VINCENT BALDERRAMA, Petitioner, v. LOCKHEED MARTIN CORPORATION, Respondent.	*	IN THE COURT OF APPEALS OF MARYLAND No. 155 September Term, 2016

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MOTION OF METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND MARYLAND EMPLOYMENT LAWYERS ASSOCIATION, FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA) and the Maryland Employment Lawyers Association (MELA) seek leave to file in this case as *amici curiae*. Both are local affiliates of the National Employment Lawyers Association, a national organization of attorneys, primarily employees' counsel, who specialize in employment law. MWELA and MELA collectively have over 300 members who represent and protect the interests of employees under state and federal law. The purpose of MWELA and MELA is to bring into close association employee advocates and attorneys to promote the efficiency of the legal system and fair and equal treatment under the law. Mr. Balderrama consents to this motion for leave; Lockheed Martin does not object to the motion for leave.

MWELA and MELA have frequently participated as *amicus curiae* in cases of interest to their members, including the following cases in this Court over the past decade: *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014); *Friolo v. Frankel*, 438 Md. 304 (2014); *Marshall v. Safeway Inc.*, 437 Md. 542 (2014);

Ocean City, Maryland, Chamber of Commerce, Inc. v. Barufaldi, 434 Md. 381 (2013); *Meade v. Shangri-La Partnership*, 424 Md. 476 (2012); *Taylor v. Giant of Maryland, LLC*, 423 Md. 628 (2011); *Prince of Peace Lutheran Church v. Linklater*, 421 Md. 664 (2011); *Parks v. Alpharma, Inc.*, 421 Md. 59 (2011); *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594 (2011); *Newell v. Runnels*, 407 Md. 578 (2009); and *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (2007).

Members of MWELA and MELA have represented numerous clients seeking to enforce federal and state anti-retaliation and discrimination laws. As longtime advocates in employment law, these members appreciate having this opportunity to offer the Court its wide-ranging expertise and unique perspective on the issues presented in this appeal. MWELA and MELA members have a significant interest in this case, as it directly affects how Maryland courts construe Maryland state and county anti-retaliation laws. MWELA and MELA submit this brief to aid this Court in ensuring that these laws fulfill their legislative intent to protect Maryland employees by encouraging competent counsel to represent employees in discrimination and retaliation cases.

MWELA and MELA have an interest in this case because of the potentially broad impact of this Court's rulings on certain issues raised in this appeal, including the proper interpretation of the anti-discrimination and anti-retaliation provisions of Montgomery County Code ("MCC") and similar anti-discrimination and anti-retaliation laws statewide. The rulings of the Court of Special Appeals on

those issues, if affirmed, could impair the ability of Maryland employees to obtain redress through the courts when employees face discrimination or retaliation.

For the foregoing reasons, MWELA and MELA respectfully request that the Court accept the attached memorandum in support of the petition for certiorari filed by Petitioner, and grant this motion for leave to participate in the case as *amici curiae*.

A proposed Order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2016, I caused to be mailed first class, postage prepaid, and by e-mail, one copy each of the foregoing Motion to:

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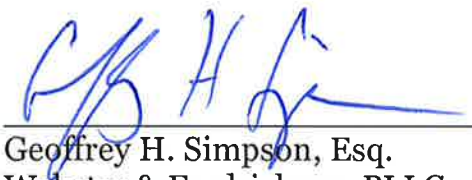

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VINCENT BALDERRAMA,	*	IN THE
Petitioner,	*	COURT OF APPEALS OF MARYLAND
v.	*	
	*	No. 155
LOCKHEED MARTIN CORPORATION,	*	September Term, 2016
Respondent.	*	
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AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

The Metropolitan Washington Employment Lawyers Association (MWELA) and Maryland Employment Lawyers Association (MELA) respectfully urge this Court to grant a writ of certiorari in this case. The jury in this matter, properly instructed, determined that Plaintiff Vincent Balderrama, a 58-year old Hispanic man, had engaged in protected activity and that Lockheed Martin had retaliated against him, and rendered an award in his favor under Maryland County Code, MCC § 27-19(c). The Maryland Court of Special Appeals applied an unusually cramped interpretation to "protected activity" and ruled as a matter of law that that Mr. Balderrama's complaints using terms commonly understood as denoting discrimination could not be found by a jury to mean that he was complaining of discrimination. The Court of Special Appeals further applied an exceedingly narrow reading to actionable discrimination under the Montgomery Country statute, at odds with the inclusive approach taken by the United States Supreme Court to federal anti-discrimination law. The application of these two incorrect

legal standards run the risk of narrowing the protections that Maryland law provides against discrimination and retaliation.

First, the Court of Special Appeals held that an employee's workplace complaint that a negative performance evaluation was based on "prejudice" and that the employee was singled out for mistreatment was not protected conduct. The Court held that an employee must explicitly specify that the "prejudice" was based on membership in a protected class. Employees who believe they are targets of discrimination are ordinarily not lawyers specializing in employment law, yet the Court of Special Appeals effectively held them to that standard. Under the Court's decision, an employee who fails to use magic words such as "race," "religion" or "age" risks being deprived of the protections that Maryland's anti-retaliation laws were designed to provide, protections that federal courts already apply to Maryland employees who bring retaliation claims under federal law.

Second, the Court of Special Appeals looked only to the motives of the "ultimate decision-maker" when evaluating the employer's retaliatory motive, but ignored the actions of purportedly biased supervisors the jury reasonably found were the cause of the employee's termination. The U.S. Supreme Court, in *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011), expressly rejected the stilted approach adopted here by the Court of Special Appeals, holding that an employer's agent acting with discriminatory intent may *cause* an adverse employment action even though he is not the ultimate decision-maker. The decision below by the Court of Special Appeals holding that an ultimate decision-maker may insulate

from challenge an otherwise discriminatory decision, if allowed to stand, might be interpreted to render Maryland's anti-discrimination protections narrower than those under federal law, undermining the broad remedial purposes of MCC § 27-19(c) and similar Maryland statutes.

Amici urge that this Court to review these errors, and help ensure that Maryland employees continue to enjoy the broad protections from discrimination and retaliation enshrined in Maryland law.

I. EMPLOYEES NEED NOT USE "MAGIC WORDS" TO ENGAGE IN PROTECTED CONDUCT.

Amici respectfully submit that the Court of Special Appeals applied the wrong legal principles when it essentially required employees to use "magic words" in making workplace complaints about discrimination in order to be protected by the Maryland state or county anti-retaliation statutes. Take, for instance, the following hypothetical: an African-American employee in a predominately white workplace is demoted. She immediately complains of "prejudice" to her supervisor without stating that the "prejudice" was based on her race. The employer fires her the next day. Under the Court of Special Appeals' analysis, this employee would have no claim of retaliation because this employee did not say her supervisor's prejudice was based on her race. This cramped reading of MCC § 27(c) could seriously undermine the protections of the anti-retaliation provisions in civil rights laws for Maryland employees.

Here, the question presented is whether Mr. Balderrama's early complaints of "prejudice" and being "singled out" constitute protected activity under the Montgomery County Code. For example, the Merriam Webster Dictionary defines "prejudice" as "an unfair feeling of dislike for a person or group because of race, sex, religion, etc." "Prejudice," Merriam-Webster.com (retrieved May 30, 2016) (http://www.merriam-webster.com/dictionary/prejudice). A jury could naturally conclude that by "prejudice" Mr. Balderrama was complaining of "discrimination," but the Court of Special Appeals ruled as a matter of law that the jury could not come to that conclusion. The jury also heard the entire constellation of evidence, including that Mr. Balderrama had complained that he was "not being measured by the same yardstick" as his peers, and that the Human Resources employee who took Balderrama's complaint apparently understood that he was complaining of discrimination; she recorded his statements in her notes from the call, noted that Balderrama was Hispanic, and indicted that his case was likely to proceed to litigation. In ruling that a jury could not permissibly conclude that Mr. Balderrama was complaining of discrimination, the Court of Special Appeals adopted a very narrow reading of the statute's protections.

As a remedial provision, MCC § 27(c) should be construed liberally in favor of claimants seeking its protection. *Meade v. Shangri La Partnership*, 424 Md. 476, 488-89 (Md. 2012) (citing *Haas v. Lockheed Martin Corp.*, 396 Md. 469, 495 (Md. 2007)); *see also Wash. Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 635 (Md. 2010); *Montgomery County Bd. of Education v. Horace Mann Ins. Co.*,

383 Md. 527, 554 (2004); *Harris v. Bd. of Education of Howard County*, 375 Md. 21, 38 (2003) ("The Maryland act is remedial and should receive a liberal construction so as to give to it the most beneficial operation . . . ."); *Marsheck v. Bd. of Trs. of the Fire & Police Employees' Retirement Sys. of the City of Baltimore*, 358 Md. 393, 403 (2000); *Coburn v. Coburn*, 342 Md. 244, 256 (1996) (quoting *Harrison v. John F. Pilli & Sons, Inc.*, 321 Md. 336, 341 (1990)) ("[R]emedial statutes are to be liberally construed to 'suppress the evil and advance the remedy.'").

The "primary purpose" of anti-retaliation provisions such as those in MCC Section 27-19(c), is to maintain "unfettered access to statutory remedies." *See Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 56 (U.S. 2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). The United States Supreme Court has consistently adhered to this principle by according sweeping readings to anti-retaliation protections because of their essential role in anti-discrimination enforcement. Thus in *Robinson v. Shell Oil*, the Court found an employee protected from retaliation by a former employer, even though the plain language definition of "employer" in the statute suggested an absence of coverage under the law. *Robinson*, 519 U.S. at 341. In three other cases, the Court found that anti-discrimination statutes necessarily extended to protect employees from retaliation. *See Sullivan v. Little Hunting Park, Inc.* 396 U.S. 229, 237 (1969) ("implied" cause of action for retaliation under 42 U.S.C. § 1982); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (implied retaliation protection

under Title IX of the Education Amendments of 1972); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (same, 42 U.S.C. § 1981). In all, the Supreme Court recognizes that the force of federal anti-discrimination statutes depends on providing broad interpretations to retaliation protections. As the Supreme Court observed with respect to Title VII of the Civil Rights Act, and in keeping with its general approach to retaliation:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

Burlington Northern, 548 U.S. at 63 (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 292 (1960) (citation omitted)).

Here, MCC Section 27(c) provides that "A person must not . . . retaliate against any person for . . . lawfully opposing any discriminatory practice prohibited under this division." MCC § 27-19(c)(1). The "beneficial operation" of Section 27(c) to suppress the evil of retaliation protects employees who oppose discriminatory practices, even if they do not use "magic words" specifying the basis of discrimination, so long as the employer knew or should have known the employee was opposing illegal conduct. *See, e.g., Okoli v. City of Baltimore*, 648 F.3d 216, 224 (4th Cir. 2011); *Burgess v. Bowen*, 466 Fed. Appx. 272, 282-83 (4th Cir. 2012).

The text of MCC § 27-19(c) does not require employees to use any particular phraseology to be afforded protection under the law. Addressing similar issues under Title VII, the United States Court of Appeals for the Fourth Circuit has explained that determining whether an employee has engaged in protected conduct turns on whether the employer was on reasonable notice that the employee was opposing illegal conduct. These decisions provide valuable guidance as how to give proper effect to Section 27-19(c), which is broadly similar to the anti-retaliation provision of Title VII. *See Mead*, 424 Md. at 489; *Haas*, 396 Md. at 494.

Thus, in *Okoli v. City of Baltimore*, a woman's complaint of "harassment" which detailed "unethical and unprofessional business characteristics, *e.g.*, harassment, degrading and dehumanizing yelling and demanding, disrespect, mocking and gossiping about other colleagues (anyone in the City government) and lack or disregard for integrity" but did *not* say the harassment was "sexual harassment" was nonetheless protected under Title VII. *Okoli,* 648 F.3d at 224. The Fourth Circuit held that the employer "surely should have known that [the plaintiff's] complaints of 'harassment' likely encompassed sexual harassment." *Id.* The context of the complaint made it clear that the harassment was connected to a protected category and therefore the complaint sufficed as protected conduct.

Following *Okoli*, the Fourth Circuit reaffirmed its position that Title VII requires no specific language – a complaint is protected so long as the employer knew, or should have known, that it concerned discrimination. Thus, a complaint

that a plaintiff and other co-worker were being "targeted," and another where the plaintiff questioned the "fairness and equality" of a co-worker's termination were protected. *Burgess*, 466 Fed. Appx. at 282-83. Again, a "complaint constitutes protected activity when the employer understood, or should have understood, that the plaintiff was opposing discriminatory conduct." *Id.* (citing *Richardson v. Richland Cnty. School Dist. No. 1*, 52 Fed. Appx. 615, 617 (4th Cir. 2002) and EEOC Compliance Manual § 8-II.B.2 (2006) ("[A] protest is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.")).

Similarly, decisions of the U.S. District Court for the District of Maryland following *Okoli* highlight different ways in which the context of an employee's conduct reflects that the conduct is protected. In *Whittaker v. David's Beautiful People, Inc.*, No. DKC 14-2483, 2016 U.S. Dist. LEXIS 13266, *19-20 (D. Md. Feb. 4, 2016), the employee showed her employer a text calling her a "Russian whore." She made no specific complaint of "sexual harassment" or even "harassment," but the court found that the circumstances showed that the protest was connected to her sex and therefore protected.

An employee in another recent case complained only of "harassment" to her employer without specifying on what grounds she was being harassed. *Strothers v. City of Laurel*, 118 F. Supp. 3d 852, 865-66 (D. Md. 2015). There, too, the court construed that complaint to mean "race harassment" based on the circumstances. *Id.*

In *Bowman v. Baltimore City Bd. of Sch. Comm'rs*, No. RDB-15-01282, 2016 U.S. Dist. LEXIS 38477, *13-15 (D. Md. Mar. 24, 2016), a teacher first complained that her classroom workload was too heavy. Her complaint that another teacher was given relief was "discrimination" constituted protected conduct because the context of the statement was that the employee, an African American, was treated less favorably than a Caucasian teacher. Even though Ms. Bowman did not explicitly state that race played a role, the court found she did not need "to be so explicit when the context clearly conveyed the purported racial impetus." *Id.*

This approach makes sense because it tracks the reality of ordinary interactions between lay employees and their employers, where employees protest discriminatory conduct but may not explicitly label it as such. By requiring more, the Court of Special Appeals discourages employees from complaining and impede the proper functioning of the remedial scheme. Here, where Mr. Balderrama used terms commonly defined as encompassing discrimination, and his employer apparently interpreted his complaints as involving his race and potential legal action, a jury could reasonably conclude (as this jury did here) that Mr. Balderrama was complaining of discrimination. *See Burgess v. Bowen*, 466 Fed. Appx. at 282-83.

In contrast, the Court of Special Appeals chose to rely on Federal cases from outside this jurisdiction that require the employee to explicitly specify that her complaint or protest is based on a protected category. *See Lockheed Martin Corp.*

v. Balderrama, No. 15-379, 2016 Md. App. LEXIS 36, *42-43 (Md. Ct. Spec. App. Mar. 31, 2016) (citing *Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 193 (3d Cir. 2015); *Slagle v. County of Clarion*, 435 F.3d 262, 268 (3d Cir. 2006); *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989)). This approach undermines the Montgomery County Code and is inconsistent with the mandate that this remedial statute be liberally construed. These cases also ignore what is made plain by the Fourth Circuit's analysis: where the employer knew or should have known the complaint was based on a protected category, the employee should be entitled to protection. Where, as here, the employer could reasonably be found to have understood that the employee was complaining of discrimination, a finding of protected activity is warranted.

The purpose of Section 27-19(c) is to protect employees who have "opposed a discriminatory practice" as listed in Section 27, Div. 3 of the Montgomery County Code. Where employers know or should know that an employee has made such complaint or undertook some other form of opposition, that employee should be protected, regardless of whether "magic words" were used.

II. EMPLOYERS ARE LIABLE FOR ADVERSE ACTIONS PROXIMATELY CAUSED BY RETALIATION.

Amici further submit that this Court should correct a second legal error in the decision below that allows employers to escape liability by showing that the ultimate decision-maker did not have retaliatory animus. The consequence of the

Court of Special Appeals' holding, if it stands, is that employers who retaliate by setting their employees up for failure will not be held liable for the consequences of their unlawful actions so long as the "ultimate decision-maker" is insulated from the original retaliatory acts. The decision below works to the detriment of Maryland workers by contravening the guiding principle that such laws are to be construed liberally to eradicate unlawful discrimination.

Consider the following hypotheticals: (A) An African-American woman complains of race discrimination to her supervisor. The supervisor tells the employee he will retaliate against her and writes a negative performance review. A manager two levels above the employee, with no knowledge of the complaint, selects the employees with negative performance evaluations for termination and fires the employee. (B) A supervisor of an African-American woman makes a series of sexually and racially charged comments to her and suggests that she should not be allowed to work for the employer. The employee commits an infraction, and the supervisor writes her up and recommends termination (the supervisor would not have recommended termination had the employee been white). The employee's second level supervisor accepts the recommendation without an independent investigation and terminates the employee.

Applying common-law agency principles, the U.S. Supreme Court found that an employer would be liable in these two hypotheticals. *See Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011) (employer liable under USERRA for the unlawful acts of their supervisors when those acts are a proximate cause the

adverse action even if those supervisors are not the ultimate decision-makers).[1] In *Edgewood*, the Court of Special Appeals adopted *Staub*'s principle that if "a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action and if that act is a proximate cause of the ultimate employment action," then the employer can be held liable. *Edgewood Mgmt. Corp. v. Jackson*, 212 Md. App. 177, 204-06 (Md. Ct. Spec. App. 2013) (quoting *Staub*, 562 U.S. at 422).

The Court of Special Appeals' decision threatens to undermine *Edgewood*, and it appears to provide weaker protections for Maryland employees than the Supreme Court provided under federal statutes in the *Staub* decision. *See Lockheed Martin Corp.*, 2016 Md. App. LEXIS 36, at *52-55. The facts of this case are parallel to Hypothetical A. The plaintiff argues his supervisors took action against him motivated by retaliation that contributed to his inclusion in the reduction-in-force ("RIF"). The Court narrowly focused on the criteria used for the RIF and whether the plaintiff had established that the person running the RIF was

[1] USERRA is a federal law that protects veterans and military personnel from workplace discrimination and retaliation, similar to Title VII of the Civil Rights Act of 1964. Courts apply these principles to anti-discrimination and anti-retaliation statutes of all types. *See, e.g., Velázquez-Pérez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 270-71 (1st Cir. 2014) (employer may be liable where co-worker undermined work because of sex); *Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015) (applying *Staub* analysis to affirm jury verdict in Title VII retaliation case); *Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552 (8th Cir. 2013) (same); *DeNoma v. Hamilton Cnty. Court of Common Pleas*, 626 Fed. Appx. 101, 108 (6th Cir. 2015) (*Staub* analysis applied in 42 U.S.C. § 1983 civil rights claim); *Smith v. Bray*, 681 F.3d 888, 898 (7th Cir. 2012) (*Staub* analysis applicable in determining individual liability under 42 U.S.C. §§ 1981 and 1983).

biased. The Court did not examine whether the plaintiff was subjected to the RIF due to retaliatory acts by the plaintiff's supervisors or whether those retaliatory acts were a proximate cause of the plaintiff's termination.

Montgomery County Code Section 27(c) is a remedial statute designed to eradicate unlawful retaliation. The narrow approach taken by the Court of Special Appeals could seriously undermine the rights of Maryland employees to be free from termination or other adverse consequences because co-workers or supervisors sought to do them harm in retaliation for engaging in protected activity. This Court should correct this legal error and foreclose that possibility.

Respectfully submitted,

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May 31, 2016

CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112

1. This amicus brief contains 3,310 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

Geoffrey H. Simpson

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ORDER

Upon consideration of the Motion of the Metropolitan Washington Employment Lawyers Association and the Maryland Employment Lawyers Association for Leave to Participate as *Amici Curiae*, it is this ___ day of _____, 2016,

ORDERED that the motion is GRANTED.

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