Supreme Court, U.S.
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No. 10-160

IN THE

Supreme Court of the United States

KRISTIN BAUM,
Petitioner,

v.

ASTRAZENECA LP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As required by Pennsylvania law, the court of appeals in this case applied federal regulations promulgated pursuant to the Fair Labor Standards Act to interpret the parallel Pennsylvania Minimum Wage Act. In doing so, did the court of appeals err in disregarding and deciding contrary to the Secretary of Labor's interpretations of those federal regulations, which are entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997) and which another circuit's court of appeals adopted as controlling under materially indistinguishable facts in *In re Novartis Wage and Hour Litigation*, -- F.3d --, 2010 WL 2667337 (2nd Cir., July 6, 2010)?

2. Is petitioner outside of the administrative and outside sales exemptions of the Pennsylvania Minimum Wage Act?

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The presence of a federal question in this case is incontrovertible: the Court of Appeals for the Third Circuit was required to look to federal law to establish the parameters of the administrative and sales exemptions at issue in this case; the court of appeals did in fact apply federal law in interpreting the administrative exemption (and did not reach the sales exemption); and, both parties cited to federal law in their briefing on the administrative and sales exemptions to the courts below. Notwithstanding the obvious, in an attempt to avoid review by this Court, Respondent now argues that such review is unwarranted because there is no federal question presented

in the context of this case. *See* Respondent's Brief in Opposition ("Opp.") at 6-7. This argument is disingenuous at best, and should be rejected.

A. Federal Law Controls The Outcome Of This Case

Respondent mischaracterizes the legal issues here in dispute as "state-law issues" (Opp. at 1) in an effort to convince this Court that it should not intervene to correct the Third Circuit's unwarranted departures from controlling Supreme Court precedent set forth in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997).[1] Respondent's position is belied, however, by Pennsylvania law, the Third Circuit's opinion below, and Respondent's own briefing to the courts below.

First, Pennsylvania law *requires* that courts use federal regulations interpreting the FLSA[2] to interpret the state's substantially similar PMWA[3] in those situations, such as here, where the state did not promulgate regulations for the PMWA's statutory terms. *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) ("it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it"), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (Pa. 2004). Therefore, even though Petitioner's

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[1] In *Smith v. Johnson and Johnson*, 593 F.3d 280 (3rd Cir. 2010), another recent FLSA case concerning pharmaceutical representatives, the Court of Appeals for the Third Circuit also failed to consider or follow *Auer*.

[2] Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*.

[3] Pennsylvania Minimum Wage Act (PMWA), 43 Pa. C.S.A. §§ 333.101-333.115.

claims in this case arise under the PMWA rather than the FLSA, her claims depend upon the meaning of the federal regulations implementing the sales and administrative exemptions to the FLSA.

Second, Respondent's position that this case is about "state-law issues" is contradicted by the Panel's opinion in this case, which specifically recognized that Pennsylvania law required it to apply federal regulations. (*See* App. C at 16a n.4 (citing *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (Pa. 2004) ("According to the Pennsylvania courts, 'it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it.'")). The court of appeals therefore applied the federal regulations promulgated pursuant to the FLSA administrative exemption, and in particular 29 C.F.R. § 541.202 (defining "discretion and independent judgment"), to interpret the PMWA administrative exemption. (*See* App. C, 17a to 18a, citing federal code sections 29 C.F.R. §§ 541.202(a) and (c)).

Third, Respondent's new position -- that this case has nothing to do with federal law -- is undercut by the fact that Respondent consistently cited to FLSA regulations and case law interpreting those federal regulations in its briefing to the courts below on the meaning of the PMWA exemptions. (*See, e.g.*, Supplemental Appendix ("Supp. App.") A, Excerpts of Memorandum in Support of AstraZeneca LP's Motion for Summary Judgment as to the Claims of Kristin Baum, at 102a (citing 29 C.F.R. § 541.205 (2004)); *id.* at 103a (citing 29 C.F.R. § 541.207 (2004)) Additionally, in its brief to the Third Circuit, rather than

asserting its current position (*i.e.*, that federal law supposedly doesn't apply), Respondent instead argued "the Department of Labor's position fully supports AstraZeneca." (*See* Supp. App. B, Excerpts of Response Brief of Appellee AstraZeneca, at 106a; *see also id.* at 106a-107a, 109a, 111a (citing Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122 (2004)); *id.* at 107a, 111a (citing 29 C.F.R. § 541.201); *id.* at 111a-112a (29 C.F.R. § 541.202)); *id.* at 107a (citing 29 C.F.R. § 541.203). Respondent also cited *Stuber* for proposition that Pennsylvania law directs courts to apply FLSA regulations to interpret the PMWA. (*See id.* at 107a, 111a).

As all of this reflects, there was no dispute below that federal law applied, nor was there any dispute that the determination of whether Petitioner fell within the administrative exemption was controlled by the meaning of the federal regulations. Respondent's belated, self-serving attempt to convince this Court that this case does not concern federal law should therefore be soundly rejected.

B. The Court Of Appeals Misapplied Federal Law

Although the Third Circuit Panel was correct to apply federal law, it erred in so doing by failing to consider or account for the Department of Labor's interpretation of the federal administrative exemption, (*see* App. C, 12a to 20a) when that interpretation was entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997). As a result, the court of appeals interpreted the federal exemption in a manner that conflicts with the interpretation of that exemption provided by the Depart-

ment of Labor (*see* App. G, 92a to 93a), and in a manner that conflicts with the interpretation of that exemption rendered by the Court of Appeals for the Second Circuit in *In re Novartis Wage and Hour Litigation*, -- F.3d --, 2010 WL 2667337 (2nd Cir., July 6, 2010).

Respondent posits that the Third Circuit did not contravene this Court's decision in *Auer* or create a circuit split, simply because Petitioner's claims are brought under state law. (Opp. at 8-11). However, this type of argument elevates form over substance. It is demonstrable from the Third Circuit's opinion that the court of appeals was applying and interpreting federal law, and that Petitioner was ultimately found exempt under the PMWA because the court of appeals determined that she fell within the parameters of the federal administrative exemption. (*See* App. C, at 12a to 20a)

Given that the Third Circuit was applying federal law, it should have applied that corpus as a whole, including the DOL's interpretation of the administrative exemption, rather than simply picking and choosing arbitrarily. Irrespective of whether Petitioner's claims were brought under state or federal law, if the court of appeals was applying federal law, it had to do so properly and consistent with this Court's directive in *Auer*. Its failure to do so, in violation of controlling precedent, was clear error.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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