Id.* ¶ 11. Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (CRC) is party to collective bargaining agreements covering units of employees who were scheduled to perform work in Lincolnshire starting in the spring of 2016. Compl. ¶ 13. CRC also alleges that it is the representative for numerous other units of employees who are likely to perform work in Lincolnshire in the future. Compl. ¶ 14.

Lincolnshire is a "home rule" unit as defined in the Illinois Constitution, meaning that it can "exercise any power and perform any function pertaining to its government and affairs." *See* Pls.' Corrected Br. in Supp. of Mot. for Summ. J. (Pls.' Opening Brief) at 1; Ill. Const. Art. VII, § 6. In December 2015, Lincolnshire passed Ordinance No. 15–3389–116. Pls.' Opening Br. at 1. In relevant part, the ordinance provides:

SECTION 4: GUARANTEE OF EMPLOYEE RIGHTS

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

(A) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;

(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; or

(E) to be recommended, approved, referred, or cleared for employment by or through a labor organization.

SECTION 5: VOLUNTARY DEDUCTIONS PROTECTED

For employers located in the Village, it shall be unlawful to deduct from the wages, earnings, or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization unless the employee has first presented, and the

> employer has received, 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.

Pls.' Resp. to Defs.' Stat. of Facts, Tab 13 Ex. C, 02475–76.

The Unions filed suit against Lincolnshire and three Lincolnshire officials in their official capacity: Chief of Police Peter Kinsey; Mayor Elizabeth Brandt; and Village Clerk Barbara Mastandrea. Compl. ¶¶ 15–18. The Unions contend that the quoted portions of the ordinance are preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–69, and the Labor–Management Relations Act (LMRA), 29 U.S.C. §§ 401–531. *See* Pls.' Opening Brief at 1, 17–19. In particular, the Unions contend that sections 4(A)–(D) of the ordinance prohibit what are known as "union security agreements" and as such are preempted by the NLRA. Compl. ¶¶ 32–37. In count 2, the Unions allege that section 4(E) of the ordinance prohibits what are known as "hiring hall provisions" and that this section is likewise preempted by the NLRA. *Id.* ¶ 38. Finally, the Unions allege in count 3 that section 5 restricts what are known as "check-off provisions" and is preempted by the NLRA and the LMRA. *Id.* ¶ 40. On all three counts, the Unions request declaratory and injunctive relief, as well as damages and attorneys' fees as authorized by 42 U.S.C. § 1988. *Id.* ¶¶ 37, 39, 41.

Discussion

The Unions have moved for summary judgment, arguing that the quoted provisions of the Lincolnshire

ordinance are preempted by federal law and that the Unions are entitled to judgment on the merits. Lincolnshire[1] has cross-moved for summary judgment, arguing that the Unions lack standing to bring these claims and that all four Unions' claims lack merit. The Court first addresses the issue of standing and the viability of the Unions' claim under 42 U.S.C. § 1983 and then addresses the preemption issue, which is argued in both sides' motions.

In considering each side's motion for summary judgment, the Court views the evidence in the light most favorable to the moving party and draws reasonable inferences in that party's favor. *See Calumet River Fleeting, Inc. v. Int'l Union of Operating Eng'rs, Local 150, AFL–CIO*, 824 F.3d 645, 647–48 (7th Cir. 2016). Summary judgment is appropriate only when there is no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. *Int'l Union, United Auto., Aerospace & Agric. Imple ment Workers of Am., and its Local 2343 v. ZF Boge Elastmetall LLC*, 649 F.3d 641, 646 (7th Cir. 2011).

I. Standing

In order to bring a claim in federal court, a plaintiff must have standing as required by Article III of the Constitution. *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 587 (7th Cir. 2016). To have standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the

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[1] Because the defendants have filed their motion and responses collectively, the Court will use the term "Lincolnshire" to refer to both the Village and the individual defendants.

defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. at 587–88 (citing *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)). In response to a motion for summary judgment, the plaintiff bears the burden of establishing standing by setting forth specific facts through affidavits or other evidence. *Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 771 (7th Cir. 2013).

The Unions allege that they are the collective bargaining representatives for various units of employees who are employed by companies located in Lincolnshire. The Unions allege that they have negotiated collective bargaining agreements on behalf of these employees that contain provisions now prohibited by the ordinance. The Unions further contend that the ordinance will invalidate these agreements and prevent the Unions from negotiating agreements with similar provisions in the future. In this way, the Unions allege that they have been injured by Lincolnshire's adoption of the ordinance and that this injury can be addressed through the requested relief. Lincolnshire contends that this is insufficient to establish the Unions' standing to challenge the ordinance.

It appears that the Supreme Court has not directly addressed what constitutes standing to bring a preemption challenge to state or local ordinances based on the NLRA or the LMRA. But in *Oil, Chemical & Atomic Workers International Union, AFL–CIO v. Mobil Oil Corp.*, 426 U.S. 407, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976), the Supreme Court held that laws like the one at issue here, commonly referred to as "right-to-work laws," apply only to employees

whose "predominant job situs" is located within the jurisdiction that passed the ordinance. *Id.* at 412–14, 96 S.Ct. 2140. It would appear, therefore, that Lincolnshire's ordinance imposes limits on the Unions' agreements—and thus generates an injury sufficient to confer standing—only if the Unions represent employees who work *predominantly* in Lincolnshire under agreements containing provisions prohibited by the ordinance.

A. Local 399

Lincolnshire concedes that Local 399 has standing to bring counts 1 and 3. Defs.' Mem. in Supp. of Mot. for Summ. J. and Resp. in Opp'n to Pls.' Mot. for Summ. J. (Defs.' Opening Br.) at 4. Lincolnshire argues that Local 399 lacks standing to bring count 2 because it has not alleged that it has entered into any agreements containing the hiring hall provisions prohibited by section 4(E). Defs.' Opening Br. at 8. The Unions do not dispute this contention. *See* Pls.' Resp. Br. in Opp'n to Defs.' Mot. for Summ. J. (Pls.' Reply) at 1 n.1 (indicating only that Local 399 has entered into agreements containing union security agreements and check-off provisions). The Court therefore concludes that Local 399 lacks standing to bring count 2.

B. Local 150

Lincolnshire next argues that Local 150 lacks standing to bring any of the claims alleged in the complaint. Defs.' Opening Br. at 5–6, 8–9. Lincolnshire says that Local 150 has failed to establish that it will be affected by the ordinance, because it has not shown that it represents any employee whose predominant job site is in Lincolnshire. *Id.* at 5. The

Court finds, however, that the Unions have established that employees represented by Local 150 work predominantly in Lincolnshire.

Local 150 submitted declarations by two of its members who meet the requirements for standing. One member, Roberto Zavala, stated that he works for Revcon Construction Corp., located in Lincolnshire. Pls.' Resp. to Defs.' Stat. of Facts, Tab 10 (Zavala Decl.) ¶ 2. Zavala further indicated that he spends the "vast majority of [his] workday, about 80% to 90%" working at Revcon's facility in Lincolnshire. *Id.* ¶ 3. Finally, Zavala stated that his employment is governed by the MARBA Illinois Building Agreement, which contains a union security clause, a hiring hall provision, and a check-off provision. *Id.* ¶ 4. Mark Beinlich, another Local 150 member, made similar statements. Specifically, he indicated that he works for Dick's Heavy Equipment Repair, also located in Lincolnshire. Pls.' Resp. to Defs.' Stat. of Facts, Tab 11 (Beinlich Decl.) ¶ 2. Beinlich stated that every day he reports to a facility in Lincolnshire and spends "50% to 60% of [his] workday" at this facility. *Id.* ¶ 3. These affidavits are sufficient to establish that Local 150 represents employees whose predominant job site is in Lincolnshire.

Lincolnshire argues that this Court should prohibit Local 150 from using these declarations in support of its motion. *See* Defs.' Reply at 10–11. Lincolnshire says that it served Local 150 with interrogatories requesting the names of every member currently working in Lincolnshire, as well as the number of hours these members spend there. *Id.* Local 150 declined to provide this information on the grounds that it was "irrelevant, cumulative, and overly

burdensome." *See*, *e.g.*, Defs.' Reply, Tab 1 (Answers to Interrogs.) at 3. As a result, Lincolnshire argues, the Court should preclude Local 150 from using this information to support its response to Lincolnshire's motion under Federal Rule of Civil Procedure 37, which says that if a party fails to provide information as required by the rules of discovery, "the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Lincolnshire has not, however, identified any harm from the late disclosure of this information. The Court finds the late disclosure was harmless under Rule 37(c)(1).

Local 150 has established that it represents employees whose predominant work site is in Lincolnshire and that at least one of these employees is party to an agreement containing the types of provisions prohibited by the ordinance. The Court therefore concludes that Local 150 has standing to bring all three claims.

C. LDC

Like Local 399, LDC appears to concede that it does not have standing to bring count 2, as it alleges only that it has entered into agreements "containing union security and check-off clauses," and not containing hiring hall provisions. *See* Pls.' Reply at 1 n.1. Lincolnshire argues that LDC also lacks standing to bring counts 1 and 3, on the grounds that it has not "identified a single employee it represents who actually spends most of his or her working hours in Lincolnshire." Defs.' Opening Br. at 7; *see also id.* at 8–9.

Two of the declarations that LDC points to in support of its standing do not permit an inference that any LDC members have Lincolnshire as their primary job site. The declaration of James Connolly, LDC's business manager, only discusses the bargaining agreements between LDC and the various employers and does not provide any evidence concerning how often LDC members worked in Lincolnshire. *See* Pls.' Stat. of Uncontested Facts, Tab 6 (Connolly Decl.). Further, the declaration of Daniel Davis, a member of LDC, is insufficient to permit the conclusion that LDC has standing. Davis states that he works for Central Boring, Inc., which is located in Lincolnshire. *Id*., Tab 7 (Davis Decl.) ¶¶ 1–2. Although Davis states that he regularly works out of a facility in Lincolnshire, he describes this as "usually at least once a week." *Id*. ¶ 3. This is insufficient, without more, to meet the predominance standard in *Mobil Oil*. Further, although Davis states that he reports his hours to supervisors at Lincolnshire and receives his paycheck from there, *id*. ¶ 4, the Supreme Court has indicated that these factors are insignificant in determining whether local labor laws apply to a particular employee. *See Mobil Oil*, 426 U.S. at 418, 96 S.Ct. 2140.

The declaration of Edwin Stuckey, however, supports an inference that LDC has members whose primary job site is in Lincolnshire. Stuckey is the president of Stuckey Construction Company and party to an agreement with LDC. Pls.' Stat. of Uncontested Facts, Tab 8 (Stuckey Decl.) ¶¶ 1–2. Stuckey states that, from 2011 to 2014, he regularly employed LDC members to perform work for elementary schools in Lincolnshire. *Id*. ¶ 5. Further, Stuckey states that he

currently employs LDC members who are working on a project at Stevenson High School in Lincolnshire. *Id*. ¶ 6. Lincolnshire argues that this evidence is insufficient to establish LDC's standing to challenge the ordinance as Stuckey does not "identify any employee who spends, has spent, or will spend the majority of his or her working hours in Lincolnshire." Def.'s Opening Br. at 7–8. But Lincolnshire does not identify any viable reason why identification of specific employees is required. Stuckey's affidavit is sufficient to carry LDC's burden to establish standing, and Lincolnshire has offered no contrary evidence. The Court finds that LDC has established its standing to bring counts 1 and 3.

D. CRC

Like Local 399 and LDC, CRC appears to concede that it does not have standing to bring count 2, as it likewise has not entered into agreements containing hiring hall provisions. *See* Pls.' Resp. at 1 n.1. Lincolnshire argues that CRC lacks standing to bring counts 1 and 3 on the ground that it has not "alleged, let alone shown, that any unionized employee of either company" party to agreements with CRC "has ever performed any work in Lincolnshire." Defs.' Opening Br. at 8–9.

CRC has provided sufficient evidence to establish its standing to bring counts 1 and 3. CRC provides the declaration of Robert Lid, CRC's contract and bonds manager, who states that CRC has agreements with Interior Investments and Build Corps, both of which are located in Lincolnshire. *See* Pls.' Stat. of Uncontested Facts, Tab 9 (Decl. of Robert Lid) ¶¶ 6–7. Lid further indicates that Interior Investments

employs approximately fifty CRC members and that Build Corps employs four CRC members. *Id.* ¶¶ 6–7. Finally, Lid states that approximately 3,000 contractors are signatories to an agreement with CRC and have the ability to bid on and perform work in Lincolnshire. *Id.* ¶ 9. In conjunction with his declaration, Lid also provides reporting documents on Interior Investments and Build Corps that support his employment estimates. *See* Decl. of Robert Lid, Exs. C & D.

In response, Lincolnshire again argues only that CRC's failure to identify particular employees renders its evidence insufficient. Def.'s Opening Br. at 8. The Court disagrees. Lid's affidavit is sufficient to establish that CRC has members who work predominantly in Lincolnshire.

5. Summary

The Court concludes that Local 399, LDC, and CRC each have standing to bring counts 1 and 3 but lack standing to bring count 2 and therefore grants Lincolnshire's motion for summary judgment to that extent only. The Court concludes that Local 150 has standing to bring all three counts and therefore denies Lincolnshire's motion for summary judgment on the standing issue.

II. Section 1983 claim

The Unions have brought all three claims under both the Supremacy Clause of the Constitution and 42 U.S.C. § 1983. Compl. ¶ 1. In its cross-motion for summary judgment, Lincolnshire argues that the Unions have failed to state a claim under section 1983 because they cannot show that Lincolnshire violated a federally protected right. Defs.' Opening Br. at 24–25.

The Supreme Court has held that the NLRA creates rights for labor and management that are "enforceable against governmental interference in an action under § 1983." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108–09, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). This appears to apply, however, only for certain types of preemption claims based on the NLRA. The Court has identified two types of preemption under the NLRA. *Chamber of Commerce v. Brown*, 554 U.S. 60, 65, 128 S.Ct. 2408, 171 L.Ed.2d 264 (2008). The first, known as *Garmon* preemption, prohibits states from regulating activity that the NLRA protects or prohibits. *Id.* The second, known as *Machinists* preemption, prohibits interference by states and the National Labor Relations Board (NLRB) on the ground that Congress intended certain conduct "to be controlled by the free play of economic forces." *Id.* The Court in *Golden State* found that the NLRA implicitly establishes a federal right protected by section 1983 based on a *Machinists* preemption challenge. *Golden State*, 493 U.S. at 112, 110 S.Ct. 444. In doing so, the Supreme Court expressly distinguished a challenge based on *Garmon* preemption. *See Id.* The Court stated that "[t]he *Machinists* rule is not designed—as is the *Garmon* rule—to answer the question whether state or federal regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty." *Id.* Golden Gate therefore suggests that *Machinists* preemption claims are based on a personal liberty protected by section 1983, whereas *Garmon* preemption claims are not. In a subsequent case, the Court again indicated that *Garmon* preemption claims

and *Machinists* preemption claims may be treated differently for the purpose of claims brought under section 1983. *See Livadas v. Bradshaw*, 512 U.S. 107, 133 & n.27, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) (suggesting that *Garmon* preemption is "fundamentally different" from *Machinists* preemption and that this difference may be significant when deciding the availability of section 1983 relief).

The Unions appear to have brought their claims as *Garmon* preemption claims. They do not argue that Lincolnshire has abridged a right or course of conduct that Congress intended to leave to the control of the free market. Instead, the Unions argue that Lincolnshire has attempted to regulate an area otherwise reserved to the federal government through the NLRA. The Unions' claims therefore do not fall within the reach of section 1983 as established by *Golden State*. The Court therefore dismisses the Unions' claims under 42 U.S.C. § 1983. The Court evaluates the Unions' claims under the Supremacy Clause in the section that follows.

III. Preemption claim

The Unions argue that the challenged provisions of the ordinance are preempted by the NLRA and that the Unions are entitled to judgment as a matter of law. Pls.' Opening Br. at 1. In its cross-motion, Lincolnshire argues that the ordinance falls under a preemption exception in the NLRA and that therefore Lincolnshire is entitled to summary judgment.

A. Count 1

In count 1, the Unions claim that sections 4(A)–(D) of the Lincolnshire ordinance are preempted by the NLRA. Compl. ¶¶ 32–37. They contend that the

NLRA generally preempts state and local regulation of labor relations. Further, the Unions argue that the preemption exception created by 29 U.S.C. § 164(b) applies only to state, and not local, ordinances.

It is well-accepted "that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). Thus states "may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* The NLRA does, however, create a single exception. The NLRA states that it shall not 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). The Supreme Court has interpreted section 164(b) as creating an exception to the NLRA's "national policy that certain union-security agreements are valid as a matter of law" in that it permits "any State or Territory that wishes" to exempt itself from that policy. *Mobil Oil*, 426 U.S. at 416–17, 96 S.Ct. 2140; *see also Sweeney v. Pence*, 767 F.3d 654, 659–660 (7th Cir. 2014). In other words, section 164(b) permits states to regulate or prohibit the use of union security agreements.

Both parties appear to agree that the ordinance provisions challenged in count 1 prohibit union security agreements, which are agreements that require union membership as a condition of employment. *See* Pls.' Opening Br. at 3 & n.2; Defs.' Opening Br. at 9–14. There is no question if the State

of Illinois had adopted a statute enacting the same provisions at issue in count 1, the provisions would not be preempted by the NLRA, as they would fall within the exception created by section 164(b). *See* Pls.' Opening Br. at 5. The Unions argue, however, that the exception in section 164(b) does not extend to local law and therefore does not permit Lincolnshire, a municipality, to prohibit union security agreements. Pls.' Opening Br. at 6.

Neither the Supreme Court nor the Seventh Circuit has expressly addressed whether the power given to states and territories in the NLRA to prohibit union security agreements extends to political subdivisions of the state. In considering the same question regarding other statutes, however, the Supreme Court has indicated that whether an exception for state regulation also extends to local regulation depends on whether Congress, in enacting the statute, intended to occupy the entire field. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (considering preemption of local law under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)). When a federal statute preempts a particular field but provides an exception for regulation by a state, the statute should not be read as *restricting* only a narrow set of state regulation—i.e., that which falls outside of the exception. *Id.* at 616, 111 S.Ct. 2476 (Scalia, J., concurring). If this were so, it would make sense to conclude that the local subdivisions faced the same narrow restriction and were otherwise free to regulate. *Id.* Instead, where the statute preempts a particular field, the statute should be read as *authorizing* only a narrow set of state regulation, in which case it makes sense that

only states and not their subdivisions would benefit from this limited authorization. *Id.* In other words, when Congress has intended a statute to preempt regulation in that field, any exception to such preemption must be read as a narrow authorization—as opposed to an expansive protection—of state regulation. Therefore if the NLRA preempts the field of union security agreements, the exception for state regulation in section 164(b) does not extend to regulation by local subdivisions.

1. Preemption

A review of the language and history of the NLRA indicates that Congress intended to preempt the field of union security agreements. The language of section 164(b) only refers to state law. The section provides that the NLRA does not authorize union security agreements "in any State or Territory" where "State or Territorial law" prohibits these agreements. The provision avoids any mention of local law, in contrast to section 164(a), which says that no employer is required to deem individuals as supervisors "for the purpose of any law, either national or local," 29 U.S.C. § 164(a), and the Fair Labor Standards Act (FLSA), passed around the same time, which says that nothing in the FLSA "shall excuse noncompliance with any Federal or State law or municipal ordinance. . . ." 29 U.S.C. § 218(a). Thus, in contemplating the scope of a national policy on labor relations, Congress clearly articulated when local ordinances can override this policy. Section 164(b) evinces no such intent, and its exception therefore extends only to state law.

The legislative history further supports the conclusion that Congress intended to preempt the field

of union security agreements. As noted by the Supreme Court, the House Report on the NLRA itself stated that "by the Labor Act Congress preempts the field that the act covers." *Retail Clerks Int'l Ass'n, Local 1625, AFL–CIO v. Schermerhorn*, 375 U.S. 96, 101 n.8, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963) (quoting H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 44). The Court then went on to conclude that Congress added section 164(b) to make clear that the NLRA did not preempt state law on the particular topic covered by that section. *See id.* In doing so, the Court did note that Congress "chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by [§ 164(b)] and decided to suffer a medley of attitudes and philosophies on the subject." *Id.* at 104–05, 84 S.Ct. 219. But the issue before the Court was "whether the Congress had precluded *state enforcement of select state laws* adopted pursuant to its authority." *Id.* at 103, 84 S.Ct. 219 (emphasis added). The Court went on to conclude that the "special legislative history" of the NLRA required "[s]tate power . . . to exist alongside of federal power," *id.* at 104, 84 S.Ct. 219, in light of the purpose of "avoid[ing] federal interference with *state* laws in this field," *id.* at 102, 84 S.Ct. 219 (emphasis added). *Schermerhorn* therefore does not contradict the conclusion that Congress intended to preempt the field of union security agreements, leaving an exception only for regulation by the states. And as discussed by Justice Scalia in *Mortimer*, this congressional intent to preempt thus makes it reasonable to interpret section 164(b) as a narrow authorization that does not extend to local regulation of union security agreements.

Finally, extending the preemption exception to local ordinances would create an impossibly disparate system that would undermine Congress's intent to create uniformity in the regulation of labor relations. The Supreme Court has held that the NLRA "articulates a national policy that certain union-security agreements are valid as a matter of federal law." *Mobil Oil*, 426 U.S. at 417, 96 S.Ct. 2140. Though section 164(b) permits a narrow exception for authorized state regulation, it is highly unlikely that Congress intended to subject this national policy to the patchwork scheme that would result from city-by-city or county-by-county regulation of such agreements. If the NLRA permitted local governmental entities to enact their own laws regarding union security agreements, "[t]he result would be a crazy-quilt of regulations within the various states." *See N.M. Fed'n of Labor, United Food and Commercial Workers Union Local 1564 v. City of Clovis*, 735 F.Supp. 999, 1002 (D.N.M. 1990). And because unions often enter into agreements that cover employees across multiple cities and towns within a given state, these agreements would be subject to multiple, potentially conflicting, laws. This would make it difficult for unions to comply with local law and would create a strong "incentive to abandon union security agreements," thereby undermining Congress's creation of a federal policy in favor of such agreements. *Id*. at 1003. And the Supreme Court in *Mobil Oil* indicated that section 164(b) should be interpreted such 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." *See Mobil Oil*, 426 U.S. at 419, 96

S.Ct. 2140. In sum, the Court concludes that section 164(b) does not permit local subdivisions to regulate union security agreements.

2. Mortier and Ours Garage

In arguing that the exception under section 164(b) extends to local laws, Lincolnshire points to two decisions by the Supreme Court addressing a parallel issue in the context of other statutes. Although the Court ruled in both cases that a statutory preemption exception for state regulation extended to local subdivisions as well, the statutes in those cases are distinguishable from the NLRA and therefore do not persuade this Court to find that the same extension applies here.

In *Mortier*, mentioned above, the Court considered a provision of FIFRA which provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State." *Mortier*, 501 U.S. at 606, 111 S.Ct. 2476 (citing 7 U.S.C. § 136v(a)). The Court first concluded that FIFRA is not "a comprehensive statute that occupie[s] the field of pesticide regulation," finding that there was neither a clear indication that Congress intended this result nor evidence from which to infer preemption. *Mortier*, 501 U.S. at 612, 111 S.Ct. 2476. Because FIFRA does not preempt the field, the Court held that the reference to "States" in section 136v(a) preserves state power in this area, which includes a state's ability to allocate its regulatory authority to political subdivisions. *Id.* at 612, 608, 111 S.Ct. 2476.

As discussed above, Congress—in adopting the NLRA—intended to create a federal policy in favor of union security agreements and otherwise preempt the

field in order to impose greater uniformity in the regulation of labor relations. The NLRA is therefore distinguishable from FIFRA and *Mortier*'s determination that the Act's exception for state regulations extends to local regulation as well. Because the NLRA preempts regulation in this area, the exception for state authority in section 164(b) only "authoriz[es] certain types of state regulation (for which purpose it makes eminent sense to authorize States but not their subdivisions)." *See id.* at 616, 111 S.Ct. 2476 (Scalia, J., concurring).

This holding is likewise consistent with the Supreme Court's ruling in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). There, the Court considered a provision of the Interstate Commerce Act stating that the Act's prohibition against state or 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." *Id.* at 428, 122 S.Ct. 2226 (citing 49 U.S.C. § 14501(c)(1)–(2)). The Court determined that—despite the fact that the exception in section 14501(c)(2) omitted any mention of political subdivisions while section 14501(c)(1) included one—Congress intended section 14501(c)(2) to permit local exercise of safety regulatory authority. *Id.* at 439–40, 122 S.Ct. 2226. The Court suggested that when a statute's specific exception to preemption "might tend against" the general policy aim of a statute, the exception should be narrowly construed. *Id.* at 440, 122 S.Ct. 2226. The Court then determined that the purpose of the Interstate Commerce Act—to preempt *economic* regulation—does not conflict with the

statute's exception for state safety regulation. *See id.* at 441, 122 S.Ct. 2226. The Court therefore determined that the exception in section 14501(c)(2) need not be construed narrowly in order to avoid interfering with the general policy aims of the Interstate Commerce Act.

This principle further indicates that the exception for state regulation in section 164(b) of the NLRA does not extend to local regulation. The NLRA expressly "permits employers as a matter of federal law to enter into agreements with unions to establish union or agency shops." *Mobil Oil*, 426 U.S. at 410, 96 S.Ct. 2140; *see also* 29 U.S.C. § 153(a)(3). The result of such provision is a federal policy that favors permitting union security agreements. *Mobil Oil*, 426 U.S. at 420, 96 S.Ct. 2140. Because the preemption exception in section 164(b) directly conflicts with the statute's policy aim, it must be read narrowly and not expanded to permit local regulation of these agreements.

In arguing otherwise, Lincolnshire relies heavily on a recent decision by the Sixth Circuit in which the court held that section 164(b) extends to local law and therefore that an ordinance similar to Lincolnshire's was not preempted by the NLRA. *See generally United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016). The Sixth Circuit analyzed the language of section 164(b), as well as *Mortier* and *Ours Garage*, and concluded that the dispositive question was whether Congress had indicated "a clear and manifest purpose to preempt state authority to delegate governmental power to its political subdivisions." *Id.* at 420. The court ultimately determined that there was no showing of a clear and manifest purpose and

therefore that section 164(b) permits local subdivisions to regulate union security agreements. *Id*. Though this Court relies on the same sources, it respectfully disagrees with the Sixth Circuit's determination of the point. The dispositive question is not whether Congress intended to preempt state authority to delegate governmental power. Rather, the question is whether Congress intended to preempt legislation in general in the field of union security agreements. Because this Court concludes that Congress, with its passage of the NLRA, did have this intention, *Mortier* and *Ours Garage* require the exception in section 164(b) to be read narrowly to extend to states and no further.

This Court therefore concludes that laws of political subdivisions do not qualify as "State law" under 29 U.S.C. § 164(b) and therefore that sections 4(A)–(D) of the ordinance are preempted by the NLRA. Accordingly, the Court grants summary judgment in favor of the Unions on count 1.

B. Count 2

In count 2, the Unions challenge section 4(E) of the Lincolnshire ordinance, which prohibits unions from imposing hiring hall provisions in its agreements with employers. Only Local 150 has negotiated any agreements containing hiring hall provisions, and therefore only Local 150 has standing to bring count 2. Because the Court holds that local ordinances do not qualify as state law under section 164(b), section 4(E) of Lincolnshire's ordinance is likewise preempted by the NLRA. But even if the Court had determined that section 164(b) permits local regulation of union

security agreements, Local 150 would still be entitled to summary judgment on count 2.

Section 164(b) permits states to prohibit only "agreements requiring membership in a labor organization as a condition of employment." 29 U.S.C. § 164(b). Courts have therefore held that the NLRA permits states to regulate only those provisions that amount to "compulsory unionism." *See Simms v. Local 1752, Int'l Longshoremen Ass'n*, 838 F.3d 613, 619–20 (5th Cir. 2016). Hiring hall provisions—requiring that all new hires by an employer be referred through a labor organization—do not amount to compulsory unionism. The result of a hiring hall provision is typically that non-union members looking to work for a particular employer are required to pay a small fee to the hiring hall for their referral service. The Fifth Circuit in *Simms* considered a similar provision and concluded that the state of Mississippi was not permitted to prohibit hiring hall arrangements. *Id.* In doing so, the court emphasized that charging referral fees relates to an employee's "pre-hire" conduct, which does not amount to compelled union membership. *Id.* Section 164(b) permits states to regulate only "the [p]ost-hiring employer-employee-union relationship." *Mobil Oil*, 426 U.S. at 417, 96 S.Ct. 2140. Because the hiring hall provisions require individuals to pay referral fees before they are hired, they do not require membership in a labor organization as a condition of employment. Therefore, section 164(b) does not give states or its subdivisions the authority to regulate these provisions. The Court concludes that section 4(E) of the ordinance is preempted by the NLRA and grants summary judgment on count 2 in favor of Local 150.

C. Count 3

In count 3, the Unions challenge section 5 of the Lincolnshire ordinance, which requires any "dues check-off arrangement"—whereby an employee authorizes his employer to automatically deduct union dues from his paycheck—to be revocable by the employee at any time. The Unions are entitled to summary judgment on this claim, because the ordinance is preempted by the NLRA and does not fall within the exception in section 164(b). And even if the Court had held that section 164(b) permits local regulation, the Unions would still be entitled to summary judgment on count 3, because the regulation of check-off provisions—either by states or by their subdivisions—is preempted by the LMRA.

The LMRA authorizes check-off arrangements so long as the employee makes "a written assignment" to his employer "which shall not be irrevocable for a period of more than one year." 29 U.S.C. § 186(c)(4). The LMRA's express regulation of this aspect of labor relations is sufficient to preempt state regulation, given that Lincolnshire's ordinance conflicts with section 186(c)(4). *See Patriotic Veterans, Inc. v. State of Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) ("conflict preemption" arises "when state law conflicts with federal law to the extent that compliance with both federal and state regulations is a physical impossibility" (internal quotation marks omitted)). Lincolnshire argues that this is not the case, because an employee may satisfy both the LMRA and the ordinance simply by having a check-off agreement that is revocable at any time. But in the context of labor

relations, the Supreme Court has made it clear that if a particular agreement could meet all federal hurdles but not all state hurdles, then the hurdles imposed by state law conflict with federal law. *Schermerhorn*, 375 U.S. at 102–03, 84 S.Ct. 219. In *Schermerhorn*, the Court found such a conflict to be permissible, but only because the conflict was authorized by Congress in section 164(b). *Id*. at 103, 84 S.Ct. 219. The Court concluded, essentially, that the language of section 164(b) permits states to impose more stringent requirements on union security agreements, despite the fact that such requirements would conflict with the NLRA.

Section 164(b) does not, however, permit states to regulate check-off arrangements as it does union security agreements. This is, again, because check-off arrangements clearly do not amount to the "compulsory unionism" that states are permitted to regulate under section 164(b). The LMRA does not require employees to use a checkoff provision for union dues—it merely enables them to do so. Employers cannot deduct the dues automatically but instead must have written authorization from each employee. Thus check-off arrangements do not compel employees to unionize; they simply make it easier for those who are union members to pay their dues. Lincolnshire argues that "a worker who decides that he or she no longer wants to pay union fees, but who cannot immediately revoke his or her dues authorization" is compelled to accept union membership as a condition of his or her employment for some period of time. Defs.' Opening Br. At 22. But giving an employee the choice whether to enter into a dues check-off arrangement, and permitting the arrangement to be

irrevocable for a certain period of time, does not amount to compulsory unionism.

Because section 5 of Lincolnshire's ordinance imposes more stringent requirements than federal law, it conflicts with the LMRA. This conflict is not authorized by section 164(b), and therefore section 5 of the ordinance is preempted. The Court grants summary judgment in favor of the Unions on count 3.

Conclusion

For the foregoing reasons, the Court grants defendants' motion for summary judgment in part and denies it in part [dkt. no. 52]. Specifically, the Court dismisses the claims of plaintiffs Local 399, LDC, and CRC in count 2 for lack of standing and dismisses all of the plaintiffs' claims brought under 42 U.S.C. § 1983 but otherwise denies defendants' motion. The Court also grants plaintiffs' motion for summary judgment in part and denies it in part [dkt. no. 35]. Specifically, the Court grants summary judgment in favor of plaintiffs Local 399, LDC, and CRC on counts 1 and 3 and in favor of Local 150 on counts 1, 2, and 3 and concludes that federal law preempts the union security agreement, hiring hall, and dues check-off provisions of Lincolnshire Ordinance No. 15-3389-116. The Court otherwise denies plaintiffs' motion. Plaintiffs are directed to file a proposed form of judgment by no later than January 12, 2017. The case is set for a status hearing on January 18, 2017 at 9:30 a.m. for the purpose of addressing and entering an appropriate judgment.

APPENDIX C

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the 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. § 164. Construction of provisions

. . .

(b) Agreements requiring union membership in violation of State law

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

. . .

APPENDIX D

ORDINANCE NO. 15-3389-116

VILLAGE OF LINCOLNSHIRE, ILLINOIS

AN ORDINANCE ON ECONOMIC DEVELOPMENT AND WORKER EMPOWERMENT BY REGULATION OF INVOLUNTARY PAYROLL DEDUCTIONS FOR PRIVATE SECTOR WORKERS IN THE VILLAGE OF LINCOLNSHIRE

* * *

SECTION 4: GUARANTEE OF EMPLOYEE RIGHTS

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

(A) to resign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization;

(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; or

(E) to be recommended, approved, referred, or cleared for employment by or through a labor organization.

* * *