NO. 13-1264

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES M. SWEENEY, DAVID A. FAGAN, CHARLES SEVERS, JAMES C. OLIVER, BRYAN SCOFIELD, *et al.*,

Plaintiffs-Appellants,

v.

MITCH DANIELS, GOVERNOR OF THE STATE OF INDIANA, GREGORY ZOELLER, ATTORNEY GENERAL OF THE STATE OF INDIANA, *et al.*,

Defendants-Appellees.

Appeal from The United States District Court
For The Northern District of Indiana Hammond Division
Case No. 12 cv 00081
Honorable Phillip P. Simon

REPLY BRIEF OF UNION PLAINTIFFS-APPELLANTS

Dale D. Pierson
Elizabeth A. LaRose
IUOE Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

Marc R. Poulos
Kara M. Principe
Indiana, Illinois, Iowa Foundation for Fair Contracting
6170 Joliet Road, Suite 200
Countryside, IL 60525

Jeffrey S. Wrage
Blachly, Tabor, Bozik, & Hartman
56 S. Washington, Suite 401
Valparaiso, IN 46383

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ARGUMENT

I. Federal Law Preempts Sections 8(2), (3) and 10 of the Indiana Right to Work Law.

A. Congress and the Supreme Court have rejected the State's argument that Indiana is allowed to create free riders under Section 14(b) of the NLRA.

In its principal brief, the Union argued that Sections 8(2) and (3) of the Indiana Right to Work law (Ind. Code § 22-6-6-8(2), (3)) are preempted by federal labor law. Section 14(b) of the National Labor Relations Act (NLRA) allows states to regulate union security clauses requiring union "membership." 29 U.S.C. § 164(b). The parties agree that Indiana's prohibition of contracts that "require an individual… to become or remain a union member," Ind. Code § 22-6-6-8(1), are within Congress's grant of authority under § 14(b).

Indiana's Right to Work law, however, also prohibits contracts which would "require an individual to… pay dues, fees, assessments or other charges of any kind," to a labor organization. Ind. Code § 22-6-6-8(2). Because federal law requires unions to represent the employees of any given bargaining unit fairly and equally - regardless of membership in that union - Section 8(2) allows employees to become "free riders," enjoying the benefits of a union contract without paying for them. *See DelCostello v. Teamsters*, 462 U.S. 151, 164 n.14 (1983); *see also Communication Workers of America v. Beck*, 487 U.S. 735, 750 (1988) (explaining that railroad unions were "legally obligated to represent the interests of all workers, including those who did not become members; thus nonunion workers were able, at no expense to themselves, to share in all the benefits the unions obtained through

collective bargaining.") In passing the Taft Hartley Amendments to the NLRA, Congress was "equally concerned," with the prevention of free riders and outlawing the closed shop. *See Beck*, 487 U.S. at 748. Hence it "authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to the cost." *Id.* at 746.

In *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963), and *Retail Clerks Int'l Assn. Local 1625 v. Schermerhorn*, 373 U.S. 746, 751-752 (1963) ("Retail Clerks I"), the Court held that states can regulate "less stringent union security arrangements" than those prohibiting membership if they require payment of sums equal to initiation fees and monthly dues - the "practical equivalent of membership." The State argues here that the "clear holdings of *Retail Clerks I* and *Retail Clerks II,* …plainly permit the states to regulate union security agreements by entirely prohibiting them" (Brief of Appellees at 16). The State adds that *Beck* "clearly applies to those states that do not have right-to-work laws and that do not prohibit union security agreements" (*id.*). Hence the State concludes that the Supreme Court rejected the Union's arguments fifty years ago in the *Retail Clerks* decisions (*id.* at 17).

Obviously, the Union's arguments here were not rejected in 1963 because those arguments are in part based upon fifty years of Supreme Court jurisprudence since *General Motors* and *Retail Clerks*. The holdings in those cases, moreover, support the Union's arguments here. The Court's treatment of the arguments advanced in those cases further support those made by the Union in this case.

The State exaggerates the "clear holdings" of the *General Motors* and *Retail Clerks* cases. In *Retail Clerks*, as in *General Motors*, the Court was concerned with an agency shop union security clause which required nonmember employees to pay the "practical equivalent" of membership – "an initial service fee which is the equal of the initiation fee for Union members and the monthly service fee which is the equal of the monthly dues for those who voluntarily become Union members." *Retail Clerks I*, 373 U.S. at 749. As the Court explained (*id.* at 751-752):

> The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. At the very least, the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso are the same 'membership' agreements expressly placed within the reach of state law by § 14(b). It follows that the *General Motors* case rules this one, for we there held that the 'agency shop' arrangement involved here-which imposes on employees the only membership obligation enforceable under s 8(a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues-is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.' Whatever may be the status of less stringent union-security arrangements, the agency shop is within § 14(b). At least to that extent did Congress intend § 8(a)(3) and § 14(b) to coincide.

The Court "concluded that the contract involved here is within the scope of § 14(b) of the National Labor Relations Act and therefore is congressionally made subject to prohibition by Florida law." *Id.* at 747 (emphasis added). "We hold that § 14(b) of the Act subjects this arrangement to state substantive law, and that the legality of [the union security clause]… is governed by the decision of the Florida Supreme Court under review here." *Id.* at 757 (emphasis added).

The Court hastened to add that it was leaving until its next term "the unresolved issue of whether the Florida courts have jurisdiction to afford a remedy

for violation of the state law…" *Id.* at 757. After "full argument" and "the benefit of the views of the NLRB, in the form a brief from the Solicitor General," *id.*, the Court resolved the remedy issue in *Retail Clerks Int'l Assn. Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963) ("*Retail Clerks II*"). It emphasized that the "sole question" was "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the state's prohibition against an agency shop clause in a collective bargaining agreement." *Retail Clerks II*, 375 U.S. at 97. The Court then held (*id.* at 98):

> The Florida Supreme Court held that this negotiated and executed union-security agreement violates the 'right to work' provision of the Florida Constitution and that the state courts have jurisdiction to afford a remedy.
>
> We agree with that view.

Far from dictating the result in this case, the Supreme Court in *Retail Clerks I* repeatedly emphasized the narrowness of its holding. "It must be remembered," the Court cautioned, "that the service fee [charged nonmembers] is the exact equal of membership initiation fees and monthly dues…" 373 U.S. at 753. Foreshadowing the core questions the Court would address over the next fifty years, it went on to discuss the purported distinction between fees charged for collective bargaining expenses, and the preemptive effective of the NLRA on state right to work laws.

The first argument rejected by the Supreme Court in *Retail Clerks I*, supports the Union's position here. There, the union argued belatedly that its internal restrictions confined nonmember service fee payments to collective

bargaining purposes only, and prohibited their use for institutional purposes unrelated to its exclusive agency functions. The Court was "wholly unpersuaded"[1] by this argument because those restrictions were not "ironclad," 373 U.S. at 752, but also because the service fee was the "exact equal" to membership initiation fees and monthly dues. *Id.* at 753-754. The Court reasoned that even if all collections from nonmembers were directly committed to paying bargaining costs, this fact is of "bookkeeping significance only" rather than a matter of real substance. *Id.* at 753. As the Court explained (*id.* at 754):

> If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less, and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities.

The Indiana Right to Work law creates an analogous problem. Nonmember employees can opt not to pay for any of the services which they receive. Members who choose to support political causes voluntarily nevertheless find their institutional contributions diminished because they must pay more than their pro rata share of collective bargaining costs. The Right to Work law's shifting of the cost of representing free riders to Union members is akin to the basic flaw the Court found in *Retail Clerks*.

---

[1] The State mischaracterizes the argument over which the Court was "wholly unpersuaded" in *Retail Clerks I*, 373 U.S. at 752. The State claims that, "the Union argued that this language could be read to allow it to charge non-union members less than what members were charged and that a state-law that prohibited such a reading was preempted by federal labor law." (Brief of Appellees at 17). In fact, the union petitioners in *Retail Clerks I* argued that this internal restriction allowed the union to charge nonmembers the equivalent of full dues and fees, because it applied the nonmembers' money only to collective bargaining expenses.

The Supreme Court resolved the problem it faced in *Retail Clerks* years later in *Beck*. By creating the option for nonmember employees to object and opt out of the payment of institutional expenses such as political activity unrelated to collective bargaining, and delegating to the NLRB the protection of those rights, the Court has in fact created the "ironclad" restriction not present in *Retail Clerks*. And obviously because these protections are created as a matter of federal law, contrary to the assertion of the State here, *Beck* rights are equally applicable to employees working in right to work states. *See Beck*, 487 U.S. at 750 (referring to union security agreements as a "national policy for all industry subject to the Labor Management Relations Act of 1947").

It was the preemption arguments which the Court found "more difficult" in the *Retail Clerks* cases. The problem the Court addressed was whether any given union security clause was within the scope of § 14(b) was in fact a question for the NLRB in the first instance. The Court stated (*Retail Clerks I*, 373 U.S. at 755):

> There is much force in the argument that the assessment of any union-security arrangement for purposes of §§ 7, 8 and 14(b), when there is significant doubt about the matter, is initially a task for the Board, so that it may finally come to this Court with the benefit of the affected agencies' views, and in all probability the preemption issue was entitled to different treatment than it received in the Florida courts at the time this case was decided. But what was then an arguable matter under § 14(b) is not necessarily arguable now.

Because the agency shop clause in issue in *Retail Clerks* conditioned employment upon the payment of sums equal to initiation fees and monthly dues, 373 U.S. at 756, it was no longer an arguable question and the Court was comfortable that it likewise fell within the scope of that regulation permitted the states under § 14(b).

That the Court did not go on to address the question of whether "lesser forms of union security" were within the scope of § 14(b) is what is of critical significance to this case. Implicit in the Court's holding is that where the scope of § 14(b) is in doubt, the issue of whether it remained for the NLRB to decide that question in the first instance remains open. That question then was effectively resolved in *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 36 (1998). While federal courts are permitted to decide statutory questions related to a union's duty of fair representation, it does not mean they can do so in the first instance. Resolution concerning questions of the scope of the union security clauses under Section 8(a)(3) fall "squarely within the primary jurisdiction of the NLRB." *Marquez*, 525 U.S. at 50. Under *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959), federal as well as state courts must defer to that primary NLRB jurisdiction.

Nothing in the Court's discussion in *Retail Clerks II* of the remedies afforded states once it is clear that the union security clause is the equivalent of union membership and therefore within the scope of § 14(b) is to the contrary. The Court did not revisit its fundamental finding in *Retail Clerks I*, and therefore all its subsequent discussion in *Retail Clerks II* as to remedy rests on that premise. That is (375 U.S. at 104)(emphasis added):

> Congress, in other words, chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements <u>authorized by § 14(b)</u> and decided to suffer a medley of attitudes and philosophies on the subject.

The agreements "authorized by § 14(b)" to which the Court refers are those requiring membership or the practical equivalent of full dues and fees.

To this day, the Supreme Court has not stepped beyond its determination that the Congressional use of the term "membership" in § 14(b) allows state regulation of union security clauses that are the practical equivalent of membership. The comprehensive rights and administrative structures created over the last fifty years make it clear that the Supreme Court is satisfied the rights of nonmembers are protected. Nothing in the language of § 14(b) or subsequent Supreme Court law authorizes the expensive reading of § 14(b) advanced by the State of Indiana as would justify the prohibition of union security clauses in their entirety. As the Court observed in *Beck*, 487 U.S. at 750, (emphasis in original), *quoting Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976):

> Indeed, "Congress' decision to allow union-security agreements at all reflects its concern that… the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them."

B. Federal law expressly authorizes religious objections to Union Security Clauses.

The State's arguments and the District Court's conclusions rest on the faulty premise that states are authorized by § 14(b) to prohibit union security agreements "carte blanche" (Brief of Appellees at 23; App. 20). As explained in its initial Brief and here *supra*, nothing in the language of Section 14(b) or the critical case law authorizes states to go beyond the regulation of union security agreements requiring "membership" or the practical equivalent of full dues and fees. That Congress did not intend to allow states to outlaw union security agreements altogether is further confirmed by the NLRA itself.

The Supremacy Clause of the Constitution empowers Congress to preempt state law. *Allis – Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Railway Employees Department v. Hanson*, 351 U.S. 225, 232 (1956); U.S. Const. art. VI, cl. 2. Once Congress has chosen to "occupy the field," state regulation must yield. *520 South Michigan v. Shannon*, 549 F.3d 1119, 1125 (7th Cir. 2008). Congress authorized private sector employees to do away with union security clauses in only two ways: as a group, the employees of any given bargaining unit can vote to "deauthorize" union security clauses in their collective bargaining agreement. *Covenant Aviation Security, LLC*, 349 NLRB 699, 700 (2007) (such deauthorization elections "reflects Congress's intent to subject union security arrangements to employee veto"); 29 U.S.C. § 159(e)(1).

Congress also authorized individual employees to opt not to pay dues and fees at all to the union provided they have a bona fide religious objection to such payments. *See Marquez* , 525 U.S. at 48 ("the NLRA provides that workers with religious objections to supporting units cannot be forced to pay any fees to a union" (emphasis in original)); 29 U.S.C. § 169. In that situation, individuals can forego payment of periodic dues and initiation fees, but must "pay sums equal to such dues and initiation fees to a non-religious, non-labor organization charitable fund…" *Id.* The existence of these two statutory options lends further support to the argument that Congress did not authorize states to do away with union security agreements entirely, and specifically preempts Indiana's § 8(3) prohibition on the payment of equivalent dues and fees to charitable organizations.

C. The criminal penalties of Section 10 are preempted.

Nor are Indiana's criminal penalties saved by Congress's limited grant of authority to restrict union security. The Court's statement in *Retail Clerks II,* 375 U.S. at 102 quoted by the State concedes that § 14(b) allowed states only to enact laws "restrict[ing]" – not prohibiting – "the execution and enforcement of union-security agreements." (Brief of Appellees at 21). While the state's power to enforce its own laws may therefore be left unaffected, the State cannot enforce a law it has no authority to enact in the first place. *See, e.g., Local 514 Transport Workers Union of America v. Keating*, 358 F.3d 743, 751, 775-776 (10th Cir. 2004).

II. Section 3 of the Right to Work Law Violates the Contracts and *Ex Post Facto* Clauses of the U.S. Constitution and Renders the Entire Statute Invalid.

In its initial brief, the Union pointed out that the Indiana legislature was explicit that its Right to Work law was immediately effective upon its passage February 1, 2012. Ind. Code §§ 22-6-6.[2] While Section 13 delayed enforcement of certain of the statute's core Section 8 provisions concerning contracts in effect on or after March 14, 2012, *id.* at § 22-6-6-13, Section 3 of the Right to Work law created a construction industry exception. *Id.* at § 22-6-6-3. That exception permits so-called "maintenance of membership" union security clauses, by omitting from Section 3 the prohibition against requiring an individual to become "or remain" a member of a labor organization; and by omitting the phrase "or continuation of employment," from the general prohibition against requiring union security as a condition of

[2] House Enrolled Act No. 1001 is introduced with the bracketed phrase "EFFECTIVE UPON PASSAGE" (App. 27). It ends with a declaration of an emergency, indicating also an immediate effect (App. 30).

employment.[3] But the enforcement of Section 3 was not delayed by Section 13. It is because Section 3 was immediately, retroactively effective that it violates the Contracts Clause and *Ex Post Facto* Clause, U.S. Const. art. I, Sec. 10, cl. 1 of the U.S. Constitution.

A. The State fails to address the Union's argument concerning the substantive nature of Section 3 of the Right to Work law and therefore concedes it.

The State argues that the Indiana Right to Work law does not violate the Contracts Clause of the United States Constitution, U.S. Const. art. I, Sec. 10, cl. 1 (Brief of Appellees at 23). After citing the relevant legal definition and three prong test of the Contracts Clause (*id.* at 23 - 24), the State effectively abandons any analysis or argument relating to the Clause. This leaves the Court with no reasonable interpretation of Defendants' unarticulated argument. Thus, it follows that the State concedes the Union's contention that the Indiana Right to Work law violates the Contracts Clause of the United States. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010), ("silence leads us to conclude" that the party concedes the argument; failure to respond results in waiver).

The State simply contends that that the Indiana Right to Work law does not apply retroactively and therefore does not violate the *Ex Post Facto* Clause of the United States Constitution (Brief of Appellees at 24). Section 13 of the law states that Sections 8 – 12 are effective March 14, 2012. Section 3 is not included in

[3] This omission is not insignificant. Maintenance of membership clauses requiring individual employees who are union members to remain members under penalty of discharge are a common component of union security agreements. *See, e.g., Algoma Plywood & Veneer Co. v. Wisconsin Emp. Relations Board*, 336 U.S. 301 (1949) (discussing enforceability of a maintenance of membership clause imposed on the parties by the War Labor Board as a wartime stabilization measure).

Section 13, and does not contain an effective date, making it immediately applicable upon passage. The State struggles in a lengthy analysis to insist that Section 3 of the Right to Work law is not substantive and therefore is not retroactive. The State offers little insight as to why Section 3 is included in the Right to Work law except to attempt to refute the Union's argument that it is mere surplusage with no meaning unless interpreted to be an exception to the express scope of Section 13.

The State does not provide the Court with any explanation as to why Section 3 omits language prohibiting "maintenance of membership clauses." Because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), the omission contained in the construction industry carve-out that is Section 3 must be substantive. The State acknowledges the importance of statutory canons of construction yet ignores the basic premise that every word of a statute must be given meaning and equal weight must be given to each term to avoid rendering parts superfluous. *See Senne v. Village of Palatine*, 695 F.3d 597, 605 (7th Cir. 2012); *Beard v. C.I.R.*, 633 F.3d 616, 620-621 (7th Cir. 2011). So as not to render such a broad omission superfluous, Section 3 must be substantive. Because Section 3 is substantive and applicable immediately, the Indiana Right to Work law violates the *Ex Post Facto* Clause of the United States Constitution.

The State ignores the Union's plain meaning construction of Section 3 and therefore concedes it. *Bonte,* 624 F.3d at 466 ("silence leads us to conclude" that

party concedes argument; failure to respond results in waiver). The State insists instead that "Section 3 is not a substantive provision of the right to work statute" (Brief of Appellees at 26), looking instead to the "design" of the statute as a whole, and its "conditional progressive verb formulation" in an attempt to side-step the retroactive application. The district court characterized Section 3's wording as "unfortunate and clumsy… not ideally suited for the purpose" of treating the construction industry differently (App. 9). Echoing the district court, the State says Section 3 is instead a "disclaimer," that nothing in the Right to Work law affects the construction industry other than the prohibitions of Section 8.

This argument is nonsense. The "design" of the statute is to render union security clauses in contracts between employers and labor organizations covering employees under the NLRA unlawful. It has no other language or purpose. Section 8 on its face reaches all such NLRA covered industries, so there is simply no need to single out any specific industry as being included in the Section 8 prohibitions. There is nothing in the Right to Work law or anywhere else that would exempt the construction industry from § 14(b) in particular or the NLRA generally. If the construction industry were exempt from § 14(b), then the State could not regulate union security clauses in that industry at all. If the construction industry were exempt from the Right to Work law completely, the legislature would have said so plainly. If the omission of the maintenance of membership language was intended to have no meaning, then Section 3 is completely superfluous - amounting to little more than emphasis that the prohibitions against union security

clauses that apply to all industries really do apply to the construction industry as well.

The only interpretation of Section 3 which does make sense is that Indiana intended to make a significant exception for the construction industry. This substantive difference, however, was given immediate effect, rendering it unconstitutional. It is therefore not severable, and the entire Right to Work law is void.

B. Retroactive application of Section 3 is not saved by principles of judicial estoppel.

In its Brief, the State argues that the District Court found that judicial estoppel would foreclose any future attempt by the State to enforce agreements in the building and construction trades industry that pre-date the Right to Work statute because the Indiana Commissioner of Labor disclaimed such interpretation of the law. However, the District Court offered no case law or analysis regarding the doctrine of judicial estoppel. Defendants' own analysis ignores overwhelming precedent cited in the Union's Brief (at 37-38) in which courts do not ordinarily apply the doctrine of judicial estoppel to states. The fact that a commissioner of a state agency stated the position of the current administration's interpretation of the Indiana Right to Work law does not mean a new administration may not have a differing interpretation. This is the precise reason courts do not generally apply judicial estoppel to states: so that governments can change their interpretations and enforce laws as they deem necessary. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001), *quoting Heckler v. Community Health Services of Crawford, CT. Inc.*,

467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to estoppel... the rule of law is undermined").

III. The Indiana Right to Work Law Impairs the Union's Fundamental Free Speech Rights.

In its initial Brief, the Union argued that the Indiana Right to Work law burdens Union members and the Union itself by requiring them to bear the full cost of representing "free riders," which in turn diverts Union resources away from voluntary First Amendment activity. The exercise of free speech by the Union and its members is a fundamental right. *Knox v. Service Employees International Union Local 1000*, 567 U.S. ___, 132 S. Ct. 2277 (2012). Laws which burden political speech are subject to strict scrutiny. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 913 (2010). Union membership is itself a fundamental right because it is grounded in First Amendment freedoms of association and assembly. *United Mine Workers of America District 12 v. Illinois Bar Ass'n*, 389 U.S. 217 (1967). The Indiana Right to Work law violates the Equal Protection Clause of the Constitution, U.S. Const. amend. XIV because it impairs these rights and cannot survive strict scrutiny.

The State's response is a collection of misstatements of the Union's argument and the case law. It begins by stating that the Right to Work law is only subject to rational basis review because union membership is not a suspect class – an argument not made by the Union. The State then goes on to claim that "in essence, the Plaintiffs want to compel the funding of speech of private individuals through forced union membership and dues" (Brief of Appellees at 31). The State then adds

that recent case law, including "*Knox* stands for the notion that it is an impermissible violation of a nonmember's First Amendment Right to force payment for political speech, but this is exactly the reason the Plaintiffs argue the Right to Work statute is un-constitutional." (*Id.* at 32). Neither of these assertions is accurate.

It is well settled that individual union members need not support political causes with which they disagree. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Machinists v. Street*, 367 U.S. 740 (1961). Hence, nonmembers are permitted to object to union political expenditures, and limit their fair share fees to support only the union's representational activities. *Beck*, 487 U.S. at 763; *Marquez*, 525 U.S. at 36. It is this balance that the Supreme Court has struck over many years between the rights of individuals not to support political speech with which they disagree, and the right of the Union and its members to engage in voluntary political activity.

The State's assertion that the Union is attempting to compel individuals to support its political activities is simply false. Individuals can object to expenditures not germane to collective bargaining like political speech, and receive routinely a reduction in their fees. Although private sector employees may not enjoy this protection based on the Constitution, the duty of fair representation created by the Supreme Court affords them the same protection. *Beck*, 787 U.S. at 745-746; *California Saw & Knife Works*, 320 NLRB 224 (1995) *enforced sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998). Nonmembers are "compelled" to pay no

more than their fair share of collective bargaining expenses. *Beck*, 487 U.S. at 746. It is because the Union's money is fungible, *Knox*, 132 S. Ct. at 2293; *Retail Clerks I*, 373 U.S. at 753, that members' money that would otherwise lawfully go voluntarily to support political speech must be diverted to finance the collective bargaining expenses not fairly born by the free riders. It is this diversion of Union revenues which burdens political speech and is therefore subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898, 913; *see, also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 367 (2009) ("restricting a channel through which speech supporting finance might flow" warrants a higher level of scrutiny) (Breyers, J. dissenting).

The State's response also repeats the same error as that committed by the District Court in its reliance on *Regan v. Taxation with Representation*, 461 U.S. 540 (1983). The State argues that "*Regan* stands for the proposition that a failure to subsidize a fundamental right is not the same as violating that fundamental right." (Brief of Appellees at 33). It therefore concludes that the Union's First Amendment rights to free speech are not violated by the Right to Work statute.

Regan's premise is that a public employer need not utilize state supported resources to collect union dues – the subsidy for the exercise of First Amendment rights upon which its decision is based. 461 U.S. at 545. No such subsidy is present here. The Right to Work law addresses private contracts between private sector employers, and the union representatives of private sector employees. *See, e.g.,* Ind. Code § 22-6-6-1(1), (3-6) (excluding public employees). The contracts requiring employers to withhold and remit to the union employees' dues are entered into

voluntarily. Their fundamental rights to engage in political activity are without question protected by the First Amendment. *See Citizens United*, 130 S. Ct. at 898, 913. Far from subsidizing the Union's political speech, the Right to Work law burdens the Union's political speech by forcing it to represent nonmembers for free. It is precisely this compelled unionism which the Indiana Right to Work law advances and which renders it unconstitutional.

CONCLUSION

For all the foregoing reasons as well as those set forth in its opening Brief, the Union respectfully requests that this Court reverse the District Court decision, find the Indiana Right to Work law unconstitutional and/or preempted under federal labor law, and vacate the final judgment entered and remand this case to the District Court for further proceedings.

Date: May 31, 2013

Respectfully submitted,

By: /s/ Dale D. Pierson
One of the Attorneys for Plaintiffs-Appellants

Names and Address of Attorneys for Plaintiffs-Appellants:

Dale D. Pierson
Elizabeth A. LaRose
IOUE Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

Marc R. Poulos
Kara M. Principe
Indiana, Illinois, Iowa Foundation for Fair Contracting
6170 Joliet Road, Suite 200
Countryside, IL 60525

Jeffrey S. Wrage
Blachly, Tabor, Bozik, & Hartman
56 S. Washington, Suite 401
Valparaiso, IN 46383

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: May 31, 2013

Respectfully submitted,

By: /s/ Dale D. Pierson
One of the Attorneys for Plaintiffs-Appellants

Names and Address of Attorneys for Plaintiffs-Appellants:

Dale D. Pierson
Elizabeth A. LaRose
IUOE Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525

Marc R. Poulos
Kara M. Principe
Indiana, Illinois, Iowa Foundation for Fair Contracting
6170 Joliet Road, Suite 200
Countryside, IL 60525

Jeffrey S. Wrage
Blachly, Tabor, Bozik, & Hartman
56 S. Washington, Suite 401
Valparaiso, IN 46383