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 plaintiffs
and similarly-situated employees,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In its Petition,[1] Kraft demonstrated that two of this Court's Rule 10(c) criteria support accepting review.

First, certiorari should be granted because this case presents an issue of vital national importance to American business. Congress passed Section 203(o) to promote the sanctity of CBAs and to allow employers and unions to resolve Clothes-Changing Compensation issues free from governmental interference. To emphasize this purpose, Congress used mandatory language in Section 203(o), noting that Clothes-Changing Time "shall be excluded" from hours worked when the issue was resolved by CBA. The submission by *Amici* – the American Meat Institute, National Meat Association, National Turkey Federation and National Association of Manufacturers (collectively "*Amici*") – further highlights that this case is of "compelling interest" to their members, who include the major participants in America's $4.5 trillion manufacturing sector and its meatpacking industry. Second, certiorari should be granted because the Decision below conflicts with this Court's controlling decisions, including authority requiring preemption under LMRA Section 301. As Kraft's Petition demonstrated, great harm to American business will inevitably result if the Decision is allowed to stand.

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[1] This Reply uses terms defined in the Petition.

In their slim Response, Respondents ignore, or at most cursorily address, Kraft's arguments. Instead, Respondents raise erroneous or straw-man arguments, including that:

- Section 203(o)'s reference to Sections 206 and 207, when considered in tandem with Section 218(a), purportedly shows that Section 203(o) is limited to federal law and permits state law that offers workers better terms. (Resp. 6-7). (When, in fact, Section 203(o) redefines for Sections 206 and 207 what constitutes an "hour worked" wherever Sections 206 and 207 are referenced in the FLSA, which includes Section 218(a), its savings clause).
- Kraft has waived its preemption arguments under § 301 and *Garmon*. (Resp. 1-2). (When, in fact, Kraft carefully preserved each preemption theory.)
- Kraft's detailing of the harm that will follow if the Decision is allowed to stand is "overblown." (Where, instead, Respondents fail to grapple with these risks.)
- Kraft cannot show a circuit conflict. (Where, because other Rule 10(c) criteria are met, no conflict is necessary).

ARGUMENT

I. Respondents Cannot Refute That Review Is Warranted Because This Case Presents A Question Of Exceptional National Importance.

Respondents acknowledge that "the purpose of Congress is the ultimate touchstone" as to whether state law is preempted. (Resp. 4). Yet, Respondents ignore Section 203(o)'s legislature history and only focus on one clause of Section 203(o)'s language – its reference to Sections 206 and 207 – and fail to consider Section 203(o)'s language as a whole. As Kraft showed in its Petition, proper deference to Congress' intent requires the preemption of state law that would include as an hour worked, time that Section 203(o) excludes.

A. Section 203(o)'s Text Supports Preemption Of State Laws That Interfere With CBA Provisions As To Clothes-Changing Compensation.

Like the Seventh Circuit, Respondents construe the opening clause of Section 203(o), which states that it is for determining the "hours for which an employee is employed" "for the purposes of Sections 206 and 207," as meaning that Section 203(o) only applies to federal law. (Resp. 6-7). They read Section 218 – which allows states to adopt more protective wage and hour rules than those imposed by federal law – as specifically empowering states to override

CBA terms regarding Clothes-Changing Compensation. (Resp. 3, 5-6). Both constructions are wrong.

Section 203(o) is located within the FLSA as part of a section of definitions applicable to the entire statute. The title shows that Section 203(o) defines "hours worked." The text that follows mandates that Clothes-Changing Time be excluded from "hours worked" for purposes of calculating a minimum wage per hour – Section 206 – or calculating the number of hours before overtime pay is owed – Section 207:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week invoked by [CBA].

(A66). In other words, Section 203(o) limits what may be treated as an hour worked under minimum wage or overtime law.

Sections 206 and 207 are specified because they are the only provisions of the FLSA that relate to hours worked. *E.g.*, *Koelker v. The Mayor and City Council of Cumberland (Maryland)*, 599 F. Supp. 2d 624, 630 (D. Md. 2009) ("'The two central themes of the FLSA are its minimum wage and overtime requirements,' and the FLSA is 'clearly structured to provide workers with specific minimum protections against excessive work hours and substandard wages.' Section 206 of the FLSA established the minimum wage

requirements, and Section 207 governs maximum work hour limitations and overtime.") (citation omitted).

Nor does Section 218(a) lead to a different result. It provides that:

> No provision of this Chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Chapter or a maximum workweek lower than the maximum workweek established under this Chapter.

(A68). First, Section 218 incorporates the hours definition set forth in Sections 206 and 207. When Section 218 speaks of the "minimum wage established under this Chapter," that means Section 206. When it refers to the "maximum work week established under this Chapter," that means Section 207. Therefore, if Clothes-Changing Time has been excepted from hours worked as to these sections, it has been excepted for Section 218. Section 218 does not mention Section 203(o) or in any way purport to limit Section 203(o). Nothing in Section 218 allows states to redefine Clothes-Changing Time as part of a workday hour when Section 203(o) would exclude this.

As *Amici* put it well:

> FLSA Section 218(a) does not save the Wisconsin law from preemption. A state law that defines "hours worked" to include time spent in activities covered by Section 203(o) does

> not shorten the maximum workweek or raise the minimum wage as permitted by Section 218(a). It simply defines which activities constitute "work," a matter not addressed by 218(a), and not "saved" for state interpretation, regulation or change. Thus the state law here does not fall within the parameters of Section 218(a) permitting states to set higher minimum wages and shorter maximum workweeks. Congress did *not* reserve to the states a definition of "hours worked" in Section 218(a), but *did* reserve to collective bargaining the right to define "hours worked" for the limited area of Clothes-Changing Time.

(Brief of *Amici* 25). Thus, Wisconsin could require employers to pay $1 more per hour for activities properly considered "hours worked," but it may not include as an hour time that Section 203(o) excludes from that definition.

B. Section 203(o)'s Legislative History Confirms Congress' Intent To Protect CBA Provisions As To Clothes-Changing Compensation From Governmental Interference.

Like the Seventh Circuit, Respondents ignore Section 203(o)'s legislative history. Yet, this history demonstrates that the Decision below improperly allowed state law to displace the CBA as the determining factor regarding the issue of Clothes-Changing Compensation, revealing that Congress wanted the

issue of Clothes-Changing Compensation "to be carefully threshed out between the employer and employee." (A76). Yet the Decision below lets states or municipalities trump that "careful thresh[ing] out." Congress wanted to prevent a court from second-guessing an employer and requiring the payment of back wages for "time which everybody had considered was excluded as a part of the working day." (A76). Yet, the Decision requires Kraft to pay for hours that it and the Union had agreed to exclude from the working day for more than 24 years.

Congress wanted to restore "sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement [as to Clothes-Changing Time]." (A76). Yet, the Decision instead substituted state or local law as that determining factor.[2]

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[2] Citing *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176 (2004) (Resp. 7), Respondents ask this Court to ignore the legislative history behind § 203(o) because, as they see it, the text is unambiguous. But as § I.A above confirms, § 203(o) is plainly subject to diverging interpretations. Moreover, this Court has departed from the plain meaning rule when acceptance of that rule would thwart the obvious purpose of a statute. *See Johnson v. U.S.*, 529 U.S. 694, 706 n.9 (2000).

II. Respondents Cannot Refute That Review Is Warranted Because The Decision Conflicts With Controlling Decisions Of This Court, Which Require Preemption.

A. Kraft Did Not Abandon Any Preemption Argument.

Respondents argue that this case is a "poor vehicle for review" because Kraft purportedly "abandoned or settled" certain issues. (Resp. 1). Yet, Respondents cite record passages that instead prove that Kraft specifically preserved each of its preemption theories. Thus, Respondents acknowledge that below, Kraft specifically preserved that "the state law claims are preempted by federal law." (Resp. 2). Respondents imply that Kraft was not pursuing its labor-related theories of preemption as separate bases for relief by misleadingly quoting out of context from Kraft's Memorandum In Support Of Its Motion For Final Judgment to the District Court ("MFJ") (Dkt. No. 277), but, even as to the memorandum, Respondents acknowledge that "Kraft stated in its brief that it was not waiving those theories." (Resp. 2).[3] Kraft did not

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[3] The footnote Respondents quote from confirms that Kraft was preserving its full array of preemption arguments:

> Kraft previously discussed this law in conjunction with its original motion for summary judgment and recognizes that the Court found it inapplicable to the record as developed at that time. While Kraft does not waive those arguments, it will not raise them in the present motion as independent grounds for preemption.

Id. at 33 n.14.

restate its full argument as to these issues in its MFJ because the District Court already had rejected these theories in denying Kraft's earlier motion for summary judgment and it would have been futile to fully restate what the district Court refused to consider. The text of the MFJ provides:

> As further support for the propriety of preemption here, it is worth noting that Congress and the courts have a long history of preempting state laws that purport to regulate fields within the area of labor and employment law. A common thread connects this line of labor-related preemption doctrines: each strongly favors preemption of state laws that intrude upon what Congressman Herter characterized as the "sanctity [of] the collective-bargaining agreements[.]" 95 Cong. Rec. 11210 (1949) (comments of Rep. Herter). Congress intended to grant "sanctity" to such agreements when it passed § 203(o), just as it intended to give sanctity to the collective bargaining process and the substance and interpretation of collective bargaining agreements under the *Garmon*, *Machinists*, and Section 301 preemption doctrines Kraft cited in its previous motion.

(MFJ 33-34) (footnote omitted).

When Kraft appealed to the Seventh Circuit, it continued to fully pursue each of its theories of preemption. Respondents do not advise this Court that they spent three pages of their appellate brief raising the same waiver argument. Kraft, in its reply,

explained why this argument was erroneous. Although the Decision rejected Kraft's preemption arguments, it made no finding of waiver. Thus, each of Kraft's preemption theories remains fully intact before this Court, making this case an excellent "vehicle" for the Court's review.

B. Respondents Misconstrue Kraft's Section 301 Argument And Ignore This Court's Controlling Authority Under Section 301 That Requires Preemption.

In its Petition, Kraft argued that Section 301 requires preemption because it directs courts to apply a body of uniform national law to resolve issues as to the collective-bargaining process and the meaning of CBAs and preempts inconsistent local rules. (Pet. 26-27).

Kraft emphasized that these principles ran through three key decisions of this Court dating back 33 years, including *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957), holding that Section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." (cited Pet. 26); *Teamsters v. Lucas Flour*, 369 U.S. 95, 104 (1962), holding that "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules," (Pet. 27), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), holding that preemption extended to state and

local laws that impacted the meaning of CBA terms. (Pet. 27).

There is no way to square the Decision below with this authority, nor do Respondents even try. They ignore *Textile Workers* and *Lucas Flour* in their entirety and cite to *Allis-Chalmers* solely to quarrel with an argument Kraft does not make – that Congress has not occupied the entire field of labor legislation. (Resp. 5). Instead of responding to what Kraft actually says about Section 301, Respondents substitute a straw-man argument, asserting in error that Kraft's "only real argument" for Section 301 preemption is "that a court would have to consult the collective bargaining agreement to calculate damages for unpaid time." (Resp. 9-10). Instead, Kraft's Section 301 argument is that the Decision below disrupted the uniform application of law sought by Congress and altered the meaning of Kraft's CBA. (Pet. 28-29).

As to uniformity, the CBA between Kraft and the Union is now subject to one interpretation for purposes of federal law and another under Wisconsin law. Moreover, identical provisions in CBAs in other Kraft CBAs, which extend to employees in other states (Iowa and Illinois), may be subject to yet a third interpretation under Iowa law and a fourth under Illinois law.[4] Uniformity means nothing if 50

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[4] In fact, Kraft alone has been sued in three additional lawsuits brought under Illinois wage laws raising claims for

(Continued on following page)

states and countless municipalities may dictate how they wish as to rules for Clothes-Changing Compensation, no matter what federal law or the applicable CBA would provide.

Regarding meaning, Respondents cannot dispute that the Decision indisputably allows states – here Wisconsin – to alter the meaning of the applicable CBA by redefining work hours to include Clothes-Changing Time, even where parties to a CBA – through bargaining and in exchange for valuable consideration – exclude such time. Additionally, the Decision allows Wisconsin to alter the CBA's bargained-for compensation structure. Workers get to keep the extra compensation they received for giving up Clothes-Changing Compensation, but receive such Clothes-Changing Compensation as well.[5]

Clothes-Changing Time, two of which involve Section 203(o)'s application under Illinois state law (*Curry* and *Whitmore*). *See Curry v. Kraft Foods Global*, No. 1:10-cv-01288 (N.D. Ill.); *Whitmore v. Kraft Foods Global, Inc.*, No. 1:10-cv-2518 (N.D. Ill.); *Porter v. Kraft Foods Global, Inc.*, No. 10-L-44 (Circuit Court of Champaign County, Illinois). Moreover, since the Petition was filed, Kraft has been sued regarding whether its CBA Clothes-Changing provisions also violate Iowa law. *See Peters v. Kraft Foods Global, Inc.*, No. 3:10-cv-00142 (S.D. Iowa).

[5] As Kraft explained in its Petition, the Wisconsin state wage laws are also preempted by Section 203(o) under the *Garmon* and conflict preemption doctrines. (Pet. at 30-34) Respondents claim that *Garmon* does not apply but, because collective bargaining is at issue, it does. Respondents' only challenge to conflict preemption is based on its flawed reading of Section 203(o).

C. The Harms That Will Follow If The Decision Is Not Reversed Are Very Real And Not "Overblown."

Kraft specifically detailed how the Decision will undermine collective bargaining. (Pet. 39-43). Here, a 24-year old CBA provision has now been undone. Knowing that any state or municipality may now displace a CBA provision as to Clothes-Changing Compensation, employers will be reluctant to bargain as to this in the future – fearing that they will be held to their end of the bargain while the Union will be freed from its concessions.

Respondents argue that this issue is not of great importance, first, because the Decision only is precedent in the Seventh Circuit. (Resp. 11). This ignores that, as the first appellate decision on an issue of vital importance to business, this Decision will motivate many states and municipalities to legislate in this area[6] (to the extent they have not already) and employees to sue. *See supra* n.4. The fear of a patchwork of incompatible approaches even for workers within several plants of the same company, is very real.

Nor is the prospect of vast amounts of new litigation exaggerated. Until now, there have been hundreds of cases challenging whether an item was "clothing"

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[6] For example, after Arizona enacted an e-verify law, many other states followed suit. *See Chamber of Commerce v. Whiting*, No. 09-115 (argued Dec. 9, 2010).

subject to Section 203(o) in a unionized facility. Previously, these challenges did not pursue preemption, because it was generally understood that, if an item was "clothing," Clothes-Changing Time was not counted as hours worked. Until this Decision, there was little authority to support that state law could override CBAs as to this issue. Now, since the Decision was issued, Kraft itself has been sued in four new cases over this issue. Whether or not the image of "floodgates opening" is otherwise overused (Resp. 12), here it is an apt metaphor.

D. This Court Should Not Wait For A Circuit Conflict Before Granting Review.

Finally, Respondents argue that certiorari should be denied because there is no conflict in the circuits. As Rule 10(c) shows, many criteria besides a circuit conflict support certiorari, including the importance of a case. *See Am. Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) ("the question being an important one of first impression under the LMRDA, we granted certiorari"), and where a decision conflicts with the Court's precedent, *see Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992).

Because of the Decision, bad law is now precedent. In the Petition, Kraft showed the harms likely to follow if this Decision is left to stand. Kraft's Petition presents the proper case and time for this Court

to rectify the Decision's misstep and to restore proper enforcement of Section 203(o).

CONCLUSION

Kraft's Petition should be granted.

Respectfully submitted,

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