AUG 26 2010

No. 10-160

IN THE

Supreme Court of the United States

KRISTEN BAUM,

Petitioner,

v.

ASTRAZENECA LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

Did the Third Circuit Court of Appeals correctly interpret and apply the Pennsylvania Minimum Wage Act ("Pennsylvania Act"), and Pennsylvania's implementing regulations, when the court concluded that Petitioner Kristen Baum was exempt from the Pennsylvania Act's overtime requirements?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent makes the following disclosures:

Respondent AstraZeneca LP is a limited partnership. Its general partner is AstraZeneca Pharmaceuticals LP (99% interest), and its limited partner is KBI Sub, Inc. (1% residual interest).

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BRIEF IN OPPOSITION

This case presents state-law issues: the scope and interpretation of the Pennsylvania Act, 43 Pa. Cons. Stat. § 333.101 *et seq.,* and the implementing regulations to the Pennsylvania Act; and whether, under the Pennsylvania statute and regulations, Petitioner Kristen Baum, a former Sales Specialist with Respondent AstraZeneca LP, satisfied the State's administrative exemption and/or outside salesperson exemption to the Pennsylvania Act's overtime requirements. Those state-law questions do not raise a federal issue. Nor does the court of appeals' answer below to those questions conflict with either this Court's precedent or precedent from other courts of appeals. Indeed, neither this Court, nor any court of appeals (outside of this case), has ever examined the Pennsylvania statutes and regulations at issue here. And, in all events, since this Court "do[es] not review . . . questions of state law," *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), the Court should deny Baum's petition for a writ of certiorari.

This case is that simple. Nevertheless, in attempting to overcome the obvious defects in her petition, Baum suggests that this case is *really* about the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and, specifically, the deference due an *amicus* brief filed by the U.S. Secretary of Labor in a different case (one that did not involve Baum, AstraZeneca, or Pennsylvania law). But Baum misses the mark. Since this is a diversity case, *state* law determines the weight (if any) due a U.S. Department of Labor litigation position. And, contrary to Baum's apparent suggestion, *Auer v.*

Robbins, 519 U.S. 452 (1997), does not suggest otherwise. *Auer* did not involve Pennsylvania law, and neither it nor any other prior case has addressed whether, in interpreting Pennsylvania law, the Supreme Court of Pennsylvania might give some level of deference to a U.S. Department of Labor *amicus* brief addressing FLSA matters in a different case.

Similarly, contrary to Baum's claims, this case does not create a circuit split with *In re Novartis Wage & Hour Litigation*, ___ F.3d ___, No. 09-0437-cv, 2010 WL 2667337 (2d Cir. July 6, 2010)): the *Novartis* case involved the FLSA, not Pennsylvania law. *See id.* at *1. Moreover, even if *Novartis* had involved the application of Pennsylvania law (which both sides agree that it did not), that would not change the outcome of Baum's petition. Rather, as to questions controlled by state law (like this case is), conflict among circuits does not present a reason for granting a writ of certiorari. *Cf. Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

At day's end, then, this case involves state-law issues, and only state-law issues. The Court should deny the petition for a writ of certiorari.

RESTATEMENT OF THE CASE

1. The Pennsylvania Act requires employers to pay overtime to their employees. 43 Pa. Cons. Stat. § 333.104(c). It also sets forth several exceptions to its overtime rules. Specifically, and among other things, the Pennsylvania Act exempts employees who work in "the capacity of outside sales[person]" or "[i]n a bona fide . . . administrative . . . capacity." *Id.* § 333.105(a)(5).

The State's outside salesperson exemption covers an employee who is "regularly engaged more than 80% of work time away from the employer's place . . . of business" "[m]aking sales, including any sale, exchange, contract to sell, consignment for sale, or other disposition or selling." 34 Pa. Code § 231.85(1).

The Pennsylvania administrative exemption covers an employee (1) "who is compensated . . . at a rate of not less than $250 per week"; (2) "[w]hose primary duty consists of the performance of office or nonmanual work directly related to management policies or general operation of his employer"; and (3) whose job "includes work requiring the exercise of discretion and independent judgment." *Id.* § 231.83(1), (5).

2. This case concerns whether these state-law exemptions apply to an AstraZeneca Sales Specialist. For its part, AstraZeneca researches, develops, and manufactures pharmaceutical products. Pet. App. 23a. The Company relies on Sales Specialists to generate sales for those products that may be purchased only with a prescription. *Id.* at 6a, 23a. Each prescription results in a sale, and Sales Specialists bring about sales by calling on physicians (the effective decisionmakers in the sales transaction) and persuading them to prescribe the products for appropriate patients. *Id.* at 6a, 23a, 25a.

Baum worked as a Sales Specialist until 2006. *Id.* at 23a. The position was a natural fit for her. She became a Sales Specialist in May 2003 because she "'always wanted to be in sales.'" *Id.* at 23a. Once in the position, she "worked in the field alone most of her time," *id.* at 25a, 9a, seeking to increase market

share for her products by making calls on physicians. *Id.* at 24a. In working to "build relationships," *id.* at 24a, Baum had "significant discretion in how she would approach physicians," *id.* at 17a. She engaged in "'personal selling,'" *id.* at 24a, using "'innovative themes,'" *id.* at 8a. Near the end of each call, Baum asked the doctor for a commitment to order AstraZeneca's products for appropriate patients. *Id.* at 25a. She was successful in these efforts, and the Company provided her a $63,000 salary, with the opportunity to earn a sales-based bonus on top of this amount. *Id.* at 25a–26a.

3. On March 27, 2007, Baum filed this suit in state court, seeking overtime pay under the Pennsylvania Act. *Id.* at 22a. AstraZeneca removed the suit to the Western District of Pennsylvania. *Id.* The district court had diversity jurisdiction under 28 U.S.C. § 1332. *See* Pet. App. at 22a–23a.

a. The district court granted summary judgment to AstraZeneca. It held that Baum fell within the Pennsylvania Act's outside salesperson exemption. *Id.* at 32a–54a. The court found that Baum made sales by obtaining physician commitments to order pharmaceuticals for approved uses. *Id.* at 42a–43a. In the alternative, the court pointed out that it "would likely find" that Baum fell within Pennsylvania's administrative exemption. *Id.* at 55a–56a.

b. The Third Circuit Court of Appeals affirmed based on Pennsylvania's administrative exemption. *Id.* at 11a. It began by noting that the exemption's "salary requirement of $250 per week was indisputably satisfied." *Id.* at 7a. It next found that Baum "perform[ed] . . . nonmanual work directly

related to AstraZeneca's general operation." Pet. App. at 7a; *see also* 34 Pa. Code 231.83(1). Specifically, Baum "'disseminat[ed] information to the marketplace [and increased] understanding [of] customers and competitors'" by visiting physicians and organizing events. Pet. App. at 8a (quoting *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 12 (1st Cir. 1997)).

As to whether Baum's work included discretion, the court concluded that "Baum's day-to-day interactions with physicians required her to exercise a significant amount of discretion and independent judgment." Pet. App. at 19a. The record showed that "[e]very visit was somewhat unique because each physician had different preferences, interests, and availability." *Id.* at 9a. As such, Baum needed to constantly "change her promotion strategy," *id.* at 8a, and she needed to "decide[] how much time she would spend with a given physician depending on whether the physician was interested in her product," *id.* at 9a. The court thus concluded that "[o]verall, Baum's day-to-day activities involved making numerous independent judgments on how best to promote AstraZeneca's products." *Id.*

In reaching its conclusions, the court discussed FLSA administrative exemption authority in addition to Pennsylvania statutes, regulations, and cases. In doing so, the court cited a Pennsylvania decision for the proposition that Pennsylvania courts have looked to federal cases regarding the FLSA for guidance in applying the Pennsylvania Act. *See id.* at 7a n.4. The court further noted that Baum's duties were similar to the duties of a sales representative that it found exempt from the FLSA

in *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010). *See* Pet. App. 9a-10a.

c. The court of appeals summarily denied Baum's petition for rehearing *en banc*, *id.* at 2a, and has since denied her petition to recall the mandate.

REASONS FOR DENYING THE PETITION

This Court will grant a petition for a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. For example, certiorari may be appropriate if "a United States court of appeals has decided an important *question of federal law* that has not been, but should be, settled by this Court." *Id.* at 10(c) (emphasis added). Likewise, certiorari might be warranted if a court of appeals "has decided an important *federal question* in a way that conflicts with relevant decisions of this Court," *id.* (emphasis added), or the decision of another court of appeal, *see id.* at 10(a).

This case, however, presents no such compelling grounds. Rather, the Court should deny Baum's petition for a writ of certiorari for at least three reasons. *First*, the petition raises only issues of state, not federal, law. *Second*, the court of appeals' interpretation of state law presents no conflict with this Court's precedents. *Third*, the court of appeals' Pennsylvania-law ruling does not conflict with the decision of any other court of appeals.

I. THIS CASE RAISES NO FEDERAL QUESTION

Baum seeks a writ of certiorari for this Court to resolve the meaning of the Pennsylvania Act and its exemptions. *See* 43 Pa. Cons. Stat. § 333.105(a)(5); 34 Pa. Code §§ 231.83, -.85. This case thus raises no federal question. *See* Sup. Ct. R. 10.

A federal court of appeals' handling of a state-law issue provides no grounds for a writ of certiorari. To the contrary, the Court "*do[es] not review*, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) (emphasis added); *see also Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 944 (1998) (Stevens, J., respecting denial of petition for writ of certiorari) ("This Court does not normally make an independent examination of state-law questions that have been resolved by a court of appeals."). Indeed, when it comes to state law, the Court not only refuses to review courts of appeals' decisions, but also "accord[s] *great deference* to the interpretation and application . . . by the courts of appeals." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) (emphasis added); *see Bishop v. Wood*, 426 U.S. 341, 345–46 (1976).

Under these principles, Baum plainly has *not* identified any valid basis for a writ of certiorari. The instant state-law matter implicates no federal constitutional questions, nor does it otherwise present "extraordinary" circumstances that might suggest a need for this Court's involvement in a diversity case. *See* Eugene Gressman et al., *Supreme Court Practice* § 4.10, at 261-62 (9th ed. 2007) (noting "the Court's current lack of interest in reviewing diversity cases where the only issue is the consistency of the court of appeals decision with applicable state substantive law"). For this reason alone, the petition should be denied.

II. THE CASE PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS

To downplay that her petition raises nothing more than a state-law issue, Baum argues that the court of appeals' decision "contravened well-established precedent by this Court." Pet. 15. Specifically, she claims that this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), required the court of appeals to construe Pennsylvania state law in strict accordance with positions adopted by the U.S. Department of Labor in an *amicus* brief addressing FLSA issues in another case.[1] Pet. 13–15 (referencing the U.S. Department of Labor's *amicus* brief in *In re Novartis Wage & Hour Litig.*, ___ F.3d ___, No. 09-0437-cv, 2010 WL 2667337 (2d Cir. July 6, 2010)).

Baum is mistaken. Neither *Auer* nor any decision from this Court has ever concluded or even suggested that a federal agency's litigation position (in another case no less) controls the application of state law. *See Auer*, 519 U.S. at 461 (deferring to federal agency's interpretation of its "*own* [federal] regulations") (emphasis added). Nor could the Court adopt such a rule. Like other federal courts, this Court is "bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assn.*, 426 U.S. 482, 488 (1976).

Thus, whether a U.S. Department of Labor's FLSA litigation position in a separate case carries even persuasive power in this diversity matter (let

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[1] The U.S. Department of Labor filed no *amicus* brief in this state-law case.

alone whether it is entitled to any level of deference) is a pure state-law issue. In fact, the Pennsylvania courts have yet to address this issue. At most, Pennsylvania courts have found it proper to look to federal interpretation of the FLSA when construing the Pennsylvania Act. *Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) (examining "federal case law"), *aff'd*, 859 A.2d 1253 (Pa. 2004); *compare* 29 C.F.R. § 541.200(a)(3) (covering those whose job includes "the exercise of discretion and independent judgment *with respect to matters of significance*") (emphasis added), *with* 34 Pa. Code § 231.83(5) (covering those whose job "includes work requiring the exercise of discretion and independent judgment"). Consistent with this guidance, the Third Circuit Court of Appeals below reasonably supplemented its decision with reference to the court's interpretation of the FLSA in the *Smith* decision (which, in turn, invoked long-standing FLSA decisions such as *Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982)). But no Pennsylvania case – let alone a Supreme Court of Pennsylvania decision – has ever examined the weight (if any) that should be accorded a U.S. Department of Labor FLSA *litigation position* in construing the Pennsylvania Act (and thus Baum cannot claim that the court of appeals decided contrary to any such Pennsylvania case).

In sum, this Court has never interpreted the Pennsylvania Act, and it has never required federal courts to defer to federal agency litigation positions (on federal law questions) when interpreting state law. As such, Baum is wrong to suggest that the court of appeals' resolution of state-law issues in this

case somehow departed from the Court's precedents. To the contrary, both the interpretation of the Pennsylvania Act and questions of any deference due the U.S. Department of Labor's FLSA litigation positions (in other cases) are state-law issues that, as described above, present no grounds for a writ of certiorari.

III. THE COURT OF APPEALS' OPINION CONFLICTS WITH NO DECISIONS FROM OTHER COURTS OF APPEALS

In a second attempt to cloud the pure state-law question at issue here, Baum claims that the court of appeals' failure to give *Auer* deference to the U.S. Department of Labor's *amicus* brief in *Novartis* has "resulted in a schism between the Second Circuit and Third Circuit courts of appeals." Pet. 16.

Baum is again wrong. As she concedes, *see* Pet. 16, the *Novartis* case did not involve the Pennsylvania Act. *See* 2010 WL 2667337, at *1, *15. As such, it could not create a conflict as to the proper meaning, interpretation, or application of the Pennsylvania Act. Indeed, aside from the court of appeals below, no other court of appeals has ever interpreted the state regulations at issue. *See* 34 Pa. Code §§ 231.83, -.85. In short, there is no circuit split for this Court to review.

Furthermore, even if *Novartis* had involved Pennsylvania law (which it did not), this would still not provide a basis for granting certiorari in this case. Circuit court disagreement on state-law issues is not a grounds for this Court's review. *Cf. Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law . . . , conflict among circuits is not, of itself, a reason for granting

a writ of certiorari."). That rule applies in full here. Baum's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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