NO. 13-689

In The
Supreme Court of the United States

JOSE E. CARRION,

Petitioner,

V.

AGFA CONSTRUCTION, INC.,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit properly dismissed Petitioner's third-party beneficiary claim for breach of contract based on its reasoning in Grochowski v. Phoenix Construction.

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JOSE E. CARRION,

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AGFA CONSTRUCTION, INC.

Respondent.

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29 and to enable justices of the court to evaluate possible disqualification or recusal, the undersigned counsel of record for Defendant, AGFA CONSTRUCTION, INC., states that there are no parent corporations or any publicly held corporation which owns 10% or more of its stock.

Dated: Lake Success, New York
February 19, 2014

MILMAN LABUDA LAW GROUP PLLC

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondent submits this brief in opposition to the petition of Jose E. Carrion (hereinafter "Carrion" or "Petitioner") for a *writ of certiorari* seeking review of the decision of the United States Court of Appeals for the Second Circuit holding that Petitioner cannot maintain a state common law claim for breach of contract whose genesis derives from an alleged violation of the Davis-Bacon Act.[1]

STATEMENT OF THE CASE

Petitioner worked as a laborer for Respondent. After his employment, he brought suit for several reasons, including, *inter alia*, failure to pay "prevailing wages" under New York Labor Law § 220. On summary judgment, Petitioner argued that he was a third-party beneficiary to a contract between Agfa and the New York City Housing Authority (hereinafter "NYCHA"). However, Petitioner's Complaint never asserted such a claim for breach of contract or even referenced the Davis-Bacon Act. The district court declined to address whether Petitioner properly alleged a breach of contract claim but granted Agfa's motion for summary judgment for this claim based on the Second Circuit's holding in Grochowski v. Phoenix Construction, 318 F.3d 80 (2d Cir. 2003).

[1] Respondent lacks the financial resources to address every issue raised by Petitioner. However, since this Court requested a response, Respondent submits this brief to address as many issues as possible within its limited financial means.

Based on the below reasons, this Court should decline review of the instant case.

STANDARD

Pursuant to Rule 10, a petition for a *writ of certiorari* will be granted "only for compelling reasons." The Court considers the following reasons for considering a review on a writ of certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important

> federal question in a way that conflicts with relevant decisions of this Court.

Additionally, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Id.

ARGUMENT

I. THE ISSUE HAS NOT BEEN SUFFICIENTLY VETTED BY THE LOWER COURTS

In the instant matter, Petitioner has filed the instant petition pursuant to Rule 10 claiming that the New York State Court of Appeals, Montana State Courts and the Seventh Circuit Court of Appeals are at odds with the Second Circuit Court of Appeals over whether the Davis-Bacon Act (40 U.S.C. §§ 3141-3148), preempts a state common law cause of action for breach of contract. Yet, this issue has not been sufficiently considered and vetted by the Circuits and other courts to be considered now by this Court. On this point, Justice Ginsburg previously held:

> We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.

Arizona v. Evans, 514 U.S. 1, 23, n.1 (1995); see, e.g., McCray v. New York, 461 U.S. 961, 961-963, 77 L. Ed. 2d 1322, 103 S.Ct. 2438 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with JUSTICE MARSHALL's appraisal of the importance of the underlying issue ... In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). Moreover, another anonymous Justice has stated that if an appeals court "has a ruling that seems to create a conflict, we will let it percolate to see if the conflict will work itself out. Conflicts often work themselves out . . . ." H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 233 (1991).

Here, Petitioner only identifies two (2) state courts and one other federal circuit court of appeals that have an adverse opinion than that of the Second Circuit. See Petition pp. 1-2, 6.[2] In this case, the Court should consider the issue as "half-brewed" since there is no "widespread disagreement." Thus, the petition should be denied until there are further decisions in different states and circuits as to the application of the preemption doctrine. This would allow an expanded body of lower court and state case law to develop that may obviate any future need for Supreme Court review, or shed additional light on or otherwise refine the issues for the Court.

[2] References to the Petition are herein cited as "P-_".

Accordingly, the instant petition must be denied on based on a lack of percolation.

II. THIS CASE IS PROCEDURALLY FLAWED WHICH WARRANTS DENIAL OF A WRIT FOR CERTIORARI

In addition, this is not the case that the Court should decide the issue at hand since Petitioner never asserted a breach of contract claim pursuant to the Davis-Bacon Act or otherwise in his Complaint. Thus, he has waived the right to raise this issue with this Court since it was never properly pled in the lower court. Simply put, as fully outlined below, the procedural posture of the case is too messy to warrant a review by the Court.

In this case, Petitioner alleged in his Complaint that he had been denied the "prevailing wage in violation of New York Labor Law § 220." [P-16a, 24a-25a]. Later, on summary judgment, Petitioner conceded that he had failed to exhaust his administrative remedies for his § 220 claim, yet argued that his prevailing wage claim should proceed under the third-party beneficiary theory or that he should be permitted to amend his complaint to add such a claim. [P-24a]. The District Court never granted Petitioner leave to amend his Complaint and never ruled on the adequacy of Petitioner's allegations as properly setting forth a third-party breach of contract claim. Id. The District Court did rule that if such a claim existed, it would be barred under Grochowski. Id. Petitioner appealed.

In denying the appeal, the Second Circuit first explained that Petitioner failed to even file a breach of contract claim under the Davis-Bacon Act. [P-4a]. Instead, Petitioner only filed a claim under § 220 of the New York Labor Law (a/k/a the "Little Davis-Bacon Act"). Id. Accordingly, the Court never addressed whether Petitioner even stated a breach of contract claim based on a violation of the Davis-Bacon Act. In fact, Petitioner's Complaint never even referenced the Davis-Bacon Act.

In addition, Petitioner has failed to explain why the Second Circuit would be required to apply state common law to his purported claim for breach of contract based on a violation of the Davis-Bacon Act when the only reference to any statute in his Complaint is to New York Labor Law § 220. Thus, Petitioner has waived his right to raise this preemption issue for the first time with this Court.

Based on Petitioner's failure to actually raise a breach of contract claim in his Complaint, this case is procedurally flawed and is a less than perfect vehicle for the Court to take a trip down "Preemption Drive." This is not the case that the Court should consider this preemption issue.

III. THE SECOND CIRCUIT RULED CORRECTLY IN GROCHOWSKI

The Grochowski Court held that "[t]o allow a third-party private contract action aimed at enforcing those wage schedules would be inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that

scheme to the same extent as would a cause of action directly under the statute." 318 F.3d at 86 (internal quotation marks omitted). The Grochowski analysis is consistent with the Court's reasoning in Astra.

In fact, as noted by the Second Circuit in the instant matter, the Court referred to its analysis in Grochowski "approvingly" where it determined that plaintiffs could not sue as third-party beneficiaries of contracts under the Public Health Services Act, 42 U.S.C. § 256b. [P-10a] citing Astra USA, Inc. v. Santa Clara County, Cal., 131 S. Ct. 1342, 1348, 179 L. Ed. 2d 457 (2011). Here, assuming Petitioner properly raised a breach of contract claim, the contract at issue would be based on another federal statute, the Davis-Bacon Act.

In Astra, the Court held that covered entities had no right to sue under the statute nor could they maintain a breach of contract action as third-party beneficiaries. 131 S. Ct. 1342, 1347 (U.S. 2011). The Court acknowledged that although the suits were labeled differently, suits to enforce § 340B and suits to enforce PPSAs were in substance one and the same, and thus they must be treated the same "[n]o matter the clothing in which [340B entities] dress their claims." 131 S. Ct. at 1345 citing Tenet v. Doe, 544 U.S. 1, 8, 125 S. Ct. 1230 (2005). Accordingly, the Court held that permitting such a suit, would "allo[w] third parties to circumvent Congress's decision not to permit private enforcement of the statute." 131 S.Ct. at 1348.

Additionally, the Astra Court noted that spreading the enforcement burden is hardly what

Congress contemplated when it "centralized enforcement in the government." 131 S.Ct. at 1349 (County's challenge is at odds with Congress' unitary administrative and enforcement scheme). Here, it is similar. Specifically, the United States Department of Labor has the enforcement power to ensure compliance with the Davis-Bacon Act. It is not for individuals to bring private causes of action alleging breaches of contracts that rest solely within the Department of Labor's powers.

In ruling to reject third-party contract suits that sprout from federal statutory obligations, the Astra Court effectively decided this issue.

CONCLUSION

This Court should decline to hear the instant case.

Dated: Lake Success, New York
February 24, 2014

Respectfully Submitted,

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