No. 07-3377

In The
United States Court of Appeals For The
Seventh Circuit

520 South Michigan Avenue Associates, Ltd., d/b/a The Congress Plaza Hotel & Convention Center

Plaintiff-Appellant,

v.

Catherine Shannon, Director of the Illinois Department of Labor,

Defendant-Appellee,

and

UNITE HERE Local 1 *Intervenor-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
District Case No. 06 C 4552, Honorable Judge Joan Lefkow Presiding

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAW PROJECT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Employment Law Project (NELP) is a national non-profit law and policy organization founded nearly forty years ago. With a staff of lawyers, social scientists, and policy experts, NELP works to modernize our nation's labor and employment law system to more effectively protect low-wage workers in the 21st century economy. Much of our work consists of direct technical assistance to federal, state and local policymakers and grassroots partners in developing, implementing and – when necessary – defending workplace policies against legal challenge.

NELP respectfully submits this brief *amicus curiae* in support of appellees' petition for rehearing *en banc* on the grounds that the panel decision conflicts with decisions of the United States Supreme Court, and that it undermines the lawful authority of state and local bodies to enact necessary workplace protections. *Amicus* wishes to assist the court in its consideration of the petition for rehearing by providing information on the predictable practical consequences of the panel decision, if it is allowed to stand.

SUMMARY

The panel decision will, perhaps unintentionally, open up a wide range of lawful and, in many cases, decades-old state and local laws establishing minimum labor standards to undefined and costly National Labor Relations Act (NLRA) preemption review for the first time. Disregarding the Supreme Court's teaching that Congress did not intend for the NLRA "to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated to the process of bargaining or self organization," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985), the decision redefines and narrows the contours of the

minimum labor standards exemption. In so doing, it announces a new and ill-defined test for what will be deemed "a genuine 'minimum' labor standard." *520 South Michigan Ave. Associates, Ltd. v. Shannon*, No. 07-3377, slip op. at 48 (7th Cir. Dec. 15, 2008).

The features of the Room Attendant Rest Break Amendment to the Illinois One Day Rest in Seven Act, 820 ILCS 140/3.1 (West 2008) ("Attendant Amendment"), cited by the panel in finding the law not to be "a genuine 'minimum' labor standard" are common and, in many cases, necessary elements of state and local labor laws. For example, such laws frequently establish special or heightened protections for specific occupations or industries – typically, as occurred here, in response to identified problems or conditions peculiar to those jobs. Not infrequently, these laws establish different standards for rural versus urban areas, often in view of differing costs of living or industry conditions. Such line-drawing not only responds to geographic or industry-based differences in jobs or labor markets but also, as happened with the Attendant Amendment, reflects the long-recognized nature of the legislative process, in which compromise and experimentation frequently lead policymakers to proceed incrementally. Similarly, anti-retaliation protections that include rebuttable presumptions and treble damages for violations are common tools as policymakers work to facilitate appropriate compliance with public laws in the face of limited enforcement resources.

The panel decision's announcement that, for the first time, some unspecified combination of such common features would move legislation outside the scope of the "minimum labor standards" safe harbor from NLRA preemption is unprecedented and risks subjecting a large body of settled law to NLRA review under an ill-defined test. If it is allowed to stand, the predictable result will be an increase in wasteful litigation challenging a wide range of lawful and appropriate state and local workplace legislation. Equally damaging, the prospect of legal

challenge under an indeterminate new standard is likely to chill state and local governments – and especially smaller states and cities for which the budgetary burdens of litigation are most serious – from enacting lawful and needed workplace law reforms.

ARGUMENT

I. State and Local Workplace Laws Frequently Draw Distinctions Based on Industry, Occupation and Geography

It is common and appropriate for state and local workplace laws to draw distinctions based on industry, occupation and geography. These types of categorizations can be found in laws old and new from within the circuit and across the nation. In many cases they address specific conditions or problems identified in particular industries, occupations or regions. In other cases they take into account differing economic conditions or costs of living in specific geographic regions or industries. And at other times – as evidently occurred with the statute at issue here – such line-drawing reflects the compromise and experimentation that are hallmarks of the legislative process, in which policymakers proceed incrementally, starting with the industry or region in which a problem is perceived to be the most serious.

A. Industry and Occupation

Perhaps most common are labor standards that address conditions in specific industries and occupations. Typically, as with the Attendant Amendment, such laws are enacted in response to particular problems or identified abuses in the industry or occupation. And it is very common for such regulation to take the same form as was at issue here: a general labor standard that applies to all employers and industries, with specially tailored, heightened standards

subsequently adopted to address problems or conditions affecting a specific occupation or industry.

In the workplace law area at issue here – rest and meal breaks – many states have enacted rules that vary by industry or occupation, in response to differing working conditions that affect the need for and feasibility of taking breaks. For example, New York mandates a twenty minute meal break for most employees after five hours of work, but requires a sixty minute meal break for factory workers. N.Y. Lab. Law § 162 (McKinney 2008). Colorado provides employees in four industries – retail and trade, commercial support service, food and beverage, and health and medical – a paid ten minute rest break for each four hour work period and a thirty minute meal break when the work period exceeds five hours. 7 Colo. Code Regs. § 1103-3 (2009). In Nebraska, employees in assembly plants, workshops, and other mechanical establishments must receive at least a thirty minute meal break in each eight hour shift, and must be allowed to leave the premises during this break. Neb. Rev. Stat. § 48-212 (2008). And in Pennsylvania, seasonal farmworkers may not be required to work more than five hours continuously without a meal or rest period. 43 Pa. Stat. Ann. § 1301.27 (West 2008).

Moreover, the rest and meal breaks provided to room attendants under the Attendant Amendment – two paid fifteen minute rest breaks and an unpaid thirty minute lunch break within a seven hour period – are not in any way unusually stringent. Instead, they are approximately comparable to what many states require for most employees: an unpaid thirty minute lunch break and two ten minute paid breaks for full work day. *See* U.S. Dep't of Labor, Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector (Jan. 1, 2009);[1] U.S. Dep't of Labor, Minimum

[1] http://www.dol.gov/esa/whd/state/rest.htm.

Length of Meal Period Required Under State Law For Adult Employees in Private Sector (Jan. 1, 2009).[2]

As the Illinois Appellate Court found, the Amendment "was introduced and passed to protect hotel room attendants from overwork." *Illinois Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846, 849 (Ill. App. 2007). The court found good reason to target special rest and meal break protections to that occupation:

> Hotel room attendants essentially work on a piece-rate system. Both union and nonunion hotels require room attendants to clean a quota of rooms each work shift. Although they are paid by the hour, room attendants are required to deliver a quantified amount of work during their shift and can be disciplined if they fail to do so.
>
> The quota system forces many room attendants to skip breaks. In a published survey of room attendants, two-thirds stated that they had skipped or shortened lunch or rest breaks, or worked longer hours, to complete assigned rooms.
>
> The workload pressure facing room attendants has contributed to injury. Ergonomic research conducted by the Ohio State University Biodynamics Laboratory found that the typical tasks performed by hotel housekeepers put these workers at a very high risk for lower back disorder.
>
> Hotel room attendant work has become more strenuous in recent years. Hotel chains have engaged in so-called "bedding wars," adding heavier mattresses, more pillows and additional amenities to compete for travelers' dollars. A published survey of room attendants found that work intensification over the previous five years, measured by the increased number and intensity of tasks required to clean a room, had led to a statistically significant increase in neck pain and lower back pain among room attendants.

Id.

This pattern seen in the Attendant Amendment – a state adopting a baseline workplace standard in a given area, and then amending it to add heightened protections addressing identified problems in specific industries or occupations – is the norm nationwide. It can be seen, for example, in the area of overtime rules. Safety concerns have led states to adopt

[2] http://www.dol.gov/esa/whd/state/meal.htm.

heightened overtime protections for dangerous or sensitive occupations such as miners[3] and nurses, barring or limiting mandatory overtime[4]

The same process has occurred with regard to wage payment rules – an area where almost all states have baseline standards that apply to all industries and occupations. Increasing numbers of states have adopted special protections and standards for industries where workers are especially vulnerable to nonpayment of wages and other forms of exploitation, such as the day labor,[5] garment[6] and carwash[7] industries.

Similarly, it is common for living wage laws – which establish minimum wage standards above the generally applicable state minimum wage for businesses that receive contracts or

[3] *See, e.g.*, Mo. Ann. Stat. § 290.020 (West 2009) (eight hour shift limit); Colo. Rev. Stat. § 8-13-110 (2008) (eight hour shift limit except pursuant to certain plans); Alaska Stat. §23.10.410 (2008) (ten hour shift limit for underground work in twenty-four hours).

[4] *See, e.g.*, 210 ILCS 85/10.9 (West 2008); Me. Rev. Stat. Ann. tit. 26, § 603 (2008); Wash. Rev. Code § 49.46.130 (2009); W. Va. Code § 21-5F-3 (2008); R.I. Gen. Laws § 23-17-17.20-3 (2008).

[5] *See, e.g.*, 820 ILCS 175/30 (West 2009) (requiring day labor employers to pay their workers at regular intervals); Ariz. Rev. Stat. Ann. § 23-553 (2009) (requiring itemized deductions and wages in a form that is payable in cash at a financial institution); Fla. Stat. Ann. § 448.24 (West 2008); 820 ILCS 175/30 (West 2009) (same); N.M. Stat. Ann. § 50-15-4 (West 2008) (same); Fla. Stat. Ann. § 448.24 (West 2008) (prohibiting fees for safety equipment used on the work assignment); Ga. Code Ann. § 34-10-2 (West 2008) (same); Tex. Lab. Code § 92.025 (Vernon 2008) (same); Mass. Gen. Laws Ann. ch. 149 § 159C (West 2008) (prohibiting unreasonable transportation fees to and from the worksite); Fla. Stat. Ann. § 448.24 (West 2008) (same); Ga. Code Ann. § 34-10-2 (West 2008) (prohibiting transportation fees altogether); 820 ILCS 175/20 (West 2009) (same). *See generally* U.S. Government Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance* (2002), p. 14 (finding that "available information indicates that day laborers face numerous potential violations. Many of these potential violations involve nonpayment of wages, including overtime.").

[6] *See, e.g.*, Cal. Lab. Code §§ 2673, 2673.1 (West 2009) (requiring special recordkeeping by garment employers and authorizing recovery of unpaid wages from apparel companies);

[7] *See, e.g.*, Cal Lab. Code § 2055 (West 2009) (requiring special recordkeeping by carwash employers and making successor owners responsible for the unpaid wages of prior owners).

subsidies from local governments – to target specific industries, typically those where the problem of poverty wages is deemed to be especially serious.[8]

B. Geography

In addition to industry- and occupation-based distinctions, it is not uncommon for labor standards to apply differently in different geographic regions within a state. Generally, such measures establish heightened standards for urban areas in light of higher costs of living or differing industry or economic conditions.

For example, for at least two decades until 1968, state law in Wisconsin established a higher minimum wage for larger cities in the state. *See* Wis. Dep't of Workforce Development, *Historical Resume of Minimum Wage Regulations in Wisconsin* 5-12 (1998). More recently, when Maryland enacted a state living wage statute in 2007 for businesses contracting with the state, it targeted contractors operating in the state's larger cities and surrounding suburbs by establishing there a wage floor nearly $3 higher than in the rural areas. Md. Procure. Regs. 21.11.10.01 § (B)(4), (5)(2007).[9]

In fact, prevailing wage laws – which many states have used for decades to improve job standards for construction and/or service workers employed on publicly contracted or subsidized projects – operate in precisely this fashion. They establish wage

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[8] *See, e.g.*, New York City Admin. Code § 6-109 (2007) (finding that "in several areas in which the city contracts for services there appears to be a trend toward paying low wages. This problem appears to be most egregious in the area of security, temporary, cleaning and food services."); Denver, Colo., Rev. Mun. Code § 20-86 (2006) (covering parking lot attendants, security guard, and childcare workers at any public building or public parking facility owned by the City, and clerical support workers); Broward County, Fla., Mun. Ords. § 26-101 (2008) (food preparation and distribution, security, routine maintenance, clerical, transportation, printing or reproduction, and landscaping industries).

[9] State of Maryland, Living Wage FAQ's, http://www.dllr.state.md.us/labor/livingwagefaqs.shtml#15

standards that are calculated on a county-by-county and occupation-by-occupation basis. As a result, they frequently establish quite robust wage requirements for some occupations and for a state's cities, but modest ones for other occupations or for rural areas. *See, e.g.*, N.Y. State Dep't of Labor, Prevailing Wage Schedules/Updates for 07/01/2008 - 06/30/2009 (the prevailing wage for a given category of carpenters under N.Y. Labor Law § 220 is $43.69 in New York City, but $23.69 in rural Lewis County).[10]

Moreover, in states like Illinois and New York that contain a densely urbanized large city that differs economically from suburban and rural areas of the state, it is not unusual for the legislature to tailor some workplace policies – like many other aspects of state law[11] – exclusively for that major urban market. For example, in Illinois the legislature has established special state rules for Chicago and Cook County regarding wage deductions for municipal employees, and dismissal standards for teachers. *See, e.g,*. 820 ILCS 115/9 (West 2008); 105 ILCS 5/34-15 (West 2008). Similar examples can be found in other states that contain economically distinct major urban areas. *See, e.g.*, N.Y. Real Prop. Tax Law § 421-a(b) (McKinney 2008) (establishing prevailing wage requirements for building services workers that apply exclusively to a tax incentive program financing multi-family housing development in New York City); 18 Pa. Cons. Stat. Ann. § 908 (West 2008) (establishing training requirements for police officers only in "first class" cities in the state, of which Philadelphia is the only one).

[10] http://wpp.labor.state.ny.us/wpp/publicViewPWChanges.do

[11] This court has recognized that the "statute books [in Illinois] are riddled with laws that treat communities with more than 500,000 residents – i.e. Chicago – differently from smaller ones." *Herne v. Board of Ed. of City of Chicago,* 185 F.3d 770, 774 (7th Cir. 1999). The same is true in states such as New York.

Finally, in some states – unlike Illinois – where municipalities have limited home rule powers, only the state legislature is empowered to address workplace conditions facing an individual city or county. In such states, elected city or county officials must submit a home rule request to the legislature asking it to authorize or enact the particular workplace protection found to be needed. Home rule requests are another circumstance that can thus lead to geographically targeted state legislation in various policy spheres, including workplace rules.

In many ways, the geographically targeted wage requirements of the Maryland living wage law are especially instructive for this case because they resulted from negotiation and compromise during the legislative process very similar to the process that yielded the geographic focus of the Attendant Amendment. In Maryland, a living wage bill had been vetoed in 2004, in part because it set a uniform wage standard across the state despite geographical variations in the cost of living. When it appeared that the new living wage bill might fail for the same reason, sponsors of the bill compromised with rural employers by creating a two-tiered system of wage levels that took into account the lower cost of living in the state's more rural areas.[12]

Similarly, the Attendant Amendment as originally proposed applied state-wide, but was narrowed to apply only to Cook County in response to objections from downstate hotel employers that the break requirement would be too burdensome for businesses in the less lucrative downstate market. *See Hotel & Lodging Assoc. v. Ludwig*, 869 N.E.2d 846, 851-52 (Ill. App. Ct. 2007) (discussing legislative history).

[12] *See* Steven Greenhouse, *Maryland Is First State to Require Living Wage*, N.Y.Times, May 9, 2007, *available at* http://www.nytimes.com/2007/05/09/us/09wage.html.

Courts have long recognized that such compromise and experimentation are hallmarks of the legislative process, in which policymakers choose to proceed incrementally, starting with the area in which a problem is perceived to be the most serious. *See, e.g.*, *Bowen v. Owens*, 476 U.S. 340, 347 (1986) ("[t]his Court consistently has recognized that in addressing complex problems a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'" (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)); New York City Admin. Code § 6-109 (2007) ("although we recognize that [the problem of low wages] exists in other areas as well, it is an important first step to concentrate on these four industries where the problem is most blatant.").

Thus, far from being unusual or illegitimate, the geographic, industry and occupational focuses of the Attendant Amendment are common features of workplace standards legislation as policymakers respond to identified problems and make the types of compromises and incremental steps that are typical of the legislative process.

II. State and Local Workplace Laws and Other Public Laws Frequently Incorporate Anti-Retaliation Protections Similar to the One at Issue Here

Contrary to the panel's suggestion, anti-retaliation protections that include rebuttable presumptions and treble damages for violations are, in fact, common tools that are routinely used by policymakers to promote improved compliance in the face of limited enforcement resources.

A. Rebuttable Presumptions

The panel decision took issue with the Attendant Amendment's use of a rebuttable presumption to protect workers asserting their rights under the law from retaliation. But while the panel indicated that it "[was] aware of no law or contract that establishes such a shifting of the burden of proof," slip op. at 33, such provisions are, in fact, common. For public laws such as workplace standards for which government enforcement resources are often limited, a key challenge is finding ways to help individuals play a role in facilitating implementation. One of the chief obstacles to individual workers playing that role, however, is workers' fears of retaliation should they assert their rights. In a range of public law areas, policymakers have found rebuttable presumptions with shifting burdens to be useful in helping individuals feel more secure in asserting their rights.

For example, the enforcement provision of Arizona's minimum wage law provides that "taking adverse action against a person within ninety days of a person engaging [in asserting any claim or right under this article, for assisting any other person in doing so, or for informing any person about their right] shall raise a presumption that such action was retaliation, which may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons." Ariz. Rev. Stat. Ann. § 23-364(B) (2008). Similar language appears in many municipal living wage or minimum wage laws, including those in San Diego, Santa Fe and San Francisco.[13]

[13] *See* San Diego, Cal., Municipal Code § 22.4201 (2005) (rebuttable presumption shall arise if discriminatory action takes place within ninety days of providing information towards or cooperating in a compliance investigation); Santa Fe, N.M., Municipal Ordinance 28-1.6(B) (taking adverse action within sixty days of individual's assertion of or communication of information regarding rights shall raise a rebuttable presumption of retaliation); S.F., Cal.,

Various industry-specific workplace regulations use the same type of rebuttable presumption to deter retaliation against workers who assert their rights. *See, e.g.*, N.J. Stat. Ann. § 34:20-9 (West 2008) (establishing protections against independent contractor misclassification in construction); N.J. Stat. Ann. § 34:8A-10-1 (West 2008) (establishing protections for seasonal farmworkers). And similar rebuttable presumptions of retaliation have become common in other public law areas – for example, under state whistle-blower statutes[14] and landlord-tenant laws.[15]

B. Treble Damages

In addition, although the panel decision found that the Attendant Amendment's provision for the recovery of treble damages, costs and attorney's fees in the case of violations could "in no sense be considered 'minimal,'" slip op. at 34, in fact such remedies – and others even more substantial – are common under workplace laws.

Admin. Code § 12W.7 (taking adverse action within ninety days of an individual's filing of a complaint, cooperating with an investigation, opposing any unlawful practice under the chapter, or informing any person of his or her rights raises a rebuttable presumption of retaliation).

[14] *See, e.g.*, Tex. Health and Safety Code Ann. §§ 161.134(a), (f) (Vernon 2008) (applying presumption to discrimination taken against employee of a hospital, mental health, or treatment facility); Del. Code Ann. tit. 16, § 1117 (2009) (residents and employees in nursing facilities); W. Va. Code § 16-5D-8 (2008) (residents and employees in assisted living facilities).

[15] *See, e.g.*, N.Y. Real Prop. § 223-b(5) (McKinney 2008) (rebuttable presumption that landlord acted in retaliation if notice to quit, action to recover possession or attempt to substantially alter terms of tenancy occurs within six months of a good faith complaint against landlord); Mich. Compiled Laws Ann. § 600.5720 (West 2008) (rebuttable presumption arises that unlawful detainer action is retaliatory if brought within 90 days after the tenant brings action to enforce rights against the landlord); Mass. Gen. Laws Ann. ch. 239 § 2A (2008) (commencement of action against tenant within six months after tenant has commenced action, exercised rights, or organized or joined a tenant's union creates rebuttable presumption); Cal. Health & Safety Code § 17031.5 (West 2009) (rebuttable presumption of retaliation if an unlawful detainer action is brought within six months after tenant has invoked rights under the Act).

For example, several states including Arizona, Ohio and Massachusetts now require mandatory treble damages for wage violations in an effort to secure better compliance with their state minimum wage laws. *See* Ariz. Stat. § 23-364(G) (2008); Ohio Const. Art. II, § 34a; Mass. Gen. Laws. Ann. ch. 149 § 27 (West 2008).

States are also using similar significant penalties to guard more effectively against retaliation. Wisconsin, for example, authorized back pay plus "exemplary damages up to double the amount of back wages found due" – a total of triple back-pay – in cases of willful violations of anti-retaliation provisions under migrant worker protection law. *See* Wisc. Stat. Ann. § 103.96 (West 2008). Ohio and Arizona authorize even more substantial penalties for retaliation against workers seeking to enforce their state minimum wage laws. In those states, the courts and state agencies are instructed to assess damages in an amount "sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued . . ." Ohio Const. art. II, § 34a; *see also* Ariz. Rev. Stat. Ann. § 23-364(G) (same). This is *in addition* to the treble damages required for wage violations themselves.

These statutes address a basic problem confounding enforcement – the reality that where penalties for violations are too modest, there is a natural tendency for some employers to not make ensuring compliance a high enough priority. For violations involving low-wage workers, a requirement to pay even double back-pay may not create enough of an incentive for rigorous compliance, in light of competing priorities and the reality that government agencies do not have the resources to pursue aggressive

enforcement. As a result, there is now a trend towards higher penalties, such as treble back-pay, in order to create more meaningful compliance incentives.

III. The Panel Decision Will Open Up a Wide Range of Lawful State and Local Workplace Laws to Indeterminate and Wasteful Litigation and Will Chill State and Local Governments from Enacting Needed Protections

The panel's decision creates a new and indeterminate NLRA preemption test that will improperly prevent state and local policymakers from moving forward with badly needed workplace law reforms. From NELP's extensive experience working with state and local lawmakers across the country, we know firsthand the role that concern about litigation often plays in the willingness of legislators – especially in small states and cities – to enact needed workplace law reforms. Having to factor in the expense and uncertainty of a likely NLRA preemption lawsuit into public cost-benefit analyses when contemplating new workplace protections will have the effect of leading some jurisdictions to conclude they cannot go forward. Even if eventually they would prevail in such a lawsuit – as we would hope most would even if the panel decision stands – the cost and staffing resources consumed in litigation are very substantial factors, especially for cities. At a time when our nation's workplace laws badly need modernization, but state and local governments simultaneously face a period of tight budgets, the chilling effect of the panel decision will be unfortunate.

CONCLUSION

For the foregoing reasons, *amicus curiae* strongly urges that appellees' petition for rehearing *en banc* be GRANTED.

Dated: January 16, 2009

Respectfully submitted,

_____/s/_____

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