TESTIMONY OF JONATHAN C. PUTH
ON BEHALF OF THE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF BILL 21-120 WAGE THEFT PREVENTION CLARIFICATION AND OVERTIME FAIRNESS AMENDMENT ACT, AND IN OPPOSITION TO PROVISIONS OF BILL 21-711, WAGE THEFT PREVENTION REVISION AMENDMENT ACT OF 2016
OCTOBER 26, 2016

To the Chair and Members of the Committee, I am honored to testify on behalf of the Metropolitan Washington Employment Lawyers Association (MWELA) regarding the Budget Support Act. I am Immediate Past President of MWELA, an association of over 300 lawyers who primarily represent employees and who are dedicated to the advancement of employee rights. MWELA is among the largest and most active affiliates of the National Employment Lawyers Association (NELA), the country's largest bar association that advances equality and justice in the workplace and whose members represent individuals in employment disputes. As a member of a small law firm, 100% of my practice is devoted to the representation of employees, including employees who have claims for unpaid wages in the District of Columbia.

MWELA salutes the work of the Chair and this Committee for its work in ensuring that employees in the District of Columbia are paid fairly and on time for their labor, and that they are provided meaningful recourse when unscrupulous employers refuse to pay promised wages. MWLEA is acutely aware of the great difficulty facing low wage workers in need of adequate legal representation. The fact is that unpaid wages may be too small to justify the expense of an attorney, which is why the fee shifting provisions of our wage statutes are so critical. It's important that employees receive all of their promised wages and that employers, not employees, remain responsible for the legal costs of recovery. What may be

considered relatively small amounts of wages represent many employees' very livelihood. MWELA is pleased to offer our support for Bill 21-120, the Wage Theft Prevention Clarification and Overtime Fairness Amendment Act.

My address to you is geared toward the Mayor's proposal, Bill 21-711, Wage Theft Prevention Revision Amendment Act of 2016, and most specifically the portion of the of the bill that would strike the provision of attorneys' fees at the rates approved in the *Salazar* court decision for prevailing wage litigants. MWELA opposes that portion of the Mayor's proposal and appears here to clarify the record. We believe that continued inclusion of the *Salazar* rate provision is critical to effective enforcement of the law by providing sorely-needed incentives for legal representation in wage theft cases.

The United States Supreme Court has emphasized that "reasonable fees" under fee-shifting statutes "are to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (U.S. 1984). The Wage Theft Prevention Act has operated on the assumption that "prevailing market rates" for the representation of employees in wage theft cases is best represented by the hourly rate schedule established in the case of *Salazar v. District of Columbia* and updated since that time, in order to reduce disputes over proper reimbursement of attorneys' fees and to attract legal representation for targets of wage theft. Based on this litigation and other cases in the District of Columbia, we wish to emphasize that the so-called "*Salazar* rates" do, in fact, provide the most accurate reflection of the prevailing market rate for legal services in employment cases in Washington, DC.

The Mayor's April 19, 2016 letter to Council Chair Mendelson requesting

introduction of Bill 21-711 bears comment. *See* Mayor Bowser letter to Chair Mendelson, p. 2, April 19, 2016 ("April 19 letter"). The Mayor is correct that the District of Columbia appealed the *Salazar* decision, but the key decision at issue here regarding prevailing attorneys' fees rates in the District of Columbia was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit last year. *See Salazar v. District of Columbia*, 809 F.3d 58, 65 (D.C. Cir. 2015). That issues is settled. In that case, the D.C. Circuit found that there was ample evidence that the hourly rates at issue in S*alazar* fairly reflect the market for legal services in the District of Columbia.

Second, we respectfully suggest that the claim that the lower U.S. Attorneys' Office *Laffey* Matrix "sets the maximum prevailing market rates in the District," is mistaken. *See* April 19 letter at 2. The so-called "USAO *Laffey* Matrix" is a schedule of attorneys' fee rates that the U.S. Attorneys' Office claims is appropriate for awards to prevailing plaintiffs against the United States. That is, the U.S. Attorneys' Office maintains that USAO *Laffey* Matrix rates should be awarded in the cases that the U.S. Attorneys' Office defends. It does not represent the maximum rates in the District of Columbia.

Indeed, in the *Salazar* case itself sheds considerable light on the accuracy of the USAO *Laffey* Matrix on the one hand, and the higher "LSI *Laffey* Matrix" at issue in the *Salazar* case on the other. The district court and the D.C. Circuit found that the adjustments made to the USAO *Laffey* Matrix over the last three decades according to the Consumer Price Index resulted in market rates for attorneys' fees being underestimated, finding that the "USAO *Laffey* Matrix rates were 38% lower than the average national law firm rates." *Salazar v. District of*

Columbia, 809 F.3d 58, 65 (D.C. Cir. 2015). By contrast, the *Salazar* rates were updated using the more accurate "legal services index" of the Consumer Price Index, such that the *Salazar*, or "LSI *Laffey* Matrix" rates fell a more modest "14% lower than the average national law firm rates." *Id*. The D.C. Circuit concluded that the district court possessed sufficient evidence to conclude that "'the LSI-adjusted matrix is probably a conservative estimate of the actual cost of legal services in this area.'" *See id*., quoting *Salazar v. District of Columbia (Salazar III)*, 991 F. Supp. 2d 39, 48 (D.D.C. 2014).

We write to emphasize, therefore, that the USAO *Laffey* rates have not been found to be a ceiling but instead, based on the findings of the *Salazar* case, may be an outdated and artificially low reflection of the market for legal services in the District of Columbia.

Additionally, we suggest that the Mayor's supposition that approval of *Salazar* rates may serve as an endorsement of such rates in other types of cases may be misplaced. Notwithstanding the approval of the USI *Laffey* Matrix rates in *Salazar*, the D.C. Circuit recently rejected application of those rates in a case against the District of Columbia under the Individuals with Disabilities Education Act (IDEA) where the prevailing party in that case failed "to demonstrate that her suggested [LSI *Laffey*] rates were appropriate." *Eley v. District of Columbia*, 793 F.3d 97, 105 (D.C. Cir. 2015). As made clear in that case, the determination of appropriate rates is dependent upon the specific facts of the case and the evidentiary showing by litigants. MWELA contends that scrapping the *Salazar* rates entirely is an inappropriate instrument for addressing the concern voiced by the Mayor and reflected in Bill 21-711.

MWELA respectfully requests that the Mayor's proposal in this regard be rejected.

Thank you for the opportunity to present this testimony.

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