No. 13-379

In the Supreme Court of the United States

RI, INC., LISA SUPRINA, SCOTT SUPRINA, AND TONY ENGLISH,

Petitioners,

v.

COLLEEN GARDNER, M. PATRICIA SMITH, JOSEPH OCON, MATTHEW MYERS, AND CHRISTOPHER ALUND,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The corporate petitioner, RI, Inc. d/b/a Seating Solutions, has no parent corporation. No public company owns 10% or more of the corporation's stock.

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REPLY BRIEF FOR THE PETITIONERS

There is a genuine circuit split at the heart of this case. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court held that the National Labor Relations Act does not prevent states from establishing minimum labor standards unrelated to the collective bargaining process. Six Circuits have applied the test established in *Metropolitan Life*, but they have stated the test in six different and conflicting ways. For a state provision to satisfy *Metropolitan Life*, the Ninth Circuit requires that the standard be a true, legal minimum. The Second Circuit, on the other hand, does not, looking instead to whether the provision is consistent with what it considers to be the NLRA's general goals.

The principal issue presented here is whether or not wage rates promulgated under New York's prevailing wage law are *Metropolitan Life* minimum labor standards. Those wage rates can be undercut with the approval of the New York State Department of Labor and, because the rates are plugged in from traditional unions' collective bargaining agreements, they are inextricably intertwined with the collective bargaining process. After trying to downplay the existence of a circuit split, the respondents gloss over the factual record in this case and argue, in essence, that regardless of what discovery revealed about how the statute is applied, the statute is not actually applied that way.

Rather than citing to record evidence concerning whether the Department allows prevailing wage rates to be undercut, the respondents resort to circular

reasoning. First, they acknowledge the rule: *Metropolitan Life* minimum labor standards may not be undercut. Second, they assert that New York prevailing wage rates are *Metropolitan Life* minimum labor standards. Finally, they reason from this that since the rates are *Metropolitan Life* minimum labor standards, they cannot be undercut. In effect, the respondents are molding the record to the rule instead of applying the rule to the record. Because there is a circuit split concerning *Metropolitan Life*, and because New York prevailing wage rates are not *Metropolitan Life* minimum labor standards, the petition for certiorari should be granted.

1. The respondents try to minimize the split between the Ninth and Second Circuits by focusing on two Ninth Circuit decisions, *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999) and *Bechtel Constr. Inc. v. United Bhd. of Carpenters & Joiners of America*, 812 F.2d 1220 (9th Cir. 1987). But *Dillingham* and *Bechtel* highlight the circuit split at issue in this case and detract from the respondents' argument that the Circuits have a "common understanding" of *Metropolitan Life*. Br. in Opp. 6.

Dillingham and *Bechtel* describe the circumstances under which prevailing wage rates can qualify as *Metropolitan Life* minimum labor standards. In *Bechtel*, the rates could be undercut with regulatory approval, distinguishing them from the true minimums at issue in *Metropolitan Life*. *See Bechtel*, 812 F.2d at 1226 ("[T]he Standards cannot be minimum legal requirements if lower wage rates can be negotiated with the approval of the Division of Apprenticeship

Standards.").[1] The Ninth Circuit thus held that the wage standards were "not minimum labor requirements such as are protected in *Metropolitan Life* and any attempt to enforce them against a collectively-bargained lower wage is preempted by federal law." *Id.* at 1222. The prevailing rates at issue in *Dillingham*, on the other hand, could *not* be undercut and therefore established "true legal minimums" that were not preempted by the NLRA. *Dillingham*, 190 F.3d at 1040.

The Second Circuit has held that the Ninth Circuit's "true legal minimum" construction of *Metropolitan Life* is "excessively narrow." *General Elec. Co. v. New York State Dep't of Labor*, 698 F. Supp. 1093, 1099 n.11 (S.D.N.Y. 1988), *aff'd*, 891 F.2d 25, 27 (2d Cir. 1989) ("Insofar as the relationship between section 220 and the NLRA is concerned, we agree with the district court that the State statute has not been preempted by the federal."). In the Second Circuit, "minimum labor standards do not have to be impregnable to undercutting to avoid pre-emption." *Id*., 698 F. Supp. at 1099 n.11.[2] The Ninth Circuit thus requires a minimum labor standard to be an actual minimum to avoid NLRA preemption and the Second Circuit does not. This conflict merits the Court's review.

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[1] That *Bechtel* turned on this issue makes it odd that the respondents try to distinguish it based on "the distinctive features of the law in question." Br. in Opp. 8. New York's prevailing wage rates share the same "distinctive features" as the rates at issue in *Bechtel*: they can be undercut with regulatory approval. R.556-57.

[2] The respondents, somewhat conspicuously, do not adopt this view of *Metropolitan Life's* parameters.

2. The respondents run into similar trouble discussing the varying approaches of the other circuits to the *Metropolitan Life* test. Like the "distinctive features" they reference in connection with *Bechtel*, the respondents say that the Seventh Circuit's decision in *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008), *cert. denied*, 558 U.S. 874 (2009), arose from "a highly unusual amendment to an Illinois statute . . . ." Br. in Opp. 12. And they make no effort at all to apply the Seventh Circuit's multi-factor test to the facts of this case. For instance, they do not discuss the fact that the prevailing wage rates at issue here are ten times the generally applicable minimum wage. *See* Pet. at 30; *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1134 ("Minimum, as used by the Supreme Court, implies a low threshold.") (internal quotation marks omitted). Nor do they address the court's statement that with respect to what enactments constitute minimum labor standards, "Unfortunately . . . the Supreme Court's guidance is sparse." *Id.* at 1129.

The First Circuit expressed its apprehensiveness about the *Metropolitan Life* test in somewhat stronger terms in *Rhode Island Hospitality Ass'n v. City of Providence*, 667 F.3d 17 (1st Cir. 2011). The respondents read *Rhode Island Hospitality* narrowly, saying that the petitioners "selectively quote language" from the case. Br. in Opp. 10 n.5. The First Circuit, the respondents say, was only referring to "potential difficulties at the margins of interpreting *Metropolitan Life* . . . ." *Id*. As the petitioners have already noted, *see* Pet. at 22, the First Circuit was more explicit than that. "It is far from clear," the First Circuit wrote, "that use of the phrase ["minimum labor standard"] helps achieve clarity as to the boundaries of

permissible state regulation." *Rhode Island Hospitality Ass'n*, 667 F.3d at 32. And the respondents completely ignore Judge Stahl's concurring opinion, in which he expresses "hope [that] the Supreme Court will provide some guidance as to just how far a state or locality can go in the name of a 'minimum labor standard.'" *Id*. at 47.

3. The respondents adopt a similar tactical approach to the deposition testimony of defendant Christopher Alund, the Director of New York's Department of Public Work. Mr. Alund testified that New York's prevailing wage rates can be undercut with regulatory approval. R.556-57. The respondents address this critical piece of evidence by first trying to diminish its significance and then by squeezing their eyes shut in hope of its disappearance.

They begin by citing to *Graver Tank & Mfg. v. Linde Air Prods. Co*., 336 U.S. 271 (1949), and say that the undercutting issue amounts to a "purely factual dispute . . . that does not merit this Court's review." Br. in Opp. 15.[3] In the context of as-applied challenges, however, factual disputes proliferate. If the respondents are arguing that only facial challenges to

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[3] The respondents, understandably, did not make this argument below. To the extent that there is a factual dispute underlying the question of whether or not New York's prevailing wage rates are *Metropolitan Life* minimum labor standards, that would suggest that granting a motion for summary judgment in this case was error. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

state enactments where the parties agree on all material facts are worthy of the Court's attention, that would seem to contradict the reality that "[s]tatutes are ordinarily challenged, and their constitutionality evaluated, 'as applied' -- that is, the plaintiff contends that application of the statute *in the particular context in which he has acted*, or in which he proposes to act, would be unconstitutional." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S. Ct. 633, 633 (1992) (Scalia, J., dissenting from a denial of certiorari) (emphasis supplied).

Even saying that there is a factual dispute as to Mr. Alund's testimony is a stretch. Mr. Alund, the individual in charge of the promulgation of New York's prevailing wage rates, testified that those rates can be undercut with regulatory approval. R.556-57. The respondents say that this is "simply incorrect." Br. in Opp. 15. They cite, however, no record testimony explaining *how* Mr. Alund's statements are incorrect. Instead, they just say that "[t]he Department sets the prevailing wage rates each July" and leave it at that. *Id*. They cite not to the discovery record in this case -- no actual kernel of testimony, no actual produced document -- for that proposition, but instead to the statute itself. *See id*. The statute is not evidence. Discovery in this case revealed that regulatory personnel charged with the enforcement of New York's prevailing wage statute exercised their discretion to permit certain parties to undercut the rates that the Department of Labor publishes each July. No provision of the prevailing wage statute forbade this conduct.

Their approach to Mr. Alund's testimony is not the only instance in which the respondents contradict the factual record in an effort to bolster their arguments. For instance, the respondents say that in setting prevailing wage rates, the Department gathers collective bargaining agreements from unions that cover "at least thirty percent of the local tradesmen." Br. in Opp. 2. This is false. R.512; R.548-52. The respondents also say that the Department's "method of setting rates does not mean that prevailing wages are set by the collective bargaining agreements themselves." This too contradicts the testimony of multiple witnesses in this case. R.538, 540, 615-17, 622. The respondents' strategy in this case seems to be premised above all upon aspiration. They cite to the record, and the *Metropolitan Life* caselaw, as they wish it were, rather than as it really is.

4. The respondents conclude by arguing that this case is analogous to *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981). The issue in *Barrentine* was whether a dispute resolution provision in a collective bargaining agreement would require arbitration of individual employees' claims brought under the Fair Labor Standards Act. *See id.* at 729. The Court held that the claims did not have to be arbitrated because "FLSA rights . . . devolve on petitioners as individual workers, not as members of a collective organization." *Id.* at 745. One of the building blocks of this holding was the Court's belief that "a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available . . . ." *Id.* at 742. A union trying to secure managerial concessions by waiving individual members' rights to

pursue FLSA claims in judicial forums would thus have a conflict of interest. *See id*.

The Court rejected this aspect of *Barrentine* in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).[4] The Court noted that labor unions regularly balance the interests of individual members against the interests of the organization as a whole. "[T]his attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This principle of majority rule . . . is in fact the central premise of the NLRA." *Id*. at 271. The Court stated that arguing an arbitration provision was unenforceable because it resulted from a conflict of interest "amounts to a collateral attack on the NLRA." *Id*.

Barrentine is inapposite, moreover, for a different reason. Unlike the FLSA, New York's prevailing wage law does not aim to protect individual workers; it aims to protect bargaining units. To their credit, the respondents acknowledge this aspect of the prevailing wage law when they say that it "level[s] the playing field between union and non-union contractors." Br. in Opp. 1.

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[4] The Court held that the arbitration provision at issue in *Penn Plaza* survived because it explicitly provided for arbitration of discrimination claims, whereas the provision at issue in *Barrentine* was silent as to its applicability to FLSA claims. *See 14 Penn Plaza*, 556 U.S. at 264 (stating that earlier cases such as *Barrentine* "do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims").

But the respondents sidestep the primacy of this purpose. If the goal were the protection of individual workers, it would be easy enough for the State of New York to mandate that the minimum wage paid on public works products had to be, say, fifty dollars per hour for all employees. That would be a true legal minimum under *Metropolitan Life*. Instead, sheet metal workers in Suffolk County are paid different wages from asbestos workers in Nassau County, who are paid different wages than carpenters in Kings County (and so on) because the unions claiming those kinds of work set different wage rates in their collective bargaining agreements. The prevailing wage law is applied to protect these unions in a competitive bidding environment, not to protect individual workers. It is a "state policy which seeks specifically to adjust relationships in the world of commerce." *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 297 (1959). New York prevailing wage rates are therefore not *Metropolitan Life* minimum labor standards. They are not "minimums" because they can be undercut. And they are not "labor standards" because their true aim is to level the bidding playing field.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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