No. 18-1070

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The National Labor Relations Act, as amended in 1947, provides that "agreement[s] requiring membership in a labor organization as a condition of employment [are] authorized in section 8(a)(3)." 29 U.S.C. § 157. But § 14(b) of the Act provides that § 8(a)(3) does not "authoriz[e] 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). "While § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy." *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416-17 (1976).

"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 [entering or enforcing] union-shop and agency-shop contracts." Pet. 5. *See* Pet. App. 58a-59a.

The respondents challenged the Village Ordinance as preempted by the National Labor Relations Act. The Seventh Circuit sustained this challenge on the ground that "Section 14(b) of the NLRA does not permit local governments on their own authority to ban agency-shop . . . agreements," and, therefore, "[i]n the absence of an applicable state law with respect to the agency-shop, as here," the Ordinance is "preempted by federal law." Pet. App. 26a. The petition for certiorari seeks review of the Seventh Circuit's construction of § 14(b). Pet. i.

On April 12, 2019, the Illinois Collective Bargaining Freedom Act went into effect as Public Act 101-0003.[1] The Illinois Act invalidates local ordinances that prohibit the negotiation or application of the sorts of union security agreements authorized by the NLRA. App. 3a, § 20(b).[2] That being so, this case challenging Lincolnshire's right-to-work ordinance has become moot, and certiorari should be denied. *See* Pet. 23 (discussing denial of certiorari as a result of mootness in *United Automobile Workers v. Hardin County*, 138 S.Ct. 190 (No. 16-1451)).

ARGUMENT

I. THIS CASE IS MOOT, BECAUSE INTERVENING STATE LEGISLATION HAS RENDERED THE CHALLENGED ORDINANCE VOID AND UNENFORCEABLE.

The Illinois Collective Bargaining Freedom Act "vests exclusively with the General Assembly" the "authority to enact any legislation . . . prohibit[ing] . . . the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 164(b)." App. 3a, § 20(a). *See also id.* at 3a, § 20(c) (retaining the General Assembly's authority to

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[1] P.A. 101-3 (to be codified at 820 Ill. Comp. Stat. Ann. §§ 12/1 to 12/99) is set forth in full as an appendix ("App.") to this brief.

[2] A virtually identical bill, SB 1905, passed the 100th Illinois General Assembly by wide margins in 2017, but failed to become law when the House fell one vote short of overriding Governor Rauner's veto. The text of SB 1905 and a record of the Illinois General Assembly's proceedings on that bill are available at http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID= SB&DocNum=1905&GAID=14&SessionID=91&LegID=105221. *See* Pet. App. 9a (noting the Village's concession that such legislation would invalidate its ordinance).

"enact[] legislation barring the execution or application of union security agreements as authorized under 29 U.S.C. 164(b)").

The Illinois Act declares "[i]t is the policy of the State of Illinois that employers, employees, and their labor organizations may freely negotiate union security agreements . . . as permitted under 29 U.S.C. 158(a)(3)." App. 1a, § 5. To effectuate this State policy, the Act provides that "[e]mployers and labor organizations covered by the National Labor Relations Act may, anywhere within the entire State of Illinois, execute and apply agreements requiring membership in a labor organization as a condition of employment to the full extent authorized by the National Labor Relations Act." *Id*. at 3a, § 15.

The Illinois Act also declares "[i]t is further the policy of the State of Illinois that no local government or political subdivision may create or enforce any local law, ordinance, regulation, rule, or the like that by design or application prohibits, restricts, tends to restrict, or regulates the use of union security agreements between a labor organization and an employer as permitted under 29 U.S.C. 158(a)(3)." App. 1a, § 5. Accordingly, the Act provides that "[n]o local government or political subdivision is permitted to enact or enforce any local law, ordinance, rule, regulation, or the like that by design or application prohibits, restricts, tends to restrict, or regulates the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 158(a)(3)." *Id*. at 3a. § 20(b). "Any . . . ordinance . . . that restricts or prohibits in any manner the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 158(a)(3) is a violation of this Act and void." *Id*. at 4a, § 30.

In sum, the Illinois Act clearly provides that, as a matter of Illinois law, local right-to-work ordinances of the sort adopted by the Village of Lincolnshire are void and unenforceable. The instant case seeking the same relief through application of federal law is, therefore, moot, and the Court should deny the petition for certiorari.[3]

II. THE SEVENTH CIRCUIT CORRECTLY INTERPRETED NLRA § 14(b).

Section 14(b) of the National Labor Relations Act creates "an exception to the general rule that the federal government has preempted the field of labor relations regulation," *Laborers Local 107 v. Kunco, Inc.*, 472 F.2d 456, 458 (8th Cir. 1973), which "gives the States power to outlaw even a union-security agreement that passes muster by federal standards," *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). The Seventh Circuit, in agreement with the Kentucky Court of Appeals, held that the authority granted to states by § 14(b) does not extend to local governments. Pet. App. 2a-3a, citing *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. Ct. App. 1965). In *United Automobile Workers v. Hardin County*, 842 F.3d 407, 417 (6th Cir. 2016), the Sixth Circuit reached the

[3] The Court's usual practice, when a case becomes moot in this posture, is to "vacate the judgment below and remand with a direction to dismiss." *Azar v. Garza*, 138 S.Ct. 1790, 1792 (2018) (citation and quotation marks omitted). "Because this practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case." *Ibid.* (citation and quotation marks omitted). The Court declined to vacate the Sixth Circuit's judgment in *United Automobile Workers v. Hardin County*, 842 F.3d 407 (6th Cir.), *cert denied*, 138 S.Ct. 130 (2017), when that case was rendered moot by enactment of the Kentucky Right-to-Work Act, Ky. Rev. Stat. 336.130(3). *See* Pet. 23.

opposite conclusion, holding that § 14(b) authorizes local right-to-work ordinances of the sort adopted by the Village of Lincolnshire.

The different interpretations of § 14(b) stem from opposite interpretative approaches. The Seventh Circuit and the Kentucky Court of Appeals construed § 14(b) in the context of the National Labor Relations Act considered as a whole and interpreted the terms of that provision in a manner that was consistent with the overall statutory structure and purpose. Pet. App. at 15a-20a; *Puckett*, 391 S.W.2d at 362. The Sixth Circuit ignored the structure and purpose of the NLRA and construed the terms of § 14(b) by applying a "clear statement rule" that required any federal statutory provision exempting "state law from preemption" to be read as encompassing the "laws of the State's political subdivisions absent a clear statement to [the contrary]." *Hardin County*, 842 F.3d at 416-17.

Section 14(b) provides that the NLRA's authorization of union security agreements does not apply "in any State or Territory in which [the] execution or application [of such agreements] is prohibited by State or Territorial law." 29 U.S.C. § 164(b). To state the obvious, "nothing in the language of section 14(b) refers to local legislation." Pet. App. 14a-15a. What is more, as the Sixth Circuit acknowledged, if "'State law,' as used in § 14(b), includes the laws of political subdivisions of the State, then the first reference to State in § 14(b) must be read to mean 'in any State or political subdivision thereof' to avoid assigning two different meanings to 'State' in the same sentence." *Hardin County*, 842 F.3d at 413. Thus, applying the Sixth Circuit's "plain statement rule" to the term "State law" would require changing § 14(b)'s limitation on the geographical reach of right-to-work laws

from "in any State" to "in any State or political subdivision thereof."

Adherence to its "clear statement rule" also caused the Sixth Circuit to disregard the fact that allowing "[a] myriad of local regulations would create obstacles to Congress' objectives under the NLRA" by "subject[ing] a single collective bargaining relationship to numerous regulatory schemes." *New Mexico Federation of Labor v. City of Clovis*, 735 F.Supp. 999, 1002-03 (D.N.M. 1990). *See* Pet. App. 16a-17a (describing how Lincolnshire's "Ordinance would put employers in and around the Village in an impossible position"). The Sixth Circuit dismissed the risk that the resulting "administrative burden" would "undermine the NLRA's purpose by discouraging rather than encouraging bargaining," *City of Clovis,* 735 F.Supp. at 1003, as "policy concerns" insufficient to "rebut[] the presumption . . . that 'State' includes political subdivisions of the State," *Hardin County*, 842 F.3d at 420.

The Sixth Circuit purported to derive its "clear statement rule" from this Court's decisions in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002). As the Seventh Circuit correctly observed, "[n]either *Mortier* nor *Ours Garage* . . . abandoned the principle that the meaning of words in a statute 'depends upon the character and aim of the specific provision involved.'" Pet. App. 20a, quoting *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Indeed, *Mortier* and *Ours Garage* strongly support the interpretative approach followed by the Seventh Circuit and the Kentucky Court of Appeals.

The Seventh Circuit and the Kentucky Court of Appeals relied on two aspects of the NLRA in deciding that § 14(b) does not authorize local right-to-work ordi-

nances. First, "[i]nterpreting the words 'State or Territory' in section 14(b) to permit delegation to local units of government would . . . do violence to the broad structure of labor law—a law that places great weight on uniformity." Pet. App. 19a. *See Puckett*, 391 S.W.2d at 362 ("Section 14(b) makes an exception out of the otherwise full pre-emption by the Act" that "should be strictly and narrowly construed because it represents a departure from the overall spirit and purpose of the Act."). Second, "[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," because "[t]he 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.'" Pet. App. 9a quoting *Mobil Oil Corp.*, 426 U.S. at 420. The Sixth Circuit dismissed both points as "the very kinds of arguments that the Supreme Court rejected in *Mortier* and *Ours Garage*." *Hardin County*, 842 F.3d at 420. They are, however, precisely the sort of considerations that *Mortier* and *Ours Garage* identified as highly pertinent in construing an exception to federal preemption.

Mortier construed a provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), stating that, notwithstanding FIFRA's labeling and packaging requirements, "[a] State may regulate the sale or use of any federally registered pesticide or device." 7 U.S.C. § 136v(a). The Court found it particularly significant that "[t]here was no suggestion that . . . FIFRA was a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States." 501 U.S. at 607. It was "in this context," i.e., in the absence of field preemption, that "[m]ere silence" regarding "local governments" in the provision authorizing "'States' to regu-

late pesticides" did not "suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Ibid.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See Rice*, 331 U.S. at 230 ("Such a purpose may be evidenced" by a "scheme of federal regulation [that is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."). Had the "FIFRA [been] a comprehensive statute that occupied the field of pesticide regulation, . . . provisions [that] opened specific portions of the field to state regulation . . . could be viewed as opening the field of general pesticide regulation to the States yet leaving it closed to political subdivisions." *Mortier*, 501 U.S. at 612.

With regard to field preemption, the FIFRA and the NLRA could not be more different, as "Congress knew full well that its labor legislation preempts the field that the act covers." *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 398 (1951) (quotation marks and footnotes omitted). Section 14(b) is an example of Congress "spell[ing] out with particularity those areas in which it desired state regulation to be operative." *Ibid. See id.* at 398 n.25 (citing § 14(b)). Thus, unlike the FIFRA provision at issue in *Mortier*, "[t]he specific grant of authority in § [14(b)] consequently does . . . serve to hand back to the States powers that the statute had impliedly usurped," *Mortier*, 501 U.S. at 614, "for which purpose it makes eminent sense to authorize States but not their subdivisions," *id.* at 616 (Scalia, J., concurring in the judgment).

Ours Garage concerned a provision stating that the Interstate Commerce Act's preemption of state and local regulation "related to a price, route, or service of any motor carrier" would "not restrict the safety regulatory authority of a State with respect to motor vehi-

cles." 49 U.S.C. § 14501(c)(1) & (2)(A). In construing this provision, the Court observed that "[a] congressional decision to enact both a general policy that furthers a particular goal and a specific exception that might tend against that goal [would seem to] call for the narrowest possible construction of the exception." 536 U.S. at 440. But the Court ultimately concluded that "[s]uch a construction is surely resistible here, for § 14501(c)(1)'s preemption rule and § 14501(c)(2)(A)'s safety exception to it do not necessarily conflict," because "[t]he problem [addressed by the preemption rule] was 'state *economic* regulation,' [while] the exemption in question is for state *safety* regulation." *Id*. at 440-41.

Section 14(b), by contrast, is "a specific exception" that "tend[s] against" the "general policy" of the NLRA. *Ours Garage*, 536 U.S. at 440. "Federal policy favors permitting [union security] agreements." *Mobil Oil*, 426 U.S. at 420. Thus, "with respect to those state laws which § 14(b) permits to be exempted from § 8(a)(3)'s national policy '[t]here is . . . conflict between state and federal law.'" *Id*. at 417, quoting *Schermerhorn*, 375 U.S. at 103. As *Ours Garage* noted, such a conflict "call[s] for the narrowest possible construction of the exception." 536 U.S. at 440.

In sum, "[w]hile § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy" by "express[ing] a contrary policy via right-to-work laws." *Mobil Oil*, 426 U.S. at 416-17 & 420. "By the time § 14(b) was written into the Act, twelve States had statutes or constitutional provisions outlawing or restricting the closed shop and related devices," a fact "about which Congress seems to have been well informed during the 1947 debates." *Schermerhorn*,

375 U.S. at 100. While Congress obviously intended to preserve the policy choice made by the twelve states that had enacted right-to-work laws, there is no indication that it intended to allow local governments to thwart federal policy in the other thirty-six states that permitted collective bargaining over union security. The Sixth Circuit's interpretation of § 14(b) allows precisely that. As the petition notes (pp. 20-21), following the *Hardin County* decision, local jurisdictions in Delaware and New Mexico enacted local right-to-work ordinances, forcing the legislatures in those states to counter with preemptive legislation similar to the Illinois Collective Bargaining Freedom Act. *See, e.g.,* Del. Code tit. 19, § 403 (preempting local right-to-work ordinances); Act of Mar. 27, 2019, 2019 N.M. Laws ch. 81 (enacting H.B. 85) (same).[4]

If this case had not become moot, the proper course would have been to affirm the judgment of the Seventh Circuit and overrule the Sixth Circuit's *Hardin County* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=85&year=19.

APPENDIX

APPENDIX A

Public Act 101-0003
SB1474 Enrolled LRB101 05275 JLS 53089 b

AN ACT concerning government.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Collective Bargaining Freedom Act.

Section 5. Policy. It is the policy of the State of Illinois that employers, employees, and their labor organizations are free to negotiate collectively. It is also the policy of the State of Illinois that employers, employees, and their labor organizations may freely negotiate union security agreements, including, but not limited to, those requiring dues to be paid to a labor organization as permitted under 29 U.S.C. 158(a)(3). It is further the policy of the State of Illinois that no local government or political subdivision may create or enforce any local law, ordinance, regulation, rule, or the like that by design or application prohibits, restricts, tends to restrict, or regulates the use of union security agreements between a labor organization and an employer as permitted under 29 U.S.C. 158(a)(3).

Section 10. Definitions. In this Act:

"Employer" includes any person acting as an agent of an employer, directly or indirectly, but does not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, 45 U.S.C. 151 et seq., as amended from time to time, or any labor orga-

nization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"Interested party" means a person with an interest in compliance with this Act.

"Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Local government" and "political subdivision" include, but are not limited to, any county, city, town, township, village, municipality or subdivision thereof, airport authority, cemetery district, State college or university, community college, conservation district, drainage district, electric agency, exposition and auditorium authority, fire protection district, flood prevention district, forest preserve district, home equity program, hospital district, housing authority, joint action water agency, mass transit district, mosquito abatement district, multi-township assessment district, museum district, natural gas agency, park district, planning agency, port district, public building commission, public health district, public library district, public water district, rescue squad district, river conservancy district, road and bridge district, road district, sanitary district, school district, soil and water conservation district, solid waste agency, special recreation association, street lighting district, surface water district, transportation authority, water authority, water commission, water reclamation district, water service district, municipal corporation, and any other district, agency, or political subdivision autho-

rized to legislate or enact laws affecting its respective jurisdiction, notwithstanding such local government or political subdivision's authority to exercise any power and perform any function pertaining to its government and affairs granted to it by the Illinois Constitution, a law, or otherwise.

Section 15. Private sector union security agreements. Employers and labor organizations covered by the National Labor Relations Act may, anywhere within the entire State of Illinois, execute and apply agreements requiring membership in a labor organization as a condition of employment to the full extent authorized by the National Labor Relations Act.

Section 20. Authority to enact legislation affecting union security agreements.

(a) The authority to enact any legislation, law, ordinance, rule, regulation, or the like that by design or application prohibits, restricts, tends to restrict, or regulates in any manner the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 164(b) vests exclusively with the General Assembly.

(b) No local government or political subdivision is permitted to enact or enforce any local law, ordinance, rule, regulation, or the like that by design or application prohibits, restricts, tends to restrict, or regulates the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 158(a)(3).

(c) Nothing in this Act shall be construed as prohibiting the General Assembly from enacting legislation barring the execution or application of union security agreements as authorized under 29 U.S.C. 164(b).

(d) This Act is a denial and limitation of home rule powers and functions under subsection (h) of Section 6 of Article VII of the Illinois Constitution.

Section 25. Private right of action. Any interested party aggrieved by a violation of this Act or any rule adopted under this Act by any local government or political subdivision as described in this Act may file suit in circuit court, in the county where the alleged violation occurred or where any person who is a party to the action resides. Actions may be brought by one or more persons for and on behalf of themselves and other persons similarly situated.

Section 30. Ordinances; laws; rules void. Any legislation, rule, law, ordinance, or otherwise that restricts or prohibits in any manner the use of union security agreements between an employer and labor organization as authorized under 29 U.S.C. 158(a)(3) is a violation of this Act and void.

Section 35. Severability. If any Section, sentence, clause, or part of this Act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this Act. The General Assembly hereby declares that it would have passed this Act, and each Section, sentence, clause, or part thereof, irrespective of the fact that one or more Sections, sentences, clauses, or parts might be declared unconstitutional.

Section 99. Effective date. This Act takes effect upon becoming law.