No. 09-14

IN THE

Supreme Court of the United States

CATHERINE SHANNON,
Director of the Illinois Department of Labor, *et al.*,

Petitioners,

v.

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

PETER ANDJELKOVICH
PETER ANDJELKOVICH
& ASSOCIATES
39 South LaSalle Street
Suite 200
Chicago, Illinois 60603
(312) 782-8345

Attorney for Respondent

224775

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF ISSUE

Whether in consistently applying other circuits' decisions and decisions of this Court the court of appeals correctly interpreted a state statute mandating by state law additional employee work breaks and drastic remedies beyond the minimum breaks already provided for by state law for a narrow group of employers in a specific industry located within a narrow geographic region with a large union presence as being preempted by federal labor laws and improperly interferes with the free play of economic forces that Congress intended to remain unregulated in the labor field?

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For years, Illinois by statute provided that employees who worked more than seven and one-half continuous hours were entitled to a minimum twenty minutes meal period. This minimum break period was explicitly deemed inapplicable where meal periods were established through the collective bargaining process. 820 ILCS 140/3. Effective August 15, 2005, 2005 ILL. ALS 593, Illinois enacted the Hotel Room Attendant Amendment ("Attendant Amendment"), 820 ILCS 140/3.1, which provided a vastly more liberal break period for a small, select group of hotel room attendant workers working within a single Illinois county and failed to exclude from application workers whose meal periods were established through a collective bargaining process or employers employing eligible room attendants like the Respondent, 520 South Michigan Avenue Associates, Ltd., d/b/a The Congress Plaza Hotel & Convention Center ("Congress Plaza Hotel"), who were governed by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* ("NLRA"). In addition, a unique whistle blower enforcement mechanism and drastic remedies were provided in the Attendant Amendment. If an employee established that he or she exercised rights under the amendment or simply "alleged" in good faith that an employer was not complying the amendment, and the employee was thereafter terminated, demoted, or otherwise penalized, the statute imposed a rebuttable presumption deeming that the employer's action was taken in retaliation for the exercise of rights under the amendment, with the burden of *proof* then shifting to the employer to "prove that the *sole* reason for the termination, demotion, or penalty was a legitimate business reason." 820 ILCS 140/3.1(g) (emphasis added). Successful claimants were entitled to relief in the form

of back pay, reinstatement, and injunctive relief and in some cases, *treble* their lost normal daily compensation and fringe benefits, along with interest, consequential damages, and attorney's fees and costs. 820 ILCS 140/3.1(h).

Even though the earlier statutory minimum twenty minute meal period had not been repealed, Petitioners attempted below to justify the Attendant Amendment as being constitutional and was not preempted under the NLRA claiming it was a permissible "minimum labor standard" allowed under *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987). Applying the standards this Court set forth in *Metropolitan Life* and *Fort Halifax* along with other court of appeal decisions, the Seventh Circuit Court of Appeals rejected Petitioners' defense of the Attendant Amendment and ruled that the law had exceeded the scope of what constitutes a permissible "minimum labor standard." Petitioners mischaracterize the impact of the court of appeals decision by claiming certiorari review by this Court is appropriate because lower courts are divided over whether minimum labor standards are preempted by federal labor law, that the court of appeals decision is incompatible with decisions of this Court, and that the court of appeals decision casts doubt on the validity of existing workplace protection laws. The Petition fails to support these claims with sound substantive argument and vastly overstates the impact of a decision that narrowly applies to a specific occupation, in a specific industry, in a specific county and does not adequately justify the exercise of this Court's jurisdiction.

First, lower courts are not divided over whether minimum labor standards are preempted by federal labor law. The basic principles of law in this area are well established and are uniform. This Court has already published cases stating that true minimum labor standards are not preempted and when they are consistent with the standards this Court set forth in *Metropolitan Life* and *Fort Halifax*, they will be sustained as valid.

Second, the court of appeals decision is not incompatible with decisions of this Court. The decision relies on the very standards set forth by this Court in *Metropolitan Life* and *Fort Halifax* in holding that the law is preempted by federal labor laws. Since Illinois has already established the appropriate break minimum to be twenty minutes, and that law was still a valid statute applicable to all workers-even hotel workers-when the Attendant Amendment was passed, the court of appeals appropriately ruled Illinois had exceeded its powers in attempting to enact further regulation under the disguise of a minimum labor standard.

Third, there is absolutely no basis for Petitioners to assert that the court of appeals decision will case doubt on workplace protection laws throughout the United States. The court of appeals decision does not set forth new law nor does it expand the restrictions pronounced by this Court on when the law will and will not constitute a valid minimum labor standard. Rather, it simply decided that Illinois went too far in passing the Attendant Amendment using the very standards this Court set forth in earlier decisions. Other workplace protection laws throughout the United States remain valid and enforceable.

STATEMENT OF THE CASE

A. The Underlying Case

Effective August 15, 2005, 2005 ILL. ALS 593, Illinois enacted the Attendant Amendment providing that only hotel room attendant workers working within a single Illinois county must be provided two paid fifteen minute rest breaks and one thirty minute meal break. 820 ILCS 140/3.1. An earlier version of the paid break law, *not* repealed as of the passing of the Attendant Amendment and still a valid Illinois statute of general application, provided that all Illinois workers working more than seven and one-half continuous hours were entitled to a minimum twenty minute meal period. Unlike the Attendant Amendment, the initially enacted minimum break period is explicitly deemed inapplicable where meal periods are provided for in a collective bargaining process. 820 ILCS 140/3. As set forth above, the Attendant Amendment also provided a drastic whistle blower enforcement mechanism making available to employees bountiful remedies which also shifted the burden of proof to the employer where an employee alleged there was a violation of the Attendant Amendment. Where an employee simply "alleged" in good faith that an employer was not complying the new break law, and the employee was thereafter terminated, demoted, or otherwise penalized, the statute imposed a rebuttable presumption deeming that the employer's action was taken in retaliation for the exercise of rights under the Attendant Amendment. Thereafter, the burden of *proof* shifted under the statute to the employer requiring it to "prove that the *sole* reason for the termination, demotion, or penalty was a legitimate

business reason." 820 ILCS 140/3.1(g) (emphasis added). The remedies available to a successful claimant include back pay, reinstatement, and injunctive relief and in some cases, *treble* their lost normal daily compensation and fringe benefits, along with interest, consequential damages, and attorney's fees and costs. 820 ILCS 140/3.1(h).

The Congress Plaza Hotel challenged the Attendant Amendment as being passed in violation of the United States Constitution Supremacy Clause and contended that the Attendant Amendment was preempted under the NLRA. Petitioners responded to the challenge by claiming that the Attendant Amendment was not preempted and constitutes a permissible "minimum labor standard" allowed under *Metropolitan Life* and *Fort Halifax*. The Seventh Circuit Court of Appeals rejected Petitioners' defense of the Attendant Amendment ruling that the law had vastly exceeded the scope of what Petitioners claim was a permissible "minimum labor standard." The Attendant Amendment did not simply form a backdrop for negotiations or constitute an isolated statutory provision of general application as approved in this Court's *Metropolitan Life* and *Fort Halifax* decisions addressing the same subject. Instead, the court of appeals concluded, rather than being a law of general application, the Attendant Amendment was much more invasive and impermissibly targeted a specific occupation, in a specific industry, in a specific county.

REASONS FOR DENYING THE PETITION

I. Lower Courts Are Not Divided Over Whether Minimum Labor Standards Are Preempted By Federal Labor Law.

1. To establish a conflict among the federal appellate courts, Petitioners must identify some appellate court decision involving the same important matter that is actually in conflict with the challenged decision and not merely assert that the case challenged was incorrect in distinguishing the application of one case over another. Sup. Ct. R. 10. The cases referenced by Petitioners fail to show any actual conflict between the court of appeals decision and decisions in other circuits involving the same matter. For example, Petitioners take issue with the court of appeals decision and its reliance on *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497 (9th Cir. Cal. 1995) in its analysis. Pet. at 13 and 14. Petitioners describe *Bragdon* as being in conflict with *Associated Builders & Contractors of So. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004). Pet. at 15. However, *Bragdon* was already published when *Nunn* was decided and the Ninth Circuit did not overruled *Bragdon* even though both decisions are from the same circuit. Further, this Court did not determine there to be a conflict between the two cases sufficient to warrant further review since this Court refused issuance of a writ of certiorari of the later *Nunn* decision when review was sought in that case. See, *Associated Builders & Contrs. of S. Cal., Inc. v. Acosta*, 543 U.S. 814 (2004).

Petitioners' reliance upon *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. Cal. 1996), and *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69 (9th Cir. Cal. 1995) (Pet. at 14 and 15) do not show any conflicts in the circuits but instead simply demonstrate that some laws enacted pass constitutional challenge while others do not. Likewise, *Rondout Elec., Inc. v. N.Y. State DOL*, 335 F.3d 162 (2d Cir. N.Y. 2003)(Pet. at 14) did not reject the analysis relied upon by *Bragdon* to support its decision. Instead, the *Rondout* court merely distinguished the decision as being inapplicable to its holding. See, *Rondout Elec.*, 335 F.3d at 169 ("[h]aving distinguished *Bragdon*, we have no need to decide whether Bragdon was correctly decided on its own facts").

Finally, *Washington Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995)(Pet. at 17) was adequately addressed by the Seventh Circuit Court of Appeals in its opinion when the court noted that the statute in *Washington Serv.* did not simply target a "particular occupation," as Petitioner suggests, but instead by its terms it expressly applied to multiple occupations including "persons who performed 'food, janitorial, maintenance, or nonprofessional health care services,'" *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1135 (7th Cir. 2008), something the Attendant Amendment fails to do. Again, as the court of appeals noted, *Washington Serv.* is not in conflict with the underlying decision but instead is simply not supportive of Petitioners' claim.

In sum, a careful examination of the cases relied upon by Petitioners to seek review shows no conflict between the underlying decision and decisions of other circuits. Instead, the cases uniformly apply the reasoning and standards set forth by this Court in the *Metropolitan Life* and *Fort Halifax* decisions and adequately decide which challenged laws fall within constitutional guidelines and which do not. No new standards are developed in the underlying opinion and the opinion does not conflict with the standards used in other cases.

2. Despite Petitioners' claims, it was not just the Attendant Amendment's targeting of a specific and narrow group or class of workers in a specific and limited locale that the court of appeals found failed to pass constitutional muster. Pet. at 17. The court of appeals also considered the unique and drastic enforcement and remedies section of the law to determine it unfairly intruded on federal labor laws. *Shannon*, 549 F.3d 1136. Other decisions that recognize and acknowledge that statutes in other areas of law sometimes target specific populations (Pet. at 17) does not show a conflict in the underlying decision but simply recognizes a state of the laws on the books. Unless the laws are challenged as being in conflict with federal labor laws, acknowledging that legislation targeting specific communities is an inconsequential fact. When targeted legislation unduly intrudes upon an area that Congress has preempted, then the legislation is subject to being challenged.

3. Finally, the fact that the court of appeals decision rejects the appellate court decision of the State of Illinois upholding the law is an insufficient reason for review under Rule 10. Pet. at 20. Rule 10 requires that there be a conflict either with a decision of another United States court of appeals or a conflict between a decision by a state court of last result. Sup. Ct. R. 10. Here, the matter was addressed by an Illinois appellate court, not the Illinois Supreme Court. As the court of appeals duly noted, "[w]e 'owe[ ] no deference to state-court interpretation of the United States Constitution.'" *Shannon*, 549 F.3d at 1124.

II. The Decision Is Not Incompatible With The Decisions Of This Court.

As noted earlier, the court of appeals decision is not incompatible with decisions of this Court. The court of appeals decision relies on the same standards set forth by this Court in *Metropolitan Life* and *Fort Halifax* along with other circuit court decisions in ruling that the Attendant Amendment is preempted by federal labor laws. Illinois had already established the appropriate break minimum to be twenty minutes, and this law was still a valid statute applicable to all workers when the Attendant Amendment was passed. Applying *Metropolitan Life* and *Fort Halifax*, the court of appeals simply ruled that Illinois had exceeded its powers in attempting pass the Attendant Amendment by claiming it was a permissible minimum labor standard when the state had already set the minimum break at twenty minutes. Petitioners fail to recognize that it was not simply the multiple breaks that the Attendant Amendment provided or the Illinois legislature's

attempt to target and benefit a small labor pool with a strong union presence that the court of appeals considered in determining the law was preempted. Rather, it was also the exceedingly harsh and drastic enforcement mechanism, unlike any other law Illinois had on the books, that the court of appeals found to be an intolerable interference with federal labor law.

Finally, the court of appeals did not invalidate the Attendant Amendment because the law did not contain an "opt-out" for labor agreements as Petitioners contend. Pet. at 32. Indeed, the court of appeals noted that had the law constituted a true minimum labor standard that did not interfere with the collective bargaining process, "the fact that the State law mandates different terms and conditions than those contained in an expired CBA would be irrelevant." *Shannon*, 549 F.3d at 1139. Contrary to the assertion of Petitioners, true minimum labor standard laws can be applied to change the terms of the bargaining agreement and do not need "opt-out" language to pass constitutional standards.

III. The Court Of Appeals Decision Does Not Cast Doubt On Workplace Protection Laws.

For their final argument in favor of review, Petitioners assert that the court of appeals decision will case doubt on workplace protection laws throughout the United States. Pet. at 35. This unfounded fear is countered by the fact that Petitioners fail to cite to a single workplace protection law that has been ruled unconstitutional based on the court of appeals decision even though the decision has been published since

December 2008. The decision neither sets forth new law nor different standards than those pronounced by this Court in *Metropolitan Life* and *Fort Halifax* as to when a law will constitute a valid minimum labor standard. Rather, the opinion simply decided that Illinois went too far in passing the Attendant Amendment using the very standards this Court provided in earlier decisions. In fact, Petitioners themselves concede to the lack of significance in the underlying decision by arguing that only the Respondent will be bound by the decision. Pet. at 21. According to Petitioners, all other hotels are bound by the challenged law in light of the earlier Illinois appellate court opinion upholding the law. Therefore, the importance and impact of the decision is negligible in Illinois.

Petitioners assert that it is common for other state laws to provide minimum labor standards that target particular occupations and locales. Pet. at 36. However, these laws do not explicitly limit their application to a finite geographic location and designated class of workers where union membership is strongest. Instead, they apply to occupations throughout the state. Further, no where do Petitioners cite to a workplace protection statute that provides such drastic and unique enforcement mechanisms and remedies. The Attendant Amendment does not merely create a "rebuttable presumption" (Pet. at 40) if adverse action is taken. Instead, it completely shifts the burden of proof to the employer and then demands that it *prove* that the *sole* reason for the termination, demotion, or penalty was a legitimate business reason.

CONCLUSION

For all the reasons set forth above, This Court should deny the Petition for Certiorari.

Respectfully submitted,

PETER ANDJELKOVICH
PETER ANDJELKOVICH
& ASSOCIATES
39 South LaSalle Street
Suite 200
Chicago, Illinois 60603
(312) 782-8345

Attorney for Respondent