No. 2:04-cv-01003-DSF-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: SEPULVEDA v. WAL-MART
STORES, INC. LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES DANIEL SEPULVEDA, ET AL.

David Borgen, CA Bar #099354
Laura L. Ho, CA Bar #173179
Heather Mills, CA Bar #215293
Jessica Beckett-McWalter, CA Bar #233238
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (Fax)

Attorneys for Amici Curiae
Asian Law Caucus
Asian Pacific American Legal Center of Southern California
Bet Tzedek Legal Services
California Rural Legal Assistance Foundation
Equal Rights Advocates
Hastings Civil Justice Clinic
Katharine and George Alexander Community Law Center
La Raza Centro Legal, Inc.
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Legal Aid Society - Employment Law Center
Mexican-American Legal Defense & Educational Fund
Northwest Women's Law Center
Northwest Workers' Justice Project
SEIU 775
Women's Employment Rights Clinic

Avantika Rao
Asian Law Caucus
939 Market Street, Suite 201
San Francisco, CA 94103
Telephone: (415) 896-1701
Facsimile: (415) 896-1702

Attorney for Amicus Curiae
Asian Law Caucus

Julie Su
Asian Pacific American Legal Center
1145 Wilshire Blvd., 2nd Floor
Los Angeles, CA 90017
(213) 977-7500 x 240
(213) 977-7595 (Fax)

Attorney for Amicus Curiae
Asian Pacific American Legal Center

Irma D. Herrera
Equal Rights Advocates
1663 Mission Street, Suite 250
San Francisco, CA 94103
(415) 621-0672
(415) 621-6744 (Fax)

Attorney for Amicus Curiae
Equal Rights Advocates

Gus May
Bet Tzedek Legal Services
12821 Victory Blvd., 2nd Floor
North Hollywood, CA 91606
(818) 769-0136
(818) 763-3299 (Fax)

Attorney for Amicus Curiae
Bet Tzedek Legal Service

Donna Ryu
Hastings Civil Justice Clinic
100 McAllister Street, Suite 300
San Francisco, CA 94102
(415) 557-7887

Attorney for Amicus Curiae
Hastings Civil Justice Clinic

Cynthia Rice
California Rural Legal Assistance Foundation
405 1405 14th Street, Suite 300
Oakland CA 94612
(510) 835-2478
(916) 446-3057 (Fax)

Attorney for Amicus Curiae
California Rural Legal Assistance Foundation

Margarita Prado Alvarez
Katharine and George Alexander Community Law Center
1030 The Alameda
San Jose, CA 95126
(408) 288-7030, ext. 245
(408) 288-3581 (Fax)

Attorney for Amicus Curiae
Katharine and George Alexander Community Law Center

Anamaria Loya
La Raza Centro Legal
474 Valencia Street, Suite 295
San Francisco, CA 94103
(415) 575-3500
(415) 255-7593 (Fax)

Attorney for Amicus Curiae
La Raza Centro Legal

Cynthia Valenzuela
Kristina M. Campbell
Mexican-American Legal Defense & Educational Fund
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512
(213) 629-0266 (Fax)

Attorney for Amicus Curiae
Mexican-American Legal Defense & Educational Fund

Robert Rubin
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
131 Steuart Street, Suite 400
San Francisco, CA 94105
(415) 543-9444
(415) 543-0296 (Fax)

Attorney for Amicus Curiae
Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Sara Ainsworth
Northwest Women's Law Center
907 Pine Street, Suite 500
Seattle, WA 98107
(206) 682-9552

Attorney for Amicus Curiae
Northwest Women's Law Center

D. Michael Dale
Northwest Workers' Justice Project
917 S. W. Oak Street, Suite 426
Portland, Oregon 97205
(503) 525-8454

Attorney for Amicus Curiae
Northwest Workers' Justice Project

Michael Gaitley
Legal Aid Society – Employment Law Center
600 Harrison Street, Suite 120
San Francisco, CA 94107
(415) 864-8848
(415) 864-8199 (Fax)

Attorney for Amicus Curiae Legal Aid Society – Employment Law Center

Doris Y. Ng
Women's Employment Rights Clinic
Golden Gate Univ. School of Law
536 Mission Street
San Francisco, CA 94105
(415) 442-6647
(415) 896-2450 (Fax)

Attorney for Amicus Curiae Golden Gate Women's Employment Rights Clinic

Sarah Volpone
SEIU 775
151 S. Lander Street, Suite A
Seattle, WA 98134
(206) 838-3203
(206) 838.3201 (fax)

Attorney for Amicus Curiae SEIU 775

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I. INTRODUCTION

Amici Curiae are non-profit organizations advocating on behalf of workers in California and other states within the Ninth Circuit. Amici's clients toil in what are often minimum and sub-minimum wage jobs as janitors, garment workers, agricultural field workers, restaurant workers, day laborers, and in other low wage positions. The District Court's erroneous denial of class certification in this case threatens to take away one of the few effective devices such workers can use to enforce their fundamental employment rights. In enacting the minimum wage and overtime laws nearly a century ago, state and federal governments recognized that no one, including amici's clients, should have to work under substandard conditions. However, studies continue to show that workers, especially low wage workers like amici's clients, frequently confront widespread minimum wage and overtime violations, lack the financial and legal resources necessary to enforce their rights through individual lawsuits, and face retaliation in the form of losing their jobs and being blacklisted if they complain about their substandard working conditions. State and federal governments have also recognized that governmental enforcement agencies alone cannot address all of the wage and hour violations by employers. For amici's constituents and clients, meaningful enforcement of the broad and remedial minimum wage and overtime laws often depends upon the availability and flexibility of class actions and classwide injunctive relief.

In this case, the plaintiffs sought an injunction forcing their employer, Wal-Mart, to abide by California wage and hour law and to disgorge and restore all the wages due to the plaintiffs and a proposed class of current and former assistant managers at Wal-Mart stores in California. *Sepulveda v. Wal-Mart Stores, Inc*., 237 F.R.D. 229, 232 (C.D. Cal. 2006). The district court denied class certification, holding, among other things, that the injunctive relief requested did not predominate over the monetary damages also sought by plaintiffs. *Id*. at 245-46. The district court failed to weigh the importance of injunctive relief to the proposed class in evaluating whether a class should be certified under Rule 23(b)(2), as required under *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). The district court also did not take into account the public policies favoring class actions and class injunctive relief in wage and hour cases.[1] Accordingly, *Amici Curiae* respectfully request that the Court reverse and remand this action with direction that it be certified as a class action.

II. ARGUMENT

The availability of class actions in general, and class injunctive relief in particular, is crucial in enforcing worker protective legislation, such as the California wage and hour laws involved in this case.

[1] This brief focuses on the public policies supporting class injunctive relief, but amici also support plaintiffs' legal analysis that the district court misapplied the

A. Public Policy Supports Class Actions and Class Injunctive Relief for the Enforcement of Worker Protective Legislation.

1. Unchecked Employer Demand for Overtime Work Harms Individuals and Society as a Whole.

Employers' demands for longer hours from workers represent a national crisis that is taking its toll on working people. Tosh Anderson, *Overwork Robs Workers' Health: Interpreting OSHA's General Duty Clause*, 7 N.Y. Cty. L. Rev. 85, 85-86 (2004). Over the last two decades, there has been a substantial increase in the number of hours that employees work. *Id*. at 99. One study indicates that the average number of overtime hours has jumped 48% since 1991, and that American workers work 350 more hours each year, or nine more full-time weeks, than Europeans. *It's About TIME!-Campaign for Workers' Health* (2001) at http://www.nmass.org/nmass/wcomp/workerscomp. html. One in five workers works more than forty-nine hours per week, while immigrant workers are forced to work upwards of eighty or ninety hours per week. *Id.* Another study indicates that almost one-third of the workforce regularly works more than the standard 40-hour week, and one-fifth work more than 50 hours. Lonnie Golden & Helene Jorgensen, *Time after Time: Mandatory Overtime in the U.S. Economy*, 3 Econ.

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Rule 23 standards set forth by this Court.

Pol. Inst. (2002), available at http://www.epinet.org/content.cfm/briefingpapers_bp120.

Employees who regularly work large amounts of overtime experience a diminution in their overall quality of life. *See* Golden & Jorgensen, *Supra*. Studies indicate that overtime is linked with increased work-related injuries, stress, depression, fatigue, repetitive motion injuries, illness, and increased mortality. U.S. Dept. of Health & Human Servs., *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries and Health Behaviors* (27) (2004), available at http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf; *see also* Juliet Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 Chi.-Kent L.R. 157, 161 (1994); Golden & Jorgensen, *supra*; John Schwartz, *Always on the Job, Employees Pay with Health*, N.Y. Times, Sept. 5, 2004 § 1, at 1, available at http://benefitslink.com/links/20040907-030551.html.

The power of employers to require overtime also undermines the ability of workers to spend more time with their families and to participate in civic activities that help create healthy communities. *See* Shirley Lung, *Overwork and Overtime*, 39 Ind. L. Rev. 51, 56 (2005).

2. State and Federal Legislation Recognize the Importance of Curbing Overtime Work.

State and federal governments have consistently recognized the importance, not only to the individual, but to the family and to society as a whole, of ensuring

that workers are paid a minimum wage and do not work excessive hours. Nearly seven decades ago, Congress enacted the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, the primary federal statute setting maximum work hours, declaring its intention to protect all covered workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine v. Arkansas-Best Freight Sys.*, Inc., 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)). FLSA was designed to ensure that each covered employee would receive "'[a] fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay.'" *Id.* (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942), quoting 81 Cong. Rec. 4983 (1937) (message of President Roosevelt); Scott D. Miller, *Revitalizing the FLSA*, 19 Hofstra Lab. & Empl. L. J. 1, 46 (2001) ("The underlying policies and purposes of the FLSA maximum hours labor standards (working less, living more, and spreading the wealth) are as relevant and vital today (if not more so) as they were when enacted in 1938."). FLSA also established that if employees work in excess of the statutory minimum number of hours, they must be compensated for the wear and tear of extra work. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948). Compensating employees for the burden of working longer hours serves the public policy principles supporting

overtime laws. *Huntington Mem'l Hosp. v. Super. Ct.*, 131 Cal. App. 4th 893, 902 (Ct. App. 2005).

FLSA also recognizes that states may enact wage and hour laws that are more protective than federal law. Fair Labor Standards Act of 1938 § 18(a), 29 U.S.C. § 218(a); 29 C.F.R. §§ 541.4, 778.5; *see also Pacific Merch. Shipping Ass'n. v. Aubry*, 918 F. 2d 1409, 1425 (9th Cir. 1990), *cert. denied*, 504 U.S. 979 (1992); *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 567 (1996). Many of the states within the Ninth Circuit's jurisdiction, including California, have greater protections than federal law. For example, the minimum wages in Alaska, California, Hawaii, Oregon, and Washington are higher than the minimum wage under federal law. Dept. of Labor, *Minimum Wage Laws in the States*, available at http://www.dol.gov/esa/minwage/america.html.[2] Moreover, California, Nevada, and Alaska are the only states in the United States that provide overtime protections greater than those of FLSA by requiring time and one-half overtime pay for any hours over an eight-hour workday. *See* Cal. Lab. Code

[2] Alaska's minimum wage is $7.50. California's minimum wage is $6.75 and is set to increase to $7.50 on January 1, 2007 and $8.00 on January 1, 2008. Cal. Labor Code §§ 1182.12, 1182.13 (AB 835, Ch. 230, stats. of 2006, adding section 1182.12 and 1182.13 to California Labor Code). The city of San Francisco has a local ordinance setting the local minimum wage at $8.50, which will go up to $9.14 per hour effective January 1, 2007. Dept. of Labor, *Minimum Wage Laws in the States*. Hawaii's minimum wage is currently $6.75, but it will go up to $7.25 on January 1, 2007. *Id.* Minimum wage is $7.50 in Oregon and $7.63 in Washington. *Id*.

§ 510;[3] Nev. Rev. Sat. § 608.018; Alaska Stat. 23.10.060.[4] California further requires that employers pay twice the regular rate of pay for hours worked in excess of twelve hours in one day. Cal. Lab. Code § 510(a). When the California Legislature codified the eight hour day in 1999, it explicitly stated the purpose of the state labor law was to protect family life and the health and welfare of the worker. *See Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(d) at http://www.dir.ca.gov/Iwc/ab60.html ("Numerous studies have linked long work hours to increased rates of accident and injury.") and (e) ("Family life suffers when either or both parents are kept away from home for an extended period of time on a daily basis").

State and federal overtime laws also serve the larger societal goal of increasing employment by spreading the amount of available work among a greater number of workers in the labor market. *Bay Ridge Operating Co.*, 334 U.S. at 460;

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[3] "In 1911, California enacted the first daily overtime law setting the eight-hour daily standard, long before the federal government enacted overtime protections for workers." *Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(b) at http://www.dir.ca.gov/Iwc/ab60.html.

[4] Montana also recognizes the need to protect the health and welfare of workers by enforcing limits on how many hours a person may work in a day and ensuring the employees who work in excess of this limit are paid accordingly. Mont. Code Ann. § 39-03-401 (2005) ("It is the public policy of the state to ... "establish minimum wage and overtime compensation standards for workers at levels consistent with their health, efficiency, and general well-being, and (2) safeguard existing minimum wage and overtime compensation standards that are adequate to maintain the health, efficiency, and general well-being of workers against the unfair competition of wage and hour standards that do not provide adequate standards of living.")

Donovan v. Crisostomo, 689 F.2d 869, 876 (9th Cir. 1982) (the purpose of the FLSA is "to spread employment more widely through the work force by discouraging employers from requiring more than forty hours per week from each employee," and to compensate employees for strain of working long hours); *Marshsall v. Chala Enterprises, Inc*, 645 F.2d 799, 803 (9th Cir. 1981) (recognizing that a principle purpose of FLSA is to "spread employment more widely through the work force by discouraging employers from requiring more than forty hours per week from each employee"); *Huntington Mem'l Hosp.*, 131 Cal. App. 4th at 902. By requiring 150% of the regular wage, overtime laws apply financial pressure upon employers to reduce the overtime hours of individual worker and hire more workers.[5] "Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market." *Gould v. Md. Sound Indus., Inc.* 31 Cal. App. 4th 1137, 1148 (Ct. App. 1995) (citation omitted). Enforcement of state and federal overtime laws through injunctive relief means more jobs for more workers.[6]

[5] Premium pay requirements for overtime work serve as a financial deterrent for employers to impose overtime hours. Daniel Hamermesh & Stephen S. Trejo, *The Demand for Hours of Labor: Direct Evidence from California*, at 13-14 (Nat'l Bureau of Econ. Research Working Paper No. 5973, 1998), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=120668.

[6] Between March 1991 and January 1998, if "employers had hired new workers instead of increasing overtime, nearly twice as many production workers would have been hired." Ron L. Hetrick, *Analyzing the Recent Upward Surge in Overtime Hours*, 123 Monthly Lab. Rev. 30, 32 (2000), available at

The state and federal legislatures have thus codified three important public policies in their wage and hour legislation: (1) the protection of the health and welfare of individual workers; (2) the protection of family life; and (3) the spreading of employment throughout the job market – all of which may be effectuated through class injunctive relief.

3. Courts Have Repeatedly Recognized the Importance of Broadly Enforcing Wage and Hour Laws.

California's state and federal courts have repeatedly affirmed that the wage and hour laws must be enforced broadly to effectuate their remedial purposes. *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1141 (9th Cir. 2004) (the court upheld Berkeley's living wage ordinance, noting "[m]inimum wage legislation was introduced into the American legal scene early in the twentieth century, as part of broader efforts to improve working conditions and regulate the employment of vulnerable groups."); *Smith v. Super. Ct. of Los Angeles*, 39 Cal. 4th 77, 82 (2006) ("California has long regarded the timely payment of employee wage claims as indispensable to the public welfare."); *Reynolds v. Bement*, 36 Cal. 4th 1075, 1093 (2005) (concurring opinion, Moreno) ("The public as a whole has a stake in enforcing the overtime wage law and creating deterrents to violations of that

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http://www.bls.gov/opub/mlr/2000/02/art3full.pdf. This would have translated into 571,000 full-time jobs. *Id.*

law."); *Sav-On Drugs Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 340 (2004) ("California's overtime laws are remedial and are to be construed so as to promote employee protection."); *Kerr's Catering Service v. Dep't. of Indus. Relations*, 57 Cal. 2d 319, 326, (1962) ("The public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established: Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public.") (internal quotation omitted); *see also* Cal. Lab. Code § 90.5(a) (1989); *Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(g) at http://www.dir.ca.gov/Iwc/ab60.html.

4. Extensive Wage and Hour Law Violations Continue to Exist.

Despite the government's recognition of the need for minimum wage and maximum hour law enforcement, there continues to be widespread non-compliance with federal and state wage and hour laws in many of the industries where amici's constituents and clients work. In 2000, the U.S. Department of Labor's Wage and Hour Division ('WHD") found that 60% of nursing homes and other personal care facilities were not in compliance with minimum wage, overtime, and child labor laws. U.S. Dept. of Labor Wage and Hour Division, *Nursing Home 2000 Compliance Survey Fact Sheet*, available at http://www.dol.gov/esa/

healthcare/surveys/printpage_nursing2000.htm. In 2000, the U.S. Department of Labor ("DOL") found that 100% of the 51 poultry plants surveyed had not paid employees for hours worked, and 65% of the plants had misclassified workers as exempt. U.S. Dept. of Labor, *Poultry Processing Compliance Survey Fact Sheet*, Jan. 1, 2001, available at http://www.ufcw.org/your_industry/meatpacking_and_poultry/industry_news/dol_poultry. A U.S. DOL study of the garment industry in Los Angeles found that two-thirds of garment employers violated minimum wage or overtime laws, or both in 2000. U.S. Dept. of Labor Wage and Hour Division News Release, *Only One-Third Of Southern California Garment Shops In Compliance With Federal Labor Laws*, (2000), available at http://www.dol.gov/esa/media/press/whd/sfwh112.htm. Studies from the General Accounting Office (GAO) in 1985 and 1992 had already confirmed widespread employer non-compliance with minimum wage and overtime laws in a variety of industries. David Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Workers Rights?* 20 Berkeley J. Emp. & Lab. L. 74, 106 (1999). These studies followed a GAO report in the late 1970s characterizing employer non-compliance with the record keeping, minimum wage, and overtime provisions of FLSA as "a serious and continuing problem" and finding that "many employers willfully violated the act." *Walsh, supra*. Further, the Employer Policy Foundation (an employer supported think tank in Washington) estimates that

"workers would get an additional $19 billion a year if the overtime rules were observed." Suzanne M. Crampton & Jitendra M. Mishra, *FLSA and Overtime Pay*, 32 Pub. Personnel Mgmt. 331 (2003), available at http://www.findarticles.com /p/articles/mi_qa3779/is_200310/ai_n9309306.

B. Agency Enforcement Is Not Adequate to Enforce Existing Employment Protections.

1. Individuals Cannot Rely on Federal Enforcement of Their FLSA Rights.

In 2004, approximately 87,691,695 workers were covered by FLSA. Annette Bernhardt & Sihbhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor,* 1975-2004 (Brennan Ctr. For Just. Economic Policy Brief No. 4, 2005), available at http://www.brennancenter.org/ dynamic/subpages/download_file_8423.pdf. In 2005, U.S. DOL and WHD recovered $134.2 million in minimum wage and overtime for only 219,000 workers, which was an increase of 22 percent over the $3.5 million recovered in 2004. U.S. Dept. of Labor, *2005 Statistics Fact Sheet*, available at http://www.dol.gov/esa/whd/statistics/200531.htm. These statistics demonstrate a substantial need for enforcement. However, the WHD does not have sufficient resources or successful strategies for wage and hour enforcement. Peter Romer-Friedman, *Eliot Spitzer meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 Colum. J.L. & Soc. Probs. 495, 507

(2006). Budget cuts reduced the number of investigators by 14% from 1974 to 2004, while the number of workers covered by the statutes administered by the WHD grew by 55% during the same period. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L & Pol'y J. 59, 61 (2005). In 2001 and 2002, for every one complaint investigated to conclusion by WHD, approximately 130 employees were paid for violations of FLSA. *Id*. This figure indicates that many violations of federal wage and hour laws go unnoticed by federal investigators. Additionally, the GAO has reported problems with WHD's enforcement procedures. For example, in 2005, The DOL Inspector's General criticized the WHD for agreeing to give Wal-Mart advance notice prior to any inspection visits. Inspector General Office of Audit U.S. Dept. of Labor, *Agreement with Wal-Mart Indicates Need for Stronger Guidance and Procedures Regarding Settlement Agreements* (October 31, 2005) available at http://www.democraticleader.house.gov/gm/DOL_ESA.pdf.

Further, many federal and state workplace laws rely on individual complaints as a trigger to enforcement, which can be problematic given that many workers fear being punished or fired for making a complaint. *See infra* Section II.C.1. Moreover, the WHD is often not interested in litigating small, individual cases, even if it does get a complaint. Weil & Pyles, *supra*. In any event, private

parties do not have access to injunctive relief under FLSA; only the DOL may seek injunctive relief under FLSA. 29 U.S.C. §§ 216(c), 217. Given this reality, workers have little hope that their rights will be vindicated through federal agency enforcement procedures; thus class injunctive relief as to their available state law claims may be their only real hope.

2. California Has Recognized the Inadequacy of Agency Enforcement.

In 2003, the California Legislature adopted the Labor Code Private Attorneys General Act ("PAGA"), Labor Code § 2698 *et seq.*, which allows private litigants to seek statutory penalties for violations of the Labor Code that were formerly available (although rarely obtained) in public Labor Commissioner proceedings. *See Caliber Bodyworks, Inc. v. Super. Ct.*, 134 Cal. App. 4th 365, 374-75 (Ct. App. 2005). The California Legislature enacted PAGA precisely because "[s]taffing levels for state labor law enforcement agencies have, in general, declined over the last decade and are likely to fail to keep up with the growth of the labor market in the future." Cal. Senate Bill 796, § 1(c). The number of people who work at the Division of Labor Standards Enforcement ("DLSE") is consistently outpaced by the increase in the number of workers in California, such that in 2000, there were 27 staff members for 26.78 million workers. Paul M. Ong & Jordan Rickles, "*Analysis of the California Labor and*

Workforce Development Agency's Enforcement of Wage and Hour Laws," pp. 48-49 (UCLA 2004), available at http://reposotoroes.cdlib.org/lewis/cspp/17.

"California's enforcement agencies are responsible for protecting the legal rights of over 17 million California workers and regulating almost 800,000 private establishments [but] the resources available to the labor enforcement divisions remain below the levels of the mid-1980s." Assembly Committee on Labor and Employment, SB 796, July 9, 2003 (citing Limor Bar-Cohen & Deana Milam Carrillo, *Labor Law Enforcement in California, 1970-2000,* 135 (University of California Institute for Labor and Employment 2002)). State labor enforcement agencies do not have the staff or resources to file workforce-wide enforcement actions in the hundreds of cases referred there every year.[7] For the entire year 2004, statewide, DLSE issued only 113 overtime citations and 81 minimum wage citations. DLSE, *Annual Report on the Effectiveness of Bureau of Field Enforcement,* March 1, 2005, available at http://www.dir.ca.gov/dlse/BOFE-2004.pdf.

[7] In California, the Industrial Welfare Commission (IWC) is empowered to issue "wage orders" regulating wages, work hours, and working conditions with respect to several industries and occupations. *See* Lab. Code, §§ 70-74, 1173, 1178, 1178.5, 1182. The Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) enforces the state's labor laws, including the IWC orders. *See id.*, §§ 61, 95, 98-98.8, 1193.5.

Employees who turn to the Labor Commissioner to address their wage and hour claims may find long delays both in the resolution of their claims and in collection of any unpaid wages. Months and even years go by before complaints are reviewed, and the DLSE files only a handful of cases each year. Many immigrant workers who file wage claims abandon them along the way because they cannot endure the long delay, cannot understand the letters they receive, or are unable to travel to attend the hearings. Daisy Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 Asian. L.J. 111, 124 (2001). Studies reveal that nearly a third of the immigrants who have filed wage claims have become discouraged and given up their claims. Don Lee, *Easy Prey: Exploiting Immigrants* L. A. Times, Jan. 13, 1997, at A1.[8]

C. Individual Worker Actions are an Inadequate Means to Enforce the Wage and Hour Laws.

Relying on individual actions to address wage and hour violations is also insufficient.

[8] Counsel for *amici curiae*, The California Rural Legal Assistance Foundation, represented farm worker plaintiffs who are challenging the State Labor Commissioner's statewide practice of failing to process wage claims in a timely manner. *Corrales, et al v. Donna Dell, Labor Comm'r for the State of California*, No. 05 CS 00421, First Amended Petition for Writ of Mandate, and Complaint for Declaratory Relief filed in the Superior Court of Sacramento County, April 14, 2005.

1. Employees Face Retaliation In Pursuing Individual Litigation Against Their Employers.

In denying class certification, the District Court failed to consider the risk of retaliation to named plaintiffs who are current employees. In choosing whether to exercise their rights, workers fear retaliatory assignments, schedule changes, or being fired. Weil & Pyles, *supra* at 83 (Studies suggest that, "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights.") Thus, many employees with legitimate claims for back wages may not pursue their remedies for the very real fear of retaliation and coercion. Workers attempting to enforce their statutory rights not only face the economic disincentive of having to pursue expensive individual litigation for potentially small recoveries, but they also face the far greater disincentive of possibly losing their jobs. *See Smellie v. Mount Sinai Hospital*, No. 03 Civ. 0805, 2004 WL 2725124 at *4 (S.D.N.Y. Nov. 29, 2004) (noting that employees may be "reluctant to serve as named plaintiffs in an action against their employer for fear of reprisal"). Thus, it is not surprising that amici find that former employees tend to be more likely to pursue their legal rights than current employees. However, because the District Court specifically found Plaintiffs' former employment status was a reason to deny class certification, *Sepulveda*, 237 F.R.D. at 246, n. 12, its decision could increase the already significant risk of retaliation against potential class members who are current

employees and particularly those who participate actively in the proposed class action.[9]

Although the risks and difficulties of pursuing wage and hour violations on an individual basis confront employees throughout multiple industries and income brackets, they remain especially poignant for the workers *amici* represent – low wage workers who are often monolingual or limited English speakers and/or unfamiliar with their legal rights. They are particularly vulnerable to retaliation due to their dependence on each paycheck and their tendency to work in low-skilled jobs where employers consider them expendable. These workers, who disproportionately include women and minorities, are all too often victims of minimum wage and overtime violations. *See* Lora Jo Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L.J. 2179, 2182 (1994); Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 Harv. Women's L.J. 89, 91 (2001).

[9] Former employees may represent current employee class members in employment class actions because they have an extensive understanding of the employer's conduct, but no longer fear retaliation. *See Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 490 n.6 (N.D. Cal. 1978) ("To bar [former employees who resigned] from representing current employees unless they stay on the job would either impose a hardship on individuals who felt that those jobs offer them no future, or prevent class treatment in a significant number of cases.")

Employers faced with an individual suit brought by an undocumented worker may try to intimidate or scare the plaintiff by seeking information regarding the plaintiff's immigration status.[10] *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2003) (granting a protective order barring discovery into each plaintiff's immigration status on the basis that allowing NIBCO to access this information would "chill the plaintiffs' willingness and ability to bring civil rights claims," noting "by revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation."); *Flores v. Amigon*, 233 F. Supp. 2d 462, 462 (E.D.N.Y. 2002) (in an action seeking unpaid wages under FLSA, employer sought plaintiff's immigration documents, social security number and passport); *see also* Tyche Hendricks, *Workers Wins Her Rights But Loses Hope*, S.F. Chronicle May 11, 2006, available at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/11/MNGR8IPK9E1.DTL.

[10] Recent studies estimate that 7.2 million undocumented workers are currently working in the United States, and a large number of them work in California and other border states. Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Pew Hispanic Center, March 2006) at http://pewhispanic.org/files/reports/61.pdf. While immigrants make up approximately eleven percent of the total population, they make up fourteen percent of the nation's labor force and twenty percent of the low wage labor force. Rebecca Smith, et al., *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. Rev. L. & Soc. Change 597 (2004).

The fear of deportation and the criminalization of undocumented workers' work status create a climate in which particularly vulnerable populations of workers are susceptible to exploitation by unscrupulous employers. Lung, *supra* at 66-67. Employers often prefer to hire undocumented rather than documented workers because their circumstances require them to tolerate a greater level of abuse and as a result, employers are able to get away with greater wage and hour violations. Jennifer Berman, "*The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What to do About it*" 13-SUM Kan. J. L. & Pub. Pol'y 585, 588 (2004).

2. <u>Wage and Hour Claims Are Often Not Large Enough for Individuals to Bring Individuals Claims.</u>

Courts recognize the necessity of class actions in wage and hour cases given that the relatively small size of wage and hour claims is an impediment to individual litigation, especially since employers are likely to marshall their resources in defending any action by an employee. *See, e.g., Chase v. AIMCO Properties, 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 Services, Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (a class action is a superior method because "the cost of individual litigation is prohibitive."); *Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (class members not likely to file individual suits because of the small size of

their claims); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-184 (W.D.N.Y. 2005) (same).

Very few statutory overtime cases, particularly for amici's types of clients, involve sufficient sums to enable most individual workers, let alone all, to vindicate the fundamental statutory rights involved. *See, e.g.*, Tyche Hendricks, *Growers, Workers Settle Suit*, S.F. Chron., Nov. 2, 2006 (farm worker claims for unpaid wages settled at approximately $2,300 per class member); Civil Minute Order Re Final Approval of Class Action Settlements, *Flores v. Albertson's, Inc.*, Case No. CV-01-00515-PA (C.D. Cal. Jan. 24, 2005) (overtime claims of Albertson's janitors settled for approximately $4,500 per class member); Asian Pacific American Legal Center, *Reinforcing the Seams: Guaranteeing the Promise of California's Landmark Anti-Sweatshop Law, An Evaluation of Assembly Bill 633 Six Years Later* at 2 (Sept. 2005), Executive Summary available at http://www.apalc.org/ pdffiles/ExecSummary.pdf. (average wage claim submitted by garment workers to DLSE ranged from approximately $5,000 to $7,000, with settlement amounts ranging from approximately $500 to $1,500); Wash. Senate Bill Report, SB 5240, Wash. Senate Committee on Labor, Commerce, Research & Dev't, (Mar. 1, 2005) (noting that the average wage claim received by Washington's enforcement agency is $200-$400). Nationwide, DOL collected an average of only $631.87 in back wages per employee in 2005. U.S. Dept. of

Labor, *2005 Statistics Fact Sheet*, available at http://www.dol.gov/esa/whd/statistics/200531.htlm.

This Court's resolution of the present dispute will undoubtedly shape lower courts' consideration of certification of class actions that involve small-sized wage and hour claims. In addition to misclassifying employees and requiring them to work overtime without overtime compensation, employers in low-wage industries may also deprive their employees of individually small but cumulatively substantial wages through a plethora of unlawful practices. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (12-14 minutes spent changing clothes and showering and few minutes spent walking between locker rooms and production area are compensable under federal law); *Harris v. Investor's Business Daily*, 138 Cal. App. 4th 28 (Ct. App. 2006) (unlawful deductions from wages); *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (Ct. App. 2005) (failing to provide meal and rest breaks); *Jameson v. Five Feet Restaurant*, 107 Cal. App. 4th 138 (Ct. App. 2003) (unlawful to require employee to share tip with manager); Order Granting Motion for Remand, *Yarbrough v. Labor Ready, Inc*, Case No. C-01-1086 at 8 (N.D. Cal. June 14, 2001) (in action for employer's failure to pay all wages due upon discharge, the Court noted that temporary day laborer plaintiff's claim for 30 days of wages under Labor Code § 203 was only $1,800). Denial of class

certification in these instances would likely insulate employers from liability based on the small size of the claims alone.

3. Individual Actions Result in Random and Fragmentary Enforcement.

To the extent individuals are able to bring individual actions, courts recognize that such individual actions result in random and fragmented enforcement of the wage and hour laws. *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 745 (Ct. App. 2004) (noting that although some employees may recover unpaid wages in an individual lawsuit or through a Labor Commission proceeding, class actions are necessary to vindicate individual rights because the alternative provides "random and fragmentary enforcement" of the employer's wage obligations). Thus, the class device is a recognized and important means of redressing wrongs that might otherwise escape redress. *Earley v. Super. Ct.*, 79 Cal. App. 4th 1420, 1434-35 (Ct. App. 2000); *Blue Chip Stamps v. Super. Ct.*, 18 Cal. 3d 381, 385-86 (1976). As the California Supreme Court observed:

> Modern society seems increasingly to expose men to ... group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of sanctions which underlie much contemporary law.

Vasquez v. Super. Ct., 4 Cal. 3d 800, 807 (1971) (quoting Kalven and Rosenfield, *Function of Class Suit* 8 U. Chi. L. Rev. 684, 686 (1941)).

D. Class Injunctive Relief Is Critical to Enforcing the Wage and Hour Laws.

Random and fragmented enforcement makes it economically viable for employers to remain non-complaint with the wage and hour laws. It is less expensive for employers to violate the law and take the chance they may get caught than to implement compensation plans that comply with federal and state wage and hour laws from the start. Class injunctive relief is thus necessary to force employers to comply with the law.

Courts have repeatedly recognized the necessity of injunctive relief to protect employees, deter defendants from evading the law in the future, and prevent a multiplicity of future lawsuits. *See e.g. Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 612 (C.D. Cal. 2005) (granting class certification in a wage and hour case and noting that injunctive relief "clearly would be both reasonably necessary and appropriate to protect CDN's employees"); *Herr v. Nestle, U.S.A.*, 109 Cal. App. 4th 779, 790 (Ct. App. 2003) (holding that an employer who engages in age discrimination in violation of FEHA is subject to a prohibitory injunction under California Business and Professions Code section 17200 *et seq*.).

In addition to protecting class members from future harm, injunctive relief will protect the public at large by forcing defendants to comply with the law,

benefiting non-class members, and deterring other companies from evading the laws for fear of a private enforcement action. The California Supreme Court has a long history of recognizing the public purpose and importance of injunctive relief under the California Unfair Competition Law ("UCL"), California Bus. & Prof. Code § 17200 *et seq*, the same type of relief that Plaintiffs seek in this case. *See Kraus v. Trinity Mgmt. Services, Inc.*, 23 Cal. 4th 116, 126 (2000) ("Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions .... These actions supplement the efforts of law enforcement and regulatory agencies. This court has repeatedly recognized the importance of these private enforcement efforts.") (internal citations omitted); *Cruz v. Pacific Health Systems, Inc., et al.*, 30 Cal. 4th 303, 316 (2003) (holding that a claim for injunctive relief under section 17200 and 17500 was inarbitrable because such claims are "designed to prevent further harm to the public at large rather than redress injury to a plaintiff"); *Vasquez,* 4 Cal. 3d at 808 ("A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims."); *see also Consumers Union of U.S., Inc. v.*

Alta-Delta Certified Dairy et al., 4 Cal. App. 4th 963, 973 (Ct. App. 1992) (in affirming the trial court's authority to issue injunctive relief including placement of a warning label on defendant's product, the court noted that such injunctive relief is necessary to deter the defendant from engaging in such activity in the future and corrects the consequences of past conduct).

The importance of class injunctive relief to workers and society is highlighted in a case like this one. Wal-Mart is the world's largest corporation and its employment practices have a profound impact on individuals, families, and communities.[11] Relevant to the case at bar, Wal-Mart deliberately relies on forced overtime as a substitute for hiring new full-time workers. Head, *supra* at 4-5, available at http://www.nybooks.com/articles/17647. By demanding longer hours from fewer workers, employers like Wal-Mart save the costs associated with hiring additional workers, including health insurance, workers compensation, and social security. Part of Wal-Mart's strategy to keep labor costs low and profits high is to inadequately staff their stores, thereby compelling more work, without pay, from

[11] As of 2003, Wal-Mart's workforce was larger than GM, Ford, GE and IBM combined, and its annual revenue ($258 billion) was eight times the size of Microsoft's. Simon Head, *Inside the Leviathan*, The New York Review of Books, Dec. 16, 2004, at 1, available at http://www.nybooks.com/articles/17647.

workers classified, rightly or wrongly, as exempt from overtime pay. Head, *supra*.[12] Class injunctive relief here would force Wal-Mart to comply with the law.

E. Class Actions Are Recognized Vehicles for Enforcing Wage and Hour Laws.

Courts have repeatedly held that class actions are appropriate vehicles to vindicate the rights of workers and to increase efficiencies in our already crowded courts. *See e.g*. *Aguilar v. Cintas Corp*., 50 Cal. Rptr. 3d 135, 148 (2006) ("Class treatment in this case, therefore, will benefit both the litigants and the courts: by establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."); *Prince v. CLS Transp., Inc.* 118 Cal. App. 4th 1320, 1324 (Ct. App. 2004) ("By establishing techniques whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and

[12] The turnover rate at Wal-Mart also indicates that working conditions there are less than optimal. Wal-Mart's turnover rate hovered at about 50 percent. Douglas Shuit, *People Problems on Every Aisle*, Workforce Management, February 2004, pp. 27-34, available at http://www.workforce.com/section/09/feature/23/62/39/index_printer. Every year in the United States, 600,000 to 700,000 Wal-Mart associates walk out the door and must be replaced by new employees. *Id.* This high turnover rate may indicate deep dissatisfaction among the employees at Wal-Mart. Maralyn Edid, *"IWS Issue Brief – The Good, the Bad and Wal-Mart"* (Cornell University 2005) available at http://digitalcommons.ilr.cornell.edu/briefs/6/.

provides small claimants with a method of obtaining redress ... generally a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer."); *Wang*, 231 F.R.D. at 614 (in granting class certification, the court explained plaintiffs noted that "many members of the proposed class are non-English speaking immigrants of moderate means who would face an enormous balance of resources if they were to take on the largest Chinese language newspaper in North America on an individual basis. Proceeding by means of a class action avoids subjecting each employee to the risks associated with challenging an employer."); *Morillion v. Royal Packing Co,.* 22 Cal. 4th 575, 579 (2000) (holding class action proper for past and present agricultural employees forced to ride company buses going to and from employer's fields); *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 935 (Ct. App. 1981) (in a class action to recover pension benefits, the court noted " the very purpose of class actions is to open practical avenues of redress to litigants who would otherwise find no effective recourse for the vindication of their rights"); *see also Ansoumana v. Gristede's Operating Corp*., 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (potential class members' "lack of adequate financial resources or access to lawyers, their fear of reprisals (especially in relation to the immigration status of many), the transient nature of their work, and other similar factors suggests that individual suits as an alternative

to class action are not practical."); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002) ("A class action approach to this litigation is superior to available alternatives. Without class certification, there could be ... a significant number of individuals deprived of their day in court because they are otherwise unable to afford independent representation."); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001) ("[a]bsent 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. Many employees would likely be unable to bear such costs or risks ... [class treatment] removes real barriers to class members obtaining relief.").

Indeed, in California there is a "clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers" and "a public policy which encourages the use of the class action device." *Sav-On Drug Stores, Inc.*, 34 Cal. 4th at 340. The California Supreme Court explained that "[b]y establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Id.* Class actions are useful and efficient vehicles for enforcing wage and hour laws and vindicating the rights of low wage workers.

This Court should not let the lower Court's erroneous denial of class certification affect the availability of class relief for amici's clients and workers throughout California and the Ninth Circuit.

III. CONCLUSION

For the reasons stated above, *Amici Curiae* respectfully submit that this Court should reverse and remand this action with direction that it be certified as a class action.

Dated: December 4, 2006 Respectfully submitted,

David Borgen, CA Bar #099354
Laura L. Ho, CA Bar #173179
Heather Mills, CA Bar #215293
Jessica Beckett-McWalter, CA Bar #233238
GOLDSTEIN, DEMCHAK, BALLER,
BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (Fax)

ATTORNEYS FOR *AMICI CURIAE:*
Asian Law Caucus
Asian Pacific American Legal Center of Southern California
Bet Tzedek Legal Services
California Rural Legal Assistance Foundation
Equal Rights Advocates
Hastings Civil Justice Clinic
Katharine and George Alexander Community Law Center
La Raza Centro Legal, Inc.
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Legal Aid Society – Employment Law Center
Mexican-American Legal Defense & Educational Fund
Northwest Women's Law Center
Northwest Workers' Justice Project
SEIU 775
Women's Employment Rights Clinic

BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 29(c)(5) AND RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 29(c)(5) and Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the Brief Of *Amici Curiae* is proportionately spaced, has a type face of 14 point and contains 6,994 words.

Dated: December 4, 2006

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Jessica Beckett-McWalter