No. 18-16581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, et al.,
Plaintiffs-Appellees,

v.

AUSTIN ELECTRICAL SERVICES LLC, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
THE HONORABLE ROSLYN O. SILVER, SENIOR DISTRICT JUDGE
CASE NO. 16-CV-02737-ROS

AMICI CURIAE BRIEF OF IMPACT FUND, ASIAN AMERICANS ADVANCING JUSTICE - ASIAN LAW CAUCUS, BET TZEDEK, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., CENTRO LEGAL DE LA RAZA, EQUAL RIGHTS ADVOCATES, KOREATOWN IMMIGRANT WORKERS ALLIANCE, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, PUBLIC JUSTICE, AND WORKSAFE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the following Amici represent that they are non-profit corporations with no parent corporations or stock owned by any publicly-held corporation:

- Asian Americans Advancing Justice - Asian Law Caucus
- Bet Tzedek
- California Rural Legal Assistance Foundation
- Centro de los Derechos del Migrante, Inc.
- Centro Legal de la Raza
- Equal Rights Advocates
- Koreatown Immigrant Workers Alliance
- Impact Fund
- Legal Aid at Work
- National Employment Law Project
- National Employment Lawyers Association
- Public Justice
- Worksafe

October 23, 2018

Respectfully submitted,

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INTEREST OF AMICI[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Impact Fund and twelve fellow non-profit legal organizations respectfully submit this brief in support of Plaintiffs-Appellees R. Alexander Acosta, the Secretary of Labor, and the U.S. Department of Labor.

Amici organizations are each dedicated to enforcing civil rights and workplace equality and protecting the rights of employees in the workplace. They share an interest in ensuring employees can exercise their legal rights without employer interference. A brief description of each amicus organization and its interest is set forth in the attached Motion for Leave to File Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The federal Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA" or "Act") provides broad and essential wage-and-hour protections to covered employees. The United States Supreme Court has repeatedly recognized the fundamental and non-waivable nature of the rights provided in the Act and has empowered courts to invalidate employers' attempts to circumvent the Act's requirements. And yet, as this case demonstrates, employers regularly engage in

[1] This brief was not authored, in whole or in part, by either party's counsel. No party or party's counsel contributed money to fund its preparation or submission. No person other than Amici and their counsel contributed money for its preparation or submission.

misleading and coercive conduct aimed at undercutting employees' statutory wage-and-hour rights.

District courts throughout this Circuit recognize the power imbalance that exists between employers and employees. When the employment relationship intersects with litigation challenging the employer's wage practices, that power imbalance creates the potential for coercion and abuse. Accordingly, district courts regularly police misleading communications between employers and employees. In the same vein, courts often disregard or invalidate declarations, releases, and opt-outs that are obtained through misleading or coercive employer conduct.

District courts' power to act in these circumstances is well established and firmly rooted in both the Act and courts' inherent ability to manage litigation. Amici respectfully request that this Court uphold the district court's injunction and recognize district courts' broad discretion to safeguard the substance of the Act and ensure that employers do not cross the line into coercive behavior undermining the Act's important remedial goals.

ARGUMENT

I. COURTS HAVE BROAD DISCRETION TO ADDRESS EMPLOYER EFFORTS TO UNDERMINE THE WORKPLACE RIGHTS ESTABLISHED BY THE FAIR LABOR STANDARDS ACT BECAUSE OF UNEQUAL BARGAINING POWER AND FEAR OF RETALIATION.

Congress enacted the FLSA in 1938 "to protect … workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Over the subsequent 80 years, the Supreme Court has forcefully and repeatedly rejected attempts by employers to undermine the substance of the Act. The Court has simultaneously endowed federal courts with broad discretion to manage wage-and-hour litigation in order to safeguard Congress's remedial design. Moreover, as Appellee (Acosta, for the U.S. Department of Labor (DOL)), argues in its opposition, "[t]here is a strong public interest in permitting the Secretary to enforce the FLSA." *See* Appellee's Opposition Brief at 30 (Dkt. No. 28, at p. 36 of 44). Where, as here, "Defendants' actions interfered with that right," district courts have broad authority to intervene. *Id.*

Decades ago, the Supreme Court recognized Congress's intent "to protect certain groups of the population from substandard wages and excessive hours" and the danger posed by allowing employers to procure agreements waiving employees' statutory rights. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706

(1945). In *Brooklyn Savings Bank*, the Court invalidated private agreements purporting to waive the right to recover liquidated damages due under the Act. *Id.* at 700-02. It held, "the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damage is called for." *Id.* at 708. The Court observed that allowing employers to procure a release of liquidated damages would "tend to nullify the deterrent effect which Congress plainly intended." *Id.* at 709. Such agreement, the Court recognized, would allow an unscrupulous employer "to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor." *Id.* at 710.

The Court reaffirmed these principles a year later in *D.A. Schulte, Inc. v. Gangi*, again invalidating a private agreement procured by an employer that sought to "thwart[] the public policy of minimum wages, promptly paid, embodied in the Wage-Hour Act, by reducing the sum selected by Congress as proper compensation for withholding wages." *See D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946).

Courts' ability to intervene and address the conduct of counsel and parties is critical in actions arising in the workplace, where "fear of economic retaliation

might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 296 (1960); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 12 (2011) (quoting *Mitchell*, 361 U.S. at 292). That fear persists today, "given the fact that case law is replete with examples of FLSA retaliation cases." *Rutti v. Lojack Corp.*, No. SACV-06-350-DOC (JCx), 2012 WL 3151077, at *6 (C.D. Cal. July 31, 2012) (collecting cases); *see also* Frances J. Milliken, Elizabeth W. Morrison & Patricia F. Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, 40 J. of Mgmt. Studies 1453, 1464 (2003) ("Fear of retaliation or punishment was raised by 22.5% of our respondents. These individuals worried that if they spoke up they might lose either their job or promotion opportunities.").[2] Appellee's brief discusses at length the retaliation in the instant case, which Amici's clients commonly experience in such wage-and-hour matters.

The Supreme Court has also emphasized the broad discretion enjoyed by district courts to manage the conduct of the parties in class and collective actions. "[C]ourts traditionally have exercised considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"

[2] Available online at http://psycnet.apa.org/record/2003-07518-005. Last viewed Oct. 17, 2018.

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 172-73 (1989) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). This supervisory function extends to "measures to regulate the actions of the parties." *Hoffmann-LaRoche*, 493 U.S. at 172. The Court observed that class and collective actions "serve important goals but also present opportunities for abuse." *Id.* at 171. "Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over [such actions] and to enter appropriate orders governing the conduct of counsel and the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

Whether plaintiffs act collectively, individually, or through the Secretary of Labor, they are entitled to enforce their workplace rights without employer interference.

II. MISLEADING AND COERCIVE TACTICS BY EMPLOYERS ARE PERSISTENT AND PERVASIVE, UNDERMINING THE VINDICATION OF IMPORTANT WORKPLACE RIGHTS.

Misleading and coercive tactics by employers are a consistent and pervasive problem in wage-and-hour litigation, whether in enforcement actions brought by the DOL, as in the present appeal, or class or collective actions brought by workers. This conduct, when not policed and remedied by courts, undermines important workplace rights.

A. Misleading and Coercive Communications from Employers Chill Employee Participation in Ongoing Litigation and Deprive Employees of Their Legal Rights.

Employer communications carry significant weight during litigation of workplace issues. While such communication cannot—and should not—cease entirely, employer communications containing threats, affirmative misrepresentations, or misleading omissions undermine fundamental workplace rights. Such communications may discourage employees from participating in meritorious cases, cause workers to release claims without appropriate remedies, or coerce employees into providing sworn statements that invalidate their claims, as occurred here. These are not abstract concerns, but rather consistent patterns of misconduct observed throughout this Circuit and nationwide.

1. *Threats and Affirmative Misrepresentations*

As demonstrated in cases throughout this Circuit, employers engage in a variety of threats and misrepresentations to depress employee participation in wage-and-hour class and collective actions.

Employers have threatened employees by telling them that pending litigation will cause operations to cease, costing employees their jobs. *See, e.g.*, *Johnson v. Serenity Transp., Inc.*, No. 15-cv-02004-JSC, 2017 WL 4236798, at *5 (N.D. Cal. Sept. 25, 2017) (granting corrective action motion in part because the employer represented that "the drivers would get nothing because [the employer] would put

the company into bankruptcy."); *Camp v. Alexander*, 300 F.R.D. 617, 623-24 (N.D. Cal. 2014) ("The Employee Letter … is problematic … [as it] contains multiple predictions that the lawsuit, if successful, will cause the practice to close, with the obvious consequence that employees would lose their jobs."); *Wright v. Adventures Rolling Cross Country*, No.12-cv-0982-EMC, 2012 WL 2239797 (N.D. Cal. June 15, 2012), at *2 (employer's email stated, "[i]f successful, this could drive [the employer] and other similar organizations out of business."). *Cf. In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492, 500 (S.D. Cal. 2008) (requiring that references in a letter to the potential opt-in threatening that a FLSA case outcome could "bankrupt the company should be deleted." "[T]he specter of bankruptcy, particularly when raised by the founder and CEO of what is a relatively small company, presents a potential chilling effect on [class members]").[3]

Employers also have misrepresented the burdens and risks of participating in class and collective actions brought under the Act. For example, just a few months

[3] *See also, e.g., Belt v. Emcare Inc.*, 299 F. Supp. 2d 664, 668-69 (E.D. Tex. 2003) (holding that an employer letter to putative class members was coercive because it suggested that the case could affect their employment and it undermined the purpose of collective action by encouraging employees not to join; a brief assurance that the law prohibits retaliation against those who join the suit was not enough to cure the coercive effect); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994) (defendants' three letters to putative class members asking them not to join the lawsuit were an improper attempt to "reduce the class members' participation in the lawsuit based on threats to their pocketbooks").

after the filing of *Wright v. Adventures Rolling Cross Country, Inc.*, the employer sent a letter to plaintiffs that included the following groundless statements:

- "All your past transgressions will become very public. In a case like this, your life will become a very public sideshow for current and future employers, friends[,] and family to access online."

- "Don't plan any significant travel for the foreseeable future: Litigation in a case like this can put your life into a holding pattern for years."

- "This is going to cost you a great deal of money, likely much more than you will receive from the lawsuit against ARCC: I'm not sure if your lawyers have told you this, but because they initiated these proceedings, we are compelled at this time to file a countersuit against you . . . for breach of contract."

2012 WL 2239797, at *2.

Employers also attack plaintiffs' counsel, mischaracterizing them in a host of negative ways. *See, e.g., Wright*, 2012 WL 2239797, at *5 (baselessly charging plaintiffs' counsel with being solely interested in a payoff and acting unethically to discourage wage claims); *Stransky v. HealthONE of Denver*, 929 F. Supp. 2d 1100, 1108 (D. Colo. 2013) (told "if [a putative opt-in] joined the lawsuit, and…won, by some chance, [he/she] would have to pay [plaintiffs' attorneys] all the winnings").

These examples are but a few common ways employers seek to deter workers from exercising their statutory wage rights through threats and affirmative misrepresentations.

2. *Omission of Material Information*

Employers typically benefit from greater access to information than employees about pending class and collective actions. Some employers use this information asymmetry to obtain releases from employees in an effort to avoid liability. For example, in *Marino v. CACafe, Inc.*, the employer offered employees $500 each in exchange for a general release of all claims without informing employees that a lawsuit was pending that concerned their legal rights. No. 16-cv-6291-YGR, 2017 WL 1540717, at *2 (N.D. Cal. Apr. 28, 2017). The court ordered corrective notice to issue and invalidated releases obtained by "deceptive omissions of material information." *Id.*

CACafe is not an outlier in the context of class and collective actions. In *Santa Clara v. Astra USA, Inc.*, a non-employment case, the defendant's letter to class members provided incomplete information about the pending action, along with payments calculated by defendant intended to resolve outstanding claims. No. 05-cv-03740-WHA, 2010 WL 2724512 (N.D. Cal. July 8, 2010) (hereinafter, *Astra*). While it acknowledged the existence of the action and provided the case name and number, the defendant omitted material information, including "a copy of the complaint, contact information for plaintiffs' counsel, or information about the current status of the case;" "an explanation of the claims of the plaintiffs;" "and, that the calculations for payments were different from those by a third-party

administrator." *Astra,* 2010 WL 2724512, at **4-6. Based on these discrepancies and others, the court concluded that the defendant "significantly misled the putative plaintiff class about the strength and extent of the plaintiffs' claims, and they were unable to make an informed choice about whether to accept the settlement payment." *Id.* at *5. The court granted plaintiffs' motion for corrective action. *Id*. at *6.

Employees must be given a fair opportunity to evaluate pending litigation before resolving or releasing their claims. Misleading or deceptive employer communications undermine employees' enforcement of statutory wage rights and have been prohibited by courts in appropriate exercises of discretion.

B. Employer Misuse of Employee Interviews and Declaration Gathering Chills Employee Participation in Ongoing Litigation and Deprives Employees of Their Legal Rights.

Beyond misleading communications, employers engage in other improper interactions with employees to encourage waiver of employees' statutory wage rights, including declaration- and release-gathering campaigns of the sort at issue in this appeal. The improprieties described in the district court's order and the Secretary of Labor's Answering Brief are common tactics employers deploy to coerce and deceive employees into providing adverse information that undermines their legal claims.

A district court in the Northern District of California recently struck employee declarations submitted by a defendant employer, barred the use of tainted deposition testimony, and ordered several additional corrective actions after it identified significant issues in the employer's declaration-gathering process. *See Richardson v. Interstate Hotels & Resorts, Inc*., No. 16-cv-06772-WHA, 2018 WL 1258192, at *7 (N.D. Cal. Mar. 12, 2018). The employer submitted form declarations from fourteen hotel employees in opposition to class certification. The declarations were prepared by defendant's attorneys and illustrated only facts favoring the employer "while omitting points favoring the putative classes." *Id*. After an evidentiary hearing, it became clear that "at least some of the employees required interpreters, did not fully understand the disclosures, did not fully understand what a putative class action was or how it might affect them (*e.g.*, that they might recover money if they became part of a prevailing class), did not fully understand how their interviews might ultimately affect this litigation, and did not feel free to decline the interviews or to speak with plaintiff's counsel instead." *Id*. The employer's counsel also represented the fourteen declarants at their depositions without obtaining a conflict waiver – a clear violation of the California Rules of Professional Conduct. *Id*.

In *Acosta v. Sw. Fuel Mgmt., Inc.*, an employer under investigation by the DOL for unpaid wages instructed its employees "to attend meetings with defense

counsel on worktime." *Acosta v. Sw. Fuel Mgmt., Inc.*, No. 16-cv-4547-FMO, 2018 WL 2207997, at *2 (C.D. Cal. Feb. 20, 2018). The employer did not tell employees the meetings were voluntary and some employees were driven to the meetings by managers or other company representatives. *Id.* During these meetings, the employer instructed employees "to 'sign papers' or provide a declaration" under "penalty of perjury." *Id.* The employer did not inform the employees that they "might be giving up [back] wages" by signing the declarations. *Id.* Nor did the employer inform the employees of other rights related to the litigation. *Id.* As in this case, the interviews occurred without notification to the DOL. The court issued a preliminary injunction restricting the employer's communications with employees. *Id.*

Employers regularly use such misleading declaration-gathering campaigns to attempt to manufacture favorable testimony from captive employees. *See, e.g.*, *Quezada v. Schneider Logistics Transloading & Distrib.*, No. 12-cv-2188-CAS, 2013 WL 1296761, at *6 (C.D. Cal. 2013) (finding employee interviews were "impermissibly coercive" when employees were ordered to attend the meetings by company managers over a loudspeaker); *Perez v. Blue Mountain Farms*, 961 F. Supp. 2d 1164, 1171 (E.D. Wash. 2013) ("the interviews that have occurred may have been tainted by the presence of supervisors and video cameras"); *Avilez v. Pinkerton Gov't Servs.*, 286 F.R.D. 450, 458 (C.D. Cal. 2012) ("An employee has

every incentive to answer 'yes' when her employer's attorney asks if she likes her employer's current practice, as … a negative answer may endanger her job, earning her at best the reputation of having a 'bad attitude' … and at worst a retaliatory termination. The incentives to answer untruthfully are even more skewed where, as here, the employer's question concerns a practice *currently being litigated in a putative class action as an illegal practice*.") (emphasis in original); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. 05-cv-1175-MHP, 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005) (finding it reasonable to assume an employee contacted by employer for interview and declaration would feel a strong obligation to cooperate with his/her employer in defending a lawsuit). [4]

[4] Myriad examples from beyond this Circuit further illustrate this problem. *See Tinsley v. Covenant Care Servs., LLC*, No. 14-cv-00026-ACL, 2016 WL 393577, at *9 (E.D. Mo. Feb. 2, 2016) ("happy camper" affidavits at the conditional certification phase are "inherently suspect"); *Myers v. Marietta Mem'l Hosp.*, 201 F. Supp. 3d 884, 891-92 (S.D. Ohio 2016) ("form affidavits 'gathered by an employer from its current employees are of limited evidentiary value in the FLSA context because of the potential for coercion'") (citation omitted); *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373, 1376 (S.D. Ga. 2009) (enjoining contact with plaintiffs after employer sent supervisors to Mexico to obtain declarations "disavowing . . . participation in the law suit"); *Longcrier v. HL–A Co.*, 595 F. Supp. 2d 1218, 1230 (S.D. Ala. 2008) (striking 245 declarations, finding: "Through misleading communications and nondisclosure of the true reason for those interviews, Defendant treated putative plaintiffs unfairly and irrevocably tainted the Declarations procured by dint of that deception"); *Sjoblom v. Charter Commc'ns LLC*, No. 07-cv-0451-BBC, 2007 WL 5314916, at *3 (W.D. Wis. Dec. 26, 2007) (sanctioning employer who obtained affidavits from potential FLSA class members in "blitz campaign," which included a consent form describing

Because district courts are regularly confronted with these issues, they must be afforded discretion to address such tactics in order to ensure employees are free to exercise their right to assert federal wage claims.

C. Employer Campaigns to Gather Employee Releases and Class/Collective Member Opt-Outs Chill Employee Participation in Ongoing Litigation and Deprive Employees of Their Legal Rights.

It is not uncommon for employers to seek to settle putative class members' claims, particularly early in the litigation when employees are least likely to understand their rights.

Courts properly intervene when employers mislead or coerce employees into providing individual releases and opt-outs. *See, e.g.*, *Serenity Transp.*, 2017 WL 4236798, at *1 (invalidating releases signed by putative FLSA opt-ins based upon misleading and coercive communications); *CACafe*, 2017 WL 1540717, at *3 (invalidating releases obtained by "deceptive omissions of material information," namely, the existence of the precertification class action); *Camp*, 300 F.R.D. at 625-26 (finding defendants' precertification *ex parte* written solicitation of opt-outs to be improper due to a "significant power imbalance" even where opt-out declarations were presented by non-management staff); *Li v. A Perfect Day*

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litigation but failing to "notify them that they might be entitled to become a part of the lawsuit").

Franchise, Inc., 270 F.R.D. 509, 517-19 (N.D. Cal. 2010) (invalidating opt-out forms obtained during mandatory on-on-one meetings during work hours); *Wang v. Chinese Daily News*, 236 F.R.D. 485, 488-490 (C.D. Cal. 2006), *rev'd on other grounds*,709 F.3d 829 (9th Cir. 2012) (finding evidence of coercion where employer solicited opt-outs and extremely high percentage of collective opted out); *see also Retiree Support Grp. of Contra Costa Cnty. v. Contra Costa Cnty.*, No. 12-cv-00944-JST, 2016 WL 4080294, at *10 (N.D. Cal. July 29, 2016) (granting request to invalidate obtained opt-outs and to issue a curative notice, after a letter was sent to class members with significant misstatements and omissions, *e.g.*, not mentioning pending litigation at all, not providing contact information for class counsel, etc.); *Astra*, 2010 WL 2724512, at **4-5 (invalidating releases obtained by letter to putative class that did not attach the complaint, explain the claims or case status, or include contact information for plaintiffs' counsel); Federal Judicial Center, Manual for Complex Litigation § 21.12 (4th ed. 2004) ("Direct communications with class members . . . can lead to abuse. For example, defendants might attempt to obtain releases from class members without informing them that a proposed class action complaint has been filed."), *available at* https://public.resource.org/scribd/8763868.pdf (last visited Oct. 9, 2018).[5]

[5] For similar out-of-Circuit authority, *see, e.g.*, *Pacheco v. Aldeeb*, 127 F. Supp. 3d 694, 696 (W.D. Tex. 2015) (finding defendants improperly discouraged employees

III. DISTRICT COURTS ENJOY BROAD DISCRETION TO MANAGE ENFORCEMENT ACTIONS AND COLLECTIVE AND CLASS ACTION PROCEEDINGS.

Courts' experiences dealing with employer interference in wage-and-hour litigation serve to reinforce their crucial role in addressing such misconduct.

A. Courts Recognize that Employer Conduct Can Undermine Enforcement of the Act's Substantive Protections.

The power imbalance between workers and their employers justifies district

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from joining suit where defendants "demanded that current employees sign releases as a condition to receiving paychecks, withheld paychecks from employees who would not sign such releases, represented to plaintiffs and class members that there was no point in joining the lawsuit and that the lawsuit had ended, offered an opt-in plaintiff a raise if he dropped his claims, reduced the hours of an opt-in plaintiff, and offered money to an employee to persuade other plaintiffs to dismiss their claims"); *Randolph v. PowerComm Const., Inc.*, 41 F. Supp. 3d 461, 463, 468 (D. Md. 2014) (invalidating opt-outs where employer engaged in a seemingly concerted campaign to obtain them: approaching plaintiffs with settlement offers while in the hospital on intravenous painkillers; intimidating plaintiffs into signing opt-out forms by a threat to terminate employees who did not opt-out; tricking plaintiffs into signing forms when they did not understand their significance; informing employees that the company was seeking to have plaintiffs' counsel disbarred; falsely promising payments or jobs for opting-out); *O'Brien v. Encotech Const. Servs., Inc.*, 203 F.R.D. 346, 348 (N.D. Ill. 2001), *on reconsideration*, 183 F. Supp. 2d 1047 (N.D. Ill. 2002) (holding it was improper for owner and top manager to have employees come to his office on payday, handing employees releases to sign, under an implied threat that if they did not sign, they would be laid off); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723-24 (W.D. Ky. 1981) (finding all opt-out class members who were contacted by the defendant "must be restored to the class and must be sent a special notice setting forth [the court's] finding of impropriety on [the defendant's] part" where court could not determine if the "class members made a free and unfettered decision").

courts' close management of communications in FLSA actions. *See, e.g., Camp*, 300 F.R.D. at 624 ("The case law nearly universally observes that employer-employee contact is particularly prone to coercion[.]"); *Li*, 270 F.R.D. at 517 (holding there was a "particularly acute risk of coercion and abuse" regarding wage claims); *Rutti*, 2012 WL 3151077, at *6 (recognizing the "fear of economic retaliation" employees face when considering participating in a lawsuit) (quoting *Kasten*, 563 U.S. at 12).[6]

In a well-known example of employer misconduct, the Eleventh Circuit in *Lynn's Food Stores Inc. v. U.S. Dep't of Labor*, discussed the risk of such employer behavior, holding that private settlements of FLSA claims, other than those approved by a court or supervised by the DOL, are precluded. 679 F.2d 1350, 1355 (11th Cir. 1982) (*Lynn's Food*). The court disapproved of FLSA settlement agreements where an employer misled unrepresented employees into sharing $1,000 among 14 employees, even though the DOL had already found the employees were entitled to back wages worth more than 10 times that amount. *Id.*

[6] *See also, e.g., Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga. 1999) ("Coca-Cola has not given the Court any reason to suspect that it will attempt to mislead its employees and coerce them into non-participation in this case. But simple reality suggests that the danger of coercion is real and justifies the imposition of limitations on Coca-Cola's communications with potential class members."); *Kleiner v. First Nat'l Bank,* 751 F.2d 1193, 1202-03 (11th Cir. 1985) (consumer case recognizing that in the employment context, the risk of coercion and abuse is particularly high when an employer solicits opt-outs from employees).

The employees had no access to an attorney, some could not speak English, and they "seemed unaware" of the DOL's findings in their favor. *Id*. at 1354.

The *Lynn's Food* court detailed the unfairness of the "settlement" process, discussing a transcript of "negotiations" between the employer and its employees:

> [T]he transcript provides a virtual catalog of the sort of practices which the FLSA was intended to prohibit. Lynn's representative repeatedly insinuated that the employees were not really entitled to any back wages, much less the amounts calculated by the Department of Labor. The employees were told that when back wages had been distributed as a result of past actions taken by the Department of Labor, 'Honestly, most everyone returned the checks….' It was suggested that only malcontents would accept back wages owed them under the FLSA: the representative stated, 'some (employees) …indicated informally to Mr. Lynn and to others within Lynn's Food Stores that they felt like they had been paid what they were due, and that they were happy and satisfied with the arrangements which had been made.' Employees who attempted to suggest that they had been paid unfairly were told by the representative 'we're not really here to debate the merits of it … and that the objections would be taken up at 'another time'. The representative summed up the proceedings with this comment, '(t)hose who feel like they've been paid fairly, we want to give them an opportunity to say so.'

Id. The court barred private, unapproved settlements in order to "prohibit such invidious practices." *Id*. at 1354-55.

This Court has endorsed the *Lynn's Food* approach. *See Seminiano v. Xyris Enter., Inc.*, 602 F. App'x 682, 683 (9th Cir. 2015) (following *Lynn's Food,* upholding district court rejection of dismissal of FLSA claims where the worker was not adequately represented when his claims were dismissed). Other circuits have done so as well. *See Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199,

206 (2d Cir. 2015) (following *Lynn's Food,* holding that dismissals settling FLSA claims require court or DOL approval to take effect, citing cases documenting the potential for abuses of wage claimants); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007), *superseded by regulation on other grounds as stated in Whiting v. Johns Hopkins Hosp.*, 416 F. App'x 312 (4th Cir. 2011) ("[U]nder the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims."); *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008) (rejecting the notion of a judicially-created exception to the general rule against waiver of FLSA claims).

The same inequalities in bargaining power that preclude unsupervised waiver of FLSA claims also require that district courts be empowered to prevent the waiver of statutory claims by other means, *e.g.*, coerced opt-outs, employer-friendly "interviews" and "happy camper declarations."

B. Courts Have Recognized That the Employer-Employee Relationship Is Particularly Vulnerable to Coercion Because of the Acute Threat of Retaliation.

Separate and apart from the inherent risk that employer misconduct will undermine the Act's substantive provisions, in many cases employer misconduct rises to the level of unlawful retaliation, as in the instant case, further violating the Act.

Courts recognize that employees fear multiple forms of possible retaliation from their employers, including termination. Courts have approved class and collective actions in part to mitigate the fear of (and vulnerability to) retaliation for initiating individual actions. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2016 WL 6576621, at *15 (N.D. Cal. Nov. 7, 2016) (granting class certification, in part because "the pursuit of individual claims is unlikely given the relatively low potential recovery and possible fear of retaliation for initiating an individual lawsuit against an employer."); *Twegbe v. Pharmaca Integrative Pharmacy, Inc.*, No. 12-cv-5080-CRB, 2013 WL 3802807, at *6 (N.D. Cal. July 17, 2013) (denying motion to decertify, in part, because "[w]hether or not an employer has actually threatened to retaliate, a class member presented with the opportunity to sue the company signing her paychecks would be reasonable to worry that the adversarial postures adopted in the lawsuit would spill over to the workplace."); *Rees v. Souza's Milk Transp., Co.*, No. 05-cv-00297-AWI, 2006 WL 738987, at *9 (E.D. Cal. Mar. 22, 2006) (recommending certification of class, in part because "some of the potential class members are still employed with defendant and are unlikely to institute action against their employer").[7]

[7] For similar out-of-Circuit authority, *see, e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (explaining that it is "reasonably presumed" that potential class members still employed by employer "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs");

Courts have observed that the threat of employer retaliation can extend beyond an employee's term of employment, implicating his or her ability to obtain work elsewhere. *See Wright*, 2012 WL 2239797, at *5 (finding defendants' communications contained improper statements which could chill participation, including "comments about how Plaintiffs' lives will be subject to public scrutiny as a result of the litigation–including [by] future employers."); *Greko v. Diesel U.S.A., Inc.*, 277 F.R.D. 419, 425 (N.D. Cal. 2011) (certifying Rule 23 class, in part because "[i]ndividuals who are currently employed by [employer] or former employees who might utilize [employer] as an employment reference may be unwilling to initiate an individual suit against the company."); *Twegbe*, 2013 WL 3802807, at *5 ("Though the logic is somewhat stronger as it relates to current employees, former workers who value a good reference from the company might also shy away from suit."); *see also Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977) (holding that a former employee "is as much in need of the [29 U.S.C. § 2]15 shield from retaliation as workers still on the job or workers who have been discharged for their protected activities").

Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 163 (S.D.N.Y. 2008) (recognizing that "employees may feel intimidated about volunteering to participate in an opt-in collective action.") (internal quotations and citation omitted).

Amici routinely represent workers who confirm that fear of retaliation for filing individual wage-and-hour claims is not theoretical. Just last year, this Court held that any person, not just a worker's employer, can be held liable under the Act's anti-retaliation provision for retaliatory conduct, because of the insidiousness of this problem. *See Arias v. Raimondo*, 860 F.3d 1185, 1192 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 673 (2018). In *Arias*, the plaintiff had filed an individual action in state court challenging his employer's wage-and-hour violations, represented by Amici California Rural Legal Assistance Foundation and Legal Aid at Work. *Id*. at 1187. Shortly before trial, the attorney for the employer began a campaign to entice Immigration and Customs Enforcement ("ICE") to remove the plaintiff from the country, even inviting ICE to detain Arias at his deposition. *Id*. at 1188. The following month, Arias essentially dropped his wage claims "due in substantial part to the threat of deportation created by Defendant's communications with ICE." *Id*. He "suffered anxiety, mental anguish, and other emotional distress" because he "[f]ear[ed] that he would be deported and separated from his family," leading him to forego his substantive rights to unpaid wages under federal and state law. *Id*.[8]

[8] *Arias* is far from the only extreme example of workplace retaliation. As another egregious example, in *Clincy v. Galardi South Enterprises*, a small group of women sued under the Act for unpaid wages against the owner of the adult entertainment nightclub where they worked. *Id.*, 2009 WL 2913208, at *1 (N.D.

Employers control critical elements of their employees' lives—their salaries, continued employment, future job opportunities, sometimes even their ability to remain with their families. Because of the power imbalance inherent in this relationship, courts have recognized that there is a heightened risk of coercion, even in collective actions. Courts must have the ability to address improper employer conduct, such as that present in this case.

IV. DISTRICT COURTS CAN MANAGE EMPLOYER COMMUNICATIONS WITHOUT IMPERMISSIBLY RESTRICTING SPEECH.

The employer's opening brief in this appeal focuses on its First Amendment right to free speech. Appellant's Opening Brief at 12 (Dkt. No. 17, p. 17 of 33). While it is true that courts may not restrict an employer's communication without reason, district courts must retain the authority to intervene and prevent or remedy abuses of the employer-employee relationship. Employers wishing to communicate

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Ga. Sept. 2, 2009). In response, the defendants rounded up and terminated all but one of the named plaintiffs and "informed other entertainers at [the adult entertainment night club] that Plaintiffs had been fired because of their participation [in the FLSA collective action]." *Id*. at *2. The Court incorporated the employer's recorded threats into its order granting plaintiffs' motion for a temporary restraining order. *Id*. at *2 n. 2. The district court granted the plaintiffs' motion to correct the employers' retaliatory conduct, and the terminated workers were reinstated. *Id*. at *3. Two years later, the plaintiffs won their motion for summary judgment, confirming defendants engaged not only in flagrant retaliation but also wage violations. *See Clincy v. Galardi S. Enters., Inc*., 808 F. Supp. 2d 1326, 1350 (N.D. Ga. 2011).

with employees during litigation can reduce the risk of coercion and increase the likelihood of obtaining admissible testimony by adhering to a few common-sense safeguards. Courts must be empowered to order such safeguards without fear of facing an unreasonably broad standard for employers' right to free speech.

First, because employee testimony must be truly voluntary, employers must take care to reduce coercion from the very beginning of the process. Courts recognize the inherent coercion when an employer pulls the employee off the job site to be interviewed by counsel. *See*, *e.g.*, *Acosta, Inc.*, 2018 WL 2207997, *2; *Quezada*, 2013 WL 1296761, at *6; *Li*, 270 F.R.D. at 518. A better practice is to inform employees of the opportunity to speak with the company's counsel through a non-coercive written notice. Employers should not compel employee attendance and should communicate that attendance is voluntary.

Second, because of the power imbalance between the employer and the employee during an interview,[9] the employee's direct supervisor should not be present and an employee should be allowed to bring a coworker of her choosing into the interview. Courts have found that involving an employee's direct supervisor in the interview process is unnecessary and coercive. *See*, *e.g.*, *Perez*, 961 F.Supp.2d at 1171; *Acosta, Inc.*, 2018 WL 2207997, at *2. A coworker's presence may mitigate the power imbalance between employer and employee and

[9] *See*, *e.g.*, *Camp*, 300 F.R.D. at 625-26.

could also allow for corroborating testimony in the event of a dispute about the propriety of the interview process. *See Richardson*, 2018 WL 1258192, at *7.

Third, prior to beginning the interview, the company's counsel must disclose that it represents the company, not the employee. *See* Mod. R. Prof. Cond. Rule 4.3. Counsel also should describe the nature of the lawsuit, including the claims asserted, the scope of any putative class, and whether the employee being interviewed fits within the class as pled. *See*, *e.g.*, *CACafe*, 2017 WL 1540717, at **2-3; *Richardson*, 2018 WL 1258192, at *7. Counsel should inform the employee that the company's interests are adverse to those of the plaintiffs and would be adverse to the employee if a class is certified. *Id.* Employers should not require employee confidentiality or other restrictive conditions that reinforce the power imbalance between employer and employee.

Fourth, pre-interview disclosures must inform the employee that she is not obligated to speak with the company's counsel and that the employee may refuse to participate in the interview without retribution. These disclosures must be clear and conspicuous, they should be repeated throughout the process, and they may not be undermined by contradictory communications from management. *See Quezada*, 2013 WL 1296761, at *6. The disclosures should also inform the employee that she has the right to speak to counsel of her own choosing (including counsel for the plaintiffs). All these disclosures should be made verbally and in writing and in the

employee's preferred language. The employer's counsel must give the employee an opportunity to leave the interview without further participation after the disclosures are complete.

Fifth, if an employer knows or has reason to believe that an employee's primary language is not English, the employer must provide a translator during all aspects of the interview process (including during pre-interview disclosures). *See Richardson*, 2018 WL 1258192, at *7. Employers should use certified translators whenever practicable, and in all cases should use a translator who is not otherwise employed by the employer. All verbal and written disclosures should be provided in the employee's preferred language and all questions and answers should be translated.

Sixth, after the interview, the employer's counsel must provide the employee with a written copy of any witness statement with verbal and written instructions that the employee: 1) should review the statement carefully for accuracy, 2) may remove or revise any inaccurate or incomplete information, and 3) may add any additional information the employee believes is important. The company should also provide verbal and written disclosures that the employee may refuse to sign the statement (without retribution) if the company's counsel rejects any proposed revisions. The declaration should be written in both English and the employee's primary language.

Lastly, employers may not use a declaration-gathering campaign as an end-around the prohibition on the waiver of statutory rights. *See Lynn's Food*, 679 F.2d at 1354-55. As the district court in this case recognized, an employer has no legitimate business for "requesting their employees sign retroactive declarations stating, under penalty of perjury, that they have never underreported their hours, have never been instructed to underreport their hours, and have been fully compensated for all work done." *Acosta v. Austin Electric Services*, 322 F.Supp.3d 951, 963 (D. Ariz. 2018).

This Court should not permit the important workplace protections codified in the Fair Labor Standards Act to be undermined by allowing unreliable factual admissions to obtained under coercive circumstances. The district court properly exercised its discretion when it enjoined the defendant employer from relying on the declarations at issue in this case, and its ruling should be upheld. Amici also respectfully request that this Court adopt the foregoing list of safeguards as prerequisites for employer communications with employees after wage claims have arisen.

CONCLUSION

Amici respectfully urge the Court to affirm the district court's order granting in part Plaintiffs-Appellees' motion for a temporary restraining order and preliminary injunction.

October 23, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned counsel certifies that this Brief: (i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Times New Roman font in a size equivalent to 14 points or larger; and (ii) complies with the length requirement of Federal Rule of Appellate Procedure Rules 5(c)(1) and 29(a)(5) because it is 6,617 words, less than "one-half the maximum length authorized . . . for a party's principal brief" (i.e., 14,000 words) (excluding cover page, corporate disclosure statement, table of contents, table of authorities, appendix, certificates of counsel, signature block, and certificate of service).

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I certify that I electronically filed this Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system on October 23, 2018. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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