No. 10-17360

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAQUAN HARVEY and RON MOWDY,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

vs.

KAG WEST, LLC, f/k/a BENETO BULK TRANSPORT, and KENAN ADVANTAGE GROUP, INC.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CASE NO. 06-CV-05682
THE HONORABLE MARILYN HALL PATEL

BRIEF OF THE ASIAN LAW CAUCUS, CENTRO LEGAL DE LA RAZA, GARMENT WORKER CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAW PROJECT, WOMEN'S EMPLOYMENT RIGHTS CLINIC, WORKSAFE, INC., AND YOUNG WORKERS UNITED AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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DISCLOSURE STATEMENTS

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

The following *amici curiae* are not-for-profit corporations that have no publicly-traded stock and no parent corporation: Asian Law Caucus, Centro Legal de la Raza, Garment Worker Center, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society – Employment Law Center, National Employment Law Project, Women's Employment Rights Clinic, Worksafe, Inc., and Young Workers United.

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: April 29, 2011

Respectfully submitted,

/s/
David Borgen
Attorney for *Amici Curiae*

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

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

Amici write to highlight the public policies supporting the need for robust, flexible class action procedures under Federal Rule of Civil Procedure 23. Low-wage workers who have been denied their lawful wages benefit when federal district courts exercise discretion to hear important, often-dispositive common questions under Rule 23(c)(4). Low-wage workers also benefit from federal court cases that combine Rule 23 "opt-out" class actions for state wage-and-hour law violations with "opt-in" collective actions for federal Fair Labor Standards Act ("FLSA") violations. *Amici* write to urge the Court to reaffirm that such "hybrid actions" are permitted under existing law and that opt-out actions for state law claims are superior under Rule 23(b)(3) to opt-in class actions because low-wage workers often fear reprisal for participating in a lawsuit against an employer.

This brief does not replicate the arguments of Plaintiffs-Appellees because it addresses policy implications for low-wage workers, provides historical context for Rule 23(c)(4) and hybrid actions, and responds to the brief of *amicus curiae*

American Trucking Associations and Chamber of Commerce of the United States, *et al.* ("Chamber of Commerce Brief"), in support of Appellants. This brief should be permitted without leave of court because all parties have consented to its filing. Fed. R. App. P. 29(a).

A brief description of each *amicus* is set forth below:

The Asian Law Caucus ("ALC") was founded in 1972 as the nation's first Asian American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting immigrant workers and engages in broad-based community education and litigation on employment rights issues. ALC is committed to ending unfair treatment of vulnerable workers, making the outcome of this case of vital interest to our organization.

Centro Legal de la Raza ("Centro Legal") was founded in 1969 to provide culturally and linguistically appropriate legal aid services to predominantly Spanish-speaking residents of the greater Bay Area. Through legal services clinics, Centro Legal assists approximately 9,000 clients annually, providing advice, referrals, and representation in court in the areas of housing, employment, family, consumer protection, immigration, and support to survivors of domestic violence. Approximately 600 of those clients each year face employment-related

problems. Centro Legal's employment practice focuses on assisting workers who face wage-theft, including denial of regular wages, overtime wages, and rest and meal periods. As a result, the outcome of this matter is of considerable interest to this organization and to the hundreds of wage and hour claimants it assists.

The Garment Worker Center ("GWC") is a nonprofit independent organization that provides resources and opportunities for garment workers to learn about their rights, to develop themselves as leaders and to advocate to stop dangerous sweatshops. Often the workers the GWC assists have suffered extreme hardships because of the poor working conditions and sub-minimum wages earned at their places of employment. Annually, hundreds of workers come to GWC with claims for unpaid wages, rest and meal period violations, and overtime violations. GWC assists these workers in confronting unscrupulous employers and also with filing and processing wage claims with the Labor Commissioner. GWC understands that without class actions to protect against retaliation, workers would continue to face more unnecessary barriers to win back wages that they are rightly owed.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants, and refugees, and other underrepresented persons. The Lawyers' Committee is

affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., which was created at the behest of President John Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Throughout its history, the Lawyers' Committee has sought broad-based relief for many of its clients. Specifically, classwide relief is often the only way its clients can effectively obtain redress for their grievances. Any improper or unnecessary restrictions on class-based treatment as a form of relief under Rule 23 is therefore an issue of vital interest to the Lawyers' Committee.

The Legal Aid Society – Employment Law Center ("LAS-ELC"), founded in 1916, provides free legal services to those who cannot afford private counsel. Since the 1970s, the LAS-ELC has addressed employment problems of the indigent and working poor through a combination of impact litigation and direct services. Among the LAS-ELC's clients are workers who have been misclassified as exempt from overtime, misclassified as independent contractors, and denied the rest and meal breaks to which they are entitled.

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 Women's Employment Rights Clinic ("WERC") is a clinical program of Golden Gate University School of Law. WERC advises, counsels, and represents clients in a variety of employment-related matters, including individual and class wide claims for wage and hour violations. WERC has provided free legal services to many hundreds of workers in wage and hour cases in state court and federal court, and in administrative proceedings. The office regularly assists clients with claims involving unpaid overtime, denial of meal and rest periods, and off-the-clock work. Rule 23 class actions are an essential mechanism for carrying out the public policy that favors enforcement of workers' rights to fair pay.

Worksafe, Inc. ("Worksafe") is a California-based non-profit organization dedicated to promoting occupational safety and health. It is a Legal Support Center funded by the California State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to legal services projects that directly serve California's most vulnerable workers. Worksafe considers it vitally important that employees are provided overtime protections and meal and rest breaks, which are critical in reducing worker illness, injuries, and stress.

Young Workers United ("YWU"), formed in 2002, is a multi-racial and bilingual membership organization dedicated to improving the quality of jobs for young and immigrant workers. YWU raises standards in the low-wage service sector in San Francisco through worker and student organizing, grass-roots advocacy, leadership development, and public education. YWU helped to write and pass the first Paid Sick Leave Law in the U.S. and has organized workers to reclaim over $800,000 in back wages since its founding.

I. SUMMARY OF ARGUMENT

"'The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies.'" *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979) (Wisdom, J.) (quoting Herbert Newberg et al., 3 *Newberg on Class Actions* § 5570c, 479-80). This flexibility in managing class actions is of particular importance to low-wage workers. The principal purpose of this brief is to demonstrate why low-wage workers benefit when district courts are given discretion to certify, in appropriate cases, significant employment law issues for classwide determination under Rule 23(c)(4). *Amici* also write to demonstrate why workers should continue to be able to prosecute Rule 23 class actions for violations of state workplace laws together in the same federal case with an FLSA opt-in action.

Ignoring the plain language of Rule 23(c)(4), or reading a new provision into the FLSA forbidding "hybrid actions," would have catastrophic effects on the rights of employees to seek redress for the violation of statutory rights to minimum wage, overtime pay, and other workplace protections. Workers presently are squeezed between increasing noncompliance with federal and state employment laws, on the one hand, and a significant decline in government enforcement of those laws on the other. At the same time, workers are often 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.

Employees injured by the same conduct may benefit from class certification of significant or dispositive issues, even where common issues do not predominate in the case as a whole. Rule 23(c)(4) has been used for this purpose for decades and has been reaffirmed time and again by the Ninth Circuit. District courts in this Circuit have demonstrated the proper use of their discretion under Rule 23(c)(4), certifying only a handful of cases under the rule in the years since this Court last affirmed its utility.

Low-wage workers also benefit from the longstanding ability to combine Rule 23 opt-out class actions asserting violations of state law in the same case as opt-in collective actions asserting violations of the FLSA. This Court, as well as the D.C. and Seventh Circuits, has rejected the proposal that there is an inherent flaw with such "hybrid actions." The majority of district courts have agreed that an opt-out class action alleging state law claims can be superior under Rule 23(b)(3) to an opt-in FLSA action.

For these reasons, the Court should affirm the judgment of the district court and clarify the continuing vitality of issue certification under Rule 23(c)(4) and hybrid FLSA/state law class actions.

II. ARGUMENT

A. Low-Wage Workers Rely on Rule 23 Class Actions for the Protections of State Wage and Hour Laws.

1. Widespread Noncompliance with Federal and State Workplace Laws Calls for Flexible Class Actions.

Violations of both state and federal workplace 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 farms, nursing homes, restaurants, and day care facilities in Arizona, California, Nevada, Washington, and other western states. The DOL found that 45% of nursing home and residential care facilities in San Francisco and Sacramento were violating applicable laws in 2000. 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 Apr. 15, 2011). In addition, 47% of such facilities in Seattle were not in compliance with wage and hour laws. *Id.* In the same study, the DOL found that 54% of garment manufacturers in Los Angeles were not in compliance with minimum wage laws in 2000. *Id.* at 13. Similarly, 33% of restaurants in Phoenix, 38% of hotels in Reno,

and 62% of garlic farms (primarily in California) were not in compliance with wage and hour laws in 2000. *Id.* at 7-9.

The problem of unscrupulous employers taking advantage of their employees is not limited to our western states. The Employer Policy Foundation, a business-funded think tank, has estimated that nationwide, employers unlawfully fail to pay $19 billion annually in wages owed to employees. Craig Becker, *A Good Job for Everyone: Fair Labor Standards Act Must Protect Employees in Nation's Growing Service Economy*, Legal Times, Vol. 27, No. 36 (Sept. 6, 2004), *available at* http://www.aflcio.org/issues/jobseconomy/over timepay/upload/ FLSA.pdf (last visited Apr. 28, 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 8, 2007), *available at* http://www.gao.gov/new.items/d07859t.pdf (last visited Apr. 28, 2011) (emphasis added).

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/brokenlaws (last visited Apr. 28, 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. *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% 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 preserve district court discretion to certify particular questions in appropriate cases and 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 Enforcement of State and Federal Workplace Laws.

Despite the widespread violations described above, government agencies are unable to enforce our nation's workplace 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 We Can Do About It* 121 (2009) (attached hereto as Exhibit 1). By 2007, when 130 million American workers were protected by the FLSA, the Division employed only 750 investigators and conducted only 24,950 investigations.[1] *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/glovesoffeconomy.pdf (last visited Apr. 28, 2011). In addition to a decline in investigations, the total number of enforcement actions pursued by the

[1] It should be noted that in recent years the DOL had begun hiring additional wage-and-hour investigators. DOL News Release (Nov. 11, 2009), *available at* http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last visited Apr. 28, 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.

Wage and Hour Division declined from 47,000 in 1997 to fewer than 30,000 in 2007. U.S. GAO, *Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance*, GAO-08-962T, at 5-6 (July 15, 2008), *available at* http://www.gao.gov/new.items/d08962t.pdf (last visited Apr. 28, 2011).

This reduction in public enforcement of the wage and hour laws has led employees to rely almost entirely on private enforcement actions. In 2010, 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 Apr. 28, 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 may prevent employees from seeking redress. These include lack of knowledge of the laws or legal system,[2] fear

[2] *See, e.g., Gentry v. Superior Court*, 42 Cal. 4th 443, 461 (Cal. 2007); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006); *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).

of retaliation,[3] small claims relative to the costs and risks of litigation,[4] and employment in transient work.[5]

The primary obstacle for such employees may be fear of retaliation. As this Court has noted, "fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights." *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004). The Supreme Court and other federal courts have repeatedly recognized this reality: "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted,

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[3] *See, e.g., Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960); *Smellie v. Mount Sinai Hosp.*, No. 03CIV.0805, 2004 WL 2725124, at *4 (S.D.N.Y. Nov. 29, 2004) (Employees may be "reluctant to serve as named plaintiffs in an action against their employer for fear of reprisals.").

[4] *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812-13 (1985); *Perez v. Safety-Kleen Sys, Inc.*, 253 F.R.D. 508, 520 (N.D. Cal. 2008) (class actions are superior in the wage and hour context because, in part, "the cost of individual litigation would be prohibitive for most, if not all, class members"); *Chase v. AIMCO Props., L.P.*, 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("[I]ndividual wage and hour claims might be too small in dollar terms to support a litigation effort."); *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 605 (E.D. Cal. 2008) (same).

[5] The Third Circuit, for example, has acknowledged the difficulty of locating low-wage poultry plant workers to notify them of their FLSA opt-in rights. *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312-13 (3d Cir. 2003); *see also 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."); Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class*, 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).

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 Mitchell*, 361 U.S. at 292 ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *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").

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.*[6]

[6] Undocumented workers must overcome greater fears of retaliation. *Rivera*, 364 F.3d at 1064. Some *amici* have represented clients who were placed in deportation hearings while their wage claims were pending because their employers reported them to federal authorities. *See Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 901-02 (M.D. Tenn. 2009).

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. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). For example, in 2007, the average back wage collected by the DOL was $645 per employee. *See* DOL, 2007 Statistics Fact Sheet, *available at* http://www.dol.gov/whd/statistics/200712.htm (last visited Apr. 28, 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.

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, at *2 (E.D.N.Y. Jan. 13, 2006); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004). One study has reported average opt-in rates of around 15%.[7] Low opt-in rates for FLSA

[7] *See* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 291-

actions, combined with the lack of public enforcement of wage-and-hour laws, point to Rule 23 class actions as essential to protecting low-wage workers and enforcing workplace laws. "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 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.").

(continued …)
94 & n.125 (2008) (reviewing a sample of FLSA cases and finding an average opt-in rate of 15.7%).

B. District Court Discretion Under Rule 23(c)(4) to Certify Significant Common Issues in Appropriate Cases Is Necessary to Protect the Rights of Low-Wage Workers.

Instead of requiring a district court to make an all-or-nothing decision to certify an entire case as a class action, Rule 23(c)(4) permits an action, "[w]hen appropriate," to be "brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). This rule, formerly known as Rule 23(c)(4)(A), is "designed to give the court additional flexibility in handling class actions . . . ." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1790 (3d ed. 2005). The theory underlying the rule "is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member." *Id.*

The flexibility provided by Rule 23(c)(4) plays an important role in preserving judicial resources and promoting compliance with workplace laws meant to protect the public. In class cases where there are significant or potentially dispositive common issues, but where these issues do not predominate over individual issues in the case as a whole, district courts have discretion to certify only those common issues. For example, cases challenging an employer's practice of requiring employees to work off the clock without pay are often difficult to certify as class actions under Rule 23(b)(3) because of individual factual issues

about the practices at each store or restaurant. But if such cases raised substantial common issues, there would be a serious benefit to the class to have those common issues addressed on a classwide basis. Subsequent actions brought by employees would be streamlined and less costly, making it easier for employees to find competent counsel. Without the option of certification under Rule 23(c)(4), it is likely that only very few individual cases would be filed, leaving the employer free to continue violating the law.

It is disingenuous to argue, as the Chamber of Commerce does in its *amicus* brief, that the rights of individual class members are not protected when courts decide to certify issues under Rule 23(c)(4), or that the other requirements of Rule 23 class actions are ignored. Chamber of Commerce Brief at 9, 14-15. This Court should clarify that courts certifying issues under Rule 23(c)(4) should also find, as did the district court below, that the other requirements of Rule 23 are satisfied. Similar to the certification order on appeal here, other district courts granting certification of issues under Rule 23(c)(4) already ensure that the other requirements of Rule 23 are met. For example, in a case alleging unfair debt collection practices, a district court certified four questions for classwide determination and left two questions for consideration in individual trials. *Campion v. Credit Bureau Servs., Inc.*, 206 F.R.D. 663, 676-77 (E.D. Wash. 2001). The court specifically held that the plaintiff had satisfied the typicality,

commonality, numerosity, and adequacy requirements of Rule 23(a), as well as the requirements of Rule 23(b)(3). *Id.* at 673-77; *see also Siemer v. Assocs. First Capital Corp.*, No. CV 97-281TUCJMRJCC, 2001 WL 35948712, at *14-26 (D. Ariz. Mar. 30, 2001) (certifying four out of six causes of action under Rule 23(c)(4) and conducting an in-depth analysis of the requirements of Rule 23(a) & (b)(3)).

Moreover, district courts should determine whether the plaintiffs meet the predominance requirement of Rule 23(b)(3) in light of the certified issues, rather than the case as a whole. As the Fourth Circuit has explained, "subsection 23(c)(4) should be used to separate . . . claims that are appropriate for class treatment, provided that within [those] claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229, 1234 (9th Cir. 1996) (district court certifying issues under Rule 23(c)(4) should have examined in more detail the predominance requirement with respect to the particular issues certified); *Simon v. Phillip Morris Inc.*, 200 F.R.D. 21, 29-30 (E.D.N.Y. 2001). In other words, courts applying Rule 23(c)(4) should engage in an "issue specific predominance analysis." *Gunnells*, 348 F.3d at 441; *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) ("[A] court

must first identify the issues potentially appropriate for certification 'and . . . then' apply the other provisions of the rule, i.e. subsection (b)(3) and its predominance analysis.").

1. This Court Has Repeatedly Endorsed the Use of Rule 23(c)(4) in the Manner Employed by the District Court.

Although the brief filed by the Chamber of Commerce suggests that Rule 23(c)(4) was created for an entirely different purpose and has been used only rarely before the district court's decision below, Chamber of Commerce Brief at 6-7, federal courts have employed Rule 23(c)(4) for decades to resolve important common questions and reduce redundancy in individual trials against the same defendant, particularly in mass tort cases. By the 1980s, the Third, Fourth, Fifth, Sixth, and Ninth Circuits had endorsed the use of Rule 23(c)(4) to certify class actions around common issues. Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 272-78 (2002). This Court, for example, has explained that "it is within the discretion of the trial judge, under Rule 23(c)(4), to limit the issues in a class action to those parts of a lawsuit which lend themselves to convenient use of the class action motif." *Soc. for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975) (per curiam opinion joined by Kennedy, J.) (internal citations omitted); *see also Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 690 (9th Cir. 1977) (upholding class certification under Rule

23(c)(4) where the district court had "certified certain issues for class adjudication but excluded others from the initial class trial").

Other circuits agreed. The Third Circuit, for example, noted that a class action "need not resolve all issues in the litigation. *See* Fed. R. Civ. P. 23(c)(4)(A). If economies can be achieved by use of the class device, then its application must be given serious and sympathetic consideration." *In re School Asbestos Litig.*, 789 F.2d 996, 1008-09 (3d Cir. 1986); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453, 456 (3d Cir. 1977), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989), *rev'd on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (upholding certification of an issue class and noting that "in order to . . . reduce the range of disputed issues, courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case"); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1018, 1022-23 (5th Cir. 1992); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988).

In the mid-1990s, the Fifth and Seventh Circuits disapproved of issue certification under Rule 23(c)(4) because of Seventh Amendment concerns. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). These cases, however,

"deviated from the norm" of other circuit decisions approving the certification of common issues for classwide determination, and their Seventh Amendment concerns "stemmed from severing negligence and comparative negligence." *Simon*, 200 F.R.D. at 47 (E.D.N.Y. 2001). Shortly after these decisions were published, this Court reaffirmed its endorsement of issue certification in *Valentino*, 97 F.3d at 1234. *See also Sepulveda v. Wal-Mart Stores Inc.*, 275 Fed. App'x. 672 (9th Cir. 2008) (unpublished decision) (remanding to the district court to reconsider, in part, using Rule 23(c)(4) to certify specific issues).

At least four other circuit courts have similarly endorsed the continuing vitality of certifying particular issues for class treatment, rejecting the reasoning of the Fifth and Seventh Circuits. *See, e.g.*, *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226-27 (2d Cir. 2006) (noting that "the Fifth Circuit's view renders subsection (c)(4) virtually null"); *Chiang v. Veneman*, 385 F.3d 256, 267 (3d Cir. 2004); *Gunnells*, 348 F.3d at 439 (4th Cir. 2003); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003); *see also Shea v. Chi. Pneumatic Tool Co.*, 990 P.2d 912, 916-17 (Or. Ct. App. 1999) (rejecting *Castano* view of Rule 23(c)(4) and endorsing certification of issue classes under an Oregon rule modeled on Rule 23(c)(4)); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1026 (11th Cir. 1996) (Barkett, J., concurring in part and dissenting in part); Wright and Miller, *Federal*

Practice and Procedure, § 1790 (Fifth and Seventh Circuit decisions "suggest caution in utilizing Rule 23(c)(4), not that it never is appropriate").

2. In the Fifteen Years Since *Valentino*, There Has Been No "Flood" of Class Actions Seeking Certification Under Rule 23(c)(4).

The *amicus* brief filed by the Chamber of Commerce warns that any decision by this Court reaffirming district court discretion to certify issues under Rule 23(c)(4) will open the floodgates to unchecked abuses of the class action procedure. The validity of this claim can be tested by looking at class certification decisions since this Court's endorsement of Rule 23(c)(4) in *Valentino*, 97 F.3d at 1234. That case did not "invite a significant upswing in the opportunistic filing of abusive class actions." Chamber of Commerce Brief at 11. On the contrary, since the *Valentino* decision in 1996, *amici* are able to locate only five (5) federal district court decisions in the Ninth Circuit relying on Rule 23(c)(4) to certify particular issues for classwide determination.[8] Furthermore, since the *Valentino* decision, district courts have not shied from denying motions for class certification under

[8] *See Ruiz v. Affinity Logistics Corp.*, NO 05CV2125 JLS (CAB), 2009 WL 648973, at *3, 10 (S.D. Cal. Jan. 29, 2009); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Norton*, No. CV-02-009-E-BLW, 2005 WL 2387595, at *5 (D. Idaho Sept. 28, 2005); *Amone v. Aveiro*, 226 F.R.D. 677, 687 & n.8 (D. Haw. 2005); *Campion v. Credit Bureau Servs., Inc.*, 206 F.R.D. 663, 676-77 (E.D. Wash. 2001); *Siemer v. Assocs. First Capital Corp.*, No. CV 97-281TUCJMRJCC, 2001 WL 35948712, at *26-27 (D. Ariz. Mar. 30, 2001); *see also Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 657-58 (C.D. Cal. 2000) (citing Rule 23(c)(4) to decertify the class for purposes of causation and damages, but not liability). We recognize the possibility that a few other cases may exist that eluded our search.

Rule 23(c)(4),[9] thus refuting the contention that district court discretion to certify issues under the rule will lead to easy and automatic certification. This Court should avoid any confusion by reaffirming the availability of Rule 23(c)(4).

C. Federal Law Authorizes "Hybrid Actions."

The court below, like many other federal courts, certified an opt-out class alleging a state law claim under Rule 23 and also conditionally certified an opt-in collective action alleging violations of the FLSA. This Court, along with two other circuit courts, have held that there is nothing "inherently incompatible" about such "hybrid actions." This Court recently affirmed a district court's exercise of supplemental jurisdiction over an Unfair Competition Law claim predicated on violations of the FLSA – the same state law claim at issue here – where the court's original jurisdiction derived from the FLSA. *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761-62 (9th Cir. 2010). In so doing, the Ninth Circuit joined the D.C. and Seventh Circuits, which agree there is nothing inherently wrong with alleging violations of federal and state laws in the same case and proceeding under opt-in procedures for the former and opt-out procedures for the latter. *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 973-74 (7th Cir. 2011) (in the context of class

[9] *See, e.g., Helm v. Alderwoods Group, Inc.*, No. C 08-01184 SI, 2009 WL 5206207, at *13 (N.D. Cal. Dec. 29, 2009); *In re Paxil Litigation*, 218 F.R.D. 242, 248-50 (C.D. Cal. 2003); *Rodriguez v. Gates*, No. CV99-13190GAF, 2002 WL 1162675, at *10 (C.D. Cal. May 30, 2002).

certification under Rule 23(b)(3)); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424-25 (D.C. Cir. 2006) (in the context of supplemental jurisdiction). The majority of district courts agree, 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.[10]

1. The District Court Properly Found the Rule 23(b)(3) Superiority Requirement Satisfied.

Just as this Court held there is no bar to exercising federal jurisdiction over state law opt-out claims in the same action as FLSA opt-in claims, *Wang*, 623 F.3d

[10] *See 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 Cortez v. Nebraska Beef, LTD.*, Case No. 8:08-cv-00090-JFB-TDT, Slip Op. at 8-13 (D. Neb. Jan. 4, 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. 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 v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 886-89 (N.D. Iowa 2008); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007); *Nerland v. Caribou Coffee Co., 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 DSF(CTx), 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 v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 311-12 (D. Mass. 2004); *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).

at 761, this Court should take the next logical step by confirming there is no categorical bar to granting class certification of those state law wage claims. District courts are free to find that an opt-out class action is superior under Rule 23(b)(3) for state law claims because "[t]here is ample evidence that a combined action is consistent with the regime Congress has established in the FLSA." *Ervin*, 632 F.3d at 977. As the Seventh Circuit has found, the FLSA contains a savings clause that "has the effect of preserving state and local regulations." *Id.*; *see also Wang*, 623 F.3d at 759-60 (noting that the "FLSA sets a floor rather than a ceiling on protective legislation").[11]

The Seventh Circuit further found that certifying both a Rule 23(b)(3) opt-out action and an opt-in collective action will not lead to undue confusion for class members, and that notice can be crafted to avoid confusion. *Ervin*, 632 F.3d at 978. Accordingly, the Seventh Circuit held that "there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also

[11] If asserted on behalf of a putative class in federal court, claims based on such state laws are necessarily brought under the opt-out class action procedures of Rule 23. *See Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) ("[L]ike the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies 'in all civil actions and proceedings in the United States district courts.'") (quoting Fed. R. Civ. P. 1).

includes a collective action brought under the FLSA." *Id.* at 973-74. This Court should follow suit.[12]

2. Congress Has Never Suggested That FLSA Opt-In Procedures Are Superior to Rule 23 Opt-Out Procedures or Required for State Law Claims.

Contrary to the suggestion by Appellants and their *amici*, there is nothing in the history of the FLSA demonstrating that Congress enacted the opt-in provision because it was concerned about Rule 23 opt-out class actions as they exist today. Indeed, Appellants' argument that Congress "expressly rejected Rule 23's 'opt-out' scheme for FLSA actions" is demonstrably wrong. Appellants' Opening Brief at 48. This is because Rule 23 opt-out class actions as we know them today did not exist in 1947 when Congress enacted the opt-in provision of the FLSA.

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

[12] This Court has implicitly agreed that a Rule 23 opt-out action could be superior for state law claims when brought alongside an FLSA collective action. In *Wang*, the Court held that the district court properly exercised supplemental jurisdiction over a state law claim – predicated entirely on the FLSA – which had already been certified as a Rule 23 class action. *Wang*, 623 F.3d at 755, 761.

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 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 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. 1945) (treating FLSA action as an opt-in action and discussing similar treatment by other courts); *Brooks v. S. Dairies, Inc.*, 38 F. Supp. 588, 588-89 (S.D. Fla. 1941); *see also* 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 . . . .") (emphasis in original); 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*, 130 S. Ct. at 1438. Permitting an individual who did not opt in to the FLSA collective 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 Prohibiting Rule 23 Certification of State Law Claims in "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 the certification of state law claims in an FLSA action would lead to absurd results. The Class Action Fairness Act of 2005 ("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. 28 U.S.C. § 1332(d). If Rule 23 certification of state law claims were barred in FLSA actions, employees could simply file class action lawsuits in state court alleging only state law claims. In light of CAFA, which contains no special exceptions for class actions alleging violations of state wage-and-hour laws, some of those cases would be removed to federal court. Alternatively, in cases that do not meet the requirements of CAFA, employees could seek certification of opt-out class actions under state law. Either situation brings about attendant redundancies and risks of inconsistent adjudications, not to mention the potential confusion of "uncoordinated notices from separate courts." *Ervin*, 632 F.3d at 978. By allowing district courts to certify state law class actions alongside FLSA collective actions, this Court will advance the interests of judicial economy and efficiency by preventing duplicative, concurrent litigation regarding the same underlying conduct in multiple courts.

4. "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. First, as discussed above, employees may 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. Some *amici* have worked with clients who, because of fears of retaliation, have declined to pursue wage claims or made clear they would not proceed with individual claims if class certification is denied. Thus, *amici* suggest that opt-out class actions for state law claims are actually "inherently superior" for workers fearful of losing their jobs or hurting their job prospects.

Second, employees may wish to seek the protection of more generous state wage and hour laws. *See generally* ABA Section of Labor and Employment Law, *Wage and Hour Laws, A State-by-State Survey* (Gregory K. McGillivary ed., 2004 & Supp. 2009). By the same token, the FLSA may offer advantages to workers that state laws do not offer, 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 id.* For these reasons, "hybrid actions" are

the optimal means by which employees can seek redress for violations of federal and state wage and hour laws.

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. This Court should reaffirm that "hybrid actions" are permissible and clarify that such actions are more efficient than litigating in two separate forums.

III. CONCLUSION

For all of the foregoing reasons, the Court should affirm the district court's class certification order in its entirety.

Dated: April 29, 2011

Respectfully submitted,

GOLDSTEIN, DEMCHAK, BALLER,
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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE AND NINTH CIRCUIT RULES

Pursuant to Ninth Circuit 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 Ninth Circuit Rule 32.1, I certify that **BRIEF OF THE ASIAN LAW CAUCUS, CENTRO LEGAL DE LA RAZA, GARMENT WORKER CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAW PROJECT, WOMEN'S EMPLOYMENT RIGHTS CLINIC, WORKSAFE, INC., AND YOUNG WORKERS UNITED AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE** is proportionately spaced, has a typeface of 14 points, contains 6836 words. Pursuant to Ninth Circuit 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: April 29, 2011

/s/
David Borgen

CERTIFICATE OF SERVICE

I hereby certify that, on April 29, 2011, a copy of foregoing **BRIEF OF THE ASIAN LAW CAUCUS, CENTRO LEGAL DE LA RAZA, GARMENT WORKER CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAW PROJECT, WOMEN'S EMPLOYMENT RIGHTS CLINIC, WORKSAFE, INC., AND YOUNG WORKERS UNITED AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE**, was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth 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.

Dated: April 29, 2011

By: /s/

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EXHIBIT 1

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

WAGE THEFT IN AMERICA

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

KIM BOBO

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

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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*