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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

In *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court held that the National Labor Relations Act (NLRA) does not preempt state laws that establish "minimum labor standards" such as mandatory healthcare benefits, severance pay, or minimum wages. New York law requires public-works contractors to pay their employees at least a "prevailing wage" commensurate with wages in the project's locality for particular occupations. The New York Department of Labor determines prevailing-wage rates annually based on the wages set by collective-bargaining agreements between private employers and unions in each locality, but the prevailing-wage requirement applies to all public-works contractors regardless of whether they use unionized labor. The question presented is:

> Whether New York's prevailing-wage law, which sets a floor below which wage rates on public-work contracts may not fall, is a minimum labor standard that is not preempted by the NLRA?

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STATEMENT

1. New York's constitution requires that workers on public-works projects be paid a wage commensurate with the prevailing wage for their trade or occupation in the project's locality. N.Y. Const., art. I, § 17. Labor Law § 220 implements this constitutional mandate. *See* Labor Law § 220(2), (3)(a), (5)(a). It requires that the wages of laborers, workmen, and mechanics on public works "shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work" will be performed. *Id.* § 220(3)(a).

Like New York, the federal government and thirty-one States have also enacted similar prevailing-wage laws. *See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 333 n.11 (1997).[1] It is widely recognized that prevailing-wage laws protect workers by preventing employers from paying below-market wages to obtain public contracts, and further aid in leveling the playing field between union and nonunion contractors bidding on such projects. *See Chesterfield Assocs. v. N.Y. State Dep't of Labor*, 4 N.Y.3d 597, 601 (2005); *Bucci v. Vill. of Port Chester*, 22 N.Y.2d 195, 201 (1968); *see also Bergman v. Monarch Constr. Co.*, 124 Ohio St. 3d 534, 537, 2010-Ohio-622, ¶ 10 (2010); *Best v. C&M Door Controls, Inc.*, 200 N.J. 348, 355-56 (2009); *see also* J.A. (Cir.) 544, 680.

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[1] See also U.S. Dep't of Labor, Wage & Hour Divs., *Dollar Threshold Amount for Contract Coverage Under State Prevailing Wage Laws* (Jan. 1, 2014), http://www.dol.gov/whd/state/dollar.htm (listing States).

The New York Department of Labor (Department) calculates prevailing-wage rates annually. *See* Labor Law § 220(5). It first classifies the types of work being performed, *id.* § 220(3-a)(a)(i), and then determines the "prevailing rate of wage" by surveying collective-bargaining agreements between private-sector employers and "bona fide labor organizations" in a locality, provided that the agreement applies to at least thirty percent of the local tradesmen. *Id.* § 220(5)(a); *see also* J.A. 680. The Department publishes the prevailing-wage rates in a schedule each July, and the rates remain in effect for one year. *See* Labor Law § 220(5)(a); *see also Lantry v. State*, 6 N.Y.3d 49, 54 (2005) (explaining the process by which prevailing-wage rates are determined); J.A. 537-538. The prevailing-wage requirement applies to all public-works contractors, without regard to whether they use unionized labor. *See* Labor Law § 220(2).

2. Petitioner RI, Inc., d/b/a Seating Solutions is a New York corporation that builds seating systems, such as bleachers. (J.A. 51, 53.) In 2005, Seating Solutions entered into four contracts to remove, replace, or install aluminum bleachers in various localities in New York (the "Public Projects"). (J.A. 186-192, 298, 460.)

An employee's complaint that Seating Solutions had not paid him the prevailing-wage rate for his work on the Public Projects triggered an investigation by the Department. (J.A. 480-486.) The prevailing-wage schedules applicable to the Public Projects were published by the Department in 2004, before the contracts for those projects were awarded. (J.A. 186-192 & nn.1-4 (noting effective dates of schedules enforced)); *see also* Labor Law § 220(3)(c). The Department classified the work that Seating

Solutions had been contracted to perform as "ornamental ironwork."[2] (J.A. 185, 499, 699.) The prevailing-wage rate in the 2004 schedule for ornamental ironworkers was determined by reference to the local ironworkers' collective-bargaining agreement. (*See* J.A. 185, 501.)

The Department reached an initial determination that Seating Solutions had illegally paid its workers less than the prevailing-wage rate for ornamental ironworkers. (J.A. 171-183.) After an administrative hearing, the Hearing Officer agreed with the Department's initial determination (J.A. 193-195) and further found that Seating Solutions had acted willfully by "elect[ing] to ignore the prevailing rate schedules, which were incorporated in the project plans and specification" (J.A. 197 & n.6). The Department adopted the Hearing Officer's findings and recommended determinations and issued its final determination in April 2009. (J.A. 202-203.)

Seating Solutions challenged the Department's administrative determination in New York state court. Seating Solutions primarily argued that the Department should not have relied on the local ironworkers' collective-bargaining agreement in setting the prevailing-wage rate, and should instead have relied on the collective-bargaining agreement of Seating Solutions' in-house union—even though the Department published the applicable rate schedule *before* the in-house union's agreement was executed.[3]

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[2] Seating Solutions has never challenged the classifications or rates set by these schedules. (J.A. 197 n.6.)

[3] Seating Solutions' brief in the state appellate court is attached as an addendum to respondents' brief before the

(*continues on next page*)

The New York court rejected Seating Solutions' arguments and confirmed the Department's determination that Seating Solutions had willfully violated the prevailing-wage law. *See R.I., Inc. v. N.Y. State Dep't of Labor*, 72 A.D.3d 1098, 1099 (2d Dep't 2010). The New York Court of Appeals later denied Seating Solutions' request for leave to appeal. *See R.I., Inc. v. N.Y. State Dep't of Labor*, 17 N.Y.3d 703 (2011).

3. During the pendency of these state-court proceedings, Seating Solutions commenced this action in federal court, claiming that New York's prevailing-wage law is preempted by the NLRA.[4] (J.A. 64-67.) The district court (Wexler, J.) rejected all of Seating Solutions' claims and granted summary judgment to defendants. Pet. App. 14-25. Relying on the Second Circuit's decision in *General Electric Co. v. New York State Department of Labor ("GE II")*, the district court upheld New York's prevailing-wage law against Seating Solutions' preemption challenge. Pet. App. 20 (citing *GE II*, 891 F.2d 25, 27-28 (2d Cir. 1989)). The

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circuit. *RI, Inc. v. Gardner*, 523 F. App'x 40 (2d Cir. 2013) (Dkt. No. 12-3885, ECF No. 46). This state-court brief is a publicly available court record and thus subject to judicial notice. *See Boag v. MacDougall*, 454 U.S. 364, 365 n.* (1982) (per curiam) (taking judicial notice of district court records).

4 Seating Solutions also asserted (1) a procedural due process violation, (2) a First Amendment retaliation claim, (3) an equal protection violation, and (4) a substantive due process violation. (J.A. 64-67.) The first three claims were abandoned by Seating Solutions, either in the district court (J.A. 306), or in the court of appeals (Br. for Appellants at 18 n.10). Seating Solutions unsuccessfully pursued its substantive due process claim in the court of appeals, but it has abandoned that claim for purposes of this petition for writ of certiorari. *See* Pet. 1-3.

court held that Labor Law § 220 was a minimum labor standard under *Metropolitan Life*, and thus not preempted by the NLRA, because the statute sets a floor on a substantive employee benefit (*i.e.*, wages) and does not impermissibly interfere with the collective-bargaining process. *See* Pet. App. 21-22. In a summary order, the court of appeals affirmed for the reasons articulated by the district court. Pet. App. 1-7.

REASONS TO DENY THE PETITION

The petition for certiorari should be denied for two reasons. First, contrary to petitioners' assertions, there is no conflict among the federal circuit courts in their understanding or application of *Metropolitan Life*'s "minimum labor standard" test. Second, the court of appeals correctly found that New York's prevailing-wage law sets a minimum labor standard that does not interfere with the collective-bargaining process, and that it is therefore not preempted by the NLRA. Accordingly, this case does not merit the Court's review.

A. The Federal Circuit Courts Have Consistently Applied *Metropolitan Life*'s Test for Minimum Labor Standards.

Petitioners assert (Pet. 12) that the federal circuit courts have applied different and inconsistent tests to determine whether a state law is a minimum labor standard under *Metropolitan Life*. But they have failed to identify any genuine conflict. The only other federal circuit court to consider a prevailing-wage law like New York's has concluded, consistent

with the court of appeals' decision below, that the law was not preempted by the NLRA. The other courts of appeals' decisions cited by petitioners likewise reflect a common understanding of *Metropolitan Life*'s holding. To the extent that there are any differences in the reasoning of these decisions, they reflect only the fact-specific nature of the courts' inquiries, not a divergence in understanding about the underlying legal rule.

1. In *Metropolitan Life*, this Court found that the NLRA did not preempt a Massachusetts law requiring insurance policies to provide certain minimum mental-health benefits, even though health benefits are a mandatory subject of collective bargaining under the NLRA. 471 U.S. at 727-30, 758. In *Fort Halifax Packing Co. v. Coyne*, this Court applied *Metropolitan Life* and likewise found that the NLRA did not preempt a Maine statute requiring employers to make one-time severance payments to employees upon a plant closing, even though such payments (like health benefits) are also subject to collective bargaining. 482 U.S. 1, 5, 7 (1987).

In both cases, the Court concluded that there was no preemption because the state laws in question established minimum labor standards affecting only *substantive* employment terms—such as mandatory benefits and "'minimum and other wage laws'"—and because Congress did not intend to disturb such state-law standards even when they affected matters over which the parties would otherwise be free to collectively bargain. *Metro. Life*, 471 U.S. at 756 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)). By contrast, the NLRA preempts only state laws that interfere with the *process* of collective bargaining, such as laws prohibiting strikes or specific union

activities. *See Fort Halifax*, 482 U.S. at 20-21; *Metropolitan Life*, 471 U.S. at 753-54. The Court articulated several factors that serve as indicia that a state law sets minimum labor standards exempt from NLRA preemption: the law must "affect union and nonunion employees equally," "neither encourage nor discourage the collective-bargaining processes," and cannot directly regulate an economic activity or "self-help weapon" (such as boycotts) of a party to a collective-bargaining agreement. *Metro. Life*, 471 U.S. at 750, 755 (quotation marks omitted); *Fort Halifax*, 482 U.S. at 20-21.

2. Applying *Metropolitan Life*, the court of appeals here held that New York's prevailing-wage law is not preempted by the NLRA because it establishes a minimum labor standard that does not interfere with the collective-bargaining process. Pet. App. 6-7, 21-22. The only other federal circuit court to consider a prevailing-wage law like New York's has likewise concluded, using similar reasoning, that the NLRA does not preempt such a law. In *Dillingham Construction N.A., Inc. v. County of Sonoma*, the Ninth Circuit considered whether the NLRA preempted California's prevailing-wage law for employees in nonapproved apprenticeship programs. 190 F.3d 1034, 1040 (9th Cir. 1999). Consistent with *Metropolitan Life*, the Ninth Circuit examined whether California's wage standards interfered with the collective-bargaining process, or instead established a minimum substantive term of employment. 190 F.3d at 1041. The court concluded that the California law merely established a legal minimum wage for apprentices rather than "inject[ing] the state into the collective bargaining process," and that NLRA preemption accordingly did

not apply. *Id.* at 1040-41; *see Metro. Life*, 471 U.S. at 758 (upholding law where it "affect[ed] terms of employment" but did "not limit the rights of self-organization or collective bargaining").

Contrary to petitioners' argument (Pet. 15-18), the Ninth Circuit did not rely on a different test for determining whether a state law is a minimum labor standard in an earlier decision, *Bechtel Construction v. United Brotherhood of Carpenters & Joiners of America*, 812 F.2d 1220 (9th Cir. 1987). Rather, *Bechtel* applied the same analysis under *Metropolitan Life* but simply reached a different result due to the distinct features of the law in question. *Bechtel* considered whether California's wage schedules for apprentices in *approved* apprenticeship programs were minimum labor standards. *Id.* at 1222-24. The Ninth Circuit concluded that they were not minimum standards at all because parties to a collective-bargaining agreement could negotiate a rate lower than the rate in the wage schedules. *Id.* at 1222-23. The court found that this feature of California's wage schedule disturbed the collective-bargaining process by essentially injecting the State's prevailing-wage laws into bargaining over wages. *Id.* at 1226.

As the Ninth Circuit later explained, *see Dillingham*, 190 F.3d at 1040, *Bechtel* is fully consistent with *Dillingham* because both decisions faithfully applied *Metropolitan Life*'s distinction between minimum labor standards (which are not preempted by the NLRA) and laws that interfere with collective bargaining (which are); the laws in question simply happened to fall on either side of this divide. Because the court of appeals and district court below applied the same rule here, there is no split of

authority over the application of *Metropolitan Life* to state prevailing-wage laws.

3. None of the other cases cited by petitioners involve a statutory scheme that, like New York's, establishes a minimum wage rate for employees on public-works projects. Petitioners nonetheless assert that these cases conflict with the decision below because they "have applied *Metropolitan Life* . . . in different and conflicting ways." Pet. 2. That is incorrect. Contrary to petitioners' assertions, the other courts that have applied *Metropolitan Life* have all engaged in the same basic inquiry into whether a state law establishes minimum labor standards, a substantive term of employment, or instead interferes with the collective-bargaining process; and they have all considered the same factors that this Court outlined to resolve that inquiry.

In *Washington Service Contractors Coalition v. District of Columbia*, the D.C. Circuit upheld a District of Columbia law that required contractors to retain a predecessor's employees for ninety days when taking over an existing project. 54 F.3d 811, 814, 817-18 (D.C. Cir. 1995). As required by *Metropolitan Life*, 471 U.S. at 755, the court examined whether the law interfered with the bargaining process and concluded that it did not because the law was simply a "substantive employee protective legislation having nothing to do with rights to organize or bargain collectively." 54 F.3d at 817-18.

In *Rhode Island Hospitality Association v. City of Providence ex rel. Lombardi*, the First Circuit found that a similar law was also not preempted by the NLRA. 667 F.3d 17 (1st Cir. 2011). That case involved a city ordinance requiring hospitality

businesses to retain the employees of a predecessor entity for three months upon a change in the business's ownership. *Id.* at 23, 32-33, 37. Petitioners assert that "[t]he First Circuit did not . . . analyze whether the ordinance was a minimum labor standard" (Pet. 22), but that is incorrect: the First Circuit expressly cited both *Metropolitan Life* and *Fort Halifax*, and found "no basis to distinguish this case" from those precedents, 667 F.3d at 32-33; *see also id.* at 33 & n.15. Moreover, in applying those precedents to conclude that the city ordinance was a minimum labor standard, the First Circuit engaged in precisely the analysis required by *Metropolitan Life*: it held that the ordinance was not preempted by the NLRA because it did not "impermissibly enhance[] employee and union bargaining power" and instead merely regulated a substantive term of employment involving the retention of employees.[5] 667 F.3d at 32, 38.

The Third Circuit's decision in *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Government of the U.S. Virgin Islands*, involved yet another straightforward application of *Metropolitan Life*. *See* 218 F.3d 232 (3d Cir. 2000) ("*St. Thomas I*"). That

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[5] Petitioners selectively quote language from the First Circuit's opinion suggesting some uncertainty about the meaning of "minimum labor standard." Pet. 22. But the First Circuit was discussing only potential difficulties at the margins of interpreting *Metropolitan Life*—what it referred to as the "outer boundary beyond which a state law can no longer be deemed a 'minimum labor standard.'" *R.I. Hospitality Ass'n*, 667 F.3d at 32. For the ordinance actually under review, the First Circuit found no meaningful distinction between the ordinance's requirements and the minimum labor standards upheld in *Fort Halifax*. *Id.* at 33.

case addressed the Virgin Islands' Wrongful Discharge Act, which established nine grounds for the lawful discharge of nonmanagerial employees. *Id.* at 235-36. The Third Circuit found that the act was a minimum labor standard not preempted by the NLRA because it imposed on all employees a "substantive minimum requirement[] for contract terms," and "neither regulate[d] the process of bargaining nor upset[] the balance of power of management on one side and labor on the other that is established by the NLRA." *Id.* at 244.

Contrary to petitioners' argument (Pet. 19), the Third Circuit did not alter the *Metropolitan Life* test in a subsequent decision examining the same act. *See St. Thomas-St. John Hotel & Tourism Association v. Government of the U.S. Virgin Islands*, 357 F.3d 297, 304-05 (3d Cir. 2004) ("*St. Thomas II*"). *St. Thomas II* did not involve *Metropolitan Life* or minimum labor standards at all. Instead, the distinct question in *St. Thomas* II was whether section 14(a) of the NLRA[6]—a provision that has no relevance here—preempted the Wrongful Discharge Act as applied to supervisors. The court concluded that it did under the doctrine of conflict preemption because compliance with the act made compliance with section 14(a) impossible. *Id.* at 302-03. But because section 14(a) is not at issue here, *St. Thomas II* does not create any conflict of authority warranting this Court's review.

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[6] Section 14(a) provides that "no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. § 164(a).

Likewise, petitioners are wrong when they assert (Pet. 20-21) that the Seventh Circuit expanded *Metropolitan Life* in *520 South Michigan Avenue Associates v. Shannon*, 549 F.3d 1119 (7th Cir. 2008). That case involved a highly unusual amendment to an Illinois statute that was adopted in the midst of an ongoing bargaining dispute and that essentially short-circuited that dispute by requiring hotel room attendants in a single county to receive mandatory rest and meal breaks. *Id.* at 1121-22, 1130. Contrary to petitioners' characterization, the Seventh Circuit's analysis breaks no new ground. To determine whether or not the NLRA preempted the amendment, the court examined whether the amendment affected union and nonunion employees equally; encouraged or discouraged the bargaining process; or interfered with the bargaining process—all factors that this Court considered in *Metropolitan Life*. *Compare id.* at 1130, 1132-34, *with Metro. Life*, 471 U.S. at 755. The Seventh Circuit concluded that the amendment was not a minimum labor standard because its extremely narrow application served "as a disincentive to collective bargaining" and "equates more to a benefit for a bargaining unit than an individual protection" for all employees. *520 S. Mich. Ave.*, 520 U.S. at 1132-33. Thus, as with all of the other cases cited by petitioners, what petitioners characterize as a new test is merely the Seventh Circuit's consistent application of *Metropolitan Life* to a distinct state law—not a fundamental disagreement on the applicable rule.

B. New York's Prevailing-Wage Law Is a Minimum Labor Standard That Is Not Preempted by the NLRA.

Labor Law § 220 requires contractors performing public-works projects to pay their employees the prevailing wage for their trade in the relevant locality. Because the statute merely affects a substantive term of employment by establishing a floor below which wages may not legally fall, the court of appeals correctly concluded that Labor Law § 220 sets a minimum labor standard that is not preempted by the NLRA.

1. The NLRA does not bar the States from exercising their traditional police powers to establish a wide range of minimum labor standards for the protection of workers, including mandatory employer contributions to workers' compensation funds, laws requiring holiday leave, and, as relevant here, minimum and other wage laws. *See Metro. Life,* 471 U.S. at 755-56; *see also Fort Halifax,* 482 U.S. at 20-21. Such standards predated the NLRA, and nothing in the text or history of the federal statute suggests that Congress intended to disturb the States' long-standing power to protect the health, safety, and welfare of workers. *See Metro. Life*, 471 U.S. at 753-54, 756.

New York's prevailing-wage law unquestionably establishes a minimum labor standard. As the court of appeals concluded in a previous challenge to Labor Law § 220, that statute imposes a "floor" on wages in public-works projects that "cannot be undercut" by an employer. *See GE II*, 891 F.2d at 27-28; *see also Gen. Elec. Co. v. N.Y. State Dep't of Labor ("GE I")*, 698 F. Supp. 1093, 1097, 1099 (S.D.N.Y. 1988), *vacated &*

remanded on ERISA grounds, *GE II*, 891 F.2d 25. New York's prevailing-wage law is thus no different from the state laws this Court upheld in *Metropolitan Life* and *Fort Halifax*. In all three instances, the state law guarantees employees a certain benefit regardless of their union status. And in all three instances, the state law does not interfere with the process of collective bargaining aside from regulating one of the substantive terms that might otherwise have been open to negotiation. As this Court has consistently held, the NLRA leaves untouched the States' authority to impose such minimum labor standards.

It is of no consequence that the Department determines the prevailing-wage rates annually by referring to the rates then prevailing in collective-bargaining agreements for the relevant trade and locality. Contrary to petitioners' characterizations, this method of setting rates does not mean that prevailing wages are set by the collective-bargaining agreements themselves. Rather, once the Department determines what the relevant prevailing wage is, it imposes that wage on all public-works contracts by operation of law for the next year. The prevailing-wage law thus has the same "legal effect" on all covered employers as any other minimum-wage statute; the only difference is that, in effect, it is amended annually to ensure that the Department's schedule of prevailing wages reflects the actual wages being paid in the relevant trade. *See GE I*, 698 F. Supp. at 1098.

2. Petitioners essentially concede that the NLRA would not preempt New York's prevailing-wage law if the statute establishes minimum wages for trades-people on public-works projects. *See* Pet. 23, 26. Their only argument is that, as a matter of practice, the

Department does not actually *apply* Labor Law § 220 as a true legal minimum because it makes ad hoc adjustments to prevailing-wage rates throughout the year. Pet. 23-26. But this argument raises a purely factual dispute about alleged administrative practice that does not merit this Court's review. *See Graver Tank & Mfg. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

In any event, petitioners' factual allegations are inaccurate. Both the court of appeals and the district court found no genuine issue of material fact to even warrant a trial on plaintiffs' allegations about the Department's application of Labor Law § 220. Contrary to petitioners' argument (Pet. 26), there is no record evidence that the Department permits certain employers to negotiate wage rates on public-works contracts that are lower than the rates published by the Department in the prevailing-wage schedules.

The testimony cited by petitioners is not to the contrary. It is true that, as petitioners say, prevailing-wage rates go "up or down" as the Department receives information about the wages established by collective-bargaining agreements in particular localities. Pet. 24. But petitioners mistakenly claim that these adjustments routinely occur between the Department's annual publication of prevailing-wage schedules. *See* Pet. 24-25; *see also* Labor Law § 220(5)(a). That is simply incorrect. The Department sets the prevailing-wage rates each July. *See* Labor Law § 220(5)(a). And in determining whether to adjust that rate, the Department will consider whether the prevailing wage in a locality changed during the one-year period. As required by the statute, a change in the prevailing-wage schedule, if

any, occurs when the Department publishes the schedule once each year.[7] *See id.* (requiring that the Department establish the prevailing wage annually beginning in July of each calendar year). This practice reflects the state-law requirement that the Department update prevailing-wage rates every year to reflect current market conditions. *See id.*

Moreover, none of the witnesses testified that employers could simply ignore the applicable prevailing-wage rates and apply different, lower rates that they had agreed to with their employees—as petitioners demand the right to do here. Labor Law § 220's protection of workers' wages thus qualifies as a minimum labor standard under *Metropolitan Life*.

3. Petitioners' argument that New York's prevailing-wage law impermissibly interferes with the collective-bargaining process is meritless. Pet. 26-28. Labor Law § 220 establishes rates that apply equally to *all* employees on public-works projects regardless of their union membership. *See* Labor Law § 220(2). As this Court explained in *Metropolitan*

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[7] State law also expressly provides an avenue for the accuracy of rates to be challenged. *See* Labor Law § 220(6). Thus, the Department will correct a prevailing wage if it is presented with evidence that the rate is erroneous. Moreover, the Second Circuit's decision in *General Electric Co. v. New York State Department of Labor*, 936 F.2d 1448, 1457-58 (2d Cir. 1991), requires that the Department reassess the prevailing wage if it uncovers evidence that the collective-bargaining agreement from which the rate is derived was collusively negotiated to artificially inflate the prevailing wage. *Id.* at 1457. There is no evidence here, however, that the prevailing-wage rates applicable to petitioners changed outside of the annual adjustments authorized by Labor Law § 220.

Life, because the law treats union and nonunion employees alike, it neither encourages nor discourages the collective-bargaining process. *See* 471 U.S. at 755; *see also Fort Halifax*, 482 U.S. at 20-21.

"Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively . . . . ." *Metro. Life*, 471 U.S. at 755. Rather, they provide minimum protections to employees "as individual workers," "independent of the collective-bargaining process." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981). The mere fact that Labor Law § 220 prevents employers from independently reaching agreements on wages with their employees does not sufficiently interfere with collective bargaining to require NLRA preemption: even "a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption" so long as it sets minimum standards for a substantive term of employment, as Labor Law § 220 does. *Fort Halifax*, 482 U.S. at 22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 2014