No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Metropolitan Life. Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court held that the National Labor Relations Act does not preempt federal and state minimum labor standards that are unrelated to the process of bargaining or organization. The six Circuits that have applied *Metropolitan Life* have all interpreted it differently, with the Second and Ninth Circuits in direct conflict with each other. The First and Seventh Circuits have stated there is a lack of clarity as to what state activities meet the *Metropolitan Life* minimum labor standard test.

New York's prevailing wage law, N.Y. Labor Law § 220, requires any contractor performing public construction work to pay wages in accordance with traditional unions' collective bargaining agreements, whether the contractor is affiliated with a traditional union or not. The law is applied to level the bidding playing field between contractors who are party to traditional union labor contracts and those who are not. Prevailing wage rates fluctuate depending on the outcome of collective bargaining negotiations between contractors and traditional unions. The rates can be undercut with the approval of the New York State Department of Labor, which administers the prevailing wage law.

The question presented in this case is whether New York prevailing wage rates are minimum labor standards under *Metropolitan Life* that supersede collectively-bargained lower wage rates.

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Congress enacted the National Labor Relations Act (the "NLRA") in 1935. The statute's objective is "the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959).

The Court has developed several preemption doctrines that aim to prevent regulatory interference with the fulfillment of this goal. First, in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court held that any regulation of activities arguably protected or prohibited by Sections 7 or 8 of the NLRA is preempted. *See Garmon*, 359 U.S. at 244. Second, in *Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132 (1976), the Court held that the NLRA preempts state regulation of labor relations activities that Congress intended to be left to "the free play of economic forces." *Machinists*, 427 U.S. at 140-41. Third, state law claims that are "substantially dependent" upon the interpretation of collective bargaining agreements are preempted by Section 301 of the Labor Management Relations Act. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Finally, the Court has prohibited state regulatory conduct that interferes with, or punishes employers or employees that engage in, collective bargaining. *See Livadas v. Bradshaw*, 512 U.S. 107, 118 fn.11 (1994) ("[A] State's penalty on those who complete the collective-bargaining process works an interference with the operation of the Act, much as does a penalty

on those who participate in the process."); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239 (1967) (finding state refusal to process unemployment claim of individual with pending unfair labor practices charge impermissibly "impede[d] resort to the [NLRA]"); *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 542 (1945) ("The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation.").

These NLRA preemption doctrines do not, however, apply to minimum labor standards unrelated to collective bargaining. As the Court has stated, "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985) (emphasis supplied). *See also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22 (1987) ("Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety . . . ."). To qualify as a minimum labor standard, the Court has cautioned that a state requirement should be "unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life*, 471 U.S. at 756.

The six Circuits that have applied *Metropolitan Life* have done so in different and conflicting ways. The question presented by this petition is whether New York prevailing wage rates, which fluctuate depending on the outcome of collective bargaining negotiations, can be undercut with the approval of the Department of Labor, and which are applied to level the playing

field between union and non-union contractors, constitute *Metropolitan Life* minimum labor standards.

OPINIONS BELOW

The opinion (App. 8a - 25a) of the United States District Court for the Eastern District of New York is published and available at *RI, Inc. v. Gardner*, 889 F. Supp. 2d 408 (E.D.N.Y. 2012). The summary order of the United States Court of Appeals for the Second Circuit (Calabresi, Cabranes, Parker, Circuit Judges) (App. 1a - 7a) is unpublished but is available at 2013 U.S. App. LEXIS 12950 (2d Cir., June 25, 2013).

JURISDICTION

The Second Circuit entered its judgment on June 25, 2013. App., 1a - 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

New York's prevailing wage law, N.Y. Labor Law § 220, defines the "prevailing rate of wage" as follows:

> The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the

> work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wage set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination. In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

N.Y. Labor Law § 220(5)(a).

STATEMENT OF THE CASE

A. The Parties And The Prevailing Wage Law

The corporate plaintiff, RI, Inc. d/b/a Seating Solutions ("Seating Solutions"), is a small business located in Commack, New York. App., 9a. The individual petitioners were employees of Seating Solutions when the suit was filed. The company designs and installs spectator seating systems at recreational and athletic facilities. *Id*. In early 2005, Seating Solutions' installation personnel formed the United Federation of Maintenance Installers and Assemblers of Audience and Spectator Seating Systems (the "United Federation"). *Id*. Seating Solutions and the United Federation negotiated a collective bargaining agreement (the "United Federation CBA"), which they signed on April 30, 2005. R.634-71.[1]

The United Federation CBA included a schedule of wage rates, grievance procedures, a multi-step disciplinary process, and an arbitration provision. R.640-46, 651. The United Federation also bargained for a guarantee of year-round employment without layoff, a valuable benefit because Seating Solutions usually has more work during warmer months of the year than during cooler months. App., 9a. In exchange, the United Federation promised that union members would accept the cash wage payments they agreed to in the United Federation CBA even if a prevailing wage statute would have entitled them to higher cash wages on public construction projects for

[1] Citations to the appellate record are denoted by an "R.__".

which Seating Solutions was the successful bidder. *Id*., 9a - 10a.

New York's prevailing wage law requires contractors to pay wages on public construction projects in accordance with collective bargaining agreements between contractors and traditional unions. *See* N.Y. Lab. Law § 220(3) (applying law to "public works" only); § 220(5)(c) (defining prevailing wage as "the rate of wage paid in the locality . . . by virtue of the collective bargaining agreements between bona fide labor organizations and employers of the private sector"). For contractors' collectively bargained-for rates to qualify as prevailing, they must "employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed . . . ." N.Y. Lab. Law § 220(5)(a). The New York State Department of Labor (the "Department") applies the prevailing wage law to "create a level playing field for all contractors bidding on public work construction projects, whether they are union or non-union companies." R.680.

The Department sets prevailing wage rates by contacting local units of old-line trade unions and requesting copies of their collective bargaining agreements. R.536-37. Defendant Matthew Myers admitted that he did not ask the United Federation for a copy of its agreement because he did not consider it to be "a bona fide labor organization." R.516. After receiving collective bargaining agreements from traditional unions, the wage rates negotiated in those agreements are plugged root-and-branch into county prevailing wage schedules. R.538, 540, 615-17, 622. The Department does not determine whether the

collective bargaining agreements from which they copy rates satisfy the 30 percent threshold required by the statute. R.512, 548-52.

The wage schedules, which are effective for twelve months, do not specify which rates apply to which construction tasks. R.681-733. If employers are investigated for failing to pay prevailing wages, department personnel decide -- after the fact and on an ad hoc basis -- what rate should have been paid. They do so by checking collective bargaining agreements of traditional, prevailing unions to see which union claims that it performs the construction task in question. R.501. The Department then requires the contractor to pay wages and provide benefits in accordance with the old-line union's collective bargaining agreement, whether the contractor is a party to that agreement, some other labor contract, or no labor contract at all. *Id*.

Under the statute, prevailing wage rates include wage and benefit components. The benefit portion represents the cost of fringe benefits provided under traditional union collective bargaining agreements. *See* N.Y. Labor Law §§ 220(3)(b), 220(5)(b). Unless they contribute to ERISA-qualified plans, non-union employers performing public work must pay employees the cash value of traditional unions' fringe benefits. *See* N.Y. Lab. Law § 220(3)(e). The defendants do not determine whether traditional union members performing public work ever receive the benefit component -- in cash or otherwise -- of prevailing wage rates. R.525-26, 553-55.

Prevailing wage rates are typically several times higher than the state-mandated minimum wage. New York's generally applicable minimum wage is $7.25 per hour and cannot be undercut.[2] The prevailing wage rate for a journeyman ornamental ironworker in Suffolk County, set by the ironworkers' Suffolk County labor contract, is $81.07 per hour.[3] The defendants readily acknowledged the negotiability of wage rates and benefit payments in agreements from which prevailing rates are copied. R.523-24, 541-42. This negotiation can happen during a contract's term or after it expires. R.541-42, 556-57. Defendant Matthew Myers admitted that he would not refuse to publish a reduced rate in the wage schedules if union ironworkers negotiated a lower rate. R.523. Defendant Christopher Alund is the director of the Bureau of Public Work, which oversees the prevailing wage law. He testified that a traditional union would not have to wait twelve months for a prevailing wage rate to expire before negotiating and obtaining Department approval for a wage rate reduction. R.556-57. New York's prevailing wage rates can thus be undercut with the Bureau of Public Work's approval.

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[2] New York State Department of Labor, Minimum Wages Page, http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/minwage.shtm (September 11, 2013).

[3] New York State Department of Labor, *Suffolk County Prevailing Wage Rate Schedule for 07/01/2013 - 06/30/2014*, p. 17 (Sep. 1, 2013), *available at* http://wpp.labor.state.ny.us/wpp/viewPrevailingWageSchedule.do?typeid=1&county=46.

B. The State Administrative Proceeding

In March 2006, the defendants began investigating Seating Solutions for paying United Federation CBA rates on public projects instead of prevailing wage rates. App., 11a. The defendants concluded that Seating Solutions had to pay wage rates in a CBA negotiated by a local ironworkers' union rather than that of the United Federation. *Id.* They reached this conclusion because the ironworkers' collective bargaining agreement claimed the right to perform seating installation work. *Id*.

The defendants went further. They decided that the United Federation was an invalid union "concocted" by Seating Solutions and that the wage rates in the United Federation CBA were "superseded" by prevailing rates. R.493-94, 506-07. Mr. Myers said that the United Federation CBA was "worthless", that the union was a "sham", and once threw the agreement into a wastebasket for dramatic effect. R.493-94, 568, 570. Defendant Patricia Smith stated that "the DOL does not recognize the Federation contract as valid." R.573. And the United Federation CBA prompted the defendants to penalize Seating Solutions for willfully not paying ironworkers' wage rates. "[T]he Federation contract," Ms. Smith argued, "too clearly demonstrates their willfulness." R.575.

Administrative proceedings concerning the reasonableness of the classification of Seating Solutions' employees as ironworkers ensued. A state hearing officer issued a report and recommendation affirming this determination in November 2008. App., 12a. Ms. Smith adopted the report and

recommendation. *Id*. Without referencing the United Federation CBA, the Appellate Division of the New York Supreme Court denied Seating Solutions' petition for review of the Commissioner's Order on April 27, 2010. *See R.I., Inc. v. New York State Dep't of Labor*, 72 A.D.3d 1098, 900 N.Y.S.2d 124 (2010). The New York Court of Appeals denied leave to appeal. *See R.I., Inc. v. New York Dep't of Labor*, 17 N.Y.3d 703 (2011).

C. Procedural History

The plaintiffs filed suit on April 22, 2010, five days before the Appellate Division's denial of the Company's petition. The sole claim at issue here is that the defendants' application of the prevailing wage law to Seating Solutions was preempted by the National Labor Relations Act. Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). The district court denied that motion in September 2011.

After discovery, the defendants moved for summary judgment. The district court allowed the motion on August 23, 2012. The district court accurately stated the plaintiff's contention that in applying state law, "defendants may not discard collectively bargained-for employment terms, such as the negotiated wage rates in the United Federation CBA." App., 20a. The district court disagreed nonetheless. *Id*. It based its conclusion on *General Elec. Co. v. New York State Dep't of Labor*, 891 F.2d 25 (2d Cir. 1989), in which the Second Circuit held that the prevailing wage law was not preempted by the NLRA. "Seating Solutions and the United Federation," the district court concluded,

"may not bargain their way around the protections of the prevailing wage law and its application to public work." *Id*.

Employing similar reasoning, the district court concluded that the defendants' regulatory conduct was not preempted by Section 301 of the Labor Management Relations Act. Section 301, the district court stated, "does not preempt the DOL's enforcement of § 220, a state statute regulating certain substantive guarantees, nor does it grant parties to a collective bargaining agreement the right or ability to contract around those guarantees." App., 24a. The district court did not discuss the fact that prevailing wage rates are the very outcome of collective bargaining, nor did it address Mr. Alund's admission that they can be undercut with the Department's approval.

On June 25, 2013, six days after oral argument, the Second Circuit affirmed the district court in a summary order. *Id*., 1a. The Second Circuit incorrectly characterized the plaintiffs as claiming "New York's prevailing wage law, § 220, is not a minimum labor standard and is, therefore, preempted by the NLRA . . . ." *Id*., 6a. The plaintiffs' claims had a tighter focus. They alleged only that the defendants do not actually apply the prevailing wage law as a minimum labor standard. The NLRA thus preempted the defendants' application of the law to Seating Solutions, a party to a federally protected collective bargaining agreement. The summary order contained no independent discussion of whether New York's prevailing wage law was applied as a true legal minimum. The Second Circuit instead affirmed

"substantially for the reasons articulated" by the district court. *Id.*, 7a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Circuits Conflict Over What Constitutes A Minimum Labor Standard Under *Metropolitan Life*.

Every Circuit that has analyzed whether an enactment constituted a minimum labor standard under *Metropolitan Life* has stated the rule differently. This case gives the Court an opportunity to harmonize those divergent approaches into a single, coherent legal standard.

This Court first considered the NLRA's effect on states' claimed exercise of their police powers in *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959). The Court was faced there with an attempt by Ohio's attorney general to block implementation of a collective bargaining agreement provision that was inconsistent with the state's antitrust law. The Court held that the regulatory conduct in question was preempted by the NLRA. *See id.*, 358 U.S. at 293. "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation," the Court concluded. "[T]he conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." *Id.* at 297.

The Court reached the issue of the effect of the NLRA on true local health and safety regulations in *Metropolitan Life*. There the statute in question, Mass.

Gen. Laws Ann. ch. 175, § 47B (2013), required that Massachusetts residents insured under general insurance policies, accident or sickness policies, or employee health care plans be provided with specified, minimum mental health care benefits. *Metropolitan Life*, 471 U.S. at 727. The case arose from a complaint filed by the Attorney General of Massachusetts seeking to force two insurance companies to abide by § 47B. *See id*. at 734. The insurers contended that the NLRA, specifically *Machinists*, preempted the law.

The Court held that the § 47B was not preempted and stated that "[t]he evil Congress was addressing [in the NLRA] was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id*. at 754. The federal statute would not preempt state laws that "impose[d] minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with the[] general goals of the NLRA." *Id*. at 754-55.

The Court specified that "[m]inimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id*. at 755. "[T]here is no suggestion in the legislative history," the Court stated, "that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Id*. at 756. Under this rubric, the Court held that § 47B was "a valid and unexceptional exercise of the . . . police power." *Id*. at 758.

Two years later, in *Fort Halifax*, the Court considered whether the NLRA preempted a Maine law requiring minimum, one-time severance payments to employees who lost their jobs due to plant closings. The statute covered facilities that employed "100 or more persons." *Fort Halifax Packing Co*., 482 U.S. at 3 n.1. It exempted from its provisions any employee "covered by an express contract providing for severance pay." *Id*.

The Court held that "the Maine law is not pre-empted by the NLRA, since it establishes a minimum labor standard that does not intrude upon the collective-bargaining process." *Id*., 482 U.S. at 7. "[P]re-emption," the Court instructed, "should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the state." *Id*. at 21. Of particular importance to the Court's analysis was "[t]he fact that the parties are free to devise their own severance pay arrangements . . . ." *Id*. at 22. "If a statute that permits no collective bargaining on a subject escapes NLRA pre-emption," the Court wrote, "surely one that permits such bargaining cannot be pre-empted." *Id*.

Because § 47B included an explicit provision permitting collective bargaining, *Fort Halifax's* description of the statute as setting a "minimum" labor standard is likely to sow continued uncertainty. The import of *Fort Halifax* is that a law expressly allowing collective bargaining cannot, on its face, interfere with the NLRA's primary aim, which is the encouragement of collective bargaining. *See Oliver*, 358 U.S. at 295 ("The goal of federal labor policy . . . is the promotion of collective bargaining . . . .").

Six Circuits have tried to navigate the tests in *Metropolitan Life* and *Fort Halifax*. They have done so in six different ways.

A. The Ninth Circuit: True Legal Minimums

The Ninth Circuit focuses on whether the labor standard at issue is a true legal minimum. In *Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners of America*, 812 F.2d 1220 (9th Cir. 1987), the Ninth Circuit considered whether private parties to a labor contract could bargain around a schedule of prevailing wages promulgated by the California Division of Apprenticeship Standards. The court held that the wage standards "are not minimum labor requirements such as are protected in *Metropolitan Life*, and that any attempt to enforce them against a collectively-bargained lower wage rate is preempted by federal law." *Id*., 812 F.2d at 1222. Central to this conclusion was the fact that rates lower than those set forth in promulgated wage schedules could be paid to employees if the rates were "submitted and approved by the Division of Apprenticeship Standards." *Id*. at 1223-24. This was enough to the take the wage rates at issue out from under the *Metropolitan Life* umbrella. "[T]he standards cannot be minimum legal requirements if lower wage rates can be negotiated with the approval of the Division of Apprenticeship Standards. A 'minimum' by definition cannot be undercut." *Id*. at 1226.[4]

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[4] Twelve years later, in *Dillingham Constr. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), the Ninth Circuit reaffirmed the *Bechtel's* validity. It found that a different

B. The Second Circuit: Not A Dictionary Definition Of "Minimum"

Under Second Circuit precedent, a labor standard *can* be undercut with state regulatory approval and still pass the *Metropolitan Life* test. The Second Circuit has held that whether a labor standard establishes a true minimum is secondary to whether the standard is consistent with the goals of the NLRA. In *General Elec. Co. v. New York State Dep't of Labor*, 891 F.2d 25 (2d Cir. 1989), the Second Circuit was faced with the question of whether wage rates in a collective bargaining agreement had to give way to New York's prevailing wage rates promulgated under N.Y. Labor Law § 220. The Second Circuit deferred to the district court's analysis: "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." *Id*., 891 F.2d at 27.

The district court's opinion in *General Electric* is thus integral to a complete understanding of Second

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prevailing wage applicable to apprentices established minimum labor standards under *Metropolitan Life*. Citing *Bechtel Construction*, the court stated that "[t]he apprentice prevailing wage law at issue in this case cannot be undercut because it establishes true legal minimums and *Bechtel Construction* does not stand for the proposition that true minimum wages or minimum apprenticeship program standards are preempted by the NLRA." It did so again in *Associated Builders & Contractors of S. Cal. v. Nunn*, 356 F.3d 979, 987-88 (9th Cir. 2004), *cert. denied*, 543 U.S. 814 (2004) (contrasting *Bechtel* and noting that the wage rates at issue in *Nunn* did not "require[] California officials to approve collective bargaining wage rates before they go into effect").

Circuit law. The district court there did find, albeit in the preliminary injunction context, that "the wage and hours standards established under the authority of Section 220 cannot be 'undercut' with the consent of the state agency charged with enforcing them . . . ." *General Elec. Co. v. New York State Dep't of Labor*, 698 F. Supp. 1093, 1099 (S.D.N.Y. 1988) (Carter, J.). But the district court went on to criticize *Bechtel Construction* for being "excessively narrow." *Id.* at 1099 n.11. Pointing to *Fort Halifax*, the district court stated that the fact that a minimum could be undercut was not dispositive as to whether the standard was a true minimum. *See General Elec. Co.,* 698 F. Supp. at 1099 n.11. ("[T]he *Bechtel* court's holding that a minimum by definition cannot be undercut is hard to reconcile with *Fort Halifax* . . . .") (internal quotations marks omitted). From employers' ability to contract around the severance pay statute in *Fort Halifax*, the district court reasoned that "[c]learly, minimum labor standards do not have to be impregnable to avoid pre-emption." *Id*.[5]

The district court's approach, which the Second Circuit blessed, focused on the idea that a minimum need not be, in the words of the Ninth Circuit, a "true legal minimum":

> The common thread in the Supreme Court's "minimum labor standard" concept is not a

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[5] The district court in *General Electric* did not account for the argument that a statute permitting parties to bargain around its terms like the one at issue in *Fort Halifax* plainly would not interfere with collective bargaining.

> dictionary definition of "minimum," nor a requirement that the minimum standards be neutral in their effect on the collective bargaining process, but a judgment that the substantive rights which the state seeks to create are consistent with the "general legislative goals of the NLRA."

Id. at 1100. The district court reasoned that both the NLRA and the prevailing wage law aimed to "overcome a variety of economic problems attributable to depressed and unstable wage rates . . . ." *Id*.[6] Based on this shared purpose, the district court found that the state law was not preempted.

C. The D.C. Circuit: Substantive Protections Having Nothing To Do With Bargaining

In *Washington Serv. Contractors Coal. v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996), the D.C. Circuit framed the test

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[6] The district court overstated the NLRA's substantive aims. As the Court has repeated over the years, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *N.L.R.B. v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960). *See also H.K. Porter, Inc. v. N.L.R.B*., 397 U.S. 99, 103 (1970) ("The object of th[e NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions ."); *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952) ("The Act does not . . . regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.").

in different terms. The court there considered whether the NLRA would preempt a local ordinance requiring contractors providing janitorial, maintenance, and similar services to continue employing certain workers for a period of 90 days after losing a contract. Finding that the statute was not preempted, the court described the *Metropolitan Life* test as turning on whether the law in question was "substantive employee protective legislation having nothing to do with rights to organize or bargain collectively." *Id*. at 818.

D. The Third Circuit: Minimum Substantive Requirements, But Not For Supervisors

The Third Circuit condensed the test. It stated that "Congress did not intend to prevent states from establishing minimum substantive requirements for contract terms." *St. Thomas - St. John Hotel & Tourism Ass'n, Inc. v. Virgin Islands*, 218 F.3d 232, 243 (3d Cir. 2000). The court there concluded that the NLRA did not preempt a Virgin Islands statute limiting the permissible reasons for discharging employees. *See id*. at 246. It later held, however, that the law *was* preempted as to supervisory employees. *See St. Thomas - St. John Hotel & Tourism Ass'n, Inc. v. Virgin Islands*, 357 F.3d 297, 304 (3d Cir. 2004). So the rule in the Third Circuit seems to be that a state law can establish minimum substantive employment terms as to lower-level employees, but not supervisors, without running afoul of the NLRA. To date, the Third Circuit has not required that a minimum labor standard be "unrelated in any way to the processes of bargaining or self-organization" *Metropolitan Life,* 471

U.S. at 756, or have "nothing to do with rights to organize or bargain collectively." *Washington Serv. Contractors Coal.*, 54 F.3d at 818.

E. Seventh Circuit: Seven Factor Test

The Seventh Circuit's *Metropolitan Life* test, which it announced in *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008), *cert. denied*, 558 U.S. 874 (2009), is comprehensive. The plaintiff in the case was the Congress Plaza Hotel in Chicago, Illinois. *See id.* at 1121. The hotel's collective bargaining agreement with a union representing 130 hotel attendants, Unite Here, had expired and the hotel and the union were in the midst of negotiating a new CBA. *See id.* These negotiations occurred against the backdrop of the Illinois "One Day Rest in Seven Act." *See id*. The One Day Rest in Seven Act required a 20 minute meal period, but did not apply to employees covered by collective bargaining agreements. *See id.* at 1122. While negotiations were ongoing, and in response to lobbying by Unite Here, Illinois enacted the "Attendant Amendment" to the One Day Rest in Seven Act. *See id*. at 1122, 1133 n.10. The Attendant Amendment applied only to hotel attendants working in Cook County, Illinois, and mandated additional break periods, record keeping, and a treble damages remedy for employees denied those break periods. *See id*. at 1123.

Noting that "the Supreme Court's guidance is sparse" in the minimum labor standard context, *id*. at 1129, the court identified seven factors to guide the determination of whether a labor standard meets *Metropolitan Life's* requirements. First, the Seventh

Circuit considered whether the Attendant Amendment "facially affect[ed] union and non-union employees equally . . . ." *Id*. at 1130. Second, it asked whether the law was "a statute of general application." *Id*. Third, the court considered whether the statute was "a disincentive to collective bargaining and instead encouragement for employers or unions to focus on lobbying at the state capital instead of negotiating at the bargaining table." *Id*. at 1132-33. Fourth, the court looked at whether the law "equates more to a benefit for a bargaining unit than an individual protection." *Id*. at 1133. Fifth, the court examined whether, in the absence of the Attendant Amendment, a different minimum labor standard was already in place that would regulate breaks. *See id*. at 1134. Sixth, the court stated that "[t]he more stringent a state . . . substantive standard, the more likely it is that the state law interferes with the bargaining process." *Id.* at 1136. Seventh, the court analyzed whether the law interfered with the structure of an existing collective bargaining agreement. *See id*. at 1137-38. After conducting this analysis, the court held that the Attendant Amendment was "not a minimum labor standard and is preempted by the NLRA." *Id*. at 1139.

F. First Circuit: Seeking Guidance

Aside from this case, the most recent effort to apply *Metropolitan Life* was undertaken by the First Circuit in *Rhode Island Hospitality Ass'n. v. City of Providence*, 667 F.3d 17 (1st Cir. 2011). The case involved a Providence ordinance, similar to the one analyzed by the D.C. Circuit, that protected hotel employees from termination for three months after management

changes. *See id*. at 23. The plaintiff contended that the ordinance was preempted by the NLRA. The court held that the ordinance was analogous to the mandatory severance provisions upheld in *Fort Halifax* and thus was not preempted. *See id*. at 33.

The First Circuit did not, however, analyze whether the ordinance was a minimum labor standard. It found that articulation to be unhelpful:

> The Supreme Court has not indicated what differentiates a "minimum labor standard" from other labor standards, nor has it explained why such standards are by virtue of that status not usually inconsistent with the goals of the NLRA. It is far from clear that use of the phrase helps achieve clarity as to the boundaries of permissible state regulation.

Id. at 32. Writing separately, Judge Stahl stated that "[t]he case law gives us few clear rules to follow, leaving preemption somewhat in the eye of the beholder." *Id*. at 46. "I do hope," Judge Stahl continued, "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*.

G. Summary: Six Circuits, Six Approaches

Six Circuits have given us six different approaches for applying *Metropolitan Life* to state and local laws. The Ninth Circuit looks at whether a law creates a true legal minimum. The Second Circuit says that a "minimum" need not be a true legal minimum to satisfy *Metropolitan Life*, focusing instead on whether the

purpose of a law is in harmony with the NLRA's purpose. The D.C. Circuit frames the question as whether a law provides substantive employee protection and has nothing to do with collective bargaining. The Third Circuit holds that NLRA does not preempt state laws that provide minimum substantive protections to lower level employees, but not to supervisors. The Seventh Circuit has a multi-factor test. And the First Circuit eschews the concept of minimum labor standards altogether, instead reasoning by analogy and contemplating how the law in question fits into existing preemption caselaw. This case presents the Court with an opportunity in the context of a narrow, as-applied challenge to resolve this circuit split and provide clarity to Circuits that are seeking it on this issue.

II. Certiorari Is Warranted Because New York's Prevailing Wage Rates Are Not Applied As True Legal Minimums.

Seating Solutions' preemption argument turns on the question of whether New York's prevailing wage rates are applied as minimum labor standards. *See e.g. Metropolitan Life Ins. Co.*, 471 U.S. at 755 ("We see no reason to believe that for this purpose Congress intended state minimum labor standards to be [preempted]".). If prevailing wage rates are applied as minimum labor standards, the defendants win and the case is over. If the wage rates are not applied as minimum labor standards, the NLRA would preempt enforcing them against collectively-bargained lower wage rates.

New York's prevailing wage rates are in no sense minimum labor standards. The district court's conclusion, as affirmed by the Second Circuit, that "Seating Solutions and the United Federation may not bargain their way around the protections of the prevailing wage law," App. 20a, was incorrect. In *Metropolitan Life*, the Supreme Court stated that "[m]inimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life,* 471 U.S. at 755. Similarly, in *Allis-Chalmers Corp.*, the Supreme Court noted that a minimum labor standard "confers *nonnegotiable* state-law rights on employers or employees independent of any right established by contract . . . ." 471 U.S. at 213 (emphasis supplied).

CBA wage rates that fluctuate depending on the outcome of collective bargaining negotiations simply cannot be true legal minimums. The defendants admitted that the rates, benefits, terms, and overtime rules they enforce *are* negotiable -- up or down -- but only by certain unions and the employers who bargain with them. R.523-24, 541-43, 556-57. Mr. Myers admitted that he would not refuse to publish lower rates than those on wage schedules if presented with such a negotiated rate by a "prevailing" union. R.523.

Even more significantly, Mr. Alund, the Director of New York's Bureau of Public Work, was asked whether a union whose collective bargaining agreement was used to set a prevailing wage rate could negotiate a lower rate during the term of a prevailing wage schedule. He stated:

> If the CBA -- the parties of the CBA -- that review the promulgate schedule, present evidence, that they are, in fact, reduced the wage rates or the benefit information, that we have a promulgate in our schedule, we look at that, weigh the evidence as to whether or not we should reduce and make an adjustment to the prevailing wage schedule then.

R.556-57 [all sic]. He added that only a union whose CBA was relied upon when Defendants set the prevailing wage schedules could negotiate such a mid-term reduction. R.557.[7]

In *Lueck*, as the district court noted, this Court stated that federal labor law "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212. *See also Metropolitan Life*, 471 U.S. at 755 ("It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally."). Mr. Alund's testimony demonstrates that the *Lueck* proposition is inapposite

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[7] By ruling as it did in this case, the Second Circuit therefore took the logical step presaged in *General Electric*. Criticizing *Bechtel Construction*, the district court there stated that "[c]learly, minimum labor standards do not have to be impregnable to undercutting to avoid preemption." *General Elec. Co.*, 698 F. Supp. at 1099 n.11. Here, both the district court and the Second Circuit concluded that a wage rate that can be undercut with the approval of regulators is nonetheless a minimum labor standard under *Metropolitan Life*. This is directly contrary to the Ninth Circuit's conclusions in *Bechtel*, *Dillingham*, and *Nunn*.

here. The Department of Labor permits parties to certain preferred collective bargaining agreements to bargain around, and thereby undercut, prevailing wage rates. Such bargaining is therefore plainly not "illegal under state law." *Id*. *See also Bechtel Constr., Inc*., 812 F.2d at 1226 ("[W]ages below state 'Approved Standards' are not illegal under state law if they can be legally instituted with the 'approval' of a state agency."). Though the prevailing wage law could conceivably be applied in a manner consistent with *Metropolitan Life*, New York's insertion of itself into the determination of who gets to engage in private collective bargaining is clearly anathema to the purpose of the NLRA. *See Hill*, 325 U.S. at 541 ("To the extent that [Florida law] limits a union's choice of . . . an agent or bargaining representative, it substitutes Florida's judgment for the workers' judgment.") (internal quotation marks omitted).

Casting further doubt on the claim that the law is applied to protect individual workers, Defendants admitted that they make no effort whatsoever to determine whether members of historically established unions receive either actual fringe benefits or the cash value of those benefits, as required by the prevailing wage law. R.525-26, 553-55. In 2005, the benefit portion of an ironworker's prevailing wage payment was $29.41 per hour, or $1,176.40 for a full week of work -- not a trivial sum. R.699.

Nor is the prevailing wage law a statute that is "unrelated in any way to the processes of bargaining or self-organization." *Metropolitan Life*, 471 U.S. at 756. *See also Washington Serv. Contractors Coal.*, 54 F.3d at 818 (noting that *Metropolitan Life* statutes "have[]

nothing to do with rights to organize or bargain collectively"). The prevailing wage law requires that wages be paid in accordance with traditional unions' collective bargaining agreements. It does so to guarantee a level playing field for union and non-union contractors. R.680. Characterizing such a law as unrelated to union bargaining or organization would muddy this Court's unambiguous instruction in *Metropolitan Life*.

Applying the Seventh Circuit's comprehensive test confirms that prevailing wage rates are not minimum labor standards. First, New York's prevailing wage law does not "facially affect[] union and non-union employees equally . . . ." *520 S. Mich Ave. Assocs., Ltd.* 549 F.3d at 1130. Indeed, its very purpose is to level the playing field between union and non-union employers. R.680. The New York law benefits union employees because it insulates their employers against wage-related competition.[8] In addition, traditional union employees have unique agency under the prevailing wage law. It is their negotiations, not the

[8] The Court of Appeals of New York acknowledged the prevailing wage law's effect on the bidding playing field when discussing the purpose of a 1956 amendment that included the cost of union fringe benefits in the prevailing wage rates. *See Action Elec. Contractors Co., Inc. v. Goldin*, 474 N.E.2d 601, 605, 64 N.Y.2d 213, 222-23 (1984) ("[N]onunion contractors were perceived by some to hold an unfair advantage through lower labor costs because the then-existing statute only required payment of the prevailing wage. These firms could submit lower bids than union contractors who had to pay for costly fringe benefits.").

negotiations of non-union employees or employees in non-traditional unions, that set wage rates. R.516, 557.

Second, a specific prevailing wage rate is not generally applicable. It applies only for one year, R.681, to one county, R.539, to one construction trade, R.684-85, and only on public construction projects. *See* N.Y. Lab. Law § 220(3) (applying law to "public works" only). Even within a trade, different wage rates will apply to different employees depending on their experience. R.699-700 (listing different rates for ornamental ironworkers and apprentices). The laws at issue in *Metropolitan Life* and *Fort Halifax* applied statewide to a variety of industries. The prevailing wage law's limited application weighs against the conclusion that it constitutes a minimum labor standard. *See 520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1132 ("We find the lack of general application in the Attendant Amendment significant.").

Third, like the Attendant Amendment, the prevailing wage law "seems to be a disincentive to collective bargaining and instead encouragement for employers or unions to focus on lobbying at the state capital instead of negotiating at the bargaining table." *Id.* at 1132-33. Employers in the building trades who do not bargain with traditional unions have no incentive to exchange benefits -- things like grievance procedures or guaranteed, year-round employment, for instance -- for reductions in cash wage payments. As this case demonstrates, a contractor intending to perform public construction work would indeed be barred from such negotiation.

Fourth, the goal of the prevailing wage law is not to provide individual workers with impermeable wage, benefit, or safety minimums; it is to protect union employers by leveling the bidding playing field. R.680. Contractors who bargain with historically prevailing unions can bid successfully on more work. This ensures that members of those unions have more work to do. Like the Attendant Amendment, the prevailing wage law thus "equates more to a benefit for a bargaining unit than an individual protection." *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1133.[9]

Fifth, the prevailing wage law layers a negotiable "minimum" on top of a true legal minimum. The Seventh Circuit found that the Attendant Amendment lacked the characteristics of a minimum labor standard because there was already a statutory minimum, the One Day Rest in Seven Act, in place. "Illinois retained its minimum labor standard," the Court wrote, "and crafted a higher standard for a specific occupation, in a specific industry, in a specific county." *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1134. There is a similar layering in this case. New York has a minimum wage law that is of true general application and does not fluctuate depending on the negotiations of private parties. N.Y. Lab. Law § 19. Like the Attendant Amendment, the prevailing wage law creates a "higher standard", *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at

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[9] See David Bernstein, *The Shameful, Wasteful History of New York's Prevailing Wage Law*, 7 GEO. MASON U. CIV. RTS. L.J. 1, 17 (1997) ("New York's prevailing wage mandate is now far stricter and more blatantly pro-union than even the pre-1982 federal Davis-Bacon Act, as well as almost every other state's prevailing wage law.").

1134, for employers in a specific industry (the skilled building trades) doing specific work (working on public projects) in a specific county. *See* N.Y. Lab. Law § 220(3) (applying law to "public works" only); R.539. This factor weighs against the conclusion that the prevailing wage law creates a minimum labor standard.

Sixth, the prevailing wage law is stringent. New York's generally applicable minimum wage, which is $7.25 per hour,[10] is significantly lower than prevailing wage rates, which for a journeyman ornamental ironworker in Suffolk County is $81.07 per hour.[11] Like the Attendant Amendment, the prevailing wage law "can in no sense be considered 'minimal.'" *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1135.

Finally, the defendants in this case applied the law in a manner that interferes with the collective bargaining process, which weighs against the conclusion wage rates are true *Metropolitan Life* minimum labor standards. Here, Defendants have disregarded terms of the United Federation CBA that they deemed inconsistent with the prevailing wage law. R.493-94, 506-07. It is difficult to conjure a greater interference than that. As the Seventh Circuit noted,

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[10] New York State Department of Labor, Minimum Wages Page, http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/minwage.shtm (September 11, 2013).

[11] New York State Department of Labor, *Suffolk County Prevailing Wage Rate Schedule for 07/01/2013 - 06/30/2014*, p. 17 (Sep. 1, 2013), *available at* http://wpp.labor.state.ny.us/wpp/viewPrevailingWageSchedule.do?typeid=1&county=46.

"[t]his interference might be acceptable[] if [the statute] was a law of general application." *520 S. Mich. Ave. Assocs., Ltd.*, 549 F.3d at 1138 n.15. But, as noted above, it is not. This final factor thus tilts in the plaintiffs' favor as well.

New York's prevailing wage law is not a minimum labor standard. It is an attempt to readjust the relationship of actors in the world of commerce to preserve the viability of contractors employing traditional union workers. The conflict here evokes the conflict the Court faced in *Oliver:* "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce." *Oliver*, 358 U.S. at 297.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-3885-cv

[Filed June 25, 2013]

RI, INC., DBA SEATING SOLUTIONS,
LISA SUPRINA, SCOTT SUPRINA,
TONY ENGLISH,
Plaintiffs-Appellants,
v.

COLLEEN GARDNER, in her official capacity as New York State Commissioner of Labor, M. PATRICIA SMITH, in her individual and official capacity as former New York State Commissioner of Labor, JOSEPH OCON, in his individual and official capacity as senior wage investigator at New York State Department of Labor, MATTHEW MYERS, in his individual and official capacity as senior public works wage investigator at the New York State Department of Labor, CHRISTOPHER ALUND,
Defendants-Appellees.

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of June, two thousand thirteen.

PRESENT:

GUIDO CALABRESI,
JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
Circuit Judges.

FOR PLAINTIFFS-APPELLANTS:

TERRY KLEIN,
Henshon Klein LLP,
Boston, MA.

FOR DEFENDANTS-APPELLEES:

LESLIE B. DUBECK, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Steven C. Wu, Special Counsel to the Solicitor General, *on the brief*), *for* Eric T. Schneiderman, Attorney General of the State of New York, New York, NY.

Appeal from the United States District Court for the Eastern District of New York (Leonard D. Wexler, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 23, 2012 judgment of the District Court granting summary judgment for defendants-appellees is **AFFIRMED**.

Plaintiffs-appellants, R.I., Inc. d/b/a/ Seating Solutions, a New York corporation, and certain of its officers ("Seating Solutions" or "plaintiffs"), appeal from the District Court's summary judgment, granted pursuant to Fed. R. Civ. P. 56, in favor of defendants-appellees, various employees of the New York Department of Labor (the "Department") responsible for enforcing New York's prevailing wage statute. *See* N.Y. Labor Law § 220 *et seq*. ("§ 220"). Under that statute, the wages to be paid in New York "for a legal day's work . . . to laborers, workmen, or mechanics upon . . . public works, shall not be less than the

prevailing rates of wages." § 220(3)(a).[1] The "prevailing rates of wages," in New York state are generally determined by the Commissioner of the Department,[2] based on collective bargaining agreements ("CBAs"). *See* § 220(5)(a). If an employer fails to pay the prevailing wage, the Department has the statutory authority to withhold payment for the public work while commencing an investigation and administrative proceedings. *See* § 220(b)(2)(c).

In early 2006, the Department investigated Seating Solutions for failing to pay the prevailing wages, and supplements, to workers that the Department classified as "ornamental ironworkers." *RI, Inc. v. Gardner*, 889 F. Supp. 2d 408, 412 (E.D.N.Y. 2012). Plaintiffs argued that the Department "did not perform any independent inquiry into the wages actually paid for similar work," and instead only relied "on the collective bargaining agreements of established trade unions," in particular the Ironworkers' CBA.[3] *Id*. (internal quotation marks omitted). Based on its calculation of the prevailing wages and supplements, the Department initially assessed that Seating Solutions had underpaid its workers by more than

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[1] The statute similarly requires wage supplements, such as benefits and life insurance, to be paid according to prevailing local practices. *See* §220(3)(b).

[2] The Comptroller of the City of New York, however, sets the prevailing wage rates for the New York City. *See* § 220(5)(a).

[3] The Ironworkers' CBA was reached between the Allied Building Metal Industries, Inc., and the Architectural and Ornamental Iron Workers Local Union No. 580. *See RI, Inc.*, 889 F. Supp. 2d at 412.

$300,000. Plaintiffs, with the assistance of counsel, challenged this determination at an administrative hearing. The hearing officer issued a Report and Recommendation upholding the Department's initial assessment, which the Commissioner of Labor subsequently adopted. Plaintiffs then commenced an Article 78 proceeding in New York state court, before the Second Department, challenging the Department's determination. *See R.I., Inc. v. N.Y. Dep't of Labor*, 900 N.Y.S.2d 124 (2d Dep't 2010). While the Article 78 proceeding was pending, plaintiffs instituted this suit before the District Court, pursuant to 42 U.S.C. § 1983, claiming violations of: (1) substantive due process; (2) equal protection; and (3) of their rights under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq*. *See RI, Inc.*, 889 F. Supp. 2d at 412. Five days after plaintiffs commenced their federal action, the Second Department held that the Department properly classified Seating Solutions' workers as ornamental ironworkers and laborers and that the Department could "rely on collective bargaining agreements in making trade classifications." *R.I., Inc.*, 900 N.Y.S.2d at 126 (citing authorities).

On May 15, 2012, the District Court denied a discovery application by plaintiffs to conduct a forensic examination of the office computers of two senior wage investigators, as both "untimely" and "devoid of merit." On August 23, 2012, the District Court granted summary judgment for the Department. This appeal followed. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review, to which we refer only as necessary to explain our decision to affirm.

On appeal, plaintiffs assert many of the same claims that they raised before the District Court: (1) that New York's prevailing wage law, § 220, is not a minimum labor standard and is, therefore, preempted by the NLRA; (2) that the District Court erred in dismissing their substantive due process claims; and (3) that the District Court abused its discretion in denying plaintiffs' motion for forensic examination of the office computers of two senior wage investigators.

We review an order granting summary judgment *de novo* and "resolv[e] all ambiguities and draw[ ] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010). Summary judgment is appropriate 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." Fed. R. Civ. P. 56(a); *see also Winfield v. Trottier*, 710 F.3d 49, 52 (2d Cir. 2013). We review a district court's denial of a motion for further discovery for an abuse of discretion, *see Gualandi v. Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004), and will not reverse where a plaintiff has failed to show "how the facts sought are reasonably expected to create a genuine issue of material fact," *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994). *See also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (explaining the term of art "abuse of discretion").

Having conducted an independent and *de novo* review of the record in light of these principles, we affirm the judgment of the District Court substantially for the reasons articulated in Magistrate Judge Boyle's

Order of March 21, 2012, affirmed by the District Court, and Judge Wexler's thorough and well-reasoned Order of August 23, 2012. *See RI, Inc.*, 889 F. Supp. 2d at 408.

We have reviewed all of plaintiffs' arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the August 23, 2012 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 10-1795 (LDW) (AKT)

[Filed August 23, 2012]

RI, INC. d/b/a SEATING SOLUTIONS, *et al.*,

Plaintiffs,

-against-

COLLEEN GARDNER, in her official capacity as New York State Commissioner of Labor, *et al.*,

Defendants.

MEMORANDUM AND ORDER

WEXLER, District Judge

Plaintiffs RI, Inc. d/b/a Seating Solutions ('Seating Solutions"), Lisa Suprina, Scott Suprina ("Suprina"), and Tony English bring this action under 42 U.S.C. § 1983 and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq*., against defendants Colleen Gardner, New York State Commissioner of Labor ("Commissioner"); M. Patricia Smith, former New York

State Commissioner of Labor; Christopher Alund, Director of the Bureau of Public Work ("BPW") of the New York State Department of Labor ("DOL"); Joseph Ocon ("Ocon), senior investigator of the BPW; and Matthew Myers ("Myers"), senior investigator of the BPW. Defendants move for summary judgment under Federal Rule of Civil Procedure 56. Plaintiffs oppose the motion.

I. BACKGROUND

For purposes of this motion, the evidence can be summarized as follows. Seating Solutions is a corporation with its principal place of business in Commack, New York. Seating Solutions specializes in seating system design and construction for installation of spectator seating at recreational and athletic facilities. Seating Solutions has performed subcontracting work on a number of public construction projects in New York, including projects in Sewanhaka, Smithtown, Brookhaven and Oyster Bay (the "Projects").

In early 2005, Seating Solutions' personnel formed a union known as the United Federation of Maintenance Installers & Assemblers of Audience & Spectator Seating Systems ("United Federation" or the "Union"). On April 30, 2005, Seating Solutions and the United Federation entered into a collective bargaining agreement (the "United Federation CBA"). The Union collectively bargained for, *inter alia*, a guaranteed work/no layoff provision, given that Seating Solutions tends to have more work in the warmer months than in the cooler months. In exchange for the guaranteed work/no layoff provision, the Union members agreed to

waive any of their rights under state and federal prevailing wage statutes.

Public construction projects in New York are subject to the state's prevailing wage law, New York Labor Law §§ 220 *et seq*. Essentially, the prevailing wage law requires contractors bidding on public work to pay union-level wages, as determined by collective bargaining agreements, whether their employees are union members or not. The law requires that the wages to be paid "for a legal day's work . . . to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages [as defined therein]." *Id.* § 220(3)(a). The law also requires "supplements" be paid to such workers in accordance with "the prevailing practices in the locality." *Id.* § 220(3)(b). Supplements include remuneration or payments which are not "wages" under the law "including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training." *Id.* § 220(5)(b).

Section 220(5)(a) defines the prevailing rate of wage as

> the rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.

Id. § 220(5)(a). The Commissioner is the "fiscal officer" responsible for setting the prevailing wage rate outside the City of New York. *Id.* § 220(5)(e). The Commissioner determines the prevailing rate through a two-step process. First, the Commissioner classifies work as pertaining to a particular trade, and second, the Commissioner determines the rate that is prescribed for the work in that locality by the collective bargaining agreements covering that trade. *See Lantry v. State of New York*, 6 N.Y.3d 49, 54-55 (2005).

In 2005, defendants received complaints that Seating Solutions had not paid the prevailing wage on the Projects. In March 2006, Ocon requested payroll information from Seating Solutions for its work on the Projects. Ocon then conducted an audit of Seating Solutions' work on the Projects. As part of the audits, Ocon and Myers classified workers employed by Seating Solutions on the Projects as "ornamental ironworkers," relying on a collective bargaining agreement between Allied Building Metal Industries, Inc. and the Architectural and Ornamental Iron Workers Local Union No. 580 (the "Ironworkers' CBA"). The Ironworkers' CBA covered the same work covered by other collective bargaining agreements (including those of carpenters and the United Federation), such as metal seats, seating and bench seats. Indeed, plaintiffs concede that the Ironworkers' CBA covered the work performed on the Projects. However, the other collective bargaining agreements had lower rates than the Ironworkers' CBA. After determining this classification, Ocon and Myers determined the prevailing wage rates for ornamental ironworkers based on Prevailing Rate Schedules created for ornamental ironworkers by the Commissioner and

DOL employees. According to plaintiffs, the Commissioner and DOL did not perform any independent inquiry into the wages actually paid for similar work in the relevant localities, relying instead on the collective bargaining agreements "of established trade unions." Plaintiffs maintain that defendants did not contact the United Federation for this purpose because it did not consider it to be a "bona fide labor organization," but merely an invalid union "concocted" by Suprina.

Relying on the Ironworkers' CBA and the rate for ornamental ironworkers listed on the Prevailing Rate Schedules, the DOL determined that Seating Solutions had underpaid prevailing wages and supplements to its workers on the Projects by more than $300,000. In November 2008, following a hearing, at which plaintiffs appeared with counsel, an administrative law judge issued a Report and Recommendation (the "R&R") determining that Seating Solutions violated the prevailing wage law and was required to pay damages, interest, and penalties. In April 2009, the Commissioner adopted the R&R. In May 2009, plaintiffs brought an Article 78 proceeding in New York State court challenging the DOL's determination.

On April 22, 2010, before a decision by the Second Department in the Article 78 proceeding, plaintiffs commenced this action, asserting various claims, of which the following remain: (1) violation of substantive

due process; (2) violation of equal protection; and (3) violation of rights under the NLRA.[1]

Thereafter, on April 27, 2010, the Second Department confirmed the DOL's determination, holding that the DOL's use of the Ironworkers' CBA for trade classification purposes was supported by substantial evidence and was not unreasonable. *See R.I., Inc. v. N.Y. Dep't of Labor*, 72 A.D.3d 1098, 1099 (2d Dep't 2010). In reaching its decision, the Second Department concluded that "the record demonstrates that the [DOL] gave due consideration to the nature of the work performed and relevant collective bargaining agreements. Consequently, [the DOL's] determination as to trade classification was not unreasonable." *Id.* The New York Court of Appeals denied leave to appeal. *See R.I., Inc. v. N.Y. Dep't of Labor*, 17 N.Y.3d 703 (2011).

II. DISCUSSION

A. Motion for Summary Judgment Standard

Summary judgment is appropriate where there exists no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FRCP 56(a); *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.1998). A material fact is one that might "affect the outcome of the suit under the governing law," and a dispute about a genuine issue of

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[1] Plaintiffs also asserted, but have stipulated to dismissal of, procedural due process and First Amendment retaliation claims.

material fact occurs if the evidence is such that "a reasonable [factfinder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine dispute of a material fact, a court must draw all inferences in favor of the nonmoving party. *D'Amico*, 132 F.3d at 149.

B. Analysis of Claims

1. Violation of Substantive Due Process

To prove a claim for violation of substantive due process, a plaintiff must show (1) that it possessed a constitutionally cognizable property interest of which it was deprived by the state, *see Clubside, Inc. v. Veletin*, 468 F. 3d 144, 152 (2d Cir. 2006); *Goodspeed Airport v. East Haddam Land Trust, Inc.*, 166 Fed. Appx. 506, 508 (2d Cir. 2006) ("To prevail on a procedural or substantive due process claim, the plaintiff must first identify a liberty or property interest protected by the Constitution of which the state deprived him or her."); and (2) that defendants' actions were "arbitrary, or conscience-shocking, in a constitutional sense," *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

Plaintiffs claim that defendants violated plaintiffs' substantive due process rights through an unlawful delegation of authority to private parties, in that defendants relied solely on, and adopted without exercising discretion, the Ironworkers' CBA to classify workers and set the prevailing rate. Plaintiffs rely on *General Electric Co. v. New York State Department of Labor*, 936 F. 2d 1448 (2d Cir. 1991) ("*GE II*"). In *GE II*,

the Second Circuit found that where unions had negotiated two different wage scales for public and private work, the DOL's adoption of those wage scales without any independent exercise of discretion could constitute an unconstitutional delegation of authority – and, therefore, a violation of substantive due process. *Id.* at 1458-59. In reversing a grant of summary judgment, the Second Circuit found genuine issues of material fact existed as to, *inter alia*, whether the DOL relied on a collusively negotiated CBA that contained a two-tier wage system for both public and private work. *Id.*

Here, defendants argue that plaintiffs' claim is barred by collateral estoppel, given the Second Department's ruling in the Article 78 proceeding following the administrative hearing. Defendants also argue, *inter alia*, that the claim is insufficient and plaintiffs' reliance on *GE II* is misplaced, as plaintiffs fail to show arbitrary, let alone conscious-shocking, conduct. The Court agrees with defendants that this claim must be dismissed, even assuming that plaintiffs have a property interest.[2]

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[2] Notably, plaintiffs argue that they have a cognizable property interest in the earned monies being withheld, *see GE II*, 936 F. 2d at 1457 ("It is well established that a contractor has a right to timely payment for work it performs under a contract with a state agency, and that such right is a property interest protected by the due process clause."), while defendants argue that a contractor does not possess a cognizable property interest in monies being withheld *until* it has complied with the prevailing wage law, *see Leed Indus., Inc. v. N.Y. State Dep't of Labor*, No. 09 Civ. 9456 (JSR), 2010 WL 882992, *3 (S.D.N.Y. March 8, 2010).

A district court is required to "give[] a prior state court decision the same preclusive effect that the courts of that state would give to it." *Colon v. Coughlin*, 58 F.3d 865, 869 n.2. (2d Cir. 1995). As the Second Circuit has explained, "[u]nder New York law, the doctrine of issue preclusion only applies if (1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Id.* at 869.

In the Article 78 proceeding, the Second Department concluded that the DOL's use of the Ironworkers' CBA for trade classification purposes was supported by substantial evidence and was not unreasonable. *See R.I.*, 72 A.D.3d at 1099. In reaching its decision, the Second Department concluded that "the record demonstrates that the respondents gave due consideration to the nature of the work performed and relevant collective bargaining agreements. Consequently, [the DOL's] determination as to trade classification was not unreasonable." *Id.* Plaintiffs do not deny that they had a full and fair opportunity to litigate the issues raised in the Article 78 proceeding. The Second Department's finding that the DOL did not act unreasonably, but gave due consideration to the nature of the work performed and relevant CBA's in determining job classification and the prevailing wage rate, precludes a determination that defendants failed to exercise discretion in classifying work and setting the rate or that their conduct was otherwise arbitrary, let alone conscious shocking. Thus, this claim is barred by collateral estoppel.

Moreover, in *GE II*, the Second Circuit held that application of New York Labor Law § 220(5) – which authorizes the Commissioner to define the prevailing wage rate by referring to collective bargaining agreements – *could* be arbitrary "particularly given the record in this case." *GE II*, 936 F. 2d at 1455. By contrast, the present action does not involve a collusively negotiated collective bargaining agreement or two-tier wage system, or circumstances involving any remotely akin delegation of authority, and plaintiffs do not identify a genuine dispute as to any material fact that could show arbitrary or conscious-shocking conduct. Thus, this claim is insufficient.

Accordingly, plaintiffs' substantive due process claim is dismissed.

2. Violation of Equal Protection

The Equal Protection Clause is "essentially a direction that all persons similarly situated be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Because plaintiffs do not claim discrimination on the basis of membership in a particular group, they may proceed on an equal protection claim under a "class of one" theory, as recognized by the Supreme Court in *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000). In this respect, plaintiffs must show that they were "intentionally treated differently from other similarly-situated individuals without any rational basis." *Clubside*, 468 F.3d at 159 (citing *Olech*, 120 S. Ct. 1073). To prevail, the "class-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare

themselves." *Id.* (citing *Neilson v. D'Angelis*, 409 F.3d 100, 104 (2d Cir. 2005)).

Plaintiffs allege that defendants intentionally and arbitrarily discriminated against them by singling plaintiffs out and treating them differently than similarly-situated contractors employing unionized workforces, and that the disparate treatment was not rationally related to a legitimate state interest. In essence, plaintiffs argue that defendants treated them differently than employers dealing with traditionally favored unions.

A review of the record demonstrates that plaintiffs fail to produce evidence sufficient to show a similarly-situated contractor that was allegedly treated differently. In this respect, plaintiffs evidence does not indicate the disparate treatment of any other contractor employing unionized workforces reported to have violated the prevailing wage law on public work. Moreover, plaintiffs fail to present evidence sufficient to show that defendants acted without any rational basis in their enforcement of the prevailing wage law against Seating Solutions. Thus, plaintiffs do not identify a genuine dispute as to any material fact as to this claim, and this claim must be dismissed.

Accordingly, plaintiffs' equal protection claim is dismissed.

3. Violation of Rights Under the NLRA

Plaintiffs argue, broadly, that defendants' actions are preempted by the NLRA because defendants applied state law "in a way that frustrates the core

goals and protection of the NLRA." Specifically, plaintiffs argue that preemption exists under (1) *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); (2) *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); and (3) Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185. Defendants argue that New York's prevailing wage law is not preempted by the NLRA and that plaintiffs fail to raise any genuine dispute of material fact as to this claim. This Court agrees with defendants that preemption does not apply under any of these grounds.

As for *Garmon* preemption, plaintiffs argue that defendants' actions are prohibited because they amount to state regulation of the negotiation of wage rates, a protected activity under NLRA section 7. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Pls.' Mem.") at 17. Under *Garmon*, "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. As the Supreme Court later emphasized, "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]." *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986). Plaintiffs argue that *Garmon* preempts attempts by state regulators "to force parties to a collective bargaining agreement to abide by wage terms other than those in their agreement." Pls.' Mem.

at 17. Thus, plaintiffs reason, defendants may not discard collectively bargained-for employment terms, such as the negotiated wage rates in the United Federation CBA.

New York law presumptively requires the use of collective bargaining agreements to set prevailing wage rates in the state, and the Second Circuit has held that New York's prevailing wage law, § 220, "has not been preempted by the [NLRA]." *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 891 F.2d 25, 27-28 (2d Cir. 1989) ("*GE I*"). The Second Circuit reaffirmed that conclusion in *GE II*. *See GE II*, 936 F. 2d at 1459-60. Contrary to plaintiffs' arguments, Seating Solutions and the United Federation may not bargain their way around the protections of the prevailing wage law and its application to public work. Accordingly, *Garmon* preemption does not apply.

As for *Machinists* preemption, plaintiffs argue that "a regulator cannot use its powers to alter the balance of power that exists between labor and management." Pls.' Mem. at 21. Under *Machinists*, the NLRA preempts state laws that " 'upset the balance of power between labor and management expressed in our national labor policy.' " *Machinists*, 427 U.S. at 146 (quoting *Teamsters v. Morton,* 377 U.S. 252, 260 (1964)). In other words, this preemption principle prohibits state regulation of areas that have been left " 'to be controlled by the free play of economic forces.' " *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). State action is "only preempted if it regulates the use of economic weapons that are recognized and protected under the NLRA such that the state or local government has entered 'into the

substantive aspects of the bargaining process to an extent Congress has not countenanced.' " *Roundout Elec., Inc. v. N.Y. State Dep't of Labor*, 335 F.3d 162, 167 (2d Cir. 2003) (quoting *Machinists*, 427 U.S. at 149) (some internal quotation marks omitted). Plaintiffs maintain that defendants' application of the state prevailing wage law "aims toward a single purpose: keeping the union construction contractors in business." Pls.' Mem. at 22. According to plaintiffs, in setting rates, defendants "only solicit collective bargaining agreements from 'established unions,' " and then they plug those rates into the prevailing wage schedules without determining whether these unions employ 30% of the workers performing the work claimed in their collective bargaining agreements. *Id.* Plaintiffs argue that defendants' application of the prevailing wage law is impermissible under *Machinists*.

Contrary to plaintiffs' arguments, *Machinists* does not preempt defendants' enforcement of § 220. The collective bargaining process between plaintiffs and the union suffered no impermissible interference from defendants' enforcement of the prevailing wage law. To the contrary, it appears that the application of the prevailing wage law "neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985). *See Roundout Elec.*, 335 F.3d at 168-69 (relying on *Metropolitan Life* in holding that DOL's implementation of prevailing wage statute through use of annualization formula not within scope of *Machinists* preemption). Indeed, plaintiffs do not show that defendants' application of the prevailing wage law had

anything more than an "indirect effect on the right of self-organization established in the Act." *Metropolitan Life*, 471 U.S. at 755. Moreover, despite plaintiffs' assertion that defendants applied the state prevailing wage law solely to keep union construction contractors in business, the law presumptively requires the use of collective bargaining agreements to set prevailing wage rates and the Second Circuit has rejected NLRA preemption challenges to this requirement. *See GE II*, 936 F. 2d at 1459-60; *GE I*, 891 F.2d at 27-28. Under § 220(6), an employer may challenge the use of a particular collective bargaining agreement to establish the prevailing wage rate by showing by competent evidence that less than 30% of local workers receive the collectively bargained rate, *see Liquid Asphalt Distrib. Ass'n v. Roberts*, 116 A.D.2d 295, 298 (3d Dep't 1986), but plaintiffs raised no such challenge. Accordingly, *Machinists* preemption does not apply.

Plaintiffs also argue that LMRA § 301[3] preempts defendants from pursuing claims against Seating Solutions because defendants did so based on the impermissible assumption that the bargain between

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[3] Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Seating Solutions and the United Federation was invalid. According to plaintiffs, defendants unlawfully "inserted themselves into the collective bargaining process," upon deciding that the United Federation CBA "was not one that the [DOL] would recognize." Pls.' Mem. at 19.

Section 301 is a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Id.* at 211. Rather, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted). As the Supreme Court further explained:

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.

Id. at 211-12 (footnote omitted).

In light of these principles, this Court concludes that § 301 does not preempt the DOL's enforcement of § 220, a state statute regulating certain substantive guarantees, nor does it grant parties to a collective bargaining agreement the right or ability to contract around those guarantees. *See Lividas v. Bradshaw*, 512 U.S. 107, 122-24 (1994). Moreover, it appears that defendants' enforcement of the prevailing wage law only tangentially involves the terms of the United Federation CBA. Accordingly, LMRA § 301 does not preempt defendants' actions.

Accordingly, this claim is dismissed, as no genuine dispute of material fact exists and it fails as a matter of law.[4]

III. CONCLUSION

For the above reasons, defendants' motion for summary judgment is granted and the complaint is

[4] Given the Court's dismissal of plaintiffs' claims on the grounds stated, the Court need not reach defendants' additional argument (argued rather perfunctorily) that plaintiffs' claims against the individual defendants are barred by qualified immunity.

dismissed.[5] The Clerk of Court is directed to close the file in this action.

SO ORDERED.

_____/s/_____
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Central Islip, New York
August 23, 2012

[5] Plaintiffs assert that defendants sent plaintiffs a letter, shortly before defendants filed their summary judgment motion, demanding payment of $366,459 for failure to comply with prevailing wage requirements. In response, plaintiffs moved for a preliminary injunction preventing defendants from taking any action pursuant to the demand letter. Given the Court's dismissal of the complaint, the motion for a preliminary injunction is denied.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-10-1795 (LDW)(AKT)

[Filed August 29, 2012]

RI, INC. d/b/a SEATING SOLUTIONS, LISA SUPRINA, SCOTT SUPRINA and TONY ENGLISH,	)
Plaintiffs,	)
-against-	)
COLLEEN GARDNER, in her official capacity as New York State Commissioner of Labor, M. PATRICIA SMITH, in her individual and official capacity as former New York State Commissioner of Labor, JOSEPH OCON, in his individual and official capacity as senior wage investigator at New York State Department of Labor, MATTHEW MYERS, in his individual and official capacity as senior public works wage investigator at the New York State Department of Labor, and CHRISTOPHER ALUND,	)
Defendants.	)

JUDGMENT

A Memorandum and Order of Honorable Leonard D. Wexler, United States District Judge, having been filed on August 23, 2012, granting defendants' motion for summary judgment, dismissing plaintiffs' complaint, and directing the Clerk of Court to close this case, it is

ORDERED AND ADJUDGED that plaintiffs take nothing of defendants; that defendants' motion for summary judgment is granted; that the complaint is dismissed; and that this case is hereby closed.

Dated: Central Islip, New York
August 29, 2012

DOUGLAS C. PALMER
CLERK OF THE COURT

By: /s/ Catherine Vukovich
Deputy Clerk