No. 05-1531

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE,

Plaintiff-Appellant,

v.

MILWAUKEE COUNTY,

Defendant-Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CASE NO. 01-C-0149

THE HONORABLE JUDGE LYNN ADELMAN

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# NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL OF DISTRICT COURT

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# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 05-1531

Short Caption: Metropolitan Milwaukee Association of Commerce v. Milwaukee County

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, of a private attorney representing a governmental party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed.R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

**National Right to Work Legal Defense Foundation, Inc**.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: **N/A**

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any:
**No parent corporation**

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: _____ Date: **4/20/05**

Attorney's Printed Name: **Glenn M. Taubman, Esq.**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _X_ No___

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**MOTION OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT**

Pursuant to Fed. R. Civ. P. 29(b), the National Right to Work Legal Defense Foundation ("Foundation") moves for leave to participate as *amicus curiae* in the above-captioned case on behalf of Plaintiff-Appellant Metropolitan Milwaukee Association of Commerce ("MMAC").[1]

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their right to work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Foundation attorneys have represented the interests of individual employees before the Supreme Court and the Seventh Circuit in cases involving employees' rights to refrain from joining or supporting labor organizations as a condition of employment.[2]

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[1] The Foundation received the consent of MMAC to participate as *amicus curiae* in this case. Counsel for Milwaukee County *et al.*, did not consent to the filing of this brief, thereby necessitating this motion.

[2] These cases include Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers of America v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Minnesota State Bd. v. Knight, 465 U.S. 271 (1984); Ellis v. Railway Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Tavernor v. Illinois Fed'n of Teachers, 226 F.3d 842 (7th Cir. 2000); Hudson v. Teachers Local 1, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); Nielsen v. Machinists Local

The Foundation's legal aid program is currently at the forefront of cases involving "top-down" union organizing, wherein unions enlist the aid of employers to unionize the employers'. *See e.g.*, Dana Corp., 341 NLRB No. 150 (2004); Patterson v. Heartland Indus. Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004). The General Counsel of the National Labor Relations Board, ("NLRB") recently issued a report about significant cases "regarding the expanded use of neutrality agreements as an organizational tool." NLRB General Counsel Report, R-2554 (November 17, 2004).[3] The charging parties in all cases discussed therein are represented by Foundation staff attorneys.

This case involves an important facet of organized labor's "top down" organizing strategy: using public entities to economically pressure private employers to sign "neutrality" or "labor peace" agreements with unions, wherein the employer must assist union organizing campaigns against its employees. This strategy is a deliberate attempt to do an "end run" around the National Labor Relations Act's ("NLRA" or "Act") prohibitions against the use of secondary economic pressure to assist union organizing, as a union and a *private* employer cannot lawfully engage in a similar course of conduct under the Act.

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2569, 94 F.3d 1107 (7th Cir. 1996).

[3] Report available at http://www.nlrb.gov/nlrb/press/releases/r2544.pdf.

The Foundation's *amicus curiae* brief is desirable because it greatly expands upon MMAC's argument that Milwaukee County is not acting as a "market participant" under Chapter 31 of the General Ordinances of Milwaukee County ("Chapter 31"), because a private employer could not engage in similar conduct under § 8(e) of the Act. 29 U.S.C. § 158(e); *see* MMAC Brief at 25.

This issue can be dispositive for MMAC in this case. Chapter 31 is assuredly preempted by the NLRA unless Milwaukee County can prove that it is acting as a "market participant." Milwaukee County cannot claim "market participant" status if Chapter 31 were unlawful if the County were a private employer. *See* Building & Constr. Trades Council v. Associated Builders, 507 U.S. 218, 231-32 (1993). If the court recognizes that a private employer could not lawfully engage in the conduct mandated by Chapter 31 under § 8(e) of the Act, as adjudicated by the Foundation, judgment is certainly appropriate for Plaintiff-Appellant MMAC.

Wherefore, the Foundation's Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiff-Appellant Metropolitan Milwaukee Association of Commerce should be granted.

Glenn Taubman
*Counsel for National Right to Work Legal Defense Foundation*

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## Interest of the *Amicus*

The National Right to Work Legal Defense Foundation ("Foundation") is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their right to work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Foundation attorneys have represented the interests of individual employees before the Supreme Court and the Seventh Circuit in cases involving employees' rights to refrain from joining or supporting labor organizations as a condition of employment.[1]

The Foundation's legal aid program is currently at the forefront of cases involving "top-down" union organizing strategies, wherein unions enlist the aid of employers to unionize the employers' workforces. *See, e.g.*, Dana Corp., 341 N.L.R.B. No. 150 (2004); Patterson v. Heartland Indus. Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004). In addition, the General Counsel of the National Labor

[1] These cases include Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991); Communications Workers of America v. Beck, 487 U.S. 735 (1988); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Minnesota State Bd. v. Knight, 465 U.S. 271 (1984); Ellis v. Railway Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Tavernor v. Illinois Fed'n of Teachers, 226 F.3d 842 (7th Cir. 2000); Hudson v. Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292 (1986); Nielsen v. Machinists Local 2569, 94 F.3d 1107 (7th Cir. 1996).

Relations Board (NLRB") recently issued a report about significant cases "regarding the expanded use of neutrality agreements as an organizational tool." NLRB General Counsel Report, R-2554 (November 17, 2004).[2] The charging parties in all cases discussed therein are represented by Foundation staff attorneys.

This case involves an important facet of organized labor's "top down" organizing strategy: using public entities to economically pressure private employers to sign "neutrality" or "labor peace" agreements with unions, wherein the employer must assist union organizing campaigns against its employees. This strategy is a deliberate attempt to do an "end run" around the National Labor Relations Act's ("NLRA" or "Act") prohibitions against the use of secondary economic pressure to assist union organizing, as a union and a *private* employer cannot lawfully engage in a similar course of conduct under the Act.

A Motion for Leave to file this brief is filed concurrently with this brief. While Appellant Metropolitan Milwaukee Association of Commerce ("MMAC") consented to the Foundation's participation as an *amicus curiae* in this case, Milwaukee County refused its consent.

[2] Report available at http://www.nlrb.gov/nlrb/press/releases/r2544.pdf.

## Summary of Argument

Milwaukee County is not acting as a "market participant" under Chapter 31 of the General Ordinances of Milwaukee County ("Chapter 31" or "Ordinance") because it could not engage in similar conduct if it were a private entity. Chapter 31 establishes an arbitration procedure wherein Milwaukee County will cease doing business with any employer that refuses union demands to enter into a "labor peace" agreement with the union. These "labor peace" agreements require employers to assist union organizing campaigns against the employers' employees. *See* Chapter 31, §§ 31.02(f)(1, 3, 5)

Sections 8(e) and 8(b)(4) of the NLRA, 29 U.S.C. §§ 158(e) and 158(b)(4), circumscribe the use of economic pressure brought by "secondary" employers to compel "primary" employers to capitulate to union organizing demands. If Milwaukee County were a private employer, Chapter 31 would be facially invalid under § 8(e) of the Act. A union invoking or otherwise using the arbitration procedure of Chapter 31 would violate § 8(b)(4)(ii)(B) of Act.

Indeed, Chapter 31 is contrary to the legislative purpose underlying the NLRA's restrictions on secondary economic activity: stopping "top down" union organizing. The manifest intent and effect of Chapter 31 is to facilitate union

organizing by economically pressuring employers to affirmatively assist union organizing campaigns against their employees.

Milwaukee County's scheme is an obvious "end run" around Congress's prohibitions on secondary economic pressure. Unions could not lawfully enlist private employers to engage in this conduct, so they turn to public bodies like Milwaukee County. If this conduct is permitted, it will unravel Congress's carefully delineated limitations on the use of secondary economic pressure.

Milwaukee County is not acting as a market participant under Chapter 31. The ordinance is preempted by the NLRA.

## Argument

### I. Milwaukee County Is Not Acting as a Market Participant Under Chapter 31, as It Could Not Engage in a Similar Course of Conduct If It Were a Private Employer Under §§ 8(e) and 8(b)(4) of the NLRA.

#### A. A Public Entity Is Not a Market Participant If Similar Conduct by a Private Employer Would Be Unlawful.

An ordinance that regulates activities which are "protected by § 7 of the [NLRA] or constitute an unfair labor practice under § 8" of the Act is preempted by the NLRA, as such matters lie exclusively within the jurisdiction of the NLRB, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959). A statute or ordinance is also preempted by the Act if it interferes with the economic weapons of unions or employers that Congress intended to be unregulated. *See*

Lodge 76, Int'l. Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Comm'n, 427 U.S. 132 (1976). As discussed at length in MMAC's brief, Chapter 31 both treads upon the jurisdiction of the NLRB and interferes with conduct that Congress left "to be controlled by the free play of economic forces." Id. at 147; *see* MMAC Brief at 9-18.

The District Court largely conceded this point, but held that Milwaukee County's conduct is exempt from preemption under the "market participant" doctrine. *See* Dist. Court Op. at 5 (S.A. 25). Under this doctrine, "a State may act without offending the preemption principles of the NLRA when it acts as a proprietor and its acts therefore are not 'tantamount to regulation' or policymaking." Building & Constr. Trades Council v. Associated Builders, 507 U.S. 218, 229 (1993) ("Boston Harbor").

What the district court failed to recognize is that a public entity cannot be a "market participant" if its conduct would be unlawful if it were a private market participant. The entire basis of the market participant doctrine is that the public entity acts just like a private participant in the free market. *See* Id. at 231-32 ("where analogous private conduct would be permitted, this Court will not infer such a restriction" on public entities). Engaging in conduct that a private entity

could not lawfully engage in certainly precludes any claim to market participant status.[3]

In Boston Harbor, the parties conceded that a *private* owner-developer could lawfully cease doing business with contractors that refused to enter into union collective bargaining agreements under the "construction industry proviso" of § 8(e) of the NLRA, which exempts employers in the construction industry from § 8(e)'s general prohibitions. Id. at 220.[4] This concession was central to the Court's holding that a *public* owner-developer who ceased doing business with contractors who did not enter into union agreements was permissible under the market participant doctrine. "[T]he general goals behind passage of

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[3] The district court stated that "the government is not required to prove that the action in question is typical of the actions of private entities." Dist. Court Op. at 13 (S.A. 33). Irrespective of whether the action has to be "typical" of a private entity or not, a public entity cannot claim to be a market participant if its actions would be *unlawful* for a private entity.

[4] In Boston Harbor, it was "*undisputed* that the Agreement . . . is a valid labor contract under §§ 8(e) and (f)." 507 U.S. at 230 (emphasis added). The Supreme Court therefore assumed, without deciding, that this conduct was lawful under the Act. *See* id. At 220 (stated issue is "whether the National Labor Relations Act . . . pre-empts enforcement by a state authority, acting as the owner of a construction project, of an *otherwise lawful* prehire collective-bargaining agreement negotiated by private parties") (emphasis added). Had the Court actually considered the issue, it likely would have recognized that a private owner-developer is not exempt under the construction industry proviso of § 8(e) because he/she is not an "employer engaged primarily in the building and construction industry" under § 8(f) of the Act. *See* 29 U.S.C. §158(f); Connell Constr. Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616, 633 (1975) (construction industry proviso applies only to employers with collective bargaining relationship with union). Here, MMAC has directly challenged whether Milwaukee County's conduct would be lawful under § 8(e) of the Act if it were a private employer. *See* MMAC Brief at 25.

§§ 8(e) and (f) are . . . relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections." Id. at 231.

> [W]hen the [public entity], acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing *upon the very sort of labor agreement that Congress explicitly authorized* and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them.

Id. at 233 (emphasis added).[5]

Similarly, in Colfax Corp. v. Illinois State Toll Highway Authority, 79 F.3d 631, 634-35 (7th Cir. 1996), a State Highway Toll Authority required contractors to enter into a multi-project labor agreement as a condition to working on public construction projects. In finding this action not preempted, the Seventh Circuit relied heavily on the concession that an analogous private entity could lawfully do the same under the construction industry proviso of § 8(e) of the Act.

> As we stated, the [Boston Harbor] Court made clear that when acting as a proprietor, a state may do what a private contractor would do. In discussing what a private contractor may do under the construction industry provisions of the NLRA, the Court cited Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982). In Woelke, the Court specifically considered subcontracting agreements which were not limited to a particular jobsite and determined that the proviso in 29 U.S.C. § 158(e) allows, in the construction

[5] *See also* Boston Harbor, 507 U.S. at 231 ("To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as a purchaser should be permitted to do the same.").

> industry, agreements "that would prohibit the subcontracting of jobsite work to nonunion firms." [456 U.S. at 662]. It is clear that a private entity could do what the Authority has done. In fact, at oral argument, though not in its briefs, Colfax conceded the point.

Colfax, 79 F.3d at 634-35.[6]

In this case, Milwaukee County's conduct under Chapter 31 is inconsistent with §§ 8(e) and 8(b)(4) of the Act. Unlike in Boston Harbor and Colfax, the construction industry proviso to § 8(e) that saved those public entities from preemption has no application here. Chapter 31 has absolutely nothing to do with the construction industry.[7]

A private entity could not lawfully engage in the secondary conduct that Milwaukee County is engaging in under Chapter 31. As discussed below, the policy embodied in Chapter 31 is contrary to the plain text of §§ 8(e) and 8(b)(4) of the Act, and repugnant to the legislative purpose underlying these provisions: prohibiting "top down" union organizing through the use of secondary economic pressure.

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[6] As in Boston Harbor, the parties in Colfax conceded that a private owner-developer qualifies for the construction industry exemption of § 8(e). In reality, it is doubtful that a private owner-developer actually qualifies for the construction industry exemption under Connell Construction, 421 U.S. 616 (1975). *See* note 4, *supra*.

[7] And unlike in Boston Harbor and Colfax, the Plaintiff-Appellant in this case directly challenges whether Milwaukee County's conduct would be lawful if it were a private employer. *See* MMAC Brief 24-25.

B. If Milwaukee County Were a Private Entity, the Policy Established in Chapter 31 Would Be Unlawful Under § 8(e) of the Act.

Section 8(e) makes it an unfair labor practice for an employer and a union "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person." 29 U.S.C. § 158(e). Exempt from this prohibition are employers operating in the construction and garment industries. These exemptions are not applicable here (unlike in Boston Harbor and Colfax).

Section § 8(e) was enacted by Congress in 1959 to preclude unions from using economic pressure brought by a "secondary" employer to influence the labor policies of the "primary" employer with whom the union has a labor dispute. Congress was concerned about the "situation where the union, in a dispute with one employer . . . force[s] [a] second employer or his employees, to stop doing business with the first employer, and bend his knee to the union's will." National Woodwork Mfg. Ass'n v. NLRB, 386 U.S. 612, 637 (1967), *quoting in part* 105 Cong. Rec. 14343 (Rep. Landrum) (quotation marks omitted).

In particular, Congress was concerned about the use of secondary economic pressure to force employers and employees to submit to union organizing demands. "[O]ne of the major aims of the 1959 amendments to the NLRA, of which § 8(e) was one, *was to limit top-down organizing campaigns*." Donald Schriver, Inc. v.

NLRB, 635 F.2d 859, 872 (D.C. Cir. 1980) (emphasis added), *quoting in part* Connell Constr. Co., v. Plumbers & Steamfitters Local No. 100, 421 U.S. at 632; *see also* Woelke & Romero Framing, 456 U.S. at 653 n.8 ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns") (citations omitted).

It is for this reason that an employer ceasing to do business with another company at the request of a union, for the purpose of assisting that union's organizing efforts, is secondary and unlawful under the § 8(e) of the Act. *See* Associate Gen. Contractors (California Dump Truck), 280 N.L.R.B. 698, 701-02 (1986) (clause with the "primary purpose serving the general institutional interest of the union in organizing or *regulating the labor policies* of employers with whom the union does not have a collective-bargaining relationship are unlawful under Section 8(e) because they are secondary in character") (emphasis added); *discussed with approval,* Southwestern Materials & Supply, Inc., 328 N.L.R.B. 934, 940(1999); *see also* Pennsylvania Reg. Council of Carpenters (Novingers, Inc.), 337 N.L.R.B. 1030, 1037 (2001) (policy secondary when it "seems aimed at fostering the [union's] own organizational interests") (citations omitted).

Chapter 31 establishes an arbitration procedure wherein Milwaukee County will cease doing business with any employer that refuses to submit to a union's demands that it enter into a "labor peace" agreement. Chapter 31, § 31.05(a). If Milwaukee County were a private employer, Chapter 31 would be unlawful under § 8(e) of the Act.

The following three-part test is utilized to determine violations under § 8(e):

> (1) it is an agreement of a kind described in the basic prohibition of that Section–e.g., an agreement to cease doing business with another person;
> (2) it has a secondary objective . . .;
> (3) it is not saved by coming within the terms of the construction industry proviso to Section 8(e).

Carpenters Dist. Council (Alessio Const.), 310 N.L.R.B. 1023, 1025 (1993).

**Agreement to Cease Doing Business**. With regard to the first criteria, Chapter 31 requires that Milwaukee County terminate or cancel its contract with an employer outright, or not accept future work proposals from an employer, if that employer refuses a union's demand that it enter into a "labor peace" agreement. Chapter 31, §§ 31.05(a)(1) & (2). This constitutes "ceas[ing] to do business" under § 8(e). *See* Sheet Metal Workers Local 91 (Schebler Co.), 294 N.L.R.B. 766, 771-72 (1989) ("it is well settled that the 'cease doing business' language of §§ 8(e) and 8(b)(4) does not require a total cessation of business. An alteration of or in reference with the business relationship is sufficient"), *citing* Longshoremen

ILA Local 1410 (Mobile Steamship), 235 N.L.R.B. 172, 179 (1978) and cases there cited therein.

An "agreement, express or implied" under § 8(e) arises from the arbitration provisions of Chapter 31. A union's invocation of this arbitration provision causes Milwaukee County to cease doing business with an employer if the employer refuses to sign a "labor peace" agreement. Chapter 31, §§ 31.02(c) & 31.03. An "agreement" to cease doing business arises when a union invokes this arbitration procedure. For example, if a private employer had a policy to cease doing business with another employer upon union request, an unlawful "agreement" under § 8(e) would arise upon a union making that request and the employer following through on its promise.

An "agreement" also arises by virtue of heavy union involvement in the drafting and promulgation of Chapter 31. *See* MMAC Brief at 29-31 ("Chapter 31 Was The Brainchild of Organized Labor, Not County Officials") and the evidence cited therein. In the private sector, if a union participated in the drafting of corporate policy to not do business with others, this would constitute an "agreement" under the Act. The strictures of § 8(e) extend to "implied" agreements, and cannot be avoided through subterfuge or ambiguous arrangements. *See* International Union of Elevator Constructors (Long Elevator),

289 N.L.R.B. 1095, 1095 n.2 (1998), *enforced* 902 F.2d 1297 (8th Cir. 1998); Retail Clerks Union Local 779 (Hughes Markets), 218 N.L.R.B. 680, 683, n.11 (1975).

**Secondary Purpose**. Assisting union organizing is the epitome of a secondary objective. *See* California Dump Truck, 280 N.L.R.B. at 701-02; Novingers, Inc., 337 N.L.R.B. at 1037. Indeed, prohibiting "top-down union" organizing is a primary purpose of Congress's restrictions on secondary economic pressure. *See* Connell Constr., 421 U.S. at 632.

Here, the manifest function of Chapter 31 is to put economic pressure on employers to coerce them to assist union organizing campaigns against their employees. *See* Ordinance, §§ 31.02(f)(1, 3, 5); *see also* MMAC Brief at 31 ("Legislative History Shows That the Purpose of Chapter 31 Was to Promote Union Organizing"). This conduct is unquestionably secondary.

Moreover, Chapter 31's requirement that Milwaukee County cease doing business with employers that are not parties to an agreement with a union is a classic "union signatory" clause, which has long been recognized as secondary:

> It is well settled that contract clauses which purport to limit . . . subcontracting to employers who are signatories to union contracts, so-called union-signatory clauses, are proscribed by Section 8(e). Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees, but as being directed at furthering general

> union objectives and undertaking to *regulate the labor policies of other employers*.

Southwestern Materials, 328 N.L.R.B. at 937 (emphasis added), *quoting* Chicago Dining Room Employees (Clubmen, Inc.), 248 N.L.R.B. 604, 606 (1980).

**Construction Industry Proviso Inapplicable**. Chapter 31 has nothing to do with the construction industry. Unlike in Boston Harbor and Colfax, the construction industry proviso that saved those public entities from preemption has no application here.

Chapter 31 does not represent a policy that Congress "expected frequently to find" in private labor relations. Boston Harbor, 507 U.S. at 233.[8] It is a policy that Congress explicitly sought to stamp out with § 8(e) of the Act. Accordingly, Milwaukee County cannot tenably claim that it is acting as a market participant.

### C. If Milwaukee County Were a Private Entity, a Union Would Violate § 8(b)(4)(ii)(B) of the Act If It Participated in the Arbitration Established in Chapter 31.

If Milwaukee County were a private employer, a union seeking to compel an employer to enter into a labor peace agreement pursuant to the arbitration provisions of Chapter 31would violate § 8(b)(4)(ii)(B) of the Act.[9] This statutory

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[8] Even the district court recognized that "Congress has not explicitly authorized private entities to enter agreements of the type described in Chapter 31." District Op. at 7 (S.A. 27).

[9] Section 8(b)(4)(ii)(B) states in pertinent part: "It shall be an unfair labor practice for a (continued...)

provision "prohibits unions and their agents from engaging in secondary activities whose object is to force one employer to cease doing business with another." NLRB v. Longshoremen ILA, 447 U.S. 490, 503 (1980). While § 8(e) strikes at *agreements* under which an employer ceases doing business with another person, § 8(b)(4) prohibits union attempts to *cause* the secondary employer to cease doing business with any other person.

It is well established that a union's use of arbitration to have a secondary employer cease doing business with another employer constitutes is unlawful under § 8(b)(4)(ii)(B). *See* Newspaper & Mail Deliverers (New York Post), 337 N.L.R.B. 608, 608 (2002) (holding that the "Union violated Section 8(b)(4)(ii)(B) by resorting to arbitration with an object of forcing or requiring [an employer] to cease doing business with [another employer]"); Service Employees Local 32B-32J (Nevins Realty), 313 N.L.R.B. 392, 392 (1993) ("resorting to arbitration" to have one employer apply pressure upon another unlawful under § 8(b)(4)(ii)(B)).

A union's invocation of Chapter 31's arbitration procedure will cause Milwaukee County to cease doing business with an employer if that employer

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[9](...continued)
labor organization . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person . . . to cease doing business with any other person." 29 U.S.C. § 158(b)(4)(ii)(B).

refuses to sign a "labor peace" agreement. *See* Chapter 31, § 31.05. If Milwaukee County were a private employer, the union's conduct would be prohibited by § 8(b)(4)(ii)(B) of the Act. *See, e.g*, Newspaper & Mail Deliverers, 337 N.L.R.B. at 608; Service Employees Local 32B-32J, 313 N.L.R.B. at 392.

D. Conclusion.

Chapter 31 is an obvious attempt to do an "end run" around the NLRA's prohibitions against the use of secondary economic pressure to assist top-down union organizing campaigns. If a private entity and a union promulgated a policy similar to Chapter 31, it would be facially unlawful under §§ 8(e) of the NLRA. Moreover, any union that invoked the arbitration procedures of this policy would violate § 8(b)(4)(ii)(B) of Act.

Chapter 31 is not a type of scheme "that Congress explicitly authorized and expected frequently to find" in the private market. Boston Harbor, 507 U.S. at 233. Instead, Chapter 31 represents a type of conduct that Congress sought to ban: "top down" union organizing through the use of secondary economic pressure. Connell, 421 U.S. at 632.

If Chapter 31 is not held preempted, unions will be able to bypass the NLRA's prohibitions on secondary conduct simply by enlisting the aid of public bodies to apply the secondary pressure that private employers cannot. Congress's

"careful limits on the economic pressure unions may use in aid of their organizational campaigns" will be torn asunder. Id.

Milwaukee County is not a market participant. Chapter 31 is preempted by the NLRA. The decision of the district court must be REVERSED.

Respectfully submitted this 20th day of April, 2005.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Word Perfect 11.0 in a 14-point font in Times New Roman for text in the body, and in a 12-point font in Times New Roman for text in the footnotes.

Dated this 20th day of April, 2005.

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Glenn M. Taubman

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the National Right to Work Legal Defense Foundation's Motion for Leave to File *Amicus Curiae* Brief, and *Amicus Curiae* Brief in Support of Plaintiff-appellant and for Reversal of District Court, including a copy on digital media, was served via Federal Express on April 19, 2005, to the following:

United States Court of Appeals
for the Seventh Circuit
Clerk's Office
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Dated this 20th day of April, 2005.

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Glenn M. Taubman