CASE NO.: 16-35963
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 370,
Plaintiff-Appellant,

v.

LAWRENCE G. WASDEN, in his official capacity as Attorney General for the State of Idaho,
Defendant-Appellee.

On Appeal from the United States District Court, District of Idaho

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BRIEF OF AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC. IN SUPPORT OF LAWRENCE G. WASDEN AND AFFIRMANCE OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

The National Right to Work Legal Defense and Education Foundation, Inc. is a non-profit corporation that has no parent corporation. It issues no stock, and therefore no publicly held corporation owns 10% or more of its stock.

s/ Milton L. Chappell
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Dated: May 3, 2017

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Right to Work Legal Defense and Education Foundation, Inc., ("Foundation") is a nonprofit charitable organization that provides free legal aid to employees whose rights are infringed by compulsory unionism. State Right to Work laws, which twenty-eight States have adopted, are the central statutory bulwark against compulsory unionism. This suit—filed some seventy years after Congress enacted Section 14(b) of the National Labor Relations Act ("NLRA" or "Act")—seeks to eliminate protections federal and state laws provide individual workers.

Since 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements, including in litigation enforcing state Right to Work laws. Foundation attorneys have represented individuals in almost all of the compulsory union fee cases that have come before the U.S. Supreme Court and this Court. These cases include, most recently, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) and *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), and *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005).

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Foundation certifies that all parties consented to the filing of this brief. The Foundation also certifies that this brief was not written in whole or in part by counsel for any party, that no party or party's counsel made a monetary contribution to the preparation and submission of this brief, and that no person or entity other than the Foundation or its counsel has made such a monetary contribution.

INTRODUCTION

Plaintiff-Appellant International Union of Operating Engineers Local 370 ("Union") is unpopular among the employees it represents at MotivePower. After more than thirty years (ER 33) of representing MotivePower employees and making its best case to win their support, only 32% of the represented employees have chosen to join Local 370. (*Id.*)

The Union, rather than reducing its dues, being more responsive to the needs and wishes of those it represents, and improving the quality of its services – i.e., the ordinary approaches that a failing service organization employs—asks this Court for the extraordinary power of industrial capital punishment: termination from employment

of employees who refuse to join or support the Union financially. *See, e.g., Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007) (discussing unions' "extraordinary" authority to compel financial support from nonmembers). What it cannot achieve through the free market, voluntary choice, or the Idaho legislature, the Union wants to achieve through a grant of judicial compulsion.

While the Union feigns "fairness" as the basis for its request to use the compulsion of capital punishment, a closer look at the facts belies any typical notions of fairness. First, paying union dues gives members an extraordinary advantage over nonmembers. Although members constitute only 32% of the MotivePower bargaining unit (ER 48, ¶ 7), they have a disproportionate impact on the working conditions of all employees in the unit, resulting in an unfair concentration of power in the hands of that 32%. This is true because, inter alia, nonmembers are denied a right to vote on the bargaining agreement and have no meaningful say in their working conditions. *See NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 200–01 (1986) (nonmembers can be denied the right to vote on affiliations and similar "internal" union matters).

At the same time, the Union's dues appear excessive. The Union claims a reduced fee representing 40% of dues would be an appropriate amount for nonmembers to pay for its collective bargaining costs. (ER 49 ¶ 16) It asserts that the collective bargaining fee would not be used for any other activity unions typically undertake. (ER 54, ¶ 4) Considering that the amount of dues is 250% more than the Union's proposed collective bargaining fee (*compare* ER 54, ¶ 1 *with* ER 48, ¶ 7), and that some individuals disagree with the political, ideological and other activities upon which the Union spends its dues, it is understandable why the overwhelming majority of MotivePower's employees have decided that it is not worth the financial and political cost to become Union members.

SUMMARY OF ARGUMENT

The Union's legal arguments are as dubious as its emotional appeal to "fairness." The Union's first legal argument is that the Act, 29 U.S.C. § 151 et seq., preempts state law, except for a tightly defined exception Congress created in Section 14(b), 29 U.S.C. § 164(b). The success of the Union's statutory argument hinges on its "Section 14(b) is a limited exception" claim. If that is wrong, the Union's entire statutory

argument crumbles. The Union's problem is that its argument mischaracterizes the law on the subject, including the Supreme Court's holding in *Algoma Plywood & Veneer Co. v. WERC*, 336 U.S. 301 (1949).

Instead of holding that Section 14(b) is a constricted exception to complete preemption, the Supreme Court treated Section 14(b) as merely a marker to make it "even clearer . . . that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements." *Id.* at 313-14. Rather than treating Section 14(b) as some cramped exception, the Supreme Court expansively noted that both Sections 8(3) and 14(b) were express *disclaimers* that the NLRA intended to "interfere with State law" concerning compulsory unionism. *Id.* at 315.

Even if the Union could somehow convince this Court to ignore binding Supreme Court precedent, its statutory construction of the "membership" language of Section 14(b) is completely counterintuitive. Instead of looking at the whole act and assuming that each time the word "membership" is used it should be interpreted in a consistent manner, the Union argues for an untethered interpretation of Section 14(b) that renders it completely meaningless. Rather than being a

marker for the policy of leaving States wholly free to pursue more restrictive policies in all matters of compulsory unionism, as *Algoma Plywood* holds, the Union's proposed statutory interpretation effectively repeals Section 14(b) by making it irrelevant and unavailable to the States.

Lastly, closely related to its bogus "fairness" claim is the Union's argument that it has suffered an unconstitutional "taking" by being "forced" to represent the 68% of MotivePower employees who have declined union membership. Both the Union's "takings" argument and its proposed remedy—to allow it to bargain for the requirement that nonmembers pay it compulsory fees—have no support in logic or precedent. The "taking" is nothing more than the voluntary assumption of an unfunded mandate such as is common in heavily regulated industries. Moreover, the NLRA allows compulsory union fees to be thwarted in additional ways having nothing to do with state law.

For more than sixty years, beginning shortly after World War II, unions have desperately tried and failed to negate employee freedom of choice by attacking Right to Work laws through increasingly creative litigation. *E.g.*, *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron &*

Metal Co., 335 U.S. 525 (1949); *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014). Three generations later, they still engage in that quest. But, no Right to Work law has ever been struck down by a federal court or state appellate court.

ARGUMENT

I. The Union's Preemption Argument Is Premised on Error.

The Union claims that Idaho's Right to Work law is preempted by the Act, 29 U.S.C. § 151 et seq. The Right to Work law, according to the Union's narrow reading of Section 14(b), overreaches the State's ability to legislate in this area. The first piece of its argument combines an expansive interpretation of NLRA preemption with a narrow interpretation of State power under Section 14(b).

The second piece of the Union's claim is that *everyone*, including the United States Supreme Court, the federal judiciary, and the National Labor Relations Board, has been misreading Section 14(b) since its inception, while the Union has now unearthed the "true" meaning of Section 14(b)'s "membership" requirement. In reality, this is

merely the latest novel attempt by a union to stamp out employee free choice and thwart the will of Congress and States.

The Answering Brief of the Idaho Attorney General (pp. 24-32) argues the impact of the legislative history of the NLRA on the preemption issue, and therefore it is not repeated here. Amicus will discuss in more detail *Algoma Plywood ,* 336 U.S. 301, and some additional cases on the preemption and statutory construction issue. That presentation will at times present similar arguments to that of the Idaho Attorney General.

A. The Union is wrong about the scope of Section 14(b)'s exception to federal preemption.

According to the Union, Section 14(b) defines the outer limits of a State's authority to limit compulsory unionism. This attempt to frame Section 14(b) as a small and singular carve-out for state legislation mischaracterizes consistent case law.

The U.S. Supreme Court has never ruled that *all* state law is preempted by the NLRA. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959) (citing *Int'l Ass'n of Machinists v. Gonzalez*, 356 U.S. 617 (1958); *see also Bellknap, Inc. v. Hale*, 463 U.S.

491, 509-512 (1983) (state law claim brought by workers hired during a strike and terminated afterwards was not preempted by the NLRA). Indeed, after the passage of Section 14(b), in *Algoma Plywood* the Supreme Court interpreted the NLRA as *not* preempting State limits on compulsory union fee agreements. The Court commented on three specific points in history.

First, it remarked on the time when the NLRA was passed: "Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts surely they would have made their purpose manifest." 336 U.S. at 306. Instead, whether States required or prohibited compulsory unionism was left to them, and not preempted by federal law. *Id.* at 309.

Second, the Court said that the 1947 amendments to the NLRA, including the passage of Section 14(b), make it "even clearer . . . that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements." *Id.* at 313-14.

Third, the Court noted that that remained true even after passage of Section 14(b). The Union's claim that State authority concerning

compulsory unionism is preempted outside the precise contours of Section 14(b) was specifically rejected: "§ 14(b) was included to forestall the inference that federal policy was to be exclusive." *Id.* at 314. The Supreme Court expansively noted that both Section 8(3) and Section 14(b) are express disclaimers that the NLRA intended to "interfere with State law" dealing with compulsory unionism. *Id.* at 315.

If, as *Algoma Plywood* holds, the States have inherent authority to regulate or prohibit compulsory unionism as they see fit, then the Union's statutory argument should end here. Thus, the Union's claim that Section 14(b) is a "narrow exception" to broad federal preemption under the NLRA is simply wrong. Moreover, as discussed next, the Union's statutory construction of the NLRA is deeply flawed.

B. The Union is wrong about statutory construction.

The Union argues that the NLRA's authorization of compulsory fees and its provision allowing States to ban such fees are not related. Instead of acknowledging that the two provisions mirror one another, the Union argues that the word "membership" should be given radically different meanings in them: namely, in Section 8(a)(3), "membership" should mean only payment of "whatever share of union dues and fees is

used for collective bargaining and contract administration," citing *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), while in Section 14(b) it should mean only "actual union membership" or payment of "*the same* union dues and fees as those paid by members." Union Br. pp. 27, 32-33.

The Union's approach violates two different canons of statutory construction. First, identical words in different parts of the same act are intended to have the same meaning. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986). Second, every clause of a statute has a purpose, *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The Union's reinterpretation violates these canons by (1) asserting a meaning for the term "membership" in Section 14(b) that is different from that in Sections 7, 8(a)(3) and 8(f), which (2) renders the text of Section 14(b) superfluous.

1. Whole Act Rule: Identical Words Have Identical Meaning.

The language in Section 14(b) is almost identical to language used in NLRA Sections 7 and 8(f), 29 U.S.C. §§ 157 and 158(f), which provisions have been interpreted to require only the financial

"membership" contemplated by *Beck*. Section 14(b) "membership" must be interpreted to have the same meaning. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by *an agreement requiring membership in a labor organization as a condition of employment* as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (emphasis added). Section 8(a)(3) allows an employer to make "an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C. § 158(a)(3). Section 8(f) permits an employer in the construction industry to enter into an "agreement [that] requires as a condition of employment, membership in such labor organization." 29 U.S.C. § 158(f).[1]

The word "membership" in Sections 7, 8(a)(3), and 8(f) has the same meaning: financial membership, that is "dues that are periodic, uniformly imposed, and not devoted to a purpose that is inimical to public policy," *Electrical Workers, Local 48* (*Kingston Constructors)*, 332 N.L.R.B. 1492, 1496 (2000) (footnote omitted), which includes agency

[1] The membership agreements authorized by Section 8(f) differ from those authorized by Section 8(a)(3) only in that membership can be required seven days after beginning employment, as opposed to thirty days under Section 8(a)(3).

fees, *Marquez v. Screen Actors Guild,* 525 U.S. 33, 36-38 (1998); *NLRB v. General Motors Corp.,* 373 U.S. 734, 742-43 (1963). Indeed, Section 7 expressly references Section 8(a)(3). *See* 29 U.S.C. § 157.

Section 14(b) uses language almost identical to that used in NLRA Sections 7 and 8(f) to refer to membership agreements authorized by Section 8(a)(3):

> 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) (emphasis added). These similarities and cross-references make clear that Congress was referring to the same thing in all three sections: the "membership" requirement of Section 8(a)(3). The word "membership" in Section 14(b) thus includes the compulsory fees authorized by Section 8(a)(3), just as it does in Sections 7 and 8(f).

To state the point conversely, to accept the Union's position, the Court would have to accept not only that "membership" has a meaning in Section 14(b) different from that in Section 8(a)(3)—which is illogical—but that "membership" has a meaning in Section 14(b)

different from that in both Sections 7 and 8(f). That construct makes even less sense, especially given that the *same phrase* is used in both Section 7and Section 14(b): "agreement[s] requiring membership in a labor organization as a condition of employment." 29 U.S.C. §§ 157, 164(b). That phrase in both sections must refer to the same "membership agreement," i.e., the membership agreement "authorized in section 158(a)(3) of this title," 29 U.S.C. § 157.

Moreover, *both* Section 8(a)(3), authorizing forced "membership" agreements, and Section 14(b), allowing States to prohibit them, were added to the NLRA by Congress in the 1947 Taft-Hartley Act. In *Beck*, the Supreme Court held that the 1947 "Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities . . . ." 487 U.S. at 759 (quote from the part of *Beck* dealing with Taft-Hartley's legislative history). *Beck* did not amend the NLRA, it merely construed what Congress intended in enacting Taft-Hartley.

Thus, even before *Beck*, agreements requiring nonmembers to pay the equivalent of full union dues were unlawful under the NLRA, but the Supreme Court had not yet so held. Section 14(b) was not a nullity

then and is not now, but rather was intended by Congress to leave States "free to pursue their own more restrictive policies in the matter of union-security agreements." *Algoma Plywood*, 336 U.S. at 313-14. Both before and after *Beck*, "the agreements requiring 'membership' in a labor union which are expressly permitted by the [Section 8(a)(3)] proviso are the same 'membership' agreements expressly placed within the reach of state law by § 14(b)," *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963), i.e., the "union shop," the "agency shop," and so-called "fair share" agreements limited to the costs of collective bargaining and contract administration.

2. Whole Act Rule: Every Clause Has Meaning.

Because "membership" in Sections 7 and 8(a)(3) has been construed by the Supreme Court as financial core "membership" only, limited to the costs of exclusive representation, *see Beck*, 487 U.S. at 762-63, the Union's statutory construction would render Section 14(b) superfluous. That is, if the only membership that can be required by Section 8(a)(3) is payment of the *Beck* amount (and the requirements of formal union membership and full dues are prohibited), the Union's interpretation of Section 14(b) only allows States to prohibit what

Section 8(a)(3) already prohibits. As a result, Section 14(b) would have no meaning and affirm no authority in the States. If Section 14(b) means nothing, the Union would be free to avoid the natural consequences of its overpriced dues and its unpopularity with the unit's workers.

Thus, the plain text of these provisions, read pursuant to these two canons of statutory interpretation, shows that whatever compulsion an employer and union might impose pursuant to Sections 7, 8(a)(3), and 8(f) as an exception to the Section 7 policy of voluntary unionism, that permission is subject to veto by the States by virtue of Section 14(b).

II. The Idaho Right to Work Law Does Not Effect an Unconstitutional Taking.

The Union argues that, if not preempted, Idaho's Right to Work law causes an unconstitutional "taking" of its services because the law prohibits the Union from compelling compensation from nonmembers for services performed pursuant to its federally mandated duty of fair representation. This argument fails for many reasons, not the least of which is the fact that "unions have no constitutional entitlement to the

fees of nonmember-employees." *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 185 (2007).[2] Most of these reasons are cogently explained in the district court's decision, and by the Idaho Attorney General's brief. However, we submit the following additional points for the Court's consideration.

A. The Union's dependence on dissents should be rejected.

The Union asks this Court to adopt the reasoning of the dissenting judges in the Seventh Circuit's holding in *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014) (2-1 decision). There, the Seventh Circuit held that a Right to Work law does not take property from a union. Rather, a union acting as an exclusive bargaining agent is "fully and adequately compensated by its rights as the sole and exclusive member at the negotiating table." *Id.* at 666. Moreover, as *Sweeney* points out, seven of

[2] Although *Davenport* addressed a First Amendment claim arising in the public sector, it applies equally on this point to the private sector. *Davenport's* proposition that unions have no constitutional entitlement to the fees of nonmembers relied upon a private sector case, *Lincoln Federal Labor Union No. 19129 v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949). 551 U.S. at 185. In *Lincoln Federal*, the Court upheld state Right to Work laws, reasoning that "[t]here cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies." 335 U.S. at 531.

the state Right to Work laws in effect when Taft-Hartley was enacted and *Lincoln Federal Labor Union No. 19129 v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949), was decided, banned compulsory payment of union dues or fees. 767 F.3d at 662-63. Although *Lincoln Federal* did not decide a Takings Clause claim, it thus made clear that Congress can constitutionally condition the privilege of exclusive representation upon the States having authority to ban compulsory union fees.

The Union wants this Court to ignore *Sweeney*'s majority opinion in favor of its dissenting opinion, citing the dissents from denial of en banc reconsideration in that case. Union Br. pp. 3, 41-42 & 44. That argument is now undercut because the judges who dissented from the denial of en banc reconsideration in *Sweeney* have since declined to revisit the issue en banc in *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d 1088 (E.D. Wis. 2016), *petition for initial hearing en banc denied*, No. 16-3736 & 16-3834 (7th Cir. Apr. 10, 2017) (Order). In *Schimel*, the district court followed *Sweeney* in upholding Wisconsin's Right to Work law against the same claims that the Union makes here. 210 F. Supp. 3d at 1097. Thus, the Seventh Circuit's holding in *Sweeney* remains undisturbed, and the Union's

speculation regarding the dissenting judges in *Sweeney* should be disregarded.

B. An unconstitutional taking presupposes something was taken.

The Union's argument is premised on the assertion that the property at issue is the services it provides nonmembers. This definition of property is too narrow. Where, as here, a "property owner" possesses a "full bundle of property rights," the "bundle" must be analyzed as a whole, and "the destruction of one 'strand' of the bundle is not a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)); *see Penn Cent. Transp. Co. v. City of N.Y.,* 438 U.S. 104, 130-31 (1978).

The Union's property right is not merely the "strand" of the duty of fair representation, but the federal grant of exclusive representation in its entirety. When properly framed, the proposition that something was "given" to nonmember employees and "taken" from the Union is unconvincing. Rather, the Union is provided with substantial benefits of exclusive representation with the qualification that it must perform a

minimum duty of fair representation for its designation as the exclusive representative to be constitutionally sound. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198 (1944) (constitutional questions arise when a union possesses exclusive representation powers "without any commensurate statutory duty toward" the employees so represented).

The argument that nonmembers are "given" anything by the Union is tenuous. A superior employee might well prefer to be his own representative, but finds himself, as a result of exclusive representation, bereft of the "power to order his own relations with his employer," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). The superior employee finds that his interests are "subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). As Professor Summers concluded:

> The individual employee loses almost entirely his freedom to contract. He is barred from bargaining on his own behalf or through any other representative, and he is bound by the agreement made by the majority union even when he is not a member, prefers individual bargaining, and opposes the specific terms negotiated by the union.

Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 531 (1969) (footnote omitted).

Worse, very little is required of unions when it comes to protecting individual employees against any arbitrary treatment created by their monopoly position. Unions violate the "arbitrary" prong of the duty of fair representation only if their actions are so far outside the range of reasonableness as to be irrational. *ALPA v. O'Neill*, 499 U.S. 65 (1991).

The value of the union "ride" has also been questioned by the U.S. Supreme Court. In *Harris v. Quinn,* 134 S. Ct. 2618, 2636 (2014), the Court noted that the argued benefit of union representation "is not enough to justify an agency fee." There is no assumption that the union deserves reimbursement for its bargaining expenses. Rather, the union carries the burden of showing that those expenses are not adequately funded by voluntary dues. *Id.* at 2641.

Rather than "taking" anything from the Union, exclusive representation confers substantial benefits on it. Exclusive representation status comes with valuable perks. It grants a union the power to bargain for all unit employees to the exclusion of any individual members of the unit. "The loss of individual rights for the

greater benefit of the group results in a *tremendous increase in the power* of the representative of the group—*the union*." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (emphasis added). An exclusive bargaining representative also has the power to compel employers to bargain with it, 29 U.S.C. § 158(d), whether an employer wants to or not. Employers can neither change their employment policies without first haggling with the union, *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991), nor deal directly with their employees individually or through organizations other than the exclusive representative, *Allis-Chalmers*, 388 U.S. at 180.

Unions use these federally conferred powers to obtain things from employers that benefit unions and their officials. For example, exclusive representatives often cajole employers to fund union healthcare and pension plans, where union officials sit as paid trustees, *see* 29 U.S.C. § 186(c)(5)-(8), that employers might not otherwise fund. Exclusive representatives often bargain for special privileges for their agents and officials, such as superseniority, *see Electric Workers IUE, Local 663 (Gulton Electro Voice)*, 276 N.L.R.B. 1043, 1045 (1985), and for the right to conduct union business on work time, *IAM, Local Lodge 964 v. BF*

Goodrich Aerospace Aerostructures Group, 387 F.3d 1046, 1058-59 (9th Cir. 2004).

Exclusive representative status facilitates a union's ability to recruit and retain dues paying members. Employees are far more likely to join and support a union that has sole authority to deal with their employer, as opposed to a union that does not. Exclusive representatives also bargain for employer assistance with recruiting members, such as by providing personal information about employees, *Tenneco Automotive, Inc.*, 357 N.L.R.B. 953, 954-56 (2011), and assistance collecting union dues from employees' wages, 29 U.S.C. § 186(c)(4). The latter practice is a particular boon for unions, as these wage deductions can be (and almost always are) made irrevocable for one year. *Id.*

Thus, the notion that Right to Work laws "confiscate" union property in exchange for no benefits or compensation is both absurd and wrong, as recognized by the Seventh Circuit in *Sweeney*, 767 F.3d at 666 ("the union is justly compensated by federal law's grant to the Union the right to bargain exclusively with the employer").

C. Idaho's Right to Work law takes no property.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. To constitute a taking under the Fifth Amendment, private property must be: (1) taken; (2) for public use; and (3) without just compensation. The portion of Idaho's Right to Work law the Union challenges simply provides: "[n]o person shall be required, as a condition of employment or continuation of employment . . . to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization . . . ." Idaho Code § 44-2003(3). This provision neither takes any property nor compels any service. Instead, it *prevents* a forced taking, namely, the taking of dues, fees, assessments, or charges from individual employees as a condition of their employment. *See Davenport*, 551 U.S. at 185. Thus, the Union seeks to strike down as a violation of the Takings Clause a statute that, in fact, takes nothing, but rather protects the private property of individual employees from union confiscation.

The ostensible "taking" of which the Union complains is the services it is required to provide to nonmembers as a condition of its

chosen status as exclusive representative of their bargaining unit by the duty of fair representation that accompanies that status. This duty of fair representation is required, *not by the Idaho statute*, but by Section 9(a) of the NLRA, 29 U.S.C. § 159(a). *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 86-87 (1989). Thus, the proper targets for the Union's challenge are Congress and the NLRA, which authorize both the Union's exclusive representation and its concomitant duty of fair representation. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *see also Sweeney,* 767 F.3d at 666 (because the NLRA, not state law, requires the duty of fair representation, the Indiana Right to Work law did not "take" property from the union merely by banning compulsory fees).

Assuming, *arguendo*, that Idaho's Right to Work law were the source of the Union's claims, it still takes nothing, for the Union seeks more than the NLRA actually provides. The NLRA does not guarantee exclusive representatives compulsory fees, even in states that lack Right to Work protections, for an employer's duty to bargain with a union "does not compel either party to agree to a proposal." 29 U.S.C. § 158(d). Employers can refuse to enter into a compulsory fee agreement.

S*ee Phelps Dodge Specialty Copper Prods. Co.*, 337 N.L.R.B. 455 (2002). Employees can also rescind compulsory fee requirements through a deauthorization election under NLRA Section 159(e), 29 U.S.C. § 159(e); *e.g., Great Atl. & Pac. Tea Co.*, 100 N.L.R.B. 1494 (1952). And, States can prohibit compulsory fees under Section 14(b). There is no basis for any union to believe that exclusive representative status guarantees it a perpetual flow of compulsory fees from unwilling employees, when employers, employees themselves, and the States have the statutory right under the NLRA to prevent compulsory fee agreements.

Thus, striking down Idaho's Right to Work law does not solve the Union's Takings Clause issue, because it still may be unable to extract a dime in compulsory fees from nonmembers even in the absence of Idaho law.

D. The alleged "taking" is merely part of a regulatory scheme that the Union voluntarily assumes.

The Union's Takings Clause argument is premised on two faulty assumptions. First, the Union claims it is *required* to perform certain actions. That is false. The Union *voluntarily* assumes these obligations when it seeks and accepts exclusive status under NLRA Section 9.

Second, the Union assumes that the duty of fair representation is somehow a unique burden placed on it. In reality, this burden is no different from any other obligation required of a business operating in a heavily regulated industry.

1. The Union's "burdens" are voluntarily assumed.

As discussed *supra*, pp. 21-23 exclusive representative status confers a wide range of benefits upon a union. That status is coupled with an obligation: the duty to represent all members of the bargaining unit fairly. Unions assume that duty of their own volition. "The Union's federal obligation to represent all employees in a bargaining unit is optional; it occurs only when the union *elects* to be the exclusive bargaining agent . . . ." *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014) (emphasis added). Unions can choose to act as members only organizations if they wish. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 236-37 (1938) (members only contract). Few unions choose to do so, because the privileges and benefits that come with being an exclusive representative far outweigh the unions' attendant responsibilities. Moreover, nothing requires them to choose to represent exclusively any particular group of employees.

The Union also *voluntarily* assumes the ostensible burden of representing nonmembers in contractual grievances. Under NLRA Section 9(a), exclusive representatives can allow employees to pursue individually their own grievances without union involvement. *See* 29 U.S.C. § 159(a) (providing that individual employees can "present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect").

Unions typically deny employees this individual freedom by requiring in collective bargaining agreements that employees exclusively go through the union to pursue grievances or arbitration. *E.g., Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 67-70 (1975). "Unions want unchallenged control over all aspects of the contract, including its grievance procedure and arbitration which they created," and "prefer that the individual employee has no independent rights," because it gives the union singular control over the employer's policies. Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle*, 20 COMP. LAB. L. &

POL'Y J. 47, 63 (1998); *see Emporium Capwell*, 420 U.S. at 70 (finding, as to grievances, a union interest in "presenting a united front" and "not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests"). Unions cannot plausibly claim that the government "takes" their grievance representation services when the unions themselves choose to contractually force employees to use those services.

2. The Union's Obligations Are No Different from Any Other Business in a Heavily Regulated Industry.

Every government regulation imposes some sort of burden on those it affects. Organizations and individuals are constantly faced with requirements imposed by the government that they are required to perform without compensation. For example, the Clean Air Act, 42 U.S.C. § 7401 et seq., imposes on those who drive cars in certain areas of the country the obligation to purchase gasoline specially processed and refined. This "reformulated" gas costs drivers one or two cents more per gallon.[3] These drivers are also forced, at their own expense, to have

[3] *Phase II Reformulated Gasoline: The Next Major Step Toward Clean Air,* https://nepis.epa.gov/Exe/ZyPDF.cgi/00000FG5.PDF?Dockey=00000FG5.PDF (last visited Jan. 5, 2017).

their cars periodically inspected and to pass emission tests, without reimbursement. Congress can also regulate the rates railroads charge, *Houston, East & West Tex. Ry. v. United States*, 234 U.S. 342 (1914), and the prices at which a commodity is sold. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

Another regulation that requires businesses to provide services and/or expend funds without compensation arises from the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., which requires most businesses providing goods or services to the public to alter their buildings, parking lots, and other areas to remove barriers for disabled customers.

The federal regulatory regime also requires businesses or individuals who choose to engage in heavily regulated industries to meet certain obligations in exchange for access to the industry. For example, Medicaid provisions of the Social Security Act, 42 U.S.C. § 1396, limit the fees and the reimbursement provided to physicians. Pharmaceutical companies are required to spend millions of dollars and expend their employees' services to perform clinical trials on their products before they can sell them to the public. *See* 21 U.S.C. § 355.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984), the Supreme Court held that the voluntary submission of trade secrets data, in exchange for the economic advantages of the registration of a product pursuant to a complex statutory scheme that was known to the company at the time of submission, did not constitute a taking. Like the company in *Ruckelshaus*, the Union has voluntarily submitted itself to the NLRA's regulatory system, which includes the obligations of fair representation and Section 14(b), in exchange for the federally conferred benefit of exclusive representation. The Union's situation is not unique; rather, it is merely another entity that chooses to participate in a complex regulatory system to gain the benefits that system provides.

Unions cannot voluntarily choose to reap the benefits of being exclusive representatives, and then complain that their attendant fiduciary obligations toward nonmembers—who are stripped of the right to deal with their employer regarding their own conditions of employment—are too onerous. Claiming that this amounts to an unconstitutional taking of its property is audacious at best, galling at worst, and must be rejected. The Court should hold that exclusive

representation is not an impermissible taking of union property under the Fifth Amendment, but simply an unfunded statutory mandate that unions voluntarily assume.

CONCLUSION

Unions have spent the better part of sixty years looking for ways to strike down judicially state Right to Work laws. They have failed. None of the nation's twenty-eight Right to Work laws has been invalidated by a federal or state appellate court. This Court should affirm the district court's decision to grant the State's motion to dismiss because Idaho's Right to Work law neither is preempted by the NLRA nor constitutes an impermissible taking under the Fifth Amendment.

Respectfully submitted,

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Dated: May 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2017. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Date: 2017-5-3

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