Case No. 11-1684

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIEL KNEPPER, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant

v.

RITE AID CORPORATION; ECKERD CORPORATION, d/b/a Rite Aid,

Defendant-Appellee

On Appeal from the Middle District of Pennsylvania
Case No. 09-cv-2069

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

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LEAD *AMICUS CURIAE*

DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici Curiae* National Employment Lawyers Association, Comité de Apoyo a los Trabajadores Agrícolas, Cornell Law School Labor Law Clinic, Friends of Farmworkers, Inc., JUNTOS, National Employment Law Project, National Lawyers Guild Labor and Employment Committee, and Working Hands Legal Clinic hereby provide that they are not-for-profit corporations, with no parent corporation and no publicly-traded stock.

Amici curiae state that no party or counsel for any party authored this brief in whole or in part and that no entity or person, aside from the *amici curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief.

Dated: June 28, 2011

Respectfully submitted,

/s/ David Borgen

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 11-1684

Knepper

v.

Rite Aid Corp.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Employment Lawyers Association (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

(Signature of Counsel or Party)

Dated: June 23, 2011

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Comité de Apoyo a los Trabajadores Agrícolas (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

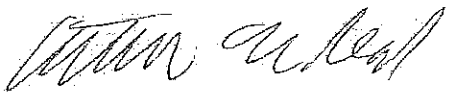
n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

n/a



(Signature of Counsel or Party)

Dated: June 23, 2011

Arthur N. Read, PA Attorney 29360
Friends of Farmworkers, Inc.
42 S 15th St, Suite 605
Philadelphia PA 19102-2205
Attorney for Comité de Apoyo a los Trabajadores Agrícolas

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Cornell Law School Labor Law Clinic makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

n/a

Angela B. Cornell
(Signature of Counsel or Party)

Dated: June 13, 2011

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Friends of Farmworkers, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

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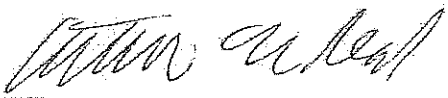
n/a



(Signature of Counsel or Party)

Dated: June 23, 2011

Arthur N. Read, PA Attorney 29360
General Counsel
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Philadelphia PA 19102-2205

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, JUNTOS makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

(Signature of Counsel or Party)

Dated: 6/21/2011

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Employment Law Project makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

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n/a

Haeyoung Yoo
(Signature of Counsel or Party)

Dated: 6/28/11

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, National Lawyers Guild Labor and Employment Committee makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Dated: June 21, 2011

(Signature of Counsel or Party)
Co-Chair
National Lawyers Guild
Labor and Employment Committee

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Working Hands Legal Clinic makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

n/a

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

n/a

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

n/a

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

s/Christopher J. Williams
(Signature of Counsel or Party)

Dated: 6/16/2011

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I. STATEMENT OF *AMICI CURIAE*

Amici curiae ("*Amici*") 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 highlight 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" collective actions for FLSA violations. *Amici* also write to urge the Court to affirm that such "hybrid actions" are permitted under existing law. *Amici* request leave to file by motion. Fed. R. App. P. 29(b).

A brief description of each amicus is set forth below:

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.

The Cornell Law School Labor Law Clinic ("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 Employment Law Project ("NELP") is a non-profit law and policy organization with 40 years of experience advocating for the employment and labor rights of the nation's workers. NELP has litigated and participated as *amicus curiae* in numerous cases addressing the rights of workers under federal and state laws. With five offices nationwide, NELP provides assistance to wage-and-hour advocates from the private bar, public interest bar, labor unions, and community organizations. NELP works to ensure that labor standards are enforced for all workers and to bolster the economic security of working families. NELP has consistently advocated for workers to receive the basic workplace protections

guaranteed in our nation's labor and employment laws, and to promote broad access to coverage under these laws to carry out the laws' remedial purpose. Access to the class action mechanism is especially important for workers whose cases are individually worth too little for individual lawsuits, and whose fears of unmitigated retaliation are real.

The National Lawyers Guild ("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 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.

II. SUMMARY OF ARGUMENT[1]

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 collective 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.

Reading a new provision into the FLSA forbidding "hybrid actions" would have catastrophic effects on the rights of low-wage workers 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 deterred 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.

[1] At the direction of the Clerk's Office, *amici* have filed an identical brief and motion in the consolidated case of *Fisher v. Rite Aid Corp.*, No. 11-1685.

The district court in this case dismissed the two actions below based on the pleadings, relying on the theory that Rule 23's opt-out procedure is "inherently incompatible" with the FLSA's opt-in procedure and extending such a theory to separately filed FLSA and state wage and hour claims. The district court noted "that a Section 216(b) collective action and a Rule 23 class action are 'inherently incompatible,'" *Knepper v. Rite Air Corp.*, No. 09-cv-2069, slip op. at 12 (M.D. Pa. Feb. 16, 2011); *Fisher v. Rite Aid Corp.*, No. 10-cv-1865, slip op. at 10 (M.D. Pa. Feb. 16, 2011), but this Court has never adopted such a categorical rule. Instead, in *De Asencio v Tyson Foods, Inc.*, 342 F.3d 301 (3d Cir. 2003), this Court recognized that supplemental jurisdiction could be exercised over state law wage claims in an FLSA action, and held that in certain circumstances it will be appropriate to decline to exercise that jurisdiction. *See Dare v. Comcast Corp.*, No. 09-4175-NLH-JS, 2010 WL 2557678, at *1 (D.N.J. June 23, 2010) ("*De Asencio* was premised on a case-specific analysis of supplemental jurisdiction, and not any alleged incompatibility between Rule 23 class actions and FLSA collective actions."). Furthermore, the district court's decisions contravene the law of every circuit court that has addressed the issue. There is no categorical rule of "incompatibility" that can preclude "hybrid actions" as a matter of law, and therefore no reason for extending such a rule to separately filed actions. Instead, "incompatibility" as an objection to "hybrid actions" is an "imaginary legal

doctrine." *Westerfield v. Wash. Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007). The three courts of appeals to address this question following *De Asencio* – the D.C., Seventh, and Ninth Circuits – have held unequivocally that the procedural differences between opt-in and opt-out actions can be managed and do not create an absolute bar to filing, and litigating, hybrid FLSA and state law actions. *See Ervin v. OS Rest. Servs. Inc.*, 632 F.3d 971, 973-74 (7th Cir. 2011) (in the context of class certification under Rule 23(b)(3); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761-62 (9th Cir. 2010) (in the context of supplemental jurisdiction); *Lindsay v. Gov't Employees Ins. Co.*, 448 F.3d 416, 424-25 (D.C. Cir. 2006) (same). The majority of district courts agree.

For these reasons, the Court should reverse the district court's adoption of a rule that hybrid actions are "inherently incompatible" as a matter of law, as well as the court's extension of that rule to separately filed actions.

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 Workplace 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 June 23, 2011). 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]

Unlawful underpayment of employees' wages 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*

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

http://www.aflcio.org/issues/jobseconomy/overtimepay/upload/FLSA.pdf (last visited June 23, 2011).

Unlawful employment practices also rob our financially strapped state and federal governments of vital 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 Proper Worker Classification* 1 (May 2007), *available at* http://www.gao.gov/new.items/d07859t.pdf (last visited June 23, 2011).

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 Los Angeles, New York, and Chicago, 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 June 23, 2011). 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.[3] *Id.* 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% of those surveyed 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 to certify Rule 23 class actions alongside FLSA claims will have its greatest impact on low-wage workers who seek to recover lost wages resulting from such violations.

2. Private Class Actions Are Essential to the Enforcement of State and Federal Workplace Laws.

Despite the widespread violations described above, government agencies are unable to enforce our nation's wage and hour laws alone. 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 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*

[3] According to a study in the Annals of Internal Medicine, individuals who regularly work overtime are at a significantly higher risk of suffering a heart attack than those who do not. *Longer Hours, Shorter Lives?*, Wall St. J, May 3, 2011, at D4.

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 *fewer* investigators – only 750 – and conducted only 24,950 investigations.[4] *Id.*

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 June 23, 2011).[5] 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*

[4] It should be noted that in recent years the DOL had begun hiring additional wage-and-hour investigators. DOL News Release (Nov. 19, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited June 23, 2011). This is a welcome development, but it still leaves a great disparity in the number of investigators when compared to earlier years, and is threatened by the ongoing federal budget crisis.

[5] As with the federal government, state agencies charged with enforcing wage and hour laws also have reduced their enforcement activities. *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 June 23, 2011).

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 June 23, 2011).

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 6,825 FLSA cases filed in federal court, but only 138 of these were filed by the Department of Labor. James C. Duff, *Judicial Business of the United States Courts, 2010 Annual Report of the Director* 146 (Table C-2), Administrative Office of the U.S. Courts (2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (last visited June 23, 2011). 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,[6] fear of retaliation,[7] small claims relative to the costs and risks of

[6] *See, e.g., Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006); *Gentry v. Super. Ct.*, 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).

[7] *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

litigation,[8] and employment in transient work.[9] For example, 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:

(continued ...)
operate to induce aggrieved employees quietly to accept substandard conditions."); *Zelinsky v. Staples, Inc.*, No. 08-684, 2008 WL 4425814, at *4 (W.D. Pa. Sept. 29, 2008) ("[E]mployees may be loath to identify themselves as opt-in or named plaintiffs in wage actions for fear of retaliation from the employer.") (citing cases and articles).

[8] *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812-13 (1985); *see also Hanlon v. Aramark Sports, LLC*, No. 09-465, 2010 WL 374765, at *5 (W.D. Pa. Feb. 3, 2010) ("Class members are unlikely to have the financial incentive to litigate their suits [as] individuals because most, if not all, of the class members' claims are modest in light of the costs of litigation."); *Chemi v. Champion Mortg.*, No. 2:05-cv-l238, 2009 WL 1470429, at *8 (D.N.J. May 26, 2009) (Requiring individual lawsuits "would be uneconomical for potential individual plaintiffs as litigation costs could dwarf any potential recovery."); *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").

[9] *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."); *Recinos-Recinos 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 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 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"); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). As a district court in this Circuit has noted, where joinder is required in the context of an employment suit, "most, if not all, of the current employees will be hesitant to join." *Slanina v. William Penn Parking Corp., Inc.*, 106 F.R.D. 419, 424 (W.D. Pa. 1984).

Empirical data supports these observations. One study has found that 43% of surveyed 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.*[10]

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. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). For example, in 2007, the average back wage collected by the DOL was only $645 per employee. *See* U.S. Dept. of Labor, 2007 Statistics Fact Sheet, *available at* http://www.dol.gov/whd/statistics/200712.htm (last visited June 23, 2011). The reality is that this amount is too small for most attorneys to take on as an individual matter. 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.

[10] Undocumented workers must overcome greater fears of retaliation. "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).

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 v. Liberty Mut. Ins., Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004). This Court, for instance, addressed an opt-in rate of 11% in *De Asencio*, 342 F.3d at 313, and one study has reported average opt-in rates of around 15%.[11] Low opt-in rates for FLSA actions, combined with the lack of public enforcement of wage and hour laws, point to Rule 23 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). "Indeed, it may be that in the wage claim context, the opt-out nature of a class action is a valuable feature lacking in an FLSA collective action, insofar as many employees will be reluctant to participate in the action due to fears of retaliation." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 163 (S.D.N.Y. 2008) (internal quotation marks omitted).

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

[11] *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%).

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.").

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 three courts of appeals, have determined there is no categorical rule against "hybrid actions."

1. The Landscape of Federal Law 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 authorized "hybrid actions." 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, 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 308-09 (recognizing that § 1367(a) is met, supplemental jurisdiction exists over the state law claims, and conducting a case-specific analysis under § 1367(c) to determine if any exceptions apply); *Ervin*, 632 F.3d at 979 (emphasizing "that the FLSA is not a statute that 'expressly provide[s]' some limit to supplemental jurisdiction, as section 1367(a) contemplates that some federal statutes might"). 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, at *5 (D.N.J. Feb. 21, 2008); *Hickton v. Enterprise Rent-A-Car Co.*, No. 07-1687, 2008 WL 4279818, at *5-7 (W.D. Pa. Sept. 12, 2008); *Espenscheid v. DirectSat USA, LLC*, 708 F. Supp. 2d 781, 791-92 (W.D. Wis. 2010); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 888 (N.D. Iowa 2008); *Osby v. Citigroup, Inc.*, No. 07-cv-06085-NKL, 2008 WL 2074102, at *3 (W.D. Mo. May 14, 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.

2. Congress Has Never Suggested That FLSA Opt-In Procedures Should Affect State-Law Remedies.

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.[12]

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); *see also Ervin*, 632 F.3d at 977-78. That is, Congress in 1947 was not choosing between an opt-in class and a modern Rule 23 opt-out class represented by adequate and typical class representatives who share the same claims and interests as members of the class.

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

[12] 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.

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 Brooks v. S. Dairies, Inc.*, 38 F. Supp. 588, 588-89 (S.D. Fla. 1941); Brunsden, *supra*, at 279-80 & nn. 50-51. Consequently, "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, at *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 . . . ."); Brunsden, *supra*, at 281.

Accordingly, there is no evidence that Congress weighed the relative merits of an opt-in approach against the modern opt-out approach and decided on the former. There is also no evidence that Congress intended the Portal-to-Portal Act of 1947 to mandate opt-in collective actions for claims other than those subject to

29 U.S.C. § 216. In fact, Congress expressly did not intend the procedures put in place by the Portal-to-Portal Act to affect state-law remedies. *See* 29 C.F.R. § 790.2(a) n.8 (provisions of the Act "do not deprive any person of a contract right or other right which he may have under the common law or under a State statute"); *id.* § 790.21(a) n.129 (Congressional sponsors of the Act "do not purport to affect the usual application of State statutes of limitation to other actions brought by employees . . . under State statutes"). The Act therefore leaves all other claims brought in federal court, including state law wage-and-hour claims, to the default procedural mechanism of Rule 23. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010) ("Rule 23 permits all class actions that meet its requirements."). Permitting an individual who did not opt in to the FLSA collective action to join a state-law opt-out class does not violate Congress's intent in passing the Portal-to-Portal Act; such an individual "will not be entitled to a single FLSA remedy, because she is not part of the FLSA litigating group." *Ervin*, 623 F.3d at 978.

3. A Categorical 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 a categorical rule barring opt-out state law claims to be pled in an FLSA action would lead to absurd results. 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 district court below extended the theory of "inherent incompatibility" to separately filed FLSA and state wage and hour claims, even though CAFA provided an independent jurisdictional basis for the state law class action. *See Knepper v. Rite Air Corp.*, slip op. at 15; *Fisher v. Rite Aid Corp.*, slip op. at 13. As recognized by several district courts in this Circuit, however, the "inherent incompatibility" doctrine is not relevant to the court's power to hear a case for which CAFA provides jurisdiction. *See Hickton*, 2008 WL 4279818, at *6 ("The inherent incompatibility doctrine does not pertain to the court's power to hear the case, and does not provide a basis for declining to exercise original jurisdiction when the jurisdictional allegations are sufficiently pled."); *Jackson*, 2008 WL 508664, at *5 (denying defendant's motion to dismiss because CAFA jurisdiction provided an independent basis for the state law claims); *see also Espenscheid*, 708 F. Supp. 2d at 791-92 ("[I]t makes little sense from the standpoint of judicial economy to require separate causes of action for two sets of nearly identical claims, especially when a court has independent jurisdiction under the Class

Action Fairness Act."); *Bouaphakeo*, 564 F. Supp. 2d at 888 ("Although the court is cognizant of the procedural differences between a Rule 23 class action and FLSA collective action . . . , the court does not feel these differences and challenges are a reason to deny, dismiss, or limit Plaintiffs' [state law] class action claim, especially when such a claim has an independent jurisdictional basis [under CAFA]."); *Osby*, 2008 WL 2074102, at *3 (finding that the argument that FLSA and state law claims could not be fairly adjudicated together was prematurely raised, "particularly so now that there is an independent basis for federal jurisdiction pursuant to the Class Action Fairness Act").

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 could 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.

4. This Court Should Join the D.C., Seventh, and Ninth Circuits in Rejecting the "Inherently Incompatible" Fiction.

To date, three courts of appeals – the D.C., Seventh, and Ninth Circuits – have held that there is nothing "inherently incompatible" between an FLSA opt-in action and a Rule 23 opt-out action. *See Ervin*, 632 F.3d at 973-74 (in the context of class certification under Rule 23(b)(3)); *Wang*, 623 F.3d at 761-62 (9th Cir. 2010) (in the context of supplemental jurisdiction); *Lindsay*, 448 F.3d at 424-25 (D.C. Cir. 2006) (same). In *Lindsay*, the D.C. Circuit – the first court of appeal to address the issue – 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 over the state law claims 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. The Seventh and Ninth Circuits have since then agreed with the D.C. Circuit that "hybrid actions" are not "inherently incompatible." *See Ervin*, 632 F.3d at 980 (affirming Rule 23 class certification of state law claims in a case also alleging FLSA claims); *Wang*, 623 F.3d at 761 (affirming exercise of supplemental jurisdiction over state law claims subject to Rule 23, in a case also alleging FLSA claims).

District courts around the country have followed their guidance, holding either that it is proper to exercise supplemental jurisdiction over state law claims in FLSA actions, or that the superiority requirement of Rule 23(b)(3) can be satisfied in cases that also involve an FLSA collective action.[13] This Court should avoid the

[13] *See Osby*, 2008 WL 2074102, at *3 n.2 ("District court cases permitting FLSA collective actions to proceed simultaneously with Rule 23 state actions are legion."); *Thorpe v. Abbott Labs., Inc.*, 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008) (collecting cases); *Salazar v. Agriprocessors, Inc.*, 527 F. Supp. 2d 873, 885-86 (N.D. Iowa 2007) (same); *see also Peterson v. Cleveland Inst. of Art*, No. 1:08 CV 1217, 2011 WL 1297097, at *2-5 (N.D. Ohio Mar. 31, 2011); *Cortez v. Nebraska Beef, LTD.*, 266 F.R.D. 275, 284-88 (D. Neb. Feb. 16, 2010); *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 210 (N.D. Cal. 2009); *Perkins v. S. New England Tel. Co.*, No. 3:07-cv-967 (JCH), 2009 WL 350604, at *3-4 (D. Conn. Feb. 12, 2009); *Hernandez v. Gatto Indus. Platers, Inc.*, No. 08 CV 2622, 2009 WL 1173327, at *3 (N.D. Ill. Apr. 28, 2009); *Patel v. Baluchi's Indian Rest.*, No.

creation of a circuit split by affirming that there is no such legal doctrine as "inherent incompatibility" that can be invoked by a court to preclude "hybrid actions" as a matter of law.[14]

5. "Hybrid Actions" Promote Enforcement of Workplace Laws and Benefit Low-Wage Workers.

"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. As discussed above, employees may

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(continued ...)
08 Civ. 9985 (RJS), 2009 WL 2358620, at *6 (S.D.N.Y. July, 30, 2009); *DeKeyser v. Thyssenkrupp Waupaca, Inc.*, 589 F. Supp. 2d 1026, 1031-33 (E.D. Wis. 2008); *Bouaphakeo*, 564 F. Supp. 2d at 886-89; *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007); *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1028 (D. Minn. 2007); *Brickey v. Dolencorp, Inc.*, 244 F.R.D. 176, 178-79 (W.D.N.Y. 2007); *Ramirez v. RDO-BOS Farms, LLC*, No. 06-174-KI, 2007 WL 273604, at *2 & n.1 (D. Or. Jan. 23, 2007); *Silverman v. SmithKline Beecham Corp.*, No. CV 06-7272, 2007 WL 3072274, at *1-2 (C.D. Cal. Oct. 16, 2007); *Bamonte v. City of Mesa*, No. CV 06-01860-PHX-NVW, 2007 WL 2022011, at *4-5 (D. Ariz. July 10, 2007); *Baas v. Dollar Tree Stores, Inc.*, No. C07-03108 USW, 2007 WL 2462150, at *3-4 (N.D. Cal. Aug. 29, 2007); *McLaughlin,* 224 F.R.D. at 311-12; *Chavez v. IBP, Inc.*, No. CT-01-5093-EFS, 2002 WL 31662302, at *2-4 (E.D. Wash. Oct. 28, 2002); *Beltran-Benitez v. Sea Safari, L.T.D.*, 180 F. Supp. 2d 772, 773-74 (E.D.N.C. 2001).

[14] As this Court noted in *De Asencio*, 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." 342 F.3d at 312. The Court, therefore, should clarify that a district court 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. *See id.* at 308-09.

have valid fears of retaliation or may be unaware of their rights – problems that are often solved by the procedural benefits conferred by the Rule 23 opt-out process.

Furthermore, 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); Noah A. Finkel, *State Wage-and-Hour Law Class Actions: The Real Wave of 'FLSA' Litigation?*, 7 Emp. Rts. & Emp. Pol'y J. 159 (2003). 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, or a lower threshold for overtime hours. *See* ABA Section of Law and Employment Law *Wage and Hour Laws, A State-by-State Survey.* For these reasons, *amici* suggest that "hybrid actions" are actually "inherently superior," the optimal means by which employees can seek redress for violations of federal and stage wage and hour laws.[15]

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

[15] There will not, of course, be double recovery if both state and federal laws are found to be violated; plaintiffs will only be entitled to a single recovery for each alleged injury. *See, e.g., Gonzalez v. Bustleton Servs., Inc.*, No. 08-4703, 2010 WL 1813487, at *6 n.13 (E.D. Pa. Mar. 5, 2010).

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 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.

IV. CONCLUSION

For these reasons, the Court should reverse the district court's adoption of a rule that hybrid actions are "inherently incompatible" as a matter of law, as well as the court's extension of that rule to separately filed actions.

Dated: June 28, 2011

Respectfully submitted,

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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, CORNELL LAW SCHOOL LABOR LAW CLINIC, FRIENDS OF FARMWORKERS, JUNTOS, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL LAWYERS GUILD LABOR AND EMPLOYMENT COMMITTEE, AND WORKING HANDS LEGAL CLINIC, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS** is proportionately spaced, has a typeface of 14 points, contains 6,751 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: June 28, 2011

/s/ David Borgen
David Borgen

CERTIFICATE OF BAR ADMISSION

In accordance with 3rd Circuit LAR 46.1(e), David Borgen, Esq., certifies that he is a member of the bar of this Court, October 2, 2006.

/s/ David Borgen
David Borgen, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2011, a copy of foregoing **BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, CORNELL LABOR LAW CLINIC, FRIENDS OF FARMWORKERS, JUNTOS, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL LAWYERS GUILD LABOR AND EMPLOYMENT COMMITTEE, 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.

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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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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*