No. 10-580

In The Supreme Court of the United States

KRAFT FOODS GLOBAL, INC.,
OSCAR MAYER FOODS DIVISION,

Petitioner,

v.

JEFF SPOERLE, NICK LEE, KATHI SMITH,
JASON KNUDTSON, on behalf of themselves
and all others who consent to become the plaintiffs
and similarly situated employees,

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 203(o) of the Fair Labor Standards Act allows collective bargaining parties to exclude time spent changing clothes from "hours worked" for the purposes of determining workers' rights under §§ 206 and 207 of that Act. Does § 203(o) preempt Wisconsin's more protective wage and hour laws, under which employers must compensate workers for such time?

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INTRODUCTION

The only question Kraft's petition fairly presents is whether Wisconsin law, which requires employers to compensate workers for time spent changing clothes, is directly at odds with § 203(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o). On that narrow question, Kraft has failed to identify any compelling reason why this Court should grant review. There is no circuit split, the Seventh Circuit's decision is consistent with this Court's well-settled approach to resolving claims of conflict preemption, and Kraft's dire predictions about the impact of the decision are overblown.

Kraft attempts to dress up its petition by drawing from myriad concepts scattered throughout labor law that do not apply to this case, asserting (in addition to the conflict preemption ground the petition presents) two other arguments for invalidating Wisconsin law aside from conflict preemption. Neither is cert-worthy—in no small part because Kraft has abandoned or settled a number of issues in this case, making it a poor vehicle for review.

For all these reasons, Kraft's petition for certiorari should be denied.

STATEMENT OF THE CASE

In a court-approved settlement reached after class certification and on the eve of trial, the parties

significantly narrowed the controversy before the court. As part of that settlement, the Plaintiffs dismissed some of their claims and agreed to limit their damages. Kraft, in return, withdrew all but two of its defenses, namely, that (1) § 203(o) bars Plaintiffs' FLSA claim for unpaid "donning and doffing" time because Kraft and the union representing its employees agreed in collective bargaining that Kraft did not have to compensate for such time; and (2) the Plaintiffs' state law claims are preempted by federal law. The parties agreed to a damages formula that Kraft would pay in full if the Plaintiffs succeeded in rebuffing either of the two defenses Kraft preserved under the settlement.

The parties then cross-moved for "final judgment" as contemplated by the settlement agreement. The district court rejected Kraft's conflict preemption arguments and ruled that Kraft was fully liable for damages under Wisconsin law; thus, the district court declined to rule on whether § 203(o) applied to bar the Plaintiffs' claims under the FLSA. (Pet. App. 20–27.) In its brief to the district court, Kraft noted that it had previously argued other theories of preemption aside from conflict preemption. But Kraft stated in its brief that, while it was not waiving those theories in its motion for final judgment, it also was not raising them "as independent grounds for preemption"; instead, it offered them "merely as further support" for its arguments on conflict preemption. (Kraft Mot. for Final J., Case No. 07-C-0300-C, Doc. No. 277, at 33 n.14 (filed Mar. 27, 2009).) The

district court ruled that "[a]lthough [Kraft] says it does not intend to waive those arguments, that is exactly what it has done by failing to develop them." (Pet. App. 21.) The court entered judgment for the Plaintiffs and instructed Kraft to pay class-wide damages in accordance with the agreed-upon damages formula. (Pet. App. 27.)

The Seventh Circuit affirmed. Writing for the court, Chief Judge Easterbrook stated that, by its plain terms, § 203(o) only goes so far as to allow a collective bargaining agreement to supersede the *FLSA's* wage and hour rules pertaining to time spent changing clothes. (Pet. App. 4.) With respect to *state laws*, in contrast, the court observed that the general savings clause in the FLSA (29 U.S.C. § 218(a)) expressly permits states to adopt more protective wage and hour rules than those imposed by federal law, and that "[n]othing in § 203(o) limits the operation of § 218(a)." (Pet. App. 5.) The court also noted that while no court of appeals had previously addressed whether § 203(o) preempts state law, all three district courts that had considered the argument rejected it. (Pet. App. 5.)

REASONS FOR DENYING THE PETITION

Kraft concedes that its petition does not raise any issue that has created a conflict among the circuits. (Pet. 9.) Thus, Kraft is left to argue that review is warranted because the Seventh Circuit's decision

conflicts with this Court's precedent, and that the case presents an issue of exceptional national importance. *See* S. Ct. R. 10(c). Those arguments fail. The Seventh Circuit followed this Court's teachings on conflict preemption in concluding that nothing in § 203(o) evinces a congressional purpose to preempt stricter state wage and hour laws with respect to donning and doffing time. All other issues that Kraft injects into its petition have been abandoned or settled and do not provide appropriate grounds for this Court to review the case. Furthermore, Kraft exaggerates the likely impact of this case and fails to demonstrate why it is important for this Court to resolve now the conflict preemption question that Kraft raises, instead of waiting to see how (and whether) the issue further develops in the lower courts.

I. The Seventh Circuit's Decision Followed this Court's Well-Settled Approach to Preemption.

This Court has laid two "cornerstones" of preemption jurisprudence that provide guidance in every preemption case. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). First, "'the purpose of Congress is the ultimate touchstone.'" *Id.* (citation omitted). Second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," courts must "start with the assumption that the historic police powers of the States were not to be superseded

by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1194–95 (2009) (internal quotation marks and ellipses omitted).

Congress may show a clear and manifest purpose to foreclose state action "by express language in a congressional enactment" (express preemption); "by implication from the depth and breadth of a congressional scheme that occupies the legislative field" (field preemption); or "by implication because of a conflict with a congressional enactment" (conflict preemption). *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). *See also English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990) (describing categories of preemption). Kraft does not assert that § 203(o) (or any other federal law) expressly bars States from adopting more protective laws on donning and doffing time; nor does it argue that Congress has occupied the entire field of labor law. Even if it had made those arguments, they would be foreclosed because this Court has made it clear that States retain "broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, [and] laws affecting occupational safety . . . are only a few examples." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Indeed, Congress "has never exercised authority to occupy the entire field in the area of labor legislation." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To the contrary, the FLSA's savings clause, 29 U.S.C. § 218(a), expressly authorizes stricter state wage and

hour standards than those imposed under the FLSA, as the Seventh Circuit held. (Pet. App. 5.) *See Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) ("[T]he FLSA's 'savings clause' is evidence that Congress did not intend to preempt the entire field.").

That leaves conflict preemption. A state law may be preempted where it "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (citation omitted). According to Kraft, Congress enacted § 203(o) in order "to protect . . . from governmental interference" any decision reached through collective bargaining as to whether time spent changing clothes is compensable, and, Kraft argues, Wisconsin law frustrates that purpose. (Pet. 17, 30–32.) The Seventh Circuit rejected this argument, however, because it cannot be squared with the text of § 203(o) or the FLSA's general savings clause, § 218(a). (Pet. App. 4.)

As the Seventh Circuit observed, "[t]he first words of § 203(o) are: 'In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed. . . .'" (Pet. App. 4 (quoting 29 U.S.C. § 203(o)).) Sections 206 and 207 set federal standards for minimum wages and overtime pay. Based on this text, the Seventh Circuit held that although § 203(o) permits collective bargaining parties to negotiate away rights to compensation *under the FLSA* for time spent changing clothes, nothing in the text of the provision—with its explicit reference to §§ 206 and 207—reflects a clear and

manifest congressional intent to limit the States' traditional authority to set more protective wage and hour rules. (Pet. App. 5.) To the contrary, the text of § 218(a) shows Congress expressly reserved that right to the States. (*Id.*)

Moreover, the Seventh Circuit's analysis closely tracks the path this Court has laid out for determining the intent of Congress. As this Court has repeatedly instructed, questions of congressional intent "begin[ ] with the statutory text, and end[ ] there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). *See also, e.g.*, *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.") (citation omitted). The Seventh Circuit held that Congress unambiguously stated its intention in the statutory text. There was therefore no reason for the court to look any further. (Pet. App. 5.)

In its petition, Kraft goes about the analysis backwards. It leads by arguing from legislative history—both without acknowledging the explicit limitation in § 203(o) that the provision applies "for the purposes of Sections 206 and 207," and without identifying any ambiguity in the text. (Pet. 17–21.) *See, e.g.*, *BedRoc Ltd.*, 541 U.S. at 187 n.8 (observing that longstanding precedent permits "resort to legislative history only

when necessary to interpret ambiguous statutory text."); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) ("[A]ppeals to statutory history are well taken only to resolve 'statutory ambiguity.'") (citation omitted). When Kraft finally turns to the statutory text on which the Seventh Circuit based its decision (Pet. 34–37), moreover, it fails to provide any critical analysis, arguing instead that the statutory text should not be construed to "undermine the legislative purpose" as reflected in legislative history. (Pet. 36.)

Because Kraft does not identify any aspect of the Seventh Circuit's preemption analysis that conflicts with this Court's precedent, its petition should be denied.

II. The Other Grounds for Preemption Kraft Raises Were Abandoned or Settled and Do Not Merit Further Review.

Faced with the presumption against preemption in the area of wage and hour laws (which States have traditionally occupied) and the lack of any textual support in the FLSA for its arguments on conflict preemption, Kraft attempts to tap into other veins of labor law to support its petition, including preemption of claims enforcing collective bargaining agreements under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and field preemption of unfair labor practice claims under *Building & Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959). (Pet. 26–29, 32–34.) Kraft

asserts that the Seventh Circuit improperly disregarded those other grounds for preemption. (*Id.*)

Not only do those theories *not* apply here, but Kraft failed to preserve them when it moved for final judgment (the vehicle established by settlement for pursuing the preserved defenses). As noted, Kraft expressly disclaimed both § 301 and *Garmon* "as independent grounds for preemption" (Kraft Mot. for Final J. at 33 n.14); and the district court held that Kraft waived those arguments because it did not develop them in its brief to the court. (Pet. App. 21.) Kraft cannot revive issues in its petition for certiorari that it forfeited below. *See, e.g.*, *United States v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (holding that party forfeited argument by failing to raise it below); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below. . . .").

In any event, Kraft's only real argument for § 301 preemption of the Plaintiffs' state law claims is that a court would have to consult the collective bargaining agreement to calculate damages for unpaid time. (Pet. 28–29). And aside from the fact that Kraft did not make that argument in its motion for final judgment (perhaps because the meaning of terms in the collective bargaining agreement was never at issue), there are at least two other reasons why it is not worthy of review. First, the argument is directly contrary to the decisions of this Court. *See Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (holding that

"the mere need to 'look to' the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301"). Second, the argument was mooted by the parties' settlement agreement that set a formula for calculating damages, which the district court instructed the parties to follow when it entered final judgment. (Pet. App. 27.) Thus, there is no need to consult the collective bargaining agreement even to determine damages (or, for that matter, any other aspect of the Plaintiff's claims).

There is also no basis for this Court to review the Seventh Circuit decision based upon Kraft's arguments for NLRA preemption under *Garmon*. Consistent with the precedent of this Court, such preemption arises only where "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8"—not where the regulated activity is merely a "peripheral concern" of the NLRA. *Garmon*, 359 U.S. at 243–44. Kraft's only argument for preemption under *Garmon* (which also was not preserved in its motion for final judgment) is that "Wisconsin law here may be viewed as adding a remedy . . . where federal law has authorized parties to a CBA to exclude that remedy." (Pet. 34.) But the federal law at issue is the FLSA, not the NLRA; and Kraft fails to show how Plaintiffs' state law claims in any way implicate NLRA §§ 7 or 8 or interfere with the NLRA's primary jurisdiction to enforce those sections.

Kraft's other preemption arguments were not preserved, lack merit, and fail this Court's criteria for cert-worthiness. Accordingly, the petition should be denied.

III. Kraft Overstates Both the Import and Impact of the Seventh Circuit's Decision.

Kraft predicts a bleak and dreary future if the Seventh Circuit's decision is left to stand. According to Kraft, the decision undermines collective bargaining throughout the nation, unsettles innumerable agreements currently in place, and opens the floodgates to federal donning and doffing litigation. (Pet. 39–44.) These predictions are unsupported and cannot be taken seriously.

The Seventh Circuit's decision is unlikely to have significant impact beyond the issue of conflict preemption the court addressed. And even on that narrow issue, the decision is precedent only within the Seventh Circuit (and it is arguably even further confined to Wisconsin law). Thus, Kraft clearly overreaches in asserting that "the Decision creates a precedent pursuant to which each of the 50 States, every territory, and every municipality across the country may override even long-settled collective bargaining determinations" regarding compensation for time spent changing clothes. (Pet. 39–40.)

Kraft's argument about "opening the floodgates to litigation" is worn-out hyperbole. Of the asserted

"hundreds of cases . . . spawned" since this Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), very few of them even raise preemption as an issue. (The vast majority involve the scope and applicability of § 203(o) under federal law.) Indeed, it is telling that over the decades following the enactment of § 203(o), only a handful of district courts have considered whether that provision preempts state law, and in every one of those cases, as Chief Judge Easterbrook observed, the courts have rejected the conflict preemption argument Kraft raises here. (Pet. App. 5.)

Finally, Kraft fails to explain why it is imperative that this Court review the issue now, after only a single decision by a court of appeals. The far better course is for this Court to await further percolation in the lower courts.

CONCLUSION

For all the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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