17-3388

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEI XING YU, individual, on behalf of all other employees similarly situated,
Plaintiff-Appellee,

v.

HASAKI RESTAURANT, INC., SHUJI YAGI, KUNITSUGU NAKATA, HASHIMOTO GEN,
Defendants-Appellants,

JOHN DOE and JANE DOE #1-10,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AMICUS CURIAE BY NATIONAL EMPLOYMENT LAW PROJECT

IN SUPPORT OF PUBLIC CITIZEN LITIGATION GROUP'S PROPOSED PETITION FOR REHEARING EN BANC, OR *SUA SPONTE* CONSIDERATION OF REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(b)(4) and 29(a)(4)(A), Amicus Curiae National Employment Law Project states that it is a non-profit corporation, that it has no parent corporations, and that no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Robust Private Enforcement Supervised by DOL & Courts Is Critical to the Design of the Fair Labor Standards Act 3

II. The Panel's Decision Creates an Incentive to Skirt the FLSA's Mandatory Protections 7

III. Abusive Confidentiality and Non-Disclosure Terms Will Undermine Robust Private and Public Enforcement of the Act's Protections 10

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

CASES

Arango v. Scotts Co., LLC, No. 17-cv-7174 (KMK),
2019 WL 117466 (S.D.N.Y. Jan. 7, 2019) 11

Carson v. Team Brown Consulting, Inc., No. 16-cv-4206 (LDH)(RLM),
2017 WL 4357393 (E.D.N.Y. Sept. 29, 2017) 7, 8

Cheeks v. Freeport Pancake House, Inc.,
796 F.3d 199 (2d Cir. 2015) 6, 10

Davitashvili v. Beacon Van Line & Storage, Inc., No. 15-cv-5575 (CBA)(JO),
2016 WL 3390410 (E.D.N.Y. May 23, 2016).....11

Gallardo v. PS Chicken Inc.,
285 F. Supp. 3d 549 (E.D.N.Y. 2018).....8

Guarnero-Ruiz v. 36-03 Food, LLC, No. 17-cv-3178 (LDH)(SJB),
2017 WL 7049543 (E.D.N.Y. Dec. 11, 2017).....8

Jones v. Smith,
319 F. Supp. 3d 619 (E.D.N.Y. 2018). 8, 9

Lara v. Air Sea Land Shipping & Moving Inc., No. 19-cv-8486 (PGG)(BCM),
2019 WL 6117588 (S.D.N.Y. Nov. 18, 2019) 10

Larrea v. FPC Coffees Realty Co., No. 15-CIV-1515 (RA),
2017 WL 1857246 (S.D.N.Y. May 5, 2017).....11

Mei Xing Yu v. Hasaki Restaurant, Inc., No. 17-3388-cv
(2d Cir. Dec. 6, 2019) (slip op.).....1, 9

Rodriguez-Hernandez v. K Bread & Co., Inc., No. 15-cv-6848 (KBF),
2017 WL 2266874 (S.D.N.Y. May 23, 2017).....9

STATUTES & RULES

29 U.S.C. § 202 3

FED. R. CIV. P. 68(a).....9

OTHER AUTHORITIES

Alex Lau, *The FLSA Permission Slip: Determining Whether FLSA Settlements and Voluntary Dismissals Require Approval*, 86 FORDHAM L. REV. 227 (2017) 6

ANNETTE BERNHARDT ET AL., NAT'L EMP'T L. PROJECT, BROKEN LAWS, UNPROTECTED WORKERS (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.....4

BRADY MEIXELL & ROSS EISENBREY, ECON. POLICY INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR (2014), https://www.epi.org/files/2014/wage-theft.pdf.....4

Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373 (2008).....5

DAVID COOPER & TERESA KROEGER, ECON. POLICY INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR (2017), https://www.epi.org/files/pdf/125116.pdf 4

Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. OF EMP. & LAB. L. 109 (2013).....10

J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) 3

LAURA HUIZAR, NAT'L EMP'T L. PROJECT, EXPOSING WAGE THEFT WITHOUT FEAR (2019), https://www.nelp.org/wp-content/uploads/Retal-Report-6-26-19.pdf 6

Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644 5

Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.....11

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U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—DECEMBER 2001, Table C-2, https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2001.....5

U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—DECEMBER 2018, Table C-2, https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2018.....6

STATEMENT OF INTEREST

The National Employment Law Project (NELP) is a non-profit legal organization with fifty years of experience advocating for the employment and labor rights of workers in low-wage industries. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor and employment laws. This work has given NELP the opportunity to learn up close about conditions in low-wage industries where fair pay violations persist. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA").

The panel's decision in *Mei Xing Yu v. Hasaki Restaurant, Inc.*, No. 17-3388-cv (2d Cir. Dec. 6, 2019) (slip op.), will undermine the fair competition and remedial purposes of the FLSA. For that reason, NELP submits this amicus brief under Federal Rule of Appellate Procedure 29(b) in support of court-appointed amicus Public Citizen Litigation Group's proposed petition for rehearing en banc or, in the alternative, *sua sponte* consideration of rehearing en banc.[1]

[1] As required by Federal Rules of Appellate Procedure 29(b)(4) and 29(a)(4)(E), the undersigned declares that no party's counsel authored the brief in whole or in part, that no party or party's counsel contributed money to prepare or submit the brief and no person other than amicus curiae, its members, and counsel contributed money to prepare or submit the brief.

SUMMARY OF ARGUMENT

The panel's decision will undermine the mandatory protections of the Fair Labor Standards Act ("FLSA") for workers like Plaintiff and his coworkers in the low-wage restaurant industry. These workers, largely immigrants and people of color, depend on robust private enforcement of the FLSA's minimum wage and overtime protections—supervised by the United States Department of Labor ("DOL") and by federal courts.

The panel's decision weakens that robust private enforcement, effectively rendering the FLSA's mandatory protections subject to waiver by private agreement. Absent judicial or DOL review, Rule 68(a) offers will become the preferred method for settling FLSA cases.

DOL and judicial review is especially critical to prevent harms flowing from employers' inclusion of abusive confidentiality and non-disclosure provisions in FLSA settlements. Without DOL or judicial review, such provisions will be routinely included in FLSA settlement agreements to silence worker-plaintiffs—undermining the FLSA's twin goals of rooting out wage theft and unfair competition by unscrupulous employers.

ARGUMENT

I. Robust Private Enforcement Supervised by DOL & Courts Is Critical to the Design of the Fair Labor Standards Act.

In enacting the Fair Labor Standards Act ("FLSA" or "the Act") in 1938, Congress had two major goals: (1) remediating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202(a); and (2) eliminating the use of such labor conditions as an "unfair method of competition" between employers, *id.* § 202(a)(3), and the burdens of those conditions on commerce, *id.* § 202(a)(2). By setting a national minimum wage floor and requiring premium pay for overtime hours, the FLSA was "a device for assuring fair competition in product markets and a hedge against the [Great] Depression." Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 22 (2000). "While workers benefited and continue to benefit from the FLSA's protection, the FLSA was principally designed to preserve capitalism by protecting employers from themselves and each other." *Id.*

In the eight decades since, private litigation has been critical to enforcement of the FLSA's mandatory protections. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 & n.42 (2012). Private enforcement has only become more important in recent decades due to the growing problem of wage theft as the U.S. has become a service-

based economy. A 2008 study found that 68% of 4,387 workers in low-wage industries in Chicago, Los Angeles, and New York City had experienced at least one pay-related violation in the prior week. ANNETTE BERNHARDT ET AL., NAT'L EMP'T L. PROJECT, BROKEN LAWS, UNPROTECTED WORKERS 5 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf. A 2014 report estimated that U.S. workers lose more than $50 billion annually due to wage theft. BRADY MEIXELL & ROSS EISENBREY, ECON. POLICY INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), https://www.epi.org/files/2014/wage-theft.pdf. A 2017 study shows that workers in the ten most-populous states lose $8 billion annually due to minimum wage violations alone. DAVID COOPER & TERESA KROEGER, ECON. POLICY INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 9–10 (2017), https://www.epi.org/files/pdf/125116.pdf.

Restaurant workers like the plaintiff in this case are routinely subject to wage theft, as segments of the industry persistently operate at subpar compliance. *See, e.g.*, *id.* at 25–26 ("[O]ver 14 percent of all workers in food and drink service (one out of every seven) report being paid less than the minimum wage. Food and drink service workers make up over a quarter (25.9 percent) of all workers suffering minimum wage violations—the largest share of any single industry.").

Congress and state legislatures have not provided government agencies the necessary resources to tackle the wage theft crisis, leaving FLSA enforcement primarily to employees. *See* Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644 (finding that DOL employs 894 investigators to detect wage-and-hour violations among 161 million American workers, compared with 1,000 investigators for 23 million workers in 1948, six states employ zero investigators, and twenty-six states employ fewer than ten investigators); Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 375–78 (2008) (documenting how underfunding has limited DOL's ability to affirmatively prosecute FLSA violations).

Private enforcement of the FLSA is now the predominant check on employer behavior. In 2001, employees filed 1,877 FLSA lawsuits (93.2%) and DOL filed 136 FLSA lawsuits (6.8%); in 2018, employees filed 7,505 FLSA lawsuits (98.1%) and DOL filed 149 FLSA lawsuits (1.9%).[2]

[2] *See* U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—DECEMBER 2001, Table C-2, at 3, https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2001 (U.S. was plaintiff in 136 out of 2,013 FLSA suits filed in district courts during 12-month period ending Dec. 31, 2001); U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY—DECEMBER 2018, Table C-2, at row 80, https://www.uscourts.gov/statistics-reports/statistical-tables-federal-

Most of these lawsuits are brought by employees in low-wage industries desperate to be made whole, represented by lawyers working on a contingency basis, against well-resourced employers. These workers often fear retaliation for bringing a claim, despite the FLSA's anti-retaliation protections. *See* LAURA HUIZAR, NAT'L EMP'T L. PROJECT, EXPOSING WAGE THEFT WITHOUT FEAR 11 (2019), https://www.nelp.org/wp-content/uploads/Retal-Report-6-26-19.pdf (describing how inconsistent interpretations of relief available under FLSA's anti-retaliation prohibition keep many workers from pursuing FLSA anti-retaliation claims).

This dynamic creates strong incentives for employees and their attorneys to quickly settle FLSA cases—even if those settlements under-compensate or contain abusive settlement terms, such as confidentiality provisions. *See* Alex Lau, *The FLSA Permission Slip: Determining Whether FLSA Settlements and Voluntary Dismissals Require Approval*, 86 FORDHAM L. REV. 227, 229–30 (2017) (noting strong incentives for employees to settle claims for "meager amounts" and agree to confidentiality provisions that "stymie additional claims by keeping workers from learning about suits"). Accordingly, private enforcement must be supervised by DOL or by courts to ensure it is genuinely protective, as this Court recognized in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015).

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judiciary-december-2018 (U.S. was plaintiff in 149 out of 7,654 FLSA suits filed in district courts during 12-month period ending Dec. 31, 2018).

II. The Panel's Decision Creates an Incentive to Skirt the FLSA's Mandatory Protections.

By creating a backdoor to the FLSA's protections not subject to DOL or judicial review, the panel's decision will weaken robust private enforcement—effectively rendering the FLSA's mandatory protections subject to waiver by private agreement. Absent judicial or DOL review, Federal Rule of Civil Procedure 68(a) will become the preferred method for settling FLSA cases, keeping settlements out of sight.

Since *Cheeks* was decided, a small subset of attorneys in the plaintiff and defense bar have continued to endeavor to evade judicial review of FLSA settlements. In addition to the Rule 68(a) offers at issue here, attorneys have employed a variety of tactics to achieve an "end-run" around *Cheeks* and the FLSA's protections, including:

- moving to voluntarily dismiss a plaintiff's FLSA claim without prejudice under Rule 41(a)(1)(A)(i) after notice of settlement was filed and defendants indicated "judicial scrutiny would 'directly impact' the terms of the settlement," *Carson v. Team Brown Consulting, Inc.*, No. 16-cv-4206 (LDH)(RLM), 2017 WL 4357393, at *4 (E.D.N.Y. Sept. 29, 2017);
- filing a general release of claims from plaintiff and moving to voluntarily dismiss plaintiff's FLSA claim, insisting the stipulation of dismissal "without prejudice" be treated at face value despite the general release,

Guarnero-Ruiz v. 36-03 Food, LLC, No. 17-cv-3178 (LDH)(SJB), 2017 WL 7049543, at *6–7 (E.D.N.Y. Dec. 11, 2017);

- bifurcating settlement of plaintiff's intertwined FLSA and New York Labor Law (NYLL) claims but moving to dismiss both without prejudice, arguing there was only a settlement agreement for NYLL claims that was not subject to judicial review, and refusing to submit any agreement for review, *Gallardo v. PS Chicken Inc.*, 285 F. Supp. 3d 549, 553–54 (E.D.N.Y. 2018); and
- stipulating to plaintiff's independent contractor status "for the purpose of the settlement," and arguing that FLSA was therefore inapplicable to plaintiff's claim and thus did not require public filing or judicial review of the settlement agreement, *Jones v. Smith*, 319 F. Supp. 3d 619, 622–24 (E.D.N.Y. 2018).

To date, courts in the Second Circuit have largely rejected such efforts. *See, e.g.*, *Carson*, 2017 WL 4357393, at *4 ("Notices of dismissal without prejudice should not be used in FLSA cases as a mechanism to effect an end-run around the policy concerns articulated in *Cheeks*."); *Guarnero-Ruiz*, 2017 WL 7049543, at *10 (recommending district judge reject "without prejudice" stipulation); *Gallardo*, 285 F. Supp. 3d at 552 ("[T]his appears to be a global settlement designed to evade this court's review, as plaintiff is apparently dropping the FLSA action in exchange for

a settlement of the state claim. I find that, in light of the underlying policy considerations behind *Cheeks*, 'to the extent that there is a quid pro quo for such a dismissal, court approval is required.'") (citation omitted); *Jones*, 319 F. Supp. 3d at 624 ("[A]llowing the parties to stipulate that the statute is no longer applicable for settlement purposes would re-open the door to the kind of employer abuses in FLSA settlement negotiations that drove the Second Circuit to clarify the need for settlement review in *Cheeks*.") (citation omitted).

But these rationales demonstrate the lengths to which some attorneys will go to circumvent the Act's protections. Those attorneys who seek to avoid judicial review will have every incentive to use Rule 68(a) to do so.

The panel's decision suggests that there is no "secret settlement problem" because Rule 68(a) "offers of judgment are publicly filed on the court's docket[.]" Slip Op. at 27. But Rule 68(a) only requires filing of three documents: (1) an "offer to allow judgment on specified terms," (2) a "notice of acceptance," and (3) "proof of service." FED. R. CIV. P. 68(a). An employer may thus file an "offer of judgment" while separately requiring a detailed settlement agreement. Indeed, some attorneys have been caught attempting a similar maneuver. *See, e.g.*, *Rodriguez-Hernandez v. K Bread & Co., Inc.*, No. 15-cv-6848 (KBF), 2017 WL 2266874, at *1 (S.D.N.Y. May 23, 2017) ("The proposed settlement agreement makes clear what the Court has suspected throughout this litigation—that the settlement was likely mischaracterized

[as an "offer of judgment"] because of a desire by plaintiff's counsel to receive an unreasonably high attorney's fee award and shield such award from review[.]").

III. Abusive Confidentiality and Non-Disclosure Terms Will Undermine Robust Private and Public Enforcement of the Act's Protections.

Judicial and DOL review is also critical to prevent the potential harms flowing from abusive confidentiality provisions and non-disclosure agreements ("NDAs") that employers insist on including in FLSA settlements. *See Cheeks*, 796 F.3d at 206 (collecting cases).

Before *Cheeks*, FLSA defendants "ha[d] come to expect confidentiality as a part of a settlement agreement." Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. OF EMP. & LAB. L. 109, 111 (2013). Such provisions "can cover the settlement amount as well as the circumstances surrounding the claim or even the fact of the litigation itself, significantly reducing the amount of information available about wage theft." *Id.* They also prevent "other workers from learning about and vindicating their FLSA rights." *Id.* at 125.

After *Cheeks*, courts in the Second Circuit routinely rejected confidentiality provisions and NDAs in FLSA settlement agreements. *See, e.g.*, *Lara v. Air Sea Land Shipping & Moving Inc.*, No. 19-cv-8486 (PGG)(BCM), 2019 WL 6117588, at *3 (S.D.N.Y. Nov. 18, 2019) (striking confidentiality term from agreement); *Larrea v. FPC Coffees Realty Co.*, No. 15-CIV-1515 (RA), 2017 WL 1857246, at

*4 (S.D.N.Y. May 5, 2017) (rejecting provision prohibiting plaintiffs from disclosing "even the existence of a settlement—let alone the settlement terms or amounts—to anyone other than their financial advisor."); *Davitashvili v. Beacon Van Line & Storage, Inc.*, No. 15-cv-5575 (CBA)(JO), 2016 WL 3390410, at *3 (E.D.N.Y. May 23, 2016) (recommending rejection of agreement prohibiting disclosure of the "terms and background of the Agreement to fellow workers.").

The #MeToo movement has exposed the wide-ranging harms wrought by confidentiality provisions and NDAs in settlements of discrimination and harassment claims. *See, e.g.*, Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements (describing how Weinstein used NDAs and confidentiality provisions in settlements "to evade accountability for claims of sexual harassment and assault for at least twenty years," noting that women often agreed to them "under pressure from attorneys on both sides.").

The panel's decision threatens to return this Circuit to the pre-*Cheeks* era, allowing confidentiality provisions and NDAs to proliferate in FLSA settlements. Public filing of the Rule 68 offer cannot correct for the damaging effect of such NDAs, as signers will still believe they cannot speak out without violating their agreement. *See Arango v. Scotts Co., LLC*, No. 17-cv-7174 (KMK), 2019 WL 117466, at *3 (S.D.N.Y. Jan. 7, 2019) ("[C]ourts in this District have repeatedly held

that, even when a settlement is publicly filed, a provision that prohibits Plaintiff's right to discuss the settlement is incompatible with the purposes of the FLSA, namely, to ensure that workers are aware of their rights.") (collecting cases).

CONCLUSION

Absent judicial or DOL review, Rule 68(a) offers will become the preferred method for settling FLSA cases, and NDAs and confidentiality provisions will be routinely employed in FLSA settlement agreements—undermining the Act's twin goals of rooting out wage theft and unfair competition. Employer accountability and compliance will slip, hurting workers and law-abiding companies.

For the reasons explained above, this Court should grant the petitioner's proposed petition for rehearing en banc or, in the alternative, order rehearing en banc *sua sponte* under 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(b)(4) because it contains 2,518 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: January 7, 2020
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