No. 23-669

IN THE

Supreme Court of the United States

MASSACHUSETTS COASTAL RAILROAD LLC, *et al.*,

Petitioners,

v.

CHAD MARSH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF

ALVIN S. NATHANSON
Counsel of Record
NATHANSON & GOLDBERG, PC
183 State Street, 5th Floor
Boston, MA 02109
(617) 210-4800
asn@natgolaw.com

Counsel for Petitioners

328927

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

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes & Other Authorities

Cited Authorities

REPLY BRIEF

The basis for granting a writ of certiorari to determine whether the application of the Massachusetts Prevailing Wage Act to railroads is preempted by federal law is fully set forth in Petitioners' Petition for a Writ of Certiorari (the "Petition"). Respondent's Brief in Opposition ("Opposition Br.") does not raise sufficient grounds for denial of the Petition. In particular, Respondent misapplies the standard for determining if the decision of the Massachusetts Supreme Judicial Court ("SJC") was a final judgment, and wrongfully asserts that there is insufficient information in the record to determine the federal preemption issue. As such the Petition should be granted.

I. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT ON FEDERAL PREEMPTION WAS A FINAL JUDGMENT UNDER 28 U.S.C. § 1257.

This case was initially appealed to the SJC under the Massachusetts "present execution doctrine" wherein an immediate appeal of an interlocutory order is allowed if the order will interfere with rights in a way that cannot be remedied on appeal from the final judgment. *Roche v. Boston Safe Deposit and Trust Co.*, 391 Mass. 785, 791 (1984) (doctrine applies where appeal from final judgment would be futile unless challenged order vacated by prompt entry of appeal in the appellate court). This exception applies only to decisions which resolve issues that are "collateral". The denial of a motion to dismiss "**based on immunity from suit enjoys the benefit of the present execution rule because it is a final order.**" *Kent*

v. Commonwealth, 437 Mass. 312, 317 (2002*)* (emphasis added). In cases that are fully briefed, a Massachusetts Appellate Court may nevertheless comment on the merits of the defendants' arguments as to questions concerning the parameters of liability that are recurrent, and the Court's discussion may be instructive in future cases. *Landry v. Massachusetts Port Authority*, 89 Mass. App. Ct. 307, 310 (2016).

The Petition herein is similar to the present execution rule of Massachusetts since a determination of federal preemption as to a railroad employee's claim for the payment of state prevailing wage rates would provide immunity from suit for the Petitioners in the underlying case, which is collateral to the merits. Under federal preemption, federal law displaces state law, and/or the authority of a particular forum over all others to hear particular claims with federal preemption of state law, rendering state statutory laws unenforceable under state law.

The issue as to applicability of the state prevailing wage law in this case is dependent upon whether Petitioners are immune from suit due to federal preemption under the ICC Termination Act of 1995, as amended ("ICCTA"), and in particular 49 U.S.C. §10501. The issues are whether as to state prevailing wage laws the Surface Transportation Board ("STB") has broad exclusive jurisdiction over transportation by rail carriers, whether state prevailing wages for a railroad regulate transportation by a railroad or constitute economic regulation of railroads, and whether state prevailing wage laws would create a patchwork of conflicting regulations.

As this Court has held, there are certain categories of cases in which the Court will consider a decision on a federal issue as a final judgment. "In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive, or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (citing *Cox Broadcasting. Corp. v. Cohn*, 420 U.S. 469, 479 (1975)). As stated by the *O'Dell* Court, "There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice." *Id.,* 420 U.S. at 477-478.

The *O'Dell* Court further stated: "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the

nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, 420 U.S. at 482–483.

Respondent acknowledges the Court's acceptance of these categories as set forth in *O'Dell* and *Cox Broadcasting,* but then erroneously argues that the SJC's decision does not fit into any of the categories. Opposition Br. at 9-10. Rather, the SJC decision on federal preemption comes within at least three of the exceptions to the finality requirement set forth in *Cox Broadcasting Corp.*

The *Cox Broadcasting* exceptions are applicable here and allow for jurisdiction in circumstances in which a federal issue has been decided, further proceedings may lead to a decision on non-federal grounds, but determination of the federal issue would immediately resolve the case, and any delay would erode a federal policy. Further, state court proceedings will determine whether state prevailing wages apply under the contract, and if so, the economic impact of those wages on Petitioners. Any further state court decision on federal preemption might well require review by this Court at a later date. However, immediate rather than delayed review would be, and is, the best way to avoid 'the mischief of economic waste and of delayed justice" (*Cox Broadcasting,* 420 U.S. at 477) as is using the "pragmatic approach" to the question of finality. *Id.,* 420 U.S. at 486.

Deciding the issue of federal preemption would moot the prevailing wage claims and end the case involving an important issue for railroads, whereas declining certiorari would require the State lower court to determine both the applicability of prevailing wage and the preemption issue again, with the possibility of further appeals to the State appellate courts and a further appeal to this Court. On the other hand, the important legal issue of federal preemption as to prevailing wages mandated for a railroad regulated by federal law can be decided immediately at a great savings of time and money for all concerned as to an important question involving federal law and railroads. Like the Massachusetts present execution doctrine, the *Cox Broadcasting* exceptions satisfy the requirement of a final judgment especially as to its pragmatic approach. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (following the "pragmatic approach" to finality of *Cox Broadcasting* on a case involving important implications for regulation of federally owned nuclear production facilities).

II. EVEN BASED ON THE LIMITED RECORD BELOW, FEDERAL PREEMPTION CAN AND SHOULD BE ADJUDICATED.

The record below is sufficiently complete as to the federal preemption claim for this Court to rule on the issue of federal preemption. As support for Respondent's position, Respondent stated that "nothing in the present record suggests payment of a prevailing wage rate would pose an undue burden on petitioner." Opposition Br. at 10. But that is not the complete issue for federal preemption, which is not only whether prevailing wages are an undue burden but whether federal law, and in particular the

ICCTA, explicitly or implicitly preempts state law as to the imposition of prevailing wages on railroads because they are improper economic regulation.

Respondent's argument that the State Court decision "concerns only privately owned railroads that choose to seek public-works projects contracts" and does not place "federal policy" "at serious risk at this time" (Opposition Br. at 10) is also invalid as federal preemption is not dependent on whether or not there a serious risk to the Petitioner. As to the unresolved issues as to the applicability of state prevailing wages, such issues are secondary to the federal preemption issue.

The Amended Complaint alleged that Petitioner was a railroad company specializing in integrated rail freight and logistics services "to complete integrated rail freight and logistics projects." No party ever contested that Petitioner is a railroad regulated under the ICCTA or that the ICCTA is applicable. The primary issue on appeal is whether the ICCTA preempts the imposition of state prevailing wages on railroads like Petitioner that are subject to regulation under ICCTA.[1]

The ICCTA preemption provisions grant the STB exclusive jurisdiction over a wide range of state and local regulation of rail activity. *BNSF Railway Company v. California Department of Tax and Fee Administration,* 904 F.3d 755 (9th Cir. 2018). The STB's authority over railroad operations and acquisitions is exclusive and preemptive of state-law remedies. *Snohomish County,*

1. Under the comparable federal prevailing wage statute, i.e. the Davis Bacon Act, 40 U.S.C. §§ 3141-3148 railroads are exempted.

Washington v. Surface Transportation Board, 954 F.3d 290 (D.C. Cir. 2020). *See also Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003) ("[I]n enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads.").

The ICCTA preempts the state and local regulation of matters directly regulated by the STB, including **"construction"** and **"operation"** (49 U.S.C. §10501(b(2)), **"rates"** and **"classifications"** (49 U.S.C. §10501(b)(1)), **"employment"** and **"employment relations"** (49 U.S.C. §10501(c)(3)(A)(iii)) of rail lines which is exclusive. (Emphasis added.) "The relevant question under the ICCTA is whether …a dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation." *Franks Inv. Co. LLC v. Union Pac. R. Co.,* 593 F.3d 404, 411 (5th Cir. 2010). Whether a state regulation is preempted requires an assessment of whether the action would have the effect of preventing or unreasonably interfering with railroad transportation activities or of economically regulating railroads.

To suggest that wages, and prevailing wages or other dealings with employment do not have the effect of managing or governing rail transportation and have a "remote or incidental impact on rail transportation" was not only without any authority, but plainly wrong. It is inconceivable that Congress would have inserted exclusive jurisdiction into the ICCTA, 49 U.S.C. §10501(c)(3)(A)(iii) (emphasis added), including a reference to "**employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers,**" if it only had a remote and incidental

impact on rail transportation. The federal government has codified several other laws for railroads dealing with employment, including minimum wages, retirement benefits, hours of service, safety acts, and collective bargaining rights including wages for the operation and management of a railroad.

If prevailing wages were required for railroad workers, that would permit a local state official to determine wage rates for railroad workers for all railroads using or working on Massachusetts tracks that could increase the payment of wages some four or five times (accepting Respondent's unsupported allegations in the Amended Complaint). Clearly, telling a railroad what to pay its employees is economic regulation, and vastly increasing the cost of wages and overhead would economically burden the railroad and impact railroad rates, charges, services, and operations. This would not only affect the management or governance of a railroad but would interrupt the centralization of rail transportation with different wage rages for each state with separate rules and regulations and resulting in a balkanization and lack of uniformity for railroads.

Respondent's arguments that the SJC decision based on the record before it "found little if any adverse economic effects on railroad operations because the cost of the law is by design absorbed by the Commonwealth;" that "no railroad is required to bid on a public works project"; and that "the Prevailing Wage Act sets forth contractual terms governing projects voluntarily agreed to be the contractor" (Opposition Br. at 18), are erroneous based on the limited record before the SJC. No where in the record was there any allegation by any party that

Petitioner ever bid on any of the applicable contracts in the context of competitive bidding projects. Nor was there any allegation or showing in the record that the "economic impact of the prevailing Wage Act is, by design, absorbed by the Commonwealth because a contractor is expected to calculate its labor costs using the prevailing wage schedule published by the state in its bid." In its opinion, the SJC stated that "Pursuant to the Act, a contractor bidding on a public works project is expected to use the prevailing wage rates to calculate the labor costs included in its proposed bid." Nowhere in the record was there any allegation that the contract of Petitioner was competitively bid and awarded with prevailing wage rates, that the Department of Labor Standards ("DLS") set or established such wage rates; or that such wage rates were in any bid or contract.

In the Amended Complaint, respondent alleged in par. 10 that "**Upon information and belief,** these projects constituted public works projects and/or public works to be constructed within the meaning of M.G.L.c. 149, 27, 27F." (Emphasis added). But in Massachusetts, a public works project is a project that is competitively bid and awarded. *Metcalf v. BSC Group Inc,* 492 Mass. 676 (2023) (contracts between employer and Massachusetts Department of Transportation at issue were not competitively-bid contracts for the construction of public works and thus workers' wages were not subject to Prevailing Wage Act). There was nothing in the record below that alleged the contract of Petitioner with MASSDOT was competitively bid.

In addition, in par. 18, Respondent alleged that "At all times, Mr. Marsh was due the prevailing wage for his work which **on information and belief,** was approximately

$63.00 per hour" (emphasis added). In the record in this case, there were no allegations that DLS set or established any prevailing wage rates and in particular "approximately $63.00 per hours. The mere allegation that the prevailing wage rate was "approximately $63.00 per hour" showed that no such wage rate was ever set or established by DLS since wage rates are never listed as "approximately." Without the setting or establishment of prevailing wage rates, the prevailing wage rate is not applicable since no such prevailing wage rate ever determined.

In Respondent's brief, he acknowledges the requirements for the Massachusetts Prevailing Wage Law that a public agency must request from DLS the "rate of wages to be paid" and the setting or establishment of such rates by DLS and to be "made a party of the public works contract." Opposition Br. at 4. No supporting allegations were ever made in this case and in particular in the Amended Complaint, which were mandatory conditions precedent for liability that had to be met.

In this case, the SJC concluded that "on the record before it, petitioners had not shown that the state wage law had an impermissible effect on railroading" since "little if any adverse economic effects on railroad operations because the cost of the law is by design absorbed by the Commonwealth." However, there was nothing in the record of this case to even show or substantiate these statements without any showing that prevailing wage were required and were set by DLS or that the Commonwealth would absorb the increased wages. Without such confirmation, it is hard to imagine that the quadrupling of wages would not have a significant adverse economic effect on the railroad.

Respondent stated that "the SJC's decision concerns only privately owned railroads that choose to seek" such work. Opposition Br. at 10. But such work is dependent on the work required and the payment terms in its contract for such work. But without such contract terms as to requiring any prevailing wage rates to be paid, a contractor cannot be held liable for payment of nonexistent prevailing wages and ought not to be faulted for seeking such work. In the absence of any compliance with the Prevailing Wage Statute, a contractor does not have the onus of paying prevailing wages and cannot be held liable. *See McGrath, III v. ACT, Inc, et al.,* 2008 Mass. App. Div. 257 (2008); *Tomei v. Corix Utilities (U.S.) Inc.,* No. CIV.A. 07-CV-11928DP, 2009 WL 2982775, at *12 (D. Mass. 2009; and *Andrews v. Weatherproofing Techs., Inc.,* 277 F. Supp. 3d 141, 153–54 (D. Mass. 2017).

III. CONCLUSION

For the reasons set forth in the Petition and this Reply, the petition for a writ of certiorari should be granted.

Dated: April 15, 2024

Respectfully submitted,

Alvin S. Nathanson
Counsel of Record
Nathanson & Goldberg, PC
183 State Street, 5th Floor
Boston, MA 02109
(617) 210-4800
asn@natgolaw.com

Counsel for Petitioners