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Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
2022CH000034

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, *and* ALBERTO MOLINA,

Petitioners,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS; IAN LINNABARY, *in his official capacity as Chair of the Illinois State Board of Elections*; CASANDRA B. WATSON, WILLIAM J. CADIGAN, LAURA K. DONAHUE, TONYA L. GENOVESE, CATHERINE S. MCCRORY, WILLIAM M. MCGUFFAGE, *and* RICK S. TERVEN, SR., *in their official capacities as members of the Illinois State Board of Elections*; JESSE WHITE, *in his official capacity as Illinois Secretary of State*; SUSANA MENDOZA, *in her official capacity as Illinois State Comptroller*,

Respondents.

Case No. 2022CH000034

Petition for Leave to File a Taxpayer Action to Restrain and Enjoin the Disbursement of State Funds

Petitioners, who are Illinois taxpayers, respectfully seek leave to file their attached complaint under 735 ILCS 5/11-303. Petitioners' complaint seeks to prevent Respondents—the Illinois State Board of Elections and its members, the Illinois Secretary of State, and the Illinois Comptroller—from using public funds to place the "Illinois Right to Collective Bargaining Amendment" on the November 2022 general election ballot because the proposed Amendment is preempted by the National Labor Relations Act and therefore violates the Supremacy Clause of the United States Constitution.

INTRODUCTION

1. Petitioners' taxpayer complaint seeks to prevent Respondents from placing the "Illinois Right to Collective Bargaining Amendment" ("Amendment 1") on the November 2022 general election ballot because the proposed Amendment is preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution.

2. The National Labor Relations Act ("NLRA") governs private-sector collective bargaining nationwide and preempts state laws that would regulate activities that the NLRA protects or prohibits. State laws that regulate private-sector collective bargaining therefore violate the Supremacy Clause of the United States Constitution.

3. The NLRA protects and regulates private-sector collective bargaining and therefore preempts Amendment 1's attempt to provide a state-law right to collective bargaining.

4. Moreover, Amendment 1 conflicts with the NLRA. The NLRA does not give private-sector workers a "fundamental" right to collectively bargain; it only gives them a *limited* right to do so under certain circumstances, subject to various rules. Also, the NLRA does not give employees any right to collectively bargain over matters that "protect their economic welfare" in general, but rather limits the subjects of mandatory collective bargaining to "wages, hours, and other terms and conditions of employment." And the NLRA imposes various other rules for collective bargaining that are absent from Amendment 1.

5. Amendment 1 therefore violates the Supremacy Clause of the United States Constitution. Petitioners respectfully ask this Court to grant their petition for leave to file their proposed complaint, which challenges Amendment 1 on that basis.

BACKGROUND

6. Amendment 1 is currently scheduled to be placed on the November 2022 general election ballot because at least 60 percent of legislators in each house of the Illinois General Assembly voted to present it to the voters. *See* 5 ILCS 20/1-2. Amendment 1 was introduced into the Illinois General Assembly as Senate Joint Resolution 11 on May 7, 2021. The Illinois Senate voted 49 to 7 to pass the Resolution on May 21, 2021. The Illinois House of Representatives voted 80 to 30 to pass the Resolution on May 26, 2021.

7. Amendment 1 would add the following language to Article I of the Illinois Constitution:

> (a) Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.

(b) The provisions of this Section are controlling over those of Section 6 of Article VII.

8. In their attached complaint, Petitioners seek to have Amendment 1 removed from the ballot because, as explained below, it is preempted by the NLRA and therefore violates the Supremacy Clause of the United States Constitution.

ARGUMENT

I. Amendment 1 is preempted by the NLRA and therefore violates the Supremacy Clause.

9. The NLRA preempts Amendment 1 because the proposed Amendment would establish a state-law right to collective bargaining in the private sector, and collective bargaining in the private sector is an activity the NLRA protects.

A. The NLRA preempts state laws that would regulate private-sector collective bargaining.

10. The NLRA grants private-sector employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. But the NLRA also limits employees' right to engage in collective bargaining by prescribing, among other rules, the conditions under which it may occur, and the subjects over which an employer may be compelled to bargain. *See, e.g.,* 29 U.S.C. § 158(a)(5) (limiting the mandatory subjects of collective bargaining); 29 U.S.C. § 159(a) (requiring an employer participate in collective bargaining only where certain conditions have been met).

11. Congress enacted the NLRA as a "comprehensive code" to regulate labor relations nationwide and "create a uniform, national body of labor law interpreted and administered by a centralized agency, the National Labor Relations Board." *Cannon v. Edgar*, 33 F.3d 880, 883 (7th Cir. 1994). The NLRA thus preempts state laws that would "regulate any activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). A state law that is preempted by the NLRA violates the Supremacy Clause of the United States Constitution. *Cannon*, 33 F.3d at 883.

B. The NLRA preempts Amendment 1 because Amendment 1 would regulate conduct that the NLRA protects and regulates.

12. Amendment 1 makes no distinction between private-sector and public-sector employees and therefore would establish a right to collective bargaining for both. But the NLRA establishes a right to collective bargaining for private-sector employees. *Cf.* 29 U.S.C. § 152(3) (excluding public-sector employees from the NLRA's coverage). Amendment 1 therefore does exactly what the NLRA preemption doctrine prohibits: "regulate[s] activity that the NLRA protects." *Gould*, 475 U.S. at 286. For that reason alone, Amendment 1 is preempted by the NLRA and violates the Supremacy Clause.

13. That would be true even if Amendment 1's right to collective bargaining were identical in substance to the NLRA's right to collective bargaining. A right created by the state constitution could only be enforced by state courts, not by the National Labor Relations Board ("NLRB"). That is impermissible: the NLRA

preempts state tribunals for the enforcement of labor rights because "Congress has entrusted administration of labor policy for the National to a centralized administrative agency [i.e., the NLRB], armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959). The U.S. Supreme Court has stated that to allow "a multiplicity of tribunals and a diversity of procedures" for the protection of labor rights—even the same rights that the NLRA protects—would be "quite as apt to produce incompatible or conflicting adjudications as [would] different rules of substantive law." *Id.* at 243 (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490–91). Thus, NLRA preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Gould*, 475 U.S. at 286.

14. Moreover, the substance of Amendment 1 conflicts with the NLRA in multiple ways.

15. *First*, Amendment 1 would give employees a "fundamental" right to engage in collective bargaining—unlike the NLRA, which gives employees only a *limited* right to engage in collective bargaining.

16. Under the NLRA, employees are not entitled to engage in collective bargaining at all unless a majority of employees in the relevant "bargaining unit" has voted to be represented by a union, or an employer has voluntarily recognized a

union as representing the majority of employees. 29 U.S.C. § 159(a); *Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216, 219 (7th Cir. 1997). The question of what constitutes an appropriate "unit" for this purpose is determined by the NLRB. 29 U.S.C. § 159(b). A bargaining unit could be an "employer unit, craft unit, plant unit, or [some] subdivision thereof." 29 U.S.C. § 159(b).

17. Also, under the NLRA, some small employers cannot be compelled to engage in collective bargaining—and their employees therefore have no right to collectively bargain. An employer is potentially subject to mandatory collective bargaining under the NLRA only if it meets a revenue threshold established by the NLRB, which varies depending on the nature of the employer's business. For example, the NLRB only has jurisdiction over retailers whose annual volume of business is at least $500,000. *See* National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases* (2017) (collecting NLRB decisions establishing revenue thresholds).[1] Amendment 1 includes no such limitation.

18. The NLRA imposes other restrictions on who may engage in collective bargaining. The NLRB may not certify a bargaining unit that consists of "both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b). It also may not decide that a craft unit is inappropriate "on the ground that a different unit has been established by a prior [NLRB] determination,

[1] https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.

unless a majority of the employees in the proposed craft unit vote against separate representation." *Id.* It also may not certify a bargaining unit that includes, together with other employees, any guards—that is, anyone "employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." *Id.* Amendment 1 lacks these limits.

19. Thus, the collective-bargaining right that the NLRA provides to employees is much more limited and qualified than the "fundamental" right that Amendment 1 would establish.

20. *Second*, Amendment 1 would establish a right to bargain over matters that are *not* mandatory subjects of bargaining under the NLRA.

21. Amendment 1 would create a right to "to bargain collectively . . . for the purpose of negotiating wages, hours, and working conditions, *and to protect economic welfare* and safety at work" (emphasis added). But where the NLRA requires employers to engage in collective bargaining, it only obligates them to do so with respect to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5), (d); *see also NLRB v. Wooster Div. of Borg-Warner Corp.* (*Borg-Warner*), 356 U.S. 342, 348 (1958). "As to other matters . . . each party is free to bargain *or not bargain* . . . ." *Borg-Warner*, 336 U.S. at 349 (emphasis added).

22. The "terms and conditions of employment" referenced in the NLRA do *not* encompass everything involving an employer's business that could affect employees' "economic welfare." Generally, "conditions of employment" over which employers

must bargain under the NLRA include such things as "the various physical dimensions of [an employee's] working environment," "[w]hat one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed," and potentially "other less tangible . . . characteristics of a person's employment," such as "the security of one's employment." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring). But an employer's use of labor-saving machinery and decisions about "the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment." *Id.* at 223 (Stewart, J., concurring). For example, an employer's economic decision to shut down part of a business is not subject to mandatory collective bargaining. *First Nat'l Maint. Corp .v. NLRB,* 452 U.S. 666, 680–86 *(*1981).

23. Thus, by giving employees a right to bargain "to protect their economic welfare," Amendment 1 would give Illinois private-sector employees greater collective-bargaining rights than the NLRA.

24. *Third*, Amendment 1 conflicts with the NLRA because it does not require, or provide conditions for, exclusive representation. Under the NLRA, when a majority of employees in a bargaining unit votes for a union to represent them, that union becomes the exclusive representative of all employees in the unit, and employees who would prefer to collectively bargain through a different union may not do so. 29 U.S.C. § 159(a). Amendment 1, in contrast, does not provide for exclusive representation.

25. Again, even without these conflicts, the NLRA would preempt Amendment 1 because Amendment 1 creates a state-law right to collective bargaining—itself inherently impermissible. *See Gould*, 475 U.S. at 286. And because the NLRA preempts it, Amendment 1 violates the Supremacy Clause.

II. Petitioners seek appropriate relief and have standing to bring their claim.

26. Petitioners' proposed complaint seeks appropriate relief for Amendment 1's unconstitutionality. Where a proposed constitutional amendment scheduled to go before voters is itself unconstitutional, the proper remedy is an injunction to prevent state officials from placing it on the ballot. *Hooker v. Ill. State Bd. of Elections*, 2016 IL 12077 ¶¶ 8 & n.2, 48; *Chi. Bar Ass'n v. Ill. State Bd. of Elections*, 161 Ill.2d 502, 508, 515–16 (1994). That is therefore the relief Petitioners seek against Respondents here.

27. Petitioners have standing to bring their claim as taxpayers. Taxpayers are injured when the state uses its general revenue funds for an unconstitutional purpose because they are liable to replenish improperly used funds. *See Barco Mfg. Co. v. Wright*, 10 Ill.2d 157, 160 (1956). Thus, the Illinois Supreme Court has repeatedly recognized that taxpayers have standing to seek an injunction to prevent the state from using public funds to place an unconstitutional proposal on the ballot. *Hooker*, 2016 IL 12077 ¶ 8 & n.2; *Chi. Bar Ass'n*, 161 Ill.2d at 507.

CONCLUSION

"In labor pre-emption cases, as in others under the Supremacy Clause, [a court's] task is not to pass judgment on the reasonableness of state policy," but "is instead to

decide if a state rule conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994). This case therefore is not about the degree of legal protection collective bargaining should receive, but about whether Amendment 1 would regulate a matter that Congress has determined should be governed by federal law alone. It is beyond dispute that the NLRA protects and regulates private-sector collective bargaining, and that Amendment 1 would protect and regulate the same activity. The NLRA therefore preempts Amendment 1 and violates the Supremacy Clause, and Petitioners have reasonable ground for their proposed complaint challenging Amendment 1 on that basis.

Petitioners respectfully ask this Court to enter an order (1) setting a date for a hearing on this Petition, not less than five days nor more than 10 days thereafter and (2) directing Petitioners to give notice in writing to each of the Respondents and the Illinois Attorney General, including the fact of the presentation of the petition and the date and time when it will be heard. 735 ILCS 5/11-303. Petitioners further request that, at the hearing on this petition, the Court find there is reasonable ground for filing it and order the complaint to be filed and process to issue, directing a date not more than 10 days thereafter for the Respondents to appear and respond to the complaint. 735 ILCS 5/11-303, 11-304.

Dated: April 21, 2022

Respectfully submitted,

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, and ALBERTO MOLINA

By: /s/ Jacob Huebert
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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, *and* ALBERTO MOLINA, Plaintiffs, v. THE ILLINOIS STATE BOARD OF ELECTIONS; IAN LINNABARY, *in his official capacity as Chair of the Illinois State Board of Elections*; CASANDRA B. WATSON, WILLIAM J. CADIGAN, LAURA K. DONAHUE, TONYA L. GENOVESE, CATHERINE S. MCCRORY, WILLIAM M. MCGUFFAGE, *and* RICK S. TERVEN, SR., *in their official capacities as members of the Illinois State Board of Elections*; JESSE WHITE, *in his official capacity as Illinois Secretary of State*; and SUSANA MENDOZA, *in her official capacity as Illinois State Comptroller*, Defendants.	Case No. **Verified Complaint for Declaratory and Injunctive Relief**

INTRODUCTION

1. This taxpayer lawsuit seeks to prevent state officials from placing the "Illinois Right to Collective Bargaining Amendment" ("Amendment 1") on the November 2022 general election ballot because the proposed Amendment is preempted by federal law and therefore violates the Supremacy Clause of the United States Constitution.

2. Amendment 1 purports to give employees a "fundamental right" to engage in collective bargaining—making no distinction between private-sector and public-sector workers—for various purposes, including "to protect their economic welfare."

3. In fact, the state cannot lawfully give private-sector workers a "fundamental right" to collectively bargain because the National Labor Relations Act, 29 U.S.C. § 151 et seq., ("NLRA") exclusively governs private-sector collective bargaining nationwide and preempts state laws that would regulate activities that the NLRA protects or prohibits. The NLRA therefore preempts state laws that regulate private-sector collective bargaining.

4. Further, Amendment 1 conflicts with the NLRA. The NLRA does not give private-sector workers a "fundamental" right to collectively bargain; it only gives them a *limited* right to do so under certain circumstances, subject to various rules. And the NLRA does not give employees any right to collectively bargain over matters that "protect their economic welfare" in general, but rather limits the subjects of mandatory collective bargaining to "wages, hours, and other terms and conditions of employment."

5. Amendment 1 therefore conflicts with and is preempted by federal law and violates the Supremacy Clause of the United States Constitution.

6. Plaintiffs therefore ask this Court to declare Amendment 1 unconstitutional and enjoin state officials from placing it on the ballot.

PARTIES

7. Plaintiff Sarah Sachen pays income taxes to the State of Illinois and is a resident of Cook County, Illinois.

8. Plaintiff Ifeoma Nkemdi pays income taxes to the State of Illinois and is a resident of Cook County, Illinois.

9. Plaintiff Joseph Ocol pays income taxes to the State of Illinois and is a resident of Cook County, Illinois.

10. Plaintiff Alberto Molina pays income taxes to the State of Illinois and is a resident of Cook County, Illinois.

11. Defendant Illinois State Board of Elections (the "Board") is the unit of Illinois state government responsible for certifying any proposal to amend the Illinois Constitution to county clerks so that it can be placed on the ballot. 5 ILCS 20/2a.

12. Defendant Ian K. Linnabary is Chair of the Board.

13. Defendant Casandra B. Watson is Vice Chair of the Board.

14. Defendants William J. Cadigan, Laura K. Donahue, Tonya L. Genovese, Catherine S. McCrory, William M. McGuffage, and Rick S. Terven, Sr., are members of the Board.

15. Defendant Jesse White is the Illinois Secretary of State and is responsible for publishing proposed constitutional amendments before they are presented to voters on the ballot. 5 ILCS 20/2.

16. Defendant Susana Mendoza is the Illinois State Comptroller and is responsible for disbursing public funds held by the Illinois State Treasurer. Ill. Const. art. V, § 17.

JURISDICTION AND VENUE

17. This Court has subject-matter jurisdiction over this matter, which challenges an Illinois ballot measure for violating the Supremacy Clause of the United States Constitution.

18. This Court has personal jurisdiction over Defendants because this lawsuit arises from their activity in the State of Illinois.

19. Venue is proper in Sangamon County because Defendants maintain their principal offices in Sangamon County, and because the transaction giving rise to this action occurred, in whole or in part, in Sangamon County.

STATEMENT OF FACTS

The NLRA governs private-sector collective bargaining nationwide.

20. Congress enacted the NLRA as a "comprehensive code" to regulate labor relations nationwide. *Cannon v. Edgar*, 33 F.3d 880, 883 (7th Cir. 1994). The NLRA "reflects a congressional intent to create a uniform, national body of labor law interpreted and administered by a centralized agency, the National Labor Relations Board." *Id.*

21. The NLRA grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157.

The NLRA does not allow collective bargaining unless certain conditions have been met.

22. The NLRA does not, however, establish a "fundamental" right to engage in collective bargaining, nor does it establish a right to engage in collective bargaining over just any subject.

23. The NLRA protects a "fundamental" right of employees to *organize* for the *purpose* of collective bargaining—but it does not give them a right to actually engage in collective bargaining with an employer.

24. Under the NLRA, employees may engage in collective bargaining—and an employer is required to engage in collective bargaining—only if a majority of employees in the relevant "bargaining unit" has voted to be represented by a union, or if an employer has voluntarily recognized a union as representing the majority of employees. 29 U.S.C. § 159(a); *Lincoln Park Zoological Soc'y v. NLRB*, 116 F.3d 216, 219 (7th Cir. 1997).

25. The National Labor Relations Board ("NLRB") must determine "the unit appropriate for the purposes of collective bargaining"—i.e., the group of employees to (potentially) be represented by a union, a majority of which must vote for union representation for collective bargaining to occur. 29 U.S.C. § 159(b).

26. A bargaining unit could be an "employer unit, craft unit, plant unit, or [some] subdivision thereof." 29 U.S.C. § 159(b).

27. When a majority of employees in a bargaining unit vote for union representation, the union becomes the exclusive representative of all employees in the bargaining unit. 29 U.S.C. § 159(a).

28. The NLRA restricts the NLRB's ability to recognize (or not recognize) a bargaining unit in certain circumstances. The NLRB may not certify a unit that consists of "both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in

such unit." 29 U.S.C. § 159(b). It also may not decide that a craft unit is inappropriate "on the ground that a different unit has been established by a prior [NLRB] determination, unless a majority of the employees in the proposed craft unit vote against separate representation." *Id.* It also may not certify a bargaining unit that includes, together with other employees, any guards—that is, anyone "employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." *Id.*

29. An employer is only subject to mandatory collective bargaining under the NLRA if it meets a revenue threshold established by the NLRB, which varies depending on the type of business in which the employer engages. For example, the NLRB only has jurisdiction over retailers whose annual volume of business is at least $500,000. *See* National Labor Relations Board, *An Outline of Law and Procedure in Representation Cases* (2017) (collecting NLRB decisions establishing revenue thresholds).

30. Once a union has been certified, another election cannot be held for 12 months. 29 U.S.C. § 159(c)(3).

The NLRA limits the mandatory subjects of collective bargaining.

31. Where the NLRA requires employers to engage in collective bargaining, it only obligates them to do so with respect to certain subjects—namely "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5), (d); *see also*

NLRB v. Wooster Div. of Borg-Warner Corp. (*Borg-Warner*), 356 U.S. 342, 348 (1958).

32. An employer who refuses to bargain over the NLRA's mandatory subjects commits an unfair labor practice and is subject to penalties. 29 U.S.C. § 158(a)(5).

33. "As to other matters, however, each party is free to bargain *or not bargain* . . . ." *Borg-Warner*, 336 U.S. at 349 (emphasis added). The U.S. Supreme Court has deemed such subjects to be "permissive" subjects of bargaining. *Borg-Warner*, 356 U.S. at 348.

34. The NLRA also makes some subjects *impermissible*, including subjects whose inclusion would be unlawful or inconsistent with the policies of the NLRA.

35. The NLRA does not define the "terms and conditions of employment" over which an employer must bargain, so the NLRB must determine whether a subject falls within that category on a case-by-case basis, and courts give those determinations "considerable deference." *Ford Motor Co. (Chi. Stamping Plant) v. NLRB*, 441 U.S. 488, 494–95 (1979). "Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition, for it did not intend to deprive the Board of the power to further define those terms in light of specific industrial practices." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981).

36. Generally, "conditions of employment" over which employers must bargain include such things as "the various physical dimensions of [an employee's working environment," "[w]hat one's hours are to be, what amount of work is expected

during those hours, what periods of relief are available, what safety practices are observed," and potentially "other less tangible . . . characteristics of a person's employment," such as "the security of one's employment." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

37. "Conditions of employment" do not encompass everything involving an employer's business that could affect employees' economic welfare.

38. For example, an employer's use of labor-saving machinery and decisions about "the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Fibreboard Paper Products Corp*., 379 U.S. at 223 (Stewart, J., concurring); *see also First Nat'l Maint. Corp.,* 452 U.S. 666 *(*1981) (employer's economic decision to shut down part of a business is not subject to mandatory bargaining).

39. A significant body of federal case law has established what subjects are encompassed by "conditions of employment" and therefore subject to mandatory collective bargaining under the NLRA.

The NLRA imposes certain requirements on the bargaining process.

40. An employer and a union must bargain in good faith over mandatory subjects, but need not reach an agreement; they need only bargain until they reach either an agreement or an impasse. *See Naperville Ready Mix v. NLRB*, 242 F.3d 744, 755 (7th Cir. 2001).

41. To determine whether the parties have negotiated in good faith to an impasse, the NLRB and courts consider such factors as "(a) the parties' bargaining history, (b) the parties' good faith in negotiations, (c) the length of the negotiations, (d) the importance of the issues over which there is disagreement, and (e) the contemporaneous understanding of the parties as to the state of regulations on the crucial date." *La Porte Transit Co. v. NLRB*, 888 F.2d 1182, 1186 (7th Cir. 1989).

42. The NLRA also requires bargaining parties to provide certain relevant information to each other. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The NLRB and federal courts enforce the NLRA's requirements.

43. If a union believes an employer has committed an unfair labor practice under the NLRA (or vice versa), the union (or the employer) may only seek redress by filing a complaint with the NLRB. 29 U.S.C. § 160(b).

44. After the NLRB determines whether an unfair labor practice has occurred, the losing party may appeal the decision to the U.S. Court of Appeals for the circuit in which the alleged unfair labor practice occurred, the circuit in which the aggrieved party resides or transacts business, or the District of Columbia Circuit. 29 U.S.C. § 160(f).

45. The jurisdiction the NLRA gives to the NLRB and the Court of Appeals is exclusive; no other court may hear a union or employer's claim for a violation of the NLRA. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938).

The NLRA preempts state laws purporting to govern private-sector unions.

46. The NLRA preempts state laws that would "regulate any activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

47. A state law that is preempted by the NLRA violates the Supremacy Clause of the United States Constitution. *Cannon*, 33 F.3d at 883.

48. The NLRA protects a right of private-sector employees to engage in collective bargaining and dictates the subjects and other conditions of mandatory private-sector collective bargaining.

49. The NLRA therefore preempts any state law that would regulate private-sector collective bargaining.

50. The NLRA not only preempts state labor laws that conflict with the NLRA but also state tribunals for the enforcement of labor rights protected by the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959).

Amendment 1 conflicts with the NLRA.

51. Amendment 1 conflicts with the NLRA.

52. Illinois law allows the Illinois General Assembly to place a constitutional amendment on the ballot through a 60 percent vote in each chamber of the legislature. 5 ILCS 20/1.

53. Once the General Assembly approves an amendment, the amendment appears before the voters at the next election of members of the General Assembly, on a separate ballot. 5 ILCS 20/2.

54. Amendment 1 was introduced into the Illinois General Assembly as Senate Joint Resolution 11 on May 7, 2021. The Illinois Senate voted 49 to 7 to pass the Resolution on May 21, 2021. The Illinois House of Representatives voted 80 to 30 to pass the Resolution on May 26, 2021. As a result, Amendment 1 is currently scheduled to appear on the November 8, 2022 general election ballot.

55. Amendment 1 would add the following language to Article I of the Illinois Constitution:

> (a) Employees shall have the fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and work place safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.
>
> (b) The provisions of this Section are controlling over those of Section 6 of Article VII.

56. Amendment 1 does not define "employees." It makes no distinction between private-sector and public-sector employees and therefore encompasses both.

57. Unlike the NLRA, Amendment 1 purports to give employees a "fundamental" right to bargain collectively.

58. Amendment 1 purports to give employees a right to collectively bargain "to protect their economic welfare," which is not a mandatory subject of collective bargaining under the NLRA.

59. Unlike the NLRA, Amendment 1 does not provide for exclusive representation by a union that has received a vote by a majority of employees, nor does it identify how collective bargaining units are determined.

60. Unlike the NLRA, Amendment 1 has no revenue threshold for businesses subject to mandatory collective bargaining.

61. Amendment 1 would create a right that would be enforceable in state courts rather than before the NLRB and the U.S. Court of Appeals.

Placing Amendment 1 on the ballot would injure Plaintiffs as Illinois taxpayers.

62. Plaintiffs are Illinois residents who pay income taxes to the state.

63. Plaintiffs are injured when the state uses its general revenue funds—i.e., Plaintiffs' tax money—for an unconstitutional purpose.

64. As set forth below, Plaintiffs allege that Amendment 1 is preempted by the NLRA and therefore violates the Supremacy Clause of the U.S. Constitution.

65. Thus, Plaintiffs will suffer injury if the state uses their tax money to place Amendment 1 on the ballot.

COUNT I

Amendment 1 violates the Supremacy Clause of the United States Constitution.

66. Plaintiffs repeat and reallege the allegations of the foregoing paragraphs as if fully set forth herein.

67. The NLRA preempts Amendment 1 because Amendment 1 would regulate private-sector collective bargaining, an activity protected and regulated by the NLRA.

68. Amendment 1 conflicts with the NLRA because it creates a state-law right that could be enforced in state court, rather than the federal forums the NLRA has established for enforcement of the right to collectively bargain.

69. Amendment 1 conflicts with the NLRA because it would give private-sector employees a "fundamental" right to engage in collective bargaining—a right the NLRA does not give to employees, as set forth above.

70. Amendment 1 conflicts with the NLRA because it would give employees the right to collectively bargain over not only "wages, hours, and working conditions" but also measures "to protect their economic welfare," which are not a mandatory subject of collective bargaining under the NLRA, as set forth above.

71. Amendment 1 conflicts with the NLRA because it does not define how collective bargaining units are to be determined, lacks any requirement of a majority vote for union representation, and does not provide for exclusive representation by a union that receives a majority of votes by a bargaining unit.

72. Amendment 1 conflicts with the NLRA because it has no revenue threshold for businesses subject to mandatory collective bargaining.

73. Amendment 1 conflicts with the NLRA because it does not otherwise limit and regulate its right to collective bargaining in the manner of the NLRA.

74. Amendment 1 therefore violates the Supremacy Clause of the United States Constitution.

75. Where a proposed amendment to the Illinois Constitution is itself unconstitutional, the remedy is for the Illinois courts to enjoin state officials from placing the measure on the ballot. *See Hooker v. Ill. State Bd. of Elections*, 2016 IL 12077 ¶¶ 8 & n.2, 48; *Chi. Bar Ass'n v. Ill. State Bd. of Elections*, 161 Ill.2d 502, 508, 515–16 (1994).

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Enter a judgment declaring that the NLRA preempts Amendment 1 and therefore violates the Supremacy Clause of the United States Constitution;

B. Preliminarily and permanently enjoin Defendants from disbursing or using public funds to place Amendment 1 on the November 2022 general election ballot;

C. Award Plaintiffs their reasonable costs, expenses, and attorneys' fees pursuant to any applicable law; and

D. Award Plaintiffs any additional relief the Court deems just and proper.

Dated: April 21, 2022

Respectfully submitted,

SARAH SACHEN, IFEOMA NKEMDI, JOSEPH OCOL, and ALBERTO MOLINA

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