No. 09-3029

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DENEENE D. ERVIN, ELIZABETH L. DYE, DAWN HARDY, on behalf of themselves and all others similarly situated persons, known and unknown

Plaintiffs-Appellants,

vs.

OS RESTAURANT SERVICES, INC. D/B/A OUTBACK STEAKHOUSE,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
CASE NO. 08-1091
HONORABLE RONALD A. GUZMAN, JUDGE

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 09-3029

Short Caption: *Ervin, et al., v. OS Restaurant Servs., Inc.*, No. 09-3029

Attorney's name: Kenneth J. Sugarman (Counsel of Record)

Full name of every *amicus* the attorney represents in this case:

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National Employment Lawyers Association
Working Hands Legal Clinic
Korean American Resource and Cultural Center
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Appellate Court No.: 09-3029

Short Caption: *Ervin, et al., v. OS Restaurant Servs., Inc.*, No. 09-3029

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

II. SUMMARY OF ARGUMENT

Workers should continue to be able to prosecute Rule 23 class actions for violations of state wage and hour laws together in the same federal case with an FLSA "opt-in" action for violations of the FLSA. *Amici's* principal purpose in 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. Losing the ability to bring such cases would be a major setback for workers and their families at a critical time in the

struggle to secure compliance with wage and hour laws, particularly for workers most susceptible to abuses and exploitation. *See* Scott Martelle, *Confronting the Gloves-Off Economy, America's Broken Labor Standards and How to Fix Them*, 1 (Annette Bernhardt et al. eds., 2009) ("Over the last three decades the lowest rungs of American labor have endured a quantum shift in working and living conditions as many employers, aided by lax enforcement, have made a lucrative game of flouting labor and employment laws.").[1]

The district court denied class certification for the Illinois law claims in this case on the theory that an "incompatibility" between Rule 23 and the FLSA opt-in provision precludes a finding that a Rule 23 class action could be the superior method for adjudicating all the class members' Illinois law claims, regardless of what the alternatives might be. But there is no "incompatibility," legal or otherwise, that can preclude Rule 23 class certification as a matter of law. The opt-in procedure will be followed for the FLSA action and the opt-out procedure will be followed for the Rule 23 action, and individuals who do not opt in to the FLSA action will not have FLSA claims in the case.

Essentially for these reasons, "incompatibility" has been aptly described as an "imaginary legal doctrine."[2] As a purported bar to FLSA/Rule 23 class actions, it has been correctly rejected by the overwhelming majority of district courts to

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[1] Available at http://nelp.3cdn.net/0f16d12cb9c05e6aa4_bvm6i2w2o.pdf.

[2] *Westerfield v. Washington Mut. Bank*, 2007 WL 2162989, *2 (E.D.N.Y. July 26, 2007).

consider it as having no legal substance or force.[3] Similarly, two courts of appeal have held that there is jurisdiction over all the Rule 23 class members in a case like this one, even though the FLSA opt-in procedure results in some of the Rule 23 class members not having federal claims because they do not opt in to the FLSA action. *Lindsay v. Government Employees Ins. Co.*, 448 F.3d 416, 420-24 (D.C. Cir. 2006); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308-13 (3d Cir. 2003). In addition, many district courts have rejected any perceived "incompatibility" as being a basis in law or logic for finding that a Rule 23 class action would not be the superior method for fairly and efficiently adjudicating the state law claims in an FLSA/state law case.[4] Many other courts have permitted FLSA opt-in actions and Rule 23 state law class actions to proceed together in one case.[5]

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[3] In addition to the cases cited by plaintiffs, *see* Brief of Plaintiffs-Appellants, 1 n.2, *see Madrid v. Peak Constr., Inc.*, No. 2:09-cv-00311, Slip Op., 14-18 (D. Ariz. July 22, 2009), *Patel v. Baluchi's Indian Restaurant*, 2009 WL 2358620, *9 (S.D.N.Y. July 30, 2009), *Guzman v. VLM, Inc.*, 2008 WL 597186, *10 (E.D.N.Y. Mar. 2, 2008), *Kasten v. Saint-Gobain Performance Plastics Corp.*, 07-cv-449-bbc, Slip Op. at 31-32 (W.D. Wis. Jun. 2, 2008), *Morrison v. Staples, Inc.*, 2008 WL 4911156, **4-5 (D. Conn. Nov. 13, 2008), *Campbell v. Energy Nuclear Operations, Inc.*, Civ. No. 05-11951-JLT, Slip Op. at 1-2 (D. Mass. Aug. 7, 2007), *Klein v. Ryan Beck Holdings, Inc.*, 2007 WL 2059828, **5-6 (S.D.N.Y. July 20, 2007), *Westerfield*, 2007 WL 2162989 at **2-3, and *see also Wren v. RGIS Inventory Specialists, Inc.*, 256 F.R.D. 180, 210 (N.D. Cal. 2009), *Resnick v. Oppenheimer & Co. Inc.*, 2008 WL 113665, *4 (S.D. Fla. Jan. 8, 2008), *Spoerle v. Kraft Foods Global, Inc.*, 253 F.R.D. 434, 438 (W.D. Wis. 2008), *Thorpe v. Abbott Labs., Inc.*, 534 F.Supp.2d 1120, 1122-25 (N.D. Cal. 2008), and *Marquez v. Partylite Worldwide, Inc.*, 2007 WL 2461667, **2-3 (N.D. Ill. Aug. 27, 2007).

[4] *See, e.g., Cuzco v. Orion Builders, Inc.*, -- F.Supp.2d --, 2009 WL 3152124, *9 (S.D.N.Y. Sep. 30, 2009); *Hernandez v. Gatto Indus. Platters, Inc.*, 2009 WL 1173327, *3 (N.D. Ill. Apr. 28, 2009); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 161-64 (S.D.N.Y. 2008); *Lindsay v. Government Employees Ins. Co.*, 251 F.R.D. 51, 56-57 (D.D.C. 2008); *Musch v. Domtar Indus., Inc.*, 252 F.R.D. 456, 462-63 (W.D. Wis. 2008); *Spoerle v. Kraft Foods Global, Inc.*, 253 F.R.D. 438, 441 (W.D. Wis.

"Incompatibility" is a legally-baseless argument. Workers are authorized to bring FLSA/state law class action cases in federal court under the federal jurisdiction statutes, *see, e.g.*, 28 U.S.C. §§ 1332(d) & 1367, and the federal Rules of Civil Procedure, *see, e.g.*, Fed. R. Civ. P. 23(b)(3). The FLSA does not preempt state law, it does not impede the operation of the federal jurisdiction statutes when state law claims are pleaded together with FLSA claims, and it does not displace the standards in Rule 23 for determining whether a state law claim can be maintained as a class action. Further, opt-out state law class actions can be maintained together with an FLSA opt-in action in a single state court case and the two types of actions can also be maintained at the same time in separate cases. There is no rationale in law for why the same actions cannot also be maintained together in one federal case.

Ultimately, all the Court is called upon to do in this appeal is recognize the law as it already exists, reverse the district court's order denying Rule 23 class

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2008); *Duchene v. Michael L. Cetta, Inc.*, 244 F.R.D. 202, 204 (S.D.N.Y. 2007); *Ramirez v. RDO-BOS Farms, LLC*, 2007 WL 273604, *2 & n.1 (D. Or. Jan. 23, 2007); *Jankowski v. Castaldi*, 2006 WL 118973, *4 (E.D.N.Y. Jan. 13, 2006); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 393-94 (W.D.N.Y. 2005); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 613-14 (C.D. Cal. 2005) *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 267-68 (D. Conn. 2002); *O'Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346, 352 (N.D. Ill. 2001); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 WL 1774091, *7 (N.D. Ill. Dec. 1, 2000); *Leyva v. Buley*, 125 F.R.D. 512, 518 (E.D. Wash. 1989) (opt-out class action for claims under federal Migrant and Seasonal Agricultural Worker Protection Act and state contract law deemed to be superior in case that also included an FLSA opt-in action); *cf. Sjoblom v. Charter Communications, LLC*, 2007 WL 4560541, *7 (W.D. Wis. Dec. 19, 2007).

[5] *Osby v. Citigroup, Inc.*, 2008 WL 2074102, *3 n.2 (W.D. Mo. May 14, 2008) (describing such cases as "legion").

certification, and instruct the court on remand that it must determine whether the Illinois law allegations satisfy the criteria in Rule 23 for certifying a class, not sidestep the determination by invoking a fictive "incompatibility." For the "superiority" part of the determination, the district court must assess the alternative methods available for adjudicating all of the proposed class members' Illinois law claims, not deliberating about what the relative sizes of the FLSA and Rule 23 classes will be or how class members came to be in federal court. These are also not valid considerations for deciding whether or not there is any basis for the court to decline to exercise its supplemental jurisdiction over the Illinois law class claims, as plaintiffs have ably demonstrated in their opening brief to this Court.

III. ARGUMENT

A. Public Policy Favors Combined FLSA/State Law Class Actions As A Necessary, Important, And Effective Procedure For Effectuating The Broad Remedial Purposes Of The Wage And Hour Laws

1. The Relationship Between The FLSA And State Wage And Hour Laws

The FLSA is the federal statute regulating minimum wages and overtime. States around the country have also enacted minimum wage and overtime laws, as well as other laws that regulate in the area of wages and work hours. Generally, these laws are intended to promote the health, safety, economic interests and general welfare of not just workers, but also of their families and communities, taxpayers, and the public at large.[6] An important example are statutes like the Illinois law in this case that regulate the minimum wages for tipped workers and

[6] *See, e.g.*, 820 ILCS 105/2; Ind. Code § 22-2-2-2; Wis. Stat. § 104.01(5).

related matters regarding tips, including to whom they belong and who is eligible to share in them.[7]

State legislatures have often gone further to protect workers than Congress has done in the FLSA, as Congress expressly contemplated they might when it enacted the FLSA. 29 U.S.C. § 281(a) (FLSA does not excuse employers from complying with more protective state and local minimum wage and overtime provisions); *see Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990) (FLSA sets only a national floor).

Many state legislatures have decided to provide for coverage for workers who are not covered by the FLSA, higher minimum wages than the FLSA, greater overtime protections, meal and rest breaks, protection for contractual wages, premium pay for certain hours, expense reimbursements, prohibitions against deductions from wages, regular and timely payment of wages, longer statutes of limitations, and greater penalties or liquidated damages for violations. *See*

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[7] *See, e.g.*, Cal. Labor Code § 351; Del. Code Ann. Tit. 19, § 902(b)-(d); Ind. Code Ann. § 22-2-2-4(c); Ind. Admin. Code tit. 646, r. 3-8-9; Ky. Rev. Stat. § 337.065; Minn. Stat. Ann. § 177.24(2), (3); N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.4; *id.* § 137-1.5; Wis. Admin. Code § 272.03(2); *see generally* ABA Section of Labor and Employment Law ("ABA"), *Wage and Hour Laws, A State-by-State Survey* (Gregory K. McGillivary ed., 2004 &Supp.2009); U.S. Dep't of Labor, Wage and Hour Div., *Minimum Wages for Tipped Employees* (2009), available at http://www.dol.gov/esa/whd/state/tipped.htm. Tip laws are important to ensure adequate wages and fair treatment for millions of tipped workers in industries such as restaurants, hotels, nail salons, and car washes. *See id.* at 1, 3 ("waitresses and waiters – the largest group of tipped workers – have three times the poverty rate of the workforce as a whole"); Rajesh D. Nayak & Paul K. Sonn, National Employment Law Project, *Restoring the Minimum Wage for America's Tipped Workers*, 9 (2009), available at http://nelp.3cdn.net/bff44d5fafbd9d2175_vem6ivjjb.pdf (noting ways in which tipped workers are particularly susceptible to wage abuses). Tip statutes also guard the public against fraud. *See, e.g.*, Cal. Lab. Code § 356.

generally ABA Section of Labor and Employment Law ("ABA"), *Wage and Hour Laws, A State-by-State Survey* (Gregory K. McGillivary ed., 2004 &Supp.2009). As Illinois has done in one of the statutes at issue here, many states have enacted laws that protect tipped workers in particular in ways that the FLSA does not, or that provide for tipped workers to receive a higher minimum wage than is provided by the federal law.[8]

States laws may be more protective of workers in ways that go beyond the substantive rights they establish concerning wages, hours, and damages. Notable here, for example, is that very few states have adopted an opt-in procedure for class actions to enforce their wage and hour laws, as Congress has done for the FLSA. *See generally id.* In a different vein, many states treat workers more favorably than the FLSA in terms of defenses that may or may not be available to employers, such as defenses against liquidated damages[9] or a safe harbor defense against liability.[10] In addition, state laws may allow workers to obtain injunctions for wage and hour violations (*see, e.g., Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 616 (Minn. 2008); R.I. Gen. Stat. § 28-14-18.1(a)), whereas private FLSA plaintiffs can

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[8] *See supra*, n.7 (citing statutes); *see also* Nayak & Sonn, *Restoring the Minimum Wage for America's Tipped Workers, supra*, at 5-7 (noting that thirty-two states and the District of Columbia require a higher minimum wage than the federal rate for tipped workers).

[9] For example, compare 29 U.S.C. § 259 with Minn. Stat. § 177.27(8) and N.M. Stat. Ann. § 50-4-26(B)(1).

[10] For example, compare 29 U.S.C. § 260 with *In re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation*, 336 F.Supp.2d 1077, 1112 (D. Or. 2004) (noting that the seven state laws at issue do not provide for a good faith defense to liability) (subsequent history omitted).

only obtain injunctions under the statute's antiretaliation provisions. *See, e.g., Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 1335-37 (11th Cir. 2002).

These and other features of state law reflect considered policy judgments that state legislatures have made in exercising their traditional police powers to regulate the treatment of workers in order to promote the general welfare and they are not preempted by the FLSA. *See, e.g., Overnite Transp. Co. v. Tianti*, 926 F.2d 220, 222 (2d Cir. 1991) ("every Circuit that has considered the issue has reached the same conclusion – state overtime wage law is not preempted by . . . the FLSA"); *Pacific Merchant Shipping*, 918 F.2d 1409 (9th Cir. 1990); *see also Cranford v. City of Slidell*, 25 F.Supp.2d 727, 729 (E.D. La. 1998); *Aragon v. Bravo Harvesting, Inc.*, 1993 WL 432402, **2-6 (D. Ariz. May 7, 1993); *Morillion v. Royal Packing Co.*, 995 P.2d 139, 150 (Cal. 2000); 29 C.F.R. § 778.102; Brief of Plaintiffs-Appellants, 23 (citing legislative history of Portal-to-Portal Act amendments to FLSA evidencing lack of congressional intent to restrict causes of action arising out of state statutes).

2. Widespread Noncompliance With Wage And Hour Laws Makes It Essential To Have Strong Procedures For Broad Enforcement

Violations of both state and federal wage and hour laws are widespread and systemic, disproportionately targeting and impacting the most vulnerable workers. *See, e.g.*, Annette Bernhardt et al., *Broken Laws, Unprotected Workers, Violations of Employment and Labor Laws in America's Cities*, 2-4, 8-9, 20-23, 26-27, 30-37 (2009), available at http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf (documenting prevalence of minimum wage, overtime, off-the-clock, meal break, paystub, pay deduction, and other violations in several major cities); Martelle,

Confronting the Gloves-Off Economy, *supra*, at 3 (noting high rates of violations in particular industries in several major cities and nationally); Siobhán McGrath, Brennan Center for Justice, *A Survey of Literature Estimating the Prevalence of Employment and Labor Law Violation in the U.S.* (2005), available at http://nelp.3cdn.net/1ef1df52e6d5b7cf33_s8m6br9zf.pdf.

A recent survey revealed that 30% of tipped workers were not paid the applicable minimum wage and 12% experienced unlawful tip stealing by their employers or managers. Bernhardt et al., *Broken Laws*, *supra*, at 3, 23, 26; *see* Rajesh D. Nayak and Paul K. Sonn, National Employment Law Project, *Restoring the Minimum Wage for America's Tipped Workers*, 9-10 (2009), available at http://nelp.3cdn.net/bff44d5fafbd9d2175_vem6ivjjb.pdf (statistical and anecdotal evidence of employers unlawfully misappropriating tips and failing to ensure tipped workers receive the minimum wage).

In the face of widespread or systemic violations, strong enforcement tools that are capable of securing broad enforcement are necessary and important to obtain relief for workers and create sufficient incentives for employers to comply with the laws.

3. Private Class Actions Are Often Necessary To Effectuate The Purposes Of The Wage And Hour Laws

a. Government Action Is Insufficient

Government agencies have become increasingly unable to enforce the wage and hour laws to any meaningful extent. Part of the problem is a shortage of resources. Another cause is the lack of will and follow-through on the part of

agencies. In addition, agencies lack successful strategies and processes, and some states may not perform investigations, bring compliance actions at all, or take action without first receiving a complaint. *See, e.g.*, Martelle, *Confronting the Gloves-Off Economy*, *supra*, at 4-5, 19, 52; Bernhardt et al., *Broken Laws*, *supra*, at 52 ("just as the need for worker protections has become most acute, enforcement efforts at both the state and federal level have weakened"); Campaign to End Wage Theft, *Protecting New York's Workers, How the State Department of Labor Can Improve Wage-and-Hour Enforcement*, 4 (Dec. 2006), available at http://brennan.3cdn.net/97857ff03d80aae74e_5lm6b9tdl.pdf; National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Worker in an Era of Government Inaction and Employer Unaccountability*, 8-9 (2006), available at http://nelp.3cdn.net/95b39fc0a12a8d8a34_iwm6bhbv2.pdf; Annette Bernhardt & Siobhán McGrath, Brennan Center for Justice, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, 1 (Sep. 2005), available at http://www.brennancenter.org/page/-/d/download_file_35553.pdf.

In short, private enforcement is indispensable. But individual actions and complaints cannot be relied upon to redress class-wide or systemic violations.

b. Public Policy Favors Class Actions Because Of Barriers And Deterrents To Individual Actions

Class actions for wage and hour law violations are a textbook example of the class action procedure being used to "make 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); *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("aggrieved persons may be without any effective redress unless they may employ the class action device"); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

There are many obstacles and deterrents that prevent workers from taking individual action to redress wage and hour violations, including filing signed, written consents to be part of an FLSA collective action, especially in the case of the most low-paid, vulnerable, and marginalized workers. The most common barriers include lack of education, English skills, or knowledge of the laws or legal system,[11] fear of reprisal,[12] small claims relative to the costs and risks of litigation or other

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[11] *See, e.g., 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); *Gentry v. Superior Court*, 165 P.3d 556, 566 (Cal. 2007), *cert. denied*, 128 S.Ct. 1743 (2008)

[12] *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Guzman v. VLM, Inc.*, 2008 WL 597186, *8 (E.D.N.Y. Mar. 2, 2008); *Ramirez v. RDO-BOS Farms, LLC*, 2007 WL 273604, *2 & n.1 (D. Or. Jan. 23, 2007); *Jankowski v. Castaldi*, 2006 WL 118973, *2 (E.D.N.Y. Jan. 13, 2006); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005); *Smellie v. Mount Sinai Hosp.*, 2004 WL 2725124, *4 (S.D.N.Y. Nov. 29, 2004); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 309 (D. Mass. 2004); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 342 (S.D.N.Y. 2004); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 267 (D. Conn. 2002); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001); *O'Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346, 351 (N.D. Ill. 2001); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 WL 1774091, *4 (N.D. Ill. Dec. 1, 2000); *Gentry*, 165 P.3d at 564, 565-66 (citing cases); Bernhardt et al., *Broken Laws, supra*, at 24; David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27

forms of complaint,[13] and employment in transient work or distance from where violations occurred.[14]

In most cases of class-wide violations, these factors render class actions necessary effectuate the important remedial purposes of wage and hour laws. States have public policies favoring class actions for this reason, and because they are often the only means for achieving more than "random and fragmentary" enforcement of the laws, and ensuring that employers are not effectively immunized from meaningful liability for violations. *See, e.g., Skirchak v. Dynamics Research Corp., Inc.*, 432 F.Supp.2d 175, 181 (D. Mass. 2006), *aff'd on other grounds*, 508 F.3d 49 (1st Cir. 2007); *Gentry v. Superior Court*, 165 P.3d 556, 567 (Cal. 2007), *cert. denied*, 128 S.Ct. 1743 (2008).[15] Also, in the FLSA itself, Congress "has stated its policy" that workers "should have the opportunity to proceed collectively." *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (collective action

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Comp. Lab. L. & Pol'y J. 83 (2005).

[13] *See, e.g., Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 812-13 (1985) (advantage of opt-out class actions is that each individual "plaintiff's claim may be so small[] . . that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required"); *Chase v. AIMCO Properties, L.P.*, 374 F.Supp.2d 196, 198 (D.D.C. 2005); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-184 (W.D.N.Y. 2005); *Gentry*, 165 P.3d at 564-65.

[14] *See, e.g., Duchene v. Michael L. Cetta, Inc.*, 244 F.R.D. 202, 203 (S.D.N.Y. 2007); *Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472, 482(E.D. La. 2006); *Ansoumana*, 201 F.R.D. at 86-87; *Leyva*, 125 F.R.D. at 518; *Gentry*, 165 P.3d at 567.

[15] *See also Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va. 2002); *Daar v. Yellow Cab Co.*, 433 P.2d 732, 746 (Cal. 1967).

gives workers the advantage of pooling resources and "[t]he judicial system benefits of efficient resolution in one proceeding of common issues of law and fact).

4. Combined FLSA/State Law Class Actions Are Necessary To Effectuate The Purposes Of Having Both Federal And State Laws For The Protection Of 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 type of action standing alone will suffice to effectuate the purposes of both the FLSA and the applicable state laws.

FLSA actions are frequently not adequate substitutes for state law actions for the simple reason that the latter will encompass various wage, hour, wage payment, or remedial provisions that are more generous to workers than the FLSA. By the same token, a state law action is not an inadequate substitute for an FLSA action to the extent the FLSA offers advantages to workers that they do not have under a state law – *e.g.*, liquidated damages in the full amount of unpaid wages, a longer statute of limitations, narrower overtime exemptions, a lower threshold for overtime hours, or coverage for workers who, for some part of the time period at issue, have not worked in a state with its own minimum wage or overtime provisions. *See generally* ABA, *Wage and Hour Laws, supra.*

Even in the rare circumstance where the rights and remedies afforded by the FLSA and the relevant state law appear to be the same, FLSA opt-in actions are still not adequate to redress the *state law* violations because participation in FLSA

cases is typically quite low – estimated at 15-30% on average[16] – because of factors such as the failure to receive, open or understand opt-in notices, fear of acting against one's employer, the small amount of individual claims, and a reluctance to submit a signed, written legal form that one did not request.[17] *See generally Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797, 812-13 & n.4 (1985) (disapproving an opt-in requirement because plaintiffs who are timid, have small claims, or are unfamiliar with the law or business matters will not take the affirmative step, thereby "imped[ing] the prosecution of those class actions involving an aggregation of small individual claims").

The ability to have an opt-out class action is an important advantage that state laws confer on workers. The cause of fulfilling the purposes of the state wage and hour laws would be harmed if workers were effectively forced to forego that advantage in order to pursue their rights under the FLSA in collective fashion.

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[16] *See, e.g.*, 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) (average opt-in rate of 15.7% from 21 cases reviewed); Gary L. Sasso et al., *Defense Against Class Certification*, 744 P.L.I./Litig. 389, 511 (2006).

[17] *See, e.g., Guzman*, 2008 WL 2008 WL 597186 at *8; *Ramirez*, 2007 WL 273604 at *2 & n.1; *McLaughlin*, 224 F.R.D. at 312; *Jankowski*, 2006 WL 118973 at *2; *Noble*, 224 F.R.D. at 342 (same); *Scott*, 210 F.R.D. at 267; *O'Brien*, 203 F.R.D. at 351; Brunsden, *Hybrid Class Actions, supra*, at 295; 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, 1326-29 (2008).

5. Combined FLSA/State Law Actions Promote Efficiency, Economy, And The Sound Administration Of The Laws

Several additional advantages compel recognition of a policy in favor of combined FLSA/state law class actions where the factual and legal issues underlying the different claims are substantially similar or interrelated.

First, by allowing the same or substantially similar factual and legal issues to be resolved in one case, combined FLSA/state law cases advance the interest of convenience, efficiency and economy for courts and litigants alike and prevent duplicative litigation, wasted resources, and delay.[18]

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 legislatures have evinced their intent to have their laws track certain aspects of the FLSA, or where state laws have been written so as to apply only if the FLSA is determined not to apply, there are distinct advantages to having one federal court decide the federal and state law questions together.

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[18] Through anecdotes, *amici* are aware of cases in which employers have prevailed on district courts to dismiss state law class action claims from hybrid cases, only to have the claims re-filed in other courts. *Amici* are informed of a case in which a state law class action claim was re-filed and then removed to federal court, at which time the defendants moved to transfer it back to the original federal court. *Amici* are informed of another case in which the state law class claim was dismissed, re-filed in state court, removed by the employer, and then challenged by a motion to dismiss on the ground that it conflicted with the FLSA opt-in provision. In another case, defense counsel succeeded in having the state law class claim dismissed, leading to a second lawsuit for that claim being filed against the employer, who subsequently sued its attorneys for malpractice based partly on the additional burdens imposed by having to defend against the second lawsuit.

Third, hybrid cases reduce the potential for claim-splitting and limit the instances in which litigation will be necessary to determine whether or how a claim preclusion doctrine accordingly.

Fourth, combined FLSA/state law cases facilitate comprehensive settlements where an employer's common course of conduct has given rise to both FLSA and state law violations.

B. Combined FLSA/State Law Class Actions Are Permitted Under Federal Law

The existing scheme of federal jurisdiction statutes and procedural rules permits combined FLSA/state law class actions to be heard in the federal courts.

Where claims arise from a common nucleus of operative fact, Congress has given the district courts jurisdiction over state law wage and hour class actions in the same case as an FLSA action through the supplemental jurisdiction statute, 28 U.S.C. § 1367. It is well recognized that supplemental jurisdiction extends to the state law claims of the class members who do not opt in to the FLSA action as well as those who do. *See, e.g., Lindsay v. Government Employees Ins. Co.*, 448 F.3d 416, 420-24 (D.C. Cir. 2006); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308-13 (3d Cir. 2003).[19]

The supplemental jurisdiction statute makes no special exception for state law wage and hour class actions. *See, e.g., Lindsay*, 448 F.3d at 421-22. The

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[19] *See also Nerland v. Caribou Coffee Co., Inc.*, 564 F.Supp.2d 1010, 1027-28 (D. Minn. 2007); *Goldman v. RadioShack Corp.*, 2003 WL 21250571, **2-5 (E.D. Pa. Apr. 16, 2003); *Carnevale v. GE Aircraft Engines*, 492 F.Supp.2d 763, 768-70 (S.D. Ohio 2003).

district court does have discretion to decline to exercise its supplemental jurisdiction if one or more of certain statutorily-enumerated conditions are satisfied. 28 U.S.C. § 1367(c). But in determining whether or not to decline to exercise its jurisdiction, the court is required to consider the interests of convenience, judicial economy, fairness, and comity. *Hansen v. Board of Trustees of Hamilton Southeastern Sch. Corp.*, 551 F.3d 599, 608 (7th Cir. 2008); *Lindsay*, 448 F.3d at 424-25. In most FLSA/state law actions, these interests will weigh heavily in favor of maintaining a single proceeding, at least when the alternatives are considered. *See generally Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 906 (7th Cir. 2007) (economy in litigation is a core rationale for exercising supplemental jurisdiction).

In the Class Action Fairness Act of 2005 ("CAFA"), Congress has gone even further to authorize and encourage FLSA/state law class actions to be brought in the federal courts on behalf of large classes. The CAFA gives the federal courts broad jurisdiction, both original and removal, over state law class actions, which the statute expressly defines as actions under Rule 23 or similar state statutes or rules of judicial procedure,[20] provided there are at least 100 class members, certain minimum diversity requirements are met, and the matter in controversy exceeds $5 million. *See* 28 U.S.C. § 1332(d); *id.* § 1453. The CAFA provides for several discretionary and mandatory exceptions (*see id.* § 1332(c)(3)-(4); *id.* § 1453(d)), but no special exceptions for state wage and hour law class actions. Indeed, many

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[20] *See* 28 U.S.C. § 1332(d)(1)(B).

"hybrid" cases involve claims on behalf of class members located in multiple states, and therefore would seem to be squarely within the ambit of Congress' intent in enacting the CAFA.

As for the opt-out procedure that applies to state law class actions for damages in the district courts, Congress has given the Supreme Court the power to prescribe the rules of practice and procedure for cases in the district courts, *see* 28 U.S.C. § 2072(a), and the Court has promulgated Federal Rule of Civil Procedure 23. Rule 23 was substantially revised in 1966 to take most of its form as it exists today, including to provide for opt-out class actions for damages. Fed. R. Civ. P. 23(b)(3). "The 1966 amendments to Rule 23 are a restatement and reinforcement of public policy, mutually expressed by the Judicial Conference of the United States, its advisory committee on Rules of Civil Procedure, the Supreme Court, and the Congress, which candidly facilitate and encourage the use of class actions." *Greenfield*, 483 F.2d at 831.

Rule 23 applies to all state law claims brought as class actions in the federal courts. *See* Fed. R. Civ. P. 1. There is no exception provided for state wage and hour law class actions, either standing alone or when filed together with an FLSA opt-in action. *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) ("In the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court"); *see also* Fed. R. Civ. P. 81. Thus, there is no dispute that Rule 23, including its opt-out provision,

applies with as much force to state wage and hour law class actions as it does to any other state law class claims in federal court

In short, combined FLSA opt-in/Rule 23 opt-out class actions are permitted in the federal courts under the existing rules, if not actively encouraged by the policies underlying those rules.

C. Combined FLSA/State Law Class Actions Cannot Be Barred On The Basis Of A Claim That They Undermine Congressional Intent

1. The Argument Against FLSA/State Law Class Actions Based On Congressional Intent Is Unpersuasive And Not Properly Directed To The Courts

Some employers have complained that applying the laws as written to allow the maintenance of hybrid FLSA/state law class actions is frustrating a Congressional intent to relieve them from the burdens of representative actions for violations of the FLSA. The argument is unpersuasive.

First, there is no risk that employers will be held liable under the FLSA to those class members in a "hybrid" case who do not opt in to the FLSA action. Thus, there is no added exposure to FLSA claims beyond what the FLSA itself permits Second, the "hybrid" situation is legally indistinguishable from having separate FLSA and state law class actions proceeding in different cases, or having a combined FLSA/state law class action in state court, both of which scenarios the law also allows.[21]

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[21] The FLSA expressly authorizes collective actions to be filed in state court. 29 U.S.C. § 216(b).

Third, there are many important policies and purposes underlying the laws and legal principles that would be *defeated* if the existence of the FLSA's opt-in provision were allowed to act as a trump card in hybrid cases – *e.g.*, the jurisdiction statutes, Rule 23, federalism, and substantive protections of either the FLSA or the state laws at issue, depending on which law(s) workers might be forced to forego as a practical matter if they could not maintain a hybrid case. These policies include promoting convenience, efficiency, and economy in litigation, maintaining the fullest possible respect for both state and federal laws and policies, eliminating substandard working conditions, and ensuring meaningful access to the courts for state law claimants whose rights under state law would not be vindicated in the absence of an opt-out class action. All of these purposes, *and* the FLSA's purpose to limit FLSA claims to just those individuals who opt in to an FLSA action, can be and are respected at one and the same time when the laws are applied as they now exist.

In any event, it is not for the courts to rewrite the law. Complaints about employers losing some benefit that the FLSA confers upon them are properly directed to Congress.

2. The History Of The FLSA's Opt-in Provision Does Not Support An Argument For A New Rule Prohibiting Combined FLSA/State Law Class Actions

The congressional intent argument put forward by many "incompatibility" proponents distills down to the dubious claim that there is a congressional intent to affirmatively shield employers from full liability when they commit class-wide violations of their workers' FLSA rights. If that were the intent, Congress would

not have expressly included a collective action provision even after the 1947 Portal-to-Portal Act amendments so that workers could sue for themselves and other employees. *Cf. Hoffmann-La Roche*, 493 U.S. at 173 (relying on Congress' retention of a representative action provision to reject the argument "that [judicial] involvement in the [collective action] notice process would thwart Congress' intention to relieve employers from the burden of multiparty actions").

With the benefit of experience, one can see that the opt-in provision has in fact come to have an exculpatory *result* where class-wide FLSA violations are concerned – because of low opt-in rates to FLSA actions. But one cannot infer from this result that it is what Congress intended, and the legislative history does not support such a conclusion either.

Congress' action in the Portal-to-Portal Act of 1947 ("Portal Act") to limit FLSA "collective actions" to workers who affirmatively "opt in" was a reaction to the unique circumstances obtaining when the Portal Act was enacted: (i) FLSA representative actions could be maintained and were being maintained by non-employee "agents" who had no personal stake at all in the case; (ii) Supreme Court decisions had opened up vast "unexpected liabilities" under the FLSA, and (iii) the FLSA did not specify any procedure for joining representative FLSA actions brought by employees. *See, e.g., Hoffmann-La Roche*, 493 U.S. at 173; 29 U.S.C. § 251(a); Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Empl. & Lab. L. 269, 279-80 & nn.53-55 (2008).

To address concerns about "representative" actions brought by non-employee agents, Congress abolished such actions in the Portal Act. *Hoffmann-La Roche*, 493 U.S. at 173. At the same time, however, Congress left intact "collective" actions in which one or more employees bring an action "in behalf" of others "similarly situated," and provided for the written consent ("opt-in") procedure for forming the collective.

In adopting an opt-in procedure, Congress was acting against the backdrop of Rule 23 as it then existed. Rule 23 required that some affirmative action such as joinder or intervention be taken by individuals who wanted to enjoy the benefits of a class action for damages based on a common question – so-called "spurious" class actions, essentially today's Rule 23(b)(3) class actions – and this was the procedure some courts already had been applying in FLSA actions. *See* Fed. R. Civ. P. 23, Adv. Comm. Notes re 1966 Amendment; Brunsden, *Hybrid Class Actions, supra,* at 279-80 & nn. 50-51; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of The Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 376-79, 383-86 (1967).

Thus, in adopting an opt-in procedure for the FLSA, Congress conformed the FLSA to the approach that was used in comparable class actions. Brunsden, *Hybrid Class Actions, supra,* at 279-80 & n.51. It so happened, however, that when Rule 23 was substantially revised in 1966, the drafters decided to have an opt-*out* procedure apply for Rule 23(b)(3) classes. *See* Adv. Comm. Notes re 1966 Amendment; Kaplan, *Continuing Work of the Civil Committee, supra,* at 386, 389-92. This

decision has been defended on policy grounds ever since, *see, e.g., Kern v. Siemens Corp.*, 393 F.3d 120, 124-25 & n.6 (2d Cir. 2004), and Congress has not acted to disturb it.

Viewed in this context, a complaint about thwarting the purpose behind the FLSA's opt-in provision begins to ring hollow. For example, there is no evidence of Congress being hostile to a notice and opt-out procedure for the FLSA, it just seems not to have been considered. Indeed, the failure of the FLSA to utilize an *opt-out* procedure can actually be viewed as largely an accident of timing; if the Portal Act had been enacted after the 1966 Rule 23 amendments, and in the era of the modern class action under Rule 23, the FLSA might well have the opt-out procedure today.

In any event, there is nothing in the legislative history that justifies using the FLSA opt-in provision today as a means to leverage a new rule that takes away the ability workers now have under existing law to bring a combined FLSA opt-in/state law opt-out class action in federal court. Not only are such cases entirely lawful, they also are one of the most important tools workers have for offsetting some of the damage that has been done to workplace protections by unscrupulous employers, the operation of the FLSA opt-in requirement in practice, and the lack of effective government enforcement of wage and hour laws.

IV. CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should reverse the district court's order denying Rule 23 class certification and remand

with instructions to the district court to comply with Rule 23 in adjudicating plaintiff's motion for class certification, just as it would in any other case.

DATED: December 1, 2009

Respectfully submitted,

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INTEREST OF THE AMICI

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 the Fair Labor Standards Act and related state fair pay laws. With offices in New York City, California, the Midwest, Washington state and Washington, D.C., NELP provides technical support and assistance to wage and hour advocates from the private bar, public interest bar, labor unions, and community worker organizations. NELP works to ensure that labor standards are enforced for all workers and to bolster the economic security of working families who bear more risks than ever in the current economy. 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 coverage under these laws to carry out the laws' remedial purpose.

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. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the United States Supreme Court and other federal appellate courts regarding the proper interpretation of the FLSA and other federal civil rights laws.

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 Illinois residents in the Chicago metropolitan region. WHLC works with a network of community-based organizations to reach those who are working on the fringes of Illinois' economy, such as the homeless or immigrant workers who are among the estimated 500,000 Illinois residents 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. Because these laborers are the least likely to enforce their own rights by affirmatively joining a collective action, it is critical that this population of workers be permitted to recover their owed minimum, overtime and other wages through class actions arising under Illinois law, without being forced to forgo their federal claims. 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.

The Korean American Resource and Cultural Center (KRCC) is a non-profit organization that provides services to low-income Korean residents of Chicago and

surrounding suburbs. Through our services such as English classes, KRCC sees firsthand how workers in the Korean community lack information about their workplace rights and the legal process. Many do not understand the complex process of an opt-in case under the Fair Labor Standards Act or are afraid to sign on to a case publicly.

The Chicago Workers' Collaborative (CWC) is a non-profit organization in the Chicago metropolitan region that assists low-income laborers in advocating for their rights in the workplace, particularly those who work in the temporary staffing industry. This industry is the fastest growing sector of the U.S. economy and is extremely competitive. Schemes to deny minimum and overtime wages as a means of lowering labor costs are commonplace and affect hundreds of thousands of laborers in Illinois. Many of the affected laborers live in poverty, are homeless or very transient and lack information about their rights or access to legal advice. CWC believes it is critical to allow wage-and-hour cases to proceed as both collective and class actions to put an end to the systematic and widespread abuses that exist in this industry.

The Latino Union of Chicago is a non-profit organization that works with day laborers in Chicago to address the labor rights violations these workers face. While many employers who hire day laborers comply with employment laws, there are also too many who exploit these workers' vulnerable position in the economy. It is important these laborers are able to bring a wage-and-hour case as a collective and class action simultaneously.

The Centro de Trabajadores Unidos is a non-profit organization that advocates for workers' rights of recent immigrants and low-wage workers on the southeast of Chicago. In several cases our organization has been involved, we have seen how easily an employer can intimidate its current employees to deter them from participating in a Fair Labor Standards Act collective action. A simultaneous state law class action is important to prevent employers from benefitting from this type of unscrupulous conduct.

Certificate of Compliance With Rules 29(d) and 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a) because this brief contains 6,774 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the appendix of *amici's* individual statements of interest, according to the word count of the Microsoft Word Count processing system used to prepare the brief.

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CERTIFICATE OF MAILING

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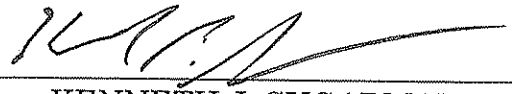
By: 
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