No. 09-3545

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ADRIAN E. PARKER, DONALD J. WILSON, FRANK L. STEPHENS, IV, MONICA THOMPSON, AND SENYA SAUNDERS, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

vs.

NUTRISYSTEM, INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
CASE NO. 08-1508
THE HONORABLE HARVEY BARTLE III

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, COMMUNITY LEGAL SERVICES, CORNELL LABOR LAW CLINIC, FRIENDS OF FARMWORKERS, JUNTOS, NATIONAL LAWYERS GUILD LABOR AND EMPLOYMENT COMMITTEE, SOUTHERN POVERTY LAW CENTER, THE SUGAR LAW CENTER, AND WORKING HANDS LEGAL CLINIC, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici Curiae* hereby provide the following disclosure statements:

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I. STATEMENT OF *AMICI CURIAE*

Amici curiae are organizations dedicated to securing enforcement of state, federal, and local laws, regulations, and ordinances that have been enacted for the purpose of protecting workers in the area of wages, hours, and working conditions, and thereby promoting the general welfare. *Amici* respectfully submit this brief pursuant to Rule 29 of the Rules of Appellate Procedure.

Amici write to shed light on the public policies supporting the maintenance of federal court cases that combine Rule 23 "opt-out" class actions for state wage and hour law violations with federal Fair Labor Standards Act ("FLSA") "opt-in" class actions for FLSA violations. *Amici* also write to urge the Court to affirm that such "hybrid actions" are permitted under existing law and that the federal jurisdiction statutes must be applied in these important cases on behalf of workers in the same manner as they are applied in all other cases. The brief should be permitted without leave of court because all parties have consented to its filing. Fed. R. App. P. 29(a). More specific statements of interest of *amici* are attached following this brief.

II. SUMMARY OF ARGUMENT

Workers should continue to be able to prosecute Rule 23 class actions for violations of state wage and hour laws together in the same federal case with an FLSA opt-in action. The principal purpose of this brief is to demonstrate why such

cases should be favored as a matter of policy, just as they are permitted as a matter of law. An absolute bar on such "hybrid actions" would have profound effects on the rights of employees to seek redress for the violation of statutory rights to minimum wage, overtime pay, and other workplace protections.

Workers presently are squeezed between increasing noncompliance with federal and state employment laws, on the one hand, and a significant decline in government enforcement of those laws on the other. At the same time, workers are often hamstrung by valid fears of retaliation and other obstacles from filing individual suits against their employers or stepping forward to file written consents to join FLSA opt-in actions. In this context, private class action lawsuits seeking the protections of both federal and state laws are the most effective vehicle for enforcing workplace rights, particularly where employees can make use of the opt-out procedures of Rule 23 for their state law claims.

The district court declined to exercise supplemental jurisdiction over the Pennsylvania law class claims in this case on a theory that Rule 23 is "inherently incompatible" with the FLSA opt-in provision. That decision, and the district court's failure to consider the limited exceptions to exercising its jurisdiction under 28 U.S.C. § 1367(c), contravenes the federal law of supplemental jurisdiction. It also conflicts with the standard articulated by this Court with regard to exercising

supplemental jurisdiction in hybrid actions in *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003).

While declining to exercise supplemental jurisdiction over hybrid actions may be appropriate in certain case-specific circumstances, such as where novel or complex state law claims are alleged and "unique circumstances" are present, *id.* at 309-12, there is no across-the-board rule of "incompatibility" that can preclude the exercise of supplemental jurisdiction as a matter of law. In *De Asencio*, this Court appeared to recognize that, depending on the circumstances of a particular case, jurisdiction could be exercised over pendent state wage and hour claims in an FLSA action, even though there will be Rule 23 class members without federal claims because they do not opt in to the FLSA action. The only other court of appeals to address this question has held unequivocally that the procedural differences between opt-in and opt-out actions cannot curtail the jurisdictional sweep of § 1367. *Lindsay v. GEICO*, 448 F.3d 416, 424-25 (D.C. Cir. 2006). The majority of district courts agree.[1]

[1] *See Esparza v. Two Jinn, Inc.*, No. SACV 09-0099, 2009 WL 2912657, *3 (C.D. Cal. Sept. 9, 2009) (collecting cases); *Osby v. Citigroup, Inc.*, No. 07-cv-06085-NKL, 2008 WL 2074102, *3 n.2 (W.D. Mo. May 14, 2008) (same); *Salazar v. Agriprocessors, Inc.*, 527 F. Supp. 2d 873, 885-86 (N.D. Iowa 2007) (same); *Westerfield v. Washington Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, *2-3 (E.D.N.Y. July 26, 2007) (same); *see also Cortez v. Nebraska Beef, LTD.*, Case No. 8:08-cv-00090-JFB-TDT, Slip Op. at 8-13 (D. Neb. Jan. 4, 2010); *Perkins v. S. New England Tel. Co.*, No. 3:07-cv-967, 2009 WL 350604, *3-4 (D. Conn. Feb. 12, 2009); *Hernandez v. Gatto Indus. Platers, Inc.*, No. 08 CV 2622, 2009 WL

"Incompatibility" as an objection to hybrid actions is an "imaginary legal doctrine." *Westerfield*, 2007 WL 2162989 at *2. Workers are authorized to bring class action cases asserting state law wage claims in federal court under the supplemental jurisdiction statute, 28 U.S.C. § 1367, the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), and Federal Rule of Civil Procedure 23. The FLSA expressly authorizes states to enact their own wage and hour laws providing equal or greater protection to employees, 29 U.S.C. § 218(a); *see also De Asencio*, 342 F.3d at 308 n.10, and does not impede the operation of the federal jurisdiction statutes when state law claims are pleaded together with FLSA claims. Further,

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1173327, *3 (N.D. Ill. Apr. 28, 2009); *Patel v. Baluchi's Indian Rest.*, No. 08 CIV 9985, 2009 WL 2358620, *6 (S.D.N.Y. July, 30, 2009); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 589 F. Supp. 2d 1026, 1031-33 (E.D. Wis. 2008); *Musch v. Domtar Indus., Inc.*, 252 F.R.D. 456, 463 (W.D. Wis. 2008); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 886-89 (N.D. Iowa 2008); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007); *Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1028 (D. Minn. 2007); *Brickey v. Dolencorp*, 244 F.R.D. 176, 178-79 (W.D.N.Y. 2007); *Freeman v. Hoffman-LaRoche, Inc.*, No. 07-1503, 2007 WL 4440875 (D.N.J. Dec. 18, 2007); *Silverman v. SmithKline Beecham Corp.*, No. CV-06-7272, 2007 WL 3072274, *1-2 (C.D. Cal. Oct. 16, 2007); *Westfall v. Kendle Int'l, CPU*, No.1:05-cv-00118, 2007 WL 486606, *7 (N.D. W. Va. Feb. 15, 2007); *Bamonte v. City of Mesa*, No.CV-06-01860, 2007 WL 2022011, *4-5 (D. Ariz. July 10, 2007); *Baas v. Dollar Tree Stores, Inc.*, No. C07-03108, 2007 WL 2462150, *3-4 (N.D. Cal. Aug. 29, 2007); *Frank v. Gold'n Plump Poultry, Inc.*, No. CIV. 041018, 2005 WL 2240336, *5 (D. Minn. Sept. 14, 2005); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 311 (D. Mass. 2004); *Goldman v. Radioshack Corp.*, No. CIV.A. 2:03-CV-0032, 2003 WL 21250571, *2-3 (E.D. Pa. Apr. 16, 2003); *Chavez v. IBP, Inc.*, No. CT-01-5093, 2002 WL 31662302, *2-5 (E.D. Wash. Oct. 28, 2002); *Beltran-Benitez v. Sea Safari, LTD*, 180 F. Supp. 2d 772, 773-74 (E.D.N.C. 2001); *Trotter v. Purdue Farms, Inc.*, No.CIV.A.99-893, 2001 WL 1002448 (D. Del. Aug. 16, 2001).

opt-out state law class actions can be maintained together with an FLSA opt-in action in federal court where original jurisdiction exists over the state law claims pursuant to CAFA.

III. ARGUMENT

A. Combined FLSA And State Law Class Actions Are Necessary To Accomplish The Broad Remedial Purposes Of Wage And Hour Laws.

1. Widespread Noncompliance with Federal and State Wage and Hour Laws Calls for the Full Exercise of Federal Jurisdiction.

Violations of both state and federal wage and hour laws are widespread and systemic. For example, in 2000, the U.S. Department of Labor ("DOL") found staggering levels of noncompliance with wage and hour laws at nursing homes, restaurants, and day care facilities in New Jersey and Pennsylvania. The DOL found that 75% of nursing home and residential care facilities in Northern New Jersey and 100% of these facilities in Southern New Jersey were violating applicable laws. DOL, Employment Standards Administration, Wage and Hour Division, *1999-2000 Report on Initiatives*, 36 (Feb. 2001), *available at* http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf (last visited Jan. 5, 2010). In addition, 50% of such facilities in Philadelphia and 40% of such facilities in Pittsburgh were not in compliance with wage and hour laws. *Id.* In the same study, the DOL found that 50% of restaurants in Pittsburgh violated wage

and hour laws in 2000, and 53% of day care facilities in Pennsylvania were not in compliance with workplace laws. *Id.* at 8.[2]

The problem of unscrupulous employers taking advantage of their employees is not limited to the mid-Atlantic region, of course. The Employer Policy Foundation, a business-funded think tank, has estimated that nationwide, employers unlawfully fail to pay $19 billion annually in wages owed to employees. Craig Becker, *A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy*, Legal Times, Vol. 27, No. 36 (Sept. 6, 2004), *available at* http://www.aflcio.org/issues/jobseconomy/overtimepay/upload/FLSA.pdf (last visited Jan. 5, 2010). Unlawful employment practices, such as misclassifying employees as independent contractors, also have an impact on tax revenue. In 1984, the Internal Revenue Service estimated that 15% of employers nationwide had misclassified 3.4 million workers as independent contractors, "resulting in an estimated tax loss of $1.6 billion (or $2.72 billion in inflation-adjusted 2006 dollars) in Social Security tax, unemployment tax, and income tax." U.S. Government Accountability Office ("GAO"), *Employee Misclassification: Improved Outreach Could Help Ensure*

[2] The DOL study did not provide information about violations in Delaware.

Proper Worker Classification 1 (May 2007), *available at* http://www.gao.gov/new.items/d07859t.pdf (last visited Dec. 9, 2009).

While the misclassification of employees as exempt from state or federal wage and hour laws, at issue in this case, primarily affects white collar employees, low-wage workers are particularly hard hit by violations of wage and hour laws. One study of 4,387 workers in low-wage industries in the nation's three largest cities found that 26% were paid less than the minimum wage in the previous work week. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Jan. 5, 2010); *see also* Editorial, *Workers in America, Cheated*, N.Y. Times, Sept. 2, 2009, at A30 (citing study). Of those surveyed who had worked more than 40 hours in the previous work week, 76% were not paid the overtime rate required by law. Bernhardt, *supra*, at 2. For low-wage workers who had come to work early or stayed late, 70% were not paid for the work they performed outside their scheduled shift. *Id.* at 3. These low-wage workers also experienced meal break violations, such that 58.3% reported being denied a meal break, working through a meal break, having a meal break interrupted by a supervisor, or having a meal break that was shorter than the law requires. *Id.* at 20.

This Court's decision with regard to federal court jurisdiction over class actions raising state law claims will have its greatest impact on low-wage workers who attempt to remedy such violations.

2. Private Class Actions, Not Government or Individual Actions, Are Key to Enforcement

Despite the widespread violations of wage and hour laws described above, government agencies are unable to adequately enforce our nation's wage and hour laws. Resources allocated to the DOL's Wage and Hour Division are insufficient to meet the demand for workplace investigations and enforcement of federal law. This is demonstrated by the drop in resource allocation over the past seven decades. In 1941, when the FLSA covered 15.5 million American workers, the Wage and Hour Division employed 1,769 investigators and launched 48,449 investigations. Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid – And What We Can Do About It* 121 (2009) (attached hereto as Exhibit 1). By 2007, when 130 million American workers were protected by the FLSA, the Division employed only 750 investigators and conducted only 24,950 investigations.[3] *Id.*

[3] It should be noted that the DOL recently announced the hiring of 250 new wage and hour investigators. DOL News Release (Nov. 11, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited Jan. 4, 2009). This is a welcome development, but it still leaves a great disparity in the number of investigators when compared to earlier years.

Looking at a smaller time period, between 1975 and 2004 "the number of federal workplace investigators declined by 14% and compliance-actions completed dropped by 36%." Scott Martelle, *Confronting the Gloves-Off Economy: America's Broken Labor Standards and How to Fix Them* 4-5 (Annette Bernhardt et al. eds., July 2009), *available at* http://www.irle.ucla.edu/publications/pdf/glovesoff economy.pdf (last visited Dec. 9, 2009).[4] In addition to a decline in investigations, the total number of enforcement actions pursued by the Wage and Hour Division declined from 47,000 in 1997 to fewer than 30,000 in 2007. U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, at 5-6 (July 15, 2008), *available at* http://www.gao.gov/new.items/ d08962t.pdf (last visited Dec. 9, 2009).

This reduction in public enforcement of the wage and hour laws has led employees to rely almost entirely on private enforcement actions. In 2007, for instance, there were 7,310 FLSA cases filed in federal court, but only 151 of these were filed by the Department of Labor. James C. Duff, *Judicial Business of the*

[4] As with the federal government, state agencies charged with enforcing wage and hour laws also have neglected their roles. *See* National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* 8-9 (Oct. 2006), *available at* http://nelp.3cdn.net/95b39fc0a12a8d8a34iwm6bhb v2.pdf (last visited Dec. 9, 2009).

United States Courts, 2007 Annual Report of the Director 147, Administrative Office of the U.S. Courts (2007), available at http://www.uscourts.gov/judbus2007/JuducialBusinespdfversion.pdf (last visited Jan. 5, 2010). Not all private enforcement actions are created equal, however. Legal actions that require individual employees to take affirmative steps to assert claims against their current employers – such as FLSA opt-in actions or individual suits – are fraught with deterrents that prevent employees from seeking redress. These include lack of knowledge of the laws or legal system,[5] fear of retaliation,[6] small claims relative to the costs and risks of litigation,[7] and employment in transient work.[8] For example,

[5] *See, e.g., Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006); *Gentry v. Superior Court*, 165 P.3d 556, 566 (Cal. 2007); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281, 286 (W.D. Mich. 2001); *Leyva v. Buley*, 125 F.R.D. 512, 518 (E.D. Wash. 1989).

[6] *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *Smellie v. Mount Sinai Hosp.*, No. 03CIV.0805, 2004 WL 2725124, *4 (S.D.N.Y. Nov. 29, 2004) (Employees may be "reluctant to serve as named plaintiffs in an action against their employer for fear of reprisals.").

[7] *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812-13 (1985); *see also Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) (recognizing that "individual wage and hour claims might be too small in dollar terms to support a litigation effort"); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (class actions are superior in the wage and hour context because "the cost of individual litigation is prohibitive"); *Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (same).

[8] *See, e.g., Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (The "lack of adequate financial resources or access to lawyers, their fear of reprisals . . . , the transient nature of their work, and other similar factors suggest that individual suits as an alternative to a class action are not practical."); *Duchene v. Michael L. Cetta, Inc.*, 244 F.R.D. 202, 203 (S.D.N.Y. 2007); *Recinos-Recinos*

this Court has acknowledged the difficulty of locating low-wage poultry plant workers to notify them of their FLSA opt-in rights. *De Asencio*, 342 F.3d at 312-13 (directing district court to reopen the opt-in period in part because 24% of the notices were "'undeliverable' and 'returned to sender' due to incorrect addresses").

The primary obstacle for such employees may be fear of retaliation. The Supreme Court and other federal courts have repeatedly recognized this reality: "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); *see also Robert DeMario Jewelry*, 361 U.S. at 292; *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (recognizing that current employees "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs"); *Horn v. Assoc. Wholesale Grocers, Inc.*, 555 F.2d 270, 275 (10th Cir. 1977) (same). As a court in the Western District of Pennsylvania has noted, where joinder is required in the context of an employment suit, "most, if

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(continued …)
v. Express Forestry, Inc., 233 F.R.D. 472, 482 (E.D. La. 2006); *see also* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 Minn. L. Rev. 1317, 1326 (2008) (noting that low wage workers often do not receive opt-in notices due to frequent changes of address).

not all, of the current employees will be hesitant to join." *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 424 (W.D. Pa. 1984).

Empirical data supports these observations by federal courts. One study has found that 43% of workers who complained about working conditions or tried to organize a union experienced illegal retaliation from their employer or supervisor. Bernhardt, *Broken Laws*, *supra*, at 3. "Another 20 percent of workers reported that they did not make a complaint to their employer during the past 12 months, even though they had experienced a serious problem such as dangerous working conditions or not being paid the minimum wage." *Id.* Of the workers who chose not to make a complaint, 50% were afraid of losing their jobs and 10% were afraid their employer would reduce their hours or wages in retaliation. *Id.*[9]

Another significant deterrent to filing an individual action or affirmatively signing onto an FLSA action is the likelihood that an employee's individual recovery will be quite small. For example, in 2005, the average back wage collected by the DOL was only $687 per employee. U.S. Dept. of Labor, 2005

[9] Undocumented workers in particular may fear retaliation by employers. "While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004).

Statistics Fact Sheet, *available at* http://www.dol. gov/whd/statistics/200531.htm (last visited Dec. 9, 2009). The Supreme Court has found that

> [r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small . . . that he would not file suit individually, nor would he affirmatively request inclusion in the class . . . .

Phillips Petrol., 472 U.S. at 812-13.

All of these deterrents contribute to low FLSA opt-in rates. *See, e.g.*, *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 538 (S.D. Tex. 2008); *Jankowski v. Castaldi*, No. 01CV0164, 2006 WL 118973, *2 (E.D.N.Y. Jan. 13, 2006); *McLaughlin*, 224 F.R.D. at 312. This Court, for instance, addressed an opt-in rate of 11% in *De Asencio*, 342 F.3d at 313, and others have reported average opt-in rates around 15%.[10] Low opt-in rates for FLSA actions, combined with the lack of public enforcement of wage and hour laws, point to private class actions as the "device [that] makes possible an effective assertion of many claims which otherwise would not be enforced, for economic or practical reasons . . . ." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 831 (3d Cir. 1973).

[10] *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Empl. & Lab. L. 269, 291-94 & n.125 (2008) (reviewing a sample of FLSA cases and finding an average opt-in rate of 15.7%).

An opt-out class action proceeding under Rule 23 overcomes the obstacles discussed above because it requires only a few current or former employees to step forward to challenge an employer's unlawful, systemic practices on behalf of other employees who lack the incentive, knowledge, or mettle to file their grievances in court. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("[A]ggrieved persons may be without any effective redress unless they may employ the class action device."); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001) ("Absent class treatment, each employee would have to incur the difficulty and expense of filing an individual claim and would have to undertake the personal risk of litigating directly against his or her current or former employer.").

3. Combined FLSA and State Law Actions Protect Workers and Promote Efficiency

"Hybrid actions" combining FLSA opt-in collective action claims and state law opt-out class action claims in one civil action are necessary in many cases because neither action standing alone will fully compensate employees who have been cheated by unscrupulous employers. In addition to the procedural benefits conferred to employees by the Rule 23 opt-out process, employees may wish to seek the protection of more generous state wage and hour laws. *See generally* ABA Section of Labor and Employment Law, *Wage and Hour Laws, A State-by-State Survey* (Gregory K. McGillivary ed., 2004 & Supp. 2009). By the same

token, the FLSA may offer advantages to workers – such as liquidated damages in the full amount of unpaid wages, a longer statute of limitations, narrower overtime exemptions,[11] or a lower threshold for overtime hours – depending on the state laws in question. *See id.*

Hybrid litigation also confers additional advantages to litigants and courts alike. First, by allowing the same or substantially similar factual and legal issues to be resolved in one case, combined FLSA and state law actions advance the interests of judicial economy and efficiency and prevent duplicative, concurrent litigation regarding the same underlying conduct in both federal and state courts. *See De Asencio*, 342 F.3d at 310 ("Moreover, joinder would permit the District Court to efficiently manage the overall litigation."). Second, hybrid cases reduce the risk of inconsistent adjudications. Hybrid cases promote consistency in the interpretation and application of federal and state laws that are often substantially similar or complementary in design and purpose. In particular, where state laws track certain aspects of the FLSA, or where state laws have been written to apply only in the absence of FLSA coverage, there are distinct advantages to having one

[11] For example, the FLSA overtime exemption for commissioned salespersons is narrower than the California exemption for commissioned salespersons, and thus more generous to certain workers. The FLSA exemption applies only to those "employed by a retail or service establishment," 29 C.F.R. § 779.411, whereas the California exemption applies to "any employee" as long as "more than half (1/2) of that employee's compensation represents commissions," *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 803 (1999).

federal court exercise its supplemental jurisdiction to decide overlapping federal and state law questions together. *See id.*

Third, hybrid cases reduce the potential for claim splitting and limit the instances in which litigation will be necessary to determine the application of *res judicata* or collateral estoppel to corresponding actions brought in the state or federal forum. In addition, as this Court has recognized, combined FLSA and state law cases facilitate comprehensive, "global" settlement agreements in which employees can release both state and federal claims. *See id.* at 311 ("A large class with few claimants with viable claims remaining outside is more likely to result in a resolution bringing 'global peace.'").

In short, private class action suits are vital to enforcing statutory rights to minimum wage, overtime pay, and other workplace protections. When coupled with FLSA actions, they are often the most effective way to remedy wrongs that would not be addressed if workers had recourse only to procedures requiring them to "affirmatively request inclusion," *Phillips Petrol.*, 472 U.S. at 813, or seek individual relief.

B. Federal Law Authorizes Hybrid Actions

The federal statutory scheme demonstrates Congressional authorization for aggrieved employees to seek redress, in a single action, under both federal and state wage and hour laws. This is particularly true because Congress adopted the

FLSA's opt-in requirement at a time when courts routinely required class members to opt-in, years before Rule 23 was revised to make opt-out class actions the primary vehicle for group representation. As a result, the majority of district courts, and the only court of appeal to have addressed the question directly, have determined there is no absolute bar to maintaining jurisdiction over hybrid actions.

1. The Landscape of Federal Law Expressly Refutes Any Implied Jurisdictional Bars to Hybrid Actions

The landscape of federal laws addressing federal jurisdiction over state wage and hour claims consists of three statutes in which Congress has expressly authorized the type of hybrid action at issue in this case. First, the FLSA expressly authorizes states to enact their own wage and hour laws providing greater protection to employees. 29 U.S.C. § 218(a); 29 C.F.R. § 541.4; *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 193 (4th Cir. 2007) ("[T]he FLSA contains a 'savings clause' that expressly allows states to provide workers with more beneficial minimum wages and maximum workweeks than those mandated by the FLSA itself."); *Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986) ("Section 218(a) of the FLSA explicitly permits states to set more stringent overtime provisions than the FLSA.") (internal citation omitted). Therefore, as this Court has recognized, the FLSA is not a statute in which "Congress has expressly provided for the preemption of state-law claims." *De Asencio*, 342 F.3d at 308 n.10. To the contrary, the FLSA explicitly permits state law wage and hour claims.

Second, in enacting 28 U.S.C. § 1367, Congress expressly granted federal courts the authority to exercise supplemental jurisdiction "to the constitutional limit, to which it appeared to be carried in" the case of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *In re Walker*, 51 F.3d 562, 571 (5th Cir. 1995) (internal quotation marks omitted); *see also Lindsay*, 448 F.3d at 424 (same). In granting supplemental jurisdiction, Congress did not carve out a special exception for state wage and hour laws in situations where original jurisdiction is predicated on the FLSA. Rather, a district court has supplemental jurisdiction unless federal law "expressly provide[s] otherwise," 28 U.S.C. § 1367(a), and must exercise its jurisdiction unless certain limited exceptions are present,[12] in which case the court may decline jurisdiction, taking into account the values of judicial economy, fairness, efficiency, and comity. *See Gibbs*, 383 U.S. at 726.

As this Court and others have found, "the FLSA does not expressly address supplemental jurisdiction." *De Asencio*, 342 F.3d at 309. "[N]ot only does section 216(b) [of the FLSA] not expressly prohibit the exercise of supplemental jurisdiction over the state law claims of opt-out class members, it includes no mention of supplemental jurisdiction at all." *Lindsay*, 448 F.3d at 422; *see also De Asencio*, 342 F.3d at 309 (recognizing that § 1367(a) is met, supplemental

[12] See *infra*, Section C, for a discussion of the § 1367(c) exceptions.

jurisdiction exists over the state law claims, and conducting a case-specific analysis under § 1367(c) to determine if any exceptions apply). Therefore, courts may exercise supplemental jurisdiction over state wage and hour claims wherever those claims share a "common nucleus of operative fact" with the FLSA claims. *Gibbs*, 383 U.S. at 725.

Third, when Congress enacted the Class Action Fairness Act of 2005 ("CAFA"), it expressly created federal diversity jurisdiction over state law class actions of a certain size and financial value, where minimal aggregate diversity is met. 28 U.S.C. § 1332(d). CAFA gives the federal courts broad original jurisdiction, as well as removal jurisdiction, over state law class actions and contains no special exceptions for class actions alleging violations of state wage and hour laws. A number of federal courts have recognized CAFA's implications for the district court's "inherent incompatibility" theory: Congress has, in effect, *required* federal courts to exercise jurisdiction over hybrid wage and hour actions where the amount in controversy in the state law action exceeds $5 million, minimum diversity is present, and there are more than 100 state law class members. *See, e.g., Jackson v. Alpharma Inc.*, No. 07-3250, 2008 WL 508664, *5 (D.N.J. Feb. 21, 2008); *Hickton v. Enterprise Rent-A-Car Co.*, No. 07-1687, 2008 WL 4279818, *5-7 (W.D. Pa. Sept. 12, 2008).

In short, Congress has expressly disclaimed any intent to preempt state wage and hour laws and has expressly granted federal courts expansive jurisdiction over the state law claims in hybrid actions. Conspicuously lacking from these jurisdictional statutes is any special exception for class actions brought by aggrieved employees.

This is particularly true given the context in which Congress enacted the FLSA's opt-in provision. This Court has noted "Congress's express preference for opt-in actions" under the FLSA, *De Asencio*, 342 F.3d at 310, but the history of the opt-in provision is more complicated than the Court recognized in *De Asencio*. Respectfully, it is an error to assign great significance to the opt-in requirement.[13]

When Congress enacted the Portal-to-Portal Act to add the opt-in provision to the FLSA in 1947, it was responding to class action lawsuits filed and maintained by "plaintiffs not themselves possessing claims" who were "lacking a personal interest in the outcome." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989). That is, Congress in 1947 was not choosing between an opt-in class or an opt-out class as we know it today, represented by adequate, typical, class representatives who share the same claims and interests as members of the class.

[13] For these reasons, the discussion in *Ellis v. Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 447 (W.D. Pa. 2007), of the Portal-to-Portal Act amendments overlooks important information about the prevalence of opt-in actions in 1947.

Indeed, at the time of the FLSA amendments, Rule 23 itself provided for an opt-in process in which individuals had to intervene in order to be party to a judgment on "a common question and related to common relief" – the so-called "spurious" class action. Fed. R. Civ. P. 23, Advisory Committee Notes to the 1966 Amendment. In accordance with the language of Rule 23 at the time, most courts, including this Court, treated FLSA actions as spurious class actions and therefore applied an opt-in rule *prior* to the passage of the Portal-to-Portal Act. *Pentland v. Dravo Corp.*, 152 F.2d 851, 853-56 (3d Cir. 1946) (treating FLSA action as an opt-in action and discussing similar treatment by other courts); *see also* Brunsden, *supra*, at 279-80 & nn. 50-51. Accordingly, "while Congress amended the FLSA to include the written consent requirement, it, in effect, just codified the prevailing practice." *Marquez v. Partylite Worldwide, Inc.*, No. 07-C-2024, 2007 WL 2461667, *5 (N.D. Ill. Aug. 27, 2007). It was not until Rule 23 was amended in 1966 that the opt-out process was used. *See* Fed. R. Civ. P. 23, Advisory Committee Notes to the 1966 Amendment ("*The amended rule* . . . provides that all class actions . . . will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable . . . .") (emphasis in original); Brunsden, *supra*, at 281.

Therefore, there is no evidence to suggest that Congress weighed the relative merits of an opt-in approach against an opt-out approach and decided on the

former. Instead, the FLSA's opt-in procedure can be viewed as an accident of historical timing; if the Portal-to-Portal Act had been enacted after 1966, Congress might well have conformed the FLSA to the opt-out procedure described in the modern version of Rule 23.

2. A Rule Against Hybrid Actions Would Lead to Absurd Results

In addition to being contrary to the scheme of federal laws Congress has actually enacted, the adoption of an across-the-board rule against the exercise of supplemental jurisdiction over state law class claims in an FLSA action would lead to absurd results. As noted above, CAFA provides federal courts with original jurisdiction over any state law class action with more than 100 class members, an amount in controversy of $5 million, and minimum diversity between the parties. In light of CAFA, it would make no sense to forbid the exercise of supplemental jurisdiction over state wage claims in FLSA actions, when federal courts would have original jurisdiction over many, if not most, of those state law class claims.

The rule of "inherent incompatibility" would also lead to anomalous results with regard to the exercise of state court jurisdiction. Congress has explicitly authorized plaintiffs to maintain FLSA opt-in actions in state court, 29 U.S.C. § 216(b), where plaintiffs might also plead claims on behalf of an opt-out class, *see, e.g.*, Pa. R. Civ. P. 1711; N.J. Ct. R. 4:32-2(b) & (c); Del. Ch. Ct. R. 23(c)(2). Under the presumption of concurrent jurisdiction, state courts would have little

choice but to exercise their jurisdiction over FLSA claims, *see Haywood v. Drown*, 129 S. Ct. 2108, 2114 (2009) (describing limited exceptions to state court jurisdiction over federal claims), such that hybrid actions would proceed in state courts even if federal courts adopted the theory of "inherent incompatibility."

In short, the adoption of the incompatibility theory would lead to an absurd patchwork of jurisdictional make-believe: the mandatory exercise of state court jurisdiction over hybrid actions – at least until removed to federal court by an employer – despite a bar to such jurisdiction in federal courts, except where the state wage and hour class meets the requirements of CAFA.

3. This Court Should Join the D.C. Circuit in Rejecting the "Inherently Incompatible" Fiction

To date, the D.C. Circuit is the only court of appeals that has addressed whether there is some inherent conflict between an FLSA opt-in action and a Rule 23 opt-out action that would preclude hybrid actions as a matter of law. In *Lindsay*, the D.C. Circuit squarely held that while there are procedural differences between the two types of actions, this difference does not, as a matter of law, preclude supplemental jurisdiction over a state law class action when original jurisdiction is provided by the FLSA. *Lindsay*, 448 F.3d at 424. The court explained that it "doubt[ed] that a mere *procedural* difference can curtail section 1367's *jurisdictional* sweep," and held that the express congressional authority for exercising supplemental jurisdiction took precedence over "any policy decision

implicit in section 216(b)'s opt-in requirement." *Id.* (emphasis in original). The D.C. Circuit also clarified that courts may not decline to exercise jurisdiction under the "exceptional circumstances" exception of § 1367(c)(4) because the difference between opt-in and opt-out actions does not rise to the level of a "compelling reason" in an "exceptional circumstance." *Id.* at 425.

Since the *Lindsay* decision came down, district courts around the country have followed its guidance.[14] This Court should avoid the creation of a circuit split by reaffirming that there is no such legal doctrine as "inherent incompatibility" that can be invoked by a court to decline to exercise its supplemental jurisdiction as a matter of law. The Court should also clarify the limited, case-specific circumstances in which a district court can decline to exercise supplemental jurisdiction over Rule 23 class actions seeking redress for state law wage and hour violations.

C. Discretion To Decline Jurisdiction Over Pendent State Law Claims Is Limited To The § 1367(c) Exceptions

As this Court has recognized, Rule 23 class claims asserting violations of state wage and hour laws often share a "common nucleus of operative fact" with the FLSA claims that form the basis of the district court's original jurisdiction. *See De Asencio*, 342 F.3d at 308. In addition, as discussed above, Congress has not

[14] *See, e.g.*, *Perkins*, 2009 WL 350604 at *4; *Salazar*, 527 F. Supp. 2d at 886; *Bamonte*, 2007 WL 2022011 at *3-4.

expressly prohibited supplemental jurisdiction over state wage and hour claims. *Id.* at 308-09 & n.10; *Lindsay*, 448 F.3d at 422. Accordingly, a district court has discretion to decline to exercise supplemental jurisdiction over state law claims in an FLSA action only where one of the "explicit statutory circumstances enunciated in section 1367(c)" is met. *De Asencio*, 342 F.3d at 309. Those exceptions include cases where (1) the state law claim "raises a novel or complex issue," (2) the state law claim "substantially predominates over" the federal claim(s), (3) "the district court has dismissed all claims over which it has original jurisdiction," or (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(1-4).

As this Court noted with respect to the second exception, predominance, the application of the § 1367(c) circumstances is "necessarily . . . a case-specific analysis" that requires a district court to "examine the scope of the state and federal issues, the terms of proof required by each type of claim, the comprehensiveness of the remedies, and the ability to dismiss the state claims without prejudice." *De Asencio*, 342 F.3d at 312. The court below, however, engaged in no analysis whatsoever of the claims, factual allegations, or required proof at issue in this particular case. Instead, the district court simply adopted the reasoning of other courts and applied an absolute bar against hybrid actions. *Parker v. NutriSystem, Inc.*, No. 08-1508, Slip Op. at 2 (E.D. Pa. July 25, 2008). Unfortunately, this

approach ignored this Court's instruction in *De Asencio* and the plain language of § 1367. Indeed, the court failed even to cite the supplemental jurisdiction statute.

If the Court decides that remand is appropriate, it should instruct the district court that it may decline to exercise supplemental jurisdiction only where one of the § 1367(c) exceptions is met, considering also the interests of judicial economy, fairness, and efficiency. Such analysis is consistent with this Court's decision in *De Asencio*, where the Court held that supplemental jurisdiction should have been declined due to the predominance of state issues, such as required proof of an oral contract, "two novel and complex questions of state law," a "great" disparity in the number of opt-in plaintiffs and putative opt-out class members, and the "unique circumstances" of the case. *De Asencio*, 342 F.3d at 309-12. The Court also should reiterate that "[p]redomination under section 1367 generally goes to the type of claim, not the number of parties involved." *Id.* at 311; *see also Gibbs*, 383 U.S. at 726-27 (predomination inquiry should be focused on proof, "the scope of the issues raised," or "the comprehensiveness of the remedy sought"); *Lindsay*, 448 F.3d at 425 ("Predomination . . . relates to the type of claim.). This is particularly true in the context of FLSA actions, where opt-in rates are historically low for the reasons discussed in Section A, *supra*.

Equally important, this Court should clarify, as the D.C. Circuit has found, that the district court cannot rely on a notion of "inherent incompatibility" to find,

under § 1367(c), that there are "compelling reasons" and "exceptional circumstances" for declining jurisdiction. *Lindsay*, 448 F.3d at 425. In considering the § 1367(c) factors, the district court should bear in mind that "[s]upplemental jurisdiction promotes 'judicial economy, convenience and fairness to litigants.'" *De Asencio*, 342 F.3d at 308 (*quoting Gibbs*, 383 U.S. at 726); *see also Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 746 (11th Cir. 2006) ("[T]he policy of supplemental jurisdiction is to support the conservation of judicial energy and avoid multiplicity in litigation.").

Finally, there appears to be some nascent confusion on the part of some district courts as to whether it is proper to exercise supplemental jurisdiction over state law wage and hour claims that seek redress for the same underlying actions by the employer as the FLSA claims. *See Brothers v. Portage Nat'l Bank*, No. 3:06-94, 2007 WL 965835, *6 (W.D. Pa. Mar. 29, 2007); *Ellis*, 527 F. Supp. 2d at 451-52. The Court should clarify, first, that the FLSA does not preempt state wage and hour laws, even where those laws address the same harm or misconduct by an employer. *De Asencio*, 342 F.3d at 308 n.10; *Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) ("We also note that every Circuit that has considered the issue has reached the same conclusion – state overtime wage law is not preempted by the MCA or the FLSA.").

Second, the Court should reiterate that where "the same acts violate parallel federal and state laws, the common nucleus of operative facts is obvious," *Lyon v. Whisman*, 45 F.3d 758, 761 (3d Cir. 1995), reminding the district courts that this Court found that jurisdiction existed in *De Asencio*, where the state and federal claims both addressed the failure to pay employees for donning and doffing time, *De Asencio*, 342 F.3d at 308. Moreover, where the state and federal claims address the same conduct, it is less likely that any of the § 1367(c) exceptions will apply because the proof and legal questions will be substantially similar, if not identical. *See Lindsay*, 448 F.3d at 425 ("[H]ere the state law claims essentially replicate the FLSA claims – they plainly do not predominate.").

IV. CONCLUSION

For all of the foregoing reasons, the Court should reverse the district court's adoption of a rule that hybrid actions are "inherently incompatible" as a matter of law and remand for a case-specific analysis of whether there is a basis for declining to exercise supplemental jurisdiction.

Dated: January 7, 2010

Respectfully submitted,

GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN

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ATTORNEYS FOR *AMICI CURIAE*

INTERESTS OF THE *AMICI*

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys (including many in Delaware, Pennsylvania, and New Jersey) committed to working for those who have been illegally treated in the workplace. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts regarding the proper interpretation and application of the FLSA and other federal civil rights laws.

Comité de Apoyo a los Trabajadores Agrícolas (CATA), known in English as the "Farmworkers Support Committee," is a non-profit membership organization founded in 1979 open to farmworkers, members of the immigrant worker community, and their supporters. Members live and work primarily in Pennsylvania, New Jersey, Delaware and Maryland. CATA strives to improve the working and living conditions of its members and member communities. CATA has extensive experience with the legitimate hesitancy of workers to expose themselves to employer retaliation for assertion of legal claims against employers

and strongly believes that federal courts need to be able to entertain claims brought on behalf of groups and classes of workers where each of the individual workers cannot present their individual claims without facing retaliation and discrimination from employers.

Community Legal Services (CLS) is a 501(c)(3) non-profit organization, founded in 1966, dedicated to serving the legal needs and advocating on behalf of low-income Philadelphia residents. Among the many areas in which CLS practices, we handle several hundred wage theft cases each year. These cases often require aggressive action and pursuit of all possible legal remedies in order to recover our clients' wages. Therefore, resolution of the issues raised in this appeal would impact our clients' ability to recover their wages.

The Cornell Law School Labor Law Clinic represents the interests of workers and unions while providing law students with meaningful opportunities to develop lawyering skills. The Clinic addresses a variety of labor and employment law topics on behalf of its clients and educates law students through both a classroom component and supervised practice.

Friends of Farmworkers, Inc. is a Pennsylvania non-profit legal services organization founded in 1975 whose purpose is to improve the living and working conditions of indigent farmworkers, mushroom workers, food processing workers, and workers from immigrant and migrant communities. The outcome of this

matter has a direct impact on the ability of Friends of Farmworkers to effectively and efficiently accomplish its corporate purposes. Since the early 1980's Friends of Farmworkers has litigated in federal court numerous Fair Labor Standards Act collective action claims lawsuits joined with class actions arising under federal law (including the Migrant and Seasonal Agricultural Worker Protection Act and the Racketeer Influenced and Corrupt Organizations Act) and claims arising under state law. Much of the recent federal litigation brought by Friends of Farmworkers has involved claims arising on behalf of foreign H-2B temporary non-agricultural workers for violations of both the Fair Labor Standards Act as well as common law contract claims to enforce the terms of H-2B workers contracts. These actions may involve claims under state minimum wage and wage payment laws. *See Rivera v. The Brickman Group, Ltd.*, United States District Court, Eastern District of Pennsylvania, Civil No. 2:05-cv-01518-LP; *Fuentes v. M.J.C. Company*, Eastern District of Pennsylvania, Civil No. 2:07-CV-980-RBS. These claims are most appropriately brought in federal court and are likely to be removed by Defendants to federal court when brought in state court. The fragmentation of these claims between the state and federal court systems would result in tremendous duplication of resources between state and federal courts. *See Fuentes v. M.J.C. Company,* Docket No. 39 and attachments thereto filed November 4, 2008; *see also Rivera v. The Brickman Group*, Ltd, Docket Nos. 124-134,192, 194, & 204.

JUNTOS / Casa de los Soles is the only community-based organization in South Philadelphia comprised of Mexican and other Latino immigrants. Our mission is to build power for justice in the city of Philadelphia and members' home countries in order to create vibrant, organized, vocal, and healthy communities. As an organization, we firmly believe that organizing provides a means through which workers can take action on their own behalf for economic and political change. It is in the interest of our community to support the *amicus curiae* brief.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should elevate human rights over property interests, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally and internationally on a wide range of legal concerns, especially those impacting people who are socially and politically marginalized and disenfranchised. Labor and employment issues have been a central focus of the Guild's mission during its nearly seventy-five-year history. The Guild's Labor and Employment Committee has a long record of action on behalf of low wage and immigrant workers in particular, both as *amicus* and through strategic coordination, scholarship and advocacy. The members of the Labor and Employment Committee also provide

direct representation to individual and organized workers in a variety of local, state, federal and international forums.

The Southern Poverty Law Center, founded in 1971, has litigated numerous civil rights cases on behalf of women, people of color, prisoners, immigrants, and other victims of discrimination. Although the Center's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

The Maurice & Jane Sugar Law Center for Economic & Social Justice is a national nonprofit law center extensively engaged in employment law litigation, including actions and advocacy in support of workers' right to obtain full and fair wages for their labor. The Sugar Law Center is deeply interested in this case because its outcome could affect the right of thousands of workers to obtain a remedy for violations of the Fair Labor Standards Act's overtime pay provisions. The judgment of *amici* is based on over 15 years of experience in advocacy and representation on behalf of thousands of workers before federal and state trial and appellate courts throughout the country.

The Working Hands Legal Clinic (WHLC) is a non-profit organization that provides access to free legal services in the area of employment law to low-income workers. WHLC works with a network of community-based organizations to reach those who are working on the fringes of the economy, such as homeless or

immigrant workers who are among those that work as day or temporary laborers each day. Factors such as geographic isolation, unfamiliarity with the legal system, inability to travel, poverty, low education levels, language barriers and fear make these workers most vulnerable to workplace abuses, including wage-and-hour violations. These workers are the least able to bring forth claims on their own behalf and the most fearful of retaliation if they do. Laborers in the day or temporary labor industry, an industry where an expectation of continued employment is, by definition, non-existent, have a legitimate fear of being blacklisted if they publicly complain. It is critical that this population of laborers be able to pursue simultaneously the rights and remedies afforded under the Fair Labor Standards Act for those able to opt into a collective action as well as the rights and remedies available under a state law class action for those unable to opt-in. To find otherwise would unjustly reward employers who exploit these laborers vulnerable position at the expense of the workers themselves and of employers who abide by the law.

CERTIFICATION OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE AND THIRD CIRCUIT LOCAL APPELLATE RULES

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that I have been admitted to practice in this Court. Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and Third Circuit Local Appellate Rule 32.1, I certify that **BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, COMMUNITY LEGAL SERVICES, CORNELL LAW SCHOOL LABOR LAW CLINIC, FRIENDS OF FARMWORKERS, JUNTOS, NATIONAL LAWYERS GUILD LABOR AND EMPLOYMENT COMMITTEE, SOUTHERN POVERTY LAW CENTER, THE SUGAR LAW CENTER, AND WORKING HANDS LEGAL CLINIC, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS** is proportionately spaced, has a typeface of 14 points, contains 6,977 words. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I also certify that the text of electronic is identical to the text in the paper copies, that the electronic brief has been checked for viruses using Symantec Endpoint Protection, and that no virus was detected.

Dated: January 7, 2010

/s/
David Borgen

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2010, a copy of foregoing **BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, COMMUNITY LEGAL SERVICES, CORNELL LABOR LAW CLINIC, FRIENDS OF FARMWORKERS, JUNTOS, NATIONAL LAWYERS GUILD LABOR AND EMPLOYMENT COMMITTEE, SOUTHERN POVERTY LAW CENTER, THE SUGAR LAW CENTER, AND WORKING HANDS LEGAL CLINIC, AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**, was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /S/

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EXHIBIT 1

"One of the most pressing issues facing millions of hardworking Americans."
–SENATOR EDWARD M. KENNEDY

WAGE THEFT IN AMERICA

WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID — AND WHAT WE CAN DO ABOUT IT

KIM BOBO

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The New Press was established in 1990 as a not-for-profit alternative to the large, commercial publishing houses currently dominating the book publishing industry. The New Press operates in the public interest rather than for private gain, and is committed to publishing, in innovative ways, works of educational, cultural, and community value that are often deemed insufficiently profitable.

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Division staff. Second, improvements in technology (e.g., computers, cell phones, cars) and other enhanced enforcement resources make staff much more efficient. According to the Bureau of Labor Statistics' Productivity and Costs Index, nonfarm business productivity, measured on an output per hour basis, increased 373 percent between 1947 and 2007 (no data is available before 1947). On the other hand, the investigators are responsible for enforcing many more laws than they did in 1941, which means that inspections today are broader and much more complicated.

Clearly 750 wage and hour investigators protecting low-wage workers against wage theft is inadequate. So what's the right number?

The best estimate of the number of investigators needed today, in my opinion, must start with the premise that the Wage and Hour Division should attempt to maintain the 1941 ratio of investigators to workers. The division's mission is to protect workers; the number of workplaces does not significantly impact investigator workload. As noted earlier, applying the 1941 ratio of investigators to workers results in 12,500 investigators. Next, applying the 373 percent productivity increase since 1941 tells us that approximately 3350 investigators are needed to maintain worker protection at the 1941 level (12,500×1/ 373%).

If instead of using the 1941 figures for comparison we use the 1962 figures, we find a similar, albeit slightly less dramatic, need for more staff. Using the ratio of investigators to workers covered by wage and hour laws, the Wage and Hour Division would need over seven thousand investigators. Using the 1962 ratio of investigators to workplaces covered, the Wage and Hour Division would need almost ten thousand investigators. Again, if we apply the 247 percent productivity change for the period from 1962 to 2007 to the seven thousand figure (7000×1/247%), we come up with the estimate of 2834 investigators needed. Either calculation suggests that the division needs significantly more staff to be able to stay abreast of its enforcement responsibilities.

Year	1941	1962[21]	2007
Investigators	1769	1544	750
Workers Covered	15.5 million	28 million	130 million
Employers Covered	360,000	1.1 million	7 million
Investigations[22]	48,449	44,115	24,950
Wages Recovered in 2008 dollars	$149,702,127	$243,890,330	$220,613,703

Even the reasonable and defensible position that the Wage and Hour Division should increase its investigative staff from 750 to 3350 (2600 new investigators) or 2834 (2184 new investigators) will be controversial because of the costs involved.

An additional challenge to immediately adding thousands of new investigators is the Wage and Hour Division's capacity to adequately train a large number of new investigators without bringing the agency's work to a halt. Quadrupling the agency's staff would be an overwhelming training challenge. Given the departure over the last few years of many dedicated career staff leaders with decades of experience, perhaps a strong team of retirees could be recruited to oversee the intensive training and mentoring program for new investigators.

Not all the enforcement staff needs to be investigators. The current way investigative staff is trained is very thorough and very costly. Instead, the Wage and Hour Division could more effectively use administrative staff hired with lower salary and training needs. For example, administrative staff could easily handle routine cases (such as late final paychecks) when an employer quickly agrees to pay. Cases could be turned over to an investigator if the employer refuses to pay.

Given the crisis of wage theft in the nation, the huge responsibility for protecting the nation's workers and deterring wage theft, and the critical Wage and Hour Division rebuilding needs, the following is a modest and reasonable recommendation:

16. U.S. Government Accountability Office, *Department of Labor: Case Studies from Ongoing Work Show Examples in Which Wage and Hour Division Did Not Adequately Pursue Labor Violations* (Washington, DC: July 15, 2008), GAO-08-973T.

17. To hear all the testimonies, visit http://edlabor.house.gov/hearings/fc-2008-07-15.shtml.

18. Frank Dellinger, Assistant Director for Labor and Employment Law, Commonwealth of Virginia shared with me an initial survey he had done of state enforcement agencies. Cathy Junia made additional calls to state agencies in order to update the information.

19. James Dao, "34th Precinct Is Expanding Police Force," *New York Times*, August 5, 1992.

20. Norman Mineta, Secretary of Transportation, remarks at the TSA anniversary event, Washington, DC, November 18, 2002.

21. These figures are taken from the Wage and Hour and Public Contracts Division, USDOL Annual Report, 1962.

22. In 1941, most of the investigations were initiated by investigators. The figure in 2007 is of "complaints registered," complaints that seemed to have some validity that were looked into for back wages owed. The figures are not exactly comparable but offer some sense of scale.

23. Conversation with Reverend Bob Coats, April 30, 2008.

24. www.hks.harvard.edu/criminaljustice/history.htm, Program History of the Program in Criminal Justice Policy and Management.

25. Center for Problem-Oriented Policing, "Community Policing," Module 2, Model Academic Curriculum.

26. U.S. Department of Labor, OSHA, Office of Communications, National News Release USDL: 03-306, June 10, 2003.

27. Notes in response to manuscript draft, June 2008.

28. U.S. Department of Labor, 1968 Budget Estimates, Volume II, 90th Congress, 1st Session, WH-16.

29. U.S. Department of Agriculture, Cooperative State Research, Education and Extension Service, *About Us* section of the website at www.csrees.usda.gov.

30. 4-H Youth Department, "The History of the Cooperative Extension Service," Purdue University, West Lafayette, Indiana, 2001.

31. Ibid.

8. Frances Perkins

1. The description of Frances Perkins's life draws heavily from the excellent biographies written by Bill Severn (*Frances Perkins: A Member of the Cabinet*, New York: Hawthorn Books, 1976) and George Martin (*Madam Secretary Frances Perkins: A Biography of America's First Woman Cabinet*