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IN THE COURT OF APPEALS OF MARYLAND

No. 14, September Term, 2021
COA-REG-0014-2021

MARIO ERNESTO AMAYA, *et al.*,
Appellants,
v.
DGS CONSTRUCTION, LLC, *et al.*,
Appellees.

BRIEF OF *AMICUS CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS

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Dated: September 27, 2021

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AUTHORIZATION FOR THIS BRIEF

Pursuant to Maryland Rule 8-511(d), *Amicus* has obtained the consent of all parties for leave to file this brief.

STATEMENT OF THE CASE

Amicus adopts the appellants' statement of the case. Appellants' Brief at 1-6.

STATEMENT OF FACTS

Amicus adopts the appellants' statement of facts. Appellants' Brief at 6-12.

ARGUMENT

This *amicus* brief focuses on one issue presented to the Court: whether the Court of Special Appeals erred by interpreting Maryland wage-and-hour laws to incorporate federal statutory exemptions into Maryland wage-and-hour law where the General Assembly did not expressly do so.

This is an important issue across the country that has a significant effect on the compensation of hourly employees in a wide range of workplaces. Numerous courts nationwide have considered the question of whether state legislatures have expanded the federal Portal-to-Portal Act exemption to limit the reach of state wage-and-hour laws and have held their legislatures' work should not be weakened in this manner.

The approach of the Circuit Court and the Court of Special Appeals conflicts with this caselaw and overrides the actions of two legislatures. First, it overrides the actions of Congress that explicitly tied the Portal-to-Portal Act exemption, 29 U.S.C. §§ 251 *et seq.*, to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and only to that statute, and drafted the FLSA to leave independent state-law remedies untouched. Second, it overrides the actions of the General Assembly in not writing into Maryland law a provision similar to the Portal-to-Portal Act and defeated its intent for the Maryland Wage and Hour Law, Md. Code Ann., Lab. & Empl. § 3–101 *et seq.*, and the Maryland Wage Payment and Collection Law, Md. Code Ann., Lab. & Empl. § 3–501 *et seq.,* to provide broader protections than under federal laws.

Accordingly, *amicus* urges the Court reverse the holding of the lower courts.

I. This Court Should Resist the Temptation to Yield to the "Gravitational Force" of Federal Law.

Although it is not uncommon for courts to look to federal law when interpreting analogous provisions of state law, *amicus* submits that is inappropriate here. Indeed, legal scholars have found that "states have routinely followed federal law even when adherence is not compelled." Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Penn. L. Rev. 703, 704 (2016). The result, in many cases, is an all too convenient substitution of

federal for state legislative purpose even where no federal preemption issue exists, and can lead to ever more similar, if not identical, federal and state legal systems, even where a state legislature deliberately drafted broader protections under state law. Not only does presumptive conformity with federal law compromise Justice Brandeis' conception of states' role as "laboratories of experimentation," it can undermine the legitimacy of state law and, ultimately, state sovereignty. *Id.* at 746-48 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Dodson's examination of state and federal employment discrimination laws reveals "egregious" cases in which courts have ignored significant differences between state and federal laws to remain in lockstep with federal precedent. *Id.* at 723. In one example, "California courts repeatedly interpreted [the state Fair Employment and Housing Act] the same as the [federal Americans with Disabilities Act]" despite a clear and broader definition of "disability" in the state law. *Id.* at 723.

This case asks the Court to reject the "gravitational force" of federal law by urging an interpretation that recognizes differences in the Maryland state law. As Dodson recognizes, "[S]lavishly following nonpreemptive federal law without considering state variables degrades both state law and state courts." *Id.* at 751. This is particularly true in the instant case where Maryland lawmakers diverged from the language of the federal Portal-to-

Portal Act in promulgating their own definition of "hours of work" and addressing travel time. *Compare* COMAR 09.12.41.10 *with* 29 U.S.C. § 254(a) *and* 29 C.F.R. § 785.38.

Further, as scholars have noted, "[i]nterpreting state statutes in tandem with federal law creates state regimes that are unmoored from their statutory language and ignores key differences between federal and state protections." Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 Geo. Mason L. Rev. 545, 546 (2013). The interpretations of the lower courts in this case ignored important differences between the Maryland state law and the federal law. Consistent with the Supreme Court's recent reaffirmation of the doctrine of dual sovereignty in the criminal law context, there is no requirement for state wage-and-hour enforcement to move in lockstep with that of the federal system. *See Gamble v. United States*, 139 S. Ct. 1960 (2019). In fact, the FLSA itself contains a "savings clause," permitting federal, state, or local laws that provide more generous standards or remedies to coexist alongside the FLSA. 29 U.S.C. § 218(a); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49 (1974) ("The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.").

And, as described in the next sections, there is strong basis for this Court to reject the "gravitational force" of federal law and refuse to incorporate the Portal-to-Portal Act into Maryland state wage laws.

II. Trends in Caselaw Relating to Incorporation of the Federal Portal-to-Portal Act.

The question in the instant appeal turns on whether the Maryland General Assembly intended to incorporate the federal Portal-to-Portal Act into the state's wage laws. As the Supreme Court explained, the Portal-to-Portal Act amends the federal Fair Labor Standards Act ("FLSA"), but it "does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005). Rather, as the Sixth Circuit recently noted, "the Portal-to-Portal Act excludes some 'work' from its bucket of what is compensable activity, but that does not mean it is not 'work.'" *Busk v. Integrity Staffing Solutions, Inc.*, 905 F.3d 387, 400 (6th Cir. 2018).

Many state wage-and-hour laws modeled on the FLSA have neither expressly adopted nor expressly rejected the Portal-to-Portal Act amendments. Since 2017, federal courts have examined five states' wage-and-hour laws to determine whether those states have incorporated the Portal-to-Portal Act. This recent caselaw sheds light on the statutory analysis and current trends in addressing the very question presented in the instant

petition. Taken as a whole, these decisions support a persuasive argument that the Circuit Court and Court of Special Appeals erred in incorporating the Portal-to-Portal Act into Maryland wage-and-hour laws.

A. Recent Caselaw Declining to Extend the Portal-to-Portal Act to Lessen State-Law Protections

The courts have recently rejected arguments to incorporate the Portal-to-Portal Act into four state wage-and-hour laws. As described below, these decisions turned on the absences of clear legislative intent to incorporate the Portal-to-Portal Act, as is the case with both the Maryland Wage and Hour Law and the Maryland Wage Payment and Collection Law.

1. Nevada

As an initial matter, the U.S. Court of Appeals for the Sixth Circuit concluded that "Nevada law incorporates the federal definition of work." *Busk*, 905 F.3d at 401.[1] Even so, the Court found that "[a]bsent any affirmative indication that the Nevada legislature intended to adopt the Portal-to-Portal Act, there is no reason to assume that it did." *Id.* at 402. Nevada law contains "no 'portal-to-portal like' statutes, regulations, or constitutional amendments." *Id.* at 403. A statute providing pay for travel,

[1] In *Busk*, the Sixth Circuit analyzed the incorporation of the Portal-to-Portal Act into both Nevada and Arizona law. The case involved a class action comprised of hourly employees at Defendants' warehouses in Nevada and Arizona. *Busk*, 905 F.3d at 391. The Sixth Circuit heard the case as part of an appeal from multi-district litigation assigned to the U.S. District Court for the Western District of Kentucky.

except time spent traveling between work and home, "omits any reference to 'preliminary' and 'postliminary' activities" covered by the Portal-to-Portal Act. *Id.* Further, several Nevada laws requiring "pay . . . for each hour the employee works" conflict with the Portal-to-Portal Act's exclusion of certain work from compensation. *Id.* Finally, "the Nevada legislature expressly included references to federal regulations in multiple parts" of the state's wage laws. *Id.* This suggests that "its failure to adopt others was intentional." *Id.* Accordingly, the Court concluded, "because there is no reason to believe that the Nevada legislature intended to adopt the Portal-to-Portal Act, we are reluctant to infer an entirely unsupported legislative intent." *Id.* at 404.

2. Arizona

Similarly, the Sixth Circuit turned to the FLSA and federal caselaw in interpreting the meaning of "work" under Arizona law. *Id.* at 401-02. Despite this reliance on federal law to address the question of whether a particular activity is "work," the Sixth Circuit again noted "there is no evidence that the Arizona legislature adopted the [Portal-to-Portal] Act." *Id.* at 404. In fact, several Arizona laws and regulations conflict with the Portal-to-Portal Act by providing that wages "shall be paid for all hours worked." *Id.* (quoting Ariz. Admin. Code R20-5-1206(A)). The Sixth Circuit noted that this language "strongly suggests that Arizona law is more inclusive than the Portal-to-Portal Act in the types of work it compensates." *Id.* at 405. Thus, as with the

Nevada law, the Sixth Circuit found "nothing to suggest that the Arizona legislature intended to adopt the federal Portal-to-Portal Act," and it "refuse[d] to read-in such a significant statute by inference or implication." *Id.*

3. New Jersey

As with Nevada and Arizona, the New Jersey wage-and-hour law is "modeled after the FLSA." "The WHL and its federal counterpart, the FLSA, reflect similar policies . . . . The state and federal statutes, however, are not identical, and New Jersey's wage-and-hour law has occasionally diverged from the federal wage-and-hour law in specific respects." *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 583, 243 A.3d 633, 642 (2021); *see also Vaccaro v. Amazon.com.dedc LLC*, Civ. No. 18-11852 (FLW), 2020 WL 3496973, at *2 (D.N.J. June 29, 2020). Accordingly, courts interpreting New Jersey law "may look to the analogous federal statute and regulations thereunder for guidance." *Vaccaro*, 2020 WL 3496973, at *2. Nevertheless, the federal district court concluded that the New Jersey law "does not incorporate the federal Portal-to-Portal Act." *Id.* at *3. It reasoned that the New Jersey wage-and-hour law "expressly refer[s] to specific provisions of the FLSA and its regulations, yet . . . do[es] not cite to the section of the FLSA that was amended by the Portal-to-Portal Act." *Id.* at *6. In addition, provisions of the

New Jersey law requiring "pay . . . for at least one hour on any day that the employee reports for duty" conflict with the Portal-to-Portal Act. *Id.*

4. Pennsylvania

Following a federal district court decision to read the Portal-to-Portal Act provisions into Pennsylvania wage-and-hour law, the Sixth Circuit certified this question to the Pennsylvania Supreme Court.[2] *Heimbach v. Amazon.com, Inc.*, 942 F.3d 297, 301-304 (6th Cir. 2019) (certifying questions of law to the state supreme court).

In considering the question, the Pennsylvania Supreme Court noted "Pennsylvania has never statutorily adopted the federal [Portal-to-Portal Act's] specific classification of certain employee activities as being exempt from compensation." *In re Amazon.com, Inc.*, ---Pa. ---, 255 A.3d 191, 201 (Pa. 2021). The court found the underlying policy of the Portal-to-Portal Act conflicts with Pennsylvania's "strong public policy protecting an employee's right to be adequately compensated for all hours for which they work." *Id.* at 200. Moreover, the state law explicitly provides for minimum wages for "all hours worked." *Id.* at 202-03 (citing 43 Pa. Stat. § 333.104(a)). Regulations further define "hours worked" broadly and in direct conflict with the Portal-

[2] This case is part of a multi-district litigation involving wage-and-hour claims at Amazon fulfillment centers, which was assigned to the U.S. District Court for the Western District of Kentucky. *Heimbach v. Amazon.com, Inc.*, No. 3:14-cv-204-DJH, 2018 WL 4148856 (W.D. Ky. Aug. 30, 2018).

to-Portal Act. *Id.* at 203 (citing 34 Pa. Code. § 231.1). As such, the court rejected the federal court's interpretation and declined to "judicially engraft [the Portal-to-Portal] provisions" to the state wage-and-hour law. *Id.* at 202. The Sixth Circuit then vacated the district court's judgment and remanded for further proceedings in light of the Pennsylvania Supreme Court's decision. *In re: Amazon.Com, Inc.*, 856 F. Appx. 42, 43 (6th Cir. 2021).

B. Recent Caselaw Incorporating the Portal-to-Portal Act

In contrast, just one court recently incorporated the Portal-to-Portal Act into the Kentucky wage-and-hour law. As described herein, that court relied on the statute's use of key terms in the federal law and, in direct contrast to the Nevada, Arizona, New Jersey, and Pennsylvania cases, interpreted the absence of evidence of legislative intent to support incorporation.

As with other states with wage-and-hour laws parallel to the FLSA, Kentucky "looks to federal precedent for interpretive guidance." *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 610 (6th Cir. 2017). Kentucky courts generally follow federal precedent except where there is a "distinct structural difference" between the federal law and the state law. *See City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n*, 212 S.W.3d 89, 92 (Ky. 2006). In other words, as the Sixth Circuit noted, the Kentucky wage-and-hour law will be interpreted differently than the FLSA where there is "an express

affirmative departure from the FLSA." *Vance*, 852 F.3d at 611 (emphasis in original).

With regard to the Portal-to-Portal Act, which the Kentucky legislature has not expressly incorporated, the Sixth Circuit recognized no "affirmative departure," only "a departure by omission." *Id.* Because Kentucky adopted its wage-and-hour law nearly three decades after the Portal-to-Portal Act, it cannot be assumed that "the legislature meant anything" by failing to expressly incorporate that law. *Id.* at 612. Rather, pursuant to state-law precedent, the Sixth Circuit held that "'absent a clear indication that the General Assembly considered the revision and deliberately rejected it,' we cannot conclude that the lack of Portal-to-Portal Act language demonstrates legislative intent to exclude its compensation limits from Kentucky's wage and hour laws." *Id.* (quoting *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 560 (Ky. 2011)).

Further, the Sixth Circuit noted that Kentucky's implementing regulations included "the Portal-to-Portal Act's exemptions [as] part of [the] framework." *Id.* at 613. Notably, the regulations adopt "the phrase and concept of a 'principal activity'" from the Portal-to-Portal Act, using language identical to the federal regulations. *Id.* (citing 803 Ky. Admin. Regs. 1:065(7)). As such, the Sixth Circuit found that the Kentucky wage-and-hour law

"incorporates the Portal-to-Portal Act's compensation limits on preliminary and postliminary activities." *Id.* at 615.

III. Maryland Courts Should Decline to Incorporate the Portal-to-Portal Act.

As in other states, Maryland courts interpret state law by seeking "to extract and effectuate the actual intent of the Legislature in enacting the statute." *Goshen Run Homeowners Assoc., Inc. v. Cisneros*, 467 Md. 74, 107 (2020) (quoting *Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 26 (2007)). Even recognizing some inconsistencies in how other courts have analyzed whether state laws incorporate the Portal-to-Portal Act, there is clear reason for this Court to conclude that the legislature did not intend to incorporate that law.

A. Regulations Under the Maryland Wage and Hour Law Incorporate Some Federal FLSA Regulations, But Do Not Incorporate the Portal-to-Portal Act.

First, the Maryland regulations implementing the Maryland Wage and Hour Law reference the federal FLSA regulations in several sections. *See, e.g.*, COMAR 09.12.41.01; 09.12.41.05; 09.12.41.17; 09.12.41.24. However, just as in Nevada and New Jersey, the Maryland regulations fail to reference the portion of the federal regulations implementing the Portal-to-Portal Act. This Court has "long applied the principle of statutory construction, '*expressio unius est exclusio alterius*'—the expression of one thing is the exclusion of another." *Baltimore Harbor Charter Ltd. v. Ayd*, 365 Md. 366, 385 (2001)

(applying this principle in interpreting the Maryland Wage and Hour Law). Accordingly, consistent with other cases cited, the fact that Maryland "expressly adopted some federal regulations indicates that its failure to adopt others was intentional." *Busk*, 905 F.3d at 403; *see also Vaccaro*, 2020 WL 3496973, at *6.

B. The Maryland Wage and Hour Law Uses Distinct Language to Create a Broader Scope of Compensable Work.

Second, the language of the Maryland Wage and Hour Law and its implementing regulations do not "mirror" the federal law. The federal law *excludes* "traveling to and from the actual place of performance of the principal activity" and activities "preliminary to or postliminary to" the principal activity from compensable time. 29 U.S.C. § 254(a). By contrast, the Maryland wage-and-hour regulations *include* in "hours of work" certain travel time, including if an employee: "(1) Travels during regular work hours; (2) Travels from one worksite to another; or (3) Is called out after work hours in emergency situations." COMAR 09.12.41.10. Similar to the Nevada law, the Maryland regulations "omit[] any reference to 'preliminary' and 'postliminary' activities" covered by the Portal-to-Portal Act. *See Busk*, 905 F.3d at 403. Moreover, in contrast to the Kentucky law, the Maryland law includes no reference to "principal activity," a key phrase in the federal law. *Compare* COMAR 09.12.41.10 *with* 803 Ky. Admin. Regs. 1:065(7).

It is true, of course, that the Maryland regulations address the same *issue* as the federal law, i.e., the compensability of certain travel time. However, the Maryland law departs from federal law by using different terminology, thereby creating a broader scope of compensable travel time. Like the Pennsylvania law, the Maryland law includes "travel[] during regular work hours" in "hours of work" without regard to whether or how the travel relates to the "performance of the principal activity." This indicates the legislature's intent to define compensable "work" more broadly than under the federal statute. Further, Maryland regulations include "travel[] from one worksite to another" with no requirement that an employee perform his "principal activity" at the worksites. Thus, unlike federal law, the Maryland law requires that time from the moment an employee reports to a location at the direction of his employer be included in that employee's "hours of work." This is reason to find that extension of the Portal-to-Portal Act to weaken the Maryland wage laws is inappropriate.

C. This Court's Prior Caselaw Supports Declining to Incorporate the Federal Portal-to-Portal Act.

Finally, though it is undeniable that Maryland courts have sometimes acceded to the "gravitational pull" of federal law in interpreting analogous state law, there is support in this state's decisional law for the Court to take a different path. Indeed, in some circumstances, the Maryland courts have

held a strict line against incorporating parallel federal provisions. For example, this Court rejected incorporation of the federal Internal Revenue Code into Maryland tax law where the two "are not exactly comparable." *Lyon v. Campbell*, 324 Md. 178, 185 (1991). In *Lyon*, the Court considered whether the "right to contribution exists between persons jointly obligated under [Maryland tax law]." *Id.* at 181. A similar provision of federal law does not provide a right to contribution. *Id.* at 185. However, the Court found that the state law provision merely "address[ed] the same subject" as the federal law. *Id.* "Importantly, the General Assembly could have, but did not, incorporate the language of [the federal law] in [the state law]. *Id.* at 186.[3] Thus, contrary to federal tax law, this Court recognized that a right to contribution does exist under Maryland tax law.

The question of incorporation of federal law presented in the instant petition requires interpretation in line with *Lyon*. As described above, the state wage law "addresses the same subject" as the Portal-to-Portal Act. Yet, neither the Maryland state legislature nor the drafters of the implementing regulations incorporated into Maryland law the language and scheme set

[3] This holding rejecting federal incorporation is all the more notable given another provision in Maryland tax law that directs that "the Comptroller shall apply the administrative and judicial interpretations of the federal income tax law to the administration of the income tax laws of this State." Md. Code, Tax-Gen. § 10-107.

forth in the federal law. Accordingly, there is no indication that the Maryland Wage and Hour Law incorporates the federal Portal-to-Portal Act.

CONCLUSION

In light of the statutory interpretation, the Court must reject the gravitational pull of federal law where the state legislature intended a different result. In the context of recent caselaw analyzing other state wage-and-hour laws, this Court has substantial grounds to reject incorporation of federal law where the state legislature did not intend it. The Court should reverse the ruling of the lower courts.

Dated: September 27, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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1. This brief contains 3,415 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2021, I mailed first class, postage prepaid, two copies of the foregoing *Amicus* Brief to:

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