No. 15-1691

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JORGE AMAYA, ET AL.,

Plaintiffs-Appellants,

v.

POWER DESIGN, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants. For the reasons set forth below, the district court erred in concluding that Jorge Amaya and other electrical construction workers could not sue for violations of the Fair Labor Standards Act ("FLSA") because they performed work

under a federal government contract covered by the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act ("CWHSSA").

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary has a strong interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. The Secretary also administers and enforces the Davis-Bacon Act and CWHSSA, as well as the other government contract labor statutes. See Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 40 U.S.C. 3703(e)(1); 41 U.S.C. 6506; 41 U.S.C. 6707. The Secretary's longstanding position is that the FLSA, the Davis-Bacon Act, and CWHSSA may apply concurrently to workers performing under federal government construction contracts.

STATEMENT OF THE ISSUE

Whether the district court erred when it ruled that electrical construction workers could not sue for violations of the FLSA because they performed work under a federal government contract covered by the Davis-Bacon Act and CWHSSA.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Davis-Bacon Act, CWHSSA, and Other Government Contract Labor Statutes

The Davis-Bacon Act, 40 U.S.C. 3141, et seq., along with the Walsh-Healey Public Contracts Act ("Walsh-Healey Act"), 41 U.S.C. 6501, et seq., and the McNamara-O'Hara Service Contract Act ("Service Contract Act"), 41 U.S.C. 6701, et seq., sets wage standards for workers performing work under contracts with the United States Government. The Davis-Bacon Act, enacted in 1931, applies specifically to federal construction contracts. See Pub. L. No. 71-798, 46 Stat. 1494 (1931); 40 U.S.C. 3142(a). The Walsh-Healey Act, enacted in 1936, and the Service Contract Act, enacted in 1965, apply to contracts for goods and services, respectively. See Pub. L. No. 74-846, 49 Stat. 2036 (1936); 41 U.S.C. 6502; Pub. L. No. 89-286, 79 Stat. 1034 (1965); 41 U.S.C. 6702.

These statutes require that federal government contracts exceeding a prescribed dollar amount contain a clause stipulating that the contractor will pay workers wages at least equal to those determined by the Secretary of Labor based on locally prevailing rates. See 40 U.S.C. 3142(a)-(c) (Davis-Bacon Act); 41 U.S.C. 6502(1) (Walsh-Healey Act); 41 U.S.C. 6702(a), 6703(1) (Service Contract Act). For contracts covered by the Davis-Bacon Act or the Service Contract Act, the prevailing rate includes both an hourly wage and a fringe benefit component.

See 40 U.S.C. 3141(2)(B); 41 U.S.C. 6703(2). As an illustration, the Secretary determined that the prevailing hourly wage for electricians on building projects in Montgomery County, Maryland in early 2010 was $37.60 plus fringe benefits equal to $12.28 per hour. JA A230-A231.

CWHSSA, a companion government contract labor statute enacted in 1962, provides overtime protection to workers under some, but not all, government contracts covered by the Davis-Bacon Act or the Service Contract Act. See Pub. L. No. 87-581, 76 Stat. 357 (1962); 48 C.F.R. 22.305.[1] CWHSSA mandates that contractors pay workers at a rate not less than one and one-half times their "basic rate of pay" for each hour of work over forty hours per week. See 40 U.S.C. 3702(a). The Walsh-Healey Act also establishes a forty-hour workweek and at least a time and one-half pay premium when workers put in overtime. See 41 U.S.C. 6502(2); 41 U.S.C. 6508(d). Although the Davis-Bacon Act does not itself provide overtime protection, it specifies how to compute the "regular or basic hourly rate of pay" for deriving overtime premiums under "any federal law" for

[1] With some exceptions, CWHSSA generally applies to Davis-Bacon Act and Service Contract Act contracts in excess of $150,000 that are subject to Federal Acquisition Regulation ("FAR") procurement, and Service Contract Act contracts in excess of $100,000 that are not subject to FAR procurement. See 40 U.S.C. 3701; 48 C.F.R. 22.305; U.S. Dep't of Labor, Wage & Hour Div., Prevailing Wage Resource Book ("PWRB"), Tab 3 at 16 (May 2015), available at http://www.dol.gov/whd/recovery/pwrb/toc.htm.

workers on contracts covered by the Act. See 40 U.S.C. 3142(e). The Service Contract Act contains a similar provision. See 41 U.S.C. 6707(e).

If a contractor fails to pay the wages required by the Davis-Bacon Act, CWHSSA, or another government contract labor law, the statutes authorize the federal government to withhold its payments due under the contract. See 40 U.S.C. 3142(c)(3); 41 U.S.C. 6503(d); 41 U.S.C. 6705(b); 40 U.S.C. 3703(b). The Secretary uses the withheld funds to pay workers their unpaid compensation. See 40 U.S.C. 3144(a)(1); 41 U.S.C. 6503(e); 41 U.S.C. 6705(b); 40 U.S.C. 3702(d). In addition, contractors who violate the Davis-Bacon Act or another government contract labor statute may, in certain circumstances, be debarred from receiving federal government contracts for a period of three years. See 40 U.S.C. 3144(b); 41 U.S.C. 6504; 41 U.S.C. 6706; 29 C.F.R. 5.12. To determine violations of the Davis-Bacon Act, CWHSSA, and other government contract labor statutes, the Secretary may hold administrative fact-finding hearings. See 29 C.F.R. 5.11(b) (setting forth the administrative procedures under the Davis-Bacon Act and CWHSSA); 41 U.S.C. 6507(b) (Walsh-Healey Act); 29 C.F.R. 4.189 (Service Contract Act). The Secretary's final administrative action is subject to judicial review under the Administrative Procedure Act. See 5 U.S.C. 702.

Some courts of appeals have held that workers do not have an implied right of private action under the Davis-Bacon Act or other government contract labor

statutes. See, e.g., Duran-Quezada v. Clark Constr. Grp., LLC, 582 F. App'x 238, 239 (4th Cir. 2014) (unpublished) (Davis-Bacon Act); Lee v. Flightsafety Servs. Corp., 20 F.3d 428, 431 (11th Cir. 1994) (Service Contract Act); Miscellaneous Serv. Workers, Drivers & Helpers, Teamsters Local No. 427 v. Philco-Ford Corp., WDL Div., 661 F.2d 776, 781 (9th Cir. 1981) (Service Contract Act); U.S. ex rel. Glynn v. Capeletti Bros., 621 F.2d 1309, 1316-17 (5th Cir. 1980) (Davis-Bacon Act); United States v. Lovknit Mfg., 189 F.2d 454, 457 (5th Cir. 1951) (Walsh-Healey Act); see also Univs. Research Ass'n v. Coutu, 450 U.S. 754, 769-70, 784 (1981) (holding that the Davis-Bacon Act does not create an implied private right of action where a contract does not contain Davis-Bacon Act specifications, but declining to decide whether the Davis-Bacon Act "creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations"); but see McDaniel v. Univ. of Chicago, 548 F.2d 689, 695 (7th Cir. 1977) ("[W]e hold that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute.").

2. The FLSA

A few years after it passed the Davis-Bacon Act and the Walsh-Healey Act, Congress enacted the FLSA, 29 U.S.C. 201, et seq. See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938). The FLSA is "not restricted to public contracts," but presents "a different and broader approach." Powell v. U.S.

Cartridge Co., 339 U.S. 497, 516 (1950). The Act "was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.'" A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934). Subject to certain express exemptions, the FLSA applies to every employee individually engaged in interstate commerce and, as amended, to every employee of an enterprise engaged in interstate commerce that does business of at least $500,000 annually. See 29 U.S.C. 206(a); 29 U.S.C. 207(a); 29 U.S.C. 203(s)(1); see also 29 U.S.C. 213 (delineating exemptions); Pub. L. No. 101-157, § 3, 103 Stat. 938, 938 (1989) (establishing enterprise coverage in its current form).

The FLSA establishes a national statutory minimum wage for all covered employees (currently $7.25 per hour). See 29 U.S.C. 206(a)(1). It also requires employers to pay covered employees an overtime premium of not less than one and one-half times their "regular rate" of pay for all hours worked over forty hours in a workweek. See 29 U.S.C. 207(a)(1).

When an employer violates an employee's FLSA rights, the employee may file a private suit in federal or state court for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs. See 29 U.S.C. 216(b). The FLSA also authorizes the Secretary of Labor to investigate violations and bring suit in federal district court for back wages and liquidated damages. See 29

U.S.C. 211; 29 U.S.C. 216(c). In addition, the Secretary may seek both restitutionary and permanent prospective injunctive relief. See 29 U.S.C. 211(a); 29 U.S.C. 217.

B. Factual Background[2]

Defendant Power Design, Inc. ("Power Design") is an electrical contractor. JA A16, ¶2. In 2011, Power Design entered into a subcontract to provide electrical work at the National Naval Medical Center in Bethesda, Maryland ("Navy Medical Center"). JA A205-A206, ¶¶3-4. Power Design's contract incorporated a CWHSSA clause, prohibiting it from engaging workers for work over forty hours per week without paying an overtime premium of at least one and one-half times their basic rate of pay. JA A212. The subcontract also incorporated by reference a Davis-Bacon Act clause. JA A210-A211.

Jorge Amaya, Miguel Martinez, Carlos Real, Jamie Zubieta, Jose Sanabria, Donaciano Cruz, and other plaintiffs in this action worked for Power Design as electrical construction workers on the Navy Medical Center project. JA A18-A21, ¶¶11-12, 16-17, 21-22, 26-27, 31-32, 36-37. Two other entities served as a pass-through for the wages Power Design paid the electrical construction workers. JA A24-A27, ¶¶62-64, 73-75, 92. Amaya and the other electrical construction

[2] The Statement of Undisputed Facts in Power Design's motion for summary judgment draws from facts alleged in Plaintiffs' Complaint and from a Declaration and accompanying Exhibits submitted in support of Power Design's motion. This Factual Background is based on the same documents.

workers routinely worked more than forty hours per week. JA A27, ¶91. Power Design, however, failed to pay the electrical construction workers premium pay at one and one-half times their regular hourly rate when they worked overtime. JA A27-A28, ¶¶93, 100. Power Design also failed to pay the electrical construction workers for work performed prior to the beginning of their shift. JA A17, ¶4.

C. Procedural History and the District Court's Decision

On February 14, 2014, Amaya and the other electrical construction workers brought suit on behalf of themselves and other similarly-situated workers. JA A16. The workers sought to recover unpaid overtime wages and compensation for all time worked under the FLSA, and also brought claims under state law. Id.

Power Design moved for summary judgment. As to the employees' FLSA claims, Power Design argued that the Davis-Bacon Act and CWHSSA exclusively governed the work they performed under the Navy Medical Center contract and that those statutes did not permit a private right of action. JA A181-A185. In response, the workers argued that although some courts do not permit a private right of action under the Davis-Bacon Act or CWHSSA, this was irrelevant to their ability to pursue claims under the FLSA. JA A539-A541. The workers also asserted that they did not "seek overtime at Davis-Bacon rates," but rather unpaid compensation under the FLSA at one and one-half of the hourly rate Power Design actually paid them. Id.

The district court granted Power Design's motion for summary judgment. JA A611-A612. The court's two-page decision addresses the workers' FLSA claims in a single paragraph. JA A611. The district court held that the Navy Medical Center contract "was a federal one to which the Davis-Bacon Act and the Contract Work Hours [and] Safety Standards Act apply." Id. Noting that "[t]hose statutes do not provide a private right of action," the district court concluded that the workers could not "circumvent those statutes by bringing claims under the Fair Labor Standards Act." Id.

On May 28, 2015, the district court entered judgment in favor of Power Design. JA A613. The Plaintiffs timely filed this appeal on June 22, 2015. JA A614.

SUMMARY OF ARGUMENT

The Davis-Bacon Act and CWHSSA do not deprive workers on contracts covered by those statutes of their rights under the FLSA. In reaching the opposite conclusion, the district court disregarded decisions from the Supreme Court, the Fourth Circuit, and other courts of appeals holding that a government contract labor statute supplements but does not preclude FLSA coverage. Indeed, the district court's holding that CWHSSA prevents the electrical construction workers' FLSA claims is directly contrary to controlling Fourth Circuit precedent and, therefore, should be reversed by this Court.

The text, history, and purpose of the FLSA, the Davis-Bacon Act, and CWHSSA make clear that Congress intended that the statutes could apply concurrently. Neither the FLSA, the Davis-Bacon Act, nor CWHSSA, by its terms or by implication, forbids FLSA claims by workers performing under contracts covered by the Davis-Bacon Act or CWHSSA. The FLSA provides broad coverage for employees, and Congress has never included a carve-out for workers performing under government contracts despite establishing exemptions where different federal statutes govern workers' employment, as well as for many other specified reasons. The Davis-Bacon Act and CWHSSA likewise do not contain any language limiting the operation of the FLSA. To the contrary, in 1964 Congress added an overtime computation provision to the Davis-Bacon Act that specifically contemplates that workers on covered contracts may be entitled to overtime premium pay under the FLSA. Given the text and history of the statutes—and the fact that depriving workers of their rights under the FLSA on account of the Davis-Bacon Act or CWHSSA would be completely at odds with the remedial purposes of all three statutes—Congress could not have intended to preclude FLSA claims by workers under covered contracts.

The district court also failed to consider the Secretary's longstanding view that the FLSA, the Davis-Bacon Act, and CWHSSA may apply concurrently. As the agency responsible for administering all three statutes, the Secretary's

reasonable interpretation, which faithfully effectuates each, warrants deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The district court rested its decision solely on the erroneous notion that permitting the workers' FLSA claims to go forward would somehow "circumvent" the lack of a private action under the Davis-Bacon Act and CWHSSA. In so holding, the district court failed to recognize that the FLSA enacts substantive rights distinct from those established by the Davis-Bacon Act and CWHSSA. Although the three statutes may provide overlapping protection, this in no way means that the Davis-Bacon Act and CWHSSA preclude the workers from employing remedial provisions duly available to them under the FLSA to enforce their substantive rights under that Act.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT CONCLUDED THAT THE DAVIS-BACON ACT AND CWHSSA PRECLUDE WORKERS FROM ENFORCING THEIR RIGHTS UNDER THE FLSA

A. The district court disregarded Supreme Court and Fourth Circuit precedent holding that coverage under a government contract labor statute does not deprive workers of rights under the FLSA.

The Supreme Court, the Fourth Circuit, and several other courts of appeals have concluded that workers on contracts covered by a government contract labor statute may also be entitled to enforce their rights under the FLSA. See Powell v. U.S. Cartridge Co., 339 U.S. 497, 519-20 (1950); Lee v. Flightsafety Servs. Corp., 20 F.3d 428, 431 (11th Cir. 1994); Masters v. Md. Mgmt. Co., 493 F.2d 1329, 1332 (4th Cir. 1974); Mitchell v. Empire Gas Eng'g Co., 256 F.2d 781, 784-85 (5th Cir. 1958); Walling v. Patton-Tulley Transp. Co., 134 F.2d 945, 949 (6th Cir. 1943). In fact, controlling Fourth Circuit precedent holds that CWHSSA and the FLSA are not "mutually exclusive," and that the overtime provisions of these statutes do not conflict. See Masters, 493 F.2d at 1332-33.

1. More than a half-century ago, the Supreme Court in Powell held that coverage under a government contract labor statute does not displace FLSA rights. See 339 U.S. at 519-20. The plaintiffs in Powell, who worked on federal munitions contracts, brought suit under the FLSA. Id. at 498, 501, 503, 504. The munitions contractors argued that the FLSA did not apply because the Walsh-

Healey Act governed the work the employees performed under the contracts. Id. at 519-20. The Supreme Court disagreed. Id. The Court determined that the FLSA by its terms did not exempt workers covered by the Walsh-Healey Act, concluded that Congress intended the FLSA to overlap with "other federal legislation affecting labor standards," and saw no conflict between the two statutes. Powell, 339 U.S. at 516-20.

Because there was no indication that complying with one statute made it "impossible" for an employer "to comply with the other," the Supreme Court rejected the contractors' argument that the FLSA and Walsh-Healey "should be construed as being mutually exclusive." Powell, 339 U.S. at 519. In particular, the Court noted, an employer could determine "the respective wage requirements under each Act" and then apply "the higher requirement as satisfying both." Id. Moreover, the "overlapping effects" of the FLSA and the government contract labor statute allowed for their "supplementary use" to better protect workers, as a government contracting manual submitted to the Court demonstrated. Id. For example, the prevailing minimum wage determined by the Secretary under the Walsh-Healey Act would in "some, and probably most, instances" prove more advantageous to employees than the FLSA minimum wage. Id. At the same time, the FLSA's remedial procedure offered advantages for employees over the procedure provided by the government contract labor statute. Id. The Supreme

Court thus deemed the two statutes "mutually supplementary," rather than "mutually exclusive." Id. at 519-20. Accordingly, the Court held that Walsh-Healey Act coverage on federal government contracts "does not preclude the application of the Fair Labor Standards Act to employees under the same contracts." Id.

2. This Court has already extended the Supreme Court's holding in Powell to CWHSSA and the Service Contract Act, concluding that both are "mutually supplemental" to the FLSA. Masters, 493 F.2d at 1332. Under Masters, CWHSSA, the Service Contract Act, and the FLSA are not "mutually exclusive" of each other; rather, the provisions of each statute "may apply so far as they are not in conflict." Id. A "laborer is ordinarily entitled to be paid in accordance with the statutes requiring the greatest pay," but this does not mean that he or she loses the protection of the other statutes. Id. Masters further indicates that the FLSA and CWHSSA do not conflict because the method of calculating overtime premiums is identical under the two statutes: the "basic rate" upon which overtime premiums are computed under CWHSSA is "synonymous" with the "regular rate" upon which overtime premiums are computed under the FLSA. Id. at 1332-33. Masters is controlling precedent in the Fourth Circuit; it therefore should lead the panel in this case to reverse the district court's holding that CWHSSA precludes the electrical construction workers' FLSA claims.

3. It also logically follows from Powell, Masters, and persuasive appellate authority that the Davis-Bacon Act does not preclude the electrical construction workers' FLSA claims. See Mitchell, 256 F.2d at 784-85 (explaining that the Supreme Court's decision in Powell as to one government contract labor statute "fully answered" the question as to another).

As with the other government contract labor statutes, the Davis-Bacon Act and FLSA supplement rather than conflict with one another. Cf. POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). The FLSA provides for overtime protection and a national minimum wage. See 29 U.S.C. 206; 29 U.S.C. 207. The Davis-Bacon Act entitles workers to straight-time wages based on locally prevailing rates, which may be higher than the FLSA minimum wage. See 40 U.S.C. 3142. This is not a conflict. An employer can simply determine "the respective wage requirements under each Act" and then apply "the higher requirement as satisfying both." Powell, 339 U.S. at 519.

The Davis-Bacon Act and FLSA also complement each other with respect to enforcement. While the Secretary must secure a settlement or pursue an action in federal court before he can collect back wages under the FLSA, see 29 U.S.C.

216(c), the Davis-Bacon Act permits the government to withhold its contract payments when contractors or subcontractors violate the Act, see 40 U.S.C. 3142(c)(3). In addition, the Davis-Bacon Act provides a powerful incentive for compliance that the FLSA does not: the possibility of debarment from receiving federal contracts for a period of three years. See 40 U.S.C. 3144(b). At the same time, the FLSA expressly provides employees with a private right of action if the Secretary does not bring an enforcement proceeding. See 29 U.S.C. 216(b). As the case law makes clear, these differences are not conflicts. See Powell, 339 U.S. at 519; Lee, 20 F.3d at 431 ("It is possible that the FLSA may allow a private right of action even though the [Service Contract Act] does not. Such a difference between the two statutes is not a conflict.") (citations omitted). Rather the overall scheme "takes advantage of synergies among multiple methods of regulation" and "is quite consistent with the congressional design to enact two different statutes, each with its own mechanisms to enhance the protection" of the public. POM Wonderful, 134 S. Ct. at 2239 (in a different context, allowing claims by private parties under one statute when the government primarily enforced an overlapping statute).[3] The district court therefore erred when it treated the Davis-Bacon Act

[3] CWHSSA's administrative scheme also provides for withholding and debarment. See 40 U.S.C. 3703(b); 29 C.F.R. 5.12. Because of these enhanced enforcement tools, the Department's Prevailing Wage Resource Book advises that "where there are concurrent FLSA and CWHSSA violations," the Secretary generally enforces

and the FLSA as mutually exclusive, despite the decisions of the Supreme Court, this Court, and other courts of appeals.

B. The statutory text, history, and purpose of the FLSA, the Davis-Bacon Act, and CWHSSA confirm that Congress did not intend to preclude the electrical construction workers' FLSA claims.

The text, history, and purpose of the FLSA, the Davis-Bacon Act and CWHSSA manifest Congress's intent and support the case law indicating that these statutes may apply concurrently. Neither the FLSA, the Davis-Bacon Act, nor CWHSSA, by its terms or by implication, forbids FLSA claims by workers performing under contracts covered by the government contract labor statutes.

1. The FLSA's coverage provisions speak "in terms of substantial universality." Powell, 339 U.S. at 516-17. The Act provides that "[e]very employer" shall pay no less than the minimum wage "to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. 206(a) (emphases added). It also provides that, excepting expressly delineated exemptions, "no employer shall employ any" of these employees for more than forty hours per week without paying the overtime premium. 29 U.S.C. 207(a)(1) (emphases added). An "employee" under the Act, moreover, includes "any individual employed by an

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back wages under CWHSSA rather than the FLSA. See PWRB, Tab 3 at 15 (May 2015), available at http://www.dol.gov/whd/recovery/pwrb/toc.htm.

employer." 29 U.S.C. 203(e)(1) (emphasis added). As a result, the text of the FLSA's coverage provision is by its own terms "amply broad enough to include employees of private contractors working on public projects." Powell, 339 U.S. at 516-17.

The FLSA does not contain an exemption for workers covered under the Davis-Bacon Act or CWHSSA, even though it carves out more than two dozen other exemptions. See 29 U.S.C. 213 (setting forth exemptions ranging from an exemption for executive, administrative, and professional employees, to an overtime exemption for employees engaged in processing maple sap). Indeed, the FLSA exempts some workers from overtime protection based specifically on their coverage under the employment provisions of another statute. See 29 U.S.C. 213(b)(1) (employees with respect to whom the Secretary of Transportation has power to establish maximum hours of service pursuant to section 31502 of Title 49); 29 U.S.C. 213(b)(3) (employees of air carriers subject to title II of the Railway Labor Act). This detailed scheme of specific, narrowly targeted exemptions "strengthens the implication that employees not thus exempted, such as employees of private contractors under public contracts, remain within the Act." Powell, 339 U.S. at 517.

2. Nothing in the Davis-Bacon Act limits the operation of the FLSA. Quite the opposite. In 1964, Congress adopted an amendment to the Davis-Bacon Act

which specifically contemplates that workers on covered contracts may be entitled to overtime premium pay under the FLSA. See Pub. L. No. 88-349, 78 Stat. 238, 239 (1964).

The "Overtime pay" computation provision of the Davis-Bacon Act excludes fringe benefits from the base rate for computing overtime premium pay under other federal laws. It provides in relevant part:

> In determining the overtime pay to which a laborer or mechanic is entitled under any federal law, the regular or basic hourly rate of pay . . . is deemed to be . . . [the prevailing wage determined by the Secretary under the Davis-Bacon Act minus fringe benefits] except . . . where the amount of payments, contributions, or costs incurred . . . exceeds the applicable prevailing wage . . . .

40 U.S.C. 3142(e) (emphasis added). The sweeping text of this provision—referring to "any federal law" providing overtime benefits—surely encompasses the FLSA as well as government contract labor overtime laws. Indeed, the Senate Committee Report accompanying the legislation describes the "existing Federal laws" under which overtime might be computed to include the FLSA, along with CWHSSA and the Walsh-Healey Act. See S. Rep. No. 88-963 (1964), reprinted in 1964 U.S.C.C.A.N. 2339, 2345 & n.1 (illustrating how the computation provision would operate and noting that the outcome would be the same under each of the "existing Federal laws," including the FLSA).

That Congress meant to include the FLSA in the Davis-Bacon Act overtime computation provision is further underscored by Congress's choice of the hybrid phrase "regular or basic hourly rate." 40 U.S.C. 3142(e). CWHSSA and the Walsh-Healey Act refer to a "basic rate" or "basic hourly rate" of pay used to determine the overtime premium. 40 U.S.C. 3702(a) (CWHSSA) (referring to the "basic rate"); 41 U.S.C. 6508(d) (Walsh-Healey Act) (referring to the "basic hourly rate"). The FLSA, meanwhile, speaks of a "regular rate." 29 U.S.C. 207(a)(1) (referring to the "regular rate"). Congress's use of the blended term "regular or basic hourly rate" reflects its understanding that workers on Davis-Bacon Act contracts might also enjoy overtime protections under the FLSA. Far from depriving employees of FLSA rights, therefore, the Davis-Bacon Act clearly contemplates that the FLSA's overtime protections would complement the prevailing wage protections provided by the Davis-Bacon Act.

3. Likewise, nothing in CWHSSA indicates that Congress intended to displace FLSA protections for workers performing under federal government construction contracts (even if Masters were not controlling in this case). See 40 U.S.C. 3701, et seq. To the contrary, the Senate and House Committee reports accompanying CWHSSA's passage reveal that Congress intended the Act to supplement the FLSA, which had then been in existence for more than twenty years. See S. Rep. No. 87-1722, at 2 (1962), reprinted in 1962 U.S.C.C.A.N. 2121,

2122 (referring to the "wage and hour law" for work connected with interstate commerce); H.R. Rep. No. 87-1553, at 3 (1962) (same). Indeed, a chief objection of those opposed to the passage of CWHSSA was that some contractors would be subject to enforcement under both statutes. See S. Rep. No. 87-1722, at 18, reprinted in 1962 U.S.C.C.A.N. at 2133 (Minority Views of Sens. Barry Goldwater and John Tower) (noting that the FLSA already subjected "much of the construction industry" to its forty-hour week overtime provision, and that if CWHSSA passed, "many contractors may well find themselves governed by several different legislative standards and enforcement procedures applicable to the same conduct").[4]

4. The district court's conclusion that the Davis-Bacon Act and CWHSSA govern workers to the exclusion of the FLSA also runs counter to the purpose of all three statutes. The FLSA is a remedial statute aimed at eliminating working conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a)-(b). The Davis-Bacon Act and CWHSSA are likewise remedial worker-protection statutes "designed for the benefit of construction workers," not

[4] Although CWHSSA and the FLSA provide overlapping overtime protections, CWHSSA reaches some distinct cases from the FLSA. For example, where workers on federal construction contracts are independent contractors rather than employees, CWHSSA applies but the FLSA does not. See 29 U.S.C. 203(d)-(e)(1),(g) (requiring an employment relationship for coverage under the FLSA).

contractors. United States v. Binghamton Constr. Co., 347 U.S. 171, 177-78 (1954) (describing the Davis-Bacon Act). It makes no sense to conclude that Congress intended the Davis-Bacon Act or CWHSSA to deprive those construction workers of their basic employee rights provided by the FLSA.

Furthermore, some workers performing under Davis-Bacon Act contracts are not covered by CWHSSA, and thus the FLSA is their only source of federal overtime protection. For example, while the Davis-Bacon Act applies to contracts in excess of $2,000, CWHSSA limits its coverage to contracts in excess of $100,000. Compare 40 U.S.C. 3142 (Davis-Bacon Act) with 40 U.S.C. 3701(b)(3)(A)(iii) (CWHSSA). Where the Davis-Bacon Act applies, but CWHSSA does not, there is no reason why a contractor for the government should be allowed to have employees work more than forty hours a week without premium pay, while private contractors are prohibited by the FLSA from doing so. Such a limitation would seriously undermine the FLSA's goals of ending "overwork" and "underpay" for working men and women. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981).

C. The district court erred by failing to defer to the Secretary's longstanding position that the Davis-Bacon Act, CWHSSA, and the FLSA may apply concurrently.

The Department has consistently espoused the view that the Davis-Bacon Act, CWHSSA, and the FLSA may apply concurrently to workers on federal

government construction contracts. As far back as 1962, the Acting Administrator of the Wage and Hour Division stated that where "a project is covered by the Davis-Bacon Act and the [precursor to CWHSSA],[5] it may very well also be covered by the 40-hour-per-week standard of the Fair Labor Standards Act." U.S. Dep't of Labor, Wage-Hour Opinion Letter No. 99 [1961-1966], Lab. L. Rep. (CCH) ¶ 30,638 (May 9, 1962).

Just three years later, the Secretary published in the Federal Register a bulletin construing the FLSA and setting forth the Department's position that the Davis-Bacon Act and FLSA may apply concurrently. See 30 Fed. Reg. 1076, 1077 (Feb. 2, 1965) (codified at 29 C.F.R. 778.6). A provision describing the effect of the Davis-Bacon Act on the FLSA explains that

> [l]aborers and mechanics performing work subject to such predetermined minimum wages [under the Davis-Bacon Act] may, if they work overtime, be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act.

29 C.F.R. 778.6; see also U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook Ch. 15, ¶ 15k11(d) (2010) (containing identical language), available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf.

[5] CWHSSA consolidated the "Eight-Hour Laws," and originally provided for overtime pay after eight hours a day, as well as overtime pay after forty hours a week. See S. Rep. No. 87-1722, at 2, reprinted in 1962 U.S.C.C.A.N. at 2121.

Since 1964, moreover, the Secretary has also interpreted the phrase "any federal law" in the Davis-Bacon Act's overtime computation provision such that workers on Davis-Bacon Act covered contracts may be entitled to overtime premium pay under the FLSA. 29 Fed. Reg. 13,462, 13,467 (Sept. 30, 1964). The Secretary's interpretation, codified in the Code of Federal Regulations, explains that the Davis-Bacon Act's overtime computation provision excludes fringe benefits "in the computation of overtime under the Fair Labor Standards Act" when the overtime provisions of the FLSA "apply concurrently with the Davis–Bacon Act." 29 C.F.R. 5.32(a) (emphasis added).

The Department has also articulated its position that the FLSA, the Davis-Bacon Act, and CWHSSA may apply concurrently in the Prevailing Wage Resource Book, a document it produces for federal government contract procurement personnel and others whose responsibilities involve government contract labor statutes. See U.S. Dep't of Labor, Wage & Hour Div., Prevailing Wage Resource Book ("PWRB"), Tab 1 (May 2015), available at http://www.dol.gov/whd/recovery/pwrb/toc.htm. The introductory chapter, in a provision titled "Important FLSA Rules for Government Contracts," states that

> [t]he minimum wage and/or overtime pay requirements of the FLSA may apply along with the wage and fringe benefit and overtime pay requirements of the government contract laws discussed in this reference book.

PWRB, Tab 3 at 12. A subsequent chapter specifically discussing overtime pay on Davis-Bacon Act contracts includes a section titled "Application of FLSA overtime pay requirements to workers employed on [Davis-Bacon Act] contracts," and states that the FLSA's overtime requirements may apply, including on contracts to which CWHSSA applies. See PWRB, Tab 10 at 4.

As the agency charged with administering the FLSA, the Davis-Bacon Act, and CWHSSA, the Department's longstanding interpretation reflected in these guidance documents is entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Skidmore deference is especially warranted here because the Secretary has held these views for approximately half of a century, a length of time that "suggests that they reflect careful consideration." Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011) (deferring under Skidmore to the Secretary's interpretation of the FLSA). Moreover, the Secretary's position that workers retain their rights under the FLSA even when the Davis-Bacon Act or CWHSSA applies is "consistent" with all three statutes. Id. It is also "reasonable." Id. Given the shared goal of the FLSA, the Davis-Bacon Act, and CWHSSA to protect workers, it would be counterproductive to construe the government contract labor statutes as operating to deprive workers of their rights under the broader worker protection of the FLSA. Nor does it make any

sense to hold entities that do business with the government to a lower standard than other employers.

D. Because the electrical construction workers seek to enforce their substantive rights under the FLSA through the remedial provisions of the FLSA, the district court erred when it held that their claims would improperly circumvent the Davis-Bacon Act and CWHSSA.

The workers in this case do not attempt an "end run" around a lack of a private right of action under the Davis-Bacon Act or CWHSSA, but seek to employ remedial provisions rightfully available under the FLSA to vindicate FLSA protections. The district court therefore erred when it relied on the notion that the workers' FLSA claims would improperly "circumvent" the Davis-Bacon Act and CWHSSA. The court's analysis fails to recognize that the FLSA provides the workers with unalterable substantive rights separate from and complementary to protections under the Davis-Bacon Act and CWHSSA.

The only authority the district court cites in support of its reasoning is its own prior decision in Duran-Quezada v. Clark Construction Group, LLC, dismissing private claims under the Davis-Bacon Act, CWHSSA, and the FLSA. See JA A611 (citing No. 8:13-cv-02963-JFM (D. Md. Dec. 20, 2013), aff'd, 582 F. App'x 238 (4th Cir. 2014) (unpublished)). A Fourth Circuit panel's non-precedential decision affirming the district court in that case, however, holds merely that the Davis-Bacon Act does not confer a private right of action; the panel did not address the district court's dismissal of the plaintiffs' FLSA claims. See

Duran-Quezada, 582 F. App'x at 239. Moreover, although the district court's decision stated that plaintiffs' FLSA claims used the Act to "end run the absence of a private right of action" under the Davis-Bacon Act and CWHSSA, the plaintiffs' FLSA claims in that case were, in fact, time barred. See Duran-Quezada, No. 8:13-cv-02963-JFM, slip op. at 2.

To be sure, some courts have rejected plaintiffs' attempts to sue for substantive violations of a government contract labor statute using the remedial provisions of a different statute. See Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003) (rejecting plaintiffs' state law contract claims for breach of Davis-Bacon Act obligations); U.S. ex rel. Sutton v. Double Day Office Servs., Inc., 121 F.3d 531, 533 (9th Cir. 1997) (explaining in a case involving the False Claims Act that "a party may not bring an action for the equivalent of [Service Contract Act] damages under the guise of another statute"); Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1229 (D.C. Cir. 1991) (holding that plaintiffs could not sue under the Racketeer Influenced and Corrupt Organizations Act for violations of the Service Contract Act).

In this case, however, the electrical construction workers do not seek to use the FLSA as a means to assert violations of the Davis-Bacon Act or CWHSSA, but rather seek only to employ the remedial provisions of the FLSA to enforce that

Act's own substantive provisions.[6] The district court erred when it concluded that the Davis-Bacon Act and CWHSSA somehow deprive the workers of their right to do so.

[6] The question of how to calculate the overtime rates sought by the electrical construction workers is not at issue in this appeal. It bears noting, however, that the Secretary construes the term "regular rate" under the FLSA to mean the pay rate at which an employee "is lawfully employed." 29 C.F.R. 778.5. Where "a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of . . . other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum." Id. This is consistent with the Davis-Bacon Act's overtime computation provision, which establishes that the "regular" rate under any federal law for a worker performing under a Davis-Bacon covered contract is the hourly rate required by the Davis-Bacon Act (the prevailing wage excluding fringe benefits), unless the worker's actual compensation is higher than the required prevailing wage. See 40 U.S.C 3142(e); see also 29 C.F.R. 5.32(a) ("It is clear from the legislative history that in no event can the regular . . . rate upon which premium pay for overtime is calculated under the [FLSA] be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis–Bacon Act.")

Without addressing the Department's interpretation or the language of the Davis-Bacon Act, the Second Circuit held in Grochowski v. Phoenix Construction that the regular rate under the FLSA is the rate that workers are actually paid, even if they were entitled to higher rates under the Davis-Bacon Act. 318 F.3d 80, 87 (2d Cir. 2003). Because the electrical construction workers in the present appeal effectively followed Grochowski in seeking unpaid compensation at one and one-half times the hourly rate Power Design actually paid them, Appellants' Br. 39-40, this Court need not address in this case whether Grochowski was correctly decided on that issue.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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ADDENDUM A

Statutory Excerpt

40 U.S.C. 3142 (e). Overtime pay.

In determining the overtime pay to which a laborer or mechanic is entitled under any federal law, the regular or basic hourly rate of pay (or other alternative rate on which premium rate of overtime compensation is computed) of the laborer or mechanic is deemed to be the rate computed under section 3141(2)(A) of this title, except that where the amount of payments, contributions, or costs incurred with respect to the laborer or mechanic exceeds the applicable prevailing wage, the regular or basic hourly rate of pay (or other alternative rate) is the amount of payments, contributions, or costs actually incurred with respect to the laborer or mechanic minus the greater of the amount of contributions or costs of the types described in section 3141(2)(B) of this title actually incurred with respect to the laborer or mechanic or the amount determined under section 3141(2)(B) of this title but not actually paid.

ADDENDUM B

Excerpts from the Code of Federal Regulations

29 C.F.R. 5.32(a). Overtime payments.

The [Davis-Bacon A]ct excludes amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours and Safety Standards Act, and the Walsh–Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis–Bacon Act or its related prevailing wage statutes. It is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis–Bacon Act. (See S. Rep. No. 963, p. 7.) Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed under these statutes; that is, an employee's regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee's contributions to fringe benefits. The contractor's contributions or costs for fringe benefits may be excluded in computing such rate so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination.

29 C.F.R. 778.6. Effect of Davis–Bacon Act.

Section 1 of the Davis–Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a) provides for the inclusion of certain fringe benefits in the prevailing wages that are predetermined by the Secretary of Labor, under that Act and related statutes, as minimum wages for laborers and mechanics employed by contractors and subcontractors performing construction activity on Federal and federally assisted projects. Laborers and mechanics performing work subject to such predetermined minimum wages may, if they work overtime, be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. In view of this fact, specific provision was made in the Davis–Bacon Act for the treatment of such predetermined fringe benefits in the computation of overtime compensation under other applicable statutes including the Fair Labor Standards Act. The application of this provision is discussed in § 5.32 of this title, which should be considered together with the interpretations in this part 778 in determining any overtime compensation payable under the Fair Labor Standards Act to such laborers and mechanics in any workweek when they are subject to fringe benefit wage determinations under the Davis–Bacon and related acts.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(B), and Local Rule 32(b) because it contains 6,652 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

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CERTIFICATE OF SERVICE

I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this 18th day of November, 2015:

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