IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

CARLOS ROMERO, *et al.*,	
Plaintiffs,	**Civil Action No. 2020 CA 003755 B**
v.	
	Judge Florence Pan
H.E.P. Construction, Inc., *et al.*,	
	Next Event: Initial Conference
Defendants.	**(Feb. 12, 2021)**

MOTION FOR LEAVE OF
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF PLAINTIFFS

The Metropolitan Washington Employment Lawyers Association (MWELA), through counsel, respectfully seeks leave to file an *amicus curiae* brief in support of plaintiffs.

MWELA, founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its more than 300 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also regularly participates as *amicus curiae* in important cases in the District of Columbia, Maryland, and Virginia, the three jurisdictions in which its members primarily practice.

MWELA's members and their clients have an important interest in the proper interpretation of the D.C. wage laws as a substantial portion of MWELA members' practices are devoted to enforcing these laws, and a substantial portion of MWELA members' clients are impacted by the protections afforded by these laws. The issue of whether the Davis-Bacon Act

preempts claims under the D.C. wage laws is an important and recurring issue that is likely to continue arising, in one form or another, in litigation brought by MWELA members, making it all the more important that the questions presented here be resolved clearly and correctly. Therefore, MWELA respectfully seeks leave to file the attached *amicus* brief.

The *amicus* brief and a proposed Order are attached hereto.

Rule 12-I statement

Undersigned counsel contacted counsel for the parties to determine their position. Counsel for plaintiffs consented to the motion for leave. Counsel for defendants HEP, Zaldana, Multi Services Zaldana, and Banneker Ventures LLC, stated that they would not consent. Counsel for defendant AFG did not respond.

Respectfully submitted,

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DATED: January 15, 2021

Certificate of Service

I hereby certify that on this 15th day of January 2021, a copy of the foregoing was electronically filed pursuant to Superior Court Administrative Order 06-17 (Oct. 23, 2006) and EF Rule 9, which will serve all counsel of record.

/s/ Alan R. Kabat

Alan R. Kabat

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METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AMICUS BRIEF IN SUPPORT OF PLAINTIFFS

Amicus MWELA respectfully submits this amicus brief to provide this Court with information on the problems of wage theft, which includes efforts by employers to circumvent prevailing wage requirements by paying their employees lower wages and pocketing the difference. This amicus brief first sets out the background for wage theft issues, in order to explain the context for why it is important to allow employees to use the District of Columbia wage statutes as a basis for obtaining relief when they are not paid the legally-required prevailing wages. This brief then explains why the Davis-Bacon Act (DBA) does not preempt wage theft claims under the District of Columbia wage statutes, because the DBA only preempts challenges to the Department of Labor's classification or wage-setting decisions, and the plaintiffs here are not raising that issue here.

I. The D.C. Wage Laws are Intended to Protect Employees from Wage Theft.

When passing the D.C. Wage Payment and Collection Law (DCWPCL) and the D.C. Wage Theft Prevention Amendment Act, the D.C. Council recognized that the withholding by employers of pay earned by their workers is alarmingly prevalent in the American workplace

generally, and in the nation's Capital in particular. These statutes were designed to ensure that people who work in D.C., and employers who operate in D.C., are covered by the rights and responsibilities the D.C. Council determined should apply to these employers and employees.

During the legislative review of the Wage Theft Prevention Amendments Act of 2014, the D.C. Council Committee report summarized the testimony of Thomas Luparello, Interim Director, D.C. Dept. of Employment Services: "Mr. Luparello . . . stated that the Department is aware of the increase in inciden[ts] of wage theft" under existing "antiquated statutes" and supported the "additional protections" added by the 2014 legislation. *See* Committee Report on Bill No. 20-671, "Wage Theft Prevention Amendments Act of 2014," D.C. Council Committee on Business, Consumer and Regulatory Affairs, at 13.[1] As the Committee on Business, Consumer and Regulatory Affairs pointed out when the Wage Theft Amendment Act of 2014 was passed, "ethical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs." *Id.* at 2.

The District of Columbia's Office of the Attorney General explained in a recent report that wage theft is rampant in the District of Columbia, particularly in the construction industry, where the plaintiffs were employed. *See* "Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry," Issue Brief and Economic Report, D.C. Office of the Attorney General, at 1 (Sept. 2019).[2]

Wage theft has grown to epidemic levels in D.C., and this epidemic has been particularly devastating to the wages of low-paid workers. *See* Brady Meixell and Ross Eisenbrey, "An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year," Economic

[1] https://lims.dccouncil.us/downloads/LIMS/31203/Committee_Report/B20-0671-CommitteeReport1.pdf

[2] https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf

Policy Institute Issue Brief No. 385 (Sept. 11, 2014);[3] Annette Bernhardt *et al.*, "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," National Employment Law Project, *et al.* (2009) (landmark survey of unpaid wages among thousands of low-wage workers in New York, Chicago and Los Angeles).[4]

The District of Columbia has been particularly impacted by wage theft. *See* Tim Judson & Cristina Francisco-McGuire, "Where Theft is Legal: Mapping Wage Theft Laws in the 50 States," Progressive States Network, at 24 (June 2012) (giving D.C. a grade of F for pre-2014 wage theft enforcement);[5] Employment Justice Center, Lawyers' Committee for Civil Rights Under Law, and Washington Lawyers' Committee for Civil Rights and Urban Affairs, Report, "Stolen Wages in the Nation's Capital" (Feb. 6, 2014).[6]

Construction workers like the plaintiffs are especially vulnerable to theft of their wages, for two reasons. First, because many are immigrants to the United States and may fear immigration enforcement even if they have no cause to do so. Second, because large building projects often involve subcontractors, sub-sub-contractors, and labor brokers, the discovery of wage theft, and the assignment of responsibility for it, have become a frustrating shell game for any aggrieved workers who dare to challenge their employers' behavior.

To this end, the Wage Theft Prevention Act of 2014 expressly created a cause of action for violation of the DBA and other federal wage laws. It does so in two ways. First, the DCWPCL defines "wages" as including "[o]ther remuneration promised or owed: . . . "(i) Pursuant to a contract between an employer and another person or entity or (ii) Pursuant to

[3] https://files.epi.org/2014/wagetheft.pdf

[4] https://s27147.pcdn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf

[5] www.researchgate.net/publication/326678129_Where_Theft_is_Legal_Mapping_Wage_Theft_Laws_in_the_50_States

[6] www.washlaw.org/pdf/stolen_wages_in_the_nations_capital.pdf

District or federal law." *See* D.C. Code § 32-1301(3). And prevailing wages under the DBA are deemed to have been promised to the employee: "[i]n enforcing the provisions of this chapter, the remuneration promised by an employer to an employee shall be presumed to be at least the amount required by federal law, including federal law requiring the payment of prevailing wages. . . ." *Id*. § 32-1305 (b).

Amicus MWELA submits that the D.C. wage statutes thus form an important safety net for employees, including construction workers such as the plaintiffs here, to ensure that they are not cheated out of the wages that their employers are legally obligated to pay them.

II. The Davis-Bacon Act Does Not Preempt D.C. Wage Claims.

Amicus MWELA further submits that the DBA does not preempt wage claims where, as here, the employees are not challenging the classification or wage-setting decisions of the U.S. Department of Labor. Several other judges of this Court, along with the U.S. District Court for the District of Columbia, have recently held that DBA preemption does not apply to claims such as those brought by the plaintiffs here.

U.S. District Judge Friedrich, in the recent *Garcia* decision, which similarly involved construction workers who were hired to work on public building projects, set forth a particularly detailed analysis of preemption, which MWELA adopts here. There are four reasons why preemption does not apply here, as set forth below.

A. The DBA Does Not Have an Express Preemption Provision.

First, since the DBA does not have any express preemption provision, there was no "congressional intent to foreclose other, extant rights of action." *Garcia v. Skanska USA Building, Inc.*, 324 F. Supp. 3d 76, 81 (D.D.C. 2018). Congress knows how to preempt other federal or state employment laws, but did not do so for the DBA. *Id*. at 82 ("The FLSA, the

DCMWA, and the DCWPCL all create express rights of action for aggrieved employees. If Congress meant to revoke these in every DBA-covered contract, longstanding precedent required it to say so clearly.").

In contrast, when Congress wanted to preempt state or D.C. employment laws, it did so expressly. For example, the primary federal employment discrimination law, Title VII of the Civil Rights Act of 1964, has an express preemption provision that preempts "any such [state] law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7. The appellate courts have held that this provision preempts state and local laws that treat women differently from men, even where those laws were enacted with the purpose to "protect" women in the workplace, such as laws imposing shorter work hours for women, or imposing lower weight-lifting requirements for women. *See*, *e.g.*, *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 246 (3d Cir. 1973) ("We conclude that it is now the law that discrimination based on reliance on conflicting state statutes is an intentional unfair employment practice" under Title VII); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir. 1971) (Title VII and the EEOC's implementing regulations preclude inconsistent state employment laws).

Similarly, ERISA, the employee retirement plan statute, also has an express preemption provision: ". . . the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title . . ." ERISA, Section 514(a), 29 U.S.C. § 1144(a). The U.S. Supreme Court thus held that an amendment to the D.C. workers' compensation statute was preempted by ERISA:

> Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with covered benefit plans (and that does not fall within a § 514(b) exception)

> "even if the law is not specifically designed to affect such plans, or the effect is only indirect," *Ingersoll–Rand*, *supra*, 498 U.S., at 139, 111 S. Ct., at 483, and even if the law is "consistent with ERISA's substantive requirements," *Metropolitan Life, supra*, 471 U.S., at 739, 105 S. Ct., at 2389.

District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 129-30 (1992) (invalidating D.C. Code § 36-307(a-1)(1), now codified at § 32-1507(a-1)(1)).

In contrast to Title VII and ERISA, the DBA contains no such preemption provision. Congress knows how to create preemption, and has done so for some employment statutes, but did not do so for the DBA.

The absence of express statutory preemption means that employers can only rely upon "implied" preemption, but that, too, is unavailing, as set forth for the remaining three reasons.

B. The D.C. Wage Statutes Do Not Conflict with the DBA.

Second, "there is no obvious conflict between the DBA, on the one hand, and the FLSA, DCMWA, and DCWPCL, on the other." *Garcia*, 324 F. Supp. 3d at 81. The Supreme Court and the U.S. Court of Appeals for the Fourth Circuit have recognized that the DBA does not preclude other federal causes of action, and compliance with the wage laws does not make "it impossible to comply with" the DBA. *Id.* (citing *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516-17 (1950) and *Amaya v. Power Design, Inc.*, 833 F.3d 440, 444-45 (4th Cir. 2016)). The same principle applies to the D.C. wage laws, which similarly do not create any "obvious conflict" with DBA and do not make it impossible for employers to comply with DBA.

C. Congress and the U.S. Department of Labor Recognize the Overlap.

Third, Congress was aware of the overlap between the DBA and other wage laws, as is the U.S. Department of Labor. The DBA itself and its implementing regulations recognize that that employees are entitled to pay "under any federal law" and are "subject to overtime compensation provisions of other laws which may apply concurrently to them." *Id.* at 81-82

(quoting 40 U.S.C. § 3142(e) and 29 C.F.R. § 778.6). This awareness by both Congress and the Department of Labor that DBA is not the sole source for determining wages further cuts against finding implied preemption.

D. There Is No Basis for an Implied or Surreptitious Preemption.

Fourth, "Courts generally presume that Congress does not cut back federal statutes or preempt state ones surreptitiously." *Garcia*, 324 F. Supp. 3d at 82 (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) and *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). The employer's reading of DBA here would require this Court to read into DBA a preemption that Congress did not create, either expressly or impliedly. Again, if Congress had wanted to make DBA the exclusive remedy for wage claims arising out of work done on public building projects, it could have done so, but Congress did not do so.

Judge Friedrich did recognize that two earlier decisions from the U.S. District Court concluded that since there was no private right of action under the DBA, the administrative remedies were exclusive and plaintiffs could not bring judicial claims for relief under local D.C. laws. *Id.* at 83 n.5 (citing *Johnson v. Prospect Waterproofing Co.*, 813 F. Supp. 2d 4, 9 (D.D.C. 2011) and *Ibrahim v. Mid-Atlantic Air of DC, LLC*, 802 F. Supp. 2d 73, 76 (D.D.C. 2011)). However, Judge Friedrich found the reasoning in those decisions flawed because they essentially found preemption, but never expressly mentioned preemption doctrine nor did they engage in the same four-part analysis that is required to find it. MWELA agrees with Judge Friedrich that the issue is one of preemption – either the DBA preempts the state law judicial remedies or it does not. The preemption doctrine places the burden of proof on the party asserting it, and that analysis requires consideration of all four factors outlined in *Garcia*. In short, the courts should not automatically assume preemption as some earlier decisions improperly did.

E. Other Judges of This Court Have Not Found Preemption.

As the plaintiffs here have briefed, at least three decisions from other judges of this Court have recently adopted *Garcia* in holding that the DBA did not preempt wage claims under D.C. law, thereby denying the employers' motions to dismiss the wage claims. *See* Pls. Opp. to Mot. to Dismiss (Jan. 12, 2021).

Judge Rigsby, in two decisions issued in October 2020, each involving construction workers on a D.C. public housing project, held that there was no DBA preemption of the D.C. wage claims, since even though the "defendants referenced the DBA rate" in their public postings and statements to the employees, that "does not speak to the merits of the DCWPCL claim." *See Calix v. Prestige Building Co.*, No. 2020 CA 00729 B, 2020 D.C. Super. LEXIS 20, at *8 (D.C. Super. Ct. Oct. 9, 2020); *Castaneda v. V&V Construction, LLC*, No. 2019 CA 002985 B, 2020 D.C. Super. LEXIS 21, at *8 (D.C. Super. Ct. Oct. 7, 2020) (same).

Judge Puig-Lugo, in a wage dispute arising from another D.C. public works contract, similarly concluded that "The Court finds *Garcia* persuasive and will follow it here." *Lara v. Bozzuto Building Co.*, No. 2020 CA 002648 B, 2021 D.C. Super. LEXIS 1, at *7 (D.C. Super. Ct. Jan. 4, 2021). Judge Puig-Lugo recognized that "as in *Garcia*, there is nothing in the Amended Complaint that would require this Court to make determinations that are within the Department of Labor's exclusive purview." *Id.* at *8.

Finally, litigating wage and hour claims under D.C. law (or federal law, for that matter), would have no effect on the U.S. Department of Labor's "legal determinations [that] Congress intended the Department of Labor to resolve." *Garcia*, 324 F. Supp. 3d at 84. Critically, the plaintiffs here, as in other cases, are not presenting any "dispute over worker classifications or corresponding rates," so that adjudication of their claims under the D.C. wage laws "would not

require any classification or wage-setting decisions of the kind Congress has reserved for the Department of Labor." *Id.* at 85.

Conclusion

Although the D.C. Court of Appeals has not yet addressed this issue, MWELA respectfully submits that the well-reasoned decisions of Judges Friedrich, Puig-Lugo, and Rigsby provide a sound basis for this Court to hold that the DBA does not preempt D.C. wage claims. Moreover, the underlying legislative purpose of the D.C. wage theft statutes – to protect workers from wage theft, which is particularly rampant in the construction industry – would be seriously undermined by a ruling that the DBA preempts claims brought under the D.C. wage statutes.

Respectfully submitted,

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DATED: January 15, 2021

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	)	**Next Event: Initial Conference**
Defendants.	)	**(Feb. 12, 2021)**
	)	

ORDER

Upon consideration of the Motion for Leave of Metropolitan Washington Employment Lawyers Association to File *Amicus Curiae* Brief in Support of Plaintiffs (Jan. 15, 2021), and the entire record in the matter, it is hereby

ORDERED on this ____ day of _____ 2021, that the Motion for Leave of Metropolitan Washington Employment Lawyers Association to File *Amicus Curiae* Brief in Support of Plaintiffs shall be, and hereby is, **GRANTED.**

_____
The Honorable Florence Pan
D.C. Superior Court Judge

Copy to all counsel
(by Case File Express)